



SEVENTH ITEM ON THE AGENDA

**Reports of the Committee on
Freedom of Association****356th Report of the Committee
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Introduction

1. The Committee on Freedom of Association set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 11, 12 and 19 March 2010, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Colombian, Mexican and Peruvian nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2614, 2691 and 2718), Colombia (Cases Nos 1787, 2362, 2565 and 2612), Mexico (2478 and 2665), and Peru (Cases Nos 2533, 2667, 2671 and 2695), respectively.

* * *

3. Currently, there are 142 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 38 cases on the merits, reaching definitive and follow-up conclusions in 27 cases and interim conclusions in 11 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 1787 (Colombia), 2254 (Bolivarian Republic of Venezuela), 2445 (Guatemala), 2450 (Djibouti), 2528 (Philippines), 2727 (Bolivarian Republic of Venezuela) because of the extreme seriousness and urgency of the matters dealt with therein.

Urgent appeals

5. As regards Cases Nos 2361 (Guatemala), 2508 (Islamic Republic of Iran), 2567 (Islamic Republic of Iran), 2638 (Peru), 2707 (Republic of Korea), 2712 (Democratic Republic of Congo), 2713 (Democratic Republic of the Congo) and 2714 (Democratic Republic of the Congo), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

New cases

6. The Committee adjourned until its next meeting the examination of the following cases: Nos 2741 (United States), 2742 (Plurinational State of Bolivia), 2743 (Argentina), 2745 (Philippines), 2746 (Costa Rica), 2747 (Islamic Republic of Iran), 2749 (France), 2750 (France), 2751 (Panama), 2752 (Republic of Montenegro), 2753 (Djibouti), 2754 (Indonesia), 2757 (Peru), 2758 (Russian Federation), 2759 (Spain), 2760 (Thailand), 2761 (Colombia), 2762 (Nicaragua), 2763 (Bolivarian Republic of Venezuela), 2764 (El Salvador), 2765 (Bangladesh), 2766 (Mexico), 2767 (Costa Rica) and 2768 (Guatemala),

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

Observations requested from governments

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: Nos 2177 and 2183 (Japan), 2602 (Republic of Korea), 2620 (Republic of Korea), 2646 (Brazil), 2648 (Paraguay), 2655 (Cambodia), 2660 (Argentina), 2661 (Peru), 2715 (Democratic Republic of the Congo), 2726 (Argentina), 2729 (Portugal), 2730 (Colombia), 2732 (Argentina), 2734 (Mexico), 2737 (Indonesia), and 2740 (Iraq).

Information requested from complainants

8. As regards Case No. 2694 (Mexico), the Committee noted that, despite the lateness of its reply, the Government contests the admissibility of the complaint. The Committee decided to forward the Government's response to the complainant organization so that the latter can provide its observations thereon.

Partial information received from governments

9. In Cases Nos 2265 (Switzerland), 2318 (Cambodia), 2522 (Colombia), 2576 (Panama), 2594 (Peru), 2613 (Nicaragua), 2639 (Peru), 2644 (Colombia), 2671 (Peru), 2690 (Peru), 2702 (Argentina), 2704 (Canada), 2706 (Panama), 2710 (Colombia), 2716 (Philippines), 2723 (Fiji), 2725 (Argentina), 2733 (Albania), 2735 (Indonesia) and 2756 (Mali), 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

10. As regards Cases Nos 2516 (Ethiopia), 2664 (Peru), 2671 (Peru), 2675 (Peru), 2676 (Colombia), 2678 (Georgia), 2679 (Mexico), 2683 (United States), 2684 (Ecuador), 2687 (Peru), 2688 (Peru), 2689 (Peru), 2697 (Peru), 2698 (Australia), 2701 (Algeria), 2703 (Peru), 2711 (Bolivarian Republic of Venezuela), 2719 (Colombia), 2720 (Colombia), 2722 (Botswana), 2724 (Peru), 2728 (Costa Rica), 2731 (Colombia), 2736 (Bolivarian Republic of Venezuela), 2738 (Russian Federation), 2739 (Brazil), 2744 (Russian Federation), 2748 (Poland) and 2755 (Ecuador), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Withdrawal of complaints

11. As regards Cases Nos 2617 and 2721 (Colombia), the Committee notes with satisfaction that the Government communicates the documents confirming that the parties to these cases, due to a preliminary contacts mission of the ILO provided for in the Committee's procedure, have put an end to the conflict and have reached an agreement. According to the aforementioned documents, the complainant organizations have retracted their complaints. Taking this information into account, the Committee accepts the withdrawal of these complaints.

Article 26 complaints

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

Admissibility of complaints

14. After considering the Government's objections in respect of two complainant organizations in Cases Nos 2203, 2241, 2341, 2609, 2708 and 2709 (Guatemala), as well as in a number of cases which are no longer active, the Committee has decided to accept the admissibility of these complaints.
15. More generally, the Committee wishes to express its concern at the practice shown by some governments in the lateness of replies objecting to the admissibility of complaints.

Transmission of cases to the Committee of Experts

16. The Committee draws the legislative aspects of the following case to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Bulgaria (Case No. 2696), Cambodia (Case No. 2222), Canada (Case No. 2654), Cape Verde (Case No. 2622), Georgia (Case No. 2663), Peru (Case No. 2587), Romania (Case No. 2611) and Uruguay (Case No. 2699).

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

Case No. 2433 (Bahrain)

17. The Committee last examined this case, which concerns legislation prohibiting government employees from establishing trade unions of their own choosing, at its June 2009 session. On that occasion the Committee, recalling once again that all public service employees (with the exception of the armed forces and police) should be able to establish organizations of their own choosing to further and defend their interests, once again strongly urged the Government to take the necessary measures without delay to amend article 10 of the Trade Union Act in accordance with this principle. It further recalled that technical assistance of the Office was available in this regard. The Committee also expressed the expectation that the Government, pending the amendment to article 10 of the Trade Union Act, would take appropriate steps to compensate Ms Najjeyah Abdel Ghaffar for the periods of suspension without pay imposed upon her, and to ensure that no further disciplinary action was taken against her or other members of public sector trade unions for activities undertaken on behalf of their organizations [see 354th Report, paras 13–18].
18. In a communication dated 26 October 2009, the Government states that the legislative authority was considering the introduction of amendments to the provisions of Decree No. 33 of 2002, which are expected, once they have been adopted, to grant new rights to trade unions.

19. *The Committee notes the Government's indication that amendments to the Trade Union Act (Decree No. 33 of 2002) are currently being considered. Recalling that it has been commenting upon the need for legislative reform for over 4 years now, the Committee once again strongly urges the Government to take the necessary measures without delay to amend article 10 of the Trade Union Act so as to ensure, for all public service employees with the exception of the armed forces and the police, the right to establish organizations of their own choosing. It once again emphasizes that technical assistance of the Office is available in this regard. The Committee deeply regrets that the Government provides no information on its previous comments concerning Ms Najjeyah Abdel Ghaffar. It once again strongly urges the Government to take the appropriate steps, pending amendment to article 10 of the Trade Union Act, to compensate Ms Ghaffar for the periods of suspension without pay imposed upon her, and to ensure that no further disciplinary action is taken against her or other members of public sector trade unions for activities undertaken on behalf of their organizations.*

Case No.2552 (Bahrain)

20. The Committee last examined this case, which concerns legislation and a ministerial decision setting out essential services in which the right to strike is prohibited, at its March 2009 meeting. On that occasion, the Committee once again requested the Government: (1) to take the necessary measures to amend section 21 of the Trade Union Law so as to limit the definition of essential services to essential services in the strict sense of the term – that is, services the interruption of which would endanger the life, personal safety, or health of the whole or part of the population – and to ensure that workers in services where the right to strike is restricted or prohibited are afforded sufficient compensatory guarantees; (2) to take the necessary measures to modify the list of essential services set out in Prime Minister's Decision No. 62 of 2006, so that it includes only essential services in the strict sense of the term; and (3) to take measures to ensure that any determination of new essential services be made in full consultation with the representative workers' and employers' organizations and in accordance with the principles of freedom of association, as well as to provide a copy of any new decision of the Prime Minister setting out essential services. The Committee requested to be kept informed of developments in this regard [see 353rd Report, paras 46–47].

21. In a communication dated 26 October 2009, the Government states that the legislative authority was considering the introduction of amendments to the provisions of Decree No. 33 of 2002 (section 21 of the Trade Union Law), which are expected, once they have been adopted, to grant new rights to trade unions.

22. *The Committee notes the Government's information. Noting that it has been commenting upon the need to amend section 21 of the Trade Union Law for several years, the Committee expresses the hope that the amendments referred to by the Government will limit the definition of essential services to essential services in the strict sense of the term – that is, services the interruption of which would endanger the life, personal safety, or health of the whole or part of the population – and ensure that workers in services where the right to strike is restricted or prohibited are afforded sufficient compensatory guarantees. The Committee requests the Government to transmit a copy of the proposed amendments and inform it of the progress made in this regard. Furthermore, the Committee once again requests the Government: (1) to take the necessary measures to modify the list of essential services set out in Prime Minister's Decision No. 62 of 2006, so that it includes only essential services in the strict sense of the term; and (2) to take measures to ensure that any determination of new essential services be made in full consultation with the representative workers' and employers' organizations and in accordance with the principles of freedom of association, as well as to provide a copy of*

any new decision of the Prime Minister setting out essential services. The Committee once again requests to be kept informed of developments in this regard.

Case No. 2371 (Bangladesh)

23. The Committee last examined this case, which concerns a refusal to register the Immaculate (Pvt.) Ltd Sramik Union and the dismissal of seven of its most active members, at its March 2009 meeting. On that occasion the Committee, expressing its deep regret that the Government had once again failed to give any follow-up action to its previous recommendations, urged the Government to institute an independent inquiry into the serious allegations of anti-union discrimination in this case and, if the allegations were proven true, to take all necessary steps to remedy the situation in relation to these allegations [see 353rd Report, paras 55–57].
24. In a communication dated 3 September 2009, the Government indicates that should a new application for registration be submitted by the complainant, whose prior registration application had been dismissed on 30 September 2007 by the First Labour Court, the Director of Labour would register the organization on receipt of the application as per the provisions of the law. With regard to the dismissal of seven union members, the Government indicates that no application has been filed for their reinstatement, either to the Director of Labour or to the Ministry, and no case is pending with the Labour Court.
25. *The Committee deeply regrets that, once again, the Government has provided no indication that it has taken steps to implement its recommendation to rapidly convene an independent inquiry into the serious allegations of anti-union discrimination in the present case. Recalling that five years have elapsed since it first issued its recommendations in the present case, the Committee once again recalls that justice delayed is justice denied and urges the Government to convene an independent inquiry to thoroughly and promptly consider the allegation that seven members of the union were dismissed by the company upon learning that a union was being established. The Committee once again requests the reinstatement of the workers concerned without loss of pay, if it appears in the independent inquiry that the dismissals did occur as a result of their involvement in the establishment of the union and, if reinstatement is not possible, to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers. The Committee once again requests to be kept informed of developments in this regard.*

Case No. 2470 (Brazil)

26. The Committee examined this case concerning allegations of anti-union discrimination and the establishment of a body of workers' representatives parallel to the Unified Trade Union of Chemical Industry Workers (Vinhedo Region) at the instigation of the company, and non-recognition of the National Trade Union Committee. At the last examination of the case at its March 2009 meeting, the Committee noted with interest the remedial measures ordered by the court against practices of anti-union discrimination and asked the Government to ensure that the principles of freedom of association are respected at the company Unilever. Furthermore, while noting the agreement concluded between the Office of the Public Prosecutor for Labour and the enterprise group, it asked the Government to provide information on the consideration given to the refusal to recognize the National Trade Union Committee and the alleged establishment of a body of parallel workers' representatives in the context of the judicial investigations and rulings [see 353rd Report, paras 423–430].
27. In a communication dated 30 March 2009, the Single Central Organization of Workers of Brazil (CUT) and the Unified Trade Union of Chemical Industry Workers (Vinhedo

Region) allege that the company IGL Industrial Ltd of the enterprise group is not complying with the abovementioned judicial agreement and has engaged in new anti-union practices. Specifically, the complainant organizations allege that: (1) trade union official Mr José Santana de Lima has been subjected to harassment and received a verbal warning for absenting himself from the workplace in order to participate in a trade union activity; (2) the company is restricting and obstructing the taking of trade union leave by union officials; (3) it is failing to comply with the collective agreement by not providing the union with documentation on industrial accidents; and (4) the company continues to fail to recognize the National Trade Union Committee of Unilever Brazil.

28. In a communication dated 29 July 2009, the Government again sends a copy of the judicial agreement of October 2008 between the Office of the Public Prosecutor for Labour and the enterprise group.
29. *The Committee urges the Government to send detailed observations without delay on the previous recommendations and with respect to the new allegations presented by the complainant organizations.*

Case No. 2222 (Cambodia)

30. The Committee last examined this case, which concerns the incompatibility of the Common Statute of Civil Servants with Conventions Nos 87 and 98 and the prohibition, by local public authorities and the police, for the complainant to hold meetings relating either to its internal organization or to its activities, at its June 2004 session. On that occasion, the Committee made the following recommendations [see 334th Report, para. 226]:
- (a) The Committee considers that the Government should take the necessary measures to amend the Common Statute of Civil Servants so as to guarantee fully the right to organize and the right to collective bargaining of civil servants, consistent with Conventions Nos 87 and 98, and the principles of freedom of association recalled in its conclusions above; once they have been adopted, the Government should diffuse widely these amendments in particular amongst the local public authorities, including the local educational administration.
 - (b) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case and reminds the Government that the technical assistance of the Office will be at its disposal if it so wishes to avail itself of this opportunity.
 - (c) The Committee requests the Government to bring the principle of freedom of association on police intervention in trade union matters as well as those relating to the holding of trade union meetings and the access by trade unions to workplaces to the attention of the police and the authorities responsible for authorizing public meetings.
 - (d) The Committee requests the Government to take specific measures, including training activities, so that officials of the local educational administration, including school directors, are fully apprised of the provisions of Conventions Nos 87 and 98, and the principles of freedom of association, with respect to teachers' rights to freedom of association and to collective bargaining.
 - (e) The Committee requests the Cambodia Independent Teachers' Association (CITA) to bear in mind, in its future activities, the principles of freedom of association in relation to the holding of trade union meetings and the access by trade unions to workplaces.
 - (f) The Committee requests the Government to invite the competent local authorities (including the local educational administration) and CITA to negotiate future agreements on the place where trade union public meetings will be held and the manner in which they will take place, as well as on facilities to be enjoyed by CITA, including access to workplaces for the furtherance and defence of its members' occupational interests.

- (g) Noting that the Government has put in place a process to investigate thoroughly the factual allegations, the Committee trusts that the Government will ensure that such a process contains guarantees of independence and impartiality.
- 31.** In a communication dated 1 June 2009, CITA alleges that the Common Statute of Civil Servants has not been amended in line with the Committee's recommendations, that freedom of association, gathering and collective bargaining were threatened by intimidation from members of the authority and police forces and that high ranking officials of government used their position to pressure teachers to either stop joining or resign from CITA, or to order their transfer. In this regard, the complainant refers in particular to the discriminatory transfer of a union president in the Kampong Thom province.
- 32.** The Government, in a communication dated 11 August 2009, provides a copy of a letter from the Ministry of Education, Youth and Sport to the Minister of Labour and Vocational Training explaining the circumstances of a teacher's transfer to another school on 15 October 2008, for professional misconduct. The Ministry states that it had assigned specialized officials to conduct an investigation into the teacher's transfer, which revealed that the teacher had indeed infringed the Code of Conduct of the teaching profession by raising political and social issues in class which did not comply with the ministry's curriculum during the courses he taught at Treal High School. He thus caused problems in the school by disseminating groundless information, thereby undermining its honour and that of the other teachers. Furthermore, he did not have good relationships with the governing board and most of his colleagues. Since his conduct violated articles 31 and 41 of the Cambodian Constitution, article 33 of the Common Statute of Civil Servants, article 34 of the Education Law and article 11 of the Code of Conduct of the Teaching Profession, the ministry decided to transfer Mr Sun Thun to a nearby school. Mr Sun Thun had meanwhile sought the intervention of national and international NGOs and requested the ministry to reinstate him in his position at Treal High School; however, due to the nature of his misconduct, the ministry states it cannot accept such an intervention.
- 33.** *As regards the complainant's allegation of the discriminatory transfer of a union president in the Kampong Thom province, the Committee notes the detailed reply of the Government indicating that the reason for the transfer was professional misconduct, as the teacher had raised social and political issues which did not comply with the ministry's curriculum during his courses. The Committee observes, in this respect, that it would need more information to determine whether the conduct leading to the teacher's transfer constituted legitimate trade union activity and therefore requests the complainant organization to provide additional information in support of its allegation, bearing in mind the information provided by the Government. In the absence of such information, the Committee will not pursue its examination of the case.*
- 34.** *The Committee regrets that the Government provides no information regarding the complainant's allegations that the Common Statute of Civil Servants has yet to be amended, and that teachers continue to face obstacles to their freedom of association rights, including the right to collective bargaining. In these circumstances, and recalling that nearly six years have elapsed since it first issued its recommendations in the present case, the Committee urges the Government to immediately take the necessary measures to amend the Common Statute of Civil Servants so as to guarantee fully the right to organize and the right to collective bargaining of civil servants consistent with Conventions Nos 87 and 98 and, once they have been adopted, to widely disseminate these amendments, in particular, among the local public authorities including the local educational administration. Finally, the Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

Case No. 2476 (Cameroon)

35. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 272–289, approved by the Governing Body at its 305th Session]. In its previous examination of the case, which concerns allegations of interference by the authorities in trade union activities and favouritism towards certain individuals and factions within the complainant organization, the Committee had urged the Government to ensure a completely neutral stance with regard to the internal disputes within the Cameroon Confederation of Free Trade Unions (USLC), requested to be kept informed of any judicial decisions handed down in the legal proceedings concerning the legality of the USLC executive committee and extraordinary congress of August 2005 and the accusations of embezzlement made against the Confederation's President, and requested the Government to indicate whether the action taken by the Deputy Prefect of the First District of Yaoundé and the police at the USLC's premises had been carried out under a warrant from the judicial authority and if so, on what grounds. The complainant organization sent new information in a communication dated 10 February 2010. For its part, the Government sent its observations in a communication dated 12 October 2009.
36. In a communication dated 10 February 2010, the complainant organization, through Mr Mbom Mefe, indicates that, pursuant to the repeated recommendations of the Committee, the USLC held an extraordinary congress at which a new executive board was elected, comprising all the previously opposing factions. Mr Mbom Mefe is a member of this board, holding the position of the Confederation's secretary for training, and an ordinary congress will be called at the end of the year. The complainant organization indicates that the authorities, although present at the extraordinary congress, refrained from any interference or intervention in the proceedings. The complainant organization concludes that the Committee's recommendations to the Government played a role in this new attitude on the part of the authorities. While expressing its disappointment at the lack of progress made with regard to the examination of its allegations concerning the violation of trade union premises and the harassment of trade union officials, the complainant organization acknowledges the progress that has been made and requests that the case no longer be considered by the Committee.
37. In a communication dated 12 October 2009, the Government indicates that it sent a communication to the USLC and other unions in a situation of crisis or divided leadership inviting them to comply with their own statutes pertaining to the election of officials, and informing them that all cooperation would be suspended until the election of union officials of undisputed legitimacy. With regard to judicial decisions, while recalling the principle of the separation of powers, the Government indicates that any ruling handed down will be examined as regards its effects in law and forwarded to the Committee. With regard to the action of the Deputy Prefect of the First District of Yaoundé and the police at the USLC premises, the Government indicates that it was an administrative measure intended to maintain public order, which was jeopardized as a result of the clash between factions over the premises in question. Finally, the Government reiterates its commitment to cooperate with any direct contacts missions to the country.
38. *The Committee takes note of the information provided by the complainant organization and the Government. It notes with interest that the USLC held an extraordinary congress, during which a new executive board was elected, comprising all the previously opposing factions and that Mr Mbom Mefe is a member of this board, holding the position of the Confederation's secretary for training. The Committee further notes that the authorities, although present at the extraordinary congress, refrained from any interference during the proceedings, thus demonstrating a new attitude towards the internal dispute in the USLC. The Committee notes, however, the disappointment expressed by the complainant organization with regard to the lack of progress made in examining its allegations*

concerning the violation of union premises and the harassment of trade union officials. In this regard, while noting the explanations provided but reminding the Government that it has a responsibility to ensure the application of international labour Conventions concerning freedom of association which have been freely ratified and which must be respected by all state authorities, and that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights, the Committee trusts that the Government will ensure in particular full respect for these principles in the future.

39. *Noting with satisfaction the request of the complainant organization to withdraw its complaint in view of the current situation, in which the USLC is in a position to carry on its activities, the Committee will not pursue its examination of this case.*

Case No. 2430 (Canada)

40. The Committee last examined this case, which concerns the provisions of a statute (Colleges Collective Bargaining Act, RSO 1990, c. 15) that denies all public colleges' part-time employees the right to join a union and engage in collective bargaining, at its March 2009 meeting [353rd Report, approved by the Governing Body at its 304th Session, paras 66–68]. On that occasion, the Committee noted with interest the Government's announcement that it introduced the Act to enact the Colleges Collective Bargaining Act which would extend collective bargaining rights to part-time academic and support staff workers at Ontario's 24 colleges. It invited the Government to keep it informed of progress made in the adoption of this bill.
41. In a communication dated 9 October 2009, the Government indicates that the Colleges Collective Bargaining Act came into effect on 8 October 2008 (except for certain transitional provisions) and submits a copy thereof. The new legislation gives part-time and sessional faculty and part-time support staff at Ontario's colleges the right to bargain collectively. In addition, the Act establishes two new province-wide bargaining units for colleges (one for part-time and sessional faculty staff and one for part-time support staff) and a certification process to allow part-time employees to unionize and bargain collectively modelled on the process in place for other workers in Ontario who are covered by the Labour Relations Act (LRA), 1995, and includes other reforms to modernize the collective bargaining process for the college sector to give the parties more ownership and control over the process as exists in other sectors covered by the LRA.
42. *The Committee notes this information with satisfaction.*

Case No. 2622 (Cape Verde)

43. The Committee last examined this case at its November 2008 meeting [see 351st Report, paras 255–294] and on that occasion made the following recommendations:
- (a) In the circumstance set out above, the Committee considers that obliging trade union organizations to meet the costs of publishing their statutes in the *Official Journal* when this involves large amounts of money (as in the present case) seriously impedes the free exercise of the right of the workers to establish organizations without previous authorization, thus violating Article 2 of Convention No. 87, and requests the Government, in consultation with the social partners, to take the necessary steps to amend or repeal this provision of the Labour Code.
 - (b) The Committee considers that obliging the parties to a collective agreement to meet the cost (extremely high in the present case) of publication of that agreement in the *Official Journal* seriously impedes the application of Article 4 of Convention No. 98 which enshrines the principle of promotion of collective bargaining, and requests the

Government, in consultation with the social partners, to take the necessary steps to amend or repeal this provision of the Labour Code.

- (c) The Committee notes that the complainant organization states that it made a submission to the Office of the Attorney-General of the Republic of Cape Verde on 14 April 2008, with the aim of having section 15 of Legislative Decree No. 5/2007 of 16 October (approving the Labour Code) declared unconstitutional and requests the Government and the complainant organization to keep it informed of the outcome of this action.

44. In a communication dated 14 April 2008, the Cape Verde Confederation of Free Trade Unions (CCSL) transmits the text sent to the Attorney-General of the Republic of Cape Verde requesting that section 15 of Legislative Decree No. 5/2007 approving the Labour Code be declared unconstitutional. In a communication dated 10 December 2008, the CCSL forwarded to the Supreme Court of Justice the request of the Attorney-General to declare the Legislative Decree in question unconstitutional. In communications dated 23 February and 19 October 2009, the CCSL states that: (1) on 20 February 2009, the Government and the social partners held a meeting in which they discussed the case and the Committee's report; (2) in this context, the Council for Social Consultation established a working group which was given 45 days in which to put forward proposed amendments to sections 15, 70, 110 and 353 of the Labour Code in line with the Committee's recommendations; and (3) the Council for Social Consultation, a tripartite body, issued a record of discussions (No. 2/2009) which envisages, inter alia, amendments to the sections of the Labour Code that had given rise to objections; the record of discussions will be published in the *Official Journal*.
45. *The Committee takes due note of this information, and draws this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

Case No. 2297 (Colombia)

46. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 61–62]. On that occasion, the Committee asked the Government to indicate the reasons why the trade unionist Mr Jiménez Suárez was relieved of his duties at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit and in particular whether the legal procedures for the lifting of trade union immunity were followed when he was dismissed. In a communication of 1 October 2009, the Government states that it has requested information from the Ministry of Finance and Public Credit. The Committee notes this information and requests the Government to keep it informed about the matter.
47. With regard to the allegations made by the General Confederation of Labour (CGT) on 21 May 2008 concerning the dismissal of Mr Gregorio Gutiérrez Torres from the National Telecommunications Company (TELECOM) under liquidation without having lifted trade union immunity, the complainant states that the first instance judicial authority ruled that in the event of the liquidation of a company it is not necessary to lift trade union immunity.
48. In a communication dated 4 September 2009, the Government states that the TELECOM liquidation process was due to financial reasons, and was not intended to undermine freedom of association and the right to organize, and that the Committee has already examined this matter.
49. *The Committee notes this information. Observing that the matter of the liquidation of TELECOM and the resulting dismissal of the workers has already been examined in this case [see 334th Report, para. 304], and that, on that occasion, the Committee felt it was not in a position to determine whether the restructuring was carried out solely with the aim of rationalization or whether it was a cover for acts of anti-union discrimination, and*

taking into account the judicial authority's ruling that in accordance with legislation it is not necessary to lift trade union immunity in the event of the liquidation of a company, the Committee will not pursue these allegations.

Case No. 2583 (Colombia)

50. The Committee examined this case at its June 2008 meeting [see 350th Report, paras 571–626]. On that occasion, the Committee made the following recommendations:

- With regard to the sanctions imposed on Mr Rodríguez, leader of SINTRAICOLLANTAS, for seeking to inform workers about the restructuring plan, the Committee requests the Government and the complainant organization to clarify whether Mr Rodríguez was suspended or dismissed, the reasons for the penalty and whether Mr Rodríguez consequently instituted judicial proceedings. The Committee also requests the Government to keep it informed of developments with regard to the complaint submitted to the Attorney-General regarding the falsified document;
- On the subject of the allegations that trade union leaders are persecuted for distributing the trade union newspaper and that trade unions are not permitted facilities for communication within the company, the Committee requests the Government to ensure that trade union leaders have access to the facilities necessary to communicate with their members and that they are able to distribute the newspaper freely. The Committee requests the Government to keep it informed on this matter;
- With regard to the appointment of an arbitration tribunal without complying with legal provisions regarding the nomination of arbiters, in June 2002, with regard to which legal proceedings were brought against the Council of State and are currently ongoing, the Committee requests the Government to keep it informed of the judgement and to ensure that the necessary measures are taken to guarantee compliance with legislation regarding the appointment and operation of arbitration tribunals.

51. In a communication dated 27 January 2009, the Sibaté subbranch of the National Union of Workers in the Processing Industry for Rubber, Plastic, Polyethylene, Polyurethane and Synthetic Substances, Parts and Derivatives of these Processes (SINTRAINCAPLA) and the National Union of Workers of Icollantas SA (SINTRAICOLLANTAS) refer to the allegations already made and report that Mr Rodríguez initiated legal proceedings with the Fifteenth Labour Court which are currently pending. The communication also refers to the transfer of three trade union leaders to other posts without their consent in April 2007 (Messrs Orlando Moreno, Wilmar Ramírez and Alfredo García), following which they lodged a complaint which is pending with the Ministry of Social Protection of Soacha.

52. The Committee notes that despite the time that has elapsed, the Government has not sent new information concerning the various legal proceedings pending even though the Committee has previously requested to be kept informed in this regard. The Committee notes that the Government has also not sent its observations concerning the new allegations reported by the trade union organizations, which are also currently the subject of pending administrative and legal proceedings. *The Committee once again requests the Government to keep it informed of the currently pending legal and administrative appeals, which are mentioned in the previous paragraphs.*

Case No. 2595 (Colombia)

53. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 485–589]. On that occasion, the Committee made the following recommendations:

- Regarding the allegations concerning Embotelladora de Carepa, according to which paramilitary groups entered the company's premises in December 1996 and forced

members of SINALTRAINAL to resign from the trade union, the Committee requests the Government to keep it informed of the outcome of the inquiry conducted by the Coordinating Board of the Human Rights Group of the Ministry of Social Welfare.

- While noting the information provided by the Government in paragraph 582, the Committee requests the Government to take the necessary steps without delay to amend the legislation to guarantee Eficacia SA (or PROSERVIS) and Ayuda Integral SA workers providing services in the bottling plants the right to join SINALTRAINAL and to have their union dues checked off, and also to guarantee the right of the trade union organization to present lists of demands and to bargain collectively on their behalf. The Committee requests the Government to keep it informed in this respect.
- Regarding the alleged refusal to register Ernesto Estrada Prada as a member of the executive board of SINALTRAINAL on the grounds that he is under contract to the services enterprise Empaques Hernández but works for Saceites SA, and the alleged refusal of the Ministry of Social Welfare to grant workers of Acueducto Metropolitano de Bucaramanga the right to join SINALTRAINAL, the Committee expects that, in the light of the recent rulings of the Constitutional Court and in accordance with Articles 2 and 3 of Convention No. 87, the Government will proceed to the registration of the executive board of SINALTRAINAL and will consider the right of the workers of Acueducto Metropolitano de Bucaramanga to become members of SINALTRAINAL. The Committee requests to be kept informed in this respect.
- As concerns the dismissal of Mr Martínez Moyano, the Committee requests the Government to undertake an independent inquiry in this regard and to keep it informed of the results thereof.

54. In a communication dated 1 October 2009, the Government indicates, with regard to the allegations concerning Embotelladora de Carepa, according to which paramilitary groups entered the company's premises in December 1996 and forced members of SINALTRAINAL to resign from the trade union, that the Coordinating Board of the Human Rights Group will report on this matter and refers to the reply sent by the company Bebidas y Alimentos de Uraba SA in which the latter it indicates that it has never been connected to groups outside the law or given direct or indirect support to such groups and that it respects the right of association and the freedom to bargain collectively. The Committee notes this information and requests the Government to continue to keep it informed in this regard, in the context of its reply under Case No. 1787.

55. With regard to the right of Eficacia SA (or PROSERVIS) and Ayuda Integral SA workers providing services in bottling plants to join SINALTRAINAL and to have their union dues checked off, as well as the right of the trade union organization to present lists of demands and to bargain collectively on behalf of these workers, the Committee notes that the Government indicates that it is not competent to amend the domestic legislation and that this competence rests with the legislative authority. *In this regard, the Committee hopes that the Government will take the necessary steps, including in the context of its authority to submit legislative drafts, to ensure recognition of the right of the workers of Eficacia SA (or PROSERVIS) and Ayuda Integral SA to join the trade union organizations present in the bottling plants in which they work, if they so wish.*

56. In respect of the allegations concerning the refusal to register Mr Ernesto Estrada Prada as a member of the SINALTRAINAL executive board and those concerning the refusal of the Ministry of Social Welfare to allow the workers of Acueducto Metropolitano de Bucaramanga to join SINALTRAINAL, the Government has requested information on the registration procedures. *The Committee notes this information and requests the Government to keep it informed in this regard and to send its observations concerning the right of the workers of Acueducto Metropolitano de Bucaramanga to join SINALTRAINAL.*

57. With regard to the dismissal of Mr Martínez Moyano, the Government indicates that although it is not competent to assess worker dismissals, it will request information from

the Territorial Directorate of Santander on whether an industrial inquiry is being conducted into the company Ayuda Integral for anti-union harassment. *The Committee notes this information and requests the Government to keep it informed in this regard.*

Case No. 2423 (El Salvador)

58. The Committee last examined this case at its May–June 2009 meeting [see 354th Report, paras 73–86]. On that occasion, the Committee made the following recommendations: (a) with regard to the refusal to grant legal personality to the private security unions, the Committee requested the Government to guarantee the right of private security workers to organize and to grant legal personality to SITRASSPES and SITISPRI and requested the complainant organizations to confirm that no further legal action had been taken to obtain legal personality for the union SITRASAIMM; (b) with regard to the dismissal of the 34 founders of the STIPES trade union, of Mr Alberto Escobar Orellana at the José Simeón Cañas Central American University, of the seven trade union officials at the clothing company CMT SA de CV and of the trade unionists at the enterprise Hermosa Manufacturing, the Committee requested the Government to continue to promote the reinstatement of the dismissed trade unionists and to keep it informed in that regard, as well as with regard to the outcome of the application for judicial administrative proceedings filed by Mr José Amílcar Maldonado (company CMT SA de CV) and the pending administrative procedures to impose penalties relating to the dismissal of STIPES members.
59. In a communication of 13 October 2009, the Government indicates that, with regard to granting legal personality to the unions SITRASSPES and SITISPRI, it has acted on the Committee's recommendation and the necessary measures will be taken to grant legal personality to the unions in question. The Government also indicates that it has no knowledge of any legal proceedings initiated by the workers of CMT SA de CV and that the Ministry of Labour and Social Welfare has not been requested to intervene in any dispute arising subsequent to the reported events. *In this regard, recalling the importance of guaranteeing the right of freedom of association to workers in the security sector and who have been subject to the refusal to grant legal personality since they submitted their request in 2005, the Committee expects that the Government will take the necessary measures for the expeditious recognition of SITRASSPES and SITISPRI and requests the Government to keep it informed in this regard.*
60. With regard to the procedures initiated by STIPES to impose penalties, the Government reports that fines of US\$6,856.86 were imposed on the enterprise O&M Mantenimiento y Servicios SA de CV in relation to the dismissal of trade union officials and the payment of outstanding wages. In addition, fines of \$2,228.46 were imposed on the enterprise Servicios Técnicos del Pacífico SA de CV in relation to the dismissal of trade union officials and the payment of outstanding wages. *The Committee takes note of this information and requests the Government, with regard to the dismissal of the 34 founders of the STIPES trade union, of Mr Alberto Escobar Orellana at the José Simeón Cañas Central American University, of the seven trade union leaders at the clothing company CMT SA de CV and of the trade unionists at the enterprise Hermosa Manufacturing, to continue to promote the reinstatement of the dismissed trade unionists and to keep it informed in this regard, as well as with regard to the outcome of the application for judicial administrative proceedings filed by Mr José Amílcar Maldonado (enterprise CMT SA de CV).*

Case No. 2227 (United States)

61. The Committee last examined this case – which concerns the effects of the inadequacy of the remedial measures left to the National Labor Relations Board (NLRB) in cases of illegal dismissals of undocumented workers, as a result of the decision of the Supreme Court in the case of *Hoffman Plastic Compounds v. NLRB* – at its March 2009 meeting [see 353rd Report, paras 87–95]. On that occasion, the Committee once again requested the Government to take steps, within the context of the ongoing debate on comprehensive immigration reform, to consult the social partners concerned on possible solutions aimed at ensuring effective protection for undocumented workers against anti-union dismissals.
62. In a communication dated 8 October 2009, the Government states that governmental agencies continue, with the assistance of the social partners, to educate all workers, including undocumented workers, about their labour rights under applicable labour and employment laws. Furthermore, the NLRB continues to coordinate with the social partners to protect the freedom of association rights of undocumented workers under the National Labor Relations Act (NLRA).
63. The Government further indicates that federal and state courts continue to apply *Hoffman* narrowly and that there has been no case law that has interpreted the decision to undercut freedom of association and collective bargaining rights for undocumented workers. In this respect, the Government indicates that the Supreme Court has declined to review the US Court of Appeals’ ruling in *Agri Processor Co., Inc. v. NLRB*, that undocumented workers were employees within the meaning of the NLRA.
64. The only recent case which considered the *Hoffman* decision in the context of freedom of association is the *NLRB v. C & C Roofing Supply, Inc.* (2009) case. In its decision, the US Court of Appeals for the Ninth Circuit requested an employer to pay liquidated damages to 20 workers fired unlawfully for their union activity, but held that the employer was not required to offer reinstatement if it could prove the workers were not authorized to work in the United States. The Government indicates that “in reaching the decision, the court rejected the employer’s argument that compliance with the terms of the agreement would require it to violate the *Hoffman* decision by providing a remedy that includes back pay to undocumented workers”. The court determined that “unlike reinstatement and back pay, liquidated damages do not pose an irreconcilable conflict with [the Immigration Reform and Control Act of 1986], because they are not predicated on an employee’s availability for work”. The Government considers that while this case involved a voluntary agreement between an employer and an aggrieved group of workers, rather than an NLRB-imposed award for back pay, the decision is yet another example of how US courts continue to protect the rights of undocumented workers and to limit the application of the *Hoffman* decision.
65. *The Committee notes the Government’s indication that governmental agencies, with the assistance of social partners, educate workers, including undocumented workers, about their labour rights, and that the NLRB continues to coordinate with the social partners to protect their freedom of association rights. It further notes the Supreme Court’s refusal to review the Court of Appeals’ decision in the Agri Processor Co. Inc. case, which maintained that undocumented workers are employees within the meaning of the NLRA.*
66. *The Committee notes with interest that in the NLRB v. C & C Roofing Supply, Inc. case, the employer was requested to pay liquidated damages to employees illegally dismissed for their union activities. The Committee recalls that when reinstatement is not possible, the dismissed employees should be adequately compensated and that such compensation should take into account both the damage incurred and the need to prevent the repetition of such situations in the future. The Government should ensure that the workers concerned*

are paid adequate compensation which would represent a sufficient dissuasive sanction for anti-trade union dismissals [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, paras 844–845]. The Committee requests the Government to continue to keep it informed of innovative steps taken to ensure that undocumented workers are sufficiently protected against acts of anti-union discrimination and to provide information on the steps taken to consult the social partners concerned on further possible solutions aimed at ensuring effective protection for undocumented workers.

Case No. 2460 (United States)

67. The Committee last examined this case, which concerns the prohibition imposed by the legislation of North Carolina to make any collective agreement between cities, towns, municipalities or the State and any labour or trade union in the public sector, at its November 2008 session [see 351st Report, paras 67–72]. On that occasion, the Committee requested the Government to continue promoting the establishment of a collective bargaining framework in the public sector in North Carolina and effective recognition of the right of collective bargaining – with the participation of representatives of the state and local administration and public employees’ trade unions.
68. In a communication dated 8 October 2009, the Government states that the North Carolina General Assembly was still considering whether to repeal the provision contained in NCGS sections 95–98, which prohibit agreements between governing bodies of the State’s political subdivisions and public sector labour organizations. The Government specifies that the four following bills to repeal or modify this law were again introduced in the 2009–10 session of North Carolina Legislature: Public Safety Employer–Employee Cooperation (House Bill 1651), Restore Contract Rights to State/Local (House Bill 750 and Senate Bill 427) and Repeal Ban GS 95-98 (Senate Bill). Each of these bills has been assigned to the appropriate committee for further consideration. As of 8 October 2009, none of the bills was enacted into law.
69. *The Committee notes the information provided by the Government with regard to the legislative agenda and, in particular, notes with interest the numerous efforts made within the North Carolina legislature to repeal the ban on collective bargaining for the public service. Recalling that the public services, broadly defined, has been prohibited from bargaining collectively for over 50 years now, the Committee expects that the new legislation will be adopted in the very near future, so as to remove the collective bargaining ban imposed on state and local public employees. It requests the Government to keep it informed of developments in this respect. The Committee further requests the Government to continue promoting the establishment of a collective bargaining framework in the public sector in North Carolina, as well as effective recognition of the right of collective bargaining.*

Case No. 2524 (United States)

70. The Committee last examined this case, which concerns three decisions (“*Oakwood trilogy*”) of the National Labor Relations Board (NLRB) setting out a new expanded interpretation of the definition of “supervisor” so as to potentially exclude large categories of workers from the protection of the right to organize and bargain collectively under the National Labor Relations Act (NLRA), at its March 2008 meeting [see 349th Report, paras 794–858]. On that occasion, the Committee made the following recommendations:
- (a) The Committee requests the Government to take all the necessary steps, in consultation with the social partners, to ensure that the exclusion that may be made of supervisory staff under the NLRA is limited to those workers genuinely representing the interests of

the employers. The Committee requests to be kept informed of progress made in this respect.

- (b) The Committee requests the Government to keep it informed of the impact of the *Oakwood trilogy*, on the one hand with regard to future decisions applying the *Oakwood* interpretation as to what constitutes authority to “assign” or “responsibly direct”, and on the other hand, with regard to the concerns raised by the complainant on possible clogging of the representation and collective bargaining process through an increase in appeals filed by the employers with a view to challenging the status of employees in bargaining units.

71. In a communication dated 8 October 2009, the Government indicates that it has reviewed the court decisions that have used the standards enunciated in the *Oakwood* cases. According to the Government, there are no cases where individuals have been deemed to be supervisors, using the *Oakwood* interpretation, other than workers genuinely representing the interests of employers. In particular, the Government refers to *NLRB v. Atlantic Paratrans of NYC, Inc.*, 300 Fed. Appx. 54 (2d Cir. 2008), enforcing a bargaining order against the employer and finding that dispatchers were not supervisors as they did not use independent judgement in assigning drivers to their routes or responsibly direct others; *Family Healthcare Inc.*, 354 NLRB No. 29 (2009), declaring that a doctor was not a supervisor and ruling that the employer had violated the NLRA in discharging her; and *Metropolitan Interpreters and Translators*, 2009 WL 330606 (NLRB Div. of Judges) (5 February 2009) in which a shift supervisor linguist was found to be a supervisor, having the authority to “assign” and “responsibly direct”, but also authority, indicating supervisory status, to “transfer” and “discipline” other employees. The Government indicates that because the decisions applying the *Oakwood* standard have resulted in few workers being deemed supervisors under the NLRA, the standard alone does not appear to be an incentive for employers to challenge employee status. Moreover, according to the information from the NLRB, *Oakwood*-related challenges account for less than 1 per cent of Board cases.

72. *The Committee notes the information provided by the Government on the three cases where the Oakwood standard was applied. It requests the Government to continue keeping it informed of the impact of the Oakwood trilogy, on the one hand, with regard to future decisions applying the Oakwood interpretation as to what constitutes authority to “assign” or “responsibly direct”, and on the other hand, on the number of appeals filed by the employers with a view to challenging the status of employees in bargaining units.*

Case No. 2547 (United States)

73. The Committee last examined this case, which concerns a decision of the National Labor Relations Board (NLRB) denying graduate teaching and research assistants at private universities the right under the National Labor Relations Act (NLRA) to engage in organizing or collective bargaining, at its June 2008 meeting [see 350th Report, paras 732–805]. On that occasion, the Committee requested the Government to take the necessary steps, including legislative, if necessary, to ensure that graduate teaching and research assistants, in their capacity as workers, are not excluded from the protection of freedom of association and collective bargaining. The Committee requested to be kept informed of progress made in this respect.

74. In a communication dated 8 October 2009, the Government indicates that proposed legislation was introduced in March and April 2009 in the United States Congress and that the latter would overrule the NLRB decision by adding the following wording to section 2(3) of the NLRA:

The term “employee” includes a student enrolled at an institution of higher education (as defined in section 101 or 102 of the Higher Education Act of 1965 (20 U.S.C. §§ 1001, 1002), other than an institution of a State or political subdivision) who is performing work for remuneration at the direction of the institution, whether or not the work relates to the student’s course of study.

The Government adds that the bills have been referred to the appropriate committees for further consideration but have not been enacted into law yet.

75. *The Committee notes the information provided by the Government and requests the latter to keep it informed of progress made in this regard.*

Case No. 2301 (Malaysia)

76. The Committee last examined this case, which concerns the Malaysian labour legislation and its application which, for many years, have resulted in serious violations of the right to organize and bargain collectively, including: discretionary and excessive powers granted to authorities as regards trade union’s registration and scope of membership; denial of workers’ rights to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal unions’ activities, including free elections of trade unions’ representatives; establishment of employer-dominated unions; and arbitrary denial of collective bargaining. The Committee formulated extensive recommendations at its March 2004 meeting [see 333rd Report, para. 599] and last examined the follow-up to this case at its March 2009 meeting. On that occasion, the Committee deplored that amendments to the Industrial Relations Act, 1967 and the Trade Unions Act, 1959 had been passed by Parliament and had entered into force, without addressing the issues raised by the Committee, and once again urged the Government to fully incorporate its long-standing recommendations with respect to the legislation. The Committee further requested the Government to transmit copies of the amended legislation to itself and the Committee of Experts on the Application of the Conventions and Recommendations (CEACR), and once again reminded the Government that it may avail itself of the ILO’s technical assistance so as to bring its law and practice into full conformity with freedom of association principles. Finally, the Committee once again urged the Government to rapidly take appropriate measures and give instructions to the competent authorities so that the 8,000 workers in 23 companies whose representational and collective bargaining rights were denied may effectively enjoy rights to representation and collective bargaining, in accordance with freedom of association principles [see 353rd Report, paras 133–140].
77. In a communication dated 6 August 2008, the Government indicates that even though Malaysia has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the principles and concepts on the right to organize have been provided for in the law as the legislation explicitly prohibits employers’ interference in the right of the workers to form or join unions and participate in its legal activities. With regard to the amended Industrial Relations Act, 1967, the Government indicates that the law provides a fast and efficient process of union recognition as a recognition claim is necessary for collective bargaining. In particular, the Government indicates that the trade union must be competent to represent the workers and obtain a majority in order for it to commence collective bargaining. The Government adds that the recognition cannot be withdrawn by the employer once it has been accorded.
78. In a communication dated 14 October 2009, the Government indicates that it fully and continuously supports the efforts to allow workers to organize and establish trade unions, as it has successfully assisted a healthy growth of trade unions, preserved industrial harmony in the country and continuously reviewed the labour laws in order to facilitate the

establishment of trade unions. The Government also indicates that the Trade Union Act, 1959 and the Trade Union Regulations, 1959 do not have specific provisions concerning the election of trade union's representatives and that the conduct of the latter is left to the election committee of the trade union. The Government attaches to its communication a copy of the Industrial Relations Act, as amended in 2007.

79. With regard to the 8,000 workers' representational and collective bargaining rights, the Government indicates that the Director-General of Trade Unions (DGTU) decided that the unions representing the workers were not competent due to a misfit between the nature of industry or business ventured by the employer and the membership scope of the union. The Government adds that the trade unions aggrieved by this decision had the right to seek legal redress by means of judicial review at the High Court and that the workers had the right to join any other union or form a union to represent them. The Government finally indicates that it would not interfere with the formation of the trade union and its recruitment but that the trade union would have to go through the recognition process as provided by law before it could exercise the right to collectively bargain.

80. *The Committee recalls, in respect of the present case, that it has commented upon the extremely serious matters arising out of the fundamental deficiencies in the legislation on many occasions, over a period spanning 18 years. The Committee takes note of the Industrial Relations Act, 1967, as amended in 2007. It notes, in particular and with regret, that those provisions of the Industrial Relations Act that it has been commenting upon over the years (sections 9(5) and 9(6), providing for the Minister's power to make a decision on trade union recognition which cannot be questioned in court, and section 13, which provides that collective bargaining can only start where a trade union has been accorded recognition by the employer), have not been amended. As in its previous examination of the present case, the Committee once again deplores that amendments to the industrial relations legislation had been passed and had entered into force, without addressing the issues raised by the Committee. In these circumstances, the Committee, noting that the Government has not provided a copy of the amended Trade Unions Act, once again requests the Government to do so and once again urges the Government to take the necessary measures without delay to fully incorporate its long-standing recommendations concerning the need to ensure that:*

- *all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, and for the establishment of federations and confederations;*
- *employers do not express opinions which would intimidate workers in the exercise of their organizational rights, such as claiming that the establishment of an association is unlawful, or warning against application with a higher level organization, or encouraging workers to withdraw their membership;*
- *no obstacles are placed, in law or in practice, to the recognition and registration of workers' organizations, in particular through the granting of discretionary powers to the responsible official;*
- *workers' organizations have the right to adopt freely their internal rules, including the right to elect their representatives in full freedom;*
- *workers and their organizations enjoy appropriate judicial redress avenues over the decisions of the minister or administrative authorities affecting them; and*
- *the full development and utilization of machinery for voluntary negotiation between employers or employers' and workers' organizations, with a view to regulating terms*

and conditions of employment by means of collective agreements is encouraged and promoted by the Government.

81. *As regards the 8,000 workers whose representational and collective bargaining rights have been denied, the Committee can only note with regret that the Government repeats the information it had previously submitted, to the effect that persons dissatisfied with a decision of the DGTU, for instance, may seek redress at the ministerial platform or through judicial review by the Malaysian High Court. The Committee once again urges the Government to rapidly take appropriate measures and give instructions to the competent authorities so that these workers may effectively enjoy rights to representation and collective bargaining, in accordance with freedom of association principles.*

Case No. 2637 (Malaysia)

82. The Committee last examined this case, which concerns the denial of freedom of association rights to migrant workers, including migrant domestic workers, in law and in practice, at its March 2009 meeting [see 353rd Report, paras 1039–1053]. On that occasion, the Committee stated that it expected the Government to take the necessary measures, including legislative if necessary, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. It further requested the Government to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requested the Government to keep it informed of the progress made in this regard.
83. In a communication dated 29 October 2009, the Government indicates that it does not intend to register the association of migrant domestic workers. The Government further states that the existing laws and guidelines on foreign workers are adequate to meet their concerns, and that they may bring their concerns to their respective embassies, the Malaysian Association of Foreign Maid Agencies (PAPA), or other relevant authorities.
84. *The Committee notes with regret that, in respect of its previous recommendations in the present case, the Government merely repeats its previous observations. The Committee recalls that on numerous occasions it has interpreted the right of freedom of association to include migrant workers, and has further stated that domestic workers are not excluded from the application of Convention No. 87 and should therefore be governed by the guarantees it affords and have the right to establish and join occupational organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, 2006, fifth edition, para. 267]. The Committee has further emphasized 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 [**Digest**, *op. cit.*, para. 255].*
85. *Recalling furthermore that it had previously considered that the Government's arguments to explain the Registrar's refusal to register the association of migrant domestic workers can in no way justify the denial of the fundamental right to organize these workers, the Committee once again expresses the expectation that the Government will take the necessary measures, including legislative if necessary, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. Additionally the Committee once again requests the Government to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requests the Government to keep it informed of the progress made in this regard.*

Case No. 2575 (Mauritius)

- 86.** The Committee last examined this case, which concerns alleged irregularities in the process leading to the setting up of a new bargaining structure, called the National Wages/Pay Council (NPC), as well in this body's composition, mode of designation of representatives and of objectives, at its March 2009 meeting. On that occasion, the Committee made the following recommendation [see 353rd Report, paras 124–138]:

The Committee trusts that the Government will continue to pursue full and frank consultations on ways to improve the composition and functioning of the NPC, including the basis on which the salary compensation should be decided. The Committee requests the Government to keep it informed in this regard and requests it to provide further information on the Government's response to the TUCP recommendations that the Government accept or reject in toto those recommendations of the NPC that may be decided by consensus and to clarify whether workers may go on strike against an NPC decision should it lack consensus.

- 87.** In a communication dated 1 April 2009, the Confédération Syndicale de Gauche (CSG), comprising the complainant General Workers' Federation (GWF) and other workers' organizations indicates that: (1) the Government has not initiated full and frank consultations with the representatives of the social partners nor held in-depth discussions so as to arrive at a conclusion in this regard, which is satisfactory to all parties concerned; (2) the functioning, composition and objectives of the NPC have remained intact, despite the Committee's recommendations; and (3) the Confederation is not aware of any communication sent by the Government of Mauritius to keep the Committee informed of developments in respect of the NPC. The CSG submits a detailed summary of the situation from March 2008 to March 2009 and provides a copy of the Additional Remuneration Act 2008 that was adopted following the NPC's recommendations with regard to the 2008 salary compensation. It further indicates that from October 2008 to March 2009, no discussions concerning the NPC were held with the trade union movement and that in particular, the criteria to determine salary compensation (terms of reference) did not change since 2007.

- 88.** In a communication dated 17 August 2009, the Government indicates that discussions on the determination of salary compensation were supposed to take place following the receipt, by the Government, of a memorandum submitted by TUCP representatives. However, as the representatives did not submit a memorandum, no meeting was held until 27 April 2009. In that meeting, trade unions' representatives stated that they were not willing to participate in the deliberations of the NPC or submit any memorandum unless the criteria for the determination of salary compensation were changed. The Government indicates that meetings were held on 7 and 15 May 2009 in order to discuss the quantum of 2009–10 salary compensation and that the trade unions' representatives did not attend any of them. The Government indicates that the Additional Remuneration Act 2009 was passed on 7 July 2009 following the recommendations of the NPC ((1) a salary compensation of 5.1 per cent paid to workers drawing up to 3,800 Mauritian rupees (MUR) per month; (2) a uniform compensation of MUR200 paid to workers drawing salary from MUR3,801 to MUR12,000; and (3) no salary compensation paid to workers drawing above MUR12,000 per month). The Government adds that since trade unions' representatives maintain that the inflation rate should be the only criteria used in order to determine the salary compensation, they have shown no predisposition whatsoever to consider any other possibility. As they refuse to participate in the deliberations of the NPC, full and frank discussions appear to be compromised. The Government however indicates that discussions will be pursued as soon as the trade unions' representatives indicate their willingness to do so. The Government provides a copy of the note of the meeting held by the Minister of Labour, Industrial Relations and Employment with the TUCP on 29 September 2008.

89. *The Committee notes, from the information at its disposal, that no further meetings regarding the composition and functioning of the NPC have been held since its previous examination of this case. Although a meeting was held on 27 April 2009, the TUCP representatives stated that they were not willing to participate in the deliberations of the NPC or submit any memorandum unless the criteria for the determination of salary compensation were changed. Furthermore, the Government indicates that meetings were held on 7 and 15 May 2009 in order to discuss the quantum of 2009–10 salary compensation and that the trade unions’ representatives did not attend any of them.*
90. *The Committee notes that the obstacle to further consultations, thus, continues to be the TUCP worker representatives’ insistence that the computation of salary compensation be based solely on the increase of the cost of living. Noting the Government’s indication that discussions will be pursued as soon as the trade unions’ representatives indicate their willingness to do so, the Committee expresses the hope that the Government and the TUCP will soon find a solution to the current impasse and trusts, once again, that the Government will continue to pursue full and frank consultations on ways to improve the NPC, including the basis on which the salary compensation should be decided. It requests to be kept informed of developments in this regard. Furthermore, the Committee once again requests the Government to provide further information on the Government’s response to the TUCP recommendations that the Government accept or reject in toto those recommendations of the NPC that may be decided by consensus and to clarify whether workers may go on strike against an NPC decision should it lack consensus.*

Case No. 2317 (Republic of Moldova)

91. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 141–151]. In its previous examinations of this case, the Committee expressed its concerns at the merger of the Confederation “Solidaritate” allegedly supported by the Government, and the main central complainant organization, the Confederation of Trade Union of the Republic of Moldova (CSRM), that had taken place within the framework of persistent allegations of interference and pressure on trade unions to change their affiliation to become members of the Confederation “Solidaritate”. The Committee noted that the Union of Public Authorities and Public Services Unions of the Republic of Moldova (USASP) was established by the trade union members of the Federation of Trade Unions of Public Service Employees (SINDASP), which was previously affiliated to the CSRM, following a disagreement with the decision taken by the then president of the SINDASP to transfer the SINDASP under the umbrella of the Confederation “Solidaritate”. The Committee noted that the registration of the newly created union was denied and that the case of registration was pending before the Supreme Court of Justice. The Committee requested the Government to keep it informed of the outcome of the court proceedings and to provide a copy of the final ruling. It also reiterated its previous request to the Government to initiate independent inquiries into all outstanding allegations in this case in relation to the Government’s interference in the trade union movement.
92. In a communication dated 25 August 2009, the Government indicates that all available information in this case has already been sent to the Committee and refers in this respect to its previous communications. With regard to the refusal of the USASP’s registration, the Government indicates that the appeal of USASP to the Supreme Court was dismissed by a decision of the Civil and Administrative Disputed Claims Board of the Supreme Court of Justice dated 12 November 2008 which recognizes the action of the Ministry of Justice as fully lawful. The Government provides a copy of the decision. The Government adds that the court decision does not deprive the USASP of the right to once again request the registration after submitting all the necessary documents in conformity with the provisions of the legislation in force.

93. *The Committee notes the information provided by the Government and the decision of the Civil and Administrative Disputes Claims Board of the Supreme Court of Justice dated 12 November 2008. The Committee understands from this decision that the USASP submitted its statutes for registration to the Ministry of Justice on 19 February 2007. The process of registration was suspended by a letter of the Ministry dated 17 March 2007 and the documents submitted for registration were returned to the union. On 2 May 2007, the USASP once again submitted its statutes for the registration. The registration was denied by Decision No. 17 of 4 June 2007 on the grounds that the statutes were not in conformity with the requirements of the legislation in force. On 3 July 2007, the USASP applied to the Ministry of Justice with a request to repeal its decision of 4 June 2007. Along with this request, the union submitted the amended statutes, in which it no longer declared itself the legal successor of the SINDASP and once again asked for the registration. By a reply dated 27 July 2007, the union request was dismissed. The union then filed a complaint to the court asking for the registration by the Ministry and a monetary compensation for material and moral damages. By a decision dated 2 June 2008, the Court of Appeal Chisinau partially satisfied the claim by requesting the Ministry to register the complainant organization's statutes presented on 3 July 2007. The Ministry submitted a writ of appeal to the Supreme Court. The Civil and Administrative Disputed Claims Board of the Supreme Court of Justice concluded that the Court of Appeal Chisinau came to an erroneous conclusion as Ministerial Decision No. 17 of June 2007 was legal and well grounded at the moment of its issuance and that subsequent amendment of the statutes does not operate retroactively. The Board therefore annulled the decision of the Court of Appeal Chisinau of 2 June 2008.*
94. *The Committee understands that the main ground for denial of registration, at least until 4 June 2007, is the USASP's declaration to be a legal successor of the SINDASP. The Committee further understands that the provision to that effect was subsequently repealed from the USASP statutes. The Committee notes the Government's indication that despite the court decision declaring the decision of the Ministry dated 4 June 2007 legal, the USASP is free to re-apply for registration. The Committee notes in this respect that another request for registration was indeed submitted on 3 July 2007, but once again denied. The Committee regrets that in its communication, the Government failed to indicate the grounds on which the decision of the Ministry was based and which legislative requirements were not satisfied. The Committee recalls that the present case was brought before the Committee amid persistent allegations of interference and pressure on trade unions to change their affiliation to become members of the Confederation "Solidaritate". It further recalls that some of the members of the SINDASP disagreed with the decision to join the Confederation and on 3 February 2007 established the USASP. The Committee notes that since its establishment over three years ago the new organization has applied for registration several times only to be denied. Recalling that the right to official recognition through legal registration constitutes an essential facet of the right to organize, being the first step that workers' or employers' organizations must take in order to be able to function efficiently and represent their members adequately [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 295], the Committee urges the Government to take the necessary measures in order to ensure that the USASP is registered without further delay. It requests the Government to keep it informed in this respect.*

Case No. 2268 (Myanmar)

95. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 154–163] and made the following recommendations:
- (a) The Committee once again urges the Government in the strongest of terms to enact legislation guaranteeing freedom of association to all workers, including seafarers,

and employers; to abolish existing legislation, including Orders Nos 2/88 and 6/88 so as not to undermine the guarantees relating to freedom of association and collective bargaining; to explicitly protect workers' and employers' organizations from any interference by the authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee once again urges the Government to take advantage in good faith of the technical assistance of the Office so as to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles.

- (b) The Committee strongly urges the Government to take the necessary steps to ensure the immediate release of Myo Aung Than from prison and to keep it informed in this respect.
- (c) The Committee once again requests the Government to take measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country and to keep it informed of the measures taken in this regard.
- (d) The Committee once again urges the Government to issue instructions to its civil and military agents as a matter of urgency so as to ensure that the authorities fully refrain from any act preventing the free operation of all forms of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile and which cannot be recognized in the prevailing legislative context of Myanmar. It further requests the Government to ensure that all those working for such organizations can exercise trade union activities free from harassment and intimidation. The Committee requests the Government to keep it informed of all measures taken in this regard.
- (e) The Committee once again urges the Government to institute an independent inquiry into the alleged murder of Saw Mya Than, to be carried out by a panel of experts considered to be impartial by all the parties concerned. The Committee requests the Government to keep it informed of measures taken in this respect.
- (f) The Committee once again requests the Government to adopt legislative measures which fully guarantee the right of seafarers to establish and join organizations of their own choosing and afford them adequate guarantees against acts of anti-union discrimination. It further requests the Government to issue appropriate instructions without delay so as to ensure that the SECD authorities immediately refrain from all acts of anti-union discrimination against seafarers who engage in trade union action, and immediately revise the text of the model agreement concerning Myanmar seafarers so as to bring it into conformity with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in this respect.
- (g) The Committee once again requests the Government to further investigate the dismissals of Min Than Win and Aung Myo Win from the Motorcar Tyre Factory and if it is found that the dismissals were due to legitimate trade union activities, to take the appropriate steps with a view to the workers' reinstatement or, if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.
- (h) The Committee once again requests the Government to inquire into the specific part of the production of the Unique Garment Factory which was stopped in July 2001 and the exact criteria for the selection of the 77 night-shift workers who were retrenched; if it is found that the dismissals were due to legitimate trade union activities, the

Committee requests the Government to take the appropriate steps with a view to ensuring the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.

- (i) The Committee requests the Government to provide full information, including official company documents where available, on the Myanmar Texcamp Industrial Ltd's decision to retain skilled and service workers over unskilled and non-service workers in undertaking its retrenchment of 340 employees.
- (j) With regard to the filing of complaints against the Yes Garment Factory on the same day by both Maung Zin Min Thu and Min Min Htwe along with five other workers, the Committee requests the Government once again to establish an impartial investigation into this matter, in particular as regards the substance of the complaints filed by Maung Zin Min Thu and Min Min Htwe along with five other workers, the substance of the agreement reached on the basis of these complaints, and the specific reasons for which Maung Zin Min Thu was dismissed; if it is found that the dismissal of Maung Zin Min Thu was due to legitimate trade union activities, the Committee requests the Government to take appropriate steps with a view to his reinstatement or, if reinstatement is not possible, the payment of adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.
- (k) The Committee once again urges the Government in the strongest terms to undertake real and concrete steps towards ensuring respect for freedom of association in law and in practice in Myanmar in the very near future.

96. In communications dated 1 June 2009 and 5 October 2009, the Government repeats its previous statement that workers already enjoy their rights under existing labour laws, and that legislation in line with Convention No. 87 would be submitted once the new Constitution is in force. The Government also reiterates information previously submitted on dispute settlement mechanisms, and adds that from January to August 2009, supervisory committees successfully settled 1,444 cases. In a communication dated 26 February 2010, the Government indicates that the basic principles of the draft laws were discussed with ILO experts during the ILO mission to Myanmar, undertaken from 17 to 24 January 2010, and that the experts' advice would be included in the preparation of the said draft legislation. The ILO furthermore would be informed of the progress made in this respect.

97. *The Committee recalls that for a number of years it has emphasized the need to both elaborate legislation guaranteeing freedom of association and ensure that existing legislation which impedes freedom of association would not be applied. The Committee therefore deeply regrets that the Government merely repeats its previous indication that new laws on freedom of association would only be submitted once the new Constitution enters into force. The Committee is bound to deplore, once again, the fact that despite its previous detailed requests for legislative measures guaranteeing freedom of association to all workers in Myanmar, there has been no progress in this regard. The Committee must also, once again, recall that this persistent failure to take any measures to remedy the legislative situation constitutes a serious and ongoing breach by the Government of its obligations flowing from its voluntary ratification of Convention No. 87. Noting the Government's indication that the draft legislation had been discussed with members of the ILO mission to Myanmar that took place from 17 to 24 January 2010, and that the advice of the mission would be included in the preparation of the draft laws to ensure freedom of association, the Committee once again urges the Government in the strongest of terms to enact legislation guaranteeing freedom of association to all workers, including seafarers, and employers; to abolish existing legislation, including Orders Nos 2/88 and 6/88 so as not to undermine the guarantees relating to freedom of association and collective*

bargaining; to explicitly protect workers' and employers' organizations from any interference by the authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee once again urges the Government to take advantage in good faith of the technical assistance of the Office so as to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. It requests the Government to keep it informed of all developments in this respect.

98. The Committee notes with deep regret that, apart from the information on the number of cases disposed of by the supervisory committees in 2009, the Government provides no information respecting its previous comments on dispute settlement mechanisms. In these circumstances the Committee must once again recall that a disputes resolution process that exists within a system with a total absence of freedom of association in law and practice, cannot fulfil the requirements of Convention No. 87. It also once again recalls its previous observation that, while it appears that the various committees referred to by the Government are all involved in some way in the conciliation and negotiation of disputes between employees and employers in Myanmar, their exact interaction and relative jurisdictions are unclear [see 337th Report, para. 1102]. The Committee further notes that, in the absence of relevant information from the Government, the composition of the Township Workers' Supervisory Committee (TWSC), the procedure to be followed should no agreement be reached by the TWSC, and the nature of the representation of employees and employers before the committees remains equally unclear. In these circumstances, the Committee once again requests the Government, pending the adoption in Myanmar of legislation that protects and promotes freedom of association, to take measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country and to keep it informed of the measures taken in this regard.
99. Finally, the Committee must once again express its deep regret that the Government provides no new information on the other recommendations and therefore once again urges it to provide information on all measures taken for their implementation, in particular as regards:
- The issuance of instructions to civil and military agents as a matter of urgency so as to ensure that the authorities fully refrain from any act preventing the free operation of all forms of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile and which cannot be recognized in the prevailing legislative context of Myanmar and the need to ensure that all those working for such organizations can exercise trade union activities free from harassment and intimidation.
 - The institution of an independent inquiry into the alleged murder of Saw Mya Than, to be carried out by a panel of experts considered to be impartial by all the parties concerned.
 - The steps taken for the immediate release from prison of Myo Aung Thant.
 - The issuance of appropriate instructions so as to ensure that the SECD authorities immediately refrain from all acts of anti-union discrimination against seafarers who engage in trade union action, and the revision of the text of the model agreement concerning Myanmar seafarers so as to bring it into conformity with Convention No. 87 and collective bargaining principles.
 - The steps taken to investigate the dismissals of Min Than Win and Aung Myo Win from the Motorcar Tyre Factory.

- *The measures taken to inquire into the specific part of the production of the Unique Garment Factory which was stopped in July 2001 and the exact criteria for the selection of the 77 night-shift workers who were retrenched.*
- *The provision of full information, including official company documents where available, on the Myanmar Texcamp Industrial Ltd's decision to retain skilled and service workers over unskilled and non-service workers in undertaking its retrenchment of 340 employees.*
- *The measures taken to investigate the allegations relating to the Yes Garment Factory.*

100. *The Committee once again urges the Government immediately to undertake real and concrete steps to ensure respect for freedom of association in law and in practice in Myanmar so as to ensure that the incipient steps on the roadmap towards democracy are carried out within a framework that respects the necessary prerequisites thereto.*

Case No. 2591 (Myanmar)

101. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 164–168]. On that occasion, the Committee expressed its deep concern at the ongoing violation of fundamental human rights and freedom of association principles in law and in practice and deplored that the Government had failed to implement its recommendations. It therefore referred to its previous examination of this case and once again urged the Government:

- to take the necessary measures to amend the national legislation so as to allow trade unions to operate in conformity with Conventions Nos 87 and 98 and to recognize the Federation of Trade Unions – Burma (FTUB) as a legitimate trade union organization;
- to carry out an independent investigation without delay into the allegation of ill-treatment of the detained persons and, if it is found to be true, to take appropriate measures, including compensation for damages suffered, giving precise instructions and apply effective sanctions so as to ensure that no detainee is subjected to such treatment in the future;
- to release Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min without delay;
- to ensure that no person will be punished for exercising his or her rights to freedom of association, opinion and expression; and
- to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including organizations which operate in exile, such as the FTUB, since they cannot be recognized in the prevailing legislative context of Myanmar and to issue instructions to that effect to its civil and military agents.

102. In communications dated 1 June and 5 October 2009, and 26 February 2010, the Government indicates that while there are no trade unions in Myanmar at the present time, the provisions of the new Myanmar Constitution (sections 353–355) capture the spirit of Convention No. 87 and that once the new Constitution comes into effect, the appropriate measures to establish labour organizations will be taken and that such organizations will be

able to carry activities for the interest of workers. Furthermore, a new legislation on labour organizations, when promulgated, will also be in line with Convention No. 87. The Government indicates in this respect that the basic principles of the drafting law were discussed with the ILO experts on 19 January 2010 at Nay Pyi Taw during the ILO mission visit to Myanmar from 17 to 24 January 2010 and that the Ministry of Labour intends to take into account the advice given by the ILO when drafting new legislation. It undertakes to keep the Committee informed of the developments in this regard. The Government hopes for the mutual understanding through constructive cooperation between the ILO and Myanmar and is confident that the objectives of both sides would be attained. With regard to other previously raised matters, the Government refers to its previous communications.

- 103.** *The Committee notes the Government's communications and, in particular, the information with regard to the intention to draft a new legislation in conformity with Convention No. 87. With regard to the matters raised in the present case, the Committee deeply regrets that the Government's communication once again essentially repeats previously submitted information and deplors that the Government has failed to implement its recommendations. The Committee emphasizes once again that it is a fundamental obligation of a member State to respect human and trade union rights, and stresses, in particular, that when a state decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 15], which it should observe in law and in practice. It therefore refers to its previous examination of this case and firmly urges the Government to fully implement as a matter of urgency its recommendations above. In particular, the Committee urges the Government to take the necessary measures for the immediate release of Thurien Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min and to keep it informed in this respect.*

Case No. 2275 (Nicaragua)

- 104.** In its previous examination of the case, at its March 2008 meeting, the Committee indicated that it understood that the reason for cancelling the registration of the "Idalia Silva" Workers' Trade Union of the company Hansae Nicaragua SA (STIS), was the reduction in the minimum number of workers needed to form a trade union (section 206 of the Labour Code). In this regard, the Committee indicated that it could not rule out that the 20 requests to leave the union and the resignations of union members from the enterprise were a result of anti-union activity. The Committee therefore requested the Government to take the necessary steps to ensure that an investigation was carried out to determine the reasons behind the members leaving the union and resigning, which had led to the cancellation of the union's registration, and to keep it informed in this regard. Furthermore, the Committee requested the Government to report on the reason for the dismissal of the union leader Ms Zoila Cáceres Rodríguez and to send the corresponding decisions, as well as to indicate whether the union leader in question had lodged an appeal against the decision of the General Labour Inspectorate before the judicial authority and, finally, it requested the Government to send the rulings handed down and information concerning the alleged threats against trade unionists Ms Marjorie Sequeira and Ms Johana Rodríguez [see 349th Report, paras 190–193].
- 105.** In its communication of 22 June 2009, the Government indicates that freedom of association is a constitutional right in Nicaragua for individuals who organize freely and peacefully for the defence of their trade union interests. Article 87 of the political Constitution establishes that right and provides that: "There is full freedom of association in Nicaragua. Workers shall organize voluntarily in trade unions and trade unions may be established in accordance with the law. No worker shall be obliged to belong to a

particular trade union or withdraw from a trade union to which he or she belongs. Full trade union autonomy shall be recognized and trade union immunity shall be respected.”

In line with the Constitution, section 204 of the Labour Code provides that: “Provided that it is through lawful means and for lawful purposes, trade unions shall have the right to: (a) draw up their constitutions and rules in full freedom; (b) elect their representatives in full freedom; (c) organize their administration and activities; and (d) formulate their programmes.”

- 106.** With regard to the status of the Idalia Silva Workers’ Trade Union of the company Hansae Nicaragua SA, the Government indicates that the department of trade union associations received a total of 20 copies of requests to leave the union and six copies of requests from members of that union to leave their posts at the company Hansae Nicaragua SA. It should be mentioned that it is on record that the ruling of the Court of First Instance which gave rise to the dissolution of the trade union was not appealed by the injured party, therewith consenting with the content of the ruling. It is not appropriate to speculate about why the injured party did not exercise its right to appeal. However, what is important in this case is to point out that the authorities in charge of the Ministry of Labour since 11 January 2007 have not produced any requests to leave any trade union organizations that were either registered or in the process of being registered. As long as the current administration is in charge of the Ministry of Labour, there will not be a situation – like has not been a situation – giving rise to requests to leave a trade union.
- 107.** In relation to paragraph 192 of the Committee’s 349th Report, the Government refers to Resolution No. 076-05 (which states that the reasons for the dismissal were absence from work and forgery of a medical certificate relating to that absence; see copy attached to its reply) concerning the case of Ms Zoila Cáceres Rodríguez, which contains the reasons for her dismissal. On 29 November 2005, Ms Cáceres Rodríguez lodged an appeal against the resolution authorizing the cancellation of her employment contract. On 30 November 2005, the Regional Labour Inspectorate for the Agribusiness Sector allowed the appeal lodged by Ms Cáceres Rodríguez. On 13 December 2005, the General Labour Inspectorate issued Resolution No. 228-05 rejecting the appeal lodged by Ms Cáceres Rodríguez, thereby upholding the resolution authorizing her dismissal. According to the labour legislation, the resolution issued by the General Labour Inspectorate exhausts the administrative channels, leaving the injured party with two options: (1) file an action for protection of constitutional rights (*amparo*), or (2) institute legal proceedings. It is not known whether Ms Cáceres Rodríguez made use of these options.
- 108.** With regard to paragraph 193 of the 349th Report concerning the ruling handed down and information requested concerning the alleged threats against trade unionists Ms Marjorie Sequeira and Ms Johana Rodríguez, the Government indicates that it requested information from the Third Local Criminal Court of Managua, which issued a report communicated to the Committee. The report indicates that the case was settled by means of a mediation procedure in which the parties participated at the appropriate time and, since the ruling was considered final, the case has been closed.
- 109.** *The Committee notes this information. In particular, the Committee notes that the legal proceedings relating to alleged threats against trade unionists Ms Marjorie Sequeira and Ms Johana Rodríguez were closed on account of a mediation procedure conducted by the parties. It also notes the reasons for the dismissal of the trade union leader Ms Zoila Cáceres Rodríguez (forgery of medical documents) and that the appeal lodged by that trade union leader was rejected. Moreover, with regard to the allegations relating to the dissolution of the Idalia Silva Workers’ Trade Union of the company Hansae de Nicaragua SA, by court ruling, taking into account the information provided by the Government and, in particular, that the court ruling ordering the dissolution was not appealed by the*

workers and that it concerns allegations made in 2002, the Committee shall not continue to examine these allegations.

Case No. 2590 (Nicaragua)

- 110.** The Committee last examined this case at its March 2009 meeting. The Committee previously urged the Government to take the necessary steps to ensure that union official Mr Chávez Mendoza was reinstated in his post without loss of pay until the judicial authority had ruled on his dismissal, and asked the Government to keep it informed in that regard and to send a copy of the final ruling as soon as it was handed down. The Committee also requested the Government to take the necessary steps to ensure that an independent investigation was carried out to determine whether there was in fact an anti-union policy against trade unions that were not in agreement with the Government and, if these allegations were shown to be true, to put an immediate end to such anti-union measures and to guarantee free exercise of the trade union activities of those organizations and their officials. At its March 2009 meeting, the Committee noted the Government's statement that workers in Nicaragua have at their disposal two possible ways of enforcing their rights, namely, administrative, through the Ministry of Labour, and judicial, through the labour courts, that Mr Donaldo José Chávez Mendoza chose the second option, and that proceedings are therefore under way in the competent court. The Committee noted with regret that the Government had not communicated the requested information, which suggested that the Government had not taken the measures called for, and it therefore reiterated its previous recommendations [see 353rd Report, paras 158–160].
- 111.** In its communication dated 4 June 2009 the Government stated, with regard to the recommendation to reinstate Mr Chávez Mendoza in his post pending the judicial authority's ruling on his dismissal, that this recommendation is legally impossible to implement in Nicaragua for several reasons. Article 129 of the Political Constitution determines the independence of the state authorities and article 159 thereof provides that the judicial power to hand down rulings and enforce them belongs exclusively to the judicial authority. Hence the Government of Reconciliation and National Unity cannot interfere with matters outside its jurisdiction, issuing an order for reinstatement and payment of outstanding wages, which is precisely the matter under dispute in the present case. It is for the judicial authority to determine whether or not the reinstatement and payment of outstanding wages should go ahead. The ILO, being aware of the labour legislation of Nicaragua, knows that the administrative authority has no power to issue any measure once the case is outside its jurisdiction. Moreover, the labour legislation is clear in this respect since section 46 of the Labour Code establishes as every worker's legitimate right the power to bring an action in a labour court to seek reinstatement and the payment of outstanding wages if the worker considers that there has been an infringement of the labour legislation, a restriction of his or her rights as a worker or an act of retaliation for exercising or seeking to exercise trade union rights. The Government points out that section 46 of the Labour Code provides that where termination of the contract by the employer is proven to have been in breach of the prohibitive provisions of the Labour Code and other labour regulations, or constitutes an act which restricts the worker's rights, or has the nature of retaliation against the worker for exercising or seeking to exercise labour or trade union rights, the worker shall be able to bring an action in the labour court to request reinstatement in the same post as before and under identical working conditions, the employer being obliged, if the reinstatement is upheld, to pay all outstanding wages and effect the reinstatement. Where the reinstatement is upheld and the employer fails to comply with the judicial ruling, the latter shall be obliged to pay the worker, on top of the compensation due, a sum equivalent to 100 per cent thereof. The labour court must settle such cases within 30 days of the action being filed and in the event of an appeal, the court in question must do so within 60 days of taking over the proceedings. Both deadlines are mandatory and, should any judge or magistrate fail to settle the case within the prescribed

deadline, the respective superior shall, at the request of the injured party, impose a fine equivalent to 10 per cent of the salary of the judicial officer concerned.

112. As regards the Committee's recommendation that the Government take the necessary steps to ensure that an independent investigation was carried out to determine whether there was in fact an anti-union policy against trade unions that were not in agreement with the Government, the Government gives the assurance that the complaint on which this recommendation is based is groundless, for the following reasons. Trade union pluralism has prevailed in Nicaragua since 1979 and this is closely linked to political pluralism. Thousands of workers freely and peacefully join trade unions of their own choosing. The wide range of unions includes the following: Confederation of Trade Union Action and Unity (CAUS); General Confederation of Independent Workers (CGT(I)); Workers' Federation of Nicaragua (CTN); General Confederation of Education Workers (CGTEN-ANDEN); Federation of Health Workers (FETSALUD); José Benito Escobar Sandinista Workers' Confederation (CST(JB)); Nicaraguan Workers' Federation (CNT); Pablo Martínez Sandinista General Workers' Confederation (CGST); Agricultural Workers' Association (ATC); National Employees' Union (UNE); Confederation of Labour Unification (CUS); Autonomous Workers' Federation of Nicaragua (CTN(A)); Confederation for Worker Unification (CUT); National Teachers' Confederation of Nicaragua (CNMN); National Workers' Front (FNT). The above list comprises just the organizations which are national in scope. All of them are linked to various partisan organizations or ideologies and all of them are active in the country, without any limitations imposed. They also include workers from the various public and private economic sectors of the country and all the departments into which Nicaragua is politically divided. They are vigorous in the defence of their union interests and can at any given time present a complaint against the Government of Nicaragua, with highly politicized overtones, to the relevant bodies of the ILO, for alleged violations of freedom of association or for failure to comply with the provisions of a Convention ratified by Nicaragua. Furthermore, they can submit a request to the country's labour authorities for failure to comply with one or more clauses of the collective agreement or for alleged violations of the national labour legislation. Moreover, freedom of association in Nicaragua is guaranteed by the provisions of the Political Constitution, and the Labour Code ensures trade union immunity for persons who have established, or are in the process of establishing, a trade union. Trade union autonomy is protected inasmuch as unions have the right to: (a) freely draft their statutes and regulations; (b) freely elect their representatives; (c) choose their organic structure, administration and activities; and (d) formulate their programme of action. (Attached to the Government's reply are statistics showing the numbers of organizations established in various years, as follows: 200 trade unions, 21 federations, three confederations and two central organizations (*centrales*) in 2007; 171 trade unions, 26 federations and seven central organizations in 2008; and 44 trade unions, six federations and one confederation in 2009.)

113. *The Committee notes this information and in particular the statistics sent by the Government in connection with the number of trade unions established between 2007 and 2009. The Committee recalls that when it examined this case in March 2008 it emphasized that Mr Chávez Mendoza was a trade union official and hence should have enjoyed the particular protection afforded by trade union immunity, according to which a trade union official may not be dismissed without the authorization of the Ministry of Labour, a condition which was not fulfilled in this case. The Committee further recalls that the union official in question was dismissed in July 2007, that he took legal action in this connection, and that section 46 of the Labour Code, quoted by the Government, states that judicial proceedings of this type must be settled within 30 days at the first instance and within 60 days at the second instance (the section also states that these deadlines are mandatory and any judges who fail to respect them may be penalized). In this respect, the Committee deeply deplores the fact that even though nearly three years have elapsed since the*

dismissal no judicial ruling has been issued in this respect. Consequently the Committee, as it has done in previous cases involving excessive delays in judicial proceedings relating to the dismissal of trade union leaders, urges the Government to take all steps at its disposal, while respecting the independence of the state authorities, to have trade union official Mr Chávez Mendoza reinstated in his post – for example, through informal procedures, good offices or mediation – pending a ruling from the judicial authority on his dismissal. The Committee also recalls that justice delayed is justice denied and firmly expects the judicial authority to issue a ruling in the very near future. The Committee requests the Government to keep it informed in this respect.

Case No. 2086 (Paraguay)

- 114.** The Committee last examined this case, relating to the trial and sentencing in the first instance for “breach of trust” of the three presidents of the trade union confederations, the United Confederation of Workers (CUT), the Paraguayan Confederation of Workers (CPT) and the Trade Union Confederation of State Employees of Paraguay (CESITEP), Mr Alan Flores, Mr Jerónimo López and Mr Barreto Medina, at its June 2009 meeting [see 354th Report, paras 180–182]. On that occasion, the Committee deeply deplored the significant amount of time that had elapsed since the initiation of legal proceedings (more than 12 years), urged the Government to take all the necessary measures to ensure that the legal proceedings would be concluded in the very near future and requested it to ensure that the guarantees of due process were respected. The Committee also requested the Government to keep it informed of the final ruling handed down in the case.
- 115.** In its communication of 19 June 2009, the Government indicates that: (1) the case before the law courts of Paraguay is entitled: “Edgar Cataldi et al. on charges including fraud”; (2) Mr Reinaldo Barreto Medina, Mr Alan Flores and Mr Jerónimo López, jointly with other accused persons, submitted a petition for the limitation of actions against final judgement No. 49 of 8 October 2001, handed down by the criminal judge of justice enforcement No. 7; (3) on 4 June 2009, the Criminal Court of Appeal, First Division, handed down decision and ruling No. 37 consisting of a total of 404 pages, and in its judgement the petitions for limitations were rejected and the remedy of annulment dismissed; and (4) the remaining points of the first instance judgement appealed against were upheld (decision and ruling No. 49 of 8 October 2001). To conclude, the sentence handed down by the judge of first instance remains in force.
- 116.** *The Committee notes this information. The Committee requests the Government to inform it of the status of judicial proceedings against the trade union officials in question, and to indicate whether any further appeals have been lodged in the case.*

Case No. 2400 (Peru)

- 117.** At its meeting in March 2009, the Committee requested the Government to keep it informed of the outcome of the appeals lodged by the enterprise Gloria SA against the decision to overturn the dismissals of trade unionists Felipe Fabián Fernández Flores and Miguel Moreno Avila. The Committee also awaited news of any ruling that might be given on the dismissal of the trade unionist Mr Fernando Paholo by the Gloria SA enterprise.
- 118.** The Committee also noted that, according to the Government, the Banco del Trabajo had claimed that some individuals were registered as members of both unions (the Unified Trade Union of Workers of the Banco del Trabajo (SUTRABANTRA) and the Single Union of Employees of the Banco del Trabajo (SUDEBANTRA)) and used that to justify its opposition to collective negotiations, and that judicial proceedings had been started to dissolve the union SUDEBANTRA. The Committee expressed its concern at this legal

request for dissolution of the union following the dismissal of trade unionists employed by the Banco del Trabajo, and requested the Government to provide clarification on this matter and to inform it of any ruling handed down [see 353rd Report, paras 208 and 210].

119. In its communications of 23 July and 18 November 2009, the Government states that the trade unionist Mr Fernando Paholo has withdrawn from the judicial proceedings he had initiated against the enterprise Gloria SA following his dismissal. The Government describes the stages of the proceedings in relation to the dismissal of the trade unionist Mr Miguel Moreno Avila, and adds that the proceedings in question have not yet been concluded. As regards the proceedings against the dismissal of the trade unionist Mr Felipe Fabián Fernández Flores, the Government states that the company has appealed to the Supreme Court against the decision allowing the trade unionist to appeal against the ruling of 9 June 2008.

120. *The Committee takes note of this information. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings against the dismissals of the trade unionists Mr Miguel Moreno Avila and Mr Felipe Fabián Fernández Flores, and hopes that a ruling will be given without delay. At the same time, given the lack of any information on the legal request lodged by the Banco del Trabajo to dissolve the union SUDEBANTRA, the Committee once again requests the Government to inform it of the ruling once it is handed down.*

Case No. 2527 (Peru)

121. At its March 2009 meeting, the Committee made the following recommendations in relation to alleged acts of anti-union discrimination by the San Martín Mining Company SA [see 353rd Report, paras 215–219]:

- The Committee takes note of the lower court rulings in favour of the trade union officials César Augusto Elías García and José Arenaza Lander (who had been dismissed), and of the fact that the company has lodged appeals. The Committee recalls that this case was presented in September 2006, and emphasizes that an excessive delay in the administration of justice is tantamount to a denial of justice. The Committee trusts that the appeals now under way will be concluded within a short time, and requests the Government to communicate the results of those proceedings.
- The Committee regrets that the Government has not indicated whether since September 2006 the trade union leader Armando Enrique Bustamante has been hired regularly by the company, and once again requests it to provide this information.
- Lastly, the Committee requests the Government without delay to send its observations on the allegations contained in the CATP's communication dated 3 March 2008.

122. In its communication dated 3 March 2008, the Autonomous Confederation of Peruvian Workers (CATP) alleged that the General Secretary, the Press and Propaganda Secretary and the Legal Affairs Secretary of the Trade Union of Workers of the San Martín Mining Company SA (César Augusto Elías García, Armando Bustamante and José Arenaza Lander) were evicted from their accommodation on 20 August 2006 by order of the Human Resources General Manager of the San Martín Mining Company SA, who stated that they no longer belonged to the company. Moreover, according to the CATP, the trade union officials had received threats of assault and even death from hired thugs with direct links to company managers [see 353rd Report, para. 212].

123. In its communication of 18 June 2009, the CATP explains that the acts of violence consisted of Mr César Augusto Elías García being beaten with sticks and blunt instruments by a number of workers who were wearing the uniforms of the Techint SAC company (where César Augusto Elías García worked temporarily following his dismissal). The

police did nothing to help him; on the contrary, he was beaten up again by other persons, and shots were even fired.

- 124.** In another communication dated 26 October 2009, the CATP alleges that the judicial authority ordered the provisional reinstatement of union official Mr César Augusto Elías García at the San Martín Mining Company SA, but in the end the reinstatement was not effected in the absence of the necessary legal formalities. In its communication dated 15 January 2010, the CATP denounces the Supreme Court of Justice's ruling on 11 January 2010, revoking the preceding judicial decisions that had ordered the provisional reinstatement of this union official.
- 125.** In its communication dated 9 November 2009, the Government states that Mr Armando Enrique Bustamante was not a union official; he worked at the company from 12 April to 31 October 2006 and is now no longer employed there, his social benefits having been finally settled and paid out that year (2009).
- 126.** *The Committee notes the Government's information. The Committee again notes with regret the delay in the proceedings relating to the dismissal of the union official Mr José Arenaza Lander as a result of the appeals against the judicial orders for reinstatement, and expresses the hope that a ruling will be issued in the very near future. The Committee requests the Government to send its observations on the most recent communication of the complainant organization relating to the Supreme Court of Justice's ruling on 11 January 2010, which resulted in the revocation of preceding judicial decisions that had ordered reinstatement, and to indicate why the judicial order for the provisional reinstatement of Mr César Augusto Elías García had not been complied with. The Committee also requests the Government to reply to the new allegations from the CATP dated 18 July 2009 concerning acts of violence against union official Mr César Augusto Elías García and indicate the outcome of the criminal complaint lodged by this official against the alleged assaults, as described in the attachments to the present complaint.*

Case No. 2532 (Peru)

- 127.** At its November 2008 meeting, the Committee made the following recommendations in relation to the matters which remained pending [see 351st Report, para. 160]:

The Committee again recalls that the right to hold meetings is essential for workers' organizations to be able to pursue their activities and that it is for employers and workers' organizations to agree on the modalities for exercising this right, and that the Labour Relations (Public Service) Convention, 1978 (No. 151), ratified by Peru, provides in Article 6 that such facilities shall be afforded to the representatives of recognized public employees' organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work and that the granting of such facilities shall not impair the efficient operation of the administration or service concerned. The Committee again requests the Government to invite the National Trade Union of Health Social Security Workers (SINACUT EsSalud) and the health social security authorities to conduct negotiations with a view to reaching an agreement on arrangements for exercising the right to hold meetings, including deciding the venue for trade union meetings. Furthermore, the Committee requests the Government to send its observations relating to the allegations recently submitted by SINACUT EsSalud [objecting to the rules for granting trade union leave].

- 128.** In its communication dated 25 January 2009, the National Trade Union of Health Social Security Workers (SINACUT EsSalud) alleges that, further to lodging an administrative appeal against Directive No. 013-GG-ESSALUD-2007 which arbitrarily regulated the granting of trade union leave at EsSalud, the directive was null and void in view of the fact that the authority issued no ruling on the appeal and in this case administrative silence

signified tacit agreement under the terms of the legislation. EsSalud's reply has been to deny that the directive is null and void.

129. As regards the allegations referring to the refusal to grant facilities for SINACUT meetings on EsSalud premises, the complainant organization points out that the general secretariat of EsSalud, by means of official communication No. 268-SG-ESSALUD-2009 of 15 May 2009, made a pronouncement on the lodged complaint, indicating that it reaffirms the version issued by human resources central management, to the effect that premises for the exercise of trade union activities can only be made available if the institution has sufficient capacity, which is not the case at EsSalud, arguing that ILO Conventions Nos 87 and 151 establish only general provisions obliging companies or employers to provide the necessary conditions for the adequate performance of activities relating to collective representation.

130. The complainant organization adds that EsSalud refused to grant trade union leave to Mr Julio Grissom Ávila to attend the UN Climate Change Conference with an international trade union organization, declaring that the abovementioned Directive No. 013 is binding. The complainant adds that it was customary also to allow attendance at non-statutory events and that a collective agreement of wider scope which allows such leave is applicable.

131. In its communication of 30 November 2009, the Government forwards EsSalud's observations on the issues under examination, as follows:

- As regards the refusal to grant trade union leave to SINACUT member Mr Julio Ávila to attend the annual UN Climate Change Conference from 1 to 12 December 2008, it should be noted that SINACUT EsSalud did not have an executive committee with a valid mandate, registered by the labour administrative authority, at that time. Regarding the representative capacity of the worker at the above event, union member Mr Julio Grissom Ávila Tamara was appointed under the relevant assembly agreement, but Peruvian legislation clearly states that only union officials have the authority to exercise a legal representative function, and this does not apply to the present case.
- As regards the discrepancy arising from the existence of a favourable collective agreement concluded with the CUT federation, whereby it was determined to approve trade union leave for the participation of delegates at national events and that cases not covered (for example, attendance at international events) would be determined by the EsSalud management in coordination with the union, it should be noted that the collective agreement in question states in its rules on trade union leave that it applies to the CUT federation without its scope extending to other union groups, thus regulating the subject of trade union leave according to the number of members in each primary union.

132. Finally, the Government recalls that the complainant union has only 150 members.

133. *The Committee notes the information from EsSalud forwarded by the Government to the effect that: (1) there is no capacity for making premises available for the trade union; (2) administrative silence does not signify tacit agreement with respect to Directive No. 013-GG-ESSALUD-2007 regulating the granting of trade union leave since it is not an administrative act; and (3) the trade union leave requested for Mr Julio Ávila to attend the UN Climate Change Conference was not granted because he was not a trade union official (as required by Peruvian law) but a trade union member and the collective agreement referred to by the complainant union does not apply here. The Committee observes that the issues of facilities for trade union representatives in EsSalud and the exercise of the union*

right of assembly on EsSalud premises continue to be the subject of allegations. The Committee repeats its previous recommendations and again requests the Government to send EsSalud the recommendation that the parties reach an agreement on arrangements for exercising the right to hold union meetings and on conditions for the taking of union leave. The Committee expresses the hope that both parties will make efforts in this respect.

Case No. 2587 (Peru)

134. At its June 2009 meeting, the Committee made the following recommendations [see 354th Report, para. 1063]:

- (a) The Committee expects that the revision of the General Labour Act will be adopted and will be in full conformity with Convention No. 87 and in particular that, in the event of a strike in the basic education sector, the determination of minimum services and the minimum number of workers providing them involves not only the public authorities, but also the relevant employers' and workers' organizations.
- (b) The Committee requests the Government to take the necessary steps to amend Supreme Decree No. 017-2007-ED regulating Act No. 28988, so that responsibility for declaring a strike in the education sector inadmissible or illegal lies with an independent body which has the confidence of the parties.
- (c) The Committee requests the Government to take the necessary steps to repeal sections 7–10 (National Register of Substitute Teachers) of Supreme Decree No. 017-2007-ED regulating Act No. 28988 and to focus its policy on effective observance of minimum services rather than on preparing lists of replacements for strikers.

135. In its communication dated 27 May 2009, the Government states that in relation to Supreme Decree No. 017-2007-ED, the executive authority is drafting a bill whose objective is to ensure that the responsibility for declaring strikes inadmissible or illegal shall lie with an independent body; moreover, the bill also regulates the participation of workers' and employers' organizations in the determination of minimum services and the number of workers providing them in the event of a strike. The Government adds that, accordingly, once the drafting of the bill has been completed, the initiative will be considered by the employers' and workers' representatives in the National Labour and Employment Promotion Council (CNTPE) so that a consensus can be reached on it.

136. *The Committee notes this information with interest and strongly hopes that the future legal reform will take account of the recommendations from the previous examination of the case. The Committee is referring the follow-up to this case to the Committee of Experts on the Application of Conventions and Recommendations.*

Case No. 1914 (Philippines)

137. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paragraphs 218–222]. The case concerns approximately 1,500 leaders and members of the Telefunken Semiconductors Employees' Union (TSEU) who, after being dismissed for their participation in strike action from 14–16 September 1995 and having failed to obtain their reinstatement (despite a Supreme Court judgement in that regard), have also been unable to obtain the payment of retirement benefits for the period they worked in the enterprise. During the last examination of this case, the Committee requested the Government to intercede with the parties, with a view to reaching a mutually satisfactory solution for the payment of retirement benefits to the dismissed workers.

138. The Committee notes that the High Level ILO Mission to the Philippines, which took place from 22 September to 1 October 2009, requested the Government to review this long-

standing case in the light of the Committee's recommendations. The Committee notes the Government's indication that, as a result, the DOLE has established contacts with the leader of the dismissed workers (affiliated to the TSEU) and the Federation of Free Workers (FFW), to which the unions of the spinned-off companies are affiliated, and has yet to establish contact with Telefunken. The FFW has presented five take-off points for assistance to the 1,500 dismissed Telefunken workers, and, on 12 January 2010, the leader of the dismissed workers has submitted the proposed five items for discussion with the DOLE. The Government indicates that an update report will be provided based on the outcome of the exploratory talks.

- 139.** *The Committee takes note of this information and requests to be kept informed of the outcome of the discussions held among DOLE, Telefunken, FFW and the leader of the dismissed workers. Recalling that justice delayed is justice denied, the Committee cannot but regret once again the manifest lack of equity in this case, owing to the excessively long period of time over which the issue of reinstatement was pending (five years); the particularly large number of workers dismissed (some 1,500); the final decision confirming dismissal and denying reinstatement, which reversed a series of earlier rulings in favour of the workers including from the Supreme Court and lastly, the denial of these workers' vested rights in terms of pensions.*
- 140.** *The Committee recalls that the issue of pensions is linked to freedom of association to the extent that these workers are denied their retirement benefits as a result of their dismissal pursuant to the strike staged in September 1995. It recalls from the previous examination of this case its conclusion to the effect that "there is no doubt in the Committee's mind that the 1,500 or so TSEU members were dismissed and not reinstated subsequently to having participated in strike action" [see 308th Report, paragraph 667].*
- 141.** *In this regard, the Committee expresses regret at the 2008 decision of the Supreme Court, which, following the denial of reinstatement in 2000 due to the alleged illegality of the strike, denied to the dismissed workers, for the same reasons, the retirement benefits for the period they had worked in the enterprise. The Committee is particularly concerned at the fact that this decision took no account of the previous judgements in favour of the complainant organization, including that of the Supreme Court itself in 1997. Noting that, according to the complainants, the dismissed workers are entitled to the retirement plan which was included in their collective bargaining agreement, and had already reached the requisite age and length of service even prior to the strike of 14 September 1995, the Committee considers that the dismissed workers should not be deprived of their lawfully acquired retirement benefits accrued over years of working for an enterprise, particularly in the light of the history of this case as described above.*
- 142.** *The Committee notes with concern the information supplied by the FFW to the High-Level Mission that about 1,000 of the 1,500 dismissed workers were not working at all any more due to age restrictions, and considers the impact of the loss of livelihood upon these individuals and their families as substantial and distressing. The Committee, therefore, once again urges the Government to continue to intercede with the parties with a view to reaching, without any further delay, a mutually satisfactory settlement for the payment of retirement benefits to the dismissed workers. The Committee requests to be kept informed of any progress achieved in resolving speedily and equitably this case which has been at a stalemate for the last 15 years.*

Case No. 2488 (Philippines)

- 143.** The Committee last examined this case at its March 2009 meeting [see 353rd Report, paragraphs 223–239], at which time it made the following recommendations:

- To take measures for an independent review of the dismissal of the entire committee of the USAEU (Theodore Neil Lasola, Merlyn Jara, Julius Mario, Flaviano Manalo, Rene Cabalum, Herminigildo Calzado, Luz Calzado, Ray Anthony Zuñiga, Rizalene Villanueva, Rudante Dolar, Rover John Tavarro, Rena Lete, Alfredo Goriona, Ramon Vacante and Maximo Montero) and to take active steps to ensure a conciliation with the university regarding their reinstatement.
- To institute an independent inquiry into the allegations of employer interference (financial incentives for trade union members to vote for another committee) and, if they are confirmed, to take all necessary measures of redress including sufficiently dissuasive sanctions.
- To take all necessary measures in respect of the requested independent inquiry into the allegations of anti-union discrimination in the Eon Philippines Industries Corporation and the Capiz Emmanuel Hospital in Roxas City, and if the acts of anti-union discrimination are confirmed, to take measures to ensure that the workers concerned are reinstated in their posts without loss of pay.

144. The complainant provided follow-up information in communications dated 15 July, 5 August and 3 October 2009, as well as 9 February 2010. Further to its previous allegations, the complainant indicates that, under the order of the city Mayor of Iloilo, the strike area, where the striking teachers had been on the picket line for four and a half years in their fight for justice for the 15 illegally dismissed USAEU committee members, has been demolished on 24 July 2009 and repeatedly thereafter, on the excuse of violation of a local ordinance concerning the use of public sidewalks. The complainant states that the complaint filed with the office of the ombudsman against those responsible for the demolition has provided no relief, nor did the petition asking for compliance with the ILO recommendations and reinstatement of the illegally terminated union officers. Furthermore, the complainant organizations supplies information showing that the issue of the legality of the dismissal of the USAEU committee is still pending before the Court of Appeals. It also indicates that a petition to nullify the unauthorized and illegal election of officers in 2006 was filed on 2 April 2009 and is still pending before the Courts of Appeals.

145. In its reply of 15 January 2010, the Government indicates that, following the high-level ILO mission's suggestion of conciliating a solution such as reinstatement in another service, the DOLE has established contacts with the concerned officials from both union and management, but exploratory talks have yet to be started. In this regard, the complainant organization informs, in its most recent communication, that it attended a meeting organized by the DOLE regional director on 8 February 2010 in Iloilo City. The complainant qualifies the meeting as disappointing, as the Committee's conclusions and recommendations in the present case were not at all discussed, and the DOLE officials were only keen on hearing the "demands" of the alleged "new set of union officers".

146. *The Committee notes the information provided by the Government, as well as the complainant's indication that a meeting took place on 8 February, which was considered as disappointing, since the Committee's recommendations have not been discussed. The Committee requests the Government to initiate exploratory talks without delay between DOLE, the University San Agustin and the USAEU, for the purpose of conciliating a solution to this long-standing case, bearing in mind the Committee's previous recommendations, and to keep it informed of the outcome of those exploratory talks. The Committee recalls that the union officers were dismissed for not having ensured immediate compliance with an assumption of jurisdiction order issued under section 263(g) of the Labour Code which has been repeatedly found to be contrary to freedom of association principles. The Committee once again recalls in this regard that it has always considered*

that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association [see 350th Report, paragraph 199, see also Case No. 2252 concerning the Philippines, 332nd Report, paragraph 886, and 350th Report, paragraph 171.] Noting the complainant's indication that legal proceedings are ongoing concerning the legality of the dismissal of the USAEU committee, the Committee requests the Government to keep it informed of any ruling handed down in this regard, and to take active steps to intercede with the parties so that the USAEU committee members who were dismissed further to their participation in strike action are reinstated immediately in their jobs under the same terms and conditions prevailing prior to the strike with compensation for lost wages and benefits. The Committee requests to be kept informed of any progress made with a view to a speedy and equitable resolution of this long-standing case.

- 147.** *The Committee notes the indication of the University San Agustin to the high-level mission that the complainants have called into question the legitimacy of the new officers of the unions, but that the latter were registered by the DOLE. It also notes the complainant's indication that legal proceedings are ongoing to nullify the 2006 election of officers. Noting that the Government does not provide any information on the Committee's previous recommendations with regard to the allegations of employer interference (financial incentives for trade union members to vote for another committee), the Committee recalls that Article 2 of Convention No. 98 establishes the total independence of workers' organizations from employers in exercising their activities [see **Digest**, *op. cit.*, paragraph 855] and that Article 3 requires the establishment of an effective mechanism of protection in this regard. The Committee requests the Government to keep it informed of any ruling handed down in the existing legal proceedings for nullification of the 2006 election of union officers. It requests the Government to ensure that if the allegations of employer interference are confirmed, all necessary measures of redress are taken, including sufficiently dissuasive sanctions. The Committee requests to be kept informed of all developments in this respect.*
- 148.** *The Committee notes with regret the new allegations of the complainant that the strike area including the shelter and other paraphernalia of the picket line has been demolished repeatedly by order of the city Mayor. The Committee recalls that the prohibition of strike pickets is justified only if the strike ceases to be peaceful, and that action of pickets organized in accordance with the law should not be subject to interference by the public authorities [see **Digest**, *op. cit.*, paragraphs 648 and 649]. The Committee therefore requests the Government to take measures to ensure respect for this principle.*
- 149.** *Noting finally with regret that the Government does not supply any information on the requested independent inquiry into the allegations of anti-union discrimination in the Eon Philippines Industries Corporation and the Capiz Emmanuel Hospital in Roxas City, the Committee once again urges the Government to take all necessary measures in this respect and, if the acts of anti-union discrimination are confirmed, to take measures to ensure that the workers concerned are reinstated in their posts without loss of pay. The Committee requests to be kept informed in this respect.*

Case No. 2546 (Philippines)

- 150.** The Committee last examined this case, which concerns discriminatory acts (attempts to curtail freedom of expression, suspension without pay, work transfers, termination of employment, withholding of financial incentives and filing a libel lawsuit against a trade union leader) against trade union members in retaliation for having participated in anti-corruption proceedings and protests targeting the Technical Education and Skills Development Authority (TESDA), at its March 2009 meeting. On that occasion, the Committee regretted the decision to drop from the payroll Annie Geron, Mitzi Barreda,

Rafael Saus, Luz Galang and Conrado Maraan Jr as well as the absence of information from the Government on the measures taken pursuant to the Committee's recommendations respecting these persons. It once again urged the Government to take the relevant steps without further delay to ensure that the transfer orders of Annie Geron, Mitzi Barreda and Rafael Saus have been effectively annulled and that they have been reinstated in their previous posts, in line with the decision of the Civil Service Commission (CSC), and to ensure that they are fully compensated for both the 90-day period of suspension and the period during which they were dropped from the TESDA payroll, as well as any other damages incurred as a result of the invalidated transfers. As concerned Luz Galang and Conrado Maraan Jr, the Committee requested the Government to indicate the measures taken to repeal their transfer orders and reinstate them in their previous posts, if they so wish, and compensate them for any wages lost in relation to the transfer.

- 151.** The Committee also reiterated its previous recommendations requesting the Government to: (1) transmit a copy of Memorandum Circular No. 6, series of 1987 regulating the right of government officials to engage in strikes and mass actions; (2) institute an independent inquiry without delay in respect of the allegations relating to the non-payment of the 10,000 Philippine pesos (PHP) incentive to several union members and, if it is found that they were denied the incentive because of their trade union membership or activities, to ensure that they are fully paid the same incentive bonus as other workers; (3) inform it of developments regarding the libel action initiated by Mr Syjuco against Ms Annie Geron for statements made to the press, and to transmit a copy of the court's judgement as soon as it was handed down; and (4) to institute an independent inquiry without delay into the matter of the dismissal of Ramon Geron and, if it has been found that he was dismissed unfairly, to ensure that he is reinstated in his post with full compensation for lost wages and benefits. The Committee further requested the Government to provide its observations on the communication of the Public Services Labor Independent Confederation (PSLINK) dated 12 December 2008 [see 353rd Report, paras 240–244].
- 152.** In a communication dated 15 January 2010, the Government indicates, with regard to Annie Geron, Mitzi Barreda, Rafael Saus, Luz Galang and Conrado Maraan Jr, that contact has been established and that discussions on the possible reinstatement within TESDA, the Department of Labor and Employment (DOLE) and other governmental agencies as well as the payment of benefits legally due are being considered. The Government adds that other options such as provision for livelihood assistance are being explored, and that a progress report would be provided.
- 153.** As concerns Ramon Geron (whose dismissal was deemed illegal by the CSC in a June 2008 decision that was appealed by TESDA Director Augusto Syjuco; the matter remains pending) the Government states that TESDA has manifested its willingness to abide by the decision of the CSC in the pending motion for reconsideration. It adds that the lengthy delay in a final review is largely due to the heavy caseload and changes in the leadership of the CSC. The Government indicates, finally, that a new chairperson of the CSC has now been appointed and that the DOLE and the Public Sector Labor Management Council (PSLMC) will work out the immediate resolution of the pending motion.
- 154.** *The Committee notes the Government's information. From the information received by the High-level Mission to the Philippines that took place from 22 September to 1 October 2009, the Committee also notes that in July 2009 the CSC found the dismissals of Annie Geron, Mitzi Barreda and Rafael Saus invalid. In its decision the CSC determined that the three trade unionists were guilty of simple misconduct punishable by suspension for six months without pay, which was deemed to have already been served by them as they had previously been dropped from the payroll. The Committee further notes that Luz Galang has reported back to the central office after TESDA lost its motion for reconsideration of the August 2007 decision of the CSC declaring her transfer order*

invalid. In respect of Conrado Maraan Jr, the Committee notes that he had reported back to his original workplace, but decided to relocate to the Abra office due to harassment.

- 155.** *Noting the Government's statement that measures for the reinstatement of Annie Geron, Mitzi Barreda and Rafael Saus were being considered, the Committee reiterates its request to the Government to take the necessary measures to ensure that their transfer orders are annulled, and that they are reinstated in their previous posts and compensated for any wages lost in relation to their transfers.*
- 156.** *In respect of Ramon Geron, whose dismissal was deemed illegal by the CSC in a June 2008 decision that was appealed by TESDA Director Augusto Syjuco, the Committee notes that according to the Government TESDA has manifested its willingness to abide by the decision of the CSC in the pending motion for reconsideration, and that the lengthy delay is largely due to the heavy caseload and changes in the leadership of the CSC. The Committee expects that the pending Motion concerning Ramon Geron will soon be heard by the CSC and requests the Government to transmit a copy of the CSC's decision once it is handed down.*
- 157.** *Noting that the Government provides no information with respect to its other previous recommendations, the Committee once again repeats its requests to the Government to: (1) institute an independent inquiry without delay in respect of the allegations relating to the non-payment of the PHP10,000 incentive to several union members and, if it is found that they were denied the incentive because of their trade union membership or activities, to ensure that they are fully paid the same incentive bonus as other workers; and (2) inform it of developments regarding the libel action initiated by Mr Syjuco against Ms Annie Geron for statements made to the press, and to transmit a copy of the court's judgement as soon as it is handed down.*

Case No. 2291 (Poland)

- 158.** The Committee last examined this case, which concerns numerous acts of anti-union intimidation and discrimination, including dismissals, lengthy proceedings and non-execution of judicial decisions at its March 2009 meeting [353rd Report, paras 245–254]. On that occasion, the Committee requested the Government to keep it informed of the progress made in the proceedings against 19 senior managers of SIMPA SA and the final ruling in the case concerning the dismissal of Mr Jedrejek, member of the NSZZ “Solidarność” Inter-Enterprise Organization from the same enterprise.
- 159.** In a communication dated 31 August 2009, the Government indicates that the case against 19 senior managers of SIPMA SA has not been closed yet due to the death of the reporting judge. It further indicates that the President of the 2nd Criminal Division ordered an appointment of a new reporting judge for the case on 1 October 2008. Pursuant to section 404(2) of the Code of Criminal Procedure, the decision on changing the composition of the Bench resulted in the necessity to commence the adjourned trial de novo. However, the hearing of the case is now about to be completed. The Government points out that this case is under constant administrative supervision of the President of the Regional Court in Lublin.
- 160.** The Government further indicates that in its judgement of 10 March 2008, the District Court in Lublin ordered the reinstatement of Mr Jedrejek. The appeal of the enterprise against this judgement was dismissed by the Regional Court in Lublin on 2 September 2008. As the enterprise did not file a cassation appeal, this case is now considered resolved validly and finally.

161. *The Committee notes the information provided by the Government with regard to Mr Jedrejek's case. It requests the Government to indicate whether Mr Jedrejek was reinstated pursuant to the District Court decision. With regard to the case against 19 senior managers of SIPMA SA, the Committee expects that the proceedings would be concluded without any further undue delay. It requests the Government to keep it informed of the progress made and to transmit a copy of the judgement once handed down.*

Case No. 2395 (Poland)

162. The Committee last examined this case, which concerns several freedom of association violations at the Hydrobudowa-6 SA company (anti-union dismissals of its chairperson and a member of the executive committee in violation of the relevant legislation and the serious delays in the proceedings concerning their reinstatement) at its March 2009 meeting [353rd Report, paras 255–260]. On that occasion, the Committee once again requested the Government to transmit the decision of the Regional (appellate) Court in the case of Henryk Kwiatkowski, to indicate whether Sylwester Fastyn had been reinstated pursuant to the decision of the District Court and to indicate the exact grounds justifying the unilateral termination of the check-off facility at the Hydrobudowa-6 SA.
163. In a communication dated 31 August 2009, the Government provided a copy of the judgement of the Regional Court for Warszawska-Praga of 26 January 2006. With regard to the case of Mr Fastyn, the Government indicates that Hydrobudowa enterprise (respondent) did not file a cassation appeal against the judgement of the Regional Court dismissing the appeal of the respondent against the judgement of the District Court which acknowledged the action of the plaintiff for his reinstatement.
164. *The Committee notes the information provided by the Government. It once again requests the Government to indicate whether Mr Fastyn has been reinstated pursuant to the decision of the District Court and whether the check-off facility has been re-established at the Hydrobudowa-6 SA.*

Case No. 2474 (Poland)

165. The Committee last examined this case at its March 2009 session [see 353rd Report, para. 261]. On that occasion, it requested the Government to provide information on the final outcome of the case of dismissal of Mr Zagrajek, trade union leader at Frito Lay Ltd.
166. In a communication dated 31 August 2009, the Government indicates that the case was heard by the District Court in Pruszków. The judgement, dated 16 October 2008, ordered reinstatement of Mr Zagrajek in his job without loss of pay and the payment of statutory interest. The Government adds that Frito Lay Ltd. appealed against the judgement to the Regional Court in Warsaw where appellate proceedings are currently pending.
167. *The Committee notes the information provided by the Government. The Committee recalls that the court proceedings concerning reinstatement of Mr Zagrajek have been pending since 28 December 2005. Regretting a lengthy delay in concluding the proceedings in this case and recalling that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 105], the Committee expects that the Government will be in the position to provide information on its final outcome in the very near future. The Committee also requests the Government to indicate whether Mr Zagrajek was reinstated pending appellate proceedings.*

Case No. 2611 (Romania)

168. The Committee last examined this case which concerns obstacles to collective bargaining in a public administration (Court of Audit) at its November 2008 meeting [see 351st Report, approved by the Governing Body at its 303rd Session, paras 1241–1283]. On that occasion it made the following recommendations:

- (a) The Committee requests the Government to take any necessary measures to amend section 12(1) of Act No. 130/1996 so that it no longer excludes from the scope of collective negotiations base salaries, pay increases, allowances, bonuses and other entitlements of public service employees. In any event, if the country's laws or Constitution require that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been freely negotiated.
- (b) Recalling that any change in legislation that could have the effect of extending the range of provisions excluded from collective negotiations on conditions of work and employment of public service employees would be contrary to the principles of developing and using collective bargaining as set out in the Conventions ratified by the Government, the Committee trusts that the Government, in any process of amendment to Act No. 130/1996, will take account of this and of the principles referred to in its conclusions. The Committee requests the Government to keep it informed of any developments in this regard.
- (c) The Committee requests the Government to take the necessary measures to amend Act No. 188/1999 so that it does not restrict the range of matters that can be negotiated in the public administration, in particular those that normally pertain to conditions of work and employment. The Committee encourages the Government to rectify this situation by drawing up with the social partners guidelines on collective negotiations and thus to define the scope of collective bargaining, in accordance with Conventions Nos 98 and 154 which it has ratified. In any event, if legislation requires that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been negotiated freely.
- (d) The Committee consequently requests the Government to take all the measures necessary to settle the dispute concerning the agreement negotiated between the trade union LEGIS–CCR and the management of the Court of Audit, as quickly as possible and in accordance with the established procedures; and to promote collective bargaining within the institution in question. The Committee trusts that the Government will keep it fully informed of any new developments in this respect.

169. In a communication dated 29 September 2009, the trade union LEGIS–CCR indicates that the management of the Court of Audit still refuses to negotiate and sign a collective labour agreement. According to the complainant organization, on 9 June 2009, the LEGIS–CCR and the Trade Union of the Court of Audit of Romania (SCCR), another trade union operating within the Court of Audit, held a meeting with the representatives of the Court of Audit which resulted in an agreement being signed, under which the date 9 June 2009 “shall represent the start date for negotiating the collective labour agreement” and the parties each had to present a draft collective labour agreement applicable to the 1,130 employees governed by Act No. 53/2003 (issuing the Labour Code), as well as a draft collective agreement applicable to the 97 civil servants governed by Act No. 188/1999 on the status of civil servants. The complainant organization indicates that, in accordance with section 3(3) of Act No. 130/1996 which provides that “the period of collective bargaining may not exceed 60 days”, the LEGIS–CCR and SCCR presented a common draft collective labour agreement on 22 June 2009. However, the Court of Audit has never replied to their written proposals, even though it was supposed to do so within 30 days of receipt. As of 29 September 2009, more than 100 days after the protocol had been signed, no collective bargaining had taken place.

- 170.** According to the complainant organization, the committee composed of three advisers appointed by the Court of Audit preferred to send the two trade unions, on 8 September 2009, a draft protocol governing the staff of the Court of Audit, stating that this was the only document that the President of the Court of Audit would agree to sign. The LEGIS-CCR indicates that, on 22 September 2009, it registered with the Court of Audit its objection to the draft protocol which does not mention the employer's obligations and violates several laws in force, and filed a request for new talks which was ignored. The LEGIS-CCR alleges bad faith on the part of the Court of Audit with regard to the talks in so far as it postpones and organizes meetings unilaterally at the last minute and without prior warning. Finally, the complainant organization indicates that the parties held a mediation session on 16 October 2009 without success, during which the representatives of the President of the Court of Audit reiterated the refusal of the management to negotiate and sign a collective labour agreement at the institutional level.
- 171.** In a communication dated 10 September 2009, the Government sent the observations of the Court of Audit concerning the follow-up to the Committee's recommendations. The Government indicates that, although the Court of Audit does not reject the idea of collaboration with the trade unions operating within the Court, the LEGIS-CCR and SCCR, it considers that the scope for concluding a collective labour agreement is extremely limited for the following reasons:
- According to section 12(1) of Act No. 130/1996, the conclusion of a collective agreement is based exclusively on the mutual agreement of the parties and the parties may not negotiate clauses, the regulation of which is within the remit of the legislative authority.
 - Section 72 of Act No. 188/1999 on the status of civil servants contains a restrictive list of the matters which may be the subject of a collective agreement which does not include clauses concerning the salary entitlements of civil servants.
 - Section 157(2) of the Labour Code provides that the rights of public institution and public authority employees relating to their salaries are established by law and may not therefore be the subject of negotiations which would result in the inclusion of clauses in a collective labour agreement.
- 172.** The Government further indicates that, following the negotiations held with the trade unions, the Court of Audit created a committee with the aim of concluding a protocol between the parties. The protocol provides for collaboration with a view to: (i) establishing collective and individual planning relating to rest periods for employees and occupational health and safety measures; (ii) drawing up and implementing the vocational training plan for employees; (iii) assessing the employment situation, structure and likely developments within the Court of Audit (as well as a number of possible forward planning measures, particularly in situations where jobs are under threat); and (iv) decisions resulting in major changes to the organization of the work, as well as to contractual or labour relations.
- 173.** In a communication dated 5 November 2009, the Government indicates that the Ministry of Labour attempted to resolve the dispute by means of a conciliation session held on 16 October 2009 at the headquarters of the Labour and Social Welfare Directorate in Bucharest, but to no avail. The Government indicates that the Court of Audit argues that section 12 of Act No. 130/1996 on collective labour agreements does not require the conclusion of a collective agreement if the plenary of the Court considers that the provisions of other laws and regulations on budgetary rights are respected. Moreover, the Court allegedly unanimously rejected the conclusion of a collective agreement, opting instead for a draft protocol presented to the trade unions by the management on 8 September 2009.

174. *With regard to its previous recommendations concerning the promotion of collective bargaining within the Court of Audit, the Committee notes that, according to the complainant organization, the LEGIS–CCR and SCCR negotiated an agreement with the representatives of the Court of Audit, under which the parties each undertook to bargain collectively and to present a draft collective labour agreement; that they presented a common draft collective labour agreement which was ignored by the Court of Audit; that, to date, no collective bargaining has taken place; and that the committee set up by the Court of Audit sent the two trade unions a draft protocol, stating that this was the only document that the President of the Court of Audit was willing to sign. It also notes that, according to the Government, although the Court of Audit does not reject the idea of collaboration with the LEGIS–CCR and SCCR, it considers that the scope for concluding a collective labour agreement is extremely limited since section 12(1) of Act No. 130/1996, section 72 of Act No. 188/1999 and section 157(2) of the Labour Code restrict the scope of negotiation. The Committee therefore notes, according to the information provided by both the complainant organization and the Government, that no collective bargaining has taken place to date at the Court of Audit concerning the conditions of employment of the staff of the institution. The Committee recalls that it has always recognized 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. However, measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organizations and workers’ organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee would like to reiterate that Convention No. 98, in particular Article 4 concerning the encouragement and promotion of collective bargaining, applies both to the private sector and to nationalized undertakings and public bodies [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 925, 880 and 885]. Consequently, while noting the conciliation session held on 16 October 2009 at the headquarters of the Labour and Social Welfare Directorate in Bucharest, which did not produce results, the Committee once again urges the Government to take all the steps necessary to settle the dispute between the trade union LEGIS–CCR and the management of the Court of Audit as quickly as possible and in accordance with the established procedures and to promote collective bargaining within this institution. The Committee trusts that the Government will keep it fully informed of any progress made in this regard.*
175. *The Committee notes the allegations made by the complainant organization that the Court of Audit showed bad faith in its conduct of the negotiations by postponing or arranging meetings unilaterally at the last minute and without prior warning. In this regard, the Committee considers that such practices, if they occurred without good reason, are harmful to the development of normal and healthy labour relations. It recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest**, op. cit., paras 934 and 935].*
176. *With regard to the draft protocol sent by the Court of Audit to the LEGIS–CCR and SCCR, stating that this was the only document that the President of the Court of Audit was willing to sign, the Committee reiterates that such practices show a lack of good faith in negotiation. With regard to the complainant organization’s allegations that the draft protocol does not mention the employer’s obligations and violates several laws in force as well as the principles of freedom of association, the Committee considers that it is not for the Committee and, given the circumstances, to decide on the content of the text. The Committee trusts that the Government will be in a position soon to provide information*

indicating that genuine collective bargaining has taken place and has led to a concerted text.

- 177.** *With regard to its recommendations concerning the need to amend section 12 of Act No. 130/1996, the Committee notes that the Government merely reiterates that, in accordance with section 12 of Act No. 130/1996, the parties may not negotiate clauses the regulation of which is within the remit of the legislative authority. The Committee once again recalls that, in general, limitations on the scope of negotiation of collective labour agreements in the public service are contrary to the principles of the collective bargaining Conventions ratified by the Government, in particular Convention No. 154, which encourage and promote the development and use of collective bargaining machinery on terms and conditions of employment [see 351st Report, approved by the Governing Body at its 303rd Session, paras 1241–1283]. The Committee notes that no steps have been taken by the Government despite its previous recommendations concerning the amendment of Act No. 130/1996. The Committee is therefore bound to request the Government once again to take all the steps necessary to amend section 12(1) of Act No. 130/1996, so that it no longer excludes from the scope of collective bargaining base salaries, pay increases, allowances, bonuses and other entitlements of public service employees. In any event, if the legislation or Constitution requires that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been freely negotiated. Recalling that any change in legislation that could have the effect of extending the scope of provisions excluded from collective bargaining on conditions of work and employment of public service employees would be contrary to the principles of developing and using collective bargaining as set out in the Conventions ratified by the Government, the Committee trusts that the Government will take this into account during any process to amend Act No. 130/1996. The Committee requests the Government to keep it informed of any developments in this regard.*
- 178.** *With regard to its recommendations concerning the need to amend Act No. 188/1999, so that it does not limit the scope of negotiation of collective agreements in the public service, the Committee notes that the Government merely repeats the reasoning of the Court of Audit that section 72 of Act No. 188/1999, on the status of civil servants, contains a restrictive list of the matters which may be the subject of a collective agreement which does not include clauses concerning the salary entitlements of civil servants. Noting that the Government has not taken any steps to amend Act No. 188/1999 despite its previous recommendations, the Committee once again requests the Government to take the necessary steps to amend Act No. 188/1999, so that it does not restrict the range of matters that may be negotiated in the public administration, in particular those that normally pertain to conditions of work and employment. The Committee once again encourages the Government to draw up guidelines on collective bargaining with the social partners concerned and to define the scope of collective bargaining, in accordance with Conventions Nos 98 and 154 which it has ratified. In any event, if the legislation or Constitution requires that agreements concluded be subject to a budgetary decision by Parliament, the system should in practice ensure full respect for provisions that have been negotiated freely. The Committee requests the Government to keep it informed of any progress made in this regard.*
- 179.** *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

Case No. 2466 (Thailand)

- 180.** The Committee last examined this case, which concerns acts of anti-union discrimination – including dismissal, threats of termination to pressure employees to resign from the union, and other acts intended to frustrate collective bargaining – at its March 2009 meeting. On

that occasion the Committee, noting that the employer's appeal to the Supreme Court of the Central Labour Court's March 2006 decision (upholding Order No. 54–55/2006 of the Labour Relations Committee finding that the union President and Treasurer had been unfairly dismissed) was still pending, once again requested the Government to transmit a copy of the Supreme Court judgement as soon as it was handed down. The Committee also once again requested the Government to secure, without delay, the reinstatement with back pay of the two other dismissed union officials and ensure that those employees who had resigned from the union may resume their membership in the union free of the threat of dismissals or any other form of reprisal [see 353rd Report, paras 280–282].

- 181.** In a communication dated 18 June 2009, the Government indicates that the Vice-President of the union was dismissed without severance pay on 14 December 2004 due to a complaint of sexual harassment, which the police had examined and confirmed. The Vice-President had then filed a complaint for illegal dismissal with the Labour Relations Committee on 1 February 2005 and the latter concluded that his dismissal was not due to union membership; he subsequently decided not to appeal the decision before the Labour Court. As concerns union organizer Ms Petcharat Meejaruen, the Government indicates that she did not submit a petition to the Labour Relations Committee or to the labour inspector. The Department of Labour Protection and Welfare of the Ministry of Labour (MOL) conducted a follow-up investigation and, according to the information gathered from the union, the union organizer was reinstated in her previous position in the company, was satisfied with the compensation offered by the company and decided not to file a complaint. The Government further indicates that according to the Department of Labour Protection and Welfare (DLPW) of the MOL all employees who resigned from the union in fear of dismissal can resume their membership in the union, free from intimidation and that, since the DLPW's intervention, the union has over 300 members and resumed normal operations.
- 182.** In a communication dated 23 September 2009, the Government states that the two dismissed trade unionists had been reinstated in accordance with the orders of the Labour Relations Committee on 18 September 2006 and 1 October 2006 and have not filed more complaints. The Government therefore suggests that the case be closed.
- 183.** *The Committee notes the information provided by the Government. In particular it notes with interest that, pending the Supreme Court decision, the union President and Treasurer had been reinstated in accordance with the Labour Relations Committee's 2006 orders. It further notes that union organizer Meejaruen had also been reinstated, while the union Vice-President was found to have been dismissed without severance pay on grounds of sexual harassment by the Labour Relations Committee. Noting that the union Vice-President has not appealed the Labour Relations Committee's decision, the Committee will not pursue its examination of this matter. Finally, the Committee takes note of the Government's statement that since the intervention of the DLPW the union has resumed normal operations with over 300 members.*

Case No. 2634 (Thailand)

- 184.** The Committee last examined this case, which concerns obstruction and violation of the right to organize and bargain collectively, at its March 2009 session. On that occasion, the Committee requested the Government to review the situation of the 178 trade unionists who had resigned from their jobs and, if the allegations of acts of anti-union discrimination influencing their resignation were found to be true, to take the necessary measures for their reinstatement, should they still so desire. If the competent court found that reinstatement was not possible, the Committee requested the Government to ensure that they were provided with adequate compensation, so as to constitute sufficiently dissuasive sanctions against anti-union discrimination. It further requested the Government to ensure that the

Labour Court, in its hearing of the dismissal of the ten trade unionists, was in full possession of all the material facts referred to in the Committee's conclusions, including the report of the NHRC, and trusted the Court would take due account of its conclusions, particularly as concerns the need for effective protection – including the remedy of reinstatement – against acts of anti-union discrimination, and requested the Government to transmit a copy of the judgement once handed down. Finally, the Committee requested the Government to take the necessary measures to ensure that the union and the employer engaged in good faith negotiations, with a view to concluding a collective agreement on terms and conditions of employment [see 353rd Report, paras 1274–1309].

- 185.** In a communication dated 18 June 2009, the Government states that on 11 June 2008, the Labour Court handed down judgement No.780-787/2008 concerning the case of eight of the ten trade unionists. The Labour Court ruled that evidence showed that the employees violated work rules and intentionally caused damage to their employer by neglecting their work and participating in the union's activities again without reporting any reason to do so to their employer. Thus, their dismissal was legal and the trade unionists were not entitled to severance pay. The Government repeats the same information in a communication dated 23 September 2009. A copy of the judgement in Thai is attached to the Government's communication.
- 186.** *The Committee notes the information provided by the Government. With respect to the ten dismissed trade unionists, the Committee notes that in judgement No. 780-787/2008 the Labour Court upheld their dismissals for having violated work rules and intentionally caused damage to their employer by neglecting their work and participating in union activities. The Committee nevertheless recalls from its previous examination of the case that the ten dismissed trade unionists were earlier found by the Labour Relations Committee to have been dismissed for having deserted work, as they had earlier given their consent to return to work but subsequently failed to appear without notifying the employer of their cancellation of the consent forms. The Committee further recalls that in its investigation of the matter, NHRC Subcommittee on Labour Rights found that the dismissed trade unionists were informed by their supervisors that signing the consent to return to work forms did not entail any obligations, and that, once they realized the potential consequences of their actions, they had verbally cancelled their consent forms to their respective supervisors. The NHRC also found that the MOL official who had acted as a mediator between the company and the union had informed the latter that it was not necessary to cancel the signed consent forms, as the demands were submitted by the union and individual members were not entitled to withdraw them; it concluded that the real reason for the dismissal of the ten trade unionists was their union membership, and was therefore unjustifiable. Observing that these dismissals occurred within the context of other alleged acts of anti-union discrimination by the employer, the Committee had also stated that it was inclined to consider the dismissals of the ten trade unionists to be discriminatory in nature.*
- 187.** *In view of the above, the Committee regrets that the Government provides no indication as to whether the Labour Court, in its judgement, was in full possession of all material facts – including those set out in the NHRC report – or whether the Labour Court gave due consideration to the Committee's previous comments concerning this matter in its judgement. Further noting that the Government provides no information respecting the two other dismissed trade unionists, the Committee requests the Government, in the light of its previous comments on this matter, to initiate discussions in order to review the possible reinstatement of the ten workers who were found by the NHRC to have been dismissed on the basis of union membership or, if reinstatement is not possible, the payment of adequate compensation.*

- 188.** *Observing that no information has been provided with respect to its other recommendations, the Committee once again requests the Government to review the situation of the 178 trade unionists who had resigned from their jobs and, if the allegations of acts of anti-union discrimination influencing their resignation were found to be true, to take the necessary measures for their reinstatement, should they still so desire. Moreover, the Committee once again requests the Government to take the necessary measures to ensure that the union and the employer engage in good faith negotiations, with a view to concluding a collective agreement on terms and conditions of employment. The Committee requests the Government to keep it informed of developments in this regard.*

Case No. 2428 (Bolivarian Republic of Venezuela)

- 189.** At its June 2009 meeting the Committee made the following recommendations on the matters which remained pending [see 354th Report, para. 201]:

The Committee notes the new information from the FMV [Venezuelan Medical Federation] and the comments of the Government. The Committee notes that the Government merely reiterates its earlier responses to the Committee, and invokes the incompatibility of the national rules governing the FMV and Conventions Nos 87 and 98. The Committee notes with regret that the Government has ignored its recommendations in which it specifically requested the amendment of the Practice of Medicine Act and the promotion of collective bargaining between the authorities in the health sector and the FMV. The Committee therefore reiterates its previous recommendations and requests the Government to supply information in this regard. The Committee also requests the Government to indicate why the National Electoral Council has not authorized the elections of the executive committee of the FMV and to provide the text of the decisions adopted in this regard. The Committee also requests the Government to respond to the allegation concerning the suspension of the trade union leave of FMV officials.

- 190.** The Committee recalls that it previously made the following recommendations [see 340th Report, para. 1441]:

- (a) The Committee requests the Government to take measures without delay, after full, frank and free consultations with the social partners, to amend the Practice of Medicine Act and to eliminate the discrepancies with Conventions Nos 87 and 98, which have been recognized by the Government, and also to avoid gaps in professional relations and reminds the Government that ILO technical assistance is at its disposal.
- (b) The Committee requests the Government in the meantime, until such time as it amends the Practice of Medicine Act, to promote collective bargaining between the FMV and the colleges of doctors with the employing bodies in the medical sector, including the MDSD, the IVSS and the IPASME.

- 191.** In its communications dated 9 June 2009, the Venezuelan Medical Federation (FMV) stated that following the presentation of three draft collective agreements in three health institutions in August 2008 (Ministry of People's Power for Health, Venezuelan Social Security Institute and Social Welfare and Assistance Institute), the Ministry of Labour did not take the action provided for in the legislation, to the consequent detriment of the doctors. The FMV points out that the authorities have prevented it from engaging in collective bargaining for years, citing "overdue elections", but at the same time the National Electoral Council (CNE) (a public body) has not authorized it to conduct its elections despite it having fulfilled the legal requirements.

- 192.** In its communication dated 20 October 2009, the Government states that the revision of the Practice of Medicine Act is before the National Assembly's Social Development Commission, the provisions of this legislative text are anachronistic and outdated in relation to the social reality and the constitutional and legal standards in force. When

information is available on any progress made, it will be sent in due course to the Committee on Freedom of Association.

- 193.** The Government states that the legislative agenda of the Social Development Commission this year includes a first discussion of the special Bill against malpractice. The Bill envisages regulation for irregular situations in medical practice, penalizing the whole of a team involved in such a situation on the grounds that responsibility should not lie with just one person but with all the players involved in cases involving irregularities or adverse outcomes. Moreover, the abovementioned Social Development Commission, through the Health Subcommittee, will resume consideration of the Public Health System Act, already approved at first discussion, in November this year. One of its main proposals is to incorporate all centres providing health services into a single system, the Venezuelan Workers' Confederation (CTV) having participated by making suggestions and its representatives taking part in discussions.
- 194.** As regards the promotion of collective bargaining with regard to the FMV and specifically with regard to its status, it should be noted that the federation is composed of associations of doctors of the country, which are in turn specifically made up of workers and employers. Section 410 of the Organic Labour Act states that trade unions may be for workers or employers, and section 118 of the regulations implementing the Organic Labour Act establishes the "purity principle" as follows: "Prohibition of mixed trade unions (purity principle). Section 118. Establishing a trade union which seeks to represent jointly the interests of workers and employers shall be prohibited ...". Accordingly, the FMV is not composed of trade unions but of doctors' associations and hence it does not have the status of federation as stipulated by law. The FMV cannot therefore qualify as a trade union since it is a professional association and as such it applied to the CNE for registration on 31 May 2005.
- 195.** As regards the alleged changes to its leadership and the CNE's alleged refusal to authorize the FMV election process, the Government declares that on 3 September 2009 the FMV electoral commission deposited the draft for the elections to the federation's electoral commission with the CNE, and requested authorization to convene the election, which was scheduled for 20 January 2010 (in this process the CNE supported the FMV). Previously, since 2003, the FMV made arrangements to hold elections but the CNE noted some omissions and called for a number of points to be rectified.
- 196.** The Government concludes, on the basis of all of the above, that there is no refusal, nor has there ever been, by the CNE or any Venezuelan state body to authorize the election process for the FMV executive committee or to discuss the collective labour agreement for this professional association. On the contrary, it is common knowledge that the public institutions demonstrate full and faithful compliance with regard to the legal system.
- 197.** *The Committee notes this information and requests the Government to send the text of the revised Practice of Medicine Act as soon as it has been adopted and to take account of the Committee's conclusions in the present case. The Committee also requests the Government to supply information on the outcome of the FMV elections convened for 20 January 2010 within the framework of the CNE. The Committee notes the FMV's statement that for years it has met the legal requirements for holding such elections, that the Government maintains that there had been omissions and that the CNE called for rectifications to be made. The Committee observes, according to its understanding of the Government's reply, that the FMV is an organization of doctors' associations (and not a trade union federation) and as such it cannot engage in bargaining in accordance with the "purity principle" (as established by section 118 of the Organic Labour Act). This argument was previously examined by the Committee and the FMV indicated that the legislation in force gives it the right to engage in collective bargaining on behalf of its members.*

198. *The Committee notes with regret that in this case, as in previous ones, the proceedings and appeals dealt with by the CNE and its decisions have resulted in the FMV elections being delayed for years. The Committee requests the Government once again to ensure that the CNE refrains from interfering in elections of organizations. The Committee reminds the Government that it previously asked it to promote collective bargaining between the FMV and doctors' associations, on the one hand, and the medical sector employers, on the other, pending the amendment of the Practice of Medicine Act. The Committee again requests the Government to guarantee this collective bargaining and regrets that the Government has previously failed to do so.*

199. Finally, it is the Committee's understanding (the Government has not sent any specific information in this respect) that the refusal to grant trade union leave to FMV officials is based on the same reasoning as the refusal to engage in collective bargaining. The Committee requests the Government to maintain the existing entitlement to trade union leave of FMV leaders.

* * *

200. Finally, the Committee requests the governments concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
1991 (Japan)	November 2000	March 2009
2153 (Algeria)	March 2005	November 2009
2169 (Pakistan)	June 2003	March 2009
2192 (Togo)	March 2003	March 2007
2228 (India)	November 2004	June 2009
2257 (Canada)	November 2004	November 2009
2292 (United States)	November 2006	November 2008
2295 (Guatemala)	November 2008	November 2009
2302 (Argentina)	November 2005	March 2009
2304 (Japan)	November 2004	November 2008
2323 (Islamic Republic of Iran)	June 2009	–
2384 (Colombia)	June 2008	June 2009
2413 (Guatemala)	November 2006	June 2009
2455 (Morocco)	June 2007	June 2009
2459 (Argentina)	June 2007	–
2462 (Chile)	June 2008	June 2009
2483 (Dominican Republic)	March 2007	June 2009
2490 (Costa Rica)	November 2008	November 2009
2500 (Botswana)	June 2007	November 2009
2506 (Greece)	June 2007	November 2009
2512 (India)	November 2007	June 2009
2520 (Pakistan)	November 2007	November 2009
2538 (Ecuador)	November 2009	–
2550 (Guatemala)	June 2008	June 2009
2553 (Peru)	March 2009	November 2009

Case	Last examination on the merits	Last follow-up examination
2554 (Colombia)	June 2008	November 2009
2568 (Guatemala)	November 2008	November 2009
2581 (Chad)	June 2009	–
2592 (Tunisia)	March 2009	November 2009
2597 (Peru)	March 2009	November 2009
2600 (Colombia)	November 2009	–
2604 (Costa Rica)	November 2008	November 2009
2605 (Ukraine)	November 2008	November 2009
2624 (Peru)	March 2009	–
2627 (Peru)	March 2009	November 2009
2633 (Côte d'Ivoire)	June 2009	–
2643 (Colombia)	November 2009	–
2651 (Argentina)	November 2009	–
2653 (Chile)	June 2009	–
2658 (Colombia)	November 2009	–
2662 (Colombia)	November 2009	–
2680 (India)	November 2009	–
2685 (Mauritius)	November 2009	–
2686 (Democratic Republic of the Congo)	November 2009	–
2705 (Ecuador)	November 2009	–

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

202. In addition, the Committee has just received information concerning the follow-up of Cases Nos 2006 (Pakistan), 2096 (Pakistan), 2160 (Bolivarian Republic of Venezuela), 2173 (Canada), 2229 (Pakistan), 2249 (Bolivarian Republic of Venezuela), 2273 (Pakistan), 2355 (Colombia), 2356 (Colombia), 2382 (Cameroon), 2383 (United Kingdom), 2390 (Guatemala), 2399 (Pakistan), 2480 (Colombia), 2560 (Colombia), 2596 (Peru), 2625 (Ecuador), 2642 (Russian Federation), 2668 (Colombia) and 2677 (Panama) which it will examine at its next meeting.

CASE NO. 2614

DEFINITIVE REPORT

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

- the Trade Union of Judicial Workers of Corrientes (SITRAJ) and
- the Argentine Judicial Federation (FJA)

Allegations: The complainant organizations object to a decision rendered by the Higher Court of Justice of the Province of Corrientes with regard to the regulations governing the right to strike within the judiciary; they also object to the decision to dock the salaries corresponding to days spent on strike by judicial employees

203. The Committee last examined this case at its meeting in March 2009, when it submitted an interim report to the Governing Body [see 353rd report, approved by the Governing Body at its 304th Session (March 2009), paras 345–402].

204. The Government sent its observations in a communication dated 17 September 2009.

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

A. Previous examination of the case

206. In its examination of this case at its March 2009 meeting, the Committee made the following recommendations [see 353rd Report, para. 402]:

- (a) The Committee expects that in future the authorities will endeavour to ensure compliance with the principle of the importance of dialogue and consultations on matters of mutual interest between the public authorities and the most representative occupational organizations of the sector involved and to promote collective bargaining, including on wages.
- (b) The Committee requests the Government to send its observations concerning the allegations, presented in 2008, that with the aim of intimidating the SITRAJ leadership, criminal charges for the alleged crime of fraud were brought against its general secretary and subsequently dismissed and requests it to establish an investigation to determine whether these charges had an anti-union intimidation or discrimination motive. The Committee also requests the Government to send its observations relating to the allegations that by Decision No. 5 of 6 March 2008 the trade union privileges enjoyed by three SITRAJ leaders were withdrawn for the purpose of weakening the complainant organization.

B. The Government's reply

207. In its communication dated 17 September 2009, the Government forwarded the observations of the Higher Court of Justice of the Province of Corrientes.

- 208.** The authorities of the Higher Court of Justice of the Province of Corrientes state that they have been requested to communicate their observations on the allegations that, with the aim of intimidating the SITRAJ leadership, it brought criminal charges against its General Secretary for the alleged crime of fraud – charges that were subsequently dismissed. They deny emphatically that the Court has brought criminal charges against any member of SITRAJ. Nevertheless, in order to clarify the situation, it conducted an inquiry among the various magistrates' courts of Corrientes to establish once and for all whether any criminal charge involving the trade union activities of any member of SITRAJ was pending. In the course of the inquiry, it was learnt from Resolution No. 2461 dated 21 December 2007 – adopted by Magistrate No. 1 of the City of Corrientes in report No. 9723/7 under the heading “Lugo Juan Heriberto S/Dcia. P/Sup. Fraud – Corrientes – art. 250 C.P.P.: González Juan Carlos” that Mr Juan Heriberto Lugo did indeed proffer charges against Mr Juan Carlos González for the alleged offence (article 173, para. 7, of the Penal Code) of fraudulent or disloyal administration, presumably on 17 December 2001. According to the resolution's preambular paragraphs, in so far as the Public Prosecutor in agreement with the magistrate concerned determined that there were no grounds for proceeding further with the investigation since the alleged incident was not covered by any provision of the Penal Code, the case came under article 204 of the Code of Criminal Procedure and was accordingly dismissed. Consequently, as indicated above, the Higher Court of Justice has not brought charges against any member of SITRAJ.
- 209.** Regarding the alleged withdrawal of trade union privileges from three SITRAJ officers for the purpose of weakening the complainant organization, the authorities of the Higher Court of Justice state categorically that the circumstances were not as portrayed by SITRAJ and by the Argentine Judicial Federation (FJA). They also state that the Court did not act in any way that was designed to weaken the trade union organization referred to or intended as a form of reprisal. The events that gave rise to the incident originated in an official request that the President of the Public College of Lawyers of Corrientes submitted in administrative report No. C-286-07 under the heading “College of Lawyers – First Constituency re. Request concerning the payment of wages of SITRAJ officers out of the budget of the Judiciary”. The request called upon the Higher Court of Justice to revoke its earlier decision agreeing to the payment of the salaries of the persons filling the posts of General Secretary, Deputy Secretary and Financial Secretary of SITRAJ in the exercise of their trade union privileges, on the grounds that they should be remunerated by the trade union to which they are affiliated and not by the Judiciary, as required by law (article 48 of Act No. 23551).
- 210.** The Higher Court of Justice adds that, as a result of the request, a number of relevant Court documents and precedents were consulted. These show that: (1) by Decision No. 3 of 1990, point 1, paragraph 2, two of the Court's officials were granted trade union privileges, including payment of salary by the Judiciary, and that by Decision No. 38 of 1994, point 17, those privileges were subsequently extended to a third employee, again with payment of salary by the Judiciary; (2) by Decision No. 27 of 1998, point 27, paragraph 4, it was decided to adapt the administrative arrangements to the requirements of Act No. 23551 and to grant trade union privileges to two officials of the Judiciary but without payment of salary by the Judiciary; (3) in 2000 it was again decided to grant union privileges to three officials, in one case with payment of salary by the Judiciary (Federal Ruling, Decision No. 03/2000, point 54). By Decision No. 26 of 2000 (point 3), such payment of salary by the Judiciary was extended to a second official, and by Decision No. 30/01 of 2001 (point 9) to all three officials.
- 211.** These precedents, together with the abovementioned administrative report, which was issued by the administrative director of the Judiciary on 14 September 2007, establish that Juan Carlos González, Adán Rodríguez and Epifanio Gómez received their income from the Judiciary and enjoyed trade union privileges. Responding to the request submitted by

the College of Lawyers, and in accordance with the Trade Union Associations Act No. 23551 that applies to SITRAJ, the Higher Court as presently constituted, under the presidency of [the undersigned], determined by Decision No. 5 of 6 March 2008 (point 13) to grant the executive committee of the trade union, to which the court officials of the Province of Corrientes are affiliated and whose legal personality as a trade union has been recognized, the right to union privileges without payment of salary by the Judiciary for the duration of their mandate and with due recognition of seniority .

- 212.** The request submitted by the College of Lawyers stated that it had learnt that the SITRAJ leadership, which at the time comprised the General Secretary, Deputy Secretary and Finance Secretary, were paid their salaries out of the budget of the Judiciary, whereas they should be paid by the union they represented inasmuch as they enjoy privileged status in respect of their trade union activities. This claim was based on the fact that union privileges were designed to ensure the stability of employment of their beneficiaries but did not justify paying a salary to people who did not provide any services. The College of Lawyers argued that it was absurd that those who called strikes and took decisions entailing a loss of earning for officials of the Judiciary (loss of work attendance bonus) should not themselves have their salaries docked. It concluded by pointing out that article 48 of Act No. 23551 clearly recognized that workers holding elective or representative posts within a trade union association were entitled to union privileges but without payment of their salary. That being so, the College of Lawyers requested that the decision granting trade union privileges with payment of salary be revoked.
- 213.** Notwithstanding the submission of the President of the College of Lawyers of the first judicial constituency, which was at the origin of this case, the Higher Court deemed it necessary to examine the provisions of article 56 of the Internal Rules of the Administration of Justice (RIAJ) in light of the relevant legal provisions in order to determine their legality. It accordingly compiled a list of precedents and previous agreements since the introduction of trade union privileges in the provincial Judiciary and verified the net monthly emoluments of Juan C. González, Adán Rodríguez and Epifanio Gómez and the amounts paid to them as officials of the Judiciary whose posts were reserved. A closer look at the legislation revealed, first of all, that trade union privileges constituted a workers' right that was laid down in article 14bis of the national Constitution and article 48 of Act No. 23551 as applying to any worker acting in the capacity of union representative. It is a right established by law for any trade union association that is empowered to request it and any employer entitled to grant it. Article 48 of the Trade Union Associations Act stipulates that "workers who cease to provide services because they occupy elective or representative posts in trade union associations with legal personality shall automatically have the right to union privileges without payment of salary and to be reinstated in the same post upon termination of their union mandate".
- 214.** The concept of trade union privileges means that certain aspects of a work contract are suspended if, by the nature of the post and the duties associated with it, the union duties require a worker's full-time presence and are therefore in practice incompatible with the simultaneous performance of the contractual duties (cf. Corte, Néstor: *El modelo sindical argentino*, page 463). This right, which is expressly provided for by law, comes into play automatically as soon as a worker ceases to provide services so as to engage in trade union activities. However, a worker may choose not to exercise that right, like any other right, and in practice many union officials do continue to provide services during their mandate without exercising such a privilege. If, for instance, a worker should for any reason decide to return to his post, the employer – who must keep the post available – must reinstate him in the undertaking. Moreover, the privilege provides for the suspension of only certain features of the work contract (cf. Chapter X of the Labour Contract Act, article 217, and article 48 of Trade Union Associations Act No. 23551), notably its material benefits, i.e. remuneration and services rendered. From a strictly literal interpretation of article 48 of

Act No. 23551, the fact is that the privilege conferred does not include the payment of salary, especially where it takes precedence as a legal standard over the Rules. Thus, the Higher Court of Justice argues that article 48 of Act 23551 was wrongly interpreted inasmuch as the possibility was recognized under article 56 of the RIAJ to confer on officials elected to represent a trade union an entitlement to union privileges for the duration of their mandate and with payment of salary. This, it states, is clearly incompatible both with the legal standard cited above and with established precedents with regard to the payment of remuneration without the provision of services in return.

- 215.** The Higher Court goes on to state that the concept of protection of trade union representatives, and specifically of the right to union privileges, is based on the fact that the post is reserved for the worker concerned for the duration of his or her mandate, but without payment of salary. And although in recent time such privileges have been granted with payment of salary, the Court has done so on the basis of the Rules in force, notwithstanding the fact that the union privileges conferred under article 48 of Act No. 23551 should be without payment of salary, since such payment can be neither assumed nor financed by the Judiciary in its capacity as employer.
- 216.** The Court adds that, although the payment was agreed to at the time, it did not imply any acquired right or create an expectation that those Rules would continue to operate in the same way as they did when the union privileges were granted previously. Consequently, it was unquestionably the trade union itself that should pay its representatives their remuneration. It states further that the said remuneration is determined by the effective and regular provision of services due by the worker, that being the legal justification for the latter's entitlement to it. In other words, the entitlement exists only in so far as services are actually rendered, whereas the union privileges that are granted for the performance of trade union activities are not designed for the same purpose and are not an inherent part of the labour relationship, which is concerned with the effective provision of services. Consequently, no remuneration can be deemed due whose justification derives from the actual fulfilment of the labour relationship. It should further be noted, according to the Higher Court, that the legal relationship of a trade union's representative with the union is not that of a labour relationship (cf. article 21 of the Labour Contract Act), but rather an institutional relationship, as a result of the worker's post and responsibilities within the union, as provided for in article 48 of Act No. 23551. That is to say that, for as long as workers are paid union officials with duties within a trade union, they are not bound by a contractual labour relationship but by a legal and institutional relationship deriving from their union status. This assertion is supported by those who maintain that union privileges do not include payment of salaries and that, in the event that remuneration is in fact paid, then by virtue of the union representative's institutional relationship with the trade union, it does not constitute remuneration for labour – even though it is calculated in the same way – but rather a form of financial compensation that is equal in amount to the salary the worker received for services rendered to the enterprise, often with the additional reimbursement of costs incurred as a result of the worker's activities as a trade union representative. In other words, trade union privileges do not entail payment of salary and, even if occupational associations normally do compensate in some way the earnings foregone by persons taking on union duties, that does not imply that the trade union association concerned can be considered the union official's employer, since between the official and the union there exists no labour relationship in the sense of articles 21, 22 and 23 of the Labour Contracts Act.
- 217.** Even when the beneficiaries are actually exercising their trade union privileges, the existing arrangement can perfectly well be modified in the future, and this should be interpreted neither as a restriction on the full exercise of their duties as union representatives, which they should continue to perform till the end of their mandate, nor as a way of hindering the full exercise of freedom of association as guaranteed by the

Constitution (article 14bis of the national Constitution and article 1 of the Trade Union Associations Act). The fact is that it is in any case desirable to also limit the number of trade union privileges that are granted to officials of the Judiciary serving as union representatives, so as to ensure the continuity and regularity of the services rendered by the Judiciary. Indeed, inasmuch as article 56 of the RIAJ contradicts and infringes the principles of labour legislation and Act No. 23551, it should, for all the reasons adduced, be brought into line with the legal provisions in force.

- 218.** Finally, the Higher Court of Justice states that it is precisely in this spirit that provision was made for union privileges in article 62 of the Rules governing the Assistance and Privileges of Magistrates, Officials and Employees of the Judiciary (RAL), that was approved by Extraordinary Decision No. 5/2002, i.e. the decision handed down by the Higher Court of Justice along with other matters in respect of which SITRAJ lodged the appeal that was denied by Decision No. 28/02, point 26. Despite the fact that the aforementioned Rules are still in force, by Decision No. 31, point 4, of 5 December 2002, the Higher Court ordered the provisional suspension of articles Nos 25–79 of the RAL. Following consultation of the Public Prosecutor of the Judiciary, it was decided to waive the suspension ordered by Decision No. 31/02, point 4 – which related solely to the first (and still suspended) part of article 62 of the RAL modifying article 56 of the RIAJ. Point 4 of Decision No. 31/02 reads as follows: “Art. 56: Trade union privileges: The executive committee of the trade union to which officials of the Judiciary of the province are affiliated and whose juridical personality has been recognized, may grant trade union privileges to one official – which official shall have been duly elected to act in the capacity of titular member of the said committee – without payment of salary and for the duration of his or her mandate with due recognition of seniority. At the end of that mandate the official must return to work within five consecutive days, failing which he or she may be dismissed. During the period covered by union privileges, the Higher Court of Justice may provisionally replace the official concerned”.
- 219.** According to the Higher Court of Justice, the foregoing considerations outline briefly the political, institutional and legal context in which it operates and could be expanded upon if necessary. The Higher Court adds that it is and has always been committed to the full protection of its employees, including their remuneration as determined by their grade and place in the hierarchy, within the framework of its budgetary restrictions and of the economic circumstances in which Argentine’s society finds itself. The appeals that were lodged with other national authorities were dealt with in a spirit of institutional dialogue, without infringing in any way the independence of the Judiciary. The goals that have been set for the Higher Court of Justice as presently constituted are being diligently pursued, with an eye to correcting the deficiencies of a system of administration of justice that suffers from chronic shortcomings and to ensuring that justice is dispensed more efficiently in the service of society. As regards its human resources management policy, the objective of the Higher Court is to ensure that every department of the Judiciary has adequate and appropriate human resources to guarantee the efficiency of the services provided. The Higher Court has reorganized the judicial career of officials in the administrative sector and in the maintenance and services sector, so that they can invest themselves in their jobs according to the competence and efficiency with which they perform their duties. Initially, this has meant modifying existing rules and procedures on the basis of an analysis and final diagnosis whereby it has been possible to redistribute the duties pertaining to each sector equitably and in keeping with the structure of the Judiciary throughout the province, while at the same time correcting inequities and shortening the time needed for the various categories of employees to progress in their careers.
- 220.** It is in line with the above that Decision No. 40/08 was adopted in order to implement a system of redistributing posts for purposes of promotion which has meant reorganizing those posts in keeping with the availability of resources. The process began in February

2009 and to date has benefited 53.14 per cent of the overall staff of both sectors. In pursuit of its goal of creating conditions that are conducive to career development in the Judiciary, the Higher Court has focused on introducing a fair and objective skills assessment system that encourages promotion, for which purpose it has drawn up and approved a corresponding workplan as an integral part of Decision No. 40/08.

C. The Committee's conclusions

- 221.** *The Committee recalls that, when it examined this case at its meeting in March 2009, it requested the Government to send its observations concerning the allegations that, with the aim of intimidating the SITRAJ leadership, criminal charges for the alleged crime of fraud were brought against its General Secretary and subsequently dismissed, and that by Decision No. 5 of 6 March 2008 the trade union privileges enjoyed by three SITRAJ leaders were withdrawn for the purpose of weakening the complainant organization.*
- 222.** *With respect to the allegation that, with the aim of intimidating the SITRAJ leadership, criminal charges for the alleged crime of fraud were brought against its General Secretary that were subsequently dismissed, the Committee notes that the Government has communicated the observations of the Higher Court of Justice of the Province of Corrientes, to the effect that: (1) the Higher Court has not brought criminal charges against any member of SITRAJ; (2) Mr Juan Heriberto Lugo brought charges against Mr Juan Carlos González for the alleged crime of fraudulent or disloyal administration, presumably in December 2001; and (3) according to the preambular paragraphs of Resolution No. 2461 of 21 December 2007 adopted by Magistrate No. 1 of the City of Corrientes, there were no grounds for proceeding any further with the investigation since the alleged incident was not covered by any provision of the Penal Code, and the case was accordingly dismissed. In the light of this information, the Committee does not intend to pursue the examination of these allegations any further.*
- 223.** *As regards the allegation that by Decision No. 5 of 6 March 2008 the trade union privileges exercised by three SITRAJ leaders were withdrawn for the purpose of weakening the complainant organization, the Committee notes the Higher Court of Justice's statement that the circumstances were not as portrayed by the complainant organizations, and that the Court did not act in any way that was designed to weaken SITRAJ or intended as a form of reprisal. Specifically, the Higher Court states: (1) that the events that gave rise to the incident originated in an official request to the Court from the President of the Public College of Lawyers of Corrientes, contained in the administrative report "College of Lawyers – First Constituency re. Request concerning the payment of wages of SITRAJ officers out of the budget of the Judiciary", calling on the Higher Court of Justice to revoke its earlier agreement to the payment of salaries due to persons filling the posts of General Secretary, Deputy Secretary and Financial Secretary of SITRAJ and benefiting from trade union privileges, since they should be remunerated by the trade union to which they are affiliated and not by the Judiciary; (2) that by Decision No. 3 of 1990, two of the Court's officials were granted trade union privileges, including payment of salary by the Judiciary, and that by Decision No. 38 of 1994 such privileges were subsequently extended to a third employee, again with payment of salary by the Judiciary; (3) that by Decision No. 27 of 1998, it was resolved to bring the administrative arrangement into line with Act No. 23551 and to grant trade union privileges to two officials of the Judiciary but without payment of salary; (4) that it was resolved by Decision No. 3 of 2000 to accord union privileges to three officials, in one case with payment of salary by the Judiciary, and by Decision No. 30 of 2001 to extend payment of salary to three officials; (5) that, in the light of the administrative report stating that Juan Carlos González, Adán Rodríguez and Epifanio Gómez received their salary from the Judiciary and had been granted trade union privileges, the Higher Court, responding to the submission of the College of Lawyers and in accordance with the Trade Unions*

Associations Act, resolved by Decision No. 5 of 6 March 2008 to grant the executive committee of SITRAJ the right to union privileges without payment of salary for the duration of its mandate; (6) that article 48 of the Trade Union Associations Act stipulates that workers who cease to provide services because they occupy elective or representative posts in trade union associations with legal personality have automatically the right to union privileges without entitlement to salary and to be reinstated in the same post upon termination of their union mandate; (7) that, although the payment was agreed to at the time, it did not imply any acquired right or create an expectation that those Rules would continue to operate in the same way as they did when the union privileges were granted previously; (8) that, even if the beneficiaries are actually exercising their trade union privileges, the existing arrangement can perfectly well be modified in the future, and this should be interpreted neither as a restriction on the full exercise of their union duties nor as a way of hindering the full exercise of freedom of association; and (9) that it is desirable to limit the number of trade union privileges that are granted to officials of the Judiciary serving as union representatives, so as to ensure the continuity and regularity of the services rendered by the Judiciary.

- 224.** *In this regard, the Committee wishes to point out that Paragraph 10, subparagraph 1, of the Workers' Representatives Recommendation, 1971 (No. 143), stipulates that workers' representatives should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions. Subparagraph 2 of the same Paragraph adds that, although a workers' representative may be required to obtain permission from the management before taking time off from work, such permission should not be unreasonably withheld. That being so, the Committee requests the Government to take steps to ensure that, bearing in mind the aforementioned principles and the fact that SITRAJ has already been granted union privileges with payment of salary for three officials, the complainant organizations and the Higher Court of Justice of the Province of Corrientes envisage the possibility of again granting such privileges, on the understanding that their exercise should not negatively affect the efficient functioning of the Judiciary.*

The Committee's recommendation

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

The Committee requests the Government to take the necessary measures to ensure that the complainant organizations and the Higher Court of Justice of the Province of Corrientes envisage the possibility of again granting such union privileges, on the understanding that their exercise should not negatively affect the efficient functioning of the Judiciary in the Province of Corrientes.

CASE NO. 2691

DEFINITIVE REPORT

**Complaint against the Government of Argentina
presented by
the Federation of Education Workers (FETE)**

Allegations: The complainant organization alleges that even though its affiliate organizations, the Argentinean Teachers' Federation (UDA) and the Association of Technical Teachers (AMET) have official trade union status, the administrative authorities in the Province of Santa Fe excluded them from collective bargaining

- 226.** The present complaint is contained in a communication from the Federation of Education Workers (FETE) of December 2008.
- 227.** The Government sent its observations in a communication in September 2009.
- 228.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 229.** In its communication of December 2008, the FETE indicates that it is presenting this complaint against the Government of Argentina on the grounds of the violation of the freedom of association of trade union associations affiliated to the FETE, the Argentinean Teachers' Federation (UDA), a workers' organization with official trade union status No. 1477, and the Association of Technical Teachers (AMET), with official trade union status No. 1461.
- 230.** The complainant organization alleges that the Government of the Province of Santa Fe is adopting an anti-union attitude, consisting of failing to give effect to the domestic provisions in force in the Republic of Argentina, Conventions Nos 87, 98 and 154 and the recommendations of the Committee on Freedom of Association. According to the FETE, the provincial authorities have prejudiced, restricted, undermined and prevented the exercise of freedom of association and the right to collective bargaining of the UDA and the AMET.
- 231.** The complainant organization indicates that in the Province of Santa Fe there are a large number of trade union organizations in the teaching sector which represent the sector as a whole. At least four representative organizations or trade unions in the teaching sector exist and carry out their programmes of action, namely: the UDA, the AMET (both affiliated to the FETE), the Argentine Trade Union of Private Teachers (SADOP) and the Association of Teachers of Santa Fe (AMSAFE). The FETE alleges that the practice of the representation of all teachers and the other trade union associations in the Province was severely prejudiced when the Government of the Province of Santa Fe issued, without previous dialogue or consensus with the social partners concerned, Decree No. 332/2008 of 8 February 2008.

- 232.** This Decree provided, in the context of the Province, for the establishment of a negotiating commission with a view to developing machinery for effective participation, consensus and social dialogue for the formulation of education policies, under the terms and within the scope of National Act No. 26026. The spirit of Decree No. 332/2008 is to create and establish collective bargaining machinery between the Ministry of Education of the Province of Santa Fe and teachers' unions that are representative at the level of the Province. The negotiating commission has been established according to a system for its composition that is set out in section 5 of the Decree, namely consisting of trade union associations in the education sector with official trade union status under the terms of Act No. 23551 and geographical representation within the Province of Santa Fe, which must cover at least 20 per cent of all those to be represented. The provisions of the Decree are in violation of the constitutional guarantees at both the national and provincial levels, as well as of all the provisions regulating education in the Province of Santa Fe.
- 233.** The complainant organization emphasizes that, through its two affiliate organizations, the UDA and the AMET, it applied in due time and in the required form for inclusion in the negotiating commission. The provincial executive authorities ignored this legitimate claim, as no reply was received until 21 February 2008. In this regard, in view of the fact that 21 February 2008 had been set as the date on which the negotiating commission established by Decree No. 332/2008 would start to operate, the FETE, maintaining its purpose of conciliation and negotiation which has characterized its bargaining record with the respective authorities, approached the Ministry of Education so that the latter authority could explicitly and tangibly manifest its position in relation to the inclusion or not of the above organization. Up to then, there had been no formal statement, nor had the corresponding invitation to participate been sent. The FETE adds that, envisaging the possibility of its exclusion, it was accompanied by a notary so that it could be authenticated that the UDA had been excluded from the negotiating commission.
- 234.** The FETE indicates that in this context it questioned the private secretary of the Minister of Education of the Province as to whether or not the UDA had been excluded from the current process of collective bargaining. The official indicated that the UDA and the AMET were indeed excluded. The grounds for such exclusion were laid out in technical terms in note No. 11/2008, signed by the Minister of Labour. Note No. 11/2008 indicates in the first place, in clause (a), that the UDA has official trade union status and its geographical coverage consists of the territory of the Province of Santa Fe. Furthermore, according to a register or database, administered by the Ministry of Education, to which the FETE does not have access, it has been concluded that the organization does not attain the minimum percentage established by Decree No. 332/2008 in section 5, based on an estimate according to which neither the UDA nor the other trade union organization are included in the composition of the negotiating commission.
- 235.** The complainant organization indicates that the UDA lodged an appeal for *amparo* (for the protection of its constitutional trade union rights), which was referred to the Labour Court of first instance, third circuit of judicial district No. 1, City of Santa Fe, Province of Santa Fe, under the claims brought by the UDA, C/ Province of Santa Fe, S/ *amparo* (file No. 78/2008), which issued the following injunction:

Santa Fe, 14 March 2008. Whereas ... Considering ... I hereby find: issuing the injunction guaranteed by the amount indicated in the introductory paragraphs, providing for the inclusion of the Argentinean Teachers' Federation as from notification of the present ruling, in each and every activity undertaken in the negotiating commission established by Decree No. 332/2008, which involves the discussion, modification, establishment or extension of the rights of teaching staff transferred to the Province of Santa Fe in collective bargaining undertaken now or in the future until the substantive issue is resolved. May this be known, the original registered, a copy sent to the parties, notified and placed on the file. Signed: Dr Alfredo José Binetti, Judge; Dr Mario S. Ruiz, Secretary.

That is, the court ordered the higher authorities of the Province of Santa Fe to include the UDA in collective bargaining in the Province of Santa Fe.

- 236.** The only response obtained was the submission by the executive authorities of the Province of Santa Fe of a bill respecting collective labour agreements for the teaching sector. It should be noted that the trade union associations which participated in the formal negotiations in the context of the negotiating commission in February 2008 agreed to work on the approval of an act respecting collective labour agreements for the teaching sector; this was not the subject of agreement with the UDA and the AMET. Those signing the agreement were the AMSAFE and the SADOP.
- 237.** The FETE adds that, at the beginning of the month of September 2008, the authorities of the provincial government submitted a bill on collective labour agreements to be examined by the legislature of the Province, following prior dialogue with all parties concerned, including the UDA and the AMET. The bill was taken up by the Parliament in the middle of September and the legislative procedure was commenced for its adoption as provincial legislation. The bill was examined principally in the Commission on Legislation, Labour Affairs and Social Welfare of the Chamber of Deputies of the Province, with all the trade union organizations being invited to indicate their position to the Commission.
- 238.** The FETE reports that while the bill was being processed and even before it had passed through the Education Commission of the Chamber of Deputies, on 27 November 2008, it was tabled outside the normal agenda in the Chamber of Deputies itself, with only the opinion of the Commission on Labour Affairs and Social Welfare, and without that of the Education Commission. The opinion issued by the Commission on Labour Affairs and Social Welfare of the Chamber of Deputies contained a majority report and a minority report, which is illustrative of the controversy existing with regard to the contents of the act respecting collective labour agreements for the teaching sector. The vote on the bill gave rise to marked differences between teachers' unions, which indicated their opposition to the text. The criticism concerned manifest partiality and restrictions on the participation of all the trade union actors in the context of the negotiating commission.
- 239.** According to the complainant organization, if the bill is approved by the Senate, the trade union organization AMSAFE will be the only actor entitled to inclusion as a joint member of the negotiating commission to be established under the Act. The legislators who support the executive authorities of the Province managed to produce a text which leaves the UDA, the AMET and the SADOP out of collective bargaining. The draft legislation that was put to the vote in the Chamber of Deputies introduced the requirement of membership of 10 per cent of all the teachers to be represented for inclusion in the negotiating commission. Decree No. 332/2008 contained the requirement of 20 per cent, and that Decree was set aside by the courts, thereby upholding the position of the UDA, one of the most representative trade unions.
- 240.** The complainant organization observes that recourse to any other effective administrative and/or legal remedy is impossible in the present situation for the organizations that are members of the FETE. It should be recalled that the provisions of Decree No. 332/2008 required intervention by a court order to amend the political will of the current Government of the Province of Santa Fe to exclude the UDA and the AMET. Moreover, recourse to administrative appeal machinery in the capital of the Province is not feasible, as the current Ministry of Labour of the Province is a body that reports to the Government and does not offer the necessary guarantees of impartiality and independence to settle the dispute that has arisen, particularly as the fundamental right to collective bargaining is at stake. Nor is it possible to lodge a complaint with the national Ministry of Labour, Employment and Social Security, as the question concerns the provincial level, which does not lie within the jurisdiction of that national authority. The FETE adds that it is not

possible to refer the matter to the courts as the legislation that it is challenging had not been approved when it lodged the present complaint.

- 241.** The complainant organization explains that the grounds for the unlawful nature of the draft legislation lies in the fact that the UDA and the AMET have official trade union status. These unions have official trade union status and the personal and territorial scope of their activities covers the Province of Santa Fe, in accordance with the provisions of the UDA's statutes. Clauses 1 and 5 of the statutes provide that:

Clause 1: The trade union association with the denomination of the Argentinean Teachers' Federation (UDA), established on the fifteenth day of February in the year one thousand nine hundred and seventy three, groups together and represents: (1) teachers who are employed or provide services in an educational establishment irrespective of the legal nature of their designation or contractual status; (2) retirees of all levels who upon taking retirement were members of the UDA and were engaged in the functions covered by the previous subclause; (3) teachers engaged as replacement teachers during the period of their assignment and for up to six months following the completion of their assignment.

Clause 5: The territorial scope of the activities the Argentinean Teachers' Federation shall cover the whole of the Republic of Argentina.

- 242.** The above statutes are supplemented by the trade union status of the UDA, approved by decision MTESS No. 809/2005, the first clause of which, for purposes of clarity, is transcribed as follows:

Clause 1: The scope of the representation exercised by the Argentinean Teachers' Federation, with its headquarters at Otamendi 28, Autonomous City of Buenos Aires, includes teaching staff who are currently active, both titular and replacement, and retirees from all branches and levels who are entitled to welfare benefits being official members at the national level of educational establishments which were transferred to the provincial states under the terms of Act No. 24049 respecting the transfer of the educational services of the nation to the provinces, with the exclusion of non-managerial teaching staff engaged in the schools of the CONET in the provinces of Tucumán, Córdoba, Río Negro, Santa Fe and the District of Luján in the Province of Buenos Aires and such exclusions as are set out in decisions MT and SS No. 355/99 and MTE and SS No. 348/02.

- 243.** The complainant organization indicates that the UDA and the AMET have always represented national teachers as they were first established as unions operating at the national level and accordingly operated under the legal denomination of federations, and their membership is consequently composed of various generations of teachers throughout the country. In 1992, Act No. 24049 respecting the transfer of the educational services of the nation to the provinces was approved. In this situation, the organizations continued to exist and to represent the teaching staff who had been transferred. Their geographical scope of action was never challenged and continued to consist of the whole of the territory of the Republic of Argentina.

- 244.** According to the FETE, the motivation which gave rise to the exclusion of the UDA and the AMET appears to be their lack of trade union status which, from all points of view is arbitrary, fanciful and lacking even the minimum legal and juridical basis. The situation is aggravated by the fact that the FETE has official trade union status, which was never challenged at any time by the Province of Santa Fe. The geographical scope of representation of the UDA and the AMET is the whole of the territory of the nation. It needs to be borne in mind that the UDA and the AMET are trade union associations at the first level established as federations representing an activity. The activity that they represent is public education. In accordance with their status as national federations covering an activity at the first level, with the geographical and personal scope of their functions being the whole of the national territory, their members enjoy the same rights, without distinction as to their location or province. There is no distinction between

members in the federal capital, the Province of Buenos Aires, the Pampa or, as in the present case, the Province of Santa Fe.

- 245.** The FETE also refers to the participation of the UDA and the AMET in the first collective labour agreement for the teaching sector at the national level. Two years ago, the UDA pressed for the conclusion of a collective labour agreement for teachers throughout the country. This initiative resulted in the current collective labour agreement, which is presently in force in the context of the Ministry of Labour of the nation, presided over by the current Secretary of Labour of the nation. The UDA and the AMET are included as joint titular members representing the workers. The FETE contends that, if it is really the intention of the Minister of Education of Santa Fe, as she indicated: “ ... to be in accordance with the national legislation respecting joint negotiations ... ”, the exclusion of the UDA and the AMET cannot therefore be understood, as they are participating in joint dialogue at the national level. It may thus be concluded that the UDA and the AMET are trade unions with official trade union status, and that they accordingly enjoy the capacity and the right to participate in collective bargaining in the context of negotiations on wages and working conditions in the Province of Santa Fe.
- 246.** The complainant organization alleges the violation of article 14bis of the national Constitution which, in its second paragraph, guarantees the right of unions to engage in collective bargaining and “to conclude collective labour agreements”. It adds that the obstruction of collective bargaining constitutes a form of attack on freedom of association as guaranteed by ILO Conventions Nos 87, 98, 151 and 154.
- 247.** According to the complainant organization, the Government of the Province of Santa Fe is endeavouring to impose a model of collective bargaining and to achieve changes in its structure, which is aggravated by it being an interested party in its capacity as employer. It has not followed a coherent system of consultations, has favoured the exclusion of certain trade unions and has abetted a single sector that is currently allied with the Government. The absence of the UDA and the AMET from collective bargaining undertaken in the future constitutes a grave violation which will certainly give rise to the possibility of various types of direct industrial action and may seriously prejudice the education system as a whole.

B. The Government’s reply

- 248.** In its communication of September 2009, the Government refers to the reply to the complaint provided by the Ministry of Labour and Social Security of the Province of Santa Fe.
- 249.** In its reply, the above Ministry indicates that the system of trade union model adopted by the national legislation is the “promoted unit” or “induced unit”, under which official trade union status is only granted to the most representative trade union organization and that, furthermore, it has to have been in operation for a period of not less than six months as an association that is simply registered (sections 21 and 22 of the Act respecting trade union associations No. 23551). This means that, of all the registered associations, only one, the most representative, is entrusted with representing the branch of activity (section 25 of Act No. 23551), that is, it has official trade union status. The other registered associations have functions that are not essential from the viewpoint of trade union rights, as they do not have official trade union status. Although article 14bis of the national Constitution refers to the right of workers to establish a free and democratic association, as recognized by its simple inclusion in a special register, the legislation respecting occupational associations which has governed the matter throughout history, Act No. 14455, Act No. 20615, Act No. 22105 and Act No. 23551, which is currently in force, has always adopted the system of trade union unity, granting official trade union status only to the most representative

trade union and denying trade union rights to organizations that are merely registered. In brief, two types of trade unions can coexist under the legislative system: those which are simply registered and which, as indicated above, do not have trade union rights in the proper sense, and those which are granted official trade union status by the competent authority (the most representative trade union), which enjoy full trade union rights.

250. With a view to applying a legislative policy for the prevention of future disputes between the parties which may arise out of contradictory interpretations, great care has been taken to avoid any confusion as to concepts. Accordingly, as in the present case, it is necessary to emphasize that, as it relates to the policy of a provincial state, the establishment of this negotiation machinery is envisaged to remain within that framework without giving up areas of competence. Starting from the basis that the employer is the State at the provincial level, it should be recalled that in principle its relationship with its employees (state employees) is of an administrative nature, which is accordingly governed by administrative law except, clearly, where the framework of rules to be signed by the parties explicitly provides that the relationship shall be governed by labour law (the Act respecting contracts of employment) which, once signed, means that all the effects of the relationship are subject to labour law and not to administrative law at the provincial level.

251. The provincial authority adds that the immediate precedent, provincial Decree No. 0332/2008 establishing the negotiating commission between the Ministry of Education and teachers' unions to determine a procedure to convene negotiations on the wages and working conditions of teachers, indicates in its introductory paragraphs that:

Whereas machinery with effective participation for consensus and social dialogue are central elements in the processes of formulating education policies, in accordance with national Education Act No. 26206. Whereas the establishment of negotiation machinery between the Ministry of Education of the Province and teachers' unions representing them at the provincial level is a necessary part of the provincial education policy with a view to determining a procedure for initiating bargaining with teachers on wages and working conditions. Whereas the present measure is adopted under the terms of article 72(1) and (4) of the provincial Constitution and in accordance with section 11(b)(3) of Act No. 12817.

On this basis, section 4 provides that the clauses of the agreements concluded shall comply with the principles and standards of provincial administrative law and of national Act No. 13047, and section 5 provides that:

The negotiating commission shall be composed of ten members, five of whom shall be representatives of the provincial executive authorities designated by the latter, and five members shall be representatives of trade union associations in the education sector with official trade union status under the terms of national Act No. 23551 and with their geographical scope of action in the territory of the Province. The representation of workers in terms of their numbers shall be proportional to their membership, on condition that they account for at least 20 per cent of all those represented. In the event that during the course of negotiations there is no uniformity of views among the representatives of the teachers' sector, those of the members of the majority shall prevail.

252. It adds that, along the same lines, it is also necessary to recall that the current provincial Act respecting collective agreements for the teaching personnel sector of the Province of Santa Fe, No. 12958, adopted on 2 January 2009, was formulated in the light of the national Act respecting collective labour agreements No. 14250 although, for the reasons set out above, it is important to indicate that no provisions of the draft agreement establish a specific framework of rules, but are only supplementary in nature. For this reason, it has to be inferred that the effects of the agreement are strictly confined to the wording of its text and the provisions to which it refers. Accordingly, clause 2 provides that:

This Collective Labour Agreement shall be concluded between the Executive Authority and the representatives of the trade union associations of teachers of the Province of Santa Fe, which enjoy official trade union status under the terms of national Act No. 23551 and of which the territorial scope of action is the Province. It shall be governed by the provisions of the present Act, supplemented by national Act No. 14250 and the national laws and decrees of equal scope that are in force in relation to collective bargaining.

253. Furthermore, in clause 12, the negotiating commission is established:

For the purposes of promoting and concluding the collective agreement, a negotiating commission shall be created composed of 14 members, seven of whom shall be representatives of the executive authorities at the provincial level and appointed by the latter, and seven members shall be representatives of the trade union associations of teachers under the terms of clause 2 of the present act. The parties may appoint advisers to intervene in the hearings without the right to speak or to vote, and shall do so in writing with notification to the other party. During the sessions of the negotiating commission, up to two advisers for the executive authorities and two for each trade union association of teachers may participate simultaneously under the terms of clause 2 of the present act ...

And clause 13 respecting its composition provides that:

The composition of the representatives of workers in terms of their numbers shall be proportional to the number of contributing members, certified by the registering official, which each of the trade union associations concerned had at the outset of the collective agreement. The participating trade union associations shall as a minimum account for 10 per cent of the total workers to be represented, in accordance with clause 2 of the present act. In the event that, during the course of negotiations, there is no uniform view among the representatives of the teachers, the vote of the sectoral union with the majority representation in the negotiating commission shall prevail.

254. The provincial authorities indicate that, for a better understanding of the principles on which the provincial text is established, it is merely necessary to reproduce the reasoning indicated for the law:

The attached Bill providing that industrial relations for teachers of the Province of Santa Fe shall be regulated by means of the system of collective labour agreements is submitted for your consideration. It is explicitly provided that the effects of the agreements concluded to give effect to the present Act shall be extended to the industrial relations of all teaching staff.

It is emphasized that the present Collective Labour Agreement will be concluded between the executive authorities and the representatives of the trade union associations of teachers of the Province of Santa Fe, which have official trade union status under the terms of national Act No. 23551 and with geographical scope of action in the Province. It will be governed by the provisions of the latter Act, supplemented by national Act No. 14250 and the national laws and decrees of equal scope that are in force respecting collective bargaining.

Its objectives shall be to: (a) regulate the characteristics and particular features of the administrative and/or labour relationship of teachers in the education services of the Province; (b) establish the working conditions and wages applicable to the employment relationship referred to in the previous subparagraph; (c) propose methods for the settlement of any collective disputes in accordance with their type and purpose; (d) grant social and trade union benefits; (e) adopt measures to facilitate the implementation of the points enumerated above; and (f) no agreement arising out of the collective agreements made may prejudice or disregard the principles and rights recognized by national Acts Nos 26061 and 26206, or such texts as may amend or replace them in future.

It should be noted that Decree No. 332, of 8 February 2008, established a negotiating commission composed of the Ministry of Education and the trade union associations of the education sector, in which the negotiations resulted in the conclusion of a first agreement consisting of 13 points respecting wages and working conditions and, in accordance with one of these points, a preliminary draft of a bill respecting collective labour agreements in the teaching sector of the Province of Santa Fe was formulated and referred to the legislature.

The introductory paragraphs of Decree No. 332/2008, referred to above, indicate that the “provincial government shall promote policies of educational dialogue, in which the shared outcomes shall not be imposed, but agreed upon starting from the different positions” and that “education policy and the relationship between the government and teachers shall be founded on broad consensus and, on this basis, the agreements shall be extended as State policy”.

Those currently responsible for education believe it essential to promote collective bargaining with a view to addressing and incorporating the various aspects of teaching, including the whole range of working conditions and the determination of wages through negotiation, as well as the form and manner of organizing work in schools, with a view to ensuring appropriate conditions for teaching and learning, as an essential basis for education.

This position has its basis in the contract theory of labour law relating to the form and content of the relationship that is established between the administration and its employees, which includes collective bargaining as a consequence of a process of democratization in public employment relationships.

This has been endorsed by the International Labour Organization (ILO) in successive Conventions: the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), which provides in Article 4 that “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”. The Labour Relations (Public Service) Convention, 1978 (No. 151), provides in Article 7 that “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters”.

Finally, the Collective Bargaining Convention, 1981 (No. 154), of the ILO, ratified by our country by Act No. 23544 of 1988, provides in Article 1, in defining the meaning of collective bargaining, that it “extends to all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for ... determining working conditions and ... regulating relations between employers and workers”. Article 7 of the Convention provides that “Measures taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers’ and workers’ organisations”. The theory of collective bargaining is clearly expressed in this latter Convention, with a view to ensuring its effective and equitable implementation. Its importance in relation to the present text lies in the fact that it includes public employees, who undoubtedly include teachers, by establishing their rights through the conclusion of a collective labour agreement.

In the Province of Santa Fe there are legislative precedents that are in force for other state labour sectors, such as Act No. 10052 respecting collective labour agreements for the personnel of the public administration and Act No. 9996 for the personnel of municipal and communal authorities.

Reference should also be made to the recent approval of national Act No. 26075, entitled the “Act respecting the financing of education”, which provides in section 10 that “The Ministry of Education, Science and Technology, together with the Federal Council on Culture and Education and the sectoral teachers’ bodies with national representation, shall agree upon a framework agreement which includes general guidelines in respect of: (a) working conditions; (b) the education calendar; (c) the minimum wage for teachers; and (d) teachers’ careers. Regulations were subsequently issued under this section by Decree No. 457 of 2007 of the national executive authorities, thereby making it possible to conclude the framework agreement referred to above. Section 1 of the Decree provides that the framework agreement referred in section 10 of Act No. 26075 shall apply to all teachers providing services in the context of the national education system who are governed by provincial jurisdictions and the Autonomous City of Buenos Aires, that is education workers bound by a public employment relationship with those states.

Also of relevance in the analysis of the Bill is the agreement signed in the Autonomous City of Buenos Aires, on 5 February of the present year, in the Ministry of Labour, Employment and Social Security, by the Ministry of Education, Science and Technology and the representatives of the executive committee of the Federal Education Council, the Confederation of Education Workers of Argentina (CTERA), the Association of Technical Teachers (AMET), the Confederation of Argentine Educators (CEA), the Argentinean Teachers' Federation (UDA) and the Argentinean Union of Private Teachers (SADOP), in the context of the National Joint Discussions for Teachers, established by Decree No. 457/07. The above agreement established the Federal Mediation Commission, with competence to collaborate in the settlement of jurisdictional disputes between branch associations and the respective governments, and was approved by the Ministry of Labour, Employment and Social Security. This agreement has been included in the legislative text under examination in sections 16 and 17.

It is considered that national Decree No. 457/07 is of fundamental importance in regulating the "minimum conditions" of teachers throughout the country. The proposed text constitutes an adaptation of the national standard to the real situation in the Province.

The adoption of this system will ensure the access of teachers to egalitarian and good conditions of work, in accordance with their dignity and with a view to improving their living standards.

The present text is accordingly of great importance and in conformity with the constitutional mandate set out in article 14bis of the national Constitution, the Collective Bargaining Convention, 1981 (No. 154), of the ILO, ratified by national Act No. 23544, and the provisions of articles 20 and 113 of the Constitution of the Province.

- 255.** The provincial authorities attest that in the administrative file in the register of the Ministry of Labour and Social Security of the Province of Santa Fe, No. 01601-0070578-5, opened on 10 February 2009, there is a record of the participation of the UDA and the AMET during the joint meetings in the teaching sector, in accordance with section 14 of provincial Act No. 12958. On the basis of the above, it is the understanding of the provincial government that the wording of the Act on collective labour agreements for the teaching personnel of the Province of Santa Fe, registered as No. 12958 and enacted on 2 January 2009, ensures that the system of official trade union status is compatible and in accordance with the principle of freedom of association and collective bargaining.

C. The Committee's conclusions

- 256.** *The Committee observes that in the present case the complainant organization alleges that even though its affiliate organizations, the UDA and the AMET, have official trade union status at the national level, they were excluded from the negotiating commission established in the Province of Santa Fe by Decree No. 332/2008 for the teaching sector (under the terms of the Decree, to be able to participate in the negotiating commission trade union organizations have to represent at least 20 per cent of all the workers to be represented). The Committee also notes that, following an appeal by the complainant organization, the judicial authorities issued an injunction ordering the inclusion of the UDA in each and every activity undertaken in the negotiating commission until the substantive issue is resolved. The Committee further notes the allegation by the complainant organization that, in response to the judicial appeal, the executive authorities of the Province submitted to the legislative authorities a bill on collective labour agreements for the teaching sector, which established the requirement for inclusion in the negotiating commission of membership of 10 per cent of all the teachers to be represented. According to the complainant organization, if the bill is approved by the Senate, the trade union AMSAFE will be the only partner in a position to be included as a joint member of the negotiating commission.*

257. *The Committee notes that the Government refers to the response of the Ministry of Labour and Social Security of the Province of Santa Fe, which indicates that: (1) the system of the trade union model adopted by the national legislation is that of the promoted unit, under which official trade union status is granted to the most representative trade union organization; (2) this means that, of all the registered associations, only one, the most representative, exercises the official trade union representation of the activity and the other registered trade unions have functions that are not essential from the viewpoint of trade union rights; (3) Decree No. 332/2008 establishing the negotiating commission provided that the establishment of negotiating machinery between the Ministry of Education of the Province and teachers' unions representing them at the provincial level is a necessary part of the provincial education policy with a view to determining a procedure for initiating bargaining with teachers on wages and conditions of work. The Committee notes that the Government emphasizes that the current provincial Act respecting collective agreements for the teaching personnel sector, No. 12958, of 2 January 2009, was formulated in the light of the national Act respecting collective labour agreements No. 14250, and that it provides in sections 12 and 2 for the establishment of a negotiating commission for the purposes of promoting and concluding the collective agreement, which shall be composed of 14 members, seven representing the provincial executive authorities and seven representing the trade union associations of teachers with a membership of at least 10 per cent of all those to be represented. Finally, the Committee notes that the Government emphasizes that the administrative file in the register of the Ministry of Labour and Social Security of the Province of Santa Fe, No. 01601-0070578-5, opened on 10 February 2009, contains a record of the participation of the UDA and the AMET in the joint meetings in the teaching sector.*
258. *The Committee observes that, since the presentation of the complaint challenging provincial Decree No. 332/2008, Act No. 12958 has been adopted reducing from 20 to 10 per cent the required percentage for the representation of teachers to be able to participate in the negotiating commission. The Committee notes from the Government's report that, in the month of January 2009, the AMSAFE had 27,186 members, the AMET had 862 members and the UDA had 731 members, and that the administrative authorities of the province decided that neither the AMET nor the UDA attained the minimum percentage necessary for inclusion in the negotiating commission, which does not prevent them from being in the advisory committee of that commission. The Committee recalls that on various occasions it has emphasized that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association. The Committee also recalls that where the law of a country draws a distinction between the most representative trade union and other trade unions, such a system should not have the effect of preventing minority unions from functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievances, [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 950 and 974]. The Committee considers that the percentage of membership required by Act No. 12958 is not in violation of the principles of freedom of association and collective bargaining. The Committee further notes that the documentation provided by the Government attached to its reply indicates that the Government of the Province of Santa Fe convened joint discussions for the purposes of formulating the collective labour agreement for the sector on 10 February 2009, that it decided that the negotiating commission would be established with five members of the AMSAFE and the SADOP representing the workers and that it also convened the advisory committee envisaged in section 20 of Act No. 12958 (the representatives of the AMET, in their capacity as members of the advisory committee, proposed subjects for examination to the members of the negotiating commission in a communication of 24 February 2009).*

259. *In the light of all this information, the Committee will not pursue its examination of the present case.*

The Committee's recommendation

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

CASE NO. 2718

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

Complaint against the Government of Argentina presented by the Association of State Workers (ATE)

Allegations: The complainant organization alleges that the authorities of the municipality of Corrientes and of the Corrientes Municipal Loan Fund decided, in a discriminatory fashion, not to deduct union dues and to persecute and take reprisals against its representatives

- 261.** The complaint is contained in a communication from the Association of State Workers (ATE) dated May 2009.
- 262.** The Government sent its observations in a communication dated 1 September 2009.
- 263.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 264.** In its communication of May 2009, ATE states that it is presenting a complaint against the Government of Argentina for the violation of Conventions Nos 87 and 98 because of unfair practice, discrimination and reprisals against both workers and the ATE on the grounds of trade union participation by the Corrientes Municipal Loan Fund and the town council of Corrientes, in the province of Corrientes. The ATE states that despite Argentina having ratified ILO Conventions Nos 87 and 98, article 14bis of the Argentine Constitution guaranteeing workers the free and democratic right to organize, the second paragraph of article 75, subsection 22, of the Constitution according constitutional status to a series of international human rights treaties; the first paragraph of article 75, subsection 22, of the Constitution granting legal precedence to other international treaties, including ILO Conventions, the Government engaged in the systematic violation of freedom of association.
- 265.** The ATE states that, the complaint concerns the following violations: (a) the financial controller of the Corrientes Municipal Loan Fund engaged in systematic violation of freedom of association and in discrimination against the organization's trade union rights

by not granting a check-off code for the deduction of trade union dues, failing to provide office accommodation for the conduct of trade union activities and not allowing workers to exercise the fundamental rights of holding assemblies, electing delegates, and so on; (b) there has been a tendency to persecute and take reprisals against representatives of the workers of the ATE; and (c) the mayor of the town council of Corrientes ordered an act prejudicial to freedom of association by withdrawing the check-off code for the deduction of trade union dues from the ATE.

- 266.** The ATE notes that it has official trade union status No. 2 and is authorized to operate throughout Argentina and, consequently, in the town council of Corrientes, as well as in the autonomous agency under its authority, the Corrientes Municipal Loan Fund. However, the ATE is prevented from fully carrying out its trade union activities, both at the town council of Corrientes and at the Corrientes Municipal Loan Fund, as its scope of activity and all the rights that flow automatically and naturally from its representation are not recognized (articles 31, 38 et seq. of Act No. 23551). The ATE adds that this situation is exacerbated by the persecution suffered by one of the delegates, María Elena Villalba, a workers' representative, who works at the Municipal Loan Fund.
- 267.** The ATE alleges that the Corrientes Municipal Loan Fund, when requested to grant the corresponding check-off code for the deduction of trade union dues, stated that, according to the terms of Corrientes Municipal Ordinance No. 3641/01, the only bodies recognized for this purpose are the Association of Municipal Workers and Employees of Corrientes (AOEM), the Federation of Corrientes Municipal Workers' Unions (FESTRAMCO) and the Confederation of Municipal Workers and Employees of Argentina (COEMA), and not the ATE. Following this response, the ATE appealed to the Ministry of Labour, Employment and Social Security (MTSS) to rule on the scope of activity of the ATE and its applicability at the town council of Corrientes and at the Corrientes Municipal Loan Fund. The Ministry of Labour granted a certificate – established in MTSS resolution No. 51/87 – ruling that union dues should be deducted from ATE members, in accordance with article 24 of Decree No. 467/88 and article 38 of Act No. 23551 concerning trade union associations. On 26 August 2008, the implementing authority issued the corresponding certificate, which was submitted to the Corrientes Municipal Fund on 10 September 2008, together with National Trade Union Associations Directorate provision No. 20/02, which establishes the deduction of trade union dues as an obligation for employers.
- 268.** Nevertheless, and before transferring to another trade union organization, the Municipal Loan Fund stated that it is an autonomous and independent entity that is governed according to Ordinance No. 3641/01, and that the provisions of the Ministry of Labour do not apply to it. Article 83 provides that: “Personnel are entitled to form unions and to organize, in accordance with the applicable legislation. This statute recognizes the Association of Municipal Workers and Employees of Corrientes (AOEM), the Federation of Corrientes Municipal Workers' Unions (FESTRAMCO) and the Confederation of Municipal Workers and Employees of Argentina (COEMA), trade unions of first, second and third levels, respectively, pursuant to the modalities provided for in article 11 of Act No. 23551, as sole trade union representatives of the workers of the town council of the city of Corrientes” ... “that on this basis and adherence to the whole by the Municipal Loan Fund through the provisions of resolution No. 063 of 29 May 2001, which makes all the agents of that institution subject to the Single Statute for the personnel of the town council of the city of Corrientes (Ordinance No. 3641/01), the Municipal Loan Fund, like the town council, only recognizes the trade union associations described in article 83 of the rules cited”.
- 269.** The ATE indicates that this is the reason why the check-off code for the deduction of trade union dues for ATE members is not authorized, as provided in article 11 of Act No. 23551,

article 83 of Ordinance No. 3641/01 and resolution No. 063/01 of the Municipal Loan Fund. According to the ATE, while the Municipal Loan Fund of the municipality of Corrientes did not grant the requested check-off code for the deduction of trade union dues, the town council of Corrientes had been deducting the union dues for the organization for over eight years. Despite such recognition, on 8 October 2008, the town council issued resolution No. 2526 withdrawing the check-off code for the deduction of trade union dues from the ATE on the basis of the abovementioned ordinance. Given this situation, and as there is no other trade union body with official trade union status at the town council of Corrientes, the implementing authority was once again asked to rule on whether this association has official trade union status, whether its rights as a legal entity are applicable in the municipality of Corrientes and whether the rights established in Act No. 23551 are accorded to it as it has official trade union status.

- 270.** On 23 October 2008, the Ministry of Labour handed down a ruling stating that “the ATE is a first-level trade union with official trade union status (registered as No. 2) with the exclusive powers indicated in article 31 and related provisions of Act No. 23551 and with representative capacity within the town council of Corrientes. It is also noted that there is no record of any displacement of the representative status of the ATE by another trade union organization”. The town council was again made aware of the implementing authority’s declaration, but it was not favourably received. The ATE alleges that the continued failure to recognize it constitutes systematic persecution of the affiliated workers and of their representatives.
- 271.** According to the ATE, on 23 June 2008, María Elena Villalba was appointed normalizing delegate of the Municipal Loan Fund, in accordance with the provisions of the statutes of the organization, and her mandate to occupy the same position was extended by 60 more days on 27 August 2008. On 8 October 2008, an election of delegates was held at the Municipal Loan Fund, and María Elena Villalba was elected. The employer was notified of this in due time, but refused to recognize her activity or position. Not only was María Elena Villalba’s position as delegate not recognized, but resolution No. 030/08, issued by the Municipal Loan Fund, ordered that she be laid off for a period of six months, extendable, together with all the other workers in the treasury sector.
- 272.** The ATE states that, while that resolution was not enforced, other actions were carried out against the workers’ organization. Memorandums were issued prohibiting workers from meeting or attempting to assemble or organize, timetables were altered, transfers were carried out and workers were intimidated. Furthermore, on 22 September 2008, the delegate María Elena Villalba was sanctioned under resolution No. 034/08, being suspended for 30 calendar days and having administrative proceedings brought against her for the purpose of imposing further sanctions, simply for being a normalizing delegate and having attended in that capacity the conciliation hearing on 18 September 2008 to which she had been summoned by the labour directorate of the province of Corrientes.
- 273.** The complainant organization indicates that the employer’s main argument for refusing to recognize the ATE revolves around Municipal Ordinance No. 3641 of 2001, mentioned above, article 83 of which recognizes that the AOEM, FESTRAMCO, and COEMA, as sole workers’ representatives at the town council of the city of Corrientes. Not only do these arguments ignore and violate national regulatory provisions, but it is also important to mention, in this specific case, that there are no administrative or judicial resolutions excluding the ATE from the Corrientes Municipal Loan Fund.
- 274.** The ATE states that the limits and scope of the principle and fundamental right of freedom of association, embodied in rules with constitutional status and legal precedence, are a federal matter, by rule of the devolution practiced in favour of the State. Consequently, provinces and municipalities are prohibited from legislating on aspects that are inherent to

the organization and functioning of trade union organizations. But, despite this, the town council of the city of Corrientes mistakenly argues for, establishes and insists upon the monopoly of the AOEM. Also, the ATE maintains, according to Act No. 23551, the refusal to recognize it lacks any real or legal basis, given that the Ministry of Labour's records show that the AOME has merely been registered and does not have official trade union status.

275. The so-called trade union monopoly implies an attempt at compulsory affiliation to a trade union with the exclusion of others. This violates article 14bis of the Constitution, by seeking to limit "free and democratic organization", and ILO Conventions Nos 87 and 98. The actions of the Corrientes Municipal Loan Fund and the town council of Corrientes constitute anti-union activity because the employer is the same in both cases. The ATE alleges that the employer's actions can be divided into the following three anti-union actions: (a) establishing a trade union monopoly, failing to recognize and discriminating against the ATE by not granting it a check-off code for the deduction of trade union dues at the Municipal Loan Fund and, after eight years of recognition, stopping deductions at the town council of Corrientes; (b) failing to recognize the trade union representation status of the delegate María Elena Villalba, elected by the workers of the Corrientes Municipal Loan Fund, and persecuting and intimidating her; and (c) prohibiting the fundamental rights of workers, such as the right to hold assemblies.

276. The complainant organization refers to a letter dated 9 October 2008, endorsed by the representative of the Corrientes Municipal Loan Fund which, in its view, details the mistaken and illegal belief held by that body, seeking to establish a trade union monopoly. The text is as follows:

... the exchange of opinions does not achieve any result. The town council of Corrientes and its autonomous body the Municipal Loan Fund is governed by Ordinance No. 3641/01, article 3, which provides that sole trade unions authorized in the public employment relationship are the Association of Municipal Workers and Employees of Corrientes (AOEM), domiciled at calle la Rioja 73, Corrientes, the Federation of Corrientes Municipal Workers' Unions (FESTRAMCO), domiciled at Avenida 3 de abril 1394, Corrientes, and the Confederation of Municipal Workers and Employees of Argentina (COEMA), current and compulsory standards (within the framework of its competence) and rights reserved (article 2 of the Constitution). Reinforced by article 123 of the Constitution, and the municipality is enjoying full autonomy. This ordinance was imposed by the federal Government through federal intervention (article 6 of the Constitution). The trade unions mentioned have almost all the unionized municipal employees, which makes the ATE's claim invalid, and as such we dismiss the claim of a trade union that has neither a territorial nor an occupational connection to the Municipal Loan Fund. While this is in force, employees are subject to the abovementioned ordinance, freely and voluntarily (theory of individual action). As to María Elena Villalba, the proceedings instituted relate to other causes and we deny any type of persecution ...

277. The ATE indicates that before Ordinance No. 3641/01 came into force it was recognized by the town council of Corrientes, which deducted the union dues from members until November 2008, adding to the above argument concerning the monopoly established by the ordinance used by the autonomous body of the municipality. It is the ATE's understanding that the actions of the administration in respect of the check-off code for the deduction of trade union dues, in addition to the express prohibition to exercise fundamental rights, shows a clear attitude of discrimination that is contrary to the spirit of the domestic and international legislation mentioned above.

278. The lack of recognition is compounded by the harassment against the delegate mentioned, proof of which is the result of the administrative proceedings ordered by resolution No. 034/08, with an excessive, unfounded and arbitrary sanction consisting of 30 days' suspension. This worker, therefore, had her wages deducted as a result of her trade union

activities, with a very severe sanction clearly intended to thwart any attempt by workers to organize in the defence of their interests. On 25 August 2008, and in compliance with a mandate from the workers of the Municipal Loan Fund, the ATE requested the intervention of the Undersecretariat of Labour of the province of Corrientes, asking it to initiate a conciliation process with the employer to solve the collective labour dispute caused by laying off all the personnel in the treasury sector, where the delegate works. The first hearing of that conciliation process was held at the headquarters of the Undersecretariat of Labour, in the presence of representatives of the Municipal Loan Fund, and the director of work called for a recess. The ATE delegate agreed. The second hearing was scheduled for 18 September 2008 by means of a writ of notification from the executive council for the province of Corrientes, and the delegate again requested an exemption in order to attend the hearing together with confirmation from the Secretary-General of the ATE. This time the exemption was refused, but María Elena Villalba attended all the same, and, in any case, she was exercising her rights under the principle of freedom of association, attending the hearing in defence of the workers. The employer then sanctioned her for attending the hearing, although she had previously requested an exemption and had informed the employer of her absence from her place of work, which, furthermore, had been approved for the first hearing without any type of objection.

- 279.** The ATE indicates that resolution No. 058/08 set aside the order to lay off all the workers in the treasury sector of the Municipal Loan Fund of the city of Corrientes. To sanction her for this is clearly an example of trade union persecution, which, in addition to the serious financial and personal damage that she has suffered, certainly also hampers her trade union representation duties.
- 280.** The ATE indicates that the terms of letter No. 988207639 of 29 October 2008, signed by the representative of the Municipal Loan Fund, reveal the illegal position held by that body, namely: "... I notify you specifically, reiterating our earlier letter in view of the fact that it appears that you do not read the texts, that it is totally and absolutely prohibited to hold any type of meeting of a religious, political or trade union nature inside the institution, and persons who pursue such objectives will be prevented from entering by the police. The town council of Corrientes and the Municipal Loan Fund are governed by Ordinance No. 3641/01, articles 83 and 59 – which I advise you to read – which provide that the AOEM, FESTRAMCO and COEMA are sole trade unions authorized in public employment relationships. The trade unions mentioned exclude the ATE in compliance with prevailing legislation. Employees subject to the Ordinance ...". According to the ATE, the writ of notification from the Municipal Loan Fund shows that all the personnel were notified that "any type of trade union act is prohibited within the Municipal Loan Fund without the due authorization of the institution's authorities".
- 281.** On this matter, it is recalled once again that national regulations, as well as specific constitutional and international guarantees, guarantee freedom of association and, more specifically, article 23 of Act No. 23551 establishes that trade unions, once they are registered, are entitled to "hold meetings and assemblies without the need for prior authorization". To summarize, the ATE claims that the State of Argentina, through the town council of Corrientes and the Municipal Loan Fund of Corrientes, has systematically violated the fundamental collective and trade union rights of workers.

B. The Government's reply

- 282.** In its communication of 1 September 2009, the Government states that it consulted the Undersecretariat of Labour of the province of Corrientes and was informed that, in provision No. 895 of 23 October 2008, a conciliation hearing was scheduled for 28 October 2008, which did not go ahead due to the failure of the parties to appear.

Furthermore, it indicates that the ATE has not taken any action in respect of the administrative proceedings since November 2008.

283. The provincial authority states that, at the beginning of 2009, the trade union organization made an application before the ordinary courts of the city of Corrientes, initiating judicial proceedings No. 33311 entitled “*Precautionary measure, Association of State Workers (ATE) v. Town council of the city of Corrientes and others concerning appeal for the protection of constitutional trade union rights*”. It also notes that the relevant part of judicial resolution No. 107, dated 8 June 2009, orders: (1) the suspension of any act by the Municipal Loan Fund that constitutes an obstacle to the ATE in the exercise of its trade union activities; and (2) that the exceptional precautionary measure be allowed, setting aside the suspension of María Elena Villalba for 30 days. The Government indicates that having channelled the claims through the appropriate judicial body and having abandoned the administrative route pursued initially, it considers that the result of the judicial proceedings should now be awaited.

C. The Committee's conclusions

284. *The Committee observes that, in this case, the complainant organization alleges that, in violation of its trade union rights, the authorities of the Corrientes Municipal Loan Fund decided not to deduct the union dues of its members, failed to provide the trade union with an office space, did not allow assemblies to be held and sanctioned with a suspension of 30 days the ATE delegate, María Elena Villalba, under resolution No. 034/08 for having attended, in her capacity as delegate, a conciliation hearing to which she had been summoned by the Labour Directorate of the Province of Corrientes. The ATE also alleges that the authorities of the municipality of Corrientes ruled in resolution No. 2526 of 8 October 2008, to withdraw the check-off code for the deduction of trade union dues from union members (according to the complainant organization, the town council had been deducting union dues for ATE members for over eight years).*

285. *The Committee notes the Government's information that it consulted the Subsecretariat of Labour of the Province of Corrientes, which informed it that: (1) in provision No. 895 of 23 October 2008, a conciliation hearing was scheduled for 28 October 2008, which did not go ahead due to the failure of the parties to appear and that the ATE had not taken any action in respect of the administrative proceedings since November 2008; (2) at the beginning of 2009 the trade union organization made an application to the courts, initiating judicial proceedings No. 33311 entitled “Association of State Workers (ATE) v. Town council of the city of Corrientes concerning appeal for the protection of constitutional trade union rights”; and (3) judicial resolution No. 107 of 8 June 2009 ordered the suspension of any act by the Corrientes Municipal Loan Fund that constitutes an obstacle to the ATE in the exercise of its trade union activities, which gave rise to a precautionary measure, setting aside the suspension for 30 days of María Elena Villalba. Finally, the Committee notes the Government's indication that, having channelled the claims of the complainant organization to the appropriate judicial body and having abandoned the administrative route, it considers that the result of the judicial proceedings should now be awaited.*

286. *The Committee takes due note of the intervention of the judicial authorities in respect of the allegations and, in particular, the provision that all acts that constitute obstacles to the ATE's trade union activities be suspended and that they cancelled the suspension of the trade union delegate María Elena Villalba. In this respect, the Committee requests the Government to keep it informed of the outcome of the judicial proceedings under way.*

287. *With respect to the alleged refusal to deduct union dues from ATE members at the Corrientes Municipal Loan Fund and at the town council of Corrientes (at the latter*

institution, the deduction had been made for eight years, according to the complainants), the Committee cannot determine, from the Government's reply, whether the judicial action under way has given rise to any measures relating to these allegations. The Committee observes the complainant organization's statement that the Ministry of Labour granted a certificate (MTSS resolution No. 51/87) ruling, in application of the Act on trade unions, that trade union dues be deducted from ATE members in the context in question. The Committee observes that neither the Government nor the municipal authorities have denied these statements. The Committee recalls that depriving trade union organizations of the trade union dues of their members can cause them considerable financial difficulties and, consequently, serious operational difficulties; also, it is not conducive to the development of harmonious industrial relations. This being the case, the Committee requests the Government to ensure that the Corrientes Municipal Loan Fund and the town council of Corrientes deduct and submit to the ATE the trade union dues of its members. The Committee requests the Government to keep it informed in this respect.

The Committee's recommendations

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

- (a) The Committee requests the Government to keep it informed of the outcome of the judicial proceedings under way initiated by the ATE against the town council of Corrientes, to which the Government refers.*
- (b) The Committee requests the Government to ensure that the Corrientes Municipal Loan Fund and the town council of Corrientes deduct and submit to the ATE the trade union dues of its members, in accordance with its certificate (MTSS resolution No. 51/87) issued by the Ministry of Labour. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2696

DEFINITIVE REPORT

Complaint against the Government of Bulgaria presented by

- Education International (EI)**
- the Trade Union of Bulgarian Teachers (SEB) and**
- the Trade Union of Teachers Podkrepa**

Allegations: The complainant organizations denounce the litigation brought following a strike, which aims to undermine the right to strike of teachers

289. The complaint is contained in a communication from Education International (EI), the Trade Union of Bulgarian Teachers (SEB) and the Trade Union of Teachers Podkrepa dated 15 February 2009.

290. The Government forwarded its response to the allegations in a communication received on 15 July 2009.

291. Bulgaria 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

292. In a communication dated 15 February 2009, the complainant organizations EI, SEB and the Trade Union of Teachers Podkrepa denounce an attempt to undermine the right to industrial action of teachers in the public sector, through litigation for alleged discrimination as a result of a lawful strike. They allege the use by Bulgarian authorities of anti-discrimination laws to restrict union rights and to deny to officials in the education sector the right to collective industrial action.

293. The complainants state that, in September–October 2007, the SEB and the Union of Teachers Podkrepa organized a large-scale strike involving 80 per cent of the staff of the public education sector (more than 110,000 teachers and educational staff). According to the complainant organizations, the strike was launched in a responsible manner, after numerous negotiation attempts to resolve the problem of low salaries for Bulgarian teachers. The complainants point out that, in 2004, when adopting the law on public servants, teachers had refused the status, which would have involved certain benefits, precisely because it would have denied them the right to strike. In their view, the teachers' strike was in strict compliance with the Bulgarian legislation on the right to strike. The issue of the legality of the strike had never been raised, since all the conditions for the use of the right to strike had been scrupulously observed by the teachers' unions. The complainants add that the strike ended after 42 days, as soon as the unions estimated that a sufficient portion of their demands were met.

294. The complainant organizations indicate that, in March 2008, more than four months after the ending of the teachers' strike, an association composed of six parents, lodged a complaint with the Commission for Protection against Discrimination in Bulgaria against the leaders of the two teachers' unions that had organized the strike, namely Yanka Takeva, President of the SEB, and Kroum Kroumov, President of the Union of Podkrepa. The argument put forward by the plaintiffs amounted to saying that, due to the strike, pupils in public education had been discriminated against compared to pupils in private education. During the hearings on 4 April and 14 May 2008 before the Commission, the two union leaders argued that the procedure of legal strike could not come within the scope of the Protection against Discrimination Act, and that no tangible proof could be given to demonstrate the existence of the alleged discrimination because the complaint did not name an individual who had suffered discrimination. The unions also protested against the fact that the complaint was directed against two union leaders who could not be held liable for actions committed by others. The Commission accepted the claim notwithstanding the trade unions' arguments.

295. The complainants denounce an intimidation attempt against teachers and a misuse of the powers of national institutions. In their view, this case being brought before the Supreme Administrative Court or eventually the Supreme Court, demonstrates that the Government attempts to hinder the freedom of workers to exercise the constitutionally recognized right to strike in order to defend their interests. The complainant organizations also refer to several legal texts regulating the procedure and scope of that right, in particular the Settlement of Collective Labour Disputes Act. They allege that the Government seeks to exploit the discontent caused by disruptions due to the strike, although strikes are by nature disruptive and costly, and ignores that strike action also calls for an important sacrifice by the Bulgarian teachers.

- 296.** According to the complainants, the teachers' strike in Bulgaria showed that it often takes several weeks of costly and disruptive conflict before a government recognizes the failure of its policy and finally accepts, as in this case, to seek a solution through negotiation. They highlight that the complaint against two union leaders occurs in a new climate of discontent among teachers who, despite the perceived wage rises, continue to deplore the weakness of their salaries. In their view, if the authorities wanted to deter unions from new mobilization, they could not find a better way to go about it.
- 297.** The complainant organizations recall that, during the discussions of the case of Bulgaria before the Committee on the Application of Standards at the International Labour Conference in 2008, the Government representative had reaffirmed the Government's commitment to the search for appropriate solutions via tripartite dialogue. They feel, however, that no such willingness seems to be reflected in the proceedings against the two union representatives before the Commission for Protection against Discrimination in Bulgaria.
- 298.** The complainants finally indicate that, upon appeal, the Supreme Administrative Court, at its recent session, considered that the rights of children in public schools had been violated and that, given its importance in the country, the public education sector should have a minimum service in schools and kindergartens and nurseries in case of strike. The ongoing litigation had also led to a broad discussion in society of the right to strike of workers in public education and the conditions to be met. The complainant organizations believe that the notion of essential services and minimum service must not have the purpose or effect of weakening the most powerful means of pressure available to workers.

B. The Government's reply

- 299.** In a communication received on 15 July 2009, the Government refers to the appeal by the trade unions of Decision No. 205 of 2 October 2008 of the Commission on Protection against Discrimination before the Supreme Administrative Court. The decision had determined an unfavourable treatment of pupils in state and municipal schools compared with those in private schools and a direct causal connection between the effective teachers' strike (24 September–5 November 2007) and the abovementioned unfavourable treatment. In addition, the decision had recommended that the Council of Ministers of Bulgaria put forward a draft law for amending section 14(1) of the Settlement of Collective Labour Disputes Act, to the effect that education services in the primary and high school education in state and municipal educational establishments are included in the category "socially important" services, which have to be provided during a strike.
- 300.** The Government notes that the appeal of the Commission's decision was made in implementation of the law. According to section 68(1) of the Protection against Discrimination Act, the decisions of the Commission are subject to appeal before the Supreme Administrative Court pursuant to the procedure of the Administrative Procedure Code within 14 days from their announcement to the interested persons. The Government refutes as unfounded the allegation of the complainants, that in the presence of a complaint lodged before the Supreme Administrative Court, the Government will try to restrict the right to strike and the freedom of workers to protest for protecting their interests – a right which is guaranteed by the Constitution of Bulgaria.
- 301.** The Government further indicates that, by Ruling No. 4991 of 14 April 2009, the Supreme Administrative Court left the complaint without examination and terminated the procedure due to the lack of legal interest of the complainants for the requested legal protection. The Ruling entered into force on 12 June 2009. Until the entry into force of the decision of the Commission on the Protection against Discrimination, the Government could not undertake any measures for implementing the Commission's recommendation.

302. The Government assures that, if it undertakes the necessary measures for drafting the amendments of the Settlement of Collective Labour Disputes Act, these amendments will be discussed with the social partners. Consultations with the representative employers' and workers' organizations are required by national legislation and regular practice in Bulgaria. The Government finally underlines that the issue of including the education services in the category "socially important" services to be provided at minimum level during a strike, is subject to a legislative decision, which under no circumstances could lead to a breach or a restriction of trade union rights, and especially the right to strike of employees in education.

C. The Committee's conclusions

303. *The Committee notes that, in the present case, the complainants denounce the litigation brought following a strike, which aims to undermine the right to strike of teachers, and allege the use by Bulgarian authorities of the discrimination laws to restrict union rights and to deny to officials in the education sector the right to collective industrial action.*

304. *The Committee notes the Government's reply and Decision No. 205 of 2 October 2008 of the Commission on Protection against Discrimination in Bulgaria. Under section 47(1) of the Protection against Discrimination Act, the Commission has the power to, inter alia: ascertain violations of legislation concerning equal treatment, the perpetrator of the violation and the aggrieved person (No. 1); order prevention or termination of the violation and restore the original situation (No. 2); impose the sanctions envisaged and implement administrative enforcement measures (No. 3); issue mandatory directions for compliance with legislation concerning equal treatment (No. 4); issue opinions on the conformity of draft legislation with anti-discrimination legislation, and make recommendations for the adoption, repeal, amendment, or supplementation of legislation (No. 8). The Committee understands that the Commission's decision solely reviews the issue from the angle of disadvantageous treatment, and does neither make a determination as to the legality of the teachers' strike of 2007, nor engage the liability or give rise to any direct sanction in relation to the exercise of this right by the two teachers' unions. In effect, the only addressee of the decision is the Council of Ministers, to which the Commission recommends, according to section 47(1) No. 8, to introduce a draft for the amendment of section 14(1) of the Settlement of Collective Labour Disputes Act, "via which the list of the socially significant services that must be ensured during a strike is to be expanded to include the educational services in the primary and secondary school education in state and municipal educational institutions" (Supreme Administrative Court citing the Commission's decision). The Committee also takes note of the Government's assurance that, if it takes the necessary measures for drafting the amendments to the Settlement of Collective Labour Disputes Act, these amendments will be discussed with the representative employers' and workers' organizations, and that any legislative decision concerning the issue of including the education services in the category of "socially important" services to be provided at minimum level during a strike, will not lead to a breach or restriction of trade union rights, and especially the right to strike of employees in education.*

305. *As regards the Government's role in the litigation, the Committee notes that, according to section 40(1) of the Protection against Discrimination Act, the Commission for Protection against Discrimination in Bulgaria is an independent specialized state body for prevention of and protection against discrimination. Whereas, according to section 50(1), proceedings before the Commission could, inter alia, be instituted on tip-offs from state and municipal authorities, the complainants themselves indicate that the complaint filed with the Commission has been lodged by a parents' association. Moreover, the Committee notes that, under section 68(1) of the Protection against Discrimination Act, the Commission's decisions are appealable to the Supreme Administrative Court under the*

conditions and procedure of the Administrative Procedure Code, and that the appeal of the decision by the trade unions (Ruling No. 4991 of 14.04.2009) was held procedurally inadmissible. In the light of this information, the Committee is not in a position to conclude that the litigation was initiated by or could be attributed to the Government.

- 306.** *As regards Decision No. 205 of 2 October 2008 of the Commission on Protection against Discrimination in Bulgaria, the Committee is concerned by the interference created by this decision in a long-established right granted to teachers on the basis of an implied violation of equal rights between the public and private sectors. The Committee is bound to reiterate that it has always held the right to strike to be one of the essential means through which workers and their organizations may promote and defend their economic and social interests. Moreover, it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests (see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 521 and 522). The Committee observes that the discrimination being referred to by the Commission on Protection against Discrimination was not the result of a difference in legislative framework – the right to strike is guaranteed for teachers in both the public and private sectors – but rather of the impact of the recourse had to that fundamental right on a specific occasion. As regards the actual impact of the strike on public school students and their families, the Committee observes, as indicated by the complainants, that strikes are by nature disruptive and costly and that strike action also calls for a significant sacrifice from those workers who choose to exercise it.*
- 307.** *While noting that Decision No. 205 of 2 October 2008 was issued by an independent national body, the Committee wishes to stress that the determinations made by that body cannot dispense the Government of its international obligations. As regards the substance of the recommendation by the Commission, the Committee understands from the Government’s reply that it will proceed to review the manner in which it shall give effect to the recommendation that the Council of Ministers introduce an amendment to section 14(1) of the Settlement of Collective Labour Disputes Act, to the effect that “educational services as public services should be included in the group of the socially significant services whose provision should be ensured to a maximum degree during a strike” (Supreme Administrative Court citing the Commission’s decision). The Committee observes that section 14(1), as currently drafted, provides that a written agreement must be concluded between workers and employers prior to a strike, ensuring the conditions for the realization of the activities, the non-fulfilment or stoppage of which during the strike may create risks for certain enumerated goods and services.*
- 308.** *In this regard, the Committee feels obliged to recall that education is not an essential service in the strict sense of the term. It points out, however, that minimum services may be established in certain sectors in accordance with the following principles: A minimum service may be set up in the event of a strike, the extent and duration of which might be such as to result in an acute national crisis endangering the normal living conditions of the population. Such a minimum service should be confined to operations that are strictly necessary to avoid endangering life or normal living conditions of the whole or part of the population; in addition, workers’ organizations should be able to participate in defining such a service in the same way as employers and the public authorities. The Committee has stated, for example, that minimum services may be established in the education sector, in full consultation with the social partners, in cases of strikes of long duration [see **Digest**, op. cit., paras 610 and 625].*
- 309.** *In light of the general wording of the recommendation and the use of terms such as “maximum degree”, the Committee wishes to recall that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers’ and workers’ organizations. This not*

only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see *Digest*, *op. cit.*, para. 612]. The Committee emphasizes that such a service must genuinely be a minimum service, i.e. restricted to the operations which are necessary to satisfy the basic needs of the population or the minimum requirements of the service, while ensuring that the scope of the minimum service does not render the strike ineffective.

310. *The Committee expects that any eventual amendment of the Settlement of Collective Labour Disputes Act that bears on issues relating to freedom of association and collective bargaining will be in full conformity with the Convention and the abovementioned principles, and that the relevant employers' and workers' organizations will be fully consulted in this regard.*

311. *The Committee draws the legislative aspects of the present case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

The Committee's recommendations

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

(a) The Committee expects that the Government, when implementing the recommendation contained in Decision No. 205 of the Commission on Protection against Discrimination in Bulgaria, will fully take into account the principles of freedom of association as set out in its conclusions and ensure that the workers' and employers' organizations concerned are fully consulted with respect to any eventual changes to the Settlement of Collective Labour Disputes Act that bear on issues relating to freedom of association and collective bargaining.

(b) The Committee draws the legislative aspects of the present case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

CASE NO. 2654

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

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

- the National Union of Public and General Employees (NUPGE)
- the Canadian Labour Congress (CLC)
- the Saskatchewan Federation of Labour (SFL)

supported by

- Public Services International (PSI)

Allegations: The complainants allege that the Public Service Essential Services Act and the recently amended Trade Union Act impede workers from exercising their fundamental right to freedom of association by making it more difficult for workers to join unions, engage in free collective bargaining and exercise their right to strike

- 313.** The complaints are contained in communications of the National Union of Public and General Employees (NUPGE), on behalf of the Saskatchewan Government and General Employees' Union (SGEU), dated 12 June 2008 and 28 September 2009; communications of the Canadian Labour Congress (CLC), on behalf of the Saskatchewan Labour Federation (SFL) and its affiliates, dated 8 September 2008 and 8 September 2009; and a communication of the SFL dated 25 May 2009. By a communication dated 25 June 2008, Public Services International (PSI) associated itself with these complaints.
- 314.** The Government sent its observations in communications dated 11 February and 15 October 2009.
- 315.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 316.** In a communication dated 12 June 2008, the NUPGE states that the Act Respecting Essential Public Services (Bill 5) and the Act to Amend the Trade Union Act (Bill 6) were introduced in the Saskatchewan legislative assembly on 19 December 2007 and proclaimed into law on 14 May 2008.
- 317.** The complainants allege that: (1) the pieces of legislation are designed to make it more difficult for workers to join unions, engage in free collective bargaining and exercise their right to strike; (2) for all intent and purposes, the legislation denies the right to strike to the majority of public employees in Saskatchewan by proclaiming essential services legislation which makes strikes ineffective for those public employees; (3) the Government of Saskatchewan failed to provide access to an independent arbitration mechanism for those public employees who will be so negatively impacted by essential services legislation; and (4) the Government of Saskatchewan failed to participate in a fully open

and extensive consultative process with representatives of workers' organizations prior to introducing legislation that has a major negative impact on the rights of the working people of Saskatchewan.

- 318.** The complainants allege, in addition, that the Saskatchewan Government's actions violate principles of freedom of association by seriously eroding the confidence of employees in the collective bargaining process and that the Government of Saskatchewan fails to give priority to collective bargaining as a means of determining public employees' employment conditions.
- 319.** The complainants note that the Government of Saskatchewan did not consult any worker organizations on the need for, contents of or potential effects of the two Bills prior to drafting them. After the legislation was introduced, the Government of Saskatchewan held private meetings with less than a dozen unions during a two- to three-week period to obtain feedback. The SFL and the labour movement of Saskatchewan invited the Government of Saskatchewan to participate in various forms of meaningful consultation and study prior to the introduction and proclamation of Bills 5 and 6, including during an informal meeting between the President of the SFL and the Minister of Labour at which the President of the SFL asked for consultation before any legislation was introduced affecting unions and workers in Saskatchewan and offered a team of experts that would be willing to meet and discuss any proposed legislation. The offer was not accepted and Bills 5 and 6 were introduced a week later. The complainants claim that this consultative process was inadequate and insufficient to constitute meaningful consultation, contrary to the basic principles of freedom of association regarding the importance of consultation and cooperation between public authorities and employers' and workers' organizations. According to the SFL, while there were several minor and insignificant changes made to Bill 5, not one of the substantive changes or concerns that it has identified was addressed. No changes were made to Bill 6.

Public Service Essential Services Act

- 320.** The complainants allege that the definition of what constitutes an essential employee is so broad that practically any public service employee could be designated as an essential employee and therefore not eligible to go on strike. Section 2(c) defines essential services as services provided by the Government of Saskatchewan or any other public employer that are necessary to enable the Government or a public employer to prevent danger to life, health or safety; the destruction or serious deterioration of machinery, equipment or premises; serious environmental damage; or disruption of any of the courts of Saskatchewan. Furthermore, the Cabinet can prescribe other services provided by the Government of Saskatchewan as essential services. The complainants allege that the Cabinet thus has an unrestrained ability to designate, as essential, those services that are beyond those outlined in the definition and there is no requirement that these be discussed or scrutinized.
- 321.** The complainants also allege that the definition of "public employer" is so broad that practically all public sector employers in the province are covered, including municipal workers and post-secondary institute workers. Moreover, the Cabinet can prescribe, by regulation, as a public employer "any other person, agency or body, or class of persons, agencies or bodies". Consequently, a non-profit private sector employer which uses government funds to provide a public service could be considered a public employer under the legislation.
- 322.** The complainants allege that the process for negotiating Essential Service Agreements (ESA) between public employers and unions, as provided for in the Act, is seriously biased toward the employer. Under section 7 of the legislation, a public employer and a union

must negotiate an ESA, setting out essential services and the classifications and numbers and names of employees who must work during a strike, at least 90 days prior to the expiration of a collective agreement. However, there is no incentive for the employer to successfully negotiate an ESA with the union. In fact, under section 9, failure to reach an agreement gives the employer the automatic right to serve notice to the union as to the number of classifications and employees it considers essential.

- 323.** Furthermore, in naming which employees from the classifications it considers essential, the employer could designate the names of some or all of the union's local executive, bargaining committee and shop stewards. This gives the Government of Saskatchewan or a public employer the ability to substantially interfere in the way the union conducts itself and represents its members during a strike.
- 324.** Moreover, if at any time after a strike has begun, the public employer determines that more employees in one or more classifications are required to maintain essential services, the employer may serve a further notice on the union setting out the additional number and names of employees who must work during all or any part of the work stoppage. By being able to increase essential service designations during a strike, the employer has the unfettered ability to determine how effective a strike will be at any stage of the job action.
- 325.** The complainants allege that the legislation prohibits unions from challenging the employer's designation of classifications of essential services. Under section 10 of the legislation, the union can appeal to the Saskatchewan Labour Relations Board (LRB) to change the *number* but not the *classifications* of employees deemed essential. In other words, under the Act, unions cannot challenge the employer's designation of classifications of workers who are "essential"; they can only argue at the LRB about whether the numbers in any classification are high. The Board then has 14 days or more to hold a hearing or conduct an investigation on the appeal prior to issuing an order accepting or denying the union's application. The employer or union may further apply to the Board to vary or rescind its original order. If employers know that unions cannot challenge the designation of classifications designated as essential, they are likely to overestimate the number of workers who they require to be at work during a dispute. Even if the Labour Relations Board rules against the employer on a union appeal, the fact remains that those affected workers were prevented from participating in the strike during the time that appeal process took place.
- 326.** Employees designated as providing essential services also face fines of up to 2,000 Canadian Dollars (CAD) and further fines of CAD400 per day for violating the legislation. Unions that impede or prevent any designated essential service employee from complying with the legislation are subject to an initial fine of up to CAD50,000, plus an additional CAD10,000 each day for which the offence continues.
- 327.** The complainants allege that this legislation is not just designed to ensure the continued provision of essential services threatened by strike action, as the Government of Saskatchewan claims, but rather to limit union bargaining power and the impact of strikes generally, as workers cannot engage in free collective bargaining without the ability to effectively withdraw their services if they deem it necessary.

Act to amend the Trade Union Act

- 328.** The complainants allege that the Trade Union Act as amended does not guarantee freedom of association but rather provides workers with less protection against unfair practices and reduces the ability of working people to join unions and engage in collective bargaining. The cumulative effect of the amendments contained in the Act is to weaken the rights of working people in the province of Saskatchewan.

- 329.** Section 3 of the Act eliminates automatic certification when a union has demonstrated to have signed union cards from a majority of workers in a bargaining unit. Instead, regardless of how many workers sign union cards, a secret ballot supervised by the LRB is required before certification can occur. The Act also requires a minimum of 45 per cent cards signed within 90 days before a certification vote can take place; previously 25 per cent of cards signed within six months was sufficient to trigger a secret ballot vote. The complainants allege that the real intent of these increased requirements is to make it more difficult for employees to organize and to increase opportunities for anti-union employers to discourage their employees from joining a union.
- 330.** According to the complainants, the Act also legalizes employer interference in union activities by weakening the rules on unfair labour practices. Section 6 allows employers to communicate to their employees not only facts, as in the previous legislation, but also opinions. The complainants consider that the amendment increases the right of employers to communicate facts and opinions to their employees on any union-related issue at any point outside of prescribed time periods for organizing drives and de-certification drives. It implies the right of an employer to communicate its opinions to an employee or group of employees about: whether they should be trying to get rid of the union; stopping a union organizing drive; refusing to file a grievance or supporting the union filing a grievance; opposing a bargaining position or proposal of the union; voting against a strike or to end a strike; organizing to defeat or elect certain employees to union positions; supporting a raid by another union; or voting against dues increases and assessments. Furthermore, the complainants allege that section 6 could even be interpreted to mean that an employer's communication on union-related issues can in fact be intimidating or coercive without being deemed an unfair labour practice.
- 331.** In their communications dated 25 May, and 8 and 28 September 2009, the complainants provide information on the impact of the new legislation in practice one year after its enactment. The complainants allege that, since the enactment of the new legislation, new and successful unionization drives have come to an historic law. The effects of the new laws combined together with the politically and ideologically motivated dismissal of the LRB's chairperson and vice-chairpersons and their replacement by the Government of Saskatchewan have brought the freedom of unorganized workers to form unions almost to a complete halt.
- 332.** In particular, the complainants indicate that as the Trade Union Act no longer guarantees that the right of employers to communicate with workers cannot be used to interfere with workers exercising their freedom of association rights, employers have begun communicating directly with workers in such a way as to undermine their freedom to associate. The SFL refers to an example when such a communication occurred during a strike at the Potash Corporation of Saskatchewan in July 2008. The employer communicated directly with employees and their families through two letters, dated 18 July and 8 October, posted to employees' homes. Allegedly, the Communications, Energy and Paperworkers' Union (CEP) has also experienced coercive communication from the employer since the enactment of the new legislation. In August 2008, Mercury Graphics, threatened to fire all workers and close the plant if workers went on strike and did not accept the employer's bargaining demands. Workers went on strike on 7 September 2009, but on 15 September 2009 the management locked them out. On 17 September 2009, workers received a letter threatening that, if they did not accept the employer's demands, the plant would be closed. On 19 September 2009, the employer gave notice of permanent closure and workers were dismissed. Furthermore, the ISM Canada management has now changed its industrial practices and communicates directly with individual members of the CEP. In June 2009, two managers of the ISM Canada held a meeting with an employee and attempted to get her to sign her own demotion letter without the consent of the bargaining committee or the union. In this respect, the SFL indicates that, along with other unions, it

met with the Minister of Advanced Employment, Education and Labour in February 2008 and raised its concern at the possible misuse of employers' rights to communicate with workers. While the Ministry acknowledged that the concern might be legitimate, it turned down the SFL's proposal for an amendment clarifying that coercion and interference would remain an unfair labour practice.

- 333.** With the card certification process that workers previously enjoyed, workers could meet secretly with union organizers, have all their questions answered in private and decide to exercise their freedom to associate without the employer knowing. During contested applications, the LRB would take the necessary measures to ensure that supporters of the union could not be identified through questioning. The complainants allege that there is a growing list of examples where this privacy has been lost. For instance, in the construction industry, employers are now notified by the LRB that a unionization drive is taking place; the vote is held at workplaces with employers having access to voters' lists and results; employers' representatives are present at polling stations to monitor who votes. There is nothing secret about this process and workers cannot protect their privacy.
- 334.** The complainants also provide examples of several cases in the construction and film industries, where union cards were signed and submitted to the LRB, a vote was ordered, but did not take place for months. By the time the vote was scheduled, the project was over and workers lost their ability to enjoy a collective agreement and to have employers recognize them as a bargaining unit on any future projects.
- 335.** The complainants consider that the abolition of an automatic card certification in favour of mandatory votes violates freedom of association principles because it destroys the collective bargaining regime that has worked for the benefit of workers and business for decades. The secrecy in organizing is compromised and the delays are resulting in the inability to form a union and conclude enforceable collective agreements. Saskatchewan had the card certification process in place for over 60 years. In reviewing the LRB decisions and reports since 1945, it appears that intimidation, coercion or any other form of unacceptable conduct by unions gathering support through card certification was almost non-existent. Out of almost 200 reported cases dealing with interference and intimidation during the organizing drives more than 180 were about interference by employers. There were only a few cases where substantive allegations of inappropriate conduct were presented against a union.
- 336.** The complainants consider that the Government of Saskatchewan has provided no rationale for changing the certification process, except to say that it would make the workplace more "democratic" if workers had to hold a secret ballot vote. The complainants submit that democracy includes a truly "secret" ballot and the greatest possible protection against the repression that follows from employers who fire or discipline workers who they know are union activists. Even despite the previously existing protection, the case law is filled with examples where employers have used coercion and intimidation to stop union drives illegally by firing union supporters. The SFL points out that even if trade unionists are given their jobs back through a court order, the organizing drive still fails, as workers no longer entertain the question of joining a union, knowing they would be putting their livelihoods on the line. The fear is even greater for vulnerable workers, such as single parents and immigrants. In a survey of Canadian business conducted in the 1990s, 95 per cent of employers surveyed said they would engage in unfair labour practices if it would result in preventing a union certification because the only consequence would be to reinstate the workers and possibly pay damages.
- 337.** The unions further indicate that, since the Public Service Essential Services Act was enacted, collective bargaining has come almost to a complete halt and very few agreements are being concluded in the public sector. The major public sector unions have been without

collective agreements since they expired in May 2008. The situation is the same for the majority of health-care workers who are also without collective agreements since they expired in March 2008.

- 338.** One of the effects of this Act is to delay any progress towards negotiating a new collective agreement. Employers are refusing to table monetary items and negotiate wage increases until unions agree to the number of people designated. Time and resources are being spent on negotiating who might be “essential” during a strike rather than making good faith efforts to negotiate a collective agreement. Trade unions do not have unlimited resources and their right to bargain collectively is therefore under serious threat.
- 339.** Employers also know that, under the new law, they can designate who they want even if there is no agreement on the designations, as the Act only requires that the employer begins to negotiate an essential service agreement and does not require the employer to reach an agreement. If the union does not agree to the employers’ proposal, the employer has the right to unilaterally designate a list of essential services employees. The complainants contend that employers are using their right to designate workers as essential and that in many workplaces they have designated almost all employees, including members of the bargaining committee. In some workplaces, employers have indicated that they would designate even the remaining workers if the strike is effective, even if that would mean designating 100 per cent of employees. In the health sector, designated employees include laundry, cafeteria and library workers, groundskeepers and even people who are temporarily off work (on education or maternity leave). Casual employees, highway workers, casino workers, crown corporation government insurance agents and post-secondary education workers can also be designated pursuant to the law. The complainants allege that, in many cases, employers have designated more employees to work during a strike than the number of employees that would be working during the time there is no strike.
- 340.** The complainants indicate that the Act supersedes all other laws, collective agreements and case precedents. This means that, even if unions had freely negotiated essential services agreements for use during a strike (in Saskatchewan, unions have historically provided emergency services during a labour dispute), these agreements are now overridden by the provincial Government and employers. The SFL alleges that the provincial Government, as the largest employer in the province, has stated in writing to the Saskatchewan Government and General Employees’ Union, that any essential services agreement they reach at the bargaining table can be overridden by their executive regulation-making authority under the Act. In this respect, the complainants indicate that, on 13 July 2009, pursuant to clause 2(c)(ii) of the Public Service Essential Services Act, the Government of Saskatchewan adopted the Public Service Essential Services Regulations prescribing which government services are required in the event of a labour dispute. These Regulations were enacted ten days after the issuance of an arbitration award concerning the essential services designation. The basis for the arbitration award was a Memorandum of Understanding signed by the Government of Saskatchewan and the bargaining unit on 14 February 2007 in which both parties agreed to negotiate into the collective agreement, an essential services agreement. According to the Memorandum, in the event that the parties fail to reach an agreement within 180 days, the issue is referred to final and binding arbitration. By unilaterally enacting the abovementioned Regulations, the Government of Saskatchewan ignored this binding award by implementing its own regulation containing a number of additional designated essential services not included in the arbitrator’s 2 July 2009 award.
- 341.** Furthermore, the complainants indicate that the Act does not provide for a compulsory arbitration mechanism to achieve a collective agreement through a third party. There is no provision in the Act for any means to compensate workers for taking away their right to

strike. The SFL indicates that, in spring 2009, the Saskatchewan Government and General Employees' Union and the Saskatchewan Government, as employer, appeared before an arbitrator to ask him to decide on the extent to which employees designated as "essential" were entitled to compensation for losing their right to strike and to bargain a collective agreement. In a written submission dated 31 March 2009, the Saskatchewan Government opposed this concept and argued that an arbiter has no jurisdiction to award compensation to workers who had lost their right to strike. In addition, the provincial Government argued that, even if the arbitrator had jurisdiction, it would not be appropriate to provide any compensation to "essential" employees.

- 342.** With regard to the provincial Government's suggestion that, in the case of violations of the legislation, unions can bring complaints to the LRB and that employers can be charged with unfair labour practices, the complainants indicate that the LRB no longer enjoys the confidence of trade unions. According to the SFL, the new chairperson of the LRB was illegally appointed and the former chairperson and vice-chairpersons were dismissed so as to replace them with new people who would interpret the laws in a manner consistent with the philosophy of the Saskatchewan Premier's party and to promote business investment. According to the complainants, the new chairperson was a lawyer who advised the new provincial Government's transition team, which recommended the firing of the former board members and was a member of that political party. The SFL and other unions filed a case in Saskatchewan's Court of Queen's Bench alleging that the terminations of the former chairperson and the vice-chairpersons of the LRB and their replacement was unconstitutional, as the process of appointments and the interference of the Saskatchewan Government compromised the judicial independence of the LRB. The Court heard the case and issued a decision in January 2009 determining that the principles of judicial independence applied to the LRB, but not agreeing with the unions with respect to the facts. The matter is now before the Court of Appeal.
- 343.** Finally, the complainants allege that the Trespass to Property Act enacted in July 2009 can potentially make it illegal for anyone to picket on any locations where workers have always lawfully picketed. Under the Act, a citizen can be arrested and fined without a warrant and there is reverse onus to prove his or her innocence.

B. The Government's reply

- 344.** By its communications dated 11 February and 15 October 2009, the Government forwards the observations of the Government of Saskatchewan in this case. In its submission, the latter acknowledges and supports the right to free collective bargaining and indicates that in Saskatchewan, the rights and principles related to the process of free collective bargaining are enshrined in the Trade Union Act. This Act provides the legal framework for collective bargaining, along with a procedure for adjudicating disputes and enforcing rights and obligations. The Act also creates the LRB, an independent, quasi-judicial tribunal with exclusive and binding jurisdiction over the matters assigned to it by the Act. The Board monitors the procedural aspects of the collective bargaining process and hears disputes related to unfair labour practices and grievances arising out of collective bargaining agreements.
- 345.** The Saskatchewan Government considers that the Public Service Essential Services Act and the Trade Union Act continue to facilitate and protect the rights of workers to engage in collective bargaining, balanced with the provincial Government's obligation to protect the health and safety of the public during a workplace dispute and ensure the continued economic growth and prosperity of the province.
- 346.** The provincial Government states that while it did not undertake consultations before introducing the draft legislation, it undertook extensive consultation afterwards. In January

and February 2008, the Ministry of Advanced Education, Employment and Labour sent out 80 letters of invitation for meetings and placed public notices in nearly 100 newspapers across the province. The Minister and officials met with nearly 100 individuals, including representatives from organized labour, over a series of 20 meetings. The Ministry received approximately 82 submissions on Bill 5 (Act Respecting Essential Public Services) and 55 submissions on Bill 6 (Act to amend the Trade Union Act). Approximately 2,480 letters received from individuals in the province expressing views on Bills 5 and 6. As a result of the consultation process, five house amendments to Bill 5 were introduced when the legislature resumed sitting in March 2008.

Public Service Essential Services Act

- 347.** The Government of Saskatchewan notes that, prior to the passing of the Act, Saskatchewan had no essential services legislation. The Act balances the right of workers to strike and the need for essential services and protection of the public. The legislation does not outlaw the right of any worker or union to strike. Rather, it creates a process for the negotiation of essential service agreements. The legislation also provides for recourse to the LRB in the event the parties are unable to conclude an ESA. As examples of the necessity for essential services legislation the Saskatchewan Government cites three public sector strikes in the last 11 years impacting hospital, snowplough, correctional, court and electricity services. While agreeing that this new process has the potential to slow negotiations, the provincial Government notes that, where there is a perceived violation of the Act, an application can be made to the LRB. The Act does supersede the provisions of other laws and collective agreements. This is to ensure that an essential services agreement is reached between the parties that meets the minimum standard established in the Act.
- 348.** According to the Government of Saskatchewan, the definition of essential services in the Act adheres to the principles enunciated by the Committee on Freedom of Association. The legislation provides categories or criteria for determining what must be considered an essential service; these criteria or categories are the basis for public employers and trade unions to negotiate ESAs, including the specific job classifications and number of employees needed to maintain essential services that are required in the event of a work stoppage. Specifically referencing services necessary to prevent serious damage to the environment and destruction of property in the definition is consistent with this concept of essential services delineated by the Committee on Freedom of Association because such events may cause irreparable harm, damage and hardship with direct and indirect impacts on human health and well-being. The definition also includes reference to maintaining the administration of the courts, which is consistent with previous decisions of the Committee on Freedom of Association.
- 349.** The Government of Saskatchewan claims that the definition of “public employer” in the Act is also consistent with the principles set out by the Committee on Freedom of Association. The definition includes the Government of Saskatchewan; Crown corporations; regional health authorities and affiliates; the Saskatchewan Cancer Agency; universities and technical colleges; municipalities; and police boards. These are public entities providing services that are potentially necessary for protection of health and safety and the prevention of serious environmental damage or destruction of property. The Saskatchewan Government further indicates that there is potential for private entities to be included in the definition of “public employer”; but only where the service provided is a public service and meets the definition of an “essential service”. Based on these criteria, private entities that provide a private service cannot be designated as essential under this legislation. The intent of this provision is to address any unionized enterprise where a public service is provided by a private entity, for example emergency medical services or ambulance services.

- 350.** Concerning the authority to prescribe further public employers, in its communication dated 11 February 2009, the Government of Saskatchewan states that public services are provided by a myriad of entities that are supported by public funding and subject to public accountability through legislative and regulatory control. It is not practical or possible to list all such entities directly in legislation, whereas prescribing them in regulation will ensure the list is reflective and current. The Saskatchewan Government adds that Cabinet does not have open-ended discretion and only those employers that provide essential services to the public may be prescribed. In its communication dated 15 October 2009, in answering the question respecting what are “prescribed” essential services, the provincial Government provides the following background information. In 2006–07, the Saskatchewan Government and General Employees Union (SGEU) went on strike for eight weeks. As part of the resolution of the strike the mediator recommended that the SGEU and the Government of Saskatchewan prepare an essential services plan prior to the expiry of the next collective bargaining agreement. In recognition of this process, and to be open and transparent as to the services of the Executive Government that are considered essential, a provision was included in the Public Service Essential Services Act which would require those services deemed essential to be established in regulations. Regulations under clause 2(c)(ii)(B) came into force on 10 July 2009. The Government transmits a copy of these regulations.
- 351.** The Government of Saskatchewan indicates that the Act requires that, within 90 days of the expiry of a collective bargaining agreement, public service employers and trade unions must undertake negotiations to conclude an ESA. The negotiation process begins with the employer providing a list to the trade union of what it considers as essential services. Within 30 days of expiry, or if the collective bargaining agreement has expired, an employer may serve notice on the trade union setting out the classifications, numbers of employees within each classification and names of employees within each classification who must continue to work during a work stoppage. The purpose of this notice is to assist with the negotiations, and this list does not automatically become the ESA. In the event there is a work stoppage or potential work stoppage and no ESA is in place, section 9 requires an employer to serve the trade union with notice setting out the classification, number and names of employees who must continue to work to maintain essential services. An additional notice may be served to increase or decrease the number of employees required to maintain essential services during a work stoppage. A trade union may apply to the LRB if it believes that essential services can be maintained with fewer employees than the number set out in the employer’s notice. The legislation directs the Board to determine the issue within 14 days of receipt of such an application.
- 352.** The Government of Saskatchewan explains that the public employer’s ability to serve a notice is not unfettered. The employer’s list of classes may only include services that are essential services as defined in the legislation. The provincial Government adds that the employer may not refuse to negotiate an ESA and wait to serve a notice pursuant to section 9; as with any collective bargaining negotiation, there is a duty on the parties to bargain in good faith on ESAs, and recourse may be had to the LRB in the event that a party refuses to bargain in good faith.
- 353.** Further, the Saskatchewan Government states that an employer cannot discriminate or interfere with the administration of any labour organization through an ESA. Public service employers must comply with the Trade Union Act, which prohibits unfair labour practices, including interfering, restraining, intimidating, threatening, or coercing an employee in the exercise of any right conferred by the Act.
- 354.** As regards fines and penalties, the Government of Saskatchewan states they may only be imposed after a person has been convicted by a court, thereby ensuring full procedural protections. The maximum fine amounts are in keeping with fine amounts provided for in

the Trade Union Act and the Labour Standards Act. It is a basic principle of sentencing that the most serious fines are imposed only for the most serious offences.

- 355.** With regard to compensatory guaranties available to workers whose right to strike is restricted or prohibited by the Act, the Government of Saskatchewan indicates that section 18 of the Act states that, if there is a work stoppage, essential service employees are required to perform the duties of their employment in accordance with the terms and conditions of the most recent collective bargaining agreement. As a result, those employees working in positions identified as essential are entitled to wages and benefits as established in that collective agreement.

Act to amend the Trade Union Act

- 356.** Concerning the requirement of secret ballot voting by all eligible employees for union certification and de-certification, the Government of Saskatchewan notes that the quorum of votes required for certification remains unchanged at 50 per cent plus one of votes cast. As an integral part of the democratic system, secret ballot voting protects the right of workers to freely exercise their choices. The Saskatchewan Government claims that the 45 per cent support requirement for a proposed bargaining unit is in keeping with the thresholds of other Canadian jurisdictions (Alberta, Manitoba and Ontario have a 40 per cent threshold, and British Columbia has a 45 per cent threshold). It also ensures greater stability for unionized workplaces as it applies to both certification and de-certification drives. Explaining how the new quorum system works in practice, the Government of Saskatchewan provides the following information. The amended certification and rescission process requires the trade union (certification) or union member (rescission) to produce written support of at least 45 per cent of the employees in the potential or existing bargaining unit. If this threshold is reached, the LRB is required to order a vote by secret ballot. Such votes monitored by the Board or its representative. In general, these votes are likely to occur in the workplace or through mail-in ballot. In making application to the LRB, the trade union must ensure that the written support used for its application (certification) to the Board is dated within the 90 days preceding the date of application. This allows for the most recent and current workers in that organization to make their wishes known without involving those whose employment may have ceased. The Government of Saskatchewan further indicates that the intent of the establishment of a secret ballot process was to ensure that workers (seeking unionization) or union members (seeking alternate representation or rescission), can freely express their democratic choice without fear of reprisals, intimidation and coercion by representatives of the union, employer or individuals in the workplace.

- 357.** Concerning employer communication, the Government of Saskatchewan notes that prior to the amendment, the legislation had been interpreted by the LRB to mean that an employer could not communicate in any manner to employees during a certification drive. Section 11(1)(a) of the Act clarifies that an employer can communicate facts and opinions to its employees. The employer remains prohibited from interfering with the exercise by employees of any rights under the Trade Union Act and from any acts of restraint, intimidation, threats or coercion which are considered to be an unfair labour practice. Any such violation may be brought before the LRB. The Saskatchewan Government indicates that, while extensive consultations were conducted on the proposed amendments to the Trade Union Act, after thoughtful consideration of the information gathered, it was determined that amendments were not required. This does not invalidate the process.

- 358.** The Government of Saskatchewan also notes that the Act promotes greater transparency and accountability by the LRB, as it is now required to submit an annual report to the Legislature and directed to render its decisions within six months of the close of a hearing. The amendments also remove a three year limit on collective bargaining agreements. This

change reflects the notion that it is more appropriate for employers and trade unions to negotiate an appropriate length for a collective bargaining agreement rather than impose an arbitrary statutory limit.

- 359.** With regard to the LRB appointments, the provincial Government indicates that the Court of Queen's Bench for Saskatchewan dismissed the SFL's challenge to the appointment of the chairperson and vice-chairpersons of the LRB in a decision dated 14 January 2009. The Court determined that the Government of Saskatchewan clearly had the statutory authority to terminate the appointments of the previous chairperson and vice-chairpersons of the LRB. The Court concluded there was no merit to the SFL's arguments that the new appointments to the LRB impacted the impartiality and independence of the Board. The SFL commenced an appeal of this decision to the Saskatchewan Court of Appeal. As of 29 September 2009, the materials required for the appellants to perfect their appeal have not been filed, and no date has been set for a hearing.

Trespass to Property Act

- 360.** The Government of Saskatchewan indicates that the Trespass to Property Act came into force on 1 July 2009. The legislation designates certain activities as offences, such as entering onto enclosed lands, lands that are posted against entry, refusing to leave lands or premises when requested to do so, or refusing to stop an activity on lands or premises when requested to do so. A peace officer can issue a ticket or potentially arrest an individual acting in breach of the legislation. The legislation does not change property owners' rights to control access to their own land under the existing common law related to trespass. Rather, the purpose of the legislation is to provide peace officers and property owners with an effective enforcement mechanism in circumstances where a trespass occurs. The rights of individuals to engage in otherwise lawful picketing are not affected by the implementation of this Act. Section 3 specifically provides that persons acting under a "right of authority conferred by law" are not committing trespass. Lawful picketing is encompassed under the right to freedom of association, and constitutionally guaranteed pursuant to section 2(b) of Canada's Charter of Rights and Freedoms. Case law continues to develop to define the appropriate balance between the rights of a property owner and the right to picket. Accordingly, it is neither necessary nor desirable to define Charter rights in provincial legislation.

C. The Committee's conclusions

- 361.** *The Committee notes that the present complaint concerns two Acts adopted in Saskatchewan in connection with labour relations, and in particular, the right to strike and collective bargaining in the public sector, namely: the Public Service Essential Services Act (Bill 5) and the Act to Amend the Trade Union Act (Bill 6). Both Acts were proclaimed into law on 14 May 2008.*
- 362.** *The Committee further notes that according to the complainants, these pieces of legislation were adopted without prior consultation with the trade unions concerned. In this regard, the Committee notes that the Saskatchewan Government concedes that it had not undertaken consultations prior to introducing the draft legislation, but rather had extensive consultations afterwards and that there were subsequently five amendments to Bill 5. The Committee considers it useful to refer to the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), Paragraph 1 of which provides that measures should be taken to promote effective consultation and cooperation between public authorities and employers' and workers' organizations without discrimination of any kind against these organizations. In accordance with Paragraph 5 of the Recommendation, such consultation should aim at ensuring that the public authorities seek*

*the views, advice and assistance of these organizations, particularly in the preparation and implementation of laws and regulations affecting their interests. It is important that consultations take place in good faith, confidence and mutual respect, and that the parties have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise. The Government must also ensure that it attaches the necessary importance to agreements reached between workers' and employers' organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1068 and 1071]. The Committee expects that the provincial Government will hold full and specific consultations with the relevant workers' and employers' organizations in the future at the early stage of considering the adoption of any legislation in this regard so as to restore the confidence of the parties in the process and truly permit the attainment of mutually acceptable solutions where possible.*

363. *With regard to the Public Service Essential Services Act, the Committee notes that the complainants allege that this legislation limits union bargaining power and the impact of strikes generally, as workers cannot engage in free collective bargaining without the ability to effectively withdraw their services if they deem it necessary. In particular, the complainants consider that the definition of what constitutes "essential services" is too broad, just as the definition of "public employer". Moreover, according to the complainants, the procedure for designation of essential services to be maintained during a work stoppage and the so affected workers violates the right to strike. The Committee notes the provincial Government's statement to the effect that legislation dealing with essential services was needed to protect the health and safety of the public during a labour dispute and that the definitions of both terms, "essential services" and "public employer", as well as the procedure of establishing essential services are in conformity with the freedom of association principles.*

364. *The Committee notes that according to section 2(c) of the Act, "essential services" are defined as:*

- (i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:

 - (A) danger to life, health or safety;*
 - (B) the destruction or serious deterioration of machinery, equipment or premises;*
 - (C) serious environmental damages; or*
 - (D) disruption of any of the courts of Saskatchewan; and**
- (ii) with respect to services provided by the Government of Saskatchewan, services that:

 - (A) meet the criteria set out in subclause (i); and*
 - (B) are prescribed.**

365. *The Committee further notes the definition of "public employer", provided for in section 2(i), which means:*

- (i) the Government of Saskatchewan;*
- (ii) a Crown corporation ...;*
- (iii) a regional health authority ...;*

- (iv) *an affiliate as defined in The Regional Health Services Act;*
- (v) *the Saskatchewan Cancer Agency ...;*
- (vi) *the University of Regina;*
- (vii) *the University of Saskatchewan;*
- (viii) *the Saskatchewan Institute of Applied Science and Technology;*
- (ix) *a municipality;*
- (x) *a board as defined in The Police Act, 1990;*
- (xi) *any other person, agency or body, or class of persons, agencies or bodies that:*
 - (a) *provides essential service to the public; and*
 - (b) *is prescribed.*

366. *The Committee notes the provincial Government’s explanation that, for the purposes of the Act, private entities may be included in the definition of “public employer” only where the service provided is a public service and meets the definition of “essential services”.*

367. *The Committee further notes the Public Service Essential Services Regulations were enacted on 10 July 2009 pursuant to subsection 2(c)(ii) of the Public Service Essential Services Act which sets out a list of prescribed essential services as follows:*

Ministry (Column 1)	Service/Programme (Column 2)
Advanced Education, Employment and Labour	Occupational Health and Safety
Agriculture	Irrigation Asset Management Unit
Corrections, Public Safety and Policing	Adult Corrections Programme Young Offender Programme Community Training Residences Community Corrections Adult Probation Services Youth Open Custody Facilities Protection and Emergency Services Licensing and Inspections – Boiler and Pressure Vessels Licensing and Inspections – Elevators Policing Services, Licensing of Private Investigators and Security Guards
Energy and Resources	Emergency Response Team
Environment	Northern Air Operations/Fire Management and Forest protection Branch Covert Operations Spill Response Programme – Provincial Hazardous Materials Coordinators
Government Services	Air Ambulance Programme Legislative Power Plant Water/Wastewater Management Services

Ministry (Column 1)	Service/Programme (Column 2)
	Building Access/Security Saskatchewan Hospital Power Plant Valley View Centre Power Plant Activities related to the prevention of destruction or serious deterioration of machinery, equipment or premises in support of the services set out in this table, including the services provided by the Government of Saskatchewan at the facilities, by the organizational units or for the purposes of the programmes set out in this table.
Health	Saskatchewan Disease Control Laboratory Health Emergency Management Branch Health Information Solutions Centre
Highways and Infrastructure	Winter Snow and Ice Control Highway Hotline for Road Information Equipment Maintenance
Information Technology Office	Support for systems related to the services set out in this table, including the services provided by the Government of Saskatchewan at the facilities, by the organizational units or for the purposes of the programmes set out in this table.
Justice and Attorney-General	Court Services Branch Victim Services Branch, Victim/Witness Services Public Prosecutions Fine Collection Branch
Social Services	Child Protection/Foster Care Emergency Social Services Youth in 24-hour facilities Community Living Division – Valley View Centre (laundry, food services, resident care, physical therapy, housekeeping, dental clinic, medical equipment repair, drivers) Community Living Division – Community Resources (Northview Home, Southview Home, Crisis Therapy, Community Intervention, Community Service)
Tourism, Parks, Culture and Sport	Water Systems in Provincial Parks

368. *The Committee notes that the Public Service Essential Services Act requires a public employer and a trade union to negotiate an ESA at least 90 days before the expiry of the collective bargaining agreement (section 6(1)). For the purposes of negotiation, a public employer other than the Government of Saskatchewan shall advise the trade union of those services that it considers essential (section 6(2)). For the purposes of an ESA between the Government of Saskatchewan and a trade union, the prescribed services, i.e. those prescribed in the regulations, are the essential services (section 6(3)). An ESA must include provisions that identify essential services that are to be maintained during the work stoppage and provisions that set out the classification, the number and the names of employees in each classification who must continue to work during the work stoppage to maintain essential services (section 7(1)). If there is a work stoppage or a potential work stoppage but no ESA concluded between the public employer and the trade union, the list of essential services to be maintained, the classification, the number and the names of employees who must continue to work to maintain essential services are notified by the public employer to the trade union (section 9). The trade union concerned may apply to the*

LRB if it disagrees on the number of employees in each classification who must work to maintain essential services, as set out in the notice (section 10).

- 369.** *From the above, the Committee understands that for the purposes of the Act, an “essential service” is not a service where strikes are entirely prohibited, but rather where some kind of minimum services are to be maintained. What constitutes an essential service is to be determined through a negotiation between a public authority and the union concerned, in line with the definition provided for in section 2 of the Act, except where the employer is the Government of Saskatchewan, in which case, essential services are provided for by the relevant regulations, which should also be in line with the definition provided for in section 2. The classification of employees, the number and names of employees are further to be determined through negotiation.*
- 370.** *At the outset, the Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) [see **Digest**, op. cit., para. 576].*
- 371.** *The Committee recalls that a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users’ basic needs are met or that facilities operate safely or without interruptions [see **Digest**, op. cit., para. 607]. The Committee considers that the definition of essential services where a minimum service is to be maintained as provided under section 2 of the Act may satisfy these criteria. With regard to the list contained in the Regulations, the Committee considers that certain services, such as licensing of boiler and pressure vessels, licensing of private investigators and security guards, laundry and drivers in community living division – Valley View Centre should not be unilaterally declared as “essential” where minimum services must be maintained. The Committee notes that allegedly the Regulations were unilaterally enacted by the provincial Government ten days after the issuance of an arbitration award concerning the essential services designation, rendered on the basis of a Memorandum of Understanding signed by the provincial Government and a bargaining unit, which provided for recourse to arbitration in the case of a disagreement over the designation of essential services. The complainants allege that the Regulations contain a longer list of essential services than the list included in the award. It therefore requests that this list be amended in consultation with the social partners and to be kept informed of developments in this respect. It draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
- 372.** *The Committee further recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers’ and workers’ organizations. This not only allows a full and frank exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see **Digest**, op. cit., para. 612]. The Committee considers that a requirement to negotiate an ESA is in conformity with the principle above.*
- 373.** *The Committee notes, however, the complainants’ allegation that under the Act, there is no incentive for the employer to successfully negotiate an ESA with the union as the Act provides for an eventuality of absence of an ESA (section 9) in which case, the employer*

has an automatic right to serve notice to the union as to the classification, the number and the names of employees it considers essential, i.e. unilaterally designate a list of essential services employees. The provincial Government disagrees with this contention stating that an employer may not refuse to negotiate an ESA and wait to serve notice pursuant to section 9 of the Act, as with any collective bargaining, there is a duty imposed on both parties to bargain in good faith. Moreover, recourse may be had to the LRB in the event that a party refuses to bargain in good faith. The Committee notes that according to the complainants, in practice, since the enactment of the Public Service Essential Services Act, the major public sector unions, including in the health-care sector, have been without collective agreements since March–May 2008, because employers would not proceed with collective bargaining without unions agreeing first to the lists of the proposed essential services.

374. *The Committee notes that in the absence of the ESA, essential services, the classification, the number and names of persons who must work during the work stoppage to maintain essential services are determined by the public employer and are notified to the union concerned. If the union disagrees with the number of workers required to work, it can apply to the LRB. It appears, however, that under the terms of section 10 of the Public Service Essential Services Act, neither the determination of what constitutes an essential service, nor the classification of workers and their names can be challenged before the Board, only the number of workers required to work may be reviewed.*

375. *In this regard, the Committee considers that essential services in the strict sense of the term and public services exercising authority in the name of the state, and as worded by section 2(c)(i) (A) and (D) may be subject to the unilateral determination of the Government insofar as they are consistent with the principles elaborated by this Committee with respect to essential services. As regards sections 2(c)(i)(B) and (C) and 2(i), the Committee considers that the determination of the sectors in question, classification, number and names of workers who must provide services should either be the result of a freely negotiated ESA or, where this is not possible, be reviewed by an independent body having the confidence of the parties concerned. The Committee recalls that a definitive ruling on whether the level of minimum services was indispensable or not – made in full knowledge of the facts – can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough knowledge of the structure and functioning of the enterprises and establishments concerned and of the real impact of the strike action [see **Digest**, op. cit., para 614]. The Committee considers that the LRB may serve as such an independent body but requests the Government to ensure that the provincial authorities amend the legislation as it is currently drafted so as to ensure that the Board may examine all the abovementioned aspects relating to the determination of an essential service and may act rapidly in the event of a challenge arising in the midst of a broader labour dispute. In this regard, the Committee expects that the LRB will bear in mind the principle according to which the determination of a minimum service should be clearly limited to the operations which are strictly necessary to meet the concerns set out in section 2(c)(i) and (ii) while ensuring that the scope of the minimum service does not render the strike ineffective and that it will further give due consideration to the concerns raised by the complainant in relation to the designation of trade union officers for required work. Finally, the Committee wishes to recall that it would be highly desirable for actions to be taken wherever convenient so that the negotiations on the definition and organization of the minimum service not be held during a labour dispute so that all parties can examine the matters with the necessary full frankness and objectivity.*

376. *Furthermore, the Committee notes that, according to the complainants, the Government failed to provide access to an independent arbitration mechanism for those public employees who are negatively impacted by essential services legislation. In this respect, the Committee notes the Government's indication that employees engaged in services*

identified as essential are entitled to wages and benefits as established in the relevant collective agreement. The Committee further notes that according to the complainants, in a written submission dated 31 March 2009, the Saskatchewan Government argued that an arbiter has no jurisdiction to award compensation to workers who had lost their right to strike. The Committee recalls that, where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned have confidence and can take part at every stage and in which the awards, once made, are fully and promptly implemented [see *Digest*, op. cit., paras 595 and 596]. The Committee requests the Government to take the necessary measures in order to ensure that such compensatory guarantees are made available to workers whose right to strike may be restricted or prohibited. It requests the Government to keep it informed in this respect.

- 377.** With regard to the Act to Amend the Trade Union Act, the Committee notes that the complainants allege that the new amendments weaken freedom of association and collective bargaining rights in Saskatchewan. In particular, the complainants point out that under the amended Act, automatic certification of the union as the most representative has now been eliminated in cases even where a union has demonstrated to have signed union cards from a majority of workers in a bargaining unit. Instead, regardless of how many workers sign union cards, a secret ballot supervised by the LRB is required before certification can occur. A minimum of 45 per cent cards signed within 90 days before a certification vote can take place is also required (previously 25 per cent of cards signed within six months was sufficient to trigger a secret ballot vote). The provincial Government, on the other hand, considers that secret ballot voting protects the right of workers to freely exercise their choices and is an integral part of the democratic system. It does not consider that the 45 per cent support requirement for beginning the process of a certification election is too high as the quorum of votes required for certification remains unchanged at 50 per cent plus one of votes cast.
- 378.** The Committee recalls that a system of collective bargaining with exclusive rights for the most representative trade union is compatible with the principle of freedom of association. Furthermore, the determination to ascertain or verify the representative character of trade unions can best be ensured when strong guarantees of secrecy and impartiality are offered. Thus, verification of the representative character of a union should a priori be carried out by an independent and impartial body [see *Digest*, op. cit., para. 351]. While representativity may be determined by the number of members or by a secret ballot, the Committee considers that a secret ballot supervised by the LRB may be consistent with the principles of freedom of association as long as it has the confidence of the parties.
- 379.** However, the Committee is of the opinion 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. In this regard, the Committee observes that section 8 of the Trade Union Act, currently as in the past, provides that “a majority of the employees eligible to vote shall constitute a quorum and, if a majority of those eligible to vote actually votes, the majority of those voting shall determine the trade union that represents the majority of employees for the purpose of bargaining collectively”. The change as to the support for a union necessary in order to conduct a requisite secret ballot actually means that the union needs to demonstrate more support in order for a ballot to be conducted than it will need ultimately to be certified on the basis of the vote (i.e., 50 per cent of 50 per

cent (the necessary quorum) is only 25 per cent of all employees). The Committee requests the Government to ensure that the provincial authorities take the necessary measures to amend the Trade Union Act so as to lower the 45 per cent support requirement for beginning the process of a certification election. It requests the Government to keep it informed in this respect.

380. *With regard to the complainants' allegation that by allowing employers to communicate to their employees not only facts but also opinions, the legislation legalizes employers' interference in trade union activities, the Committee notes that the Government of Saskatchewan stresses that while the amendment clarifies that an employer can communicate facts and opinions to its employees, he or she remains prohibited from interfering with the exercise by employees of any rights under the Trade Union Act and from any acts of restraint, intimidation, threats or coercion; any such violation may be brought before the LRB, which has interpreted the legislation as to mean that an employer cannot communicate in any manner to employees during a certification drive.*

381. *The Committee notes in fact that section 11(1)(a) of the Act provides for the following:*

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

- (a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinion to its employees.*

The list of what constitutes an unfair labour practice by an employer further includes: discrimination or interference with the formation or administration of any labour organization, financial contribution or other support (subsection b); failure or refusal to bargain collectively with elected or appointed representatives (subsection c); discrimination in regard to hiring or tenure of employment or any term or conditions thereof or use of coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity of a trade union (subsection e); interference in the selection of a trade union as a representative for the purpose of bargaining collectively (subsection g); collective bargaining with a company dominated organization (subsection k); interrogation of employees as to whether or not they have exercised any right conferred by the Act (subsection o); etc. The Committee further notes section 15 of the Act which provides for penalties imposed on individuals and corporations committing unfair labour practices ranging between CAD50 and CAD1,000 in the case of an individual and CAD1,000 and CAD10,000 in the case of a corporation. In these circumstances, the Committee firmly expects that the application of the latest amendments in conjunction with the protection still awarded under section 11(1)(a) of the Trade Union Act will ensure effective protection of the freedom of association rights of workers and their organizations.

382. *The Committee notes the LRB is the body responsible for adjudicating disputes arising under the Trade Union Act and the Public Service Essential Services Act. The Committee further notes that the complainants questioned its independence following the recent nomination of a new chairperson and vice-chairpersons. This case is now pending before the judicial authorities. The Committee recalls that in mediation and arbitration proceedings it is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned [see **Digest**, op. cit., para. 598]. Without taking a position as to the independence of the LRB as currently constituted, the Committee draws the provincial*

Government's attention to the need to ensure that the members of bodies entrusted to administer labour relations legislation enjoy the confidence of all parties and are impartial and are seen to be impartial. The Committee therefore requests the Government to encourage the provincial authorities to endeavour, in consultation with the social partners, to find an appropriate means of ensuring that the LRB enjoys the confidence of all the parties concerned.

- 383.** *The Committee notes the complainants' allegations with regard to the new Trespass to Property Act and the provincial Government's reply thereon. The Committee trusts that the right of individuals to engage in lawful picketing will not be affected by this Act.*

The Committee's recommendations

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

- (a) The Committee expects that the Government will ensure that the provincial authorities hold full and specific consultations with the relevant workers' and employers' organizations in the future at an early stage of considering the process of adoption of any legislation in the field of labour law so as to restore the confidence of the parties and truly permit the attainment of mutually acceptable solutions where possible.*
- (b) The Committee requests the Government to ensure that the provincial authorities take the necessary measures, in consultation with the social partners, to amend the Public Service Essential Services Act so as to ensure that the LRB may examine all aspects relating to the determination of an essential service, in particular, the determination of the sectors in question, classification, number and names of workers who must provide services and act rapidly in the event of a challenge arising in the midst of a broader labour dispute. The Committee further requests that the Public Service Essential Services Regulations, which sets out a list of prescribed essential services, be amended in consultation with the social partners. It requests the Government to provide information on the measures taken or envisaged in this respect.*
- (c) The Committee requests the Government to ensure that the provincial authorities take the necessary measures so that compensatory guarantees are made available to workers whose right to strike may be restricted or prohibited and to keep it informed in this respect.*
- (d) The Committee requests the Government to ensure that the provincial authorities take the necessary measures to amend the Trade Union Act so as to lower the requirement, set at 45 per cent, for the minimum number of employees expressing support for a trade union in order to begin the process of a certification election. It requests the Government to keep it informed in this respect.*
- (e) The Committee requests the Government to encourage the provincial authorities to endeavour, in consultation with the social partners, to find an appropriate means of ensuring that the LRB enjoys the confidence of all the parties concerned.*

- (f) *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2626

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

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

- **the Confederation of Copper Workers (CTC) and**
- **the Single Central Organization of Workers (CUT)**

Allegations: The complainants allege restrictions on the right to strike, repression and arrests of demonstrators by the forces of law and order, refusing union leaders access to their workplaces, anti-union dismissals and failure to comply with the Framework Agreement that had put an end to the dispute

- 385.** The Committee examined this case at its meeting in May–June 2009 and submitted an interim report to the Governing Body [see 354th Report, paras 305–363, approved by the Governing Body at its 305th Session (June 2009)].
- 386.** Subsequently, the Government sent new observations in a communication dated 4 November 2009.
- 387.** Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 388.** During its last examination of the case, in May–June 2009, the Committee made the following recommendations on the outstanding issues [see 354th Report, para. 363]:
- (a) The Committee requests the Government to provide information on any proceedings against the two workers arrested during the search, sanctioned by judicial order, of the home of a member of the union, Mr Juan Carlos Miranda Zamora and Mr Francisco Javier Díaz Herrera (who, according to the complainants, were not charged) and whether other union leaders or members have been arrested and charged in relation to the strike carried out by the CTC between 25 June and 1 August 2007, and, if so, that it provide information on the charges brought and the current status of any legal proceedings. Furthermore, the Committee requests the Government to provide information on whether any legal action has been brought in respect of these violent events.
 - (b) The Committee requests the Government to ensure compliance with the agreement concluded on 1 August 2007 between CODELCO, the subcontracting enterprises and the CTC. The Committee requests the Government to keep it informed in this regard.

- (c) The Committee requests the Government to provide information on the specific facts of the cases and the reasons given for beginning proceedings to remove the union leaders Mr Emilio Zárate Otárola, Mr Patricio Rocco Bucarey, Mr Luis Garrido Garrido, Mr Patricio Alejandro García Barahona, Mr Ramón Segundo Salazar Vergara, Ms Viviana Andrea Abud Flores and Mr Juan Francisco González Bugueño, and on the outcome of these proceedings.
- (d) The Committee requests the Government to take all necessary measures to promote an agreement between CODELCO and the CTC so that the CTC's representatives can gain access to workplaces to pursue their union activities, without compromising the functioning of the enterprise. Furthermore, the Committee requests the Government to investigate the allegation that the union leaders mentioned in the complaint have been refused work and to keep it informed in this regard.

B. The Government's reply

- 389.** In its communication of 4 November 2009, the Government states that it transmitted the recommendations of the Committee on Freedom of Association in this case to the enterprise CODELCO. CODELCO has provided information in response.
- 390.** With regard to the status of legal proceedings against Mr Juan Carlos Miranda and Mr Francisco Javier Díaz Herrera, who are alleged to have been detained during a house search sanctioned by judicial order, the Government states that it has no information on the matter, but undertakes to provide any information relating to the case as soon as possible. Notwithstanding the above, Mr Francisco Javier Díaz Herrera is currently working for a contracting enterprise that provides services to CODELCO's Andean division.
- 391.** Concerning the Framework Agreement signed on 1 August 2007, the Government states that it has been fully implemented and that there are no administrative or legal complaints relating to it. The Government points out that CODELCO is not the employer of those who work for the contracting enterprises that provide it with labour or services, using their own staff, on their own account, at their own risk, and under their authority (in accordance with the provisions of section 183-A of the Labour Code). Nevertheless, with the aim of ensuring that the commitments assumed by the contracting enterprises in the aforementioned Framework Agreement are fulfilled in due time, CODELCO has resolved to include the fulfilment of the commitments acquired by contracting enterprises as employers, as a requirement in its tendering procedures and documents, as reflected in the Agreement. The Government adds that the contracting enterprises that provide services to CODELCO have fulfilled and are fulfilling the terms agreed with their respective workers.
- 392.** With respect to the removal proceedings referred to in the Committee's report, the Government states that it has no information on the current status of the proceedings. The Government undertakes to report on this matter as soon as possible once it has any relevant information.
- 393.** With regard to access by union leaders to the premises of CODELCO, and a possible agreement between it and the Confederation of Copper Workers (CTC) to enable trade union representatives from contracting enterprises to enter workplaces in order to pursue their trade union activities, without compromising the functioning of the enterprise, the Government reiterates that union leaders from the CTC are not employed by CODELCO but by contracting enterprises that have provided or could provide services to the main enterprise under tendering procedures that may arise. This being the case, if one or more leaders usually work for their contracting employer at sites or workplaces belonging to CODELCO, and if they possess the duly authorized passes or cards, they may enter the industrial areas in which they perform contractual services.

394. The Government adds that, notwithstanding the above, under Chilean labour legislation, trade union leaders from a contracting enterprise may enter sites or workplaces operating within dependencies of a main enterprise, only if members of their unions work there and if the purpose of visiting a particular site or workplace is to carry out trade union activities, always in strict compliance with the safety standards and subject to the prior coordination required for the workplaces in question. On this last point, the Government underlines that there is no free access to industrial areas and other dependencies of CODELCO's divisions, inasmuch as the access is regulated by the legal imperative to safeguard the health and physical integrity of persons and the safety of installations, as prescribed by section 184(1) of the Labour Code: "The employer shall be obliged to take the measures necessary to effectively protect the life and health of workers, maintaining appropriate health and safety conditions in workplaces, as well as the equipment necessary to prevent occupational accidents and diseases."

C. The Committee's conclusions

395. *The Committee takes note of the information provided by the Government in relation to the recommendations that it made in its previous examination of the case at its meeting in May–June 2009. The Committee notes the Government's statement that according to the enterprise the Framework Agreement signed on 1 August 2007, has been fully implemented and that there are no administrative or legal complaints relating to it; the Government also points out that CODELCO is not the employer of those who work for the contracting enterprises that provide it with labour or services, using their own staff, on their own account, at their own risk, and under their own authority (in accordance with the provisions of section 183-A of the Labour Code); nevertheless, with the aim of ensuring that the commitments assumed by the contracting enterprises in the aforementioned Framework Agreement are fulfilled in due time, CODELCO has resolved to include the fulfilment of the commitments acquired by contracting enterprises as employers, as a requirement in its tendering procedures and documents, as reflected in the Agreement. According to the Government, the contracting enterprises that provide services to CODELCO have fulfilled and are fulfilling the terms agreed with their respective workers.*

396. *With respect to the status of legal proceedings against Mr Juan Carlos Miranda and Mr Francisco Javier Díaz Herrera, who are alleged to have been detained during a search, sanctioned by judicial order, of the home of a union member, and with respect to developments in and the results of the removal proceedings against union the leaders Mr Emilio Zárate Otárola, Mr Patricio Rocco Bucarey, Mr Luis Garrido Garrido, Mr Patricio Alejandro García Barahona, Mr Ramón Segundo Salazar Vergara, Ms Viviana Andrea Abud Flores and Mr Juan Francisco González Bugueño, the Committee takes note of the Government's statement that it has no information on the issues and undertakes to provide any information as soon as possible. The Committee therefore reiterates its previous recommendations and expects to receive the information requested without delay. The Committee reiterates its request to the Government to report on whether legal proceedings have been initiated in respect of the violent acts during a lawful strike between 25 June and 1 August 2007, mentioned in the complaint.*

397. *As regards the recommendation concerning access by union leaders to workplaces at the enterprise and a possible agreement between the latter and the CTC to enable trade union representatives from contracting enterprises to enter workplaces in order to pursue their trade union activities, without compromising the functioning of the enterprise, the Committee notes that the Government underlines the fact that union leaders from the CTC are not employed by the enterprise but by contracting enterprises that have provided or could provide services to the main enterprise under tendering procedures that may arise. Therefore, if one or more leaders usually work for their contracting employer at sites or workplaces belonging to the enterprise, and if they possess the duly authorized passes or*

cards, they may enter the industrial areas in which they perform contractual services. The Committee also notes that, according to the Government, under Chilean labour legislation, trade union leaders from a contracting enterprise may enter sites or workplaces operating within dependencies of a main enterprise, only if members of their unions work there and if the purpose of visiting a particular site or workplace is to carry out trade union activities, always in strict compliance with the safety standards and subject to the prior coordination required for the workplaces in question. In particular, in the case of a mining enterprise, there is no free access, as it must be guaranteed that the health of persons and the safety of installations are safeguarded, as laid down in the Labour Code. Taking full account of these specific circumstances relating to the enterprise, the Committee reiterates its previous recommendation concerning the promotion of an agreement between the enterprise and the CTC trade union on access by CTC representatives to workplaces or nearby areas, taking full due account of the safety of workers and the mine and in accordance with national law.

- 398.** *Lastly, the Committee had requested the Government to investigate the allegation that the union leaders mentioned in the complaint had been refused work, and to keep it informed in this regard. On this matter, the Committee notes that the Government has only reported that trade union member Mr Francisco Javier Díaz Herrera is currently employed by a contracting enterprise that provides services to the Andean division of CODELCO. The Committee requests the Government to indicate without delay whether the other union leaders mentioned in the complaint have been refused work.*

The Committee's recommendations

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

- (a) *The Committee expects to receive without delay information from the Government on the status of legal proceedings against those arrested during the search, sanctioned by judicial order, of the home of a union member, Mr Juan Carlos Miranda Zamora and Mr Francisco Javier Díaz Herrera (who, according to the complainants, have not been charged), and as to whether other union leaders or members have been arrested and charged in relation to the strike carried out by the CTC between 25 June and 1 August 2007, and, if so, requests that the Government provide information on the charges brought against them and the current status of the legal proceedings. Furthermore, the Committee requests the Government to supply information as to whether any legal action has been initiated in respect of the violent acts.*
- (b) *The Committee expects to receive without delay information from the Government on the specific facts of the cases and the reasons given for beginning proceedings to remove the union leaders Mr Emilio Zárate Otárola, Mr Patricio Rocco Bucarey, Mr Luis Garrido Garrido, Mr Patricio Alejandro García Barahona, Mr Ramón Segundo Salazar Vergara, Ms Viviana Andrea Abud Flores and Mr Juan Francisco González Bugueño, as well as on the outcome of these proceedings.*
- (c) *The Committee requests the Government to take the necessary measures to promote an agreement between CODELCO and the CTC so that the CTC's representatives can gain access to workplaces or nearby areas to pursue their union activities, without compromising the functioning of the*

enterprise and with full due consideration for the safety of workers and of the mine and in accordance with national law. Furthermore, noting that the Government has only reported that Mr Francisco Javier Díaz Herrera is employed by a contracting enterprise that provides services to CODELCO, the Committee requests the Government to indicate without delay whether the other union leaders mentioned in the complaint have been refused work.

CASE No. 2692

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

Complaint against the Government of Chile presented by

- **the National Association of Public Servants (ANEF) and**
- **the Association of Public Employees of the Metropolitan South Regional Public Prosecution Service (AFFRMS)**

Allegations: The complaints allege obstacles to the establishment of the AFFRMS, acts of anti-union discrimination and other anti-union practices

- 400.** The present complaint is contained in a communication dated 20 October 2008 of the National Association of Public Servants (ANEF) and the Association of Public Employees of the Metropolitan South Regional Public Prosecution Service (AFFRMS).
- 401.** The Government sent its observations in a communication dated 29 October 2009.
- 402.** Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 403.** In their communication dated 20 October 2008, the ANEF and the AFFRMS of the Department of the Public Prosecutor allege various acts by the authorities intended to impede and raise obstacles to the lawful establishment of the complainant association. More specifically, they indicate that on 26 March 2007, at the time when the association was being established, the substitute head of human resources of the Southern Regional Public Prosecution Service arrived and questioned those present concerning their participation in the meeting and claimed that their presence in the meeting was allegedly unlawful, thereby giving rise to fears by various public employees, who left the meeting room. There can be no doubt that an attempt was being made to prevent the achievement of the statutory quorum for the establishment of the association. Moreover, hours after its establishment, the press adviser and the Chief of Cabinet of the Regional Public Prosecution Service, adopting a threatening tone, warned various employees in all units to withdraw their participation from the association as it was unlawful.
- 404.** The complainant organizations add that, when the officers of the association, in accordance with Act No. 19296 respecting associations of public sector employees, provided

notification of the establishment of the association and its elected officers, they received a demand from the Chief of the Cabinet of the Regional Public Prosecution Service, Leandro Fontalba, to immediately hand over a list of the names of the employees who were members of the association. It was clear that the purpose of doing so was to review the list, seek some pretext to invalidate it and obtain precise information on the members so as to continue exerting direct pressure on them and subsequently succeed in obtaining the resignation of a sufficient number of members to prevent the normal operation of the association.

- 405.** The complainant organizations allege that, not being able to prevent the establishment of the association, nor invalidate it, the Regional Public Prosecutor held a meeting for the first and only time with the leaders, with much of the meeting being taken up by issuing warnings that no trade union action of any type would be accepted because in his opinion it could be considered unlawful in an institution such as the Public Prosecution Service, and emphasizing in particular that the association should not be affiliated to any higher level trade union organization, such as the ANEF or the CUT, as such affiliation was invalid. At the same time, the recently elected Secretary, César Soto, began to suffer harassment from the chief prosecutor of his unit, being subject to interrogation concerning the activities of the association, with accusations of disloyalty on the grounds that part of his working time was taken up with union matters, and he was placed in such a difficult situation in respect of his colleagues that César Soto was forced to give up union office.
- 406.** As from the month of July 2007, the leaders of the association requested in writing on at least three occasions in different months to be received by and to meet the Regional Public Prosecutor and the management of the Public Prosecution Service, with a view to addressing various matters affecting the members and drawing attention to administrative and managerial irregularities. However, the Regional Public Prosecutor and the management never even replied to these requests.
- 407.** Furthermore, when the officers of the association, in an interview with an electronic newspaper, expressed opposition to the administrative staff of the institution being required to discharge functions that were not their responsibility and were of the exclusive competence of the prosecutors, the Regional Public Prosecutor ordered the management and chief prosecutors, in an electronic mail, to take action to induce subordinates who were members of the association to leave it. This action resulted in 23 individuals, under pressure from the management, resigning their membership, making use of the same model letter especially drawn up for this purpose. In this respect, an internal inquiry ordered by the National Public Prosecution Service found that this intervention had occurred in the cases of at least 16 of the persons who resigned membership. In the inquiry, the managers reporting to the Regional Public Prosecutor admitted in their evidence that they had taken action against the association, forcing public employees not to join it and exerting pressure on those who were already members to resign, in compliance with explicit instructions from the Regional Public Prosecutor. In a meeting with the chief of human resources of the Regional Public Prosecution Service and the substitute regional executive director, complaints were made concerning the action in relation to the resignations of membership and the persistence of threats towards workers to resign their membership. This complaint gave rise to a response by the head of human resources, Ms Sylvia Arancibia, who thrust a copy of the Code of Good Labour Practices in the face of the President of the AFFRMS and proceeded to order its leaders to leave her office.
- 408.** The complainants add that the Regional Public Prosecutor initiated an investigation against the President of the AFFRMS, Ms Paulina Ruiz, for possible trade union leave that she may have taken on 16 September 2007 without notifying the management. The investigation commenced in the month of October 2007 and found that she had not committed any violation due to the fact that on 16 September, which in Chile is the eve of

the celebrations of national independence, all of the staff and all of the management, with the exception of a sole employee and Ms Paulina Ruiz herself, were engaged as from the morning and for the whole of the day in a recreational activity held at a location distant from the centre of Santiago. As a result, it was impossible for her to notify anyone in authority of the trade union leave that she took on that day to meet the lawyer who was advising her in the context of the investigation initiated against her. The investigation suffered from a series of procedural flaws and had no legal basis, and accordingly was exclusively motivated by the sustained campaign of labour harassment and anti-union practices which continued to exist in the service. This was clear as, in the first place, the Regional Public Prosecutor proposed as a punishment that the President of the Association should be suspended and removed from her duties for six months, clearly indicating the spirit of persecution towards which this administrative action was directed. Notwithstanding the above, and in view of the inconsistencies in the charges and the arguments raised against the President, the investigation was subsequently closed with only a verbal warning being given.

- 409.** In December 2007, four employees were dismissed from the service under the terms of section 81(k), which allows dismissal on the grounds of the necessities of the institution, without indicating the reasons upon which it is based, as well as four individuals whose evaluation in that year had been negative. Of the eight employees dismissed, seven were members of the AFFRMS, all of whom had had excellent qualifications for all of the previous years, an unblemished record and even, in some cases, had recently been rewarded with promotions for their outstanding service. None of the appeals overturned their dismissals, despite the fact that in many of these cases there was evidence of arbitrary and unjustified dismissal.
- 410.** Moreover, in the months of January and June 2008, a series of investigations were initiated against members of the association with a view to identifying administrative and managerial irregularities (those that had been indicated in the interview with the electronic newspaper, referred to above). Nevertheless, these facts were investigated with a view to punishing employees who were members of the AFFRMS and clearing the regional authorities of responsibility for such faults.
- 411.** In February 2008, a new investigation was initiated concerning the loss of cash held in custody. The investigation was initiated against three employees who were members of the association. Despite the rules of the Department of the Public Prosecutor providing that the sole person responsible for handling monies in a public prosecution service is the administrator, nobody took action against the latter and instead the investigation was directed exclusively against subordinate employees, all connected with the association. In this case, the investigation consistently failed to demonstrate the direct responsibility of the accused employees, Mr Luis Pérez Jeldres, Mr Matías Anguita and Ms Chriss Caballero Jiménez, against whom charges were levelled for minor administrative errors, which incredibly resulted in their dismissal. At the same time, in parallel with the administrative investigation for the disappearance of the cash, a criminal investigation was carried out by the Public Prosecutor Marcos Emmilfork Konow, which did not lead to any charges being brought against any employees.
- 412.** Two days prior to the application of the penalty of the dismissal of Luis Pérez and Matías Anguita, the employee Chriss Caballero, implicated in the same investigation, gave up membership of the AFFRMS and in so doing managed to obtain a reduction in her charges and only received a verbal warning, which allowed her to keep her job. The other two members, one of whom was an active and outstanding member of the association, despite being in the same situation in relation to the procedure, did not have such luck and were dismissed and had to leave the institution.

- 413.** According to the complainants, in June 2008, César Soto Torres, former Secretary of the AFFRMS, was publicly linked with a dangerous band of Chilean drug traffickers, known as *Los Cavieres*. This situation occurred as, when the lawyer defending the drug traffickers was detained, indications came out in public of the interception of a telephone conversation in which the lawyer for the defence and the employee Soto Torres, in the context of the activities of the Public Prosecution Service, were talking about a case of drug trafficking. Even though this recording was the basic reason for the investigation against the employee, it was not possible to reach agreement for him or his lawyer to ever hear it. Similarly, the penalty of dismissal is outside the limits of the comprehensible, particularly as the charges relating to drug trafficking and theft of important information were found to be totally false, firstly by the Regional Public Prosecution Service, and secondly by the National Public Prosecution Service.
- 414.** The complainant organizations also allege that the Public Prosecutor, Mr Peña, was the subject of an investigation on the grounds of various charges made against him and that the investigation also included the complaint by the complainant organizations of anti-union practices. The outcome of the investigation in this respect indicated that “the practice existed, and was systematic and continuous over time, with the objective of invalidating the quorum of the group with a view to its disappearance”. The final conclusion was that “this constitutes a serious unfair practice against the public employees”. Nevertheless, it is a grave fact that the Regional Public Prosecutor, when preparing his evidence, obtained a full copy of the investigation and was aware of the statements made by the prosecutors and public employees. Accordingly, the person responsible for the anti-union practice gained access to the statements and names of the persons who gave evidence against him. In contrast, the officers of the AFFRMS, in their capacity as the complainants, were denied the legitimate right to this information. Moreover, the penalty of written censure of the Regional Public Prosecutor, which was the absolute minimum, did not envisage in any of its points any type of compensation for the damage that the latter had caused to the association and to the employees in the service. Indeed, the Public Prosecutor, Mr Peña, when he had received the report of the investigation and was aware of the names and statements made by those who gave evidence against him, removed from his post the Chief Public Prosecutor for Violent and Sex Crimes, Mr Pedro Orthusteguy Hinrichsen, and demoted him to a post of lower responsibility as a deputy prosecutor, placing him in a small office that was cold, without light, windows or ventilation, with a reduction in salary and the resulting moral prejudice to a brilliant public servant renowned for his outstanding work in the Department of the Public Prosecutor, which even included replacing the Regional Public Prosecutor himself. Once again, no external institution or authority was able to review the outcome or demand any explanation from the Regional Public Prosecutor, and it accordingly constituted, in the opinion of the association, a brutal act of revenge and reprisal.
- 415.** In the cases described above, the workers who were investigated or dismissed do not have access to any external appeal bodies, as the General Inspectorate of the Republic and the Directorate of Labour are not competent in the matter. The penalties imposed on the employees of the Southern Regional Public Prosecution Service by the Regional Public Prosecutor and the National Public Prosecutor were therefore arbitrary.
- 416.** On 1 August 2008, Act No. 20285 respecting access to public information was published in the *Diario Oficial*. The purpose of the Act is to provide for the principle of transparency in the public service and the right of access to information held by the bodies of the State Administration, with the establishment of machinery for appeals, *amparo* (protection of constitutional rights) and the determination of exemptions. However, as the Department of the Public Prosecutor is not part of the state administration, section 9 contains special provisions in this respect which can be summarized as follows: “It is reaffirmed that the Department of the Public Prosecutor is governed by the principle of transparency in the

exercise of public functions, in accordance with the mandate set forth in article 8(2) of the Political Constitution of the Republic.”

- 417.** In the discharge of public functions, the Department of the Public Prosecutor shall permit and facilitate knowledge of procedures, content and the decisions adopted, in strict compliance with the principle of transparency, in accordance with sections 3 and 4 of Act No. 20285.
- 418.** Claims against the Department of the Public Prosecutor on the grounds of denial of information or the failure to provide a response within the statutory period (20 working days from the receipt of the request) shall be referred to the respective Court of Appeal.
- 419.** Under the terms of this new legal provision, the AFFRMS once again requested a copy of the investigation into anti-union practices from the National Public Prosecutor, Mr Sabas Chauán, on 19 August 2008, with a view to exercising the legitimate right to take legal action in the courts. It also intended to identify other facts denounced in the investigation which might constitute criminal acts. Nevertheless, this request was refused.

B. The Government’s reply

- 420.** In its communication dated 29 October 2009, the Government indicates, in relation to the alleged acts of the substitute chief of human resources of the Metropolitan South Public Prosecution Service consisting of the notification of an alleged illegality in the establishment of an association of public employees, that it should be noted that the present circumstance, in the hypothesis indicated in the complaint, is only based on the opinion of one employee in relation to the action of his subordinates. Such an opinion in itself cannot constitute any obstacle to the establishment by the employees of an association in accordance with the law. Chilean legislation and particularly Chapter II of Act No. 19296 respecting associations of public sector employees, determines the procedure to be followed for the establishment of such associations. This procedure does not under any circumstances include the intervention of the management in the process of such associations obtaining legal recognition.
- 421.** Furthermore, although it is clear that any comment or action intended to obstruct the lawful establishment of a group of workers is essentially reproachable, in the present case this cannot constitute an anti-union practice, as the management of the services concerned, in their capacity as such, are governed by Chilean public law, under the terms of which their action is confined to the fields attributed by the law and, consequently, any act in violation of this is null and void in public law, in accordance with article 7, first and final paragraphs, of the Political Constitution of the Republic of Chile. In the present case, there is no document or act of any type which records any action taken by a public official in the discharge of her or his functions which, in view of the context, can be held to be an objective obstacle to the establishment of an association of public employees. It may therefore be inferred from the text of the complaint that the association is validly constituted in accordance with the provisions of Act No. 19296 respecting associations of public sector employees.
- 422.** With regard to the alleged demand by the management to be provided with a list of the names of the employees who were members of the association, the Government indicates that Act No. 19296 does not establish requirements in relation to the provision of the list of members, for which reason they had no right to request the list and, accordingly, the employees are not bound by any legal provision to provide such a list. With reference to the establishment of an association of public employees for the purpose of representation in respect of the authority, section 12 of Act No. 19296 clearly establishes a time period for the officers of the association to notify in writing the highest official of the respective

division of the constituent assembly and the list of officers on the working day following the holding of the assembly.

- 423.** Notwithstanding the above, for the purposes of collecting the trade union dues of the organization, sections 44, 45 and 46 establish the procedure under which associations may require the higher management of the respective service to collect the dues from the staff, which clearly involves making a formal request undoubtedly accompanied by the provision of a list of members. The legislation accordingly envisages the provision of this information for the purposes of the organization, based on the collective will of its members, requesting the deduction of trade union dues from the remuneration to be paid to members. In this manner, knowledge of the list of members by the management does not constitute an act intended to repress the freedom of association of public employees, in respect of the establishment of associations of both public employees and of workers governed by common labour law.
- 424.** Making trade union records public is strictly in accordance with the case law of the Committee on Freedom of Association of the ILO Governing Body, which provides that “National legislation providing that an organization must deposit its rules is compatible with Article 2 of Convention No. 87 if it is merely a formality to ensure that those rules are made public”. In the same way, making the list of members public should not be a problem under the legislation that is in force, which prohibits arbitrary acts that prejudice the right to organize, as in the present case. In the last resort, making the list of members public is a matter for the organization, and not for the authorities or third parties. The provisions on transparency that have recently been adopted in Chile have been interpreted as being in compliance with freedom of association, with the effect that when the Directorate of Labour, the body which receives a copy of the trade union records of the organizations, is requested for such information, it does not provide the lists of members of organizations without the prior authorization of the respective organization.
- 425.** Similarly, nor does the request for the statutes of the association so that they can be reviewed by the management represent an act of trade union repression, as there is no way in which the management can claim the right to ascertain the validity and lawful nature of its statutes. Indeed, in conformity with the special and general rules set forth in Chilean legislation, this function is discharged solely by the respective national labour inspectorate, which may make comments on the act establishing an association of public employees, which can be appealed to special labour tribunals (section 10(3) and (4) of Act No. 19296 and section 222 of the national Labour Code).
- 426.** Accordingly, a reading of the text of the complaint does not reveal any anti-union action by the management of the National Department of the Public Prosecutor, nor by the Government in the final instance since, although it is clear that the alleged action by the highest authorities of the institution concerned do not constitute a particularly favourable background, it is not possible to conclude that in practice there were any anti-union activities since, in circumstances such as those described, both the law governing the subject and the statutes of the authorities involved in the complaint prevent any effective intervention by them with a view to raising obstacles to the establishment of an association of public employees.
- 427.** With regard to the opinion expressed by the Public Prosecutor of the Metropolitan South Region concerning the inappropriate nature of an association of public employees and the affiliation of the AFFRMS with any higher level organization, such as the ANEF or the CUT, the Government points out, as indicated in the text of the complaint, that these actions are confined to mere opinions issued outside the functions of the official who expressed them. Nevertheless, they reflect a situation of tension within the public prosecution service between the management and the employees who are members of the

association; although this does not permit the inference that they constitute anti-union practices. This is the case because an opinion of this type cannot give rise to an act by a managerial official in accordance with the law, or resulting in such acts being able to bring an end to an association of this type.

- 428.** Chilean legislation, and in particular section 1 of Act No. 18834 establishing the Administrative Statute and governing relations between the State and its employees, provides that: “The relations between the State and the personnel of Ministries, Offices of Intendants and Governorates and the centralized and decentralized public services established in compliance with the administrative function, shall be governed by the provisions of the present Administrative Statute ...”. Such personnel, from whom the staff of the National Department of the Public Prosecutor are not excluded, are covered by fully developed regulations respecting the right to establish associations. Accordingly, section 1 of Act No. 19296 provides that “The right shall be recognized of workers in the State Administration, including municipal authorities and the National Congress, to establish, without previous authorization, associations of public employees of their own choosing, subject only to compliance with the law and the statutes of the latter”. Moreover, section 84(1) of the Basic Act establishing the Department of the Public Prosecutor provides that: “The provisions respecting associations of public employees of the State Administration set forth in Act No. 19296 shall be applicable to public employees in the Department of the Public Prosecutor.” Similarly, and as indicated above, the lawful nature of the act establishing an association in accordance with Act No. 19296, or in relation to the capacity of certain public employees to establish associations, shall only be determined by the service indicated by law, which is no other than the respective Labour Inspectorate.
- 429.** Act No. 19296, in Chapter VII, *Respecting federations and confederations or groupings*, also guarantees the right to associate with higher level organizations, in strict compliance with Article 2 of Convention No. 87 of the ILO, which provides that: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”
- 430.** The establishment of associations of public employees in general, and in the Department of the Public Prosecutor in particular, is permitted without restriction under Chilean law. This is in accordance with Act No. 18834 establishing the Administrative Statute, Act No. 19296 respecting associations of public employees, and particularly the Basic Act establishing the Department of the Public Prosecutor, which explicitly authorizes the organization of its employees.
- 431.** With regard to the circumstances indicated in the complaint in relation to the refusal by the Regional Public Prosecutor and the management of the public prosecution service to receive the leaders with a view to addressing various matters, the use by the management of a model letter used for the resignation of the membership of 20 per cent of the members of the association, it should be noted that the Government of Chile has not seen the evidence referred to in the complaint and attached to it (electronic mail from the Public Prosecutor to service managers to obtain the resignation of members of the association, letters asking to be received by the authority, the model letter sent to public employees for the resignation of their membership) and it is not therefore possible to comment on their value as evidence in support of the allegations made in the complaint.
- 432.** Notwithstanding the above, the Government recognizes that such acts constitute a hostile situation between the management and the employees who are members of the association, which is reproachable and punishable from all points of view if substantiated. However, it is not admissible to attribute responsibility to the Public Prosecution Service or the Government in the final instance on the grounds of failure to comply with any legal

provision, as the National Public Prosecutor of the Department of the Public Prosecutor, as the hierarchical superior and in accordance with the provisions and principles governing Chilean administrative law, ordered an internal investigation with a view to ascertaining the truth of the situation and imposing, where appropriate, the corresponding administrative sanctions and, most importantly, upholding in the presence of any element of doubt the right of the employees in this service to organize. Accordingly, and in accordance with Article 5, paragraph 2, of ILO Convention No. 151, which provides that: “Public employees’ organisations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration”, the administrative investigation was initiated into the Regional Public Prosecutor, Mr Alejandro Peña Ceballos, to which reference is made below.

- 433.** With reference to the administrative procedure initiated against the leader of the association, Ms Paulina Ruiz Tapia, with regard to whom the text of the complaint refers to a series of procedural flaws, without any legal basis, which are alleged to be exclusively the outcome of a sustained campaign of labour harassment and anti-union practices, the Government observes that the above claim does not describe the flaws in the administrative procedure, and that it also lacks sufficient grounds to establish a causal relationship between the instigation of an administrative procedure and an anti-union practice by the management of the Department of the Public Prosecutor. The instigation of an administrative investigation into facts that were finally established does not provide grounds, without an exhaustive investigation into the legitimacy of the procedure, for inferring the existence of an anti-union practice and, accordingly, the claims relating to these circumstances, as they fall short of this requirement, can be no more than subjective assessments.
- 434.** Additionally, there is no evidence that the Regional Public Prosecutor proposed as a punishment that the President of the AFFRMS, Ms Paulina Ruiz Tapia, should be suspended and removed from her functions for a period of six months. In practice, and according to the report prepared by the National Public Prosecutor of the Department of the Public Prosecutor, the penalty applied in the first instance by the Regional Public Prosecutor was a fine equivalent to 25 per cent of her remuneration for a period of one month (decision IA No. 15/2007, of 13 November 2007). The employee appealed against this decision and the Regional Public Prosecutor upheld the appeal in part, applying the disciplinary sanction of a private warning.
- 435.** Moreover, the dates do not coincide for the beginning of the investigation referred to in the complaint and the content of the report by the highest authority of the Department of the Public Prosecutor. The complaint indicates that the investigation was commenced in the month of October 2007 into events that occurred on 16 September 2007, while the report establishes that the investigation started on 29 July 2007. In view of the above, and taking into account the information provided concerning the employee in relation to the administrative procedures, which is the only information available to the Public Prosecution Service, it may be concluded that the reason for the administrative procedure against the leader of the association referred to above is not the one indicated in the complaint, for which reason the latter is imprecise on this point.
- 436.** Accordingly, the report prepared in this respect by the National Public Prosecutor of the Department of the Public Prosecutor, in accordance with the information contained therein, indicates as follows (additional information):

Matter under investigation: by decision IA No. 13/2007, of 29 July 2009, FRMS, an administrative investigation was ordered to clarify the report by the Chief Public Prosecutor of the Specialized Public Prosecution Service for Theft and Hearings concerning the early withdrawal without authorization from the support shift of hearings to supervise detentions

and the use of a radio taxi coupon, also without due authorization, by the employee Ms Paulina Ruiz Tapia.

Penalty imposed by the Regional Public Prosecutor: fine equivalent to 25 per cent of her remuneration for a period of one month (decision IA No. 15/2007, of 13 November 2007, FRMS).

Appeal lodged: the employee under investigation appealed for the review of the case. By decision IA No. 307/2007, of 28 December 2007, the appeal was set aside and the decision of the Regional Public Prosecutor was confirmed which applied to the employee the disciplinary measure of a private warning.

- 437.** With regard to the departure from the Department of the Public Prosecutor of four employees under the terms of section 81(k) of Act No. 19640, as well as four individuals whose evaluation that year was unsatisfactory, of whom seven were members of the association, it may be noted that the gist of the information provided by the Public Prosecution Service in the document referred to above, that the employment contracts were terminated on the grounds indicated in section 81(k) of Act No. 19640, that is “Necessities of the National or Regional Public Prosecution Service, as appropriate, which shall be determined by the National Public Prosecutor once a year, having previously notified the General Council, such as those resulting from the annual budget allocation for personnel, rationalization or modernization and changes in the nature of the functions which make the termination of one or more employees necessary”. From the above, it is clear that the workers affected by the decision of the National Public Prosecutor were only separated from the institution under the terms of section 81(k), and not by virtue of section 81(f), which refers to dismissal for inadequate performance, as there is no report indicating that they were terminated under these circumstances. This is important, as the situation indicated in section 81(k) gives entitlement to the payment of compensation for years of service, which is not the case when termination is decided on grounds of inadequate performance.
- 438.** Similarly, section 83 of the above Act provides that “The procedure for the termination of the contract of employment of employees, any resulting appeals and the compensation arising there from, shall be governed, where there is no provision in the present Act, by the standards set forth in the Labour Code”. Accordingly, the national legislation envisages the situation in which workers in the Department of the Public Prosecutor are affected by possible anti-union practices involving the termination of their contract of employment, thereby allowing them to assert their rights before a neutral tribunal, namely the labour tribunal determined by the law. Therefore, in accordance with the rules established by the labour legislation which favours workers in terms of the burden of proof, it is the defendant who has to demonstrate to the court that the grounds invoked are justified.
- 439.** In view of the above, it is not possible to conclude in the circumstances indicated that there was any violation by the Government or of the legislation in force governing the principles of freedom of association, as the respective managers only acted under the terms of section 81(k) of Act No. 19640, which is a matter that, if it is not justified or if there are differences of views concerning its application, would lie within the competence of the courts of law, and particularly the labour courts which, under the principle of procedural initiative governing the new Chilean labour procedures, may call upon any person involved with a view to clarifying the impugned facts. This is in conformity with the ILO Termination of Employment Convention, 1982 (No. 158), which provides that “A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator”.
- 440.** With regard to the grounds invoked, that is the requirements of the institution, there is no flaw, particularly as Convention No. 158, referred to above, provides that “The

employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”.

- 441.** With regard to the instigation of an investigation concerning the employees Mr Luis Pérez Jeldres, Mr Matías Anguita Carrión and Ms Chriss Caballero Jiménez, the elements indicated above are reaffirmed and it is observed that there do not appear to be authenticated violations of freedom of association and, if any are substantiated, there exist in Chile guarantees to protect this right since, as explained above, in the event of the termination of the contract of employment of public employees, where the matter is not covered by Act No. 19640, as in the present case, an appeal may be made to the respective Labour Tribunal so that, if the claims are upheld, the internal legislation in respect of freedom of association is applied, as well as the content of Conventions Nos 97 and 151 of the ILO. Furthermore, with regard to the administrative procedures undertaken by the Department of the Public Prosecutor, it is not possible to comment on their legitimacy, nor are there justified grounds to identify flaws in their lawful application. The grounds indicated by the Department of the Public Prosecutor in relation to this situation are as follows:

Matter investigated: by decision IA No. 02/2008, of 13 March 2008, FRMS, an administrative investigation was ordered to clarify the facts relating to the existence of missing monies, and in exchange of surplus monies in relation to those held by the Regional Public Prosecution Service with regard to the Cooper building, in which all the local prosecution services are located, excluding that of Puente Alto, as indicated in the report accounting for the monies held, issued on 12 March 2008, and all the facts brought to light by the investigation, which may give rise to administrative liability. Inconsistencies are also reported between the physical count and the control undertaken by the custodian and deficiencies in compliance with the provisions set out in the regulations respecting the holding of monies seized by the Department of the Public Prosecutor.

Penalty applied by the Regional Public Prosecutor: dismissal of the employees Anguita Carrión and Pérez Jeldres and private warning to the employee Caballero Jiménez. Decision IA No. 08/2008, of 9 July 2008.

Appeal lodged: the employees Anguita Carrión and Pérez Jeldres sought the setting aside of the administrative procedure in addition to the subsidiary claims made in an appeal for review. By decision IA No. 13/2008, of 22 July 2008, the Regional Public Prosecutor dismissed the appeal for the administrative procedure to be set aside and referred the administrative investigation to the National Public Prosecutor for the purposes of the examination of the appeal.

Decision of the National Public Prosecutor: by decision FN/MP No. 1701/2008, of 4 August 2008, the appeal is set aside and decision FR is confirmed imposing upon the employees Pérez Jeldres and Anguita Carrión the disciplinary measure of dismissal.

- 442.** With reference to the same point and in relation to the parallel conduct of a criminal investigation on the same matter, which did not find any of the parties guilty, it should be noted that Chilean legislation, and specifically the regulations respecting the administrative liability of employees of the Department of the Public Prosecutor, envisages situations such as those described and provides in regulation 7 that:

An administrative penalty is independent of civil or criminal liability, and accordingly the related measures or decisions, such as provisional shelving, the use of discretionary powers, the conditional suspension of the procedure, agreements for compensation, conviction, the staying of proceedings or judicial acquittal, do not exclude the possibility of imposing a disciplinary measure on the employee for the same acts.

Notwithstanding the above, if the penalty of dismissal is applied as an exclusive consequence of acts of a criminal nature which in the criminal proceedings result in acquittal or are definitively set aside on the grounds that the acts denounced or investigated do not

constitute a crime, or if they do constitute a crime, where the innocence of the public employee concerned is clearly established, the latter shall be reinstated in the institution in the functions performed on the date of the dismissal, or another post of similar seniority, where possible, with the maintenance of all rights and other statutory and social benefits, as if the employee had remained in the post.

In cases where the charges are definitively set aside or of acquittal, the reopening of the administrative investigation may be requested, within three months following the date on which the respective judicial ruling becomes final, and if acquittal is also pronounced in such investigation, reinstatement shall be ordered under the terms indicated above.

443. It may be concluded from the text reproduced above that the provisions on this matter protect employees affected by circumstances such as those described, making it impossible to deny the right of the person concerned to overturn a decision set out in an administrative procedure where a court has ruled differently.

444. With regard to the matter covered by the complaint, with reference to the former Secretary of the AFFRMS, Mr César Torres, the arguments set out above are reiterated. In addition, the information provided by the National Department of the Public Prosecutor in the report indicated above is reproduced below:

Matter investigated: by decision IA No. 07/2008, of 30 June 2008, FRMS, an administrative investigation was ordered to clarify the indication provided by the Chief Public Prosecutor of the Specialized Anti-Narcotic Public Prosecution Service, in ordinary official letter No. 6970/2008, reporting a link between the employee referred to and the lawyer Hernando Ariel Marín Cáceres, as determined in investigation RUC No. 0700500869-1 and the information provided by the employee referred to above to the same lawyer, as reported in investigation RUC No. 0700500869-1.

Penalty applied by the Regional Public Prosecutor: by decision IA No. 15/2008, of 2 September 2008, the Regional Public Prosecutor decides upon the administrative investigation, accepting the proposal made by the investigator, and determines to impose upon the employee Soto Torres the disciplinary measure of dismissal.

Remedy applied: Appeal.

Notification by the National Public Prosecutor: by decision FN/MP No. 2118/2008, of 23 September 2008, the appeal is set aside and decision FR is confirmed which imposed upon the employee César Soto Torres the disciplinary measure of dismissal.

445. With reference to the alleged anti-union practices by the Metropolitan South Public Prosecutor, Mr Alejandro Peña Ceballos, the fact that he received the full copy of the administrative procedure against him and that the complainant employees did not have access to it, and the minor nature of the penalty imposed on the Public Prosecutor, the following comments may be made: with reference to the report of the Department of the Public Prosecutor on the matter, and with the objective of protecting the workers members of the association from any interference which might affect their right to organize, an administrative investigation was ordered to clarify the facts in relation to the various accusations made against the Public Prosecutor, which established the existence of anti-union practices by the latter. Accordingly, by virtue of the logic required to confirm a fact, it is difficult to conclude that the National Department of the Public Prosecutor, as an institution, could have engaged in anti-union practices, as it was this same institution which, through an administrative procedure, ascertained these facts and penalized the person responsible, as indicated by the information reproduced below:

Matter under investigation: by decision FN/MP No. 819/2008, an administrative investigation was ordered to clarify the administrative liability of the Southern Regional Public Prosecutor in relation to the acts denounced by the deputy public prosecutor, Ms Ana Quintana Olgún, consisting of ill-treatment at work. By decision FN/MP No. 838/2008, of 11 April 2008, an extension of the administrative investigation was ordered, also with a view

to clarifying the administrative liability that may rest with the Southern Regional Public Prosecutor with reference to alleged anti-union practices denounced by the officers of the Association of Public Employees of the Metropolitan South Regional Public Prosecution Service. Finally, by decision FN/MP No. 866/2008, of 16 April 2008, the investigation was once again ordered to be extended to determine the veracity of the facts denounced, as well as to determine the administrative liability which may rest with each of the employees and/or prosecutors of the Department of the Public Prosecutor.

Penalty applied: by decision FN/MP No. 1300/2008, of 13 June 2008, the National Public Prosecutor imposed the penalty of written censure on Mr Peña Ceballos.

Appeal lodged: the Southern Regional Public Prosecutor lodged a submission in which he requested that a series of considerations be taken into account in relation to the investigation referred to above and formally renounced an appeal for review as envisaged in regulation 46 of the regulations respecting the administrative liability of public prosecutors and employees of the Department of the Public Prosecutor, which is taken into account in decision FN/MP No. 1337/2008, of 20 June 2008.

- 446.** With reference to the point raised in the complaint concerning the access by the Regional Public Prosecutor to supporting information in circumstances in which the employees concerned did not have such access, it is not possible to comment on the matter as the allegation is not supported or accompanied by evidence on the basis of which comments may be made on the truth of the circumstances described with a view to supporting the allegations contained in the complaint.
- 447.** Clearly the Political Constitution of the Republic of Chile provides in article 8 that “The exercise of public functions shall require those involved to observe strictly the principle of probity in all their acts. The acts and decisions of State bodies shall be public, as are their reasons and the procedures used. However, only a law of qualified quorum may determine that the former or the latter shall be reserved or confidential, where their being made public might affect due compliance by such bodies with the rights of individuals, the security of the nation or the national interest.”
- 448.** Section 8(3) of the Basic Act establishing the Department of the Public Prosecutor is derived from this constitutional precept and provides that. “The administrative acts of the Department of the Public Prosecutor and the documents supporting them or directly or fundamentally supplementing them shall be public. However, the delivery of documents or supporting information upon request may be denied for the following reasons: the reservation or confidentiality set forth in law or regulations; where making them public would impede or prejudice the due discharge of the functions of the body; the presumed opposition of third parties that are referred to or affected by the information contained in the requested documents; where divulging or handing over the requested documents or supporting information would substantially affect the rights or interests of third persons, as determined, with an indication of the reasons, by the respective Regional Public Prosecutor or, as appropriate, the National Public Prosecutor; and where making them public would prejudice the security of the nation or the national interest.”
- 449.** Similarly, Act No. 20285, of 25 August 2008, respecting transparency in the public service and access to information held by the state administration sets out in Title IV, *On the right of access to information held by the bodies of the State Administration*, the “Principle of Freedom of Information”, under the terms of which “(...) every person shall have the right of access to the information that is held by the bodies of the State Administration, with the sole exceptions and limitations being established by qualified quorum laws”. The above Act, with a view to guaranteeing the procedural principle of double instance and the avoidance of discretionary decisions by the administration, provides in transitional section 9(3) for the possibility to appeal against a decision to deny access to information to the respective Court of Appeal in the following terms: “Once the statutory period for the provision of the requested information has expired or the request has been denied on any of

the grounds authorized by the law, the applicant may appeal to the respective Court of Appeal, in accordance with the provisions of sections 28, 29 and 30 of the Act respecting transparency in the public service and access to information held by the state administration. In its ruling, the court may indicate the requirement to initiate a disciplinary procedure to determine whether any employee or authority has committed any of the violations of Title VI of the Act respecting transparency in the public service and access to information held by the state administration, which shall be conducted in accordance with the respective basic laws. The penalties that may be imposed for breaches of the standards set forth in the Act respecting transparency in the public service and access to information held by the state administration shall be those established in the above Act.”

- 450.** With reference to the proportional nature of the penalty imposed on the Regional Public Prosecutor referred to above, and the claim that it is weak in relation to the fault that he is reported to have been committed, we believe that it cannot jeopardize the freedom of association of the employees of the Department of the Public Prosecutor. In practice, the instigation of an administrative procedure which ends up with the imposition of a penalty on the Public Prosecutor amounts in effect to a criticism of his conduct.
- 451.** Finally, and in light of all of the above, it should be noted that, based on a reading of the text of the complaint, two aspects may be identified in respect of which the Government in the final instance is held responsible for anti-union practices, namely its responsibility for the actions of the Regional Public Prosecutor in relation to repressing the legitimate right to organize of his subordinate employees and the absence of guarantees in substantive and supplementary law.
- 452.** With reference to the first point, it should be indicated that, with a view to repressing any anti-union action by the Metropolitan South Regional Public Prosecutor, as indicated above, an investigation was conducted with a view to determining the existence of anti-union practices. The investigation ascertained the existence of such practices and, accordingly, the person responsible was penalized. From the description provided above, there is no evidence to support the conclusion that there was any flaw which might affect the outcome of the investigation or the proportional nature of the penalty imposed, in accordance with the standards and principles which regulate and govern administrative procedures in Chile. Accordingly, as indicated in the report prepared by the National Department of the Public Prosecutor, “with regard to the provision respecting administrative investigations, the present Department of the Public Prosecutor gave full effect to the provisions governing the matter, as set out in both the Basic Act establishing the Department of the Public Prosecutor, No. 19640, sections 46 et seq., and in the regulations respecting the administrative liability of public prosecutors and employees of the Department of the Public Prosecutor, applying the administrative penalties that were appropriate in law and in accordance with the merits of the proceedings”.
- 453.** With reference to the second point, and in accordance with the import of these observations, Chilean legislation, in compliance with its obligation to ensure the means of guaranteeing the exercise of the right to organize of public employees, sets forth adequate protection of trade union freedoms and those entitled to them. As can be seen, Act No. 19296 respecting associations of public sector employees, accordingly allows the personnel of the Department of the Public Prosecutor to associate to organize, as well as the affiliation of legally established associations with other higher level associations. This is also set out in the same terms in the Basic Act establishing the Department of the Public Prosecutor. With reference to the protection of these rights in cases in which they are violated or challenged, as has been seen in the present case, administrative procedures were set in motion in relation to all of the situations described, guaranteed by the principle of double instance and hierarchical remedies, with a view to ascertaining the existence of

the alleged violations of the principle of freedom of association in the National Department of the Public Prosecutor. In order to prevent the most serious consequences of anti-union practices, including dismissal, Chilean legislation has provided in law for the referral of such acts to the courts of law, and the Labour Code contains provisions regulating the dismissal of workers.

- 454.** We accordingly believe that full effect has been given to the constitutional provisions, laws and regulations in relation to ILO Convention No. 87, Articles 2, 3, 5, 7 and 11, as well as ILO Convention No. 151, Articles 2, 3, 4 and 5.
- 455.** Notwithstanding the above, and in consideration of the content of the complaint, the Government recognizes the existence of possible deficiencies in the Department of the Public Prosecutor in relation to the development and utilization of machinery within the institution for the negotiation of terms and conditions of employment and the participation of its employees in the determination of such conditions (Convention No. 151, Article 7), for which reason the present situation is noted and an undertaking is made to inform the ILO of any action intended to change this situation.
- 456.** With reference to the indications contained in the text of the complaint relating to the legal framework of the Department of the Public Prosecutor, the Government notes the observations made and undertakes to keep the Committee informed of the measures that are adopted in this respect in future.
- 457.** Firstly, with regard to making public the administrative acts of the Department of the Public Prosecutor, article 19(3)(5) of the Political Constitution of the Republic provides that “Any ruling by a body which exercises jurisdiction shall be based on a legally conducted prior process. It shall be the responsibility of the legislator to ensure in all cases the guarantees of a rational and just procedure and investigation.”
- 458.** With reference to transparency in this context, the Political Constitution of the Republic, in article 8, sets forth the principle of making administrative acts public. In terms of legislation, Act No. 20285 respecting transparency of the public service and access to information held by the State Administration, of 25 August 2008, sets out in Title IV the “Right of access to information held by the bodies of the State Administration” and the “Principle of Freedom of Information”. Section 9, transitional subsection 3, of Act No. 20285, referred to above, establishes the procedural principle of double instance, providing for the referral of cases of the denial of access to information to the respective Court of Appeal.
- 459.** With reference to the dismissal of workers under section 81(k) and (f) of Act No. 19640, the workers concerned can refer these matters to the labour tribunals, in accordance with the provisions of section 86 of the above Act. This implies that the settlement of such matters will be in accordance with the respective general rules and by a neutral tribunal, in virtue of the constitutional principle of due process.

C. The Committee’s conclusions

- 460.** *The Committee observes that in the present complaint the complainant organization alleges in the first place acts by the authorities of the Metropolitan South Regional Public Prosecution Service to impede and raise obstacles to the establishment of the AFFRMS (expression of opinions on the illegality of establishing the association, inciting members to resign their membership and warning that the association could not affiliate with higher level organizations, such as the ANEF or the CUT).*

- 461.** *The Committee notes the Government's indications that: (1) the legislation provides with total clarity for the right to organize of the public employees of the Department of the Public Prosecutor and that of their associations to affiliate with higher level organizations; (2) the complainant association was validly constituted; (3) in the hypothesis that the authorities expressed opinions or issued warnings, as indicated in the complaint, they would be reproachable, although in any event the law holds as null and void any act that is not confined to the attributions established by the law for such officials and authorities, and those concerned are entitled, in accordance with the law, to take legal action to safeguard the exercise of their right to organize; and (4) the complaint does not however provide any document or evidence demonstrating any action by a public official in the discharge of her or his functions which, in view of the context, may be held to constitute an objective obstacle to the establishment of an association of public employees. Furthermore, the Committee notes the Government's indication that the complainant organizations have not provided proof of such acts, but that it recognizes that the Regional Public Prosecutor was subsequently penalized for other types of anti-union practices. Under these conditions, as the complainant association has been established, the Committee will not pursue its examination of these allegations.*
- 462.** *With reference to the alleged demand by the management of the Department of the Public Prosecutor for the lists of members of the complainant organization, the Committee notes the Government's statement that the determination of the representative nature of the association and the deduction of trade union dues from the payroll require the provision of this list, and that the Directorate of Labour does not provide lists of members of associations without previous authorization by the organization concerned.*
- 463.** *In respect of the alleged demand by the management of the Public Prosecution Service for the statutes of the association, the Committee notes the Government's indication that under Chilean legislation only the national labour inspectorate may make comments on the act establishing an association of public employees, which may be referred as appropriate to judicial oversight.*
- 464.** *With regard to the alleged refusal of the authorities of the Regional Public Prosecution Service to engage in dialogue and to receive the leaders of the complainant association to address various problems and the aggressive attitude of the chief of human resources of the Public Prosecution Service, thrusting a copy of the Code of Good Labour Practices in the face of the President of the complainant association (an attitude to which the Government has not responded), the Committee notes the recognition by the Government of possible deficiencies in the Department of the Public Prosecutor concerning collective bargaining of terms and conditions of employment, and the indication that it will inform the ILO of any action envisaged to change this situation. The Committee awaits this information and expects that measures will be taken to promote dialogue and collective bargaining between the parties, as well measures to restore mutual respect between the parties.*
- 465.** *As to the alleged use by the management of public prosecution services of a model letter for members of the complainant association to resign their membership, the Committee notes the Government's statement that: (1) it does not have the evidence referred to in the complaint (electronic mail from the Regional Public Prosecutor to service managers to obtain the resignation of members, the model letters sent to employees for the resignation of their membership, the letters from the officers of the association requesting meetings); (2) these would constitute reproachable and punishable situations; (3) the National Public Prosecutor of the Department of the Public Prosecutor initiated an investigation into the Regional Public Prosecutor; (4) the investigation found anti-union practices by this Public Prosecutor and applied the penalty of written censure; (5) it cannot comment on whether or not the complainant employees had access to the same supporting information as the*

Public Prosecutor who was penalized as the complainant associations which claim that the employees did not have the same supporting information have not provided evidence in this respect; (6) the legislation allows for judicial appeals against decisions to deny access to supporting information or information that directly or essentially supplements it, except in specific cases; and (7) the penalty imposed on the Public Prosecutor may appear weak to the complainant organizations, but it represents a criticism of his conduct and was applied in accordance with the merits of the procedure.

- 466.** *The Committee deplores the anti-union conduct of the Regional Public Prosecutor as ascertained and penalized by the competent authority and requests the Government to ensure the exercise without hindrance of trade union rights in this public prosecution service and the application of sufficiently dissuasive sanctions to prevent this type of conduct.*
- 467.** *With reference to the allegations relating to the leader of the association, Ms Paulina Ruiz Tapia (the opening of an administrative investigation with various procedural flaws, which resulted in a verbal warning in relation to trade union leave that she had taken on 16 September 2007 without notifying the management – according to the allegations, due to the material impossibility of doing so, as all the personnel were engaged in a recreational activity), the Committee notes the Government’s statements according to which: (1) the initiation of an administrative investigation into facts that were finally established in relation to the leader of the association, Ms Paulina Ruiz Tapia, does not provide grounds for inferring the existence of an anti-union practice; (2) the complainant association does not describe the alleged procedural flaws; and (3) there is no evidence of the proposal, as maintained by the complainants, of a penalty of suspension for six months; in practice, the employee appealed against the decision to impose a fine of 25 per cent of her remuneration for a month and the Regional Public Prosecutor upheld the appeal in part, applying a disciplinary sanction of a private warning; furthermore, the investigation did not begin in October 2007 into events that occurred on 16 September 2007, as claimed by the complainants, but commenced on 29 July 2007, meaning that the reason for the administrative procedure is not the one indicated in the complaint, but the early withdrawal without authorization from the support shift of hearings to supervise detentions and the use of a radio taxi coupon without due authorization by the employee concerned. Under these conditions, the Committee will not pursue the examination of this allegation.*
- 468.** *In respect of the alleged dismissal of seven members of the complainant association (four on the grounds of the necessities of the Public Prosecution Service and three due to an unsatisfactory evaluation), the Government indicates that they were not dismissed for unsatisfactory service, but in the context of the legislation respecting “necessities of the National or Regional Public Prosecution Service which shall be determined by the National Public Prosecutor once a year, having previously notified the General Council”, which gives entitlement to the payment of compensation for years of service. The Committee notes the Government’s statement that those concerned may appeal to the judicial authorities if they consider that the termination of their contracts of employment constituted anti-union practices. With reference to the investigation into the employees Mr Luis Pérez Jeldres, Mr Matías Anguita Carrión and Ms Chriss Caballero Jiménez, the Government also indicates that they can take action in the courts in the event of the violation of freedom of association, and that the investigation relates to monies missing from those held by the Regional Public Prosecution Service in March 2008, the inconsistencies between the physical count and the control undertaken by the custodian and deficiencies in compliance with the regulations respecting the holding of monies seized by the Department of the Public Prosecutor. In these circumstances, the Government adds that the Regional Public Prosecutor applied the penalty of the dismissal of the employees Matías Anguita Carrión and Luis Pérez Jeldres (this penalty was*

confirmed on appeal to the National Public Prosecutor) and issued a private warning to the employee Ms Chriss Caballero Jiménez. The claim by the complainant organizations that there was a parallel criminal investigation into the matter, which did not lead to any charges being brought, is not contradictory as, in accordance with the legislation “An administrative penalty is independent of civil or criminal liability”, although in the event of a verdict of acquittal, the reopening of the administrative investigation may be requested within three months, and if acquittal is pronounced, reinstatement shall be ordered.

- 469.** *Taking into account the Government’s explanations, the Committee requests the complainant organizations to indicate whether the seven employees referred to above who were dismissed and the employees Anguita Carrión and Pérez Jeldres (dismissed) and Ms Caballero Jiménez (private warning) have taken action in the courts on the grounds of anti-union practices.*
- 470.** *With regard to the allegation respecting Mr César Torres, former Secretary of the complainant association, the Committee notes that the Government has provided information from the National Department of the Public Prosecutor, according to which, following the administrative investigation, Mr César Torres was penalized by the disciplinary measure of dismissal, which was confirmed on appeal (the penalty is related to a link between the latter employee and a lawyer questioned by the Specialized Anti-Narcotics Public Prosecution Service). The Committee observes that, according to the complainants, the latter employee was not able to have access during the procedure to the recording of the intercepted telephone conversation attributed to him, and that the charges relating to drug trafficking and the theft of important information were found to be totally false by the Regional Public Prosecution Service and, secondly, by the National Public Prosecution Service. The Committee requests the complainant organizations to provide the text of the administrative decisions and of any criminal rulings concerning this former leader of the association so that it can review all of the facts.*
- 471.** *Finally, the Committee requests the Government to transmit any decisions adopted in relation to the procedures instituted by the Public Prosecutor, Mr Pedro Orthusteguy Hinrichsen, on the grounds of his alleged demotion to the level of deputy prosecutor for giving evidence in the procedure relating to anti-union practices by the Regional Public Prosecutor.*

The Committee’s recommendations

- 472.** *In the light of its foregoing conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) The Committee notes the efforts undertaken by the Government to progress with the resolution of the pending issues.*
 - (b) The Committee expects that the Government, as it has indicated, will provide information on the action taken to promote dialogue and collective bargaining between the Regional Public Prosecutor and the complainant association. The Committee also requests the Government to take measures to restore mutual respect between the parties.*
 - (c) The Committee deplores the anti-union conduct of the Regional Public Prosecutor as ascertained and penalized by the competent authority and requests the Government to ensure the exercise without hindrance of trade*

union rights in this public prosecution service and the application of sufficiently dissuasive sanctions so as to prevent this type of conduct.

- (d) *The Committee requests the complainant organizations to indicate whether the seven members referred to who were dismissed and the employees Mr Anguila Carrión and Mr Pérez Jeldres (dismissed) and Ms Caballero Jiménez (private warning) have taken action in the courts against these measures on the grounds of anti-union practices.*
- (e) *The Committee requests the complainant organizations to provide the text of the administrative decisions and of any criminal rulings concerning the former trade union leader, Mr César Torres, so that it can review all of the facts.*
- (f) *Finally, the Committee requests the Government to transmit any administrative or judicial decisions adopted in relation to the procedures instituted by the Public Prosecutor, Mr Pedro Orthusteguy Hinrichsen, for anti-union practices, on the grounds of his alleged demotion to the level of deputy prosecutor for giving evidence in the procedure relating to anti-union practices by the Regional Public Prosecutor.*

CASE NO. 1787

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

Complaints against the Government of Colombia presented by

- **the International Trade Union Confederation (ITUC)**
- **the Latin American Central of Workers (CLAT)**
- **the World Federation of Trade Unions (WFTU)**
- **the Single Confederation of Workers of Colombia (CUT)**
- **the General Confederation of Labour (CGT)**
- **the Confederation of Workers of Colombia (CTC)**
- **the Trade Union Association of Civil Servants of the Ministry of Defence, Armed Forces, National Police and Related Bodies (ASODEFENSA)**
- **the Petroleum Industry Workers' Trade Union (USO) and others**

***Allegations: Murders and other acts of violence
against trade union leaders and trade unionists***

473. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 469–521, approved by the Governing Body at its 304th Session]. The World Federation of Trade Unions (WFTU) sent new allegations in a communication dated 4 May 2009. The Single Confederation of Workers of Colombia (CUT) sent new allegations in a communication dated 24 April 2009. The International Trade Union Confederation (ITUC) sent new allegations in a communication dated 15 May 2009. The National Union of Food Industry Workers (SINALTRAINAL) sent new allegations in a communication dated 3 February 2009. In a communication dated 19 June 2009, the CUT sent additional allegations.

474. The Government sent its observations in communications dated 4, 10 and 24 March, 26 May, 16 July, 26 August, 26 October, 7, 12, 14 and 15 December 2009, 14 and 22 January and 5 March 2010.
475. 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

476. At its meeting in March 2009 the Committee formulated the following recommendations on the allegations that were still pending, most of which related to acts of violence against trade unionists [see 353rd Report, para. 521]:
- (a) With regard to acts of violence in particular, the Committee observes that considerable progress has been made in combating violence. Nevertheless, the situation of officials, members and the trade union movement in general continues to be grave; the Committee deplores this situation which it considers unacceptable and totally incompatible with the requirements of the Convention. Under these circumstances, the Committee urges the Government to continue to take all the necessary measures to ensure that workers and trade unions can exercise their rights in full in freedom and security.
 - (b) With regard to the list submitted by the trade union confederations which contains 2,669 officials and members murdered and 197 disappeared, in incidents which occurred between 1 January 1986 and 30 April 2008, the Committee invites the trade unions to make available to the Government and the Office of the Public Prosecutor all the additional relevant information which it may have in order to enable the Office of the Public Prosecutor to update the number of cases that require investigation. The Committee requests the Government to keep it informed in that respect.
 - (c) With respect to progress in the investigations and information provided by the Office of the Public Prosecutor and the Government, the Committee requests the Government to continue to take all the necessary measures to achieve significant progress in the outstanding investigations and the new investigations begun on the basis of the complaints contained in the “new allegations” section and thereby to put an end to the intolerable situation of impunity. The Committee requests the Government to inform it in detail concerning progress in each of the investigations begun, who the guilty persons were, and, in particular, whether it was a case of specific armed groups and what their motives were.
 - (d) As regards the complaints of the ITUC concerning the existence of a close link between paramilitary groups and the DAS which is responsible for providing protection to trade union officials and members, the Committee notes with deep regret that the Government has not sent its observations and strongly urges it to do so without delay.
 - (e) With reference to the Justice and Peace Act, No. 975, while observing that the impact of this new law on investigations into acts of violence against the trade union movement is now very limited, the Committee requests the Government to continue to keep it informed of progress in the application of this law and its relation to progress in the abovementioned investigations.
 - (f) As regards the so-called “Operation Dragon”, which according to the allegations was intended to eliminate several trade union officials, the Committee urges the Government to take the necessary measures to ensure that this investigation yields concrete results as soon as possible and to send its observations in this respect.
 - (g) As regards the mass detentions of trade unionists alleged by FENSUAGRO in its communication of June 2007, once again the Committee observes that the Government has not sent information in this respect. In these circumstances, bearing in mind the time that has elapsed, the Committee urges the Government to inform it without delay whether the trade unionists are still detained, whether the detentions are based on orders

issued by the judicial authority and the grounds for those orders and the status of the related judicial proceedings.

- (h) As regards protection measures for trade unionists, the Committee requests the Government, while using every means in its power to eradicate violence against trade union officials and members, to take all necessary measures to ensure better and broader protection for threatened trade union officials and members who request it. The Committee requests the Government to continue to send information on any additional measures adopted in this respect and to keep it informed of developments.
- (i) The Committee considers it necessary to draw the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.

B. New allegations

477. In their communications, the WFTU, CUT, ITUC and SINALTRAINAL make allegations that are summarized as follows:

Murders

1. Mario Zuluaga, 2 January 2008, in Antioquia, member of ASMEDAS.
2. Miguel Andrés López, 11 January 2008, in Amazonas, member of the Trade Union Association of Employees of the National Prison Institute (ASEINPEC).
3. Israel Andrés Pérez Montes, 11 January 2008, in César, member of SINTRADRUMMOND.
4. María Teresa Trujillo, 9 February 2008, in Cauca, member of ASOINCA.
5. Miller Vaquero, 9 March 2008, in Tolima, member of the Single Agricultural Trade Union Federation (FENSUAGRO)
6. Ignacio Andrade, 15 March 2008, in Tolima, member of FENSUAGRO.
7. Julio César Trochez Peña, 22 March 2008, in Valle, member of the Single Education Workers' Trade Union of Valle (SUTEV).
8. Rafael Antonio Leal Medina, 4 April 2008, in Tolima, member of AICA.
9. Omar Ariza, 7 April 2008, in Valle, member of SUTEV.
10. Luis Enrique Gutiérrez Ruiz, 15 April 2008, in Cundinamarca, member of SINDESENA.
11. Guillermo Rivera Funeque, 28 April 2008, in Tolima, member of SINSEVPUB.
12. Tomás Alberto Chiquillo Pascuales, 10 May 2008, in Magdalena, member of SINTRAPROACEITES.
13. Luis Orlando Gelves, 11 May 2008, in Arauca, member of FENSUAGRO.
14. Marcelo Sánchez Vergara, 5 June 2008, in Valle, member of SUTEV.
15. Omar Alexander Camacho Vásquez, 6 June 2008, in Norte de Santander, member of ASEINPEC.

16. Javier Darío Peláez Castaño, 13 June 2008, in Valle, member of ASEINPEC.
17. Walter Aníbal Recalde Ordóñez, 19 June 2008, in Valle, member of ASEINPEC.
18. José Humberto Muñoz Guarín, 22 June 2008, in Valle, member of SUTERV.
19. Haly Martín Mendoza Carreño, 9 June 2008, in Norte de Santander, member of ASINORT.
20. Jesús Palomeque Valencia, 5 August 2008, in Norte de Santander, member of ASINORT.
21. Luis Maryusa Prada, 8 August 2008, in Arauca, member of the CUT.
22. Manuel Emirson Gamboa Meléndez, 13 August 2008, in Putumayo, member of FENSUAGRO.
23. José Omar Galeano Martínez, 23 August 2008, in Valle, member of FECOLOT.
24. Pablo Flórze Barrera, 24 August 2008, in Magdalena, member of SINTRAMINERGETICA.
25. Jesús Escorcía Cortés, 24 August 2008, in Atlántico, member of SINTRAMINERGETICA.
26. Eliseo Vera González, 27 September 2008, in Norte de Santander, member of ASEINPEC.
27. Álvaro Antonio Guecha Morales, 18 October 2008, in Boyacá, member of SINDIMAESTROS.
28. Estiven Bastidas Jeferson, 25 October 2008, in Putumayo, member of FENSUAGRO.
29. Roberto Morales, 13 November 2008, in Valle, member of SUTEV.
30. William Rubio Ortiz, 12 December 2008, in Cauca, member of SINTRAMBIENTE.
31. Adolfo Tique, 1 January 2009, in the municipality of Prado, department of Tolima, leader of the Tolima Farm Workers' Union (SINTRAGRITOL).
32. Diego Ricardo Rasedo Guerra, 7 January 2009, in the municipality of Sabanas de Torres, department of Santander, member of the Agrarian Association of Santander (ASOGRAS).
33. Arled Samboni Guaca, 16 January 2009, in the municipality of Argelia, official of the Rural Workers' Association of the municipality of Argelia (ASCAMTA).
34. Leovigildo Mejía, 28 January 2009, in the municipality of Sabana de Torres, member of ASOGRAS.
35. Luis Alberto Arango Crespo, 12 February 2009, in Barrancabermeja, President of the Fishers and Farmers Association of Llanito, the municipality of Barrancabermeja.
36. Guillermo Antonio Ramírez, 15 February 2009, in Belén de Umbría, member of the Teachers' Trade Union of Risaralda.

37. Leoncio Gutiérrez, 20 February 2009, in Valle del Cauca, member of SUTEV.
38. Ramiro Cuadros Roballo, 24 March 2009, in Tulúa, member of SUTEV.
39. José Alejandro Amado Castillo and Alexander Pinto Gómez, 21 March 2009, in Santander, members of ASEINPEC.
40. Armando Carreño, 27 March 2009, in Arauca, member of the Manual Workers' Trade Union.
41. Hernán Polo, 5 April 2009, in the department of Córdoba, President of the Regional Trade Union of Employees and Workers of the Ministry of National Education (his six-year-old son was injured in the same attack).
42. Asdrúbal Sánchez Pérez, 18 April 2009, in the department of Córdoba, member of ASEINPEC.
43. Frank Mauricio Aguirre Aguirre, 16 April 2009, in Itagüi, member of ASEMPI.
44. Edgar Martínez, 22 April 2009, in Bolívar, member of FEDEAGROSIMBOL.
45. Víctor Franco Franco, 23 April 2009, in the municipality of Villamaría, member of the United Teachers' Trade Union of Caldas (EDUCAL).
46. Milton Blanco, in Villamaría, 24 April 2009, member of ASEDAR.
47. Rigoberto Julio Ramos, 9 May 2009, in Córdoba, member of ADEMACOR.
48. Vilma Cárcamo Blanco, 9 May 2009, in the municipality of Magangue, member of the Executive Committee of ANTHOC.
49. Hebert Sony Cárdenas, 15 May 2009, in Santander, member of ASODEMI.
50. Sikuaní Pablo Rodríguez Garavito, 5 June 2009, member of the Teachers' Association of Arauca.
51. José Humberto Echeverry Garro, 12 June 2009, in the municipality of Arauquita, member of the Teachers' Association of Arauca.

Attempted murder

1. José Jair Valencia, shot on 26 February 2009, member of EDUCAL.
- 478.** In its communication dated 3 February 2009, SINALTRAINAL alleges that there were seven murders at Nestlé between 1986 and 2007 (Héctor Daniel Useche Berón, Harry Laguna Triana, José Manuel Becerra, Toribio de la Hoz Escorcía, Alejandro Matías Hernández, Hernando Cuartas, José de Jesús Marín Vargas), one disappearance (Luis Alfonso Vélez Vinazco) and several instances of members of SINALTRAINAL being threatened and harassed.
- 479.** In its communication of 19 June 2009, the CUT sent a detailed analysis of the climate of violence and impunity and an assessment of the measures that had been adopted. It points out that the Office of the Public Prosecutor only investigates cases that are listed in the present Case No. 1787, and the CUT therefore supplied the Committee with a list of 2,712 murders and other violations of the law. This information was also sent to the Office of the Public Prosecutor and to the Ministry of Social Protection so that the State could

investigate all the cases and punish the guilty parties. The CUT emphasizes the need to adopt a strategy for investigating all the cases and that no corresponding structural measures have been adopted. These issues need to be discussed in the Inter-institutional Committee on Human Rights.

480. The CUT observes that the Government has decided to transfer responsibility for protecting trade union leaders from the Department of Administrative Security (DAS) to a private enterprise and states that it has opposed this step as a distortion of the responsibility of the State to protect trade union members who are in danger.

481. With regard to the allegation concerning DAS operations according to which the DAS has links with paramilitary agents for murdering trade unionists, the CUT states that on 8 May 2009 the Public Prosecutor accused the DAS' former Director Mr Noguera, before the Supreme Court of Justice of the murder of Mr Zully Esther Codina, Mr Adán Pacheco, Mr Alfredo Correa de Andreis and Mr Fernando Piscioti. The first three of these were union leaders and the fourth a political leader. Meanwhile, no charges have been brought in the case of 21 union leaders who were allegedly on lists handed over to the paramilitary forces by the DAS.

C. The Government's reply

482. In its communications dated 4, 10 and 24 March, 26 May, 16 July, 26 August, 26 October, 7, 12, 14 and 15 December 2009, and 14 and 22 January and 5 March 2010, the Government sent the following observations.

(a) *Climate of violence*

483. The Government considers it important to point out that the climate of violence and attacks against life has affected thousands of Colombians every year and that the trade unionists were among those victims. In the table below, the Government shows that the murders do concern not only trade unionists but a large number of Colombians.

Year	Total number of homicides in the country	Number of trade unionists murdered, according to				
		Government	ENS	UNDH	DNF	DIH
2001	27 841	205	197			158
2002	28 837	196	186			151
2003	23 507	101	94			83
2004	20 167	89	96			69
2005	18 112	40	70			31
2006	17 479	60	72	55	5	60
2007	17 198	26	39	28	3	31
2008	16 140	38	49	24	18	42
2009	–	17		1	16	17

Note:

ENS = National Trade Union School.

UNDH = Human Rights Unit.

DNF = Office of the Public Prosecutor.

DIH = National Unit for Human Rights and International Humanitarian Law.

The first three columns indicate the figures provided by the Government, i.e. in 2001 there were 27,841 homicides in the country as a whole, of which the Government reported that 205 concerned trade unionists, and the ENS 197 and the DIH 158.

From 2006 onwards, the last three columns distinguish between the number of victims reported by the UNDH (55) and some of those reported together with the DNF (5).

In Colombia, the UNDH handles the cases assigned to it by the DNF and comprise the most serious violations of human rights – not all the investigations.

It should be noted that the overall number of homicides has declined, and this concerns the number of murdered trade unionists too. That said, there should ideally be no more homicides in the country.

- 484.** Though there is no denying that it has been impossible to eradicate violence against trade union activists, the improvement in the situation as a whole is reflected in the decline in the number of crimes against members of trade union organizations. This is thanks to the special measures adopted by the Government and the judiciary, such as the increased budget and improvement of the Government's protection programmes and the strengthening of the judicial sector with the establishment of a Sub-unit for Crimes against Trade Unionists, of the National Unit for Human Rights and International Humanitarian Law, of the Office of the Public Prosecutor and of the special courts for combating impunity in the case of crimes against members of trade union organizations.
- 485.** As a result, the total number of homicides in the Colombian population dropped by 44.1 per cent between 2002 and 2008 and that of homicides among members of the trade union movement by 81 per cent. In 2009 the number of trade unionists murdered declined by 34.6 per cent, though this does not mean that the murder of trade unionists stems from their union activities.
- 486.** Thanks to the efforts of the State the number of murdered trade unionists has been steadily declining, and compared with 193 in 2002 the figure is now much lower. Despite the improvement the Government does recognize that difficulties remain, and it intends to continue its efforts tirelessly until all acts of violence against members of trade union organizations have ended.

(b) Status of the investigations into acts of violence

Homicides in 2009

487. With regard to the alleged homicides in 2009, the Government sent the following information:

1. Adolfo Tique, file No. 735856000484200900001, killed 1 January 2009, member of ASTRACATOL–SINTRAGRITOL. The First Sectional Prosecutor's Office of Purificación is pursuing its investigation under criminal file No. 735856000484200900001 with the assistance of an official of the Investigation Unit of Purificación (SIJIN). Initial reports indicate that he was not threatened in any way.
2. Diego Ricardo Rasedo Guevara, killed 6 January 2009 in the village of Agua Bonita, municipality of Sabana de Torres. Status of investigation: Jaime Rodríguez Figueroa was sentenced to 11 years in prison; the sentence was appealed.
3. Arled Samboni Guaca, ID No. 16.932.895, killed 21 January 2009. Investigation file No. 190016000602200900091 currently with the Third Sectional Prosecutor's Office.
4. Leovigildo Mejía, member of ASOGRAS, disappeared and murdered 28 January 2009; his body was found with two bullet wounds in Sabana de Torres. Investigation file No. 68655000225200900029 currently with the Support Unit of the Prosecutor.
5. Luis Alberto Arango Crespo, President of the Fishermen's and Agricultural Workers' Association of Llanito, municipality of Barrancabermeja, Santander, and leader of the Artisan Fishermen's Association of Magdalena Medio (ASOPESAM), murdered 12 February 2009. The investigation has led to the arrest of three persons by the police. According to information from trade union files, the Association does not appear as a trade union organization. Investigation file No. 680816000135200900094, Second Special Prosecutor's Office of Bucaramanga, currently awaiting trial, with three persons being held in preventive detention.
6. Guillermo Antonio Ramírez Ramírez, murdered 15 February 2009, municipality of Belén de Umbría Risaralda (western Colombia). Primary teacher at "Juan Hurtado" school. According to information supplied by the trade union none of its members had been threatened by any individual or group operating outside the law. Investigation file No. 66866000062200900075, Sectional Prosecutors' Office of Belén de Umbría Risaralda. The Guarantee Monitoring Judge declared the arrest warrant legal, authorized a house search on grounds of aggravated homicide and ordered the preventive detention of a person who accepted the charges. He was indicted on 26 May 2009 and filed a plea bargain.
7. José Jair Valencia Agudelo, victim of an attempt on his life on 26 February 2009. URI file No. 174866108805200980022, 20th Sectional Prosecutor's Office, Manizales, attempted murder. The investigation is under way.
8. Ramiro Cuadros, member of SUTEV, murdered 24 March 2009, apparently after receiving death threats. A reward of 5 million Colombian pesos (COP) was offered for information leading to the arrest of the perpetrators. Criminal investigation file No. 768346000187200980055, dated 24 March 2009. The investigation is being conducted by officials of the DEVAL criminal investigation section in coordination with the 31st Sectional Prosecutors' Office of Tulúa, where it is currently under way.

9. José Alejandro Amado Castillo and Alexander Pinto Gómez, members of ASEINPEC, murdered 21 March 2009. According to the President of the trade union, neither of the victims had received threats. A reward of COP5 million was offered for information leading to the arrest of the perpetrators. Criminal investigation file No. 68001600015920091308, Third Support Unit of the Prosecutor's Office, Bucaramanga. The investigation is being conducted in conjunction with the judicial police of the technical investigation unit of the CTI, the judicial police of the criminal investigation section SIJINMEBUC and the DAS, under file No. 68001600015920091308 of the Third Support Unit of the Prosecutor's Office of Bucaramanga. The investigation is currently under way and steps are being taken to identify, locate and indict the perpetrators and to establish their motive.
10. Hernán Polo, official of the Administrative Workers' and Employees' Trade Union of the Education Sector (SINTRENAL), murdered 4 April 2009 in front of his residence. The Córdoba police offered COP20 million for information leading to the arrest of the perpetrators.
11. Asdrúbal Sánchez Pérez, member of ASEINPEC, murdered 18 April 2009 in the city of Montería, department of Córdoba. One of the murderers died and the other was caught and is under arrest. According to reports, the motive was the theft of jewellery worn by the victim. File No. 230016001015200902004, Fourth Sectional Prosecutor's Office of Montería. Arrest, indictment and preventive detention of the suspect, who accepted the charges. Deibis Antonio Hoyos Navarro was sentenced to 21 years in prison; the sentence is under appeal.
12. Edgar Martínez, member of FEDEAGROMISBOL. According to trade union files the association is not registered as a trade union. Investigation file No. 136706001122200980103, Second Sectional Prosecutor's Office of San Pablo Cartagena. The investigation is under way.
13. Franco Franco Víctor murdered in Villamaría Caldas, 23 April 2009. Investigation file No. 70016000030200900146, 13th Sectional Prosecutor's Office of Manizales. The investigation is under way.
14. Milton Blanco Leguizamón, murdered 24 April 2009, opposite the TAME Coliseo, municipality of Arauca Barrio, Sucre. A reward of COP10 million was offered for information leading to the arrest of the perpetrators. Investigation file No. 817946109541200980185, Humanitarian Affairs Investigation Unit of the First Prosecutor's Office of Cúcuta. Status of investigation: a hearing is being held into the arrest warrant, indictment and preventive detention of the suspect.
15. Vilma Cárcamo Blanco, member of ANTHOC, murdered 9 May 2009. A reward of COP5 million was offered for information leading to the arrest of the perpetrators. Investigation file No. 134306001118200900779, 19th Sectional Prosecutor's Office of Magangue. The investigation is under way.
16. Frank Mauricio Aguirre Aguirre, member of ASEMPI, murdered 16 April 2009 in Itagüí, Antioquia. Investigation conducted by Section 235 of Itagüí. A reward of COP5 million was offered for information leading to the arrest of the perpetrators.
17. Julio Ramos Rigoberto, murdered 9 May 2009 at Kilometre 18 on the road from Moñitos to San Bernardo del Viento, at a location known as La Apartada de La Rada. A reward of COP5 million was offered for information leading to the arrest of the perpetrators. Investigation file No. 234176100586200980075, section 26 of the Prosecutor's Office of Lorica Montería. The investigation is under way.

18. Herbert Sony Cárdenas Camargo, member of ASODEMI, murdered 15 May 2009. This miners' association is not registered as a trade union. Investigation file No. 680816000135200900378, Support Unit of the First Prosecutor's Office of Bucaramanga. The investigation is under way.

Homicides in 2008

488. With regard to the alleged homicides in 2008, which are being handled by the Sub-unit of the Office of the Prosecutor for Human Rights, the Government gives the following figures and states that the following results have been achieved:

- sentences handed down: 4
- persons convicted: 5

The cases in which these decisions were reached are as follows:

File No.	Victim	Court	Place and date of incident	Date of conviction	Crime	Person convicted	Group	Sentence
4456	Emerson Iván Herrera Ruales Luz Mariela Díaz López	Penal Court 56 of the ILO Decongestion Circuit	La Hormiga, Putumayo 1 April 2008	6 October 2008	Aggravated homicide, ilegal possession, injury to foetus	Edgardo Alexander Díaz, accomplice	Common delinquents	720 months
4441	Mario Zuluaga Correa	Penal Court 28 the Medellín Circuit	Medellín, Antioquia, 20 January 2008	3 October 2008	Aggravated homicide	Yenson Alexander González, perpetrator	Common delinquents	104 months
4445	María Teresa Trujillo Orozco	Single Penal Court of the ILO Investigation Circuit	Santander de Quilichao, Cauca, 7 February 2008	17 October 2008	Aggravated homicide	Wilson Cristo Herrera Pineda, accomplice	Common delinquents	420 months
767 366 000 186 200 800 154	Omar Ariza	Minors Court, Valle del Cauca	Caicedonia, Valle del Cauca, 7 April 2008	2 July 2008	Aggravated homicide	Andrés David Alegría, accomplice Jhon Luis Restrepo, accomplice	Common delinquents	36 months 36 months

The convictions obtained in the first three of these cases, in which four victims were involved, were due to the work of investigators of the Sub-unit, and in the fourth case to that of investigators from another unit under the supervision of the Office of the Public Prosecutor. In 2009 two cases were brought to trial: one has been investigated and the rest are under investigation.

Threats

489. With regard to the alleged threats against Ms Lina Paola Malagón, the Government states that as soon as it was informed of the threats it provided her with institutional protection under the Protection Programme run by the Minister of the Interior and of Justice, so as to offer her all the guarantees and security she might request. However, the Coordinator of the Legal Protection Area of the Colombian Commission of Jurists (CCJ) informed the Government that, since provisional protective machinery existed at the Commission on

International Human Rights and at the International Human Rights Court, a joint meeting had been requested on protective measures. In the light of the Commission's position, the Ministry of Social Protection sent a communication to Ms Malagón suggesting that she consider the deployment of immediate measures.

- 490.** Finally, the national police conducts police rounds and has a strategic security arrangement with members of the CCJ, which has a direct link to the Human Rights Coordinator of the national police, which deals with problems as they arise. Specifically, the National Police has provided institutional support and assistance and maintained communications between one of its members and a lawyer from the Commission.
- 491.** As to the investigations to determine who was responsible for the threats, the Ministry of Foreign Affairs asked the Office of the Public Prosecutor (International Affairs Department) to inform it of the steps taken in response to the complaint and to keep it informed of developments in any criminal investigation initiated.

Allegations presented by SINALTRAINAL

- 492.** With regard to the alleged attacks on leaders and members of SINALTRAINAL, the Government has asked the Office of the Public Prosecutor for information on the complaints. It emphasizes that the investigations concerning the members of SINALTRAINAL (as well as of the other organizations) are being conducted by the Sub-unit attached to the Human Rights Unit of the Office of the Public Prosecutor and by special judges.
- 493.** The Government also sent a reply from Nestlé containing highly detailed information on each of the victims of acts of violence (murder, disappearance, threats) referred to by SINALTRAINAL and indicating that some of the workers were not employed by the company. The Government also sent the following information on freedom of association in the company:
- Bipartite works committees: each factory spends 25 hours a week on meetings with the union in what are known as “conventional committees”, where the most pressing labour issues can be discussed.
 - Trade union safety: Nestlé supports the introduction of safety measures proposed to the union leaders by the Government. Currently, these include:
 - training and courses on self-protection;
 - installation of protective barriers at four of the union's premises;
 - seven mobile phones; and
 - three collective safety plans, armoured vehicles, defensive weapons and bodyguards.
 - Threats against union members: whenever collaborators of the company, especially union leaders, claim that they have been threatened or that they or the members of their family are in danger, the company first of all invites them to inform the competent authorities of the facts so that an investigation can be initiated. At the same time, the company takes steps to inform the government bodies responsible for the safety of people at risk and lends its good offices to making arrangements for technical studies into the level of risk and subsequently, if necessary, for the implementation of safety measures according to the risk faced by each person. As far as Nestlé is concerned, the safety and physical integrity of its employees, whether

trade unionists or executives, is paramount. The violence in Colombia affects the whole country and Nestlé, committed as it is to the country's development, is cooperating with the authorities and trade unions to reduce the risks facing all the member of the staff.

494. The Government also sent a detailed report from the Ministry of the Interior and of Justice on the protective measures it has adopted for members of SINALTRAINAL.

(c) *Situation of impunity*

495. With regard to the adoption of measures to combat impunity and obtain results, the Government recalls that prior to 2002 there had only been two convictions for this type of crime. Since 2002 there have been 218 convictions, 317 persons have been condemned for acts of violence and 190 have been sent to prison. Of those condemned 50 were the perpetrators, 220 were accomplices and 34 were the instigators of the crime. This illustrates clearly the radical change that has taken place since 2002 and is beginning to have a very definite effect on the situation.

Report of the Sub-unit for Crimes against Trade Unionists

496. The Government sent a report by the Sub-unit for Crimes against Trade Unionists, which is attached to the National Unit for Human Rights and International Humanitarian Law, containing the following information:

Composition

Investigating officer	City	Number of staff
Special investigators dealing exclusively with crimes against trade unionists	Barranquilla, Villavicencio, Bucaramanga, Cartagena, Medellín (2), Neiva, Pasto, Cali (2)	10
Special investigators dealing exclusively with issues of human rights and international humanitarian law and crimes against trade unionists	Bogotá	9
Investigators of the CTI	Barranquilla, Villavicencio, Bucaramanga, Cartagena, Medellín, Neiva, Pasto, Cali and Bogotá	26
Investigators of the DIJIN	Barranquilla, Villavicencio, Bucaramanga, Cartagena, Medellín, Neiva, Pasto, Cali and Bogotá	50
Assistant investigators	Barranquilla, Villavicencio, Bucaramanga, Cartagena, Medellín, Neiva, Pasto, Cali and Bogotá	19
Total		114

Note: The Higher Council of the Judiciary established two Special Decongestion Criminal Courts for crimes against trade unionists and one Single Criminal Court of the Decongestion Circuit with headquarters in Bogotá, exclusively for hearing and passing judgement on cases involving trade unionists – ILO Case No. 1787.

Results of the UNDH and DIH Sub-unit for Crimes against Trade Unionists, 1 October 2007–15 January 2010

Cases assigned to the Sub-unit	1 344
Cases at the preliminary verification stage	571
Cases ascertained and under investigation	286
Number of persons placed in preventive detention	465
Indictments	158
Plea bargains	183
Guilty verdicts	189
Number of convictions obtained (out of 167 verdicts)	234
Total number of victims	1 580

Note 1: Of the cases assigned to the Sub-unit 676 were for homicide (involving 886 victims), in several cases concurrently with other crimes, and 299 were for the use of threats.

Note 2: Of all the cases assigned, 66 are conducted under the oral hearings system – Act. No. 906 of 2004.

Note 3: Of the 189 verdicts, 9 correspond to cases under the oral hearings system – Act. No. 906 of 2004.

Note 4: The 189 verdicts were handed down in 131 cases.

Comparative results of the UNDH and DIH Sub-unit for Crimes against Trade Unionists

Description	30 September 2007	30 March 2008	15 January 2010
	Total	Total	Total
Cases assigned	1 194	1 264	1 344
Number of cases undertaken	1 008	1 033	1 150
Cases at the preliminary stage	775	691	571
Cases under investigation	64	136	286
Number of persons in preventive detention	31	106	465
Absent	3	11	55
Charges	15	44	158
Plea bargain	–	–	183 *
Dismissal	2	11	43
Guilty verdict	13	43	189
Not guilty verdict	0	2	14
Arrest	14	46	133
Preventive detention	9	33	102
Prison sentence	15	51	169
Public or preliminary hearings attended by investigators of the Sub-unit for Crimes against Trade Unionists	31	64	271

* Of the 183 cases where a plea bargain was filed, 90 were based on the Justice and Peace Act.

Priority cases: Comparative results, up to 15 January 2010

Current status	March 2008	January 2010
Preliminary stage or under investigation	125	93
Court hearing	37	61
Conviction obtained	6	20
Trial	3	7
Case dismissed	1	1
Restraining order	5	3
Indictment	3	None
Not guilty verdict	1	None
Not yet apprehended	6	None
Total	187	185

Note: The 187 priority cases referred to in previous reports have been reduced to 185, two cases (Elber Orozco Pinzón and Wilson Arenas) having been withdrawn at the request of the trade union organizations on the grounds that they did not constitute anti-union violence.

Sentences handed down in priority cases up to 15 January 2010

Description	20 October 2007	March 2008	January 2010
Convictions obtained	11	15	51
Prison sentences	11	17	70 *
Persons convicted	20	28	88

* Twelve of the sentences correspond to convictions under the Justice and Peace Act.

Priority cases under Acts Nos 600 of 2000 and 906 of 2004

Act No. 906	29
Act No. 600	156
Total	185

Note 1: In 40 of the 44 cases where a conviction was obtained, the judgement was handed down after the establishment of the Sub-unit for Crimes against Trade Unionists; guilty verdicts were reached against 71 persons.

Note 2: The idea of giving some cases priority originated with the Tripartite Agreement on Freedom of Association and Democracy that was adopted on 1 June 2006 between the Government, the employers and the trade unions. After the proposals of each sector had been accepted, the number of priority cases steadily increased, although the original intention had been to prioritize only 100. On 2 October 2007 a meeting between the Government, the Office of the Public Prosecutor and the trade unions decided to prioritize 187 of the 1,264 cases assigned to the Sub-unit for Crimes against Trade Unionists. These mainly consisted of investigations requested by the three main trade union organizations – the CUT, CGT and CTC – and those concerning the murder of trade unionists in 2006 and 2007. Currently, seven priority cases are being handled by the Office of the Public Prosecutor and the rest by its Sub-unit.

Guilty verdicts resulting from the 1,344 investigations being carried out by the UNDH and DIH Sub-unit, up to 15 January 2010*

Year	Annual number of convictions
2000	1
2001	1
2002	10
2003	7
2004	12
2005	8
2006	10
2007	43
2008	73 **
2009	74
Total	239

* i.e. verdicts that have so far been identified. The Sub-unit is currently trying to identify other verdicts that have been handed down in respect of crimes against trade unionists.

** Of these 50 were plea bargains, 21 of which were entered under the Justice and Peace Act. The 73 verdicts handed down in 2008 concerned 57 investigations.

Cases in which the 218 verdicts were handed down	163
Persons convicted	317
Plea bargains filed	96
Plea bargains entered under the Justice and Peace Act	54
Prison sentences	190 *

* Of which 19 entered under the Justice and Peace Act.

Note: In several instances, because the trial was interrupted, more than one conviction was handed down. This explains why the number of cases leading to convictions (163) is lower than the number of convictions handed down (218).

Annual number of verdicts handed down, 2000–09

Year of incident	Year and number of verdicts										Total annual convictions
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	
1996									1	1	2
1997	1										1
1998			3				1				4
1999					1					2	3
2000			1	1	1			3	11	4	21
2001		1	3	6	2	3	1	12	10	20	58
2002			3		6	4	4	10	12	17	56
2003					2	1	2	3	18	16	42
2004								4	14	6	24

Year of incident	Year and number of verdicts										Total annual convictions
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	
2005							2	5	1	5	13
2006								6	3	3	12
2007											3
2008									3		4
Grand total	1	1	10	7	12	8	10	43	73	74	239

- Convicted of homicide: 196
- Convicted of other crimes: 22

Number of plea bargains, up to 15 January 2010

Total number of verdicts	Total number of plea bargains	Plea bargains filed by the defendant	Pleas entered under the Justice and Peace Act
239	110	61	31

Note: The number of plea bargains in the total number of verdicts is 110, of which 61 were filed by the defendant and 31 were entered under the Justice and Peace Act.

Number of verdicts handed down by each responsible body

Unit	Number of verdicts handed down
UNDH	17
Sub-unit for Crimes against Trade Unionists	189
Other bodies	33
Total	239

Homicides, 2006

Cases	Victims
58	60

Cases filed under Act No. 906	Cases filed under Act No. 600
17	41

Status	November 2008	September 2009
Preliminary stage	33	18
Under investigation		12
Investigation completed		1
Court hearing (two verdicts handed down)	11	14
Verdict reached (one under appeal)	10	12
Trial	2	
Case filed	1	1

Note. The 59 homicides in 2006 referred to in previous reports have been reduced to 58, one case (Elber Orozco Pinzón) having been withdrawn from the priority list at the request of the workers' organizations on the grounds that it was not a case of anti-union violence.

Homicides, 2007

Cases	Victims
28	31

Cases filed under Act No. 906	Cases filed under Act No. 600
22	6

Current status	November 2008	September 2009
Preliminary stage	21	2
Under investigation		19
Investigation completed	2	4
Trial	1	1
Sentence handed down	2	2

Homicides, 2008

Month	Cases	Victims
August 2009	41	42

Current status	November 2008	September 2009
Under investigation	35	32
Investigation completed (charges brought)	1	
Case closed		1
Indictments	1	4
Sentence	2	2
Investigation completed/sentence handed down	2	2

Convictions	Persons convicted
4	5

Note: In two of the four cases with convictions, a claim was filed for breach of the unity of procedure in the stage of inquiry. The investigations continue to be in the stage of inquiry.

Homicides, 2009**Cases handled by the National Unit for Human Rights and International Humanitarian Law**

Status	Total number of cases
Under investigation	2

Cases	Victims
2	2

Cases handled by the Office of the Public Prosecutor

Status	Total
Under investigation	18
Investigation completed	1
Trial	1
Sentence	1
Total number of cases	22
Number of victims	23

Convictions	Persons convicted
1	1

Trials conducted by UHDH and DIH judges

Indictments pending court appearance and trial	Projected indictments
6	14

497. In general, the Government is convinced that, as the investigations progress and the perpetrators of crimes against trade unionists are punished, the right to truth and justice will become more and more of a reality, and the likelihood of further violations will be diminished. The Government is absolutely determined to meet its commitment to combat impunity.

498. In 2006 the National Council for Economic and Social Policy (CONPES) adopted document No. 3411 setting out the Government's policy of strengthening the State's capacity to investigate, judge and punish human rights violations and infringements of international humanitarian law. Under the anti-impunity policy outlined above, steps are being taken to reinforce the institutions responsible for clarifying the incidents denounced, investigating and judging the perpetrators and compensating the victims of human rights violations.

Structural measures adopted in the fight against impunity

499. More than US\$11.8 million have so far been allocated to the effective implementation of the policy adopted. Of this, 60.7 per cent comes from the general budget, 19.6 per cent from cooperation resources provided by the Netherlands and 19.7 per cent from the European Union. Progress in the fight against impunity can be summarized as follows:

- Strengthening of the institution and budget of the judiciary, especially the Office of the Public Prosecutor which includes the National Institute of Forensic Medicine and Science, and of the country's prison structure. The resources so allocated rose by 86 per cent between 2002 and 2007 (National Planning Department, 2008).
- Creation of 2,166 new posts in the Office of the Public Prosecutor since January 2008.

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- Improvements in the safety and protection of officials of the judiciary working in the regions.
 - Consolidation of the attributes of the ordinary jurisdiction over the military criminal jurisdiction.
 - Coordination of the work of the bodies involved in the investigation, trial and punishment of human rights violations and infringement of international humanitarian law.
 - Drafting and dissemination of an identification guide for cases of human rights violations and infringements of international humanitarian law, which was used to train 240 investigators, and strengthening of the State's capacity to assist and advise victims effectively, thanks to the design of a proposal for a new institutional architecture.
 - Active follow-up of investigations into human rights violations. This is a fundamental component of the policy that focuses on violations against vulnerable groups such as indigenous communities and trade unionists and on the murder of persons under state protection.
 - Establishment of a more representative working group comprising the Office of the Inspector General, the Office of the Public Prosecutor, the Anti-Impunity Project, the Ombudsperson's Office, the Higher Council of the Judiciary and the National Prison Institute, to act as a link between the various institutions concerned with following up and coordinating the policy.
 - Creation in the Office of the Public Prosecutor of juridical committees for the assessment and prosecution of investigations, in which the sectional directors of the Office of the Public Prosecutor and the sectional directors of the Technical Investigations Unit, the unit coordinating investigators and the investigators themselves meet periodically with representatives of the judicial police to assess results and analyse the progress and weaknesses of the investigations, correct shortcomings and thereby advance the cause of justice.
 - Creation of Investigation Units for Humanitarian Affairs (UFAHs) with their respective support structures, in order to speed up investigations and facilitate the adoption of fundamental legal decisions within reasonable time limits, access to justice and respect for judicial guarantees. The specific goals of the UFAHs are:
 - To advance the investigations by identifying the material links between each case, with the assistance of the analysts of the judicial police, so as to speed up the process and complete the examination of as many cases as possible within a reasonable time.
 - To train the UFAH special investigators in human rights, international humanitarian law and investigation techniques and strategies so as to create a climate of respect for people's rights, i.e. so that a thorough grounding in human rights becomes part and parcel of the Unit's culture and contributes to the maintenance of a respectful and dignified attitude towards the victims, as well as the use of appropriate language, throughout the process.
 - Provide the victims with effective recourse in accordance with the Inter-American Human Rights System.

- At the same time, the UFAHs are responsible for studying and advancing the cases entrusted to them, by means of a differential approach that takes into account the social, economic and cultural variables as well as the nature of each case, as they relate to the victims of each offence. Their work should be of great assistance to the vulnerable citizens or groups, such as indigenous peoples, journalists, persons of African descent, displaced persons, women, children, adolescents, human rights activists, community leaders and others, who seek the protection of their rights.
- In this broad spectrum, and thanks to their particular expertise, the UFAHs have a valuable contribution to make to the investigations into human rights violations, so that, through the coordinated efforts of the judicial police in recording, verifying and compiling the material evidence relating to each case, they can establish beyond doubt the existence of punishable offences that threaten fundamental prerogatives that are essential to human dignity.
- The implementation of an oral hearing system on 1 January 2005 has brought substantial progress in terms of the speed with which justice is rendered and impunity has thus diminished. The change in the criminal procedure is intended to guarantee a more efficient and effective justice that protects the rights of the victims and has the capability to fight organized crime. The system includes major conceptual improvement, such as a strict differentiation between those responsible for the investigation (Public Prosecutor), for guaranteeing people's rights (Guarantee Judge) and for trial by court (judge). The state budget for the judiciary between 2003 and 2009 (projected) has been increased by more than 66 per cent.

Office of the Public Prosecutor

500. In order to provide for the effective protection of the fundamental rights of trade unionists, in accordance with national and international standards and in the light of the threats and homicides of which trade unionists have been the victims, the Office of the Public Prosecutor initiated an inter-institutional plan of action in February 2008 that is specifically designed to ensure the efficient judicial conduct of investigations in which trade unionists are the victims and to improve the quality of the services rendered by the judiciary. The strategies implemented include:

- (1) *Creation of a dedicated database.* The matrix of cases involving trade unionists was designed to optimize the follow-up of the work of the investigators and to permit the continuous assessment of each case. This strategy also serves to monitor the activities of officials of the judiciary and to devise the means whereby the latter's attention to the specific problems encountered by citizens can meet the actual demand for justice and whereby it can respond opportunely to all requests for information on the part of the victims, the members of their family and society as a whole.
- (2) *Creation of expert juridical committees.* As was explained in the reply to the 353rd Report, the purpose of the expert juridical committees was to enable the investigators to assess the progress of the investigations, to encourage good practices, to identify obstacles and immediately apply the appropriate solutions so that the process can be more effective. Periodically, the sectional directors of the Office of the Public Prosecutor and of the Technical Investigation Unit, as well as the unit coordinating investigators and the investigators themselves, hold meetings with the judicial police groups.
- (3) *Differential investigation in the case of trade unionists.* The National Directorate has been working on the design of differential methodologies for these cases,

principally to help the investigators improve the quality of their work, make the best possible use of available resources and learn to treat the victims with dignity, for example by taking all necessary steps to facilitate the dedicated, objective and positive efforts of trade union organizations and to ensure the protection of their legitimate, necessary and productive activities. One of the results has been the issue of Memorandum No. 026 of 3 March 2009 by the National Directorate for Investigation Strategies regarding cases in which trade unionists are the victims.

- (4) *Inter-institutional coordination.* The bodies responsible for defending the rights of trade unionists work together harmoniously.
- (5) *Establishment of UFAHs.* See above.

Higher Council of the Judiciary

501. The Government also sent a report from the Vice-President of the Higher Council of the Judiciary which indicates that, for criminal proceedings concerning the murder and other acts of violence committed against trade union leaders and members, the Council's Administrative Chamber has the legal authority to set up any judicial offices that are needed to meet the demands of justice, provided it has the necessary resources (normally earmarked in its annual budget at the Government's initiative). In doing so, the Administrative Chamber can establish temporary or permanent courts. Since 2007, for example, it has been focusing especially on the aforementioned crimes in judicial offices throughout the country. A special unit of judges has been established with headquarters in Bogotá, as well as a support office, initially on a temporary basis but now permanent; it comprises two special criminal circuit courts (for less serious offences) and one criminal circuit court, each of which consists of a judge and four employees, together with an administrative services centre. The cost so far amounts to US\$1,037,108.

502. The administration of the courts for 2008 and 2009 is outlined in the following table:

Year	Name	Initial inventory of active cases	Incoming	Outgoing	Not guilty verdict	Guilty verdict
2008	Tenth Special Criminal Court of the Bogotá Circuit	1	35	25	0	28
	11th Special Criminal Court of the Bogotá Circuit	3	41	26	0	9
2009	Tenth Special Criminal Court of the Bogotá Circuit	10	47	26	0	32
	11th Special Criminal Court of the Bogotá Circuit	10	58	40	1	24
	56th Criminal Court of the Bogotá Circuit	5	45 *	26	3 *	28*

* In 2009, 41 of the 45 cases taken up by the 56th Criminal Court of the Bogotá Circuit concerned homicides and other acts of violence committed against trade union leaders and members; a verdict was reached in 18 instances, one not guilty verdict and 17 guilty verdicts.

503. Currently the courts are not too busy and can deal with their workload with due speed. Should the volume of work increase greatly, which will depend on the activity of the Office of the Public Prosecutor, the Administrative Chamber could find itself obliged to establish more courts, which it is empowered to do provided the necessary resources are available.

504. With regard to the proceedings concerning trade union immunity and the protection of trade unionists from discrimination in their stability of employment, it is important that the Government continue its financial support for oral hearings in cases concerned with labour affairs and social security issues, as the pilot project in Bogotá shows how swift and efficient oral hearings in labour courts can be.
505. In a succession of communications, the Government provides details (general administrative reports) of the work carried out by the special criminal courts in current research into solutions to the issue of trade unionists' rights.

Legislative measures adopted in the fight against impunity

506. Finally, with regard to the anti-impunity measures adopted, the Government adds that, in order to continue to combat impunity and to protect the democratic institutions, the Congress adopted Act No. 1309 of 2009 concerning punishable offences against the legally protected assets of members of a trade union organization. The new law:
- establishes that the statute of limitations for the murder of a member of a trade union organization shall be the same as for the crimes of genocide, forced disappearance, torture and forced removal of persons, namely 30 years;
 - extends the definition of “aggravated offence” to cover any member of a trade union organization, where previously it related only to union leaders;
 - increases the penalty for the forced disappearance of any member of a trade union organization, where previously it related only to union leaders;
 - increases to between 100 and 300 SLMLVs [the SLMLV, or *salario mínimo legal mensual vigente*, is the equivalent of the legal minimum monthly wage in force.], or the perpetrator's arrest, the penalty incurred by any person who prevents or disrupts a lawful meeting or the exercise of the rights conferred by labour laws, or takes reprisals against a lawful strike, meeting or association; and
 - extends and increases the penalty incurred by any person who threatens any member of a trade union organization – where previously it concerned only public officials employed by the judiciary or the Office of the Public Prosecutor – and the members of their family.

(d) **Department of Administrative Security (DAS) investigations**

507. With regard to the ITUC's allegations concerning the existence of close links between paramilitary groups and the DAS responsible for the protection of trade union leaders and members, the Government states that it has treated the accusations of alleged irregularities within the DAS with the utmost seriousness and with the firm undertaking to facilitate the most rigorous, independent and autonomous investigations into whether or not any such crimes have been committed and, if so, by whom, so as to administer prompt and immediate justice. Both the Office of the Public Prosecutor and the Office of the Inspector General are currently investigating these accusations.

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- 508.** Alongside these judicial proceedings, the Government has taken administrative steps that are more robust and less open to corruption. In 2005 a special committee was set up to assess the situation in the DAS and to make recommendations for the introduction of structural improvements. At the same time, internal procedures were revised, reliability studies were carried out and hundreds of officials were removed. These were all coherent decisions that were designed to facilitate the work of the criminal and disciplinary investigation bodies and to achieve swift results.
- 509.** In recent years the DAS has carried out 417 internal investigations involving 675 officials, 166 of whom have been relieved of their functions in the exercise of the DAS' discretionary powers and 25 have been taken to court. The Government has been at pains to adopt measures and decisions that are designed to improve transparency within the DAS. It is currently conducting further studies into the adoption of new administrative reforms.
- 510.** Other, complementary steps have been taken to ensure greater guarantees for the exercise of individual rights, such as the recent adoption of Act No. 1288 of 5 March 2009 (Intelligence Act) which strengthens the prevention and control function of intelligence work as a legitimate attribution of the State. The adoption of the new Act stemmed from the need to improve the legal framework within which state bodies conduct intelligence and counter-intelligence activities, so that they can carry out their mission properly by means of monitoring and supervisory machinery. In the absence of any juridical framework authorizing the carrying out of intelligence work to forestall major threats to the security of the State, while at the same time protecting the fundamental rights of the people and ensuring that they are not defended at the expense of state security, the new law was introduced to establish an appropriate legal framework in which, on the one hand, the goals, limits and principles of intelligence work are clearly defined, and, on the other, the information obtained and the public officials who engage in this activity at considerable risk to themselves are duly protected.
- 511.** In the course of the investigations into former DAS officials, the Office of the Public Prosecutor indicted the former Director, Mr Jorge Noguera, and other former employees. An appeal against the indictment is currently awaiting a ruling by the Public Prosecutor.

Status of investigations into acts of violence against trade unionists

Victim	File No. and Investigating Office	Description of Incident	Current status
César Augusto Fonseca Morales José Rafael Fonseca Ramón Fonseca Morales	166659 ILO Investigating Office No. 2	On 2 September 2003, in Puerto Giraldo, jurisdiction of Ponedera, the victims (brothers) were approached by four people, after which they disappeared; a search was undertaken by motorized personnel.	The verdict was handed down on 25 August 2008. Breach of the unity of procedure ordered. Preferred to the Office for decision. On 16 September 2008 Luis Alberto Cabarcas Amador was sentenced to 466 months and 20 days in prison and a fine of 4,333.34 SLMLVs.
Zully Esther Codina Pérez	1828 UNDH-DIH Investigating Office No. 12	On 11 November 2003 at approximately 7.30 a.m., Ms Zully Esther Codina Pérez was intercepted by two individuals on motor-cycles who, after speaking to her briefly, shot her three times.	The verdict was handed down on 25 August 2008. Referred to the Office. On 18 September 2008 Rolando Leonel Bonilla Guerrero was sentenced to 230 months in prison. On 16 October 2008 the file was sent to the Criminal Court of the Special Circuit of Santa Marta.
Correa de Andrés Alfredo Rafael	2030 UNDH Investigating Office No. 12	On 17 September 2004, in Barranquilla, Mr Correa de Andrés and his personal bodyguard, Mr Edelberto Ochoa Artínez, were attacked by an individual who fired at them repeatedly.	Breach of the unity of procedure ordered on 23 July 2008. On 12 August 2008 Mr Edgar Ignacio Fierro Flórez was sentenced to 504 months in prison and a fine of 2,200 SLMLVs.

Source: Higher Council of the Judiciary – Special Judges.

(e) “Operation Dragon”

512. With regard to “Operation Dragon”, whose objective was allegedly to eliminate trade union leaders, the Government states that the Office of the Inspector General, through the National Director of Special Investigations, has ordered an inquiry into a complaint lodged by Senator Alexander López Maya (file No. 009-152804-06), which is currently at the assessment stage.

513. According to information supplied by the Office of the Public Prosecutor, a formal investigation was recently ordered into six former officials of the municipal enterprises of Cali (EMCALI). The Office of the Public Prosecutor carried out a series of searches, inquiries and interviews and ordered that the case be linked to an investigation into Lieutenant Colonel Julián Villate Leal, a contract worker employed by a multinational enterprise as chief of port security, and Mr Carlos Potes, former manager of EMCALI. The inquiries also implicated Mr Germán Huertas, EMCALI’s chief of security, and contract workers Mr Hugo Abondano Mikán, Mr Marco Fidel Rivera and Mr Húber Botello, who are being investigated for aggravated conspiracy to commit a felony and violation of the right to hold meetings and of the right of association.

(f) Justice and Peace Act

514. With regard to Justice and Peace Act No. 975, the Government states that the Act has provided not only a juridical framework for the demobilization, disarmament and social reintegration of members of unlawful armed groups that have ceased their acts of violence

and opted for civil obedience but also a guarantee of effective access to truth, justice and compensation for their victims.

- 515.** The process of demobilization, disarmament and social reintegration under the Justice and Peace Act has contributed effectively to the fight against impunity. Not only is this apparent from the verifiable reduction in the number of acts of violence, but the confessions elicited from the demobilized individuals have also been a major source of information on hundreds of crimes, including crimes against trade unionists. Moreover, confessions can be expected to continue to be forthcoming, given the requirement under the Act that those concerned collaborate in the pursuit of justice.
- 516.** In addition to the confessions elicited from demobilized persons covered by the Justice and Peace Act, and because of the improved climate of trust in state institutions and in their greater ability to process the information and use it to shed light on the truth and protect the victims, more and more of the latter have lodged complaints. By February 2009 some 22,461 victims had taken part in the process at their own free will and 194,553 had been registered with the Justice and Peace Unit of the Office of the Public Prosecutor.
- 517.** In order to ensure that the rights of victims participating in the justice and peace process are better protected, a Victims and Witnesses Protection Programme has been introduced, with a budget of US\$21 million for 2007 and 2008. On instructions from the Constitutional Court, the Programme is currently being revised to incorporate a gender focus and to make it more streamlined.
- 518.** These voluntary confessions have made it possible to establish the background of many of the victims of the crimes. The confessions have produced the following statistics on the people who have been the victims of such incidents: 216 trade unionists, 28 journalists, 15 members of civil society organizations and 13 human rights activists. Of the 216 trade unionists, the Office of the Public Prosecutor has been able to identify 167 with certainty and is still engaged in identifying the remaining 49. The Government also provides information on Decree No. 1290 under which an Administrative Compensation Programme was set up for victims of unlawful armed groups.

(g) Allegations concerning FENSUAGRO

- 519.** With regard to the alleged mass dismissal of trade unionists cited by FENSUAGRO in its communication of June 2007, the Government reiterates its irrevocable commitment to provide all necessary guarantees for the exercise of every freedom without exception. The steps that the State has taken to guarantee conditions of security for all, without exception, and to facilitate the rendering of justice are designed solely to ensure the full application and enjoyment of their rights by all citizens.
- 520.** The Government states that there have been instances in recent years when union leaders, some of them belonging to FENSUAGRO, have been arrested in the course of lawful investigations by the judiciary headed by the Office of the Public Prosecutor. Denial of freedom in Colombia is possible only by order of the competent judicial authority. In the cases referred to here, the alleged crime being investigated is defined as rebellion in the Penal Code, article 467 of which stipulates that anyone who seeks by the use of arms to overthrow the Government or to suppress or modify the constitutional or existing legal order shall be liable to 96–162 months in prison and to a fine of between 133.3 and 300 SLMLVs.
- 521.** In the specific case of Mr Miguel Ángel Bobadilla, the Government states that Mr Bobadilla has been charged with kidnapping for the purpose of extortion (Anti-Kidnapping Unit, Ninth Prosecutor's Office, file No. 70356) and is currently facing

trial. The investigation of Mr Bobadilla stemmed from the kidnapping of Mr Rubén Darío Ramírez on 19 December 2002.

- 522.** The Government also informed the Committee that on 5 March 2009 the Secretary-General of FENSUAGRO, Mr Juan Efraín Mendoza Gamba, was arrested in the Sumapaz region, in the department of Cundinamarca, in the course of a search conducted by the police on a camp of the illegal armed group Revolutionary Armed Forces of Colombia (FARC), under the command of a criminal known under the alias of “Negro Antonio”. With Mr Mendoza Gamba were seven alleged FARC guerrillas. The Office of the Public Prosecutor accuses Mr Mendoza Gamba of the crimes of rebellion and aggravated homicide. Mr Mendoza, like any individual brought before the courts, has throughout the process enjoyed all the guarantees and opportunities to exercise his right to defend himself according to the due process of law.
- 523.** Furthermore, Ms Lilianny Patricia Obando, a member of FENSUAGRO, has also been charged in connection with her alleged participation in the activities of the FARC. Ms Obando, according to the charges brought by the Office of the Public Prosecutor, appears under various aliases in messages found on a computer seized at the camp of alias Raúl Reyes. All in all, 2,900 files have been found that are said to compromise Ms Obando with the FARC.

(h) Protection of trade unionists

- 524.** The Government states that the resources allocated to the Protection and Security Programme for Colombian workers have risen from US\$7 million in 2002 to US\$11 million in 2008 and that the Programme then covered 1,980 union leaders. By September 2009 the budget was over US\$13 million, making possible the protection of 1,450 union leaders. Since the teaching profession is one of the most vulnerable sectors, the Government has implemented strategies specifically directed at teachers. It has set up special Committees of Teachers under Threat in each department and decentralized entity, to study and assess threats against teachers and to find solutions. Between 2002 and 2009 more than 72 per cent of the 2,040 teachers classified as being under threat have been permanently transferred and another 15 per cent on a temporary basis. The Government is making steady progress in the design and implementation of protection plans and new laws, in an effort to end the violence confronting the Colombian population as a whole, including trade unionists.
- 525.** The steady improvement of the systems of protection for especially vulnerable groups, of which trade unionists are one, has been the Government’s constant concern during the past seven years. It has strived persistently to make additional resources available and to find new means of offering the best possible protection for all those who consider themselves to be under threat, if they so wish.
- 526.** Each year the Protection Programme for trade unionists has become stronger and its coverage both broader and more effective. Whereas in 1999 the Programme covered 84 trade unionists, or 47.75 per cent of all those benefiting from protective measures that year, in 2008 protection was extended to 1,980 trade unionists, constituting 22.66 per cent of the total population covered, i.e. 10,716 people.
- 527.** With regard to the specific allegations presented by SINALTRAINAL, the Government states that the union enjoys several forms of protection, both collective and individual. The members of the union thus have access to six collective schemes and two individual schemes. Moreover, protective barriers have been installed at 12 of the union’s buildings, 23 requests for relocation and one for removal transport have been endorsed, and

72 national air tickets, eight bullet-proof vests, 30 long-distance telephones and 51 mobile phones have been issued.

Protection of trade unionists from 1999 to 2008

- In 1999 protection was available to 84 trade unionists, 47.45 per cent of the total number of people (177) benefiting from protective measures.
- In 2000 the Programme covered 375 trade unionists, 74.25 per cent of the total (880).
- In 2001 the Programme covered 1,043 trade unionists, 79.55 per cent of the total (2,354).
- Between January and July 2002 the Programme covered 940 trade unionists, 32.25 per cent of the total (2,914).
- During the same period, the resources made available for the protection of trade unionists amounted to COP51,518 million, 66.3 per cent of the total resources allocated for such purposes (COP32,453 million).
- Between August and December 2002 the Programme covered 626 trade unionists, 32.21 per cent of the total (1,943).
- In 2003 the Programme covered 1,424 trade unionists, 27.27 per cent of the total (5,221).
- In 2004 the Programme covered 1,615 trade unionists, 29.65 per cent of the total (5,446).
- In 2005 the Programme covered 1,493 trade unionists, 27.11 per cent of the total (5,507).
- In 2006 the Programme covered 1,504 trade unionists, 24.67 per cent of the total (6,097).
- In 2007 the Programme covered 1,959 trade unionists, 20.74 per cent of the total (9,444).
- In 2008 the Programme covered 1,980 trade unionists, 22.66 per cent of the total (10,716).
- During the same period, the resources made available for the protection of trade unionists amounted to COP121,355 million, 38.56 per cent of the total resources allocated for such purposes (COP314,633 million).

Source: Ministry of the Interior and of Justice.

528. The budget for the protection of trade unionists in 2008 was approximately US\$10 million.

Percentage of budget allocated to the protection of trade unionists under the Protection Programme, 2002–08

Year	Trade unionists (US\$)	Percentage
2002	6 684.00	69
2003	7 081.00	62
2004	7 757.20	57
2005	7 905.45	47
2006	9 500.00	34
2007	10 260.00	30
2008	10 000.00	28

Source: Ministry of the Interior and of Justice.

Principal protection measures, 2002–09

Mobile protection units

Target group	Number of units								Total
	2002	2003	2004	2005	2006	2007	2008	2009	
Trade unionists	143	30	13	5	5	6	9	3	214

Source: Ministry of the Interior and of Justice.

Maintenance of trade union headquarters and installation of protective barriers

Target group	2002–07	2008	Total
Trade unionists	177	15	192

Source: Ministry of the Interior and of Justice.

Means of communication

Target group	Long-distance telephones (Avantel)	Mobile phones	Satellites	Total
Trade unionists	729	653	0	1 382

Source: Ministry of the Interior and of Justice.

- 529.** In addition, with the assistance of the United States Agency for International Development (USAID), the Ministry of the Interior and of Justice has been implementing the Preventive Security Project, under which a methodology has been designed and introduced to enable the target population, which includes trade union leaders and members, to adopt measures of self-protection that render them less vulnerable.

Preventive security capability, by city and number of trade union leaders

Department	City	Trade union leaders
Atlántico	Barranquilla	68
Valle del Cauca	Cali, Cartago y Buenaventura	116
Tolima	Ibagué	65
Risaralda	Pereira	39
Norte de Santander	Cúcuta y Ocaña	34
Antioquía	Medellín	17
Arauca	Arauca y Saravena	15
Huila	Neiva	12
Caquetá	Florencia	13
Magdalena	Santa Marta	20
Bolívar	Cartagena	29
Meta	Villavicencio	34
Nariño	Pasto	14
Córdoba	Montería	2
Cauca	Popayán	17
Total		495

Source: Ministry of the Interior and of Justice.

- 530.** Regarding the teachers under threat, the Government states that, under Decree No. 3222 of 2003 and whether or not they are members of trade unions, teachers are transferred whenever a threat arises or when, in the interests of public order, they are obliged to relocate because of the threat to their lives or physical integrity. So far, all the relocations ordered under Decree No. 3222 have been for reasons of public order rather than trade union activities.
- 531.** Requests for relocation are dealt with by Committees of Teachers under Threat, which have been set up in each of the country's 32 departments, in Bogotá and in the decentralized territorial entities, to study and assess threats against teachers and to find solutions when the life or physical integrity of teachers and administrative staff of state or nationalized educational establishments is threatened.
- 532.** The Committees are made up as follows:
- (a) the chief of the Senior Sectional Office, who acts as coordinator;
 - (b) the departmental or Bogotá education secretary;
 - (c) the permanent delegate of the Ministry of Education to the Regional Education Fund;
 - (d) the regional prosecutor or delegate; and
 - (e) a representative of the trade union comprising the largest number of teachers in the territorial entity concerned.
- 533.** The right to personal security has been defined in constitutional jurisprudence as “the entitlement to receive adequate protection from the authorities whenever a person is

exposed to exceptional risks that are juridically unacceptable, until such time as the danger has descended to an acceptable level such as is implicit in life in society”.

534. The Government recognizes that challenges remain in respect of vulnerable segments of the population that continue to be threatened by unlawful armed groups and organized crime. Nevertheless, as part of its policy of providing vulnerable segments of the population, including trade unionists, with protection and guarantees of security, the Government has been successful in obtaining adequate resources and adopting adequate measures to ensure a steadily increasing level of protection. The Government adds that the Committee is aware that, thanks to the support and participation of the trade union federations in the Protection Programme of the Ministry of the Interior and of Justice, not one member of a trade union organization who is under the collective protection of the State has been the victim of anti-union violence.

Further information

535. The Government adds that a meeting of the Inter-institutional Committee on Human Rights was held on 23 November 2009 to analyse and follow up the investigations into anti-union violence. The agenda of the meeting, which was attended by representatives of the investigating bodies (Office of the Public Prosecutor and Special Judges), the Government and the trade unions, was as follows:

- (1) progress report of the Office of the Public Prosecutor;
- (2) report of the Higher Council of the Judiciary;
- (3) Protection Programme;
- (4) other matters.

536. The Government also states that on 6 October 2009 the President of the Republic held a meeting with the trade union federations, employers’ organizations and members of his Cabinet, at which the following matters were dealt with:

- (1) security arrangements (President, Confederation of Workers of Colombia (CTC));
- (2) FECODE item;
- (3) situation of workers in the public sector in light of ruling No. C588 of 2009;
- (4) human rights report of members of trade union organizations;
- (5) consultation and negotiation on wage increases (public sector workers).

537. The Government also sent information on the situation with regard to freedom of association in general, the creation of trade unions, strikes and penalties imposed on companies for violating trade union rights.

538. In its communication dated 7 December 2009, the Government notes that, following its invitation, the Director of the ILO’s International Labour Standards Department (NORMES) visited Colombia from 19 to 23 October to monitor the progress made in implementing the conclusions of the Conference Committee on the Application of Standards concerning the application of Convention No. 87 and in developing the Tripartite Agreement on Freedom of Association and Democracy.

- 539.** The Director of NORMES was able to meet representatives of the Government, employers, trade union organizations and the National Trade Union School, as well as of the Office of the Inspector General, the Office of the Public Prosecutor, the High Courts, the Higher Council of the Judiciary and the Mayor of Medellín. She was given detailed information on the steps taken by the State to combat impunity, the Protection Programme for trade unionists, the progress made in terms of legislation, the development of social dialogue and the functioning of the Special Committee for the Handling of Conflicts Referred to the ILO (CETCOIT).
- 540.** At the end of her visit the Director presented her preliminary conclusions to the social partners at a meeting on 22 October. In a communication, the Government undertook major commitments in areas of interest to the Committee on Freedom of Association, notably with respect to clarification of the present case (No. 1787) and the strengthening of CETCOIT.
- 541.** Regarding the clarification of Case No. 1787, it is of vital importance to Colombia that light be shed on the violent incidents suffered by the trade union movement. In order to speed up the investigation of all alleged acts of violence, the Government has undertaken to make available, on a temporary basis, the necessary financial resources for the Office of the Public Prosecutor and the Higher Council of the Judiciary to make headway in this area. It has also undertaken to present a progress report to the ILO's supervisory bodies in due course concerning these two institutions.
- 542.** Since October 2009, meetings have been held with the Office of the Public Prosecutor, the Higher Council of the Judiciary and the National Police Directorate, all of which are working on their schedule and budget proposals specifically relating to this subject.
- 543.** In its communication of 22 January 2010, the Government refers to the progress made in implementing the conclusions of the meeting held in October 2009.
- 544.** The Government states that Colombia has undertaken to make a budget of more than US\$2 million available to the Office of the Public Prosecutor, which the latter requested in note No. 04965 of 2 December 2009 drawing attention to the Government's commitment vis-à-vis the ILO. The Brigadier General of the Criminal Investigation Department of the National Police has also requested more than US\$250,000 for the active pursuit of its investigations and has promised to increase its staff by 25 investigators, to be dedicated exclusively to investigations into crimes against trade unionists conducted by the Office of the Public Prosecutor through its National Unit for Human Rights and International Humanitarian Law.
- 545.** The Government reiterates its absolute readiness to continue the process of social dialogue through the National Committee on Consultation and Wage Policies and to transmit to the latter all the information provided by the Office of the Public Prosecutor and the Higher Council of the Judiciary on the progress made in respect of Case No. 1787. The Government adds that a meeting of the Inter-institutional Committee on Human Rights was held in November 2009 at which a progress report was presented and that similar meetings will be held in 2010. The Government reiterates its intention, with ILO assistance, to establish criteria on a tripartite basis for collating the information on acts of violence against the trade union movement. Regarding measures to prevent further acts of violence against trade union leaders and workers, the Government again gives its undertaking to maintain the Protection Programme and to provide it with the necessary financial resources. It likewise reiterates that, irrespective of the body responsible for implementing the protection measures, the State will always assume responsibility for the conduct of the Programme.

546. As to the strengthening of the CETCOIT, the Government states that it has reached an agreement with NORMES to strengthen the conflict resolution procedure in the Special Committee and that it has undertaken to appropriate the necessary funds for CETCOIT to be assisted by a national university so as to facilitate the resolution of the cases that are still pending. To this end, it is currently contacting the country's educational institutions.
547. In its communication of 5 March 2010, the Government transmits additional information concerning convictions handed down until 15 January 2010.

C. The Committee's conclusions

548. *The Committee takes note of the mission conducted by the Director of NORMES in October 2009 to follow up progress: (1) in the implementation of the conclusions of the June 2009 Conference Committee on the Application of Standards regarding the application of Convention No. 87; and (2) in the further implementation of the 2006 Tripartite Agreement on Freedom of Association and Democracy.*
549. *The Committee notes that the mission examined, among other issues, the measures taken to combat violence affecting trade union movement and impunity. In this framework, it met with various authorities, including the Minister of Social Protection, who referred to the progress of investigations undertaken to date and the measure taken to protect trade unionists that had been subject to threats. The mission also met with the Minister of the Interior and of Justice who referred to Justice and Peace Act No. 975 and to the victims' compensation fund. The mission also met with the National Association of Entrepreneurs of Colombia (ANDI) and trade union organizations (Single Confederation of Workers of Colombia (CUT), General Confederation of Labour (CGT), and Confederation of Workers of Colombia (CTC)). The mission also met with representatives of the Fiscalía General de la Nación which provided detailed information on the work of the National Unit for Human Rights and, in particular, of its sub-unit created in 2006 to investigate the acts of violence alleged under Case No. 1787. The Superior Council of the Judiciary informed the mission of the adoption of special measures to prosecute the authors of offences against trade unionists, including through nomination of specialized judges. The Prosecutor General provided detailed information on the function and competence of the institution. With regard to Case No. 1787, it was indicated that criminal prosecutors intercede with the judges who examine the acts of violence perpetrated against trade unionists with the participation of the agents of the State.*
550. *The Committee notes that, in the course of the mission, the Government confirmed its undertaking to combat impunity and corroborated the information supplied on progress in the fight against impunity. The Committee notes with interest the information submitted orally by the Office and the report of the mission, which refers to the measures that the Government has adopted, namely:*
- *the Government's undertaking to make available the necessary financial resources to strengthen the Sub-unit for Crimes against Trade Unionists of the National Human Rights Unit of the Office of the Public Prosecutor (US\$2 million) and the Special Judges of the Higher Council of the Judiciary, so that all the acts of violence alleged under Case No. 1787 can be clarified;*
 - *the Government's undertaking, with the assistance of the ILO, to reach an agreement with the trade union federations on criteria for compiling information on acts of violence against the trade union movement, in order to transmit it to the investigating bodies, as a means of supporting the work of investigation;*

- *the Government's undertaking to pursue the Protection Programme by making available the necessary financial resources, thereby engaging the full responsibility of the Government in the Programme's implementation;*
 - *the adoption of Act No. 1309 (concerning punishable acts against the juridically protected assets of members of a legally recognized trade union organization) and of Decree No. 1290 establishing an Administrative Compensation Programme for the victims of unlawful armed groups.*
- 551.** *With specific regard to each of the matters that are still pending in Case No. 1787, the Committee takes careful note of the new allegations presented by the WFTU, the ITUC, the CUT and SINALTRAINAL. The Committee also notes the detailed replies of the Government concerning the progress made in the case.*
- 552.** *With respect to the alleged acts of violence in particular, the Committee notes that the complainant organizations denounce the murder of 29 trade unionists in 2008 (not included in previous examinations of this case) and 21 trade union leaders and members in 2009, as well as an attempted murder in 2009. The Committee notes further that in its allegations SINALTRAINAL refers to the situation of the trade union organization at Nestlé and denounces the murder of seven of its members between 1986 and 2007.*
- 553.** *The Committee notes that the Government points out that the climate of violence has affected thousands of Colombians throughout the country and that trade unionists are among the victims (the Government attached a statistical table showing the total number of murders in the country and the number of murdered trade unionists). The Committee notes that the Government points out that, while it has not yet been possible to eliminate anti-union violence, there has been a significant improvement in the situation, thanks to the measures adopted by the Government and by the judiciary. The Committee notes in this respect that, according to the Government, the total number of homicides between 2002 and 2008 dropped by 44.1 per cent. It notes further that, with respect to the trade union organizations' latest allegations of acts of violence, the Government has sent information on the investigations that have been initiated into almost all the incidents that occurred in 2008 and in 2009. The Government has informed the Committee of the status of each of these investigations and points out that 15 of the 23 incidents where trade unionists were murdered in 2009 were not directed against trade unions and, of the remaining eight murders, only one was on trade union grounds. The Committee notes that, as regards the investigations into murders committed in 2008, there have already been four convictions. As to SINALTRAINAL's allegation that seven of its members were murdered between 1986 and 2007, the Government emphasizes that, as with the other acts of violence, the relevant investigations are being conducted by the Office of the Public Prosecutor (the Government also attaches information supplied by the company strongly denying the existence of anti-union violence and outlining the steps taken to protect union leaders).*
- 554.** *The Committee deeply regrets the murders and other forms of violence directed against trade union leaders and members in 2008 and considers the allegations to be very serious. The Committee has repeated on numerous occasions in the course of its examination of this case 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 that 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]. That said, the Committee does note the Government's efforts to remedy the climate of violence in the country and to investigate all the cases of violence against trade unionists that have been denounced, and that these efforts appear to be giving genuine results and to be bringing about a reduction in the number of such cases. The Committee urges the Government to continue to take the*

necessary steps to ensure that workers and their organizations can fully exercise their right in freedom and safety. The Committee requests the Government to keep it informed in this respect.

- 555.** *With regard to the climate of impunity, the Committee notes that, in its detailed report, the CUT maintains that impunity in Colombia has reached 98.3 per cent.*
- 556.** *The Committee notes that, for its part, the Government states that 218 sentences have been handed down since 2002 and that 317 persons have been convicted, among them the perpetrators, the accomplices and the instigators of the crimes. The Committee notes the Government's statement that the fact that those responsible for crimes against trade unionists come under investigation and are punished not only guarantees the right to truth and justice but also contributes to the prevention of further acts of violence. The Committee notes that the CONPES document No. 3411 adopted in 2006 by the National Council for Economic and Social Policy, which sets out the Government's policy for strengthening the State's ability to investigate, judge and punish human rights violations, clearly identified the action to be taken to strengthen the institutions responsible for clarifying and investigating acts of violence, judging their perpetrators and compensating their victims. So far, US\$11.8 million have been allocated to this end and have been used among other things to strengthen the judicial sector, improve the security of officials of the judiciary, coordinate the work of the bodies involved in the process of investigation, judgement and punishment, and develop an identification guide for investigations into human rights violations.*
- 557.** *The Committee notes further that in its observations the Government communicates the information transmitted by the various government and judicial bodies with specific responsibilities in the fight against impunity. It notes the detailed report sent by the Sub-unit for Crimes against Trade Unionists of the National Unit for Human Rights and International Humanitarian Law, which contains information on the work carried out by investigators specialized in crimes against trade unionists, the handling of the cases assigned, the status of the investigations and the sentences handed down in each case.*
- 558.** *The Committee notes that the National Directorate of Special Investigations is working on the design of differential methodologies for investigating the violation of rights of trade unionists, primarily so as to focus the efforts of officials of the judiciary on improving the quality of the investigations, make the best use of available resources and ensure decent treatment of the victims.*
- 559.** *The Committee also notes the information provided by the Vice-President of the Higher Council of the Judiciary and the report of the special courts for incidents involving trade unionists in 2008 and 2009. The Committee observes that, in his report, the Vice-President states that the Council is empowered to establish new courts where necessary and provided adequate financial resources are available, and that at present the number of judges is sufficient but that it might be increased as the work of the National Directorate of Special Investigations progresses.*
- 560.** *The Committee notes with satisfaction the adoption of Act No. 1309 of 2009 cited above, which: (1) provides that the statute of limitations on punishable actions involving the homicide of a member of a legally recognized trade union organization shall be 30 years; (2) considers crimes against members of a trade union organization or defenders of human rights to be an aggravating circumstance; (3) establishes that any person who prevents or disrupts a lawful meeting or the exercise of rights recognized under labour legislation, or engages in reprisals against a lawful strike, meeting or association, shall be liable to a fine of 100–300 SLMLVs; and (4) stipulates that in the case of threats or intimidation against a member of a trade union organization the penalty shall be increased by one third.*

- 561.** *The Committee notes with interest the Government's undertaking, in its communication of 22 January 2010, to make available the sum of US\$2 million to the Office of the Public Prosecutor and its indications that the national police have requested an additional US\$250,000 for the active pursuit of its investigations and have promised to increase staff by 25 investigators dedicated exclusively to assisting the Office of the Public Prosecutor with the investigations being conducted through its National Sub-unit for Human Rights. The Government reiterates its absolute readiness to continue the process of social dialogue through the National Committee on Consultation and Wage Policies, to which it will transmit all the information provided by the Public Prosecutor.*
- 562.** *In this regard, the Committee draws attention to the importance that the investigations and the administration of justice be conducted swiftly and recalls that justice delayed is justice denied, and 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**, op. cit., paras 52 and 105]. The Committee expects that the combination of measures adopted by the three state powers and by the various government bodies will make it possible to continue and improve on the work carried out so far in the fight against impunity and to look forward to more sentences being handed down in the near future in the investigations that are still pending. The Committee: (1) requests the trade union organizations to provide the competent bodies with all the information in their possession that might facilitate such investigations; (2) invites the Government and the social partners to establish criteria on a tripartite basis for compiling the information to be transmitted to the investigating bodies; and (3) requests the Government to keep it informed in detail of any developments in the climate of impunity, and of any concrete progress in the investigations initiated and any other measures adopted in this matter.*
- 563.** *With regard to the alleged existence of links between paramilitary groups and the DAS, which is responsible for providing protection to trade union officials and members, the Committee notes that, according to the CUT's allegations of 8 May 2009, the Office of the Public Prosecutor has indicted the former Director of the DAS for the murder of three trade unionists (Mr Zully Esther Codina, Mr Adán Pacheco and Mr Alfredo de Andreis) as well as of a political leader (Mr Fernando Piscioti). The Committee notes that the Government corroborates this information and adds that in the last few years there have been 417 internal investigations of 617 officials, 166 of whom have been relieved of their functions and 25 of which have been brought to trial. The Committee also notes the adoption of Act No. 1288 of 2009, which is designed to strengthen the prevention and control mechanisms of intelligence work of the State and to protect the fundamental rights of citizens. The Committee notes that the Office of the Inspector General is taking steps in this direction. The Committee observes that the allegations of presumed connivance between a state body responsible for protecting trade unionists and groups operating outside the law, are extremely serious, as such a situation can seriously undermine the credibility of the Government's determination to combat violence and impunity. That being so, the Committee expresses the hope that the investigations that have been initiated and the court cases that are under way will shortly establish the facts of the case so that responsibilities can be determined and guilty parties punished appropriately.*
- 564.** *Concerning the alleged plan known as "Operation Dragon" whose purpose is said to be the elimination of a number of union leaders, the Committee notes the Government's statement that the Office of the Inspector General is conducting an investigation into the matter through the National Directorate of Special Investigations, and that the Office of the Public Prosecutor recently ordered a formal investigation of six former officials of EMCALI whose premises were searched, as a result of which several former officials and contract workers have been charged with aggravated conspiracy to commit a crime and to violate the right of assembly and the right of association.*

- 565.** *With regard to the application of Justice and Peace Act No. 975, the Committee notes the Government's statement that the confessions of those responsible for violent incidents have made it possible to determine the background of the victims of many crimes. Thus, in the cases concerning trade unionists, it has been established that 216 were the victims of crimes confessed to by persons invoking the Justice and Peace Act, 167 of the victims having been identified by the Office of the Public Prosecutor. The Committee also takes note of Decree No. 1209 establishing the Compensation Programme for Victims of unlawful armed groups, under which 177 trade unionists have already received compensation.*
- 566.** *In relation to the alleged mass arrest of trade unionists presented by FENSUAGRO, the Committee notes the Government's statement that some of the Federation's leaders were arrested and charged with the crime of rebellion in the framework of legitimate interrogation procedures conducted by the Office of the Public Prosecutor. The Government stresses that no arrest is made without a warrant. The Committee notes that the Government refers by name to three members of FENSUAGRO who are facing trial: one for kidnapping for purposes of extortion, one for rebellion and aggravated homicide (he was arrested in a raid on an illegal camp of the FARC along with seven alleged guerrillas) and one for presumed participation in FARC activities.*
- 567.** *With regard to the measures to protect trade unionists, the Committee notes the Government's confirmation, in its communication of 22 January 2010, of its undertaking to pursue the Protection Programme and to continue to make available the necessary financial resources (a matter the CUT was concerned about), and its statement that, irrespective of the body responsible for implementing the protection measures, the State will always assume responsibility for the conduct of the Programme. The Committee likewise notes that the Programme's resources have been increased in recent years and that in 2009 its budget exceeded US\$13 million and the Programme covered 1,450 union leaders. The Government refers to the measures adopted to improve the Programme, and describes those aimed at certain trade union sectors that are particularly under threat, such as teachers, commenting in detail on the protection given to SINALTRAINAL. The Committee notes, too, that the issue of protection is also dealt with at regular meetings of the Inter-institutional Committee on Human Rights, and that at a meeting with the federations in October 2009, the President of the Republic raised the question of the safety of members of teachers' union federations.*
- 568.** *The Committee strongly urges the Government, at the same time as it takes all necessary steps to put an end to the violence against union leaders and members, to continue to guarantee the full protection of those whose lives have been threatened.*
- 569.** *The Committee takes note of the information supplied by the Government in its communication of 5 March 2010 concerning convictions handed down until 15 January 2010. This information will be examined at the next examination of Case No. 1787.*
- 570.** *Taking into account the extent of the threat which hovers over trade union leaders and members, and thus over the trade union movement as a whole, the Committee will pay particular attention to the evolution of this case and in this regard urgently invites the parties concerned to transmit all information on the developments with respect to each of these allegations.*

The Committee's recommendations

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

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- (a) *While noting with interest the measures adopted by the Government to combat violence, the Committee deeply regrets the murder of trade union leaders and members denounced by the complainants. The Committee urges the Government to continue taking all necessary steps to guarantee that workers and their organizations can fully exercise their rights in freedom and safety. The Committee requests the Government to keep it informed in this regard.*
- (b) *While noting with interest the measures adopted by the Government and the commitment it has made to investigate all the allegations presented under this case, the Committee: (1) requests the trade union organizations to provide the competent bodies with all the information in their possession that might facilitate such investigations; (2) invites the Government and the social partners to establish criteria on a tripartite basis for compiling the information to be transmitted to the investigating bodies; and (3) requests the Government to keep it informed in detail of any developments in the climate of impunity, and of any concrete progress in the investigations that have been initiated and any other measures adopted in this matter, especially regarding the alleged existence of links between paramilitary groups and the DAS responsible for providing protection for trade union leaders and members, and regarding the allegations concerning the plan known as “Operation Dragon” whose purpose is said to be the elimination of a number of union leaders.*
- (c) *The Committee strongly urges the Government to continue to guarantee the full protection of the union leaders and members whose lives have been threatened.*
- (d) *Taking into account the extent of the threat which hovers over trade union leaders and members, and thus over the trade union movement as a whole, the Committee will pay particular attention to the evolution of this case and in this regard urgently invites the parties concerned to transmit all information on the developments with respect to each of these allegations.*
- (e) *The Committee draws the Governing Body’s attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2362

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

Complaints against the Government of Colombia presented by

- **the National Union of Employees of AVIANCA (SINTRAVA)**
- **the Single Confederation of Workers of Colombia (CUT)**
- **the Colombian Association of Civil Aviators (ACDAC)**
- **the Colombian Association of Aviation Mechanics (ACMA) and**
- **the Colombian Association of Flight Attendants (ACAV)**

Allegations: Anti-union dismissals in the context of restructuring beginning in March 2004 within the AVIANCA–SAM–HELICOL group of companies; rehiring of dismissed workers through labour cooperatives, depriving them of coverage under the collective agreement with the company group; threats against trade union officials; failure to comply with the collective agreement; pressure on individuals to sign a (non-union) collective accord and dismissals of trade union officials; non-compliance with a collective agreement and signing of a (non-union) collective accord

- 572.** The Committee last examined this case at its June 2008 meeting [see 350th Report, paras 350–436, approved by the Governing Body at its 302nd Session].
- 573.** The Government sent its observations in communications dated 18 June, 15 September and 24 November 2008.
- 574.** 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

- 575.** At its June 2008 meeting, the Committee made the following recommendations [see 350th Report, para. 436]:
- (a) In regard to allegations that dismissed employees were replaced by the members of cooperatives or employees of companies that do not enjoy freedom of association within AVIANCA SA, the Committee requests the Government to guarantee that all AVIANCA–SAM employees fully enjoy their trade union rights and to keep it informed of any legal proceedings initiated by the parties contesting Ministry of Labour resolution No. 000221 which revokes the decision to impose sanctions on the company.
 - (b) Recalling that, in conformity with Article 2 of Convention No. 87, the notion of worker includes not only dependent but also independent workers and that workers in associated

labour cooperatives should be able to establish and join the trade union organizations of their own choice, the Committee requests the Government to confirm whether workers in associated labour cooperatives can establish and join trade unions.

- (c) In regard to allegations of threats against AVIANCA SA's unionized workers in Cali, by the United Self-Defence Forces of Colombia (AUC), the Committee urges the trade union to provide specifics about the circumstances of the threats, so that more information can be requested from the relevant authorities.
- ...
- (e) In regard to the new allegations against AVIANCA SA submitted by ACDAC, ACAV and SINTRAVA, on the subject of pressure on trade union organizations, leading to extensive withdrawal of union membership by employees, and even causing ACDAC to withdraw the present complaint in 2005; dismissal of ACDAC-member employees – Captains Quintero and Escobar; drafting of a voluntary benefits plan outside the current collective agreement which disproportionately benefits non-unionized employees and which discourages union membership and pressure on newly hired pilots to join the plan, with the result that they cannot join the trade union; and adoption by the Ministry for Social Protection of internal labour regulations that were drafted without the participation of trade unions and of which they were not informed, the Committee requests the Government to take the necessary measures to ensure that an independent investigation is carried out into these allegations so as to enable the Committee to reach a conclusion in full knowledge of the facts, and to send its observations on these matters.
- (f) In regard to the ACDAC's allegations that HELICOL has refused to update salaries on account of the union's refusal to negotiate a new collective agreement, and the existence of a collective accord that offers higher salaries to non-unionized workers than those paid to unionized employees and the pending decision regarding the appointment of an arbitration tribunal, the Committee, noting that this situation is not satisfactory for any of the parties, requests the Government to take the necessary measures to guarantee that collective accords are not concluded with non-unionized workers, to the detriment of the trade union, and asks the parties to endeavour once more to reach a negotiated solution to this dispute. The Committee requests the Government to keep it informed in this respect.
- (g) In regard to ACDAC's allegation that HELICOL has unilaterally imposed one day per week on which Captain Cantillo can pursue union activities, the Committee, noting that this is a matter that affects both the operation of the company and the correct performance of union activities, requests the Government to take all measures in its power to encourage the parties to reach a negotiated solution in this matter.
- (h) In regard to sanctions against AEROREPUBLICA SA union leaders, the Committee requests the Government to keep it informed of the pending cases involving Mr Restrepo Montoya and Mr Vargas.
- (i) In regard to ACDAC's allegations that AEROREPUBLICA SA refuses to bargain collectively and to the company's response that the agreement is obstructed by the union's inflexible position, the Committee requests the Government to take all measures in its power to bring the parties closer together and allow them to reach a negotiated solution to the dispute. The Committee requests the Government to keep it informed in this respect.
- (j) In regard to ACDAC's allegations that Vertical de Aviación SA is not complying with the current collective agreement and refuses to bargain collectively, leading to the appointment of an arbitration tribunal which issued an arbitral ruling that was subsequently challenged by the union, the Committee requests the Government to provide information on the pending administrative investigation into failure to comply with the current collective agreement and into whether agreed benefits are currently being paid, together with information on the Supreme Court of Justice's decision on the challenge to the arbitral ruling.
- (k) In regard to allegations of a refusal to grant trade union leave of absence on a given day each week, given that this is a matter of interest to both parties and relates to the service

requirements and the correct conduct of union activities, the Committee asks the parties to endeavour to find a negotiated solution in this matter.

B. The Government's reply

- 576.** In its communications of 18 June, 15 September and 24 November 2008, the Government sent the following observations.
- 577.** As regards recommendation (a) concerning the replacement of dismissed employees with the members of cooperatives or employees of companies that do not enjoy freedom of association within AVIANCA SA, the Government indicates that, in Colombia, freedom of association is respected and workers belonging to cooperatives may exercise their right to organize within a trade union at the same time, since nothing prevents them from joining an occupation- or even industry-based union. The Government explains, however, that members of associated labour cooperatives may not establish trade unions at the companies where they exercise an activity as cooperative members since the legislation provides that, in terms of both their structure and functions, trade unions shall be composed of workers who hold employment contracts in which a relationship of dependence or subordination may be established. Hence only workers covered by the Labour Code may form trade unions, though this does not prevent other workers from establishing other kinds of associations.
- 578.** As regards Decision No. 00021 of the Territorial Directorate of Atlántico in which it was decided not to penalize the company, the Government attaches a communication from AVIANCA SA in which the latter states that the trade unions have not taken any legal action against the decision.
- 579.** Concerning recommendation (b) in which the Committee requests the Government to confirm whether workers in labour cooperatives can establish and join trade unions, the Government refers to its statements in the preceding paragraphs.
- 580.** With regard to recommendation (c) relating to SINTRAVA's allegations concerning threats made by the United Self-Defence Forces of Colombia (AUC), the Government is awaiting information on the matter from the complainant organization in order to make inquiries with the competent authorities.
- 581.** With respect to recommendation (e) concerning pressure on trade union organizations, resulting in many workers relinquishing their union membership; the dismissal of ACDAC-member employees – Captains Quintero and Escobar; the drafting of a voluntary benefit plan outside the current collective agreement which particularly benefits non-unionized employees, discourages union membership and puts pressure on newly hired pilots to join the plan; and the adoption by the Ministry for Social Protection of internal labour regulations that were drafted without the participation of the trade unions; the Government refers to the indication by the Territorial Directorate of Atlántico that Decision No. 386 of 21 April 2004 (which was communicated to the trade union on 27 April 2004), approving the internal regulations drafted by the company, was challenged by three appeals for direct revocation, one of which was dismissed.
- 582.** Moreover, in the communication from the company attached by the Government, the company points out that the voluntary benefit plan is intended for three groups of workers with different needs, and the benefits involved are no greater or better than those established in the collective agreement. They were devised in response to constant pressure from a number of non-unionized workers to have their own benefit scheme separate from the collective agreement. The benefit plan was the subject of an action for the protection of constitutional rights (*tutela*), which was decided in favour of the company in two instances.

583. Relating to the dismissals of Captains Carlos Quintero and Santiago Escobar, the communication from the company indicates that the former was dismissed for claiming to have a medical disability and the latter was dismissed for misconduct.
584. As regards recommendation (g) concerning HELICOL's refusal to negotiate with respect to union leave for Captain Cantillo, the Government invites the trade union to bring these allegations to the attention of the Special Committee on the Handling of Conflicts referred to the ILO (CETCOIT).
585. With respect to recommendation (h) concerning the penalties imposed on union officials of AEROREPUBLICA, the Government indicates that the Office for International Cooperation and Relations requested information on the proceedings instituted by Captains Héctor Vargas and David Restrepo Montoya in the Ninth Labour Court of the Bogotá Circuit and the Fifteenth Labour Court of the Medellín Circuit.
586. Concerning recommendation (i) relating to the allegations concerning AEROREPUBLICA's refusal to engage in collective bargaining, the Government states that, according to information supplied by the ACDAC union and the company, an agreement was signed putting an end to the dispute between the parties.
587. As regards recommendation (j) concerning the administrative investigation against Vertical de Aviación Ltda, the Coordinating Office for Prevention, Inspection and Surveillance of the Territorial Directorate of Cundinamarca stated that the investigation is under way in Inspectorate No. 12. It also referred to two investigations against the aforementioned company for alleged violations of the right to organize which are being conducted by Inspectorates Nos 12 and 4. Relating to the union's appeal against the arbitration award, the Government states that the Supreme Court of Justice decided by means of a ruling of 2 October 2007 not to annul the arbitration award (a copy of the decision is attached).
588. As regards recommendation (k) concerning the refusal to grant trade union leave, the Government refers to the statement by Vertical de Aviación Ltda that attempts are being made to reach an agreement with the trade union in order to settle the matter in question. The Government attaches a copy of the relevant communication from the company.

C. The Committee's conclusions

589. *The Committee notes the Government's observations relating to the recommendations which remained pending.*
590. *As regards recommendations (a) and (b) concerning the replacement of dismissed workers with the members of cooperatives or employees of companies that do not enjoy freedom of association within AVIANCA SA, the Committee notes the Government's statement to the effect that workers belonging to cooperatives may exercise their right to organize within a trade union at the same time, since nothing prevents them from joining an occupation- or even industry-based union, but that they may not establish trade unions at the companies where they exercise an activity as cooperative members because the legislation provides that unions must be composed of workers who hold employment contracts in which a relationship of dependence or subordination may be established. The Committee also notes the company's assertion (through a communication attached by the Government) that no legal action has been taken against the decision of the Territorial Directorate of Atlántico in which it was decided not to penalize the company in this regard. The Committee recalls that, under Article 2 of the Convention, all workers, without distinction whatsoever, shall have the right to establish and join organizations of their own choosing, including the unions of the enterprise in which they perform their work. The Committee observes that the Committee of Experts on the Application of Conventions and Recommendations, when*

examining this matter in 2009, asked the Government to consider the possibility of an independent expert conducting a national survey on the application of the Associated Labour Cooperatives Act, and the use thereof in the sphere of labour relations, and clarifying whether or not workers in cooperatives can join trade unions. The Committee requests the Government to keep it informed of any measures taken in this respect.

- 591.** *With respect to recommendation (c) relating to SINTRAVA's allegations concerning threats made by the AUC against AVIANCA SA's unionized workers in Cali, the Committee observes that, despite asking the trade union to provide specific details of the circumstances of the threats so that inquiries can be made with the relevant authorities, it has not received any further information in this respect. That being the case, the Committee will not examine these allegations any further.*
- 592.** *Relating to recommendation (e) concerning pressure on trade union organizations, resulting in many workers relinquishing their union membership; the dismissal of ACDAC-member employees – Captains Quintero and Escobar; the drafting of a voluntary benefit plan outside the current collective agreement, which particularly benefits non-unionized employees, discourages union membership and puts pressure on newly hired pilots to join the plan (with the result that they cannot join the trade union); and the adoption by the Ministry for Social Protection of internal labour regulations that were drafted without the participation of the trade unions; the Committee notes the Government's statements to the effect that: (1) the Territorial Directorate of Atlántico stated that Decision No. 386 of 21 April 2004 (which was communicated to the trade union on 27 April 2004), approving the internal regulations drafted by the company, was challenged by three appeals for direct revocation, one of which was dismissed; (2) in the communication attached by the Government, the company points out that the voluntary benefit plan was devised in response to pressure from non-unionized workers to have their own scheme of benefits, which are no greater or better than those established in the collective agreement, and are intended for three groups of workers with different needs; the benefit plan was the subject of an action for the protection of constitutional rights (tutela), which was decided in favour of the company in two instances; and (3) as regards the dismissals of Captains Carlos Quintero and Santiago Escobar, the company states that the former was dismissed for claiming to have a medical disability and the latter was dismissed for misconduct.*
- 593.** *Concerning the voluntary benefit plan devised by the company for non-unionized workers, the Committee considers that when the company offers improvements in the conditions of work to non-unionized workers through individual benefits, there is a serious risk that the bargaining capacity of the union will be undermined and that discriminatory situations will occur which favour non-unionized workers; moreover, this can also lead unionized workers to relinquish their union membership. The Committee therefore requests the Government to ensure that the voluntary benefit plan is not applied in such a way as to undermine the position of the trade unions and their bargaining capacity, in accordance with Article 4 of Convention No. 98, and that no pressure is placed on workers to join the plan. The Committee also requests the Government to keep it informed of the final outcome of the direct revocation proceedings brought against the decision approving the internal work regulations. The Committee invites the enterprise and the complainant organization to bring these issues to the attention of the CETCOIT and expresses the hope that the parties will be able to reach a negotiated solution.*
- 594.** *As regards recommendations (f) and (g) concerning HELICOL's refusal to update salaries and the union's refusal to negotiate a new collective agreement, the existence of a collective accord that offers higher salaries to non-unionized workers than those which are also paid to unionized employees, and HELICOL's unilateral imposition of one day per week on which Captain Cantillo can pursue union activities, the Committee notes the*

Government's invitation to the parties to bring these issues to the attention of the CETCOIT and hopes that the parties will be able to reach a negotiated solution to the dispute in order to develop harmonious working relations. The Committee requests the Government to keep it informed in this respect.

- 595.** *With respect to recommendation (h) concerning the penalties imposed on AEROREPUBLICA union officials Mr Héctor Vargas and Mr David Restrepo Montoya for asserting their right of expression and for claiming the exercise of their rights, the Committee noted in its previous examination of the case that Mr Vargas and Mr Restrepo Montoya had initiated legal proceedings against their dismissals. The Committee notes the Government's indication that information on the current status of the proceedings was requested from the Ninth Labour Court of the Bogotá Circuit and the Fifteenth Labour Court of the Medellín Circuit. The Committee expects that these proceedings will be concluded in the near future. Should it be established that the dismissals occurred on anti-union grounds, the Committee requests the Government to take the necessary measures to ensure that the dismissed trade union leaders will be reinstated without loss of pay. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed in this respect.*
- 596.** *Concerning recommendation (i) relating to the allegations concerning AEROREPUBLICA's refusal to engage in collective bargaining, the Committee notes with interest the Government's indication that the ACDAC union and the company signed an agreement putting an end to the dispute between the parties.*
- 597.** *As regards recommendation (j) concerning the administrative investigation against Vertical de Aviación Ltda for non-compliance with the collective agreement in force, and concerning the decision of the Supreme Court of Justice relating to the appeal against the arbitration award, the Committee notes the Government's statement to the effect that: (1) as regards the union's appeal against the arbitration award, the Supreme Court of Justice decided by means of a ruling, dated 2 October 2007, not to annul the arbitration award; and (2) the Coordinating Office for Prevention, Inspection and Surveillance of the Territorial Directorate of Cundinamarca stated that two investigations into alleged violations of the right to organize are being conducted by Inspectorates Nos 12 and 4. The Committee requests the Government to keep it informed of the final outcome of these investigations.*
- 598.** *Relating to recommendation (k) concerning refusal to grant trade union leave, the Committee notes the Government's statement that Vertical de Aviación Ltda is endeavouring to reach an agreement with the trade union in order to settle the matter in question. The Government attaches a copy of the relevant communication from the company.*

The Committee's recommendations

- 599.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) As regards the allegations concerning the replacement of dismissed workers with the members of cooperatives or employees of companies that do not enjoy freedom of association within AVIANCA SA, observing that the Committee of Experts on the Application of Conventions and*

Recommendations, when examining this matter, asked the Government to consider the possibility of an independent expert conducting a national survey on the application of the Associated Labour Cooperatives Act and the use thereof in the sphere of labour relations in order to determine whether or not workers in cooperatives can join trade unions, the Committee requests the Government to keep it informed of any measures taken in this respect.

- (b) *With respect to the allegations concerning pressure on trade union organizations in the same enterprise, resulting in many workers relinquishing their union membership, the drafting of a voluntary benefit plan outside the current collective agreement which particularly benefits non-unionized employees; the pressure on newly hired pilots to join the plan (with the result that they cannot join the trade union); and the adoption by the Ministry for Social Protection of internal labour regulations that were drafted without the participation of the trade unions, the Committee requests the Government to ensure that the voluntary benefit plan is not applied in such a way as to undermine the position of the trade unions and their bargaining capacity, in accordance with Article 4 of Convention No. 98, and that no pressure is placed on workers to join the plan. The Committee also requests the Government to keep it informed of the final outcome of the direct revocation proceedings brought against the decision approving the internal work regulations. The Committee invites the enterprise and the complainant organization to bring these issues to the attention of the CETCOIT and expresses the hope that the parties will be able to reach a negotiated solution.*
- (c) *As regards the allegations concerning HELICOL's refusal to update salaries owing to the union's refusal to negotiate a new collective agreement, the existence of a collective accord that offers higher salaries to non-unionized workers than those paid to unionized employees and HELICOL's unilateral imposition of one day per week for the pursuit of union activities by Captain Cantillo, while noting the Government's invitation to the parties to bring these issues to the attention of the CETCOIT, the Committee hopes that the parties will be able to reach a negotiated solution to the dispute in order to develop harmonious working relations. The Committee requests the Government to keep it informed in this respect.*
- (d) *Concerning the penalties of dismissal imposed on AEROREPUBLICA union officials Mr Héctor Vargas and Mr David Restrepo Montoya for asserting their right of expression and for claiming the exercise of their rights, the Committee expects that the judicial proceedings instituted by the union officials against their dismissal will be concluded in the near future. Should it be established that the dismissals occurred on anti-union grounds, the Committee requests the Government to take the necessary measures to ensure that the dismissed trade union leaders will be reinstated without loss of pay. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed in this respect.*

- (e) *The Committee requests the Government to keep it informed of the final outcome of the administrative investigations against Vertical de Aviación Ltda which are being conducted by Inspectorates Nos 12 and 4 of the Territorial Directorate of Cundinamarca into alleged violations of the right to organize.*

CASE NO. 2565

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

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

- **the Single Confederation of Workers of Colombia (CUT)**
- **the National Trade Union of Workers of Omnitempus Ltda (SINTRAOMNITEMPUS) and**
- **the National Unitary Trade Union of Official Workers and Public Servants of the State (SINUTSERES)**

Allegations: (1) Declaration of loss of enforceability (validity) of the decisions providing for the founding document, executive board and by-laws of the National Trade Union of Workers of Omnitempus Ltda (SINTRAOMNITEMPUS) to be entered in the trade union register, and subsequent dismissal of all of its officers and 80 per cent of its members; (2) refusal of the administrative authority to enter the Trade Union of Workers of the Sylvania Lighting International Enterprise (SINTRAESLI) in the register of trade unions; (3) refusal of the administrative authority to register María Gilma Barahona Roa as national controller (fiscal) of the National Unitary Trade Union of Official Workers and Public Servants of the State (SINUTSERES), and her subsequent dismissal along with other union officers and over 20 officials of the National Local Road Fund (in the process of being liquidated), in which Ms Barahona Roa was employed; and (4) refusal of the administrative authority to register the executive committee of SINUTSERES' Soacha Cundinamarca Colombia branch

- 600.** The Committee last examined this case at its meeting in May–June 2009 [see 354th Report of the Committee on Freedom of Association, approved by the Governing Body at its 305th Session (June 2009), paras 441–484].
- 601.** The Government sent new observations in a communication dated 1 October 2009.
- 602.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

- 603.** In its previous examination of this case at its May–June 2009 meeting, the Committee made the following recommendations [see 354th Report, para. 484]:
- (a) As regards the declaration of loss of enforceability (validity) of the decisions entering in the trade union register, the founding document, executive board and by-laws of SINTRAOMNITEMPUS, the Committee requests the Government, in accordance with Constitutional Court Rulings Nos C-465 of 14 May and C-695 of 9 July 2008, to provisionally reinstate the dismissed officers and members of the trade union, and provisionally register SINTRAOMNITEMPUS pending a final decision by the administrative court on both the refusal to register the trade union and the subsequent dismissal of the officers and members of the trade union. The Committee requests the Government to keep it informed in this regard.
 - (b) As regards the allegations of the refusal by the administrative authority to register SINTRAESLI and the subsequent dismissal of the founding members of the trade union, the Committee requests the Government to take the necessary measures to ensure that an investigation is carried out without delay into these allegations and, should they be found to be true, to take appropriate steps to reinstate the workers dismissed for having attempted to form a trade union, with back pay and compensation constituting sufficiently dissuasive sanctions, and to proceed with the registration of the SINTRAESLI trade union. The Committee requests the Government to keep it informed in this regard, as well as on the challenges filed against the rejection of the tutela actions initiated by the trade union.
 - (c) The Committee requests the Government to send its observations on the allegations made by SINUTSERES concerning the administrative authorities' disregard for the Committee's recommendations on the registration of Ms Barahona Roa as controller and the subsequent dismissal of Ms Barahona Roa and other union officers, as well as other officials of the National Local Road Fund, and their refusal to register the executive committee of the Soacha Cundinamarca Colombia branch of the same trade union.

B. The Government's reply

- 604.** In its communication dated 1 October 2009, the Government sent the following observations.
- 605.** With regard to point (a) of the recommendations, concerning the request for the dismissed officers and members of SINTRAOMNITEMPUS to be reinstated, the Government states that appropriate legal proceedings have to be initiated with the ordinary labour court.
- 606.** With regard to SINTRAOMNITEMPUS' registration, the Government states that the trade union can initiate the relevant proceedings through the Ministry of Social Protection. As to the decision whereby the organization's registration was declared to be unenforceable, the Government states that it will be guided by the decision of the administrative disputes body which rules on the legality of the steps taken by the Ministry of Social Protection.

607. With regard to paragraph (b) of the recommendations, concerning the administrative authority's refusal to register SINTRAESLI and the subsequent dismissal of its founding members, the Government states that it has asked the Cundinamarca Regional Directorate of the Ministry of Social Protection to look into the labour administration inquiry. As to the challenges filed against the rejection of the *tutela* actions initiated by SINTRAESLI, the Government suggests that the trade union inform it of the present status of the proceedings initiated through the administrative disputes body to have the decision denying its registration revoked, so that it can send its observations on the subject.
608. With regard to the reference in paragraph (c) of the recommendations to the allegations made by SINUTSERES concerning the administrative authorities' disregard of the Committee's recommendations with respect to the refusal to register Ms Barahona Roa as controller, her subsequent dismissal along with two other union officers (Ms Olga Mercedes Suárez Galvis and Ms Yolanda Montilla), as well as other officials of the National Local Road Fund, and the refusal to register the executive committee of SINUTSERES' Soacha Cundinamarca Colombia branch, the Government states that the International Cooperation and Relations Office has sought clarification in this regard from the Cundinamarca Regional Directorate of the Ministry of Social Protection.

C. The Committee's conclusions

609. *The Committee notes the Government's new observations.*
610. *As regards paragraph (a) of the recommendations, concerning the declaration of loss of enforceability (validity) of the decisions providing for the founding document, executive board and by-laws of SINTRAOMNITEMPUS to be entered in the trade union register, and the subsequent dismissal of its officers and members, the Committee had requested the Government, as a provisional measure, to reinstate the dismissed officers and members of the trade union and to register SINTRAOMNITEMPUS, pending a final decision by the administrative disputes court. In its response, the Government states: (1) that, for the workers and executive committee members to be reinstated, appropriate legal proceedings have to be initiated with the ordinary labour court; (2) that, for an entry to be made in the trade union register, relevant proceedings must be initiated with the Ministry of Social Protection; and (3) that, in the case of the proceedings initiated through the administrative disputes body to have the decision invalidating the trade union's registration revoked and to re-establish its right to register, the Government will abide by the decision of the disputes body, which determines the legality of steps taken by the Ministry of Social Protection. The Committee notes the Government's statement and requests the Government to keep it informed of the final outcome of the trade union's request currently lodged with the administrative disputes body to have the decision concerning its registration revoked, as well as of any action taken by the trade union with a view to its registration. The Committee draws the complainant organization's attention to the Government's statement that, to have its workers and executive committee members reinstated, appropriate legal proceedings have to be initiated with the ordinary labour court. The Committee invites the complainant to act accordingly if it so wishes.*
611. *With regard to paragraph (b) of the recommendations, concerning the alleged refusal of the administrative authority to register SINTRAESLI and the subsequent dismissal of its founding members, the Committee notes the Government's statement that it has asked the Cundinamarca Regional Directorate of the Ministry of Social Protection to look into the labour administration inquiry concerning the matter. The Committee expects that the inquiry into the refusal of the administrative authority to register SINTRAESLI, and into the subsequent dismissal of its founding members, will reach its conclusions without delay and that, should the allegations be found to be true, the dismissed workers will be duly reinstated and the wages owing to them duly paid. The Committee calls on the Government*

to keep it informed of developments in this respect. As regards the challenges filed against the rejection of the tutela actions initiated by the trade union with respect to its registration, the Committee requests the union to supply additional information on the status of those challenges so as to enable the Government to provide its observations in this regard, and to indicate whether it has submitted a new request to be registered.

- 612.** *With regard to paragraph (c) of the recommendations, concerning SINUTSERES' allegations that Ms Barahona Roa was denied registration as the union's controller, that she was subsequently dismissed along with two other union officers (Ms Olga Mercedes Suárez Galvis and Ms Yolanda Montilla) and other officials of the National Local Road Fund, and that the executive committee of the union's Soacha Cundinamarca Colombia branch was denied registration, the Committee notes the Government's statement that it has asked the Cundinamarca Regional Directorate of the Ministry of Social Protection to look into the matter. The Committee regrets that, despite the time that has elapsed since its previous examination of the case in May–June 2009, the Government has not supplied any specific information on the allegations.*
- 613.** *Given this situation, the Committee wishes to recall that in its previous examination of the case it took note of the Constitutional Court Rulings Nos C-465 of 14 May and C-695 of 9 July 2008. Bearing in mind that these are general and mandatory rulings, to the effect that the registration of a change in the composition of an executive committee with the Ministry of Social Protection is strictly a matter of public information and does not entitle the Ministry to conduct a preliminary examination of its composition, the Committee calls on the Government to take the necessary steps for Ms Barahona Roa to be registered as the trade union's controller and for its Sochoa branch's executive committee likewise to be entered in the register. The Committee also calls on the Government to conduct an investigation without delay into the subsequent dismissal of Ms Barahona Roa along with two other union officers (Ms Olga Mercedes Suárez Galvis and Ms Yolanda Montilla) and other officials of the National Local Road Fund and to keep it informed of the outcome, together with the reasons adduced thereto.*

The Committee's recommendations

- 614.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the declaration of loss of enforceability (validity) of the decisions providing for the founding document, executive board and by-laws of SINTRAOMNITEMPUS to be entered in the trade union register, and the subsequent dismissal of its officers and members, the Committee requests the Government to keep it informed of the outcome of the trade union's request currently lodged with the administrative disputes body to have the decision concerning its registration revoked, as well as of any action taken by the trade union with a view to its registration. The Committee draws the complainant organization's attention to the Government's statement that, to have its workers and executive committee members reinstated, it must initiate legal proceedings with the ordinary labour court and invites it to act accordingly if it so wishes.*
- (b) *Concerning the alleged refusal of the administrative authority to register SINTRAESLI and the subsequent dismissal of its founding members, the Committee expects that the inquiry into the matter will reach its conclusions in the near future and that, should the allegations be found to be true, the*

dismissed workers will be duly reinstated and the wages owing to them duly paid. The Committee calls on the Government to keep it informed of developments in this respect. The Committee requests the union to supply additional information on the status of the challenges filed against the rejection of the tutela actions initiated by the trade union with respect to its registration so as to enable the Government to provide its observations in this regard, and to indicate whether it has submitted a new request to be registered.

- (c) *With regard to SINUTSERES' allegations that Ms Barahona Roa was denied registration as the union's controller, that she was subsequently dismissed along with two other union officers (Ms Olga Mercedes Suárez Galvis and Ms Yolanda Montilla) and other officials of the National Local Road Fund, and that the executive committee of the union's Soacha Cundinamarca Colombia branch was denied registration, the Committee calls on the Government, in keeping with the recent Constitutional Court Rulings Nos C-465 of 14 May and C-695 of 9 July 2008 (to the effect that the registration of a change in the composition of an executive committee with the Ministry of Social Protection is strictly a matter of public information and does not entitle the Ministry to conduct a preliminary examination of its composition), to have Ms Barahona Roa registered as the trade union's controller and its Soacha branch's executive committee likewise entered in the register, to take steps to have an investigation conducted without delay into the subsequent dismissal of Ms Barahona Roa along with two other union officers (Ms Olga Mercedes Suárez Galvis and Ms Yolanda Montilla) and other officials of the National Local Road Fund, and to keep it informed of the outcome, together with the reasons adduced thereto.*

CASE No. 2612

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

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

- **the National Union of Workers of Banco Bilbao Vizcaya Argentaria Colombia (SINTRABBVA) and**
- **the National Union of Bank Employees (UNEB)**

Allegations: The complainant organizations allege pressure being put on workers to accept a collective accord, violation of the collective agreement in force, dismissals and disciplinary proceedings with respect to trade union leaders and mass dismissals of bank workers

615. The Committee last examined this case at its June 2009 meeting [see 354th Report, approved by the Governing Body at its 305th Session, paras 590–628].

616. The Government sent its observations in a communication dated 1 October 2009.

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

A. Previous examination of the case

618. In its previous meeting, the Committee made the following recommendations [see 354th Report, para. 628]:

- (a) The Committee requests the Government to keep it informed of developments in the investigations currently before the Territorial Directorate of Cundinamarca with regard to:
 - (i) the allegations relating to the pressure put on workers at the BBVA and Granahorrar in the context of the merger between the two entities in 2006 to sign a collective accord despite the existence of a collective agreement which was still valid until 31 December 2007 and non-compliance with various provisions of this agreement;
 - (ii) the allegations concerning the harassment of trade union leaders; in this respect, the Committee expresses the hope that the aforementioned investigations will cover all the allegations of harassment brought by the trade unions, including dismissals (Mr José Murillo and Mr Henry Morantes) and the pressure put on some workers to leave the union (Ms Nidia Patricia Beltrán, Mr Dairo Cortés, Ms Luz Helena Vargas, Ms Gloria María Carvajal and Ms Marina Guzmán).
- (b) With regard to the allegations concerning the mass dismissal of workers by means of conciliation agreements in order to replace them with subcontracted workers, the Committee requests the Government to keep it informed with regard to the administrative complaint and the judicial proceedings in progress.

B. The Government's reply

619. In its communication of 1 October 2009, the Government sent the following observations.

620. As regards recommendation (a), point (i), the Government indicates that the Territorial Directorate of Cundinamarca instigated an administrative inquiry into the Banco Bilbao Vizcaya Argentaria (BBVA), in connection with the possible violation of article 39 of the Political Constitution and of ILO Convention No. 98, by undertaking a general campaign to induce employees to sign up to a collective accord and adopting measures against anyone who decided to join the trade union. The draft resolution containing the decision on the aforementioned inquiry is now before the Inspection, Supervision and Monitoring Coordination Authority.

621. As regards recommendation (a), point (ii), the Territorial Directorate of Cundinamarca launched an administrative inquiry into the actions of BBVA on the grounds of possible anti-union harassment. A decision is still pending.

622. As regards the dismissals of Mr José Murillo and Mr Henry Morantes, the Government refers to statements made by the bank according to which: the employment relationship was terminated unilaterally and the two former workers initiated legal action which is still ongoing, with the aim of obtaining reinstatement in their former posts. In their claims, they have not reported any harassment or persecution for belonging to the union (the Government sends copies of the claims in question).

623. As regards Ms Nidia Patricia Beltrán, Mr Dairo Cortés, Ms Luz Helena Vargas, Ms Gloria María Carvajal and Ms Marina Guzmán, the Government indicates that according to the company:

- Nidia Patricia Beltrán is working as an official in Cali and has not made any claims against the bank in connection with the allegations.
- Dairo Cortés was dismissed for valid reasons connected with failure to fulfil his obligations and serious misconduct.
- As regards Luz Helena Vargas, there is no record of her in the database of employees and former employees.
- In the case of Gloria María Carvajal and Marina Guzmán, their employment was terminated by the bank with their consent and approval was given by the labour inspector. This was set out in the conciliation agreement, which also acknowledged settlement of any account (copies are provided by the Government).

624. As regards recommendation (b), the Government indicates that the workers in question were not dismissed but signed conciliation agreements. The Government explains that conciliation is instituted in the public interest as a means of resolving, through negotiation, a legal dispute between two parties, with the assistance of a public official from the judicial or the administrative branch, or in exceptional cases, of private individuals. The conciliation procedure is characterized by the following elements: (a) it is a tool via which a dispute can be settled by the parties themselves, through reconciliation or consensus; (b) it is a preventive action in that it seeks a settlement before or during judicial proceedings, in which case the settlement pre-empts the final ruling and terminates the judicial proceedings; (c) conciliation is not strictly speaking a judicial measure, nor does it give rise to a jurisdictional process, because the conciliator, be it an administrative or judicial authority or an individual, does not intervene to impose on the parties a settlement under the terms of an autonomous and innovative decision; (d) conciliation is a useful means of settling disputes; (e) conciliation can be applied in any disputes in which a settlement can, in principle, be negotiated, or which involves persons whose capacity to conciliate is not legally limited; and (f) conciliation is the result of proceedings that are legally regulated.

625. The Government adds that according to the bank, there are no administrative complaints or judicial proceedings against the bank in connections with the allegations that figure in this recommendation.

C. The Committee's conclusions

626. *The Committee takes note of the Government's observations on the following questions still pending.*

627. *The Committee recalls that, in its previous recommendation (a), point (i), it had requested the Government to inform it of developments in the investigations then before the Territorial Directorate of Cundinamarca with regard to the allegations relating to the pressure put on workers at the BBVA and Granahorrar in the context of the merger between the two entities in 2006 to sign a collective accord despite the existence of a collective agreement which was still valid until 31 December 2007 and non-compliance with various provisions of that agreement. In that regard, the Committee takes note of the Government's statement to the effect that the investigation launched by the Territorial Directorate of Cundinamarca into an alleged contravention of article 39 of the Political Constitution and of Convention No. 98 is still pending a decision by the Inspection,*

Supervision and Monitoring Coordination Authority. The Committee requests the Government to keep it informed of the outcome of the investigation.

- 628.** *The Committee had also requested the Government to carry out an investigation into alleged harassment of trade union leaders, including the dismissals of Mr José Murillo and Mr Henry Morantes, and the pressure put on some workers to leave the union (Ms Nidia Patricia Beltrán, Mr Dairo Cortés, Ms Luz Helena Vargas, Ms Gloria María Carvajal and Ms Marina Guzmán). In that regard, the Committee takes note of the Government's statements to the effect that according to the bank, Mr Murillo and Mr Morantes have initiated legal action to obtain their reinstatement but do not refer in their claims to any specific situation of harassment or persecution for belonging to a trade union. The Committee notes also that according to the bank, Ms Nidia Patricia Beltrán is an active official and has not filed any claim against the institution. Mr Dairo Cortés was dismissed for failure to fulfil his obligations and misconduct, and Ms Carvajal and Ms Guzmán left the Bank after reaching a conciliation agreement with the bank. As regards Ms Vargas, there is no record of her in the bank's database. The Committee takes note of this information and requests the Government to keep it informed of the final outcome of any current judicial proceedings in connection with these allegations.*
- 629.** *As regards recommendation (b) concerning the allegations concerning the mass dismissal of workers by means of conciliation agreements in order to replace them with subcontracted workers, the Committee had previously taken note of the Government's reply according to which the complainant organization had initiated an administrative complaint which was pending a decision, and requested the Government to keep it informed of developments in this regard. The Committee notes that, in its most recent observations, the Government specifies that conciliation proceedings are a means of settling a legal dispute, and indicates that, according to the bank, there is no administrative complaint and no pending judicial proceedings in connection with these allegations. The Committee takes note of this information, and will not pursue its examination of these allegations unless the complainant organization provides new information in this regard.*

The Committee's recommendations

- 630.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations.*
- (a) *As regards the allegations relating to the pressure put on workers at the BBVA and Granahorrar in the context of the merger between the two entities in 2006 to sign a collective accord despite the existence of a collective agreement which was still valid until 31 December 2007, and the non-compliance with various provisions of this agreement, the Committee requests the Government to keep it informed of the final outcome of the investigation launched by the Territorial Directorate of Cundinamarca.*
- (b) *As regards the allegations concerning the harassment of trade union leaders, including dismissals (Mr José Murillo and Mr Henry Morantes) and the pressure put on some workers to leave the union (Ms Nidia Patricia Beltrán, Mr Dairo Cortés, Ms Luz Helena Vargas, Ms Gloria María Carvajal and Ms Marina Guzmán), the Committee requests the Government to keep it informed of the final outcome of any current judicial proceedings in connection with these allegations.*

CASE NO. 2518

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

**Complaint against the Government of Costa Rica
presented by**

- **the Industrial Trade Union of Agricultural Workers, Cattle Ranchers and Other Workers of Heredia (SITAGAH)**
- **the Plantation Workers Trade Union (SITRAP)**
- **the Chiriqui Workers Trade Union (SITRACHIRI) and**
- **the Coordinating Organization of Banana Workers Trade Unions of Costa Rica (COSIBA CR)**

Allegations: The complainant organizations allege the slowness and ineffectiveness of administrative and judicial procedures in cases involving anti-union practices, the impossibility of exercising the right to strike given that most strikes are declared illegal by the judicial authorities, discrimination in favour of permanent workers' committees to the detriment of trade unions and numerous acts of anti-union discrimination in enterprises in the banana sector

- 631.** The Committee last examined the substance of this case at its March 2009 meeting, when it presented an interim report for approval by the Governing Body [see 353rd Report, paras 796–828, approved by the Governing Body at its 304th Session].
- 632.** The Government sent its observations in a communication dated 15 June 2009.
- 633.** Costa Rica 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. Previous examination of the case

- 634.** At its March 2009 meeting [see the 353th Report, para. 828], the Committee made the following recommendations:
- (a) The Committee expects that the various bills currently in progress in relation to the slowness and ineffectiveness of administrative and judicial procedures in cases of anti-union practices, on which the Government provides information, will be adopted in the very near future and that they will be in full conformity with the principles of freedom of association.
 - (b) As to the alleged discrimination in favour of the permanent workers' committees to the detriment of the trade unions, while noting that the Government has submitted this issue to a tripartite body and that it intends to adopt measures regarding the report made by an independent investigator in this respect, the Committee expects that appropriate solutions will be found to the problem of collective agreements with non-unionized workers referred to when the case was last examined.

- (c) In the absence of information from the Government regarding certain allegations, the Committee expects that, together with any information the enterprises might wish to transmit, the Government will send its observations in due course regarding the following recommendations made in November 2007, which are reproduced below:
- in regard to the Chiquita Cobal enterprise, the Committee requests the Government to inform it: (1) whether trade union officials Mr Teodoro Martínez Martínez, Mr Amado Díaz Guevara, member of the Committee on the Implementation of the Regional Agreement between the IUF/COLSIBA and Chiquita, Mr Juan Francisco Reyes and Mr Ricardo Peck Montiel have initiated judicial proceedings concerning their dismissals and, if so, of the status of these proceedings; (2) of the grounds for the dismissal of Mr Reinaldo López González and the reasons why the court ruling ordering his reinstatement was not executed, and to send it a copy of the agreement that is to be signed by the enterprise and the worker; and (3) of the grounds for the dismissal of Mr Manuel Murillo de la Rosa and the status of the court proceedings concerning his dismissal;
 - in regard to the Chiquita-Chiriquí Land Company, the Committee requests the Government to inform it whether, in the process of the negotiations which the company says it has conducted with the trade union, it was decided to reinstate the dismissed trade unionists and members and, if not, to inform it of the grounds for the dismissals and whether judicial proceedings have been initiated in this regard.
- (d) The Committee urges the Government, as previously requested, to take all steps at its disposal so as to promote collective bargaining between the employers and their organizations on the one hand, and the organizations of workers on the other, in order to regulate the conditions of work in the enterprise Desarrollo Agroindustrial de Frutales SA and to keep it informed in this respect.
- (e) The Committee understands that the Government is prepared to accept a mission sent by the Subregional Office so that an independent inquiry can be carried out into the allegations concerning the keeping of blacklists in the banana sector, and hopes that the necessary measures will be taken to provide this assistance as soon as possible.

B. The Government's reply

- 635.** In its communication of 15 June 2009, the Government sent its observations in relation to the recommendations made by the Committee at its March 2009 meeting.
- 636.** With regard to recommendation (a), the Government notes the recommendations made by the Committee concerning the present case, particularly with regard to the urgency of approving the various bills currently in progress in relation to the slowness and ineffectiveness of administrative and judicial procedures in cases of anti-union practices. In this regard, it should be recalled that the Government of Costa Rica has made efforts to promote the approval of the above bills and it reiterates its will to resolve the problems raised. The Government considers that the solution to the problems affecting the country has to be found through the joint efforts of the representatives of the three authorities of the Republic, the executive, legislative and judicial authorities, with a view to the adoption as laws of the Republic of the set of bills that are currently going through the legislative process and which are intended to strengthen the effect given in practice to Convention No. 98, under the terms indicated by the ILO. The Government is aware that the efforts to resolve the problems identified in the country need to be undertaken on a joint basis and indicates that work is being carried out on this process.
- 637.** To illustrate the interest of the Ministry of Labour and with a view to strengthening the measures to guarantee effective compliance with the principle of collective bargaining in the public sector, the Minister of Labour, via official letter No. DMT-088-2009 of 27 January 2009, requested the Minister of the Office of the President to push forward the whole group of bills to contribute to strengthening the right of collective bargaining, including the bills approving Conventions Nos 151 and 154 of the ILO and the draft

reform of labour procedures. Despite the fact that approval is still pending for these bills, in which the highest authorities of the country are showing interest, when analysing the delay in the approval of the bills, on which the Committee of Experts was consulted, the events in the country in recent years have to be taken into consideration. In the first place, on 7 October 2007, in a binding referendum, the Free Trade Agreement concluded by Central America, the Dominican Republic and the United States was approved. With the implementation of this Agreement, the Members of Parliament embarked on the examination, discussion and approval of a series of bills which had to be tabled alongside the Treaty and which formed an additional legislative agenda. These bills took up the attention of the Members of Parliament until the end of 2008 in both their ordinary and extraordinary sessions. In brief, the long discussions on the Free Trade Agreement and the approval of the additional laws delayed examination of the reforms to labour procedures and compliance with the Agreement of the Higher Labour Council of October 2006.

- 638.** In addition, at the present time, the Government is focusing its efforts on dealing with the situation arising out of the global financial crisis as it affects the families of Costa Rica, men and women workers, enterprises and, in general terms, the financial sector of the country, as other governments throughout the world are doing. In this respect, Costa Rica is no exception and this situation is even having an impact on the order in which draft legislation is examined by the Legislative Assembly, which is currently engaged in the examination of the bills tabled under the “Escudo Plan” presented by the President of the Republic. The Escudo Plan does not constitute a reform of the Labour Code, but consists of a series of temporary measures, the principal objective of which is social protection and economic stimulus in the face of the international crisis. The Plan is based on four pillars, which are the beneficiaries of the Government’s measures: families, workers, enterprises and the financial sector. One of the components of the Plan is Bill No. 17315 on the protection of labour in times of crisis, which provides for the possibility of the conclusion of an agreement between employers and workers under which, in the light of the crisis, enterprises undertake to reduce the number of hours worked by their employees, without reducing the value of the hour not performed by the worker, on condition that there are no dismissals. Managers and high-level executives are also urged to reduce their salaries.
- 639.** Furthermore, through this Bill it is hoped to promote new working arrangements in law, which will have a direct effect on the creation of employment, as it has had in other countries. The Bill is currently going through the legislative process of being discussed and examined. Alongside the Bill, it is intended to promote telework in private enterprises, which will offer major benefits for the public sector, as it involves a reduction in costs. Enterprises will accordingly have to consider reducing costs through this system before cutting back their staff. In addition to these measures, it is planned to implement a programme of grants to train 5,000 workers in enterprises affected by the crisis with a view to encouraging enterprises not to reduce their payroll, but to keep their employees on and at the same time train them in fields such as English, computer skills and the management of micro-, small and medium-sized enterprises.
- 640.** Moreover, on 11 March 2009, the launch was officially announced of the Young Entrepreneurs Programme. This is a proposal intended for young persons between 18 and 35 years of age who want to become entrepreneurs. The Programme is designed to develop an enterprise culture among the young, providing them with the essential skills to become good entrepreneurs and persons who contribute to national development. Another important measure is the extension of the period of health insurance coverage for persons who have stopped working, so that for six months after leaving their jobs, they and their families continue to be covered by the scheme to which they were paying contributions while they find another job. The Escudo Plan has been submitted to the International Labour Office for analysis and its comments are currently awaited.

- 641.** The Government indicates that, on 5 May 2009, the President of the Republic received in the Presidential Residence a group of representatives of the social sectors with a view to listening to and considering their Ten-Point Proposal to address the crisis in the country. This response is based on two principal approaches: the first is from the viewpoint of the supply of decent work, and the second from the viewpoint of the demand for decent work. The first element proposes the promotion of productive activities by refocusing on the socio-productive function of the financial system, guaranteed security and food sovereignty, as well as agricultural employment. A system of conditional transfers is also established to promote decent work by minimizing dismissals for economic reasons and promoting social, labour and environmental investment. As these initiatives are intended to mitigate the negative impact of the global economic crisis in the various sectors of the national economy, they require the attention of the Members of Parliament for their examination and rapid implementation, which makes it necessary to leave aside temporarily the examination and approval of other draft legislation, including the bills relating to the effectiveness and rapidity of protection procedures against anti-union discrimination and for collective bargaining in the public sector.
- 642.** The Government of Costa Rica therefore retains the hope that, once the response to the economic crisis has been dealt with, the Legislative Assembly will take up again all the bills relating to anti-union discrimination and collective bargaining in the public sector and that they will be approved in the near future. With regard to the progress of the various bills in the Legislative Assembly, it should be noted that Bill No. 13475 to reform various sections of the Labour Code, of Act No. 2 of 27 August 1943, and sections 10, 15, 16, 17 and 18 of Decree No. 832 of 4 November 1949, and their amended texts, is near the top of the agenda of the Legislative Plenary. Bill No. 15990 to reform labour procedures is currently being examined by a subcommittee set up by the Standing Committee on Legal Affairs of the Legislative Assembly and it is hoped that it will be tabled during the ordinary sessions to be held from May to October 2009.
- 643.** The Bill to reform labour procedures is an integrated proposal incorporating the recommendations of the ILO Committee on Freedom of Association in relation to the matters under examination. It is the outcome of a broad consultation process set in motion by the Supreme Court of Justice. It has benefited from the financial support of the Government of Canada and from ILO technical assistance. Emphasis should be placed on the participation of titular and substitute magistrates of the Second Chamber, labour judges, law professionals specializing in labour law, officials of the Ministry of Labour and Social Security, representatives of employers' chambers and of trade unions, among others. The Bill addresses the subject of the slowness of procedures in the case of anti-union action and strengthens the right to collective bargaining in the public sector. Essentially, it seeks to simplify judicial procedures and make them more rapid, including those relating to anti-union acts, by replacing written proceedings by oral hearings, as well as strengthening the application in practice of the right to collective bargaining in the public sector and reinforcing protection against anti-union acts.
- 644.** It is important to indicate that official letter No. DMT-552-2009, of 25 May 2009, submitted to the subcommittee of the Standing Committee on Legal Affairs of the Legislative Assembly the study on the Bill to reform labour procedures, which was prepared with the technical assistance requested by the Ministry of Labour to ensure that all the terms of the Bill are in compliance with the provisions of ILO Conventions Nos 87 and 98. This was done so that the comments by ILO experts were taken into consideration in the analysis of the Bill. The bill respecting the negotiation of collective agreements in the public sector, and the addition of subsection 5 to section 112 of the General Act on the Public Administration, is being examined by the Standing Committee on Legal Affairs of the Legislative Assembly. It was placed in 91st position at the last sitting of the ordinary session held on 26 November 2008 and a legal report has now been prepared by the

Technical Services Department of the Legislative Assembly, through official letter No. ST-019-2008. It is expected that it will be tabled during the ordinary session at the initiative of the Members of Parliament.

- 645.** In view of the significance of the joint efforts made by the executive and judicial authorities and the principal social partners, guided by ILO technical advice, the Government hopes that the bills, once they have been analysed and studied by the Legislative Plenary session, will be adopted as laws of the Republic in the near future. On various occasions, the Committee on Freedom of Association has been informed of the comments received from the Second Chamber and the Constitutional Chamber of the Supreme Court of Justice. In the present case, the comments are being forwarded that were received from the current President on 15 April 2009. The President of the Second Chamber transmitted his observations to the Office of the President of the Supreme Court of Justice on 31 March 2009. In his communication he indicated, with regard to the principle of collective bargaining, that the Supreme Court of Justice has endeavoured to achieve its effective implementation through legal provisions which make it possible and practicable in reality. In this respect, reference is made to the Bill to reform labour procedures, with the indication that the Bill has not received the agreement of the social organizations in relation to certain provisions, including those relating to the percentage of workers required to call a strike and engage in protest action. He adds that he held a meeting with the Standing Committee on Legal Affairs (where the Bill is currently being examined), with a view to determining the bills of interest to the judicial authorities, and on that occasion the Bill to reform labour procedures was included as a priority.
- 646.** With regard to the subject of the slowness of administrative and judicial procedures in cases of anti-union persecution, it should be noted that the Supreme Court of Justice, in addition to promoting the Bill to reform labour procedures, has made other significant efforts to resolve this problem, which are documented in the reports on its activities. These efforts include the allocation of increased human resources to the labour courts, as well as strengthening the operation of the courts through the extension of electronic links with external institutions, such as the CCSS, the INS and the Public Registry, with a view to facilitating judicial processes in labour procedures, and the purchase of digital recording equipment for use in oral hearings. Emphasis should be placed on the establishment of smaller labour tribunals in various areas of the country with a view to accelerating procedures, particularly as the rules governing these services are characterized by the principle of oral proceedings. It is hoped that these decisions will contribute to improving the service in this jurisdiction and that users can have their cases settled in a more appropriate time period. The Government adds that a workshop was successfully held on 2 June 2009 in the Legislative Assembly on “The Impact of the Reform of Labour Procedures”. The most important conclusions of this activity concern the importance of focusing discussion on the Bill to reform labour procedures on the points of divergence in the social sectors so as to make progress in its examination, thereby guaranteeing access to justice as a human right.
- 647.** The Government hopes to be able to make tangible progress in its efforts to give effect to ILO Convention No. 98, particularly through the establishment of a joint commission (unions, employers, the executive, legislative and judicial authorities), with the technical assistance of the ILO, with a view to promoting and developing consensus concerning the text of the Bill to reform labour procedures, which is currently before the legislative bodies.
- 648.** With regard to recommendation (b) concerning the examination of the ILO report on direct settlements, prepared by an independent investigator, it is necessary to note that it was submitted by the Minister of Labour to the Higher Labour Council, a tripartite body reporting to the Ministry of Labour and Social Security, and was discussed at its meetings

on 30 April and 26 June 2008. Nevertheless, it has not been possible for the Council, at least at present, to continue the discussion of the report on direct settlements as it has had to attend to other priority subjects, including the reform of labour procedures and the Decent Work Country Programme. Examination of the report on direct settlements is the next priority on the Council's agenda and it is hoped that the meetings will soon be held at which it will be examined fully in a tripartite context.

649. With reference to recommendation (c), the Government notes the Committee's recommendations concerning the absence of information regarding certain allegations in the context of Case No. 2518. Nevertheless, the Government reiterates that it forwarded the follow-up reports requested by the Committee in due time and form, with the information provided by the enterprises concerned. Notwithstanding this, the observations and recommendations of the 353rd Report of the Committee on Freedom of Association were communicated once again to the enterprises Chiquita Cobal SA and Chiriquí Land Company SA so that they could exercise their right of legitimate defence in relation to the supervisory body and provide the relevant information. In this respect, the Government indicates that in most of the cases referred to by the Committee the workers have initiated the corresponding official procedures, as indicated by the Atlántica Banana Company Ltd.

650. In this regard, the Government wishes to forward the report containing the company's reply, which was received with the communication dated 21 May 2009, and which refers to the cases of Mr Teodoro Picado, Mr Amado Díaz, Mr Ricardo Peck, Mr Reinaldo López, Mr Manuel Murillo and Mr Juan Reyes, workers at Chiquita Cobal. The report also contains information on the final negotiations through which Mr Ramiro Beker, Mr Demetrio López and Mr Norlando Ortiz, workers in the ranches of the Chiriquí Land Company, were reinstated. The text of the company's comments on each specific case is quoted below:

- The case of worker Teodoro Martínez Martínez: judicial file No. 06-001828-0166-LA, before the Labour Court, Second Circuit of San José, based in Goicoechea. Cause of dismissal: addressed his immediate chief in an unruly and disrespectful manner. Date of the occurrence: 8 April 2006, during working hours. Current status: by decision of the judicial office, at 7.05 p.m. on 29 August 2008: "... The parties are hereby informed that they are to await the determination by this Office of the schedule for the next year to indicate the respective hearing ...” (this refers to the hearing for conciliation and the submission of evidence). Attachment No. 1.
- The case of worker Amado Díaz Guevara: judicial file No. 06-001864-0166-LA, before the Labour Court, Second Circuit of San José, based in Goicoechea. Cause of dismissal: failure to comply with contractual obligations in relation to pruning, for which he was under contract, causing prejudice to the plantation; failing to inform his immediate superior of the true situation, claiming that the assigned work had been fully completed, which was not true. Date of the occurrence: 13 May 2006, Oropel ranch, in the jurisdiction of Sarapiquí. Current status: an appeal has been lodged against the ruling of the court of first instance, No. 3280, at 10.05 a.m. on 28 August 2008, which upheld the charges before the Labour Court. On 19 September 2008 the appeal was found receivable.
- The case of worker Ricardo Saturnino Peck Motiel: judicial file No. 07-000087-0166-LA, before the Labour Court, Second Circuit of San José, based in Goicoechea. Cause of dismissal: Mr Peck Montiel, in his work of protecting the fruit, for which he was hired by the Cocobolo ranch, in the jurisdiction of Sarapiquí, repeatedly failed to carry out his work, failing to follow the established procedures that were known to him in his work of protecting the fruit, as the achievement of the condition required to export the fruit depends on the efficient performance of this work, which is therefore essential for the cultivation of bananas. On previous occasions, prior to his dismissal,

Mr Peck Montiel had received warnings for the same reason of failing to perform his work. His employment contract was terminated on 7 September 2006. Current status: the latest decision of the judicial office consists of the acknowledgement of receipt at 7.35 p.m. on 6 January 2009 of the action by the party.

- The case of worker Reinaldo López González: judicial file No. 00-000031-0166-LA, before the Labour Court, Second Circuit of San José, based in Goicoechea. Current status: this file dates from the year 2000, and we have no copy of it. The case has been settled by agreement between the parties, as noted in a document submitted to the judicial office on 13 February 2007, following payment to the complainant Mr López González by the Atlántica Banana Company Ltd. of the sum of 7 million colones. The court ordered the file to be placed in the archives and lifted the restraints that had been ordered "... As the parties have reached an out of court settlement ...".
- The case of worker Manuel Murillo de la Rosa: judicial file No. 98-003283-0166-LA, before the Labour Court, Second Circuit of San José, based in Goicoechea, against the Chiriquí Land Company. Current status: by ruling No. 4779, at 1.07 p.m. on 18 December 2008, the claims brought by Mr Manuel Murillo de la Rosa were "set aside with all their demands". The ruling is currently under appeal before the Labour Tribunal, 3.56 p.m., 4 February 2009.
- The case of worker Juan Francisco Reyes: after reviewing our files of the claims brought against the Atlántica Company Ltd. in the courts, we have not found any brought by Mr Juan Francisco Reyes (of unknown second family name); however, we will send notification immediately if the file is found.

651. The Atlántica Banana Company Ltd. has accordingly provided information on the current status of the cases referred to by the Committee, some of which have already been resolved through out of court settlements, while others are awaiting their judicial outcome, as indicated in the documentation provided by the company. The Government of Costa Rica is clear in its intention to punish the existence of anti-union practices and has no hesitation in applying the full rigour of the law in those cases in which there is evidence that such unlawful acts have been committed. In this respect, the Government of Costa Rica is fully prepared to resolve the judicial proceedings concerning alleged unfair labour practices, such as those referred to in the present case, through the adoption of reasonable policies to guarantee the rights of unionized workers, in accordance with the constitutional guarantees of due process and legitimate defence. The Government is working on this together with the three authorities of the Republic, namely the legislative, judicial and executive authorities.

652. With regard to recommendation (d), the Government notes the Committee's recommendations concerning the promotion of collective bargaining between employers and their organizations, on the one hand, and organizations of workers, on the other, with a view to regulating conditions of work in the enterprise Desarrollo Agroindustrial de Frutales SA. In this respect, it should be noted that a collective agreement is concluded between one or more workers' organizations and one or more employers, or one or more employers' organizations, with the objective of regulating the conditions under which work is to be performed and other related matters. It has the force of law between the parties which conclude such an agreement, and must be understood to include all the provisions relating to trade union guarantees set out in the ILO Conventions that have been ratified by the country, in accordance with section 54 of the Labour Code.

653. The Basic Act respecting the Ministry of Labour and Social Security, No. 1860, establishes in section 39 the functions of the competent institution, namely the Directorate of Labour Affairs of the Ministry. These include: "... Intervening amicably in labour disputes with a

view to endeavouring to resolve them, keeping under constant review labour disputes which arise, analysing their causes and proposing appropriate means for their avoidance in future, or of rendering their consequences less serious; and reviewing collective labour agreements, making appropriate comments so that they are in accordance with the law.” This responsibility is shared between the Departments of Social Organizations and of Industrial Relations, which provide advice to both workers and employers. Advisory services are also provided under budget line 800-TRABAJO and by the Department for External Advisory Services of the Directorate of Legal Affairs. Section 39(f) of Act No. 1860, referred to above, also sets out as a function of the Directorate of Labour Affairs: “... Convening employers and workers with a view to concluding a collective labour agreement which is to be raised to the category of a legislative contract, or for the purpose of revising contracts of this nature.” In this respect, it should be noted that the intervention of officials of the Ministry of Labour is always at the initiative of the parties. This means that the Ministry cannot initiate collective bargaining in a private enterprise or public institution without previously being so requested by the workers or a workers’ organization, by virtue of the freedom of trade unions and employers to decide whether to conclude a collective agreement in the institution or enterprise concerned.

- 654.** Once the intervention of the Ministry has been requested, the officials of the Directorate of Labour Affairs are able to promote and initiate collective bargaining, providing legal advisory services to the parties concerned, taking up an impartial position and acting as an amicable intermediary. In addition, the Department of Industrial Relations of the Directorate of Labour Affairs keeps a register of the collective agreements concluded, with a view to complying with the approval procedure set out in the Labour Code. The enterprises or institutions concerned are under the obligation to submit a copy of the collective agreement once it has been concluded, under firm penalty of it being null and void if this step is omitted, as collective agreements acquire legal status as from the date on which a copy is submitted to the above Department. In this way, the Ministry of Labour controls the lawfulness of the provisions of such agreements.
- 655.** In the present case, the Directorate of Labour Affairs indicates that it has no record of any communication or letter sent by the trade union of the enterprise Desarrollo Agroindustrial de Frutales SA, under the terms of the Labour Code, with a view to notifying or requesting the intervention of the Ministry for the purpose of promoting the negotiation of a collective agreement. Furthermore, it should be noted that the company referred to above was merged in February 2009 with the Corporación de Desarrollo Agrícola del Monte, in a takeover by the latter.
- 656.** With reference to recommendation (e), the Government notes the consent of the supervisory body to consider the sending of a mission by the ILO Subregional Office to carry out an independent inquiry in the banana enterprise sector in relation to the allegations concerning the keeping of blacklists. In this respect, it should be emphasized that it is of great importance for the Government to have an official report to determine the truth in this sector of the national economy so that the necessary and appropriate measures can be taken in accordance with the mission’s findings and recommendations.

C. The Committee’s conclusions

- 657.** *The Committee observes that the Government sent its observations on the recommendations that it made when it last examined this case.*

Recommendation (a)

- 658.** *The Committee indicated that it expected that the various bills currently in progress in relation to the slowness and ineffectiveness of the administrative and judicial procedures*

in cases of anti-union practices, on which the Government provided information, would be adopted in the very near future and that they would be in full conformity with the principles of freedom of association. The Committee notes the Government's indication that: (1) the solution to the problems raised has to be found through the joint efforts of the representatives of the State authorities with a view to the adoption in law of the set of bills that are currently going through the legislative process and which are intended to strengthen the effect given in practice to Convention No. 98; (2) to illustrate the interest of the Ministry of Labour and with a view to strengthening the measures to guarantee effective compliance with the principle of collective bargaining in the public sector, the Ministry of Labour, via official letter of 27 January 2009, requested the Minister of the Office of the President to push forward the whole set of bills with a view to contributing to strengthening the right to collective bargaining, including the Bills to approve Conventions Nos 151 and 154 and the draft reform of labour procedures; (3) despite the fact that approval is still pending for these bills and the interest shown by the highest authorities of the country, when analysing the delay in the approval of the bills the events in the country in recent years have to be taken into consideration (the approval of the Free Trade Agreement with the Dominican Republic and the United States and the various bills which had to be tabled alongside the above Agreement, as well as the various bills designed to address the situation resulting from the global financial crisis); (4) the hope is retained that once the response to the economic crisis has been dealt with, the Legislative Assembly will take up again all the bills relating to anti-union discrimination and collective bargaining in the public sector and that they will be approved in the near future; (5) the Bill to reform labour procedures is an integrated proposal incorporating the recommendations of the Committee on Freedom of Association in relation to the matters under examination, and it addresses the subject of the slowness of procedures in cases of anti-union acts and strengthens the right to collective bargaining in the public sector (on 25 May 2009, the study prepared on the Bill to reform labour procedures to ensure that all the terms of the Bill are in compliance with the provisions of Conventions Nos 87 and 98 was submitted to the subcommittee within the Standing Committee on Legal Affairs); (6) the Supreme Court of Justice, in addition to promoting the Bill to reform labour procedures, has made other significant efforts, including the allocation of increased human resources to the labour courts and strengthening the operation of the courts with a view to facilitating judicial processes in the labour procedures; and (7) it is hoped to make tangible progress in relation to the application of Convention No. 98 and in particular to establish a joint commission (unions, employers, the executive, legislative and judicial authorities) with the technical assistance of the ILO,- with a view to promoting and developing consensus concerning the text of the Bill to reform labour procedures, which is currently before the legislative bodies.

- 659.** *The Committee expects that the bills referred to by the Government, which have been before the Congress for years, and particularly the Bill to reform labour procedures, which in the Government's view addresses the subject of the slowness of procedures in cases of anti-union acts and strengthens the right to collective bargaining in the public sector, will be adopted in the near future.*

Recommendation (b)

- 660.** *With regard to the alleged discrimination in favour of the permanent workers' committees to the detriment of trade unions, the Committee noted that the Government had submitted this issue to a tripartite body and that it intended to adopt measures regarding the report made by an independent investigator in this respect, and it indicated that it expected that appropriate solutions would be found to the problem of collective agreements with non-unionized workers. The Committee notes the Government's reiterated statement that the report in question was submitted to the Higher Labour Council – a tripartite body – in 2008, and the indication that it has not been possible for the Council to continue the*

discussion of the report as it has had to attend to other priority subjects, including the reform of labour procedures and the Decent Work Country Programme. The Committee further notes the Government's indication that the report is the next priority on the agenda of the Council and that it is hoped that the meetings will soon be held to examine the report fully in a tripartite context. The Committee regrets the delay that has occurred in the discussion of the above report and expects that it will be examined in the very near future and that the appropriate measures will be adopted without delay in this respect.

Recommendation (c)

661. *The Committee requested the Government to send its observations regarding the allegations concerning the enterprise Chiquita Cobal, and to inform it:*

- *whether the trade union officials, Mr Teodoro Martínez Martínez, Mr Amado Díaz Guevara (member of the Committee on the Implementation of the Regional Agreement IUF/Colsiba/Chiquita), Mr Juan Francisco Reyes and Mr Ricardo Peck Montiel, have initiated judicial proceedings concerning their dismissals and, if so, of the status of these proceedings. The Committee notes the Government's indication that: (1) the case of Mr Teodoro Martínez Martínez is before the Labour Court, Second Judicial Circuit of San José; the grounds for his dismissal were that he addressed his immediate chief in an unruly and disrespectful manner on 8 April 2006 during working hours, and that in August 2008 the determination of the date of the hearing for conciliation and the submission of evidence was awaited; (2) the case of Mr Amado Díaz Guevara is before the Labour Court, Second Judicial Circuit of San José; the grounds for dismissal were the failure to comply with contractual obligations in the work of the plantation, causing prejudice to the plantation; he also failed to inform his immediate superior of the true situation by claiming that the assigned work had been carried out; the ruling of the court of first instance upheld the charges and an appeal has been lodged with the Labour Tribunal; and (3) the case of Mr Ricardo Saturnino Peck Montiel is before the Labour Court, Second Judicial Circuit of San José; the grounds for dismissal were the repeated failure to follow the established procedures for the protection of the fruit; the latest decision by the judicial office in relation to the action brought by the party was on 6 January 2009; in this respect, the Committee regrets the long period that has elapsed since the commencement of the current court proceedings without rulings being handed down up to now. The Committee trusts that the current judicial proceedings will be brought to a conclusion rapidly and requests the Government to keep it informed of their outcome;*
- *of the grounds for the dismissal of Mr Reinaldo López González and the reasons why the court ruling ordering his reinstatement was not executed, and to provide a copy of the agreement that the enterprise and the worker were about to sign. The Committee notes the Government's indication that the file dates from the year 2000 and that it does not have a copy of it. According to the indications of the judicial authorities, the plaintiff received the sum of 7 million colones from the enterprise and the respective court ordered the file to be placed in the archives and lifted the restraints that had been ordered. In the light of this information, the Committee will not pursue its examination of these allegations;*
- *of the grounds for the dismissal of Mr Manuel Murillo de la Rosa and the status of the judicial proceedings concerning his dismissal. The Committee notes the Government's indication that, in a ruling of 18 December 2008, the claims brought by the worker were set aside with all their demands and that the ruling has been under appeal before the Labour Tribunal since February 2009. The Committee requests the Government to provide a copy of the ruling of the court of first instance.*

The Committee also expects that the judicial authorities will rule in the near future on the appeal and requests the Government to keep it informed of the final outcome;

- *with regard to the case of Mr Juan Francisco Reyes, the Committee notes the Government's indication that it has not found any claim in the files, which was brought against the Atlántica Banana Company Ltd by the worker. Noting this information, the Committee will not further pursue its examination of this allegation.*

662. *With reference to the Chiquita-Chiriquí Land Company, the Committee requested the Government to inform it whether, in the process of the negotiations that the company conducted with the trade union, it was decided to reinstate the dismissed trade unionists and members and, if not, to inform it of the grounds for the dismissals and whether judicial proceedings had been initiated in this regard. In this respect, the Committee notes with interest the Government's indication that, as a result of the negotiations held, Mr Ramiro Beker, Mr Demetrio López and Mr Norlando Ortiz were reinstated.*

Recommendation (d)

663. *The Committee urged the Government to take all steps at its disposal to promote collective bargaining between employers and their organizations, on the one hand, and the organizations of workers, on the other, in order to regulate conditions of work in the enterprise Desarrollo Agroindustrial de Frutales SA and to keep it informed in this respect. The Committee notes the Government's indication that: (1) the Basic Act governing the Ministry of Labour and Social Security establishes the functions of the competent institution, namely the Directorate of Labour Affairs of the Ministry, which include intervening amicably in labour disputes with a view to endeavouring to resolve them and reviewing collective labour agreements, making appropriate comments so that they are in accordance with the law; (2) also, in accordance with the above Act, it is the function of the Directorate of Labour Affairs to convene employers and workers with a view to concluding a collective labour agreement which is to be raised to the category of a legislative contract, or for the purpose of revising contracts of this nature; (3) the intervention of officials of the Ministry of Labour is always at the initiative of the parties, and accordingly the Ministry cannot initiative collective bargaining in a private enterprise or public institution without previously being so requested by the workers or a workers' organization, and by employers, to determine whether to conclude a collective agreement; (4) once the intervention of the Ministry has been requested, the officials of the Directorate of Labour Affairs are able to promote and initiate collective bargaining, providing legal advisory services and taking up an impartial position; (5) in the present case, the Directorate of Labour Affairs indicates that it has no record of a communication or letter sent by the trade union of the enterprise with a view to notifying or requesting the intervention of the Ministry for the purpose of promoting collective bargaining; and (6) the enterprise Desarrollo Agroindustrial de Frutales SA was merged in February 2009 with the Corporación de Desarrollo Agrícola del Monte, in a takeover by the latter.*

664. *In this respect, the Committee recalls that it was alleged that it was impossible to engage in collective bargaining in the enterprise, for which reason the authorities could intervene with a view to bringing the parties closer so that they could reach an agreement on the terms and conditions of employment of the workers. Under these circumstances, the Committee requests the Government, should it be requested to do so by the trade union organizations, to make every possible effort to promote collective bargaining between these organizations and the representatives of the Corporación de Desarrollo Agrícola del Monte (which was merged with and took over the enterprise Desarrollo Agroindustrial de Frutales SA).*

Recommendation (e)

665. *The Committee understood that the Government was prepared to accept a mission sent by the ILO Subregional Office so that an independent inquiry could be carried out in the banana sector into the allegations concerning the keeping of blacklists, and it hoped that the necessary measures would be taken to provide this assistance as soon as possible. In this respect, the Committee notes the Government's indication that it is of great importance to have an official report to determine the truth in this sector of the national economy so that the necessary and appropriate measures can be taken in accordance with the mission's findings and recommendations. The Committee expects that the mission will be undertaken in the very near future and requests the Government to keep it informed of any developments in this respect.*

The Committee's recommendations

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

- (a) The Committee expects that the bills referred to by the Government, and particularly the Bill to reform labour procedures, which in the Government's view addresses the subject of the slowness of procedures in cases of anti-union acts and strengthens the right to collective bargaining in the public sector, will be adopted in the near future.*
- (b) As regards to the alleged discrimination in favour of the permanent workers' committees to the detriment of trade unions, and the report made by an independent investigator in this respect, the Committee expects that the report will be examined in the very near future and that the appropriate measures will be adopted without delay in this respect.*
- (c) With respect to the dismissals of the trade union leaders, Mr Teodoro Martínez Martínez, Mr Amado Díaz Guevara (member of the Committee on the Implementation of the Regional Agreement IUF/Colsiba/Chiquita), Mr Ricardo Peck Montiel and Mr Manuel Murillo de la Rosa, the Committee regrets the long period that has elapsed since the commencement of the current court proceedings without rulings being handed down up to now, trusts that the current judicial proceedings will be brought to a conclusion rapidly and requests the Government to keep it informed of their outcome.*
- (d) The Committee requests the Government, should it be asked to do so by the trade union organizations, to make every possible effort to promote collective bargaining between these organizations and the representatives of the Corporación de Desarrollo Agrícola del Monte (which was merged with and took over the enterprise Desarrollo Agroindustrial de Frutales SA).*
- (e) With regard to the possibility of the ILO Subregional Office undertaking an independent inquiry in the banana sector into the allegations concerning the keeping of blacklists, the Committee notes the acceptance of such a mission by the Government and expects that it will be carried out in the very near future. The Committee requests the Government to keep it informed of any developments in this respect.*

CASE NO. 2450

INTERIM REPORT

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

- the Djibouti Union of Workers (UDT)
- the General Union of Djibouti Workers (UGTD) and
- the International Confederation of Free Trade Unions (ICFTU)
(now the International Trade Union Confederation (ITUC))

Allegations: The complainant organizations allege that the Government refuses to take the necessary measures to reinstate union members dismissed in 1995 following a strike in protest against the consequences of a structural adjustment programme, despite having made a commitment in 2002 to reinstate them; continues to dismiss union officials unfairly and to harass them; and has adopted a new Labour Code spelling the end of free and independent trade unionism. Their allegations also relate to the violent suppression of a strike and the barring from entry of an international trade union solidarity mission

667. The Committee last examined this case at its November 2008 session [see 351st Report, paras 775–798]. The Djibouti Union of Workers (UDT) and the General Union of Djibouti Workers (UGTD) jointly sent additional information in a communication dated 4 March 2009.

668. As the Government did not respond to the latest information supplied by the complainant organizations, the Committee was twice obliged to postpone its examination of the case. At its meeting in November 2009 [see 355th Report, para. 9], the Committee launched 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 session, even if the requested observations or information had not been received in due time. To date, the Government has not sent any information.

669. Djibouti 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

670. During its previous examination of the case in November 2008, the Committee made the following recommendations [see 351st Report, para. 798]:

- (a) With regard to the reinstatement of workers dismissed in 1995, following a strike, who have not yet been reinstated, the Committee expects that the Government will provide in

the very near future the necessary clarifications on the situation of the workers mentioned in its previous recommendations as well as those whose names appear on the list provided by the complainant organizations, in accordance with the commitment it made before the direct contacts mission.

- (b) The Committee expects that the Government will act promptly in following up on the commitments made before the direct contacts mission concerning the reinstatement of workers dismissed in 1995 who have not yet been reinstated, the payment of compensation to these workers and arrears payments. The Committee requests the Government to inform it without delay of the situation of the negotiations and of the progress made.
- (c) The Committee expects that the Government will take all the necessary measures to adopt without delay the requested amendments to the Labour Code, as discussed with the direct contacts mission, specifically with regard to sections 41, 42, 214 and 215 of the Code, in order to give full effect to the international Conventions that it has ratified on freedom of association.
- (d) Noting that the draft legislative amendments will be submitted to the National Council of Labour, Employment and Vocational Training for consideration, the Committee urges the Government to inform it as soon as possible about the establishment and composition of this body.
- (e) The Committee urges the Government to provide without delay information on the current situation of Mr Hassan Cher Hared, including the results of any inquiry concerning his 2006 dismissal and the follow-up taken.
- (f) The Committee urges the Government to indicate the measures taken to guarantee the implementation of objective and transparent criteria for the nomination of Workers' representatives at the International Labour Conference.
- (g) In general terms, the Committee urges the Government to give priority to promoting and safeguarding freedom of association and act promptly following up on the specific commitments that it made before the direct contacts mission to resolve all the pending issues and therefore facilitate a transparent and sustainable social dialogue in Djibouti. Recalling that some of the events and disputes in this case date back to 1995, the Committee expects that the Government will inform it without delay of any progress made in this regard.
- (h) The Committee calls the Governing Body's attention to this serious and urgent case.

B. New allegations

671. In a communication dated 4 March 2009, the UDT and the UGTD report the Government's refusal to engage in dialogue and its repeated withdrawals despite the numerous mediation missions by international organizations, including the International Labour Office, which have been visiting Djibouti for many years. The complainant organizations indicate that the latest about-turn by the Government dates back to the follow-up to the ILO's direct contacts mission of January 2008 which, following consultation with all parties, achieved a comprehensive agreement which included Government commitments made by the Prime Minister with a view to settling the disputes. According to the complainant organizations, the Government not only quickly reneged on all the commitments made, but also orchestrated a destabilization of the UDT involving trade unionists who had already participated in an initial attempt at taking over the trade union in 1999 and who attended the International Labour Conference as representatives of the UDT in the place of its legitimate leaders as part of the Djibouti delegation.

672. The complainant organizations report that the Government continues to openly scorn trade union rights, violate international labour Conventions on freedom of association, systematically punish trade union activists and leaders and remain indifferent to the ILO's recommendations made to the Government each year. The complainant organizations point

out that other international bodies have also issued resolutions condemning the Government's attitude.

673. The organizations reiterate their willingness to resolve the issues pending and strongly urge the implementation in good faith of the commitments made following the direct contacts mission of January 2008, as well as the revision of the Labour Code of 2006.

C. The Committee's conclusions

674. *The Committee deeply regrets that the Government has not provided information in response to the previous recommendations of the Committee and to the new allegations of the complainant organizations, even though it has been invited on several occasions, including by means of an urgent appeal, to submit its comments and observations on the follow-up to this case. The Committee urges the Government to be more cooperative in the future.*
675. *Under these circumstances, in accordance with the applicable rule of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to submit a report on the substance of the case without the information it hoped to receive from the Government.*
676. *The Committee recalls that, in its previous examination of the case, it noted the information provided in the report of the direct contacts mission of January 2008 and in particular the spirit of cooperation shown by the Government towards the accomplishment of that mission. The Committee notes with concern that the complainant organizations indicate that the Government quickly reneged on all the commitments made during the mission. The Committee regrets that the Government has not continued to show the same open-mindedness noted by the mission.*
677. *With regard to its previous recommendation on the reinstatement of workers who had not yet been reinstated following their dismissal in 1995, the Committee recalls that the list of workers covered by an agreement of 8 July 2002 was subject to differences of opinion between the Government and the complainant organizations but that the Government had made a commitment before the direct contacts mission to carry out the necessary checks into the situation of the workers on the basis of the list provided by the mission and to inform the Office accordingly. The Committee notes with regret that no information has since been provided in this regard and urges the Government to take all the necessary steps, in accordance with the commitment that it made, to carry out such checks and provide clarification on the situation of both the workers referred to in the Committee's previous recommendations and those mentioned by the complainant organizations [see 351st Report, para. 787].*
678. *Furthermore, the Committee recalls that, according to the complainant organizations, under the agreement of 8 July 2002 signed through the mediation of an ILO mission, workers who wished to be reinstated had to make an individual request to that effect and that those who did not wish to be reinstated had to be compensated. However, according to the different high-level authorities interviewed by the direct contacts mission, including the Prime Minister, the issue of the 1995 dismissals was settled through a mass reinstatement process in all but a few isolated cases. This reinstatement of dismissed workers was said to be the result of political goodwill and the Government had indicated that it was ready to rectify the situation of the few cases still pending. The Government made a commitment to reinstate all the dismissed workers in their original posts or, if such reinstatement was impossible, to find them other work, and to pay the retirement contributions for these individuals. With regard to the payment of compensation, the Government indicated that it was not opposed to the principle, if the workers agreed to be reinstated in their jobs. The*

departments of the Ministry of Employment and National Solidarity had been given the task of conducting and concluding negotiations on the issue of reinstatement, compensation and the payment of social security contributions. The Committee notes with deep regret that, according to the complainant organizations, no progress has been made on the issue of reinstatement and compensation. The Committee once again requests the Government to make every effort to follow-up on the commitments made before the direct contacts mission concerning the reinstatement of workers dismissed in 1995 who have not yet been reinstated, the payment of compensation to these workers and arrears payments. The Committee urges the Government to keep it informed of the situation with regard to the negotiations and the progress made.

- 679.** *With regard to the allegations of systematic repression of trade union leaders and activists, the Committee firmly recalls once again that a free trade union movement can develop only under a regime which guarantees fundamental rights, including the right of trade unionists to hold meetings in trade union premises, freedom of opinion expressed through speech and the press and the right of detained trade unionists to enjoy the guarantees of normal judicial procedure at the earliest possible moment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 37]. In this regard, the Committee recalls that its previous recommendations concerned, in particular, the situation of the trade unionist Mr Hassan Cher Hared who was allegedly dismissed in September 2006. The Committee urged the Government to provide, without delay, information on the current situation of Mr Hassan Cher Hared, including the results of any inquiry concerning his dismissal. The Committee notes with regret that no information has been provided by the Government on this matter and is bound to urge it once again to inform it of the current situation of the trade unionist Mr Hassan Cher Hared and the results of any inquiry concerning his dismissal in 2006.*
- 680.** *The Committee notes with concern the allegations made by the complainant organizations concerning the Government's interference in the UDT's affairs and, in particular, the nomination of representatives in the place of the legitimate leaders in the delegation of Djibouti at the International Labour Conference in June 2008. The Committee recalls that respect for the principles of freedom of association requires that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions. The Committee further recalls that it previously noted that one of the outstanding issues raised by the direct contacts mission concerned the representation of Djibouti workers at the International Labour Conference but that this issue had been the subject of objections and discussions in the Credentials Committee of the Conference for several years. The Committee also recalls that it noted that the appointment of the Djibouti Workers' delegation had once again been the subject of an objection lodged by the UDT and the UGTD at the 97th Session (June 2008) of the International Labour Conference based on the fact that the Government had failed to honour its commitments by continuing to appoint at the Conference individuals who did not represent the unions. The Committee noted that in its conclusions the Credentials Committee indicated that it been given contradictory information about the capacity of the members of the UDT, but that, according to the information available to it, the representative of the UDT to the Conference had not been chosen independently and without interference by the Government. It therefore urged the Government to guarantee the implementation of a procedure based on objective and transparent criteria for the nomination of the Workers' representatives in future sessions of the Conference. It trusted that the nomination could be finally made in the spirit of cooperation between all the parties concerned, in a climate of confidence that fully respected the ability of the workers' organizations to act in total independence from the Government [see Provisional Record No. 4A, paras 25–37].*
- 681.** *The Committee notes with concern that the Djibouti Workers' delegation was once again the subject of an objection lodged with the Credentials Committee at the 98th Session*

(June 2009) of the International Labour Conference. The Committee notes that, in its conclusions, the Credentials Committee regrets the clear lack of progress made on this matter since 1997 and notes that it does not have before it any new information providing answers to the questions raised in 2008. The Credentials Committee continues to have serious doubts as to the independent nature of the nominated representative of the UDT to the Conference and concludes that the nomination of the representative of the UDT to future sessions of the Conference should be carried out in consultation with the UDT as presently led by Mr Mohamed Abdou as Secretary-General. The Committee notes that the nomination of the representative of the UGTD at the same session of the Conference was also questioned by the Credentials Committee which concludes that the Government has not fulfilled its obligations as set out in article 3 of the ILO Constitution because it has not nominated Workers' delegates representing the workers of Djibouti in agreement with the most representative workers' organizations. The Committee expresses its deep concern with regard to this situation which highlights not only the seriousness of the situation relating to the trade union climate in Djibouti, but also the clear lack of willingness on the part of the Government to improve the situation (see Provisional Record No. 4C, paras 43–56). The Committee once again urges the Government to indicate the steps taken to guarantee the implementation of objective and transparent criteria for the nomination of Workers' representatives at the International Labour Conference.

- 682.** *With regard to the allegations relating to the revision of the 2006 Labour Code, which the complainant organizations describe as “antisocial”, the Committee requested the Government in its previous recommendations to amend sections 41, 42, 214 and 215 of the Labour Code. In its last examination of the case, the Committee noted with interest that the Government had made a commitment to make the requested amendments and to that end it wished to receive technical assistance and advice from the Office. The Committee notes with regret that no information has since been provided by the Government on the progress made in adopting the requested amendments. The Committee therefore once again urges the Government to keep it informed of any steps taken to adopt without delay the amendments requested to the Labour Code which have been the subject of comments by the ILO’s supervisory bodies for many years. The Committee reminds the Government that it may avail itself of the technical assistance of the Office.*
- 683.** *The Committee further recalls that its previous recommendations also concerned the National Council of Labour, Employment and Vocational Training (CNTEFP) to which any draft amendments to the Labour Code would be submitted. In this regard, the Committee recalls that the direct contacts mission cautioned against excessive delay in the establishment of this body and the consequent impact that such a delay would have on the adoption of the necessary legislative amendments and, in particular, against any decision, especially in relation to the composition of the CNTEFP, which could be a source of further tension. The Committee once again urges the Government to provide information without delay on the establishment and composition of this body.*
- 684.** *In general, the Committee notes with deep concern the obvious unwillingness on the part of the Government to improve the situation and resolve the issues pending in this case. The Committee draws the Government’s attention to its responsibility, as a member of the ILO, to respect the principles of freedom of association as set forth in the ILO Constitution. Furthermore, considering the history of this case, some events of which date back to 1995, the Committee emphasizes the importance for the Government to provide concrete replies to the long-standing recommendations of the Committee; it is a question of the effectiveness of its special procedure. The Committee therefore once again urges the Government to give priority to promoting and safeguarding freedom of association and to urgently implement the specific commitments that it made before the direct contacts mission to resolve all issues and therefore facilitate a transparent and sustainable social*

dialogue in Djibouti. The Committee expresses in the strongest of terms its expectations that the Government will take concrete measures without delay in this regard.

The Committee's recommendations

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

- (a) With regard to the list of workers dismissed in 1995 and not yet reinstated, the Committee urges the Government to take all the necessary steps, in accordance with the commitment it made before the direct contacts mission, to carry out checks and provide clarifications on the situation of the workers mentioned both in the Committee's previous recommendations and by the complainant organizations.*
- (b) The Committee once again requests the Government to make every effort to follow-up on the commitments made before the direct contacts mission concerning the reinstatement of the workers dismissed in 1995 who have not yet been reinstated, the payment of compensation to these workers and arrears payments. The Committee urges the Government to keep it informed of the situation of the negotiations and of the progress made.*
- (c) The Committee is bound to urge the Government once again to inform it of the current situation of the trade unionist Mr Hassan Cher Hared and of the results of any inquiry concerning his dismissal in 2006.*
- (d) The Committee once again urges the Government to indicate the steps taken to guarantee the implementation of objective and transparent criteria for the nomination of Workers' representatives at the International Labour Conference.*
- (e) The Committee once again urges the Government to keep it informed of any steps taken to adopt, without delay, the amendments requested to the Labour Code which have been the subject of comments by the ILO's supervisory bodies for many years.*
- (f) The Committee once again urges the Government to provide information, without delay, on the establishment and composition of the CNTEFP.*
- (g) In general, the Committee notes with deep concern the obvious unwillingness on the part of the Government to improve the situation and resolve the pending issues in this case. The Committee once again urges the Government to give priority to promoting and safeguarding freedom of association and to urgently implement the specific commitments that it made before the direct contacts mission to resolve all issues and therefore facilitate a transparent and sustainable social dialogue in Djibouti. The Committee expresses in the strongest of terms its expectations that the Government will take concrete measures without delay in this regard.*
- (h) The Committee reminds the Government that it may avail itself of the technical assistance of the Office.*

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

CASE NO. 2557

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

Complaint against the Government of El Salvador presented by

- **the Trade Union Confederation of El Salvador Workers (CSTS)**
- **the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and**
- **the Sweets and Pastries Industrial Trade Union (SIDPA)**

Allegations: Fraudulent dissolution of a trade union involving financial offers from the employer and dismissal of a large number of union members

- 686.** The Committee last examined this case at its March 2009 meeting [see 353rd Report, approved by the Governing Body at its 304th Session, paras 829–841].
- 687.** The Government sent new observations in communications dated 11 March, 28 May, 15 July and 13 October 2009.
- 688.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 689.** In its previous examination of the case, the Committee made the following recommendations [see 353rd Report, para. 841]:
- (a) The Committee emphasizes the seriousness of the allegations in this case, concerning the dissolution of a trade union and anti-union dismissals, and regrets the Government's failure to cooperate with the procedure by not sending the information requested, despite the urgent appeal sent in November 2008; the Committee expects that the Government will be more cooperative in future.
 - (b) The Committee regrets that, even though the present case contains serious allegations of anti-union dismissals of a large number of trade union members (16), as well as allegations of acts of interference in union affairs by the employer in the form of financial offers, the Government has not undertaken an in-depth investigation of these matters. The Committee urges the Government to carry out an investigation without delay, to keep it informed in this regard and – if the allegations are proven – to take the necessary measures to reinstate without delay the trade union members in their posts with back pay, as well as to take the measures and impose the sanctions provided for in law so as to remedy such acts.
 - (c) In close connection with the dissolution of the SIDPA trade union, the Committee urges the Government to send the report of the Human Rights Ombudsperson on the present case as soon as the Ombudsperson reaches a decision, and also to send any decisions

taken as a result of the criminal complaint filed at the Attorney-General's Office by a union member for alleged falsification of documents and facts by the former General Secretary who instigated the allegedly fraudulent dissolution of the union.

- (d) The Committee recalls in general that no one should be dismissed or be subjected to anti-union discrimination because of trade union membership or activities, and the authorities must ensure that adequate protection is provided against acts of interference by employers in trade union affairs. The Committee requests the Government to ensure that these principles are respected.
- (e) The Committee requests the Government to send the information requested, and expects that it will do so without delay, and that it will obtain information from the enterprise concerned by the questions under examination through the national employers' organization.

B. The Government's reply

690. In its communications of 11 March, 28 May, 15 July and 13 October 2009, the Government sends the following observations.

691. As regards the application to dissolve the Sweets and Pastries Industrial Trade Union (SIDPA), the Government states that on 21 December 2006 Mr Daniel Morales Rivera, First Secretary for Disputes of SIDPA, applied to the National Department for Social Organizations of the General Labour Directorate to register a change to the union's executive board owing to alleged action to remove from office and expel the following members of the executive board: the General Secretary, the culture and education secretary and the records and agreements secretary. The application was rejected in a decision by the National Department for Social Organizations on 12 January 2007 (owing to failure to comply with due procedure as established under article 51(2) of the Rules of the professional association concerning sanctions of suspension, removal from office and/or expulsion of members). In the light of this, the members of the executive board remained in their posts and were authorized to seek from the Ministry the documentation they considered necessary.

692. The Government supplies a copy of the report of the Human Rights Ombudsman of 27 August 2007 calling for: (a) a report from the Director-General for Labour of the Ministry of Labour and Social Protection on the measures adopted in response to the allegations made and any other information it might wish to bring to the attention of the Attorney-General's Office for the purposes of any investigation; (b) a report from the Second Labour Judge of San Salvador on action taken to verify the claimant's legal status in order to ensure the legitimacy of the proceedings to dissolve the SIDPA, and any other information it may wish to bring to the attention of the institution; and (c) to seek a report from the headquarters of the Unit for Offences in connection with the Administration of Justice of the Attorney-General's Office, regarding the investigations carried out in connection with the complaint made in the case in question and the current status thereof.

693. The Government reports that the Attorney-General's Office is in the process of submitting preliminary evidence to the courts concerning alleged falsification of documents and facts used as a basis for the judicial dissolution of SIDPA. On 9 September 2009, the Subdirector responsible for the Defence of the Interests of Society of the Attorney-General's Office petitioned the Third Justice of the Peace of San Salvador to open a formal investigation with interim detention, a decision adopted by the Court which called a preliminary hearing for the 15 December 2009. The Government states that it will report on the outcome as soon as it is informed.

C. The Committee's conclusions

- 694.** *The Committee recalls that according to its previous examination of the case, the allegations in the present complaint refer to: (1) the fact that three trade union officials of SIDPA, having accepted a financial offer from the president of the company Productos Alimenticios Diana SA de CV, instigated a fraudulent process of “voluntary” dissolution of the union unbeknown to the other officials and members of the union, ostensibly following a general meeting on 13 January 2007 (with 28 signatures on one document, ten of which were forged), without adhering to the established deadlines; (2) on 15 February 2007, the Second Labour Judge approved the dissolution (although labour proceedings normally take months or years); and (3) between 12 March and 7 May 2007, the company dismissed 16 trade unionists.*
- 695.** *The Committee recalls that in its previous examination of the case, it noted the Government's statements to the effect that: (1) the judiciary requested the Ministry of Labour and Social Security to revoke the registration of the SIDPA trade union, and on 2 March 2007 this request was granted by the Ministry, which declared the union dissolved, revoked the registration of the union and its executive committee and, in accordance with the law, appointed the Liquidation Board, whose proceedings were completed on 25 July 2007 and approved by the Ministry of Labour; (2) the workers concerned did not initiate administrative or judicial proceedings against the decision concerning the dissolution of the union and the dismissals; (3) a union member filed a criminal complaint against one of the instigators of the dissolution of the union and the dismissals (its general secretary at the time) for alleged falsification of documents and facts; and (4) the General Secretary of Productos Alimenticios Diana SA de CV branch of SIDPA filed a complaint with the Human Rights Ombudsman on account of the dissolution of the union and the dismissals.*
- 696.** *In this respect, the Committee notes that in its most recent observations the Government indicates that: (1) on 21 December 2006, the first secretary for disputes of SIDPA requested that a modification in the union's general executive board be registered, following the alleged removal from office and expulsion of the General Secretary, the culture and education secretary and the records and agreements secretary; the request was rejected by the National Department for Social Organizations on 12 January 2007 for non-compliance with the procedure established for such sanctions, which meant that the executive board members in question continued in their union posts and were thus able to seek from the Ministry any documentation they deemed necessary; (2) on 27 August 2007, the Human Rights Ombudsman issued a report which called for: (a) a report from the Director-General for Labour of the Ministry of Labour and Social Security on action taken in response to the allegations; (b) a report from the Second Labour Judge of San Salvador concerning the action taken to verify the legal status of the claimant as part of the procedure to verify the legitimacy of the procedure to dissolve the SIDPA; and (c) a report from the headquarters of the Unit for Offences relating to the Administration of Justice of the Attorney-General's Office regarding the investigations carried out in relation to the complaint in this case, and its current status; and (3) on 9 September 2009, the Attorney-General's Office requested the Third Magistrate's Court of San Salvador to open a formal investigation with interim detention for the offence of falsifying documents and facts used to justify the judicial dissolution of SIDPA, a decision adopted by the Court which called a preliminary hearing for 15 December 2009.*
- 697.** *In this regard, noting that legal proceedings have been initiated before the Third Magistrate's Court of San Salvador for falsifying documents and facts used to justify the judicial dissolution of the union, the Committee expects that these proceedings will be concluded without delay, with a view to determining responsibilities and punishing those*

responsible. The Committee requests the Government to keep it informed in this regard and of any further decision or action taken by the Human Rights Ombudsman.

698. *As regards the allegations of interference by the employer in the union's affairs by offering economic incentives, and the anti-union dismissals between 12 March and 7 May 2007 of 16 trade unionists following the dissolution of the trade union, the Committee regrets that the Government has not sent its observations in that regard. The Committee recalls that no one should be subjected to prejudicial measures because of legitimate trade union membership or activities. The Committee urges the Government to carry out an in-depth investigation of these matters without delay and, if the allegations are proven, to take the necessary measures to reinstate without delay the trade union members in their posts with back pay, as well as to take the measures and impose the sanctions provided for in law so as to remedy such acts. The Committee urgently requests the Government to keep it informed of developments in this regard.*

C. The Committee's recommendations

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

- (a) As regards the dissolution of the SIDPA, the Committee, noting that a criminal complaint has been lodged with the Third Magistrate's Court of San Salvador for falsification of documents and facts used to justify judicial dissolution of the union, expects that the court proceedings will be concluded without delay and will make it possible to identify and punish those responsible. The Committee request the Government to keep it informed in this regard and of any decision or action taken by the Human Rights Ombudsman.*
- (b) As regards the allegations concerning acts of interference by the employer in a trade union's affairs by means of economic incentives and the anti-union dismissals, between 12 March and 7 May 2007, of 16 trade unionists following the dissolution of the trade union, the Committee regrets that the Government has not sent its observations in that regard. The Committee recalls that no one should be subjected to prejudicial measures because of his or her legitimate trade union membership or activity. The Committee urges the Government to carry out an in-depth investigation of these matters without delay and, if the allegations are proven, to take the necessary measures to reinstate without delay the trade union members in their posts with back pay, as well as to take the measures and impose the sanctions provided for in law so as to remedy such acts. The Committee urgently requests the Government to keep it informed of developments in this regard.*

CASE NO. 2571

INTERIM REPORT

Complaint against the Government of El Salvador

presented by

- the Trade Union Confederation of El Salvador Workers (CSTS)
- the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and
- the General Trade Union of Workers in the Fishing and Allied Industries (SGTIPAC)

Allegations: anti-union dismissals, acts of intimidation against trade unionists in the Calvoconservas El Salvador SA de CV company, and establishment of a trade union made up of the company's heads and trusted staff

700. The Committee last examined this case at its November 2008 meeting [see 351st Report approved by the Governing Body at its 303rd Session, paras 799–835].

701. The Government sent new observations in a communication dated 28 May 2009.

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

A. Previous examination of the case

703. At its previous meeting the Committee made the following recommendations [see 351st Report, para. 835]:

- (a) As regards the alleged anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), Mr Joaquín Reyes (union member and former official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials) and the non-payment of the salaries to which they are entitled, the Committee requests the Government to inform it of the outcome of the procedure for the imposition of a fine initiated by the Labour Inspectorate against the company, and to continue to recommend to the company that it reinstate those dismissed.
- (b) With regard to the allegations of intimidation against trade unionists, the Committee requests the Government to reply specifically to the allegation concerning the stationing within the plant of armed guards who call on the workers not to join SGTIPAC.
- (c) The Committee notes with regret that the Government has not replied to the allegation concerning the management's refusal to receive foreign trade union officials, in particular from IUF and Comisiones Obreras de España, despite having indicated or suggested that it would do so. The Committee requests the Government to ascertain the facts of the matter and, if it turns out that the company acted in the manner reported by the complainant organizations, to inform the company that such an attitude does not lead to harmonious labour relations based on mutual respect and dialogue.
- (d) As regards the alleged recognition as a legal entity of a union (Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as the negotiation of a collective agreement between that union and the company, the Committee regrets that the Government has made no

reference either to the alleged presence of company heads and trusted staff within the said union or to the negotiation of the collective agreement by that union. The Committee requests the Government to carry out an investigation into the alleged facts without delay and to keep it informed in that regard.

B. The Government's reply

- 704.** In its communication of 28 May 2009, the Government makes the following observations.
- 705.** As regards recommendation (a) regarding the alleged anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), Mr Joaquín Reyes (union member and former official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials), and the non-payment of the salaries to which they are entitled, the Government indicates that in the case of Mr Roberto Carlos Hernández, social relations and welfare secretary of the Sectional Executive Board for the Calvoconservas El Salvador SA de CV of the General Trade Union of Workers in the Fishing and Allied Industries (SGTIPAC), the special inspection undertaken has found that there had been contraventions of sections 248, 29(2) and 189 of the Labour Code for de facto dismissal, non-payment of salary arrears due to the employer's action, and non-payment of annual leave. As a result of this, the employer was fined US\$171.42, that is, \$57.14 for each contravention.
- 706.** As regards the dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch) and of Mr Joaquín Reyes (member and former union official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials), the Government states that on 14 May 2009, the Ministry sent representatives to the company to interview the human resources director. As regards Ms Menjivar, the director in question states that, in the course of the legal action brought against the company, a definitive ruling in the company's favour was given on 5 July 2007. An appeal was lodged against that ruling, which was upheld by the First Chamber of Labour Affairs of San Salvador.
- 707.** As regards Mr Roberto Carlos Hernández, in the legal proceedings against the company for non-payment of salaries before the Fourth Labour Court of San Salvador, a ruling was given on 24 September 2007 in the company's favour, and was upheld by the Second Labour Chamber.
- 708.** As regards Mr Joaquín Reyes, the Government states that, at the official's request, a special inspection was carried out on 15 March 2007 by the Special Unit for Gender and Prevention of Discrimination. The inspection found that the union official in question voluntarily agreed to the termination of his employment contract on 15 March 2007.
- 709.** With regard to Mr José Antonio Valladares, the Government states that in the proceedings initiated against him before the Civil Court of the Department of La Unión, a ruling is still pending. The Government adds that according to the record of monthly contributions to the national social security fund, the official continues to work for the company.
- 710.** As regards recommendation (c), concerning the management's refusal to receive foreign trade union officials, the Government states that according to the human resources director of the company, premises have always been provided for dialogue and, if on one occasion it was not possible to receive foreign trade union officials, it was because of other engagements which could not be postponed. The director adds that since that time he has held meetings with International Union of Food workers (IUF) officials.

C. The Committee's conclusions

- 711.** *The Committee takes note of the Government's observations concerning the recommendations made in the previous examination of this case.*
- 712.** *As regards recommendation (a) concerning the alleged anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), Mr Joaquín Reyes (union member and former official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials) and the non-payment of the salaries to which they are entitled, the Committee recalls that in its previous examination of the case, it requested the Government to inform it of the outcome of the procedure for the imposition of a fine initiated by the labour inspectorate against the company, and to continue to recommend to the company that it reinstate those dismissed. In this regard, the Committee notes that according to the Government: (1) in the case of Mr Roberto Carlos Hernández, the special inspection revealed that there had been contraventions of sections 248, 29(2), and 189 of the Labour Code for de facto dismissal of the worker in question, non-payment of salary arrears brought about by the employer, and failure to pay annual vacation benefits, and imposed a fine of \$171.42; (2) as regards the dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), the human resources director reported that, in the legal proceedings against the company before the First Labour Court of San Salvador, a definitive ruling was given on 5 July 2007 in the company's favour, and upheld by the First Labour Chamber of San Salvador; (3) as regards Mr Joaquín Reyes, at his request a special inspection was carried out on 15 March 2007 by the Special Unit for Gender and Prevention of Discrimination and found that he had voluntarily agreed to termination of his employment contract on 15 March 2007; (4) in the case of Mr Roberto Carlos Hernández, in the legal proceedings against the company for non-payment of salary arrears before the Fourth Labour Court of San Salvador, a ruling was given on 24 September 2007 in the company's favour and upheld by the Second Labour Affairs Chamber; and (5) lastly, in the case of Mr José Antonio Valladares Torres, in the proceedings against him before the Civil Court of the Department of La Unión, a ruling is still pending, and according to the record of monthly social security contributions to the national social security fund, he continues to work in the company.*
- 713.** *The Committee takes note of this information, and recalls the importance which it attaches to sanctions against acts of anti-union discrimination established by national legislation being sufficiently dissuasive in conformity with the principles of freedom of association. The Committee requests the Government to keep it informed of the final outcome of the proceedings against Mr José Antonio Valladares Torres and send a copy of the court decisions already handed down in connection with the other union officials concerned in this case.*
- 714.** *As regards recommendation (b) concerning the allegations of intimidation against trade unionists, and in particular the allegation concerning the stationing within the plant of armed guards who called on workers not to join the SGTIPAC, the Committee regrets that the Government has not sent its observations in this regard. The Committee recalls that freedom of association can only be exercised in conditions free from pressure and threats against trade union officials and members, and requests the Government to conduct an investigation without delay into the allegations and to keep it informed of the final outcome.*
- 715.** *As regards recommendation (c) concerning the company's refusal to receive foreign trade union officials, in particular from the IUF and Comisiones Obreras de España, the Committee notes that the Government, in its observations, refers to the company's reply which indicates its commitment to dialogue and states that, since the allegations were made, it has held meetings with the IUF. The Committee recalls the importance that it*

*attaches to the principle that no obstacle should be placed in the way of the affiliation of workers' organizations, in full freedom, with any international organization of workers of their own choosing [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para.735].*

716. *As regards recommendation (d), the Committee recalls that it had requested the Government to carry out an investigation without delay into the alleged recognition as a legal entity of a union (the Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as the negotiation of a collective agreement between that union and the company. The Committee regrets that the Government has not sent its observations in this respect and once again requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome.*

The Committee's recommendations

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

- (a) As regards the allegations of anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), Mr Joaquín Reyes (member and former union official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials), and non-payment of wages owed to them, the Committee requests the Government to keep it informed of the final outcome of the legal proceedings against Mr José Antonio Valladares Torres and to send a copy of the court rulings already given regarding the other union officials concerned.*
- (b) Concerning the alleged intimidation against trade unionists, in particular the stationing inside the plant of armed guards who called on workers not to join the SGTIPAC, the Committee requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome.*
- (c) As regards the alleged recognition as a legal entity of a trade union (the Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as the negotiation of a collective agreement between that union and the company, the Committee once again requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome.*

CASE NO. 2630

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

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

– the Trade Union Confederation of Workers of El Salvador (CSTS)

supported by

– the Trade Union of Workers of the Confitería Americana SA de CV
Enterprise (STECASACV) and

– the Trade Union Federation of Food, Beverage, Hotel, Restaurant and
Agro-Industry Workers of El Salvador (FESTSSABHRA)

Allegations: Request by the Confitería Americana SA de CV Enterprise to dissolve and cancel the registration of the complainant trade union; promotion of another trade union organization by the enterprise and pressure on the members of the complainant trade union to resign their membership

718. The Committee last examined this case at its meeting in March 2009 [see 353rd Report, approved by the Governing Body at its 304th Session, paras 899–916].

719. The Government sent new observations in communications dated 28 May, 15 July and 13 October 2009.

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

A. Previous examination of the case

721. During its last examination of the case, the Committee made the following recommendations [see 353rd Report, para. 916]:

- (a) The Committee highlights the seriousness of the allegations and regrets that the Government has not sent its observations on this case even though it has been invited to do so on several occasions and was issued with an urgent appeal.
- (b) The Committee urges the Government to send its observations on the allegations and all the administrative decisions without delay – in particular those which relate to anti-union discrimination and interference – and rulings on this case, including those relating to the application filed by the enterprise to dissolve the trade union and the issue of union accreditation for the collective agreement, and expects that, through the employers' organization concerned, it will also benefit from the comments of the enterprise.
- (c) Given the lack of observations on the part of the Government, the Committee underscores in general that Convention No. 98 prohibits all acts of anti-union discrimination and interference in union matters and, therefore, any practice that involves pressure to join or leave a trade union, the promotion of workers' organizations by the employer and measures aimed at dissolving a trade union by an employer, which, according to the allegations, used pressure to bring about a reduction in union membership. The

Committee requests the Government to guarantee that these principles are respected and to ensure an effective remedy for the workers and the trade union.

B. The Government's reply

- 722.** In its communications of 28 May, 15 July and 13 October 2009, the Government sent the following observations.
- 723.** On 5 April 2006, the labour inspectorate carried out an inspection based on a complaint from the Trade Union of Workers of the Confitería Americana SA de CV Enterprise (STECASACV) about the lowering of standards set out in the economic clauses of the collective labour agreement signed between the parties. In the course of that inspection, and with the aim of harmonizing labour relations, the issue of adherence to the terms of the collective agreement was considered, despite the fact that section 35 of the Act on organization and functions in the labour and services sector stipulates that the scope of inspection does not include collective legal disputes arising from the application or interpretation of legal provisions, the resolution of which falls within the purview of labour judges. Attempts were also made to warn the legal representative not to pursue the actions brought by the union.
- 724.** The Government adds that subsequent inspections requested by the union identified the following violations of current labour legislation: acts that indirectly restrict the rights of workers conferred by the Labour Code and other sources of labour obligations; coercion of workers to resign from a representative organization of which they are member; violation of section 305 of the Labour Code through failure to draw up internal work regulations and submit them to the Director-General for Labour for approval; and violation of section 165 of the same legal instrument by making changes to working hours without submitting them to the Director-General for Labour for approval.
- 725.** The Government states that, with respect to the allegations concerning the process of resignation from their union to which workers at the enterprise were allegedly subjected under threat of dismissal, the National Department for Social Organizations has processed the resignations from 39 workers at their own request and in accordance with the procedure established in sections 253 and 254 of the Labour Code, without any indication by the workers concerned that they have been coerced or threatened by the enterprise to resign from their union. In this regard, the Government points out that a worker must personally submit a request to resign before the National Department for Social Organizations can begin the process of resignation.
- 726.** As regards the union accreditation for the collective agreement concluded between Confitería Americana SA de CV Enterprise and STECASACV requested by the Trade Union Association of Workers of the Confitería Americana SA de CV Enterprise (ASTECASACV), the Government states that the Secretary-General of ASTECASACV requested accreditation for the above collective agreement and submitted to that end the minutes of the extraordinary general assembly on first summons, which record the unanimous agreement reached by the assembly. In view of this, and in accordance with the provisions of section 270(3) of the Labour Code, a visit was made to the enterprise in order to obtain documentation to support the application by ASTECASACV, and it was found that, of the 53 workers providing services to the enterprise, 36 were ASTECASACV members. For this reason, on 21 February 2007, the National Department for Social Organizations replaced the declining trade union and declared ASTECASACV accredited for the purpose of the collective agreement. This decision has been appealed before the Chamber of Administrative Dispute of the Supreme Court of Justice, whose ruling is still pending.

C. The Committee's conclusions

- 727.** *The Committee recalls that, as can be seen from the previous examination of the case, the complainant alleges that it initiated sanctions proceedings against the Confitería Americana SA de CV Enterprise because of the enterprise's intention of lowering the standards set out in ten clauses of the collective agreement. As a result: (1) the enterprise coerced members of the union to resign from it and join an alternative organization, the ASTECASACV, which has been granted legal personality and union accreditation for the purpose of the collective agreement by the Ministry of Labour and Social Provision. The administrative decision granting this accreditation has been appealed before the courts, which have not yet ruled in the case brought by the complainant; (2) the coercion led to the resignation of 33 members (the complainant has emphasized that these resignations were submitted in the same format and had been completed by the same person); and (3) as a result of these resignations, the enterprise requested the courts to dissolve the complainant union and cancel its registration in October 2007, on the grounds that it no longer had the minimum number of members required by legislation, the number having fallen from 180 to eight as a result of pressure from the enterprise; the court ruled against the dissolution of the union, as a year had not elapsed from the time when the trade union's membership had fallen below the minimum required by the Labour Code. The Committee takes note of the fact that the labour inspection report supplied by the complainant establishes that there has been coercion of workers belonging to STECASACV through (direct quotation) "indirect inducement, persuasion or coercion of workers to resign their membership of the Trade Union of Workers of the Confitería Americana SA de CV Enterprise ...".*
- 728.** *The Committee first of all regrets that the Government did not indicate whether it consulted the enterprise concerned in relation to these allegations, as it had requested during the previous examination of the case. The Committee takes note of all the Government's observations, in particular that: (1) during the inspections carried out by the labour inspectorate at the request of STECASACV on the basis of a complaint about the lowering of standards set out in the economic clauses of the collective agreement concluded between the parties, violations of current labour legislation were identified, including acts indirectly restricting the rights conferred on workers by the Labour Code and other sources of labour obligations, and coercion of workers to resign from the representative organization to which they belong; and (2) the National Department for Social Organizations has processed resignations from 39 workers, at their own request and in accordance with the procedure established in sections 253 and 254 of the Labour Code (according to the Government, those concerned gave no indication that they were being coerced or threatened by the enterprise to resign from the union).*
- 729.** *The Committee requests the Government to state whether, as a consequence of the coercion of workers to resign their union membership, as identified by the labour inspectorate, the sanctions provided for in national legislation, in the case of anti-union practices, have been imposed on the enterprise.*
- 730.** *The Committee further observes that, according to the allegations, the reduction in the number of members belonging to the complainant organization, STECASACV, enabled the other existing trade union, ASTECASACV (which, according to the allegations, is supported by the enterprise), to request and successfully obtain accreditation for the purpose of the collective agreement, which had previously been held by STECASACV (before the resignation of 33 of its members). The Committee notes that, according to the Government, since the Secretary-General of ASTECASACV requested accreditation for the collective agreement, a visit to the enterprise was made, which established that, of the 53 workers providing services to the enterprise, 36 were members of ASTECASACV. On 21 February 2007, the National Department for Social Organizations therefore declared*

ASTECASACV accredited for the purpose of the collective agreement, replacing STECASACV; this decision has been appealed before the Chamber of Administrative Contention of the Supreme Court of Justice, whose ruling is still pending. The Committee expects that this case will be resolved without delay and that the court will have access to all elements of the case when reaching its decision. The Committee requests the Government to keep it informed in this regard.

731. *The Committee also observes that, on the grounds of the reduction in the number of members belonging to STECASACV, the enterprise requested the courts to dissolve the union in September 2007. The Committee notes that, according to the court ruling supplied by the Government, it appears that the request was rejected because legal requirements had not been met.*

732. *In general, the Committee observes that this case deals with serious allegations of interference by the enterprise in the complainant's activities in order to promote another union organization, which, according to the allegations, is close to the enterprise, and to grant it accreditation for the purpose of the collective agreement. In anticipation of a ruling on this matter, the Committee underlines the importance of effective compliance with Article 2 of Convention No. 98, which establishes the obligation to ensure adequate protection against acts of interference in workers' organizations.*

The Committee's recommendations

733. *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 state whether, as a consequence of the coercion of workers to resign their union membership, as identified by the labour inspectorate, the sanctions provided for in national legislation in the case of anti-union practices have been imposed on the enterprise.*
- (b) With regard to granting accreditation for the purpose of the collective agreement to ASTECASACV, the Committee expects that the action brought by STECASACV to challenge the decision to grant accreditation, currently before the Chamber of Administrative Dispute of the Supreme Court of Justice, will be resolved without delay and that the court will have access to all elements of the case in reaching its decision. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2663

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

**Complaint against the Government of Georgia
presented by
the Georgian Trade Unions Confederation (GTUC)**

Allegations: Failure of the Labour Code to provide adequate and sufficient protection against anti-union dismissals; dismissal of nine trade union activists from Poti Sea Port and nine trade union activists from BTM Textile and failure of the Government to provide redress

- 734.** The complaint is contained in communications from the Georgian Trade Unions Confederation (GTUC) dated 24 July and 26 August 2008, and 11 March 2010. The International Trade Union Confederation (ITUC) associated itself with the complaint in a communication dated 29 September 2008.
- 735.** The Government's reply is contained in a communication dated 7 November 2008. The Government sent a further communication on 19 February 2010.
- 736.** Georgia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 737.** In its communication dated 24 July 2008, the GTUC alleges that certain provisions of Georgian legislation cause proliferation of anti-union harassment, dismissals of trade union activists and closing of trade union offices.
- 738.** Specifically, the GTUC criticizes sections 37(d) and 38(3) of the Labour Code adopted in May 2006. Section 37(d) stipulates that an invalidation of the employment agreement is a ground for termination of the employment relations. Section 38(3) states that in case of termination of the employment agreement upon the initiative of an employer, an employee shall receive severance pay for not less than one month. According to the complainant, sections 37(d) and 38(3) allow an employer to terminate employment contracts without notice for any reason or for no reason. These sections provide the employer with the unlimited right to terminate labour contracts without any explanation whatsoever. The GTUC had protested against this section, including by organizing protest strikes, and on several occasions made legislative initiatives. The GTUC argues that the abovementioned provisions leave space for trade union discrimination and that the Labour Code as a whole does neither sufficiently protect labour rights nor prevent acts of anti-union discrimination.
- 739.** The complainant refers to the following observations of the Committee of Experts on the Application of Conventions and Recommendations regarding Georgia's labour legislation:

While the Government refers to the general prohibition of anti-union discrimination provided for in section 11(6) of the Law on Trade Unions, in light of the absence of explicit provisions banning dismissals by reason of union membership or participating in union

activities ... the Committee [of Experts] considers that the legislation is unclear as to the regulation of cases of anti-union dismissals and does not offer sufficient protection against anti-union dismissals

- 740.** The GTUC further submits allegations of violation of trade union rights at Poti Sea Port and BTM Textile.
- 741.** With regard to the first enterprise, the complainant explains that Poti Sea Port is one of the largest enterprises in Georgia, employing almost 1,200 workers. At the time of the alleged violations of trade union rights, it was mainly owned by the Georgian Government (the company was privatized in May 2008 and is now a free industrial zone). According to the complainant, the Dockers' and Seafarers' Union at Poti Sea Port exists since 2000 and is affiliated with the Adjara branch of the GTUC.
- 742.** The GTUC relates that on 15 October 2007, the trade union of the Port organized a 45-minute protest action during lunch break, demanding that the manager participate in collective bargaining with the union on the issues of labour conditions and the expected privatization of the Port. On 19 October 2007, the management of the enterprise sealed the office of the union. On 22 October 2007, a security guard at the Port did not permit trade union leaders to enter their office. On 23 October 2007, the General Director terminated the employment relation with the following nine trade unionists: Tengiz Jaiani, Zaza Torchinava, Mamuka Shengelia, Sergo Tirkia, Kakhaber Simonia, Giorgi Gurjia, Khvicha Gogia, Vakhtang Tirkia and Merab Romanishvili. The complainant is convinced that the enterprise dismissed these trade unionists for their trade union activities because: (1) only the heads of primary trade union organizations and active trade unionists were terminated; and (2) the dismissals occurred just days after the protest actions and the closing of the trade union's office. On 13 November 2007, the Dockers' and Seafarers' Union of Georgia (DSUG) submitted a lawsuit to the Poti City Court, requesting reinstatement, remuneration for coercive suspension, invalidation of the management's ordinance to seal the trade union office and a decision enabling the trade union to exercise its statutory authority. The DSUG asked the court to apply ILO Conventions Nos 87 and 98. On 21 March 2008, the court rejected the lawsuit and refused to reinstate workers, explaining that the Labour Code did not require the employer to substantiate decisions to terminate labour contracts.
- 743.** The complainant appealed this decision on the following grounds. Firstly, section 2 of the Labour Code prohibits any discrimination on the basis of trade union membership. Secondly, the court failed to apply section 23 of the Law on Trade Unions, which prohibits dismissing an employee who is an elected shop steward or a trade union officer without consent of the trade union. The court considered that pursuant to the Labour Code, the employer had the right to terminate employment relations on the basis of the termination of the employment contract. The complainant is of the opinion, however, that the Labour Code's scope of application is limited to regulating employment relations that are not otherwise regulated by a specific legislation or by international treaties signed by Georgia. In this respect, the Law on Trade Unions is a more specific legislation than the Labour Code. Finally, the court failed to apply national legislation in line with ILO Conventions Nos 87 and 98.
- 744.** On 30 June 2008, the Kutaisi Court of Appeal upheld the decision of the Poti City Court and referred to the employers' unrestricted right to terminate employment relations pursuant to articles 37 and 38 of the Labour Code. The complainant provides a copy of this decision. According to the court:

[i]t is established that at the moment of the dismissal of the employees no written collective agreement between the Poti Sea Port and the trade union existed. According to the explanations of the claimant himself, in January 2007, the Director-General of the Poti Sea Port informed the union committee that he was unilaterally terminating the agreement. [In

these circumstances] (i.e. the reality that there exists no collective agreement between the parties), the Court holds groundless the opinion of the claimants to the effect that the employer had no right to dismiss union activists without prior consent of the trade union.

In accordance with paragraph 5 of section 11 of the Law on Trade Unions, a labour contract with an employee, who is a member of a trade union, can be terminated upon an employer's initiative with a prior agreement of a trade union committee concerned only in accordance with the legislation and in cases provided for by a collective agreement; and pursuant to part 3 of section 23 of the same Law, it shall be inadmissible to dismiss or transfer to a new employment a chairperson, member or organizer of an elected labour organization without prior consent of the labour organization concerned, except for the cases provided for by law.

The Court indicates that the Law referred to is enacted in 1997, while the Labour Code of Georgia, sections 37 and 38 of which provide the legal basis for the termination of labour relations, is enacted in 2006.

The Court explains that the Labour Code of Georgia is a special and newer legislation, governing the labour and concomitant relations on the Georgian territory, unless they are governed otherwise by some other special law or international treaties entered into by Georgia. The issues, which are not governed by this Code or some other special law, are governed by the Civil Code of Georgia. In accordance with part 2 of section 26 of the Georgian Law on Normative Acts, the Labour Code of Georgia must be applied when solving the dispute under consideration.

As far as the invalidation of the order concerning the termination of labour relations is the subject of the dispute under consideration, consequently, the provisions of the Labour Code must be applied in order to solve this dispute, since the Code is a special legislation regulating the basis for the abrogation of the contract and the termination of labour relations between the employer and the employee.

The Court explains that the said Code does not provide for the consent of third parties, including trade unions, in cases of termination of labour relations with employees. Consequently, the appealed orders of the Director-General of the Poti Sea Port cannot be invalidated pursuant to the Law on Trade Unions as far as the termination of labour relations is regulated only by the Labour Code.

...

The Court cannot agree with the opinion of the appellants that the dismissed employees were subjected to discrimination prohibited under the labour legislation, as far as the claimants could not indicate any evidence in proof of the said factual circumstance.

...

The claimants have presented to the Court no proof which could attest that it was the membership of and activity within the trade union that resulted in the persecution of the claimants, in the creation of debasing and humiliating environment for them and in putting them into the state which deteriorated their plight as compared with other individuals under similar conditions. The statements to the effect that the claimants were summoned to the headquarters of the administration, were visited at home, intimidated and blackmailed are only allegations. The claimants have not presented to the Court any witness who could at least attest to the fact that any claimant was really visited at home and intimidated. Statement to the contrary is made by the adversary party, which explains that no such actions on the part of the administration have taken place.

...

The Labour Code of Georgia, in conformity with paragraph 2 of Article 30 of the Georgian Constitution, provides for the right of an owner at his/her discretion to employ or dismiss the employees, which means that an owner shall prolong labour relations with the candidates who are agreeable and desirable for him/her.

The said circumstances cannot be deemed to be discrimination.

...

It is significant that, according to the explanation of the representatives of the defendant, at the moment of the dismissal of the claimants and other persons, the administration did not know who of the 30 dismissed employees were members of the trade union.

Based on the aforesaid, the Court holds that the allegation of the claimants about their discrimination is groundless, which rules out the possibility of the claim to be satisfied.

- 745.** The complainant indicates that an appeal against this decision will be lodged before the Supreme Court.
- 746.** The complainant states that after the trade union leaders undertook a five-day hunger strike, the trade union office was reopened. The union, however, remains significantly weakened because it continually loses members, who have also stopped paying their membership fees.
- 747.** In November 2007, the President of the GTUC, Mr Irakli Petriashvili, met with the State Minister for Economic Reforms and requested him to intervene, but the Minister refused and referred the GTUC to the courts. The complainant therefore considers that the Minister favours the infringements of ILO Conventions. The complainant also states that the Georgian Government is fully informed on the matter and that it has received communications not only from the GTUC, but also from the General Secretary of the ITUC and the General Secretary of the European Trade Union Confederation reminding the Government of the illegality of anti-union harassment.
- 748.** With regard to the second enterprise, the complainant alleges that BTM Textile, which employs 500 women workers in the Khelvachauri district of the Autonomous Republic of Adjara, dismissed nine officials of a newly formed trade union. According to the complainant, on 16 March 2008, 250 employees established a trade union that joined the Adjara branch of the GTUC. On the same day, nine women workers, who had been working at the enterprise since 2007, were elected to the trade union committee. On 10 April 2008, in a meeting with the General Director of the enterprise, the GTUC's Adjara branch informed the employer that the trade union had been formed. On 11 April 2008, the management of the enterprise dismissed all nine trade union committee members on the basis of section 37(d) of the Labour Code without providing any further information. The affected women are: Manana Sushanidze, the head of the trade union, Nargiz Evgenidze, Mzia Murvanidze, Rusiko Kokobinadze, Rusiko Abashidze, Iamze Tsintsadze, Neli Tsintsadze, Tamila Beridze and Darejan Kharabadze. Because nobody else was dismissed, the complainant contends that the company dismissed the workers solely for their trade union activities. The dismissed workers were unable to obtain any explanation for losing their jobs; the General Director refused any explanation, citing section 37(d) of the Code.
- 749.** The complainant further alleges that the company violated the principles of ILO Conventions Nos 87 and 98 and the Labour Code, which prohibit any discrimination on the basis of trade union membership. The Adjara branch of the GTUC therefore challenged the dismissals in Khelvachauri City Court and court hearings were scheduled to begin in July 2008.
- 750.** According to the complainant, the nine dismissed workers remain unemployed and trade union members now only rally outside the office. Workers also continue to be intimidated and threatened with dismissal unless they discontinue their trade union activities.
- 751.** The complainant states that in April 2007, the dismissed workers had asked the Deputy Chairman of the Board of Municipal Administration of Khelvachauri for help. The Deputy Chairman, however, declared that dismissing the workers was the right decision. The complainant thus considers that the local government violated Convention No. 87. The

Adjara branch of the GTUC also met with the Adjara Ministry of Economic Reforms. According to the GTUC, the Minister admitted that the actions of the enterprise contradicted ILO Conventions and that the management's actions were inappropriate. The Minister promised to address this case of anti-union behaviour but, according to the complainant, he has not followed through on this promise so far.

752. In its communication dated 11 March 2010, the GTUC informs that a meeting to discuss the problems in the field of industrial relations, labour legislation and the cases of violation of trade union rights currently pending before the Committee on Freedom of Association took place on 10 March 2010 between the GTUC President, the Prime Minister of Georgia and its Chief Adviser. The parties have agreed to continue working on the legislative issues. With regard to the alleged violations of trade union rights, the Prime Minister has instructed in writing the Minister of Labour, Healthcare and Social Protection and the Chief Adviser to the Prime Minister to investigate and discuss the issues concerning anti-union discrimination at the earliest tripartite Social Dialogue Commission, as well as the possibilities of an alternative employment of workers allegedly dismissed from Poti Sea Port.

B. The Government's reply

753. In its communication dated 7 November 2008, the Government states that its reply is based on the information it has obtained from the parties involved, i.e. the complaint and the management of Poti Sea Port and BTM Textile enterprises.

754. With regard to the first enterprise, the Government concurs that there was a dispute between the administration and the Port trade union. According to the Government, the union made several "inappropriate" requests which were "impossible" to satisfy. Specifically, the union requested a provision of a life-long monthly payment in the amount of 100 Lari (GEL) (US\$60) for Port workers retired in 2007; a 100 per cent increase of workers' salaries before the company's privatization; and three years guaranteed employment for the workers hired before 15 October 2007.

755. The Government indicates that labour contracts with nine workers were terminated because the management was not satisfied with the way they were fulfilling their tasks and duties and that the dismissals were not based on the workers' trade union membership or activities. The dismissals were made in accordance with section 37(d) of the Labour Code. The Government also indicates that the strike carried out on 15 October 2007 was not preceded by a token strike (as required by sections 49(4) and (6) of the Labour Code).

756. The Government explains that the trade union office was sealed off by the administration because the collective agreement, which gave the union the right of access to the office, was terminated on 1 January 2007. The union was informed of the termination of the collective agreement signed in 2004 by a letter dated 8 December 2006. Due to the lack of interest expressed by the trade union, no new collective agreement has been signed at the Port. In these circumstances, there was no legal basis for the primary trade union organizations to use the Port property.

757. With regard to the refusal of the State Minister for Economic Reforms to intervene on the GTUC's behalf, the Government emphasizes that it is illegal for anyone to intervene in the Court's decision or influence the Court and judges.

758. The Government further indicates that the dismissals of nine employees from BTM Textile were not related to their trade union membership and were done in conformity with section 37(d) of the Labour Code. According to the Government, the company does not practice anti-union discrimination. Indeed, three members of the trade union committee are

still employed. In addition, the Government indicates that the union activists have organized a strike without a prior token strike as required by the Labour Code, and held a demonstration seeking to recruit new members without informing the company. It indicates that none of the 500 employees showed any interest in becoming members of the union.

759. In its communication dated 19 February 2010, the Government requests the Committee to postpone the discussion of this case.

C. The Committee's conclusions

760. *The Committee notes that, in the present case, the complainant trade union alleges that: (1) the Labour Code does not sufficiently protect against anti-union discrimination; (2) the Poti Sea Port's management, while it was still owned by the Government, refused to bargain collectively with the union, sealed the office of the trade union for some time and dismissed nine trade unionists for their trade union activities after a workers' protest demanding the management to participate in collective bargaining; (3) BTM Textile dismissed all members of the trade union committee for their trade union activities the day after the company was informed of the founding of the union; (4) workers at BTM Textile are threatened with dismissal unless they discontinue their trade union activities; and (5) the Government had failed to provide redress for any of these actions. While noting the Government's request to postpone the discussion of this case, the Committee considers that it has sufficient information to pursue its examination thereof.*

761. *With regard to the allegations of legislative provisions setting out an unlimited right to terminate labour contracts without reason (sections 37(d) and 38(3) of the Labour Code), the Committee recalls that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and that it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment. The Committee further recalls the general principle according to which, it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities. 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 considers 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. If trade union leaders are dismissed without an indication of the motive, the Government should take steps with a view to punishing acts of anti-union discrimination and to making appeal procedures available to the victims of such acts. Finally, the Committee recalls the importance it attaches to the principle that legislation should lay down explicitly remedies and penalties against acts of anti-union discrimination in order to ensure the effective application of Article 1 of Convention No. 98 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 771, 791, 799, 807 and 813].*

762. *In light of the interpretation given by the courts to sections 37(d) and 38(3) of the Labour Code and their apparent negation of any other legislative protection against anti-union discrimination, the Committee is concerned that the current legal framework in the country*

may well be insufficient for ensuring adequate protection against anti-union discrimination. In these circumstances, the Committee requests the Government, in full consultation with the social partners concerned, to take the necessary measures to amend the Labour Code so as to ensure specific protection against anti-union discrimination, including anti-union dismissals, and to provide for sufficiently dissuasive sanctions against such acts. Along the same lines, observing the difficulty of contesting an alleged anti-union dismissal if there is no obligation to provide a motivation for that dismissal, the Committee requests the Government to take the necessary measures to ensure that workers may obtain an explanation as to the grounds for their dismissal.

- 763.** *The Committee understands that the ILO has been providing technical support to the Georgian tripartite constituents to advance the process of dialogue and the review of the labour legislation. The Committee notes that in October 2009, an ILO tripartite round table was held in Tbilisi to discuss the current status of the national labour legislation, implementation of Conventions Nos 87 and 98 and promotion of tripartism in Georgia.*
- 764.** *The Committee takes note from the information provided to the Committee of Experts on the Application of Conventions and Recommendations of the establishment of the National Social Dialogue Commission, as well as the creation of a tripartite working group to review and analyse the conformity of the national legislation with the findings and recommendations of the Committee of Experts and to propose the necessary amendments. The Committee expects that all matters relating to the application of the freedom of association principles and the relevant Conventions and that, in particular, the issue of protection against anti-union discrimination will be dealt with by the tripartite working group in the very near future and that the group will be able to formulate appropriate amendments to the Labour Code so as to take into account the principles above. It urges the Government to keep it informed in this respect.*
- 765.** *The Committee notes the complainant's allegations of violations of trade union rights at Poti Sea Port and BTM Textile and the Government's reply thereon. With regard to the first enterprise, the Committee notes that according to the information submitted by the complainant, the management's unilateral decision to terminate the collective agreement in force (as concurred by the decision of the Kutaisi Court of Appeal) and refusal to bargain collectively with a view to concluding a new collective agreement on labour conditions and expected privatization of the Port allegedly led to the protest action, sealing of the trade union office by the management and dismissal of nine trade union officers. At the textile enterprise, all trade union committee leaders were allegedly dismissed following communication to the enterprise of the establishment of the union.*
- 766.** *With regard to the unilateral termination of the collective agreement by the Poti Sea Port management, the Committee recalls that agreements should be binding on the parties and 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., paras 939 and 940]. It further recalls 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 the 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**, op. cit., para. 941].*
- 767.** *With regard to the employer's alleged refusal to bargain collectively, the Committee notes the information provided by the Government that the union made "inappropriate"*

*demands which the administration could not satisfy and which, in turn, created a dispute between the union and the administration. The Government also indicates that no new agreement was signed by the parties due to the lack of interest expressed by the union. While noting that collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining, the Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest**, op. cit., paras 926, 934 and 935]. The Committee requests the Government to take the necessary measures to promote respect for the abovementioned principles of bargaining in good faith and to indicate whether a collective agreement has since been concluded between the union and the new management of the Port.*

- 768.** *With regard to the sealing of the trade union office, the Committee notes that according to the complainant, the office was sealed on 19 October 2007 following a 45-minute protest organized by the union during lunch break on 15 October 2007. According to the Government, the union had no grounds for using the property of the Port after the termination of the collective agreement on 1 January 2007. While noting that the union office at the Poti Sea Port has since been reopened, the Committee considers that the closure of trade union offices, as a consequence of a 45-minute protest organized during lunch break, as alleged to be the case here, constitutes a violation of the principles of freedom of association and, if carried out by management, interference by the employer in the functioning of a workers' organization, which is prohibited under Article 2 of Convention No. 98. The Committee requests the Government to ensure respect for this principle in the future and to keep it informed of the situation in this regard.*
- 769.** *The Committee notes the complainant's further allegation that workers at BTM Textile have been intimidated and threatened with dismissal if they did not discontinue their trade union activities. The Committee considers that where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 835]. The Committee requests the Government to conduct an independent inquiry into these allegations and, if found to be true, to take suitable measures of redress including, where appropriate, the issuance of relevant instructions and/or sanctions. It requests the Government to keep it informed in this respect.*
- 770.** *With respect to the 18 dismissed trade union leaders (nine from the Port and from the textile enterprise, respectively), while noting that the Government denies that these were anti-union dismissals, the Committee observes that these allegations were not fully investigated and that the Government appears to have based its reply merely on the statement of the Port's management. The Committee recalls that no one should be subjected to anti-union discrimination because of legitimate trade union activities, and the remedy of reinstatement should be available to those who are victims of anti-union discrimination [see **Digest**, op. cit., para. 837]. In this respect and with reference to the complainant's allegation of failure by the Government to ensure respect for the principles of freedom of association, the Committee recalls that it is the responsibility of the Government to ensure the application of international labour Conventions concerning freedom of association which have been freely ratified and which must be respected by all state authorities, including the judicial authorities [see **Digest**, op. cit., para. 18]. While noting that the union has brought actions before the competent courts and decisions are pending at various levels of the judicial system, in light of the courts' judgements in the*

Poti Sea Port case, the Committee is concerned that the current state of the Georgian legislation may not provide the judiciary with sufficient tools to ensure adequate protection against, and remedy for, acts of anti-union discrimination. The Committee notes the most recent communication from the complainant, in which it indicates that the Prime Minister of Georgia issued an instruction to the Minister of Labour, Healthcare and Social Protection and the Chief Adviser to the Prime Minister to investigate and discuss the issues concerning anti-union discrimination at the earliest tripartite Social Dialogue Commission, as well as the possibilities for alternative employment for the workers allegedly dismissed from Poti Sea Port. In these circumstances, the Committee expects that, should the matter not be satisfactorily and promptly resolved through the tripartite Commission, the Government will carry out an independent investigation and if the allegations are found to be true, will take the necessary measures for the reinstatement of the dismissed workers in their posts. It further requests the Government to transmit a copy of the relevant judgements once they are handed down.

The Committee's recommendations

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

- (a) *Noting the establishment of the National Social Dialogue Commission and of a tripartite working group, the Committee requests the Government, in full consultation with the social partners concerned, to take the necessary measures to amend the Labour Code so as to ensure specific protection against anti-union discrimination, including anti-union dismissals and provide for sufficiently dissuasive sanctions against such acts. Along the same lines, observing the difficulty of contesting an alleged anti-union dismissal if there is no obligation to provide a motivation for that dismissal, the Committee requests the Government to take the necessary measures to ensure that workers may obtain an explanation as to the grounds for their dismissal. It urges the Government to keep it informed in this respect.***
- (b) *The Committee requests the Government to take the necessary measures to promote respect for the principles of bargaining in good faith and to indicate whether a collective agreement has been concluded between the union and the new management of the Poti Sea Port.***
- (c) *With regard to the sealing of the trade union office at the Poti Sea Port, while noting that the union office has since been reopened, the Committee considers that the closure of trade union offices, as a consequence of a 45-minute protest organized during lunch break, as alleged to be the case here, constitutes a violation of the principles of freedom of association and, if carried out by management, interference by the employer in the functioning of a workers' organization, which is prohibited under Article 2 of Convention No. 98. The Committee requests the Government to ensure respect for this principle in the future and to keep it informed of the situation in this regard.***
- (d) *The Committee requests the Government to conduct an independent inquiry into the allegations of intimidation and threats at BTM Textile and if found to be true, to take suitable measures of redress including, where appropriate,***

the issuance of relevant instructions and/or sanctions. It requests the Government to keep it informed in this respect.

- (e) *The Committee expects that, should the matter not be satisfactorily and promptly resolved through the tripartite Commission, the Government will carry out an independent investigation into the dismissals of the nine Port trade union leaders and nine textile enterprise union leaders and should the allegations be found true, will take the necessary measures for the reinstatement of the dismissed workers in their posts. Noting that the union has brought actions before the competent courts and the cases of the alleged anti-union dismissals are pending at various levels of the judicial system, the Committee further requests the Government to transmit a copy of the relevant judgements once they are handed down.*

CASE NO. 2445

INTERIM REPORT

Complaint against the Government of Guatemala presented by

- **the World Confederation of Labour (WCL) (now the International Trade Union Confederation (ITUC)) and**
- **the General Confederation of Workers of Guatemala (CGTG)**

Allegations: Murders, threats and acts of violence against trade unionists and their families; anti-union dismissals and refusal by private enterprises or public institutions to comply with judicial reinstatement orders; harassment of trade unionists

772. The Committee examined this case at its November 2008 meeting and presented an interim report to the Governing Body [see 351st Report of the Committee, paras 873 to 884, approved by the Governing Body at its 303rd Session (November 2008)].

773. At its meeting in November 2009, the Committee noted that, despite the time that had passed since the previous examination of the case, it had not received the information sought from the Government. The Committee drew to the Government's attention the fact that, in accordance with the procedural rule set out in paragraph 17 of its 127th Report approved by the Governing Body, it would present a report on the substance of the case at its next session even if the requested observations or information had not been received in due time. The Committee urged the Government by means of an urgent appeal to provide its observations or information without delay. The Government sent partial information in a communication dated 27 October 2008. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

774. In its previous examination of the case, the Committee made the following recommendations on the issues that remained pending [see 351st Report, para. 884]:

- (a) The Committee regrets that the Government has only sent information regarding a small number of the allegations presented.
- (b) Recalling that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are respected, the Committee once again deplores the murder of the trade union officials Rolando Raquec and Luis Quinteros Chinchilla, and the attempt against the life of the trade unionist Marcos Alvarez Tzoc and the trade union official Imelda López de Sandoval, once again strongly requests the Government to inform it as a matter of urgency of developments in the inquiries and proceedings currently under way, and expects that those responsible will be severely punished.
- (c) The Committee once again strongly requests the Government immediately to take all the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist Rolando Raquec, given the death threats which, according to the allegations, they have received.
- (d) With regard to the allegations of death threats against the Secretary-General of the Trade Union Association of Itinerant Vendors of Antigua, the Committee requests the complainant organizations to inform the trade unionists of the need to confirm the legal complaint lodged with the judicial authority and hopes that the ongoing proceedings relating to the threats and assaults will be concluded in the near future and requests the Government to keep it informed in this regard.
- (e) The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, Secretary-General of the CGTG.
- (f) With regard to the alleged dismissal of trade unionists at the El Arco Estate (municipality of Puerto Barrios), the Committee notes the Government's statements according to which the proceedings initiated by the dismissed workers at the Clermont Estate in the municipality of Río Bravo, who had obtained a judicial reinstatement order, and the application to the judicial authority by the employer for authorization to dismiss trade unionists at the Los Angeles Estate (municipality of Puerto Barrios) were before the Chamber of Constitutional Protection (*amparo*) of the Supreme Court of Justice. The Committee again requests the Government to inform it of the outcome of these proceedings, and expects that they will be concluded without further delay.
- (g) With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac) for submitting lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee again requests the trade union to which these trade unionists belong to request the competent legal authority to implement the reinstatement order.
- (h) The Committee notes with regret that the Government has not provided any information on the allegations relating to: (1) the non-payment of wages and other benefits ordered by the judicial authority to trade unionists in the municipality of Livingston; and (2) the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union. The Committee urges the Government to send the requested information without delay.
- (i) With regard to the allegations relating to the abusive investigation conducted by the Department of Human Resources against Ms Imelda López de Sandoval, Secretary-General of USTAC, the Committee urges the Government to instruct the General Directorate of Civil Aviation without delay to delete from its staff database any information of a private nature relating to this trade unionist.
- (j) With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant

abuse by the administration (according to the allegations, the General Directorate's chief maintenance officer threatened that they would be reported and subsequently dismissed, if they were five minutes late back to work, and then took photographs of them) and with regard to the intimidation by security officers against the members outside the room where the union's general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.

- (k) The Committee notes that the Government has accepted and hopes shortly to obtain technical assistance from the ILO. The Committee expects that the object of this assistance will be to ensure promptly an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, beginning with the implementation, without delay, of the judicial reinstatement orders.
- (l) The Committee calls the Governing Body's attention to this serious and urgent case.

B. The Government's reply

775. In its communication of 27 October 2008, the Government states, with regard to the allegation of non-payment of wages and other benefits owed to trade unionists in the municipality of Livingston, that the competent judicial authority dealing with the claims in question was consulted, which indicated that a compliance order had been issued but had not been implemented by the defendant, and, for that reason, the matter will be referred to the criminal jurisdiction for refusal to comply with a court decision.

C. The Committee's conclusions

776. *The Committee deeply deplores that, despite the time that has passed since it last examined the case, the Government has confined itself to sending observations only in relation to one of the many allegations – some of which are extremely serious in that they concern alleged murders or death threats – which had remained pending when the case was last examined at the Committee's meeting in November 2008. The Committee deplores the lack of cooperation on the part of the Government. It reiterates its previous conclusions and recommendations and urges the Government to send its observations without delay on all the allegations that had remained pending, which are reproduced here.*

777. *As regards the allegation concerning non-payment of wages and other benefits ordered by the judicial authority to trade unionists in the municipality of Livingston, the Committee notes that according to the Government: (1) the competent judicial body was consulted and stated that a ruling had been issued ordering compliance with the court's decision but the defendant failed to do so; and (2) the matter will be referred to the criminal jurisdiction owing to the refusal to comply with the judicial order. The Committee urges the Government to take, without delay, any measures in its power to ensure that the trade unionists of the municipality of Livingston who did not receive their wages and other benefits ordered by the judicial authority, receive them immediately, and to inform it of developments with regard to the criminal proceedings initiated against the municipality.*

The Committee's recommendations

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

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

- (b) *The Committee deplores that the Government has only sent information regarding a small number of the allegations presented, as well as its lack of cooperation, despite the extreme gravity of some of the allegations.*
- (c) *Recalling that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are respected, the Committee once again deplores the murder of the trade union officials Rolando Raquec and Luis Quinteros Chinchilla, and the attempt against the life of the trade unionist Marcos Alvarez Tzoc and the trade union official Imelda López de Sandoval, and once again strongly expresses its expectation that the Government will inform it as a matter of urgency of developments in the inquiries and proceedings currently under way, and urges that the necessary measures be taken so that those responsible will be severely punished.*
- (d) *The Committee once again strongly urges the Government immediately to take all the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist Rolando Raquec, given the death threats which, according to the allegations, they have received.*
- (e) *With regard to the allegations of death threats against the Secretary-General of the Trade Union Association of Itinerant Vendors of Antigua, the Committee requests the complainant organizations to inform the trade unionists of the need to confirm the legal complaint lodged with the judicial authority and hopes that the ongoing proceedings relating to the threats and assaults will be concluded in the near future and requests the Government to keep it informed in this regard.*
- (f) *The Committee once again requests the Government to communicate the outcome of the inquiries carried out by the national police and the Prosecutor General for Human Rights into the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, Secretary-General of the CGTG.*
- (g) *With regard to the alleged dismissal of trade unionists at the El Arco Estate (municipality of Puerto Barrios), the Committee notes the Government's statements according to which the proceedings initiated by the dismissed workers at the Clermont Estate in the municipality of Río Bravo, who had obtained a judicial reinstatement order, and the application to the judicial authority by the employer for authorization to dismiss trade unionists at the Los Angeles Estate (municipality of Puerto Barrios) were before the Chamber of Constitutional Protection (amparo) of the Supreme Court of Justice. The Committee again requests the Government to inform it of the outcome of these proceedings, and expects that they will be concluded without further delay.*
- (h) *With regard to the alleged dismissal of workers at the El Tesoro Estate (municipality of Samayac) for submitting lists of claims during negotiations on a collective agreement, despite a judicial reinstatement order, the Committee again requests the trade union to which these trade unionists belong to request the competent legal authority to implement the reinstatement order.*

- (i) *The Committee notes with regret that the Government has not provided any information on the allegations relating to the absence of measures by the authorities to promote collective bargaining between the El Carmen Estate and the trade union. The Committee urges the Government to send the requested information without delay.*
- (j) *With regard to the allegations relating to the abusive investigation conducted by the Department of Human Resources against Ms Imelda López de Sandoval, Secretary-General of USTAC, the Committee urges the Government to instruct the General Directorate of Civil Aviation without delay to delete from its staff database any information of a private nature relating to this trade unionist. The Committee requests to be kept informed in this respect.*
- (k) *With regard to the alleged threats against the employees of the General Directorate of Civil Aviation who participated in a protest in front of the building against the constant abuse by the administration (according to the allegations, the General Directorate's chief maintenance officer threatened that they would be reported and subsequently dismissed, if they were five minutes late back to work, and then took photographs of them) and with regard to the intimidation by security officers against the members outside the room where the union's general assembly was to be held, the Committee regrets that the Government has not sent its observations and urges it to do so without delay.*
- (l) *The Committee expects that the Government will continue to receive technical assistance from the ILO and that the object of this assistance will be to ensure promptly an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, beginning with the implementation, without delay, of the judicial reinstatement orders.*
- (m) *The Committee urges the Government to take, without delay, all the measures in its power to ensure that the trade unionists of the municipality of Livingston who did not receive the wages and other benefits owed to them as ordered by the judicial authority, receive them immediately, and to inform it of developments with regard to the criminal proceedings initiated against the municipality.*

CASE NO. 2673

INTERIM REPORT

**Complaint against the Government of Guatemala
presented by
the General Union of Workers of the Directorate General for
Migration of the Republic of Guatemala (USIGEMIGRA)**

*Allegations: The transfer of trade union leaders
without their consent in violation of the
collective agreement in force*

- 779.** The complaint is contained in a communication from the General Union of Workers of the Directorate General for Migration of the Republic of Guatemala (USIGEMIGRA) dated 28 October 2008. On 29 January 2009, the trade union sent further information.
- 780.** At its November 2009 meeting, the Committee noted that, despite the time that had elapsed since the submission of the complaint, it had not received the full observations requested from the Government. The Committee issued an urgent appeal to the Government and drew its attention to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it would present a report on the substance of this case at its next meeting even if the full observations requested had not been received in due time. The Committee therefore urged the Government to transmit its observations as a matter of urgency [see 354th Report, para. 9]. Since then, the Committee has not received full observations from the Government concerning the complaint.
- 781.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 782.** In its communications dated 28 October 2008 and 29 January 2009, USIGEMIGRA alleges that on 18 September 2009, the joint board, a body established under section 11 of the collective agreement on working conditions in force in the Directorate General for Migration which, according to the collective agreement, has to be composed of three regular members and two alternate members representing the trade union and three representing the Directorate General for Migration, decided to transfer USIGEMIGRA trade union leaders Huberto Fidel Joachin López, Jorge Raymundo Orozco Miranda, César Augusto López González, Miguel Roberto López Pedroza, Víctor Manuel Valladares and Carlos Adán García Caniz from their posts on the border with Mexico to posts on the border with El Salvador. The complainant organization objects to the fact that when the decision was taken, the board was not composed of three regular members and two alternate members representing each of the parties, as provided for in the collective agreement in force. The workers affected filed an action for protection of constitutional rights (*amparo*) which was accepted. An appeal is currently pending before the Constitutional Court.
- 783.** The complainant organization adds that on 25 January 2009, the joint board (composed of another two unions separate from the complainant organization) agreed on the transfer of another group of USIGEMIGRA trade union leaders, namely Lucrecia Rufina Cuellar

Castillo, Moisés Flores Morán, Mayra Leticia Vásquez Rodríguez, Rubén Darío Balcarcel López, Mario Rolando Oxom Rey and Mary Gregoria Gutiérrez García. The individuals affected filed *amparo* actions, some of which were denied while others resulted in provisional *amparo*. Despite this, the Overseer and Deputy Director again ordered the transfers following which new *amparo* actions were filed which are currently pending. In its communication of 29 January, the trade union alleges that five of the *amparo* actions filed were rejected by the judicial authority.

- 784.** USIGEMIGRA alleges that complaints were lodged with the Labour Inspectorate, which confirmed that there had been violations but did not draw up the appropriate legal measures. The Ministry of Labour called the parties to mediation meetings but these were not attended by the Directorate authorities. A mediation committee was also appointed in response to the complaints lodged with the Human Rights Prosecutor but this was also ignored by the authorities of the Directorate General for Migration.
- 785.** Finally, the complainant organization alleges the intimidation of a member of the trade union's advisory board, Lucrecia Cuellar Castillo, who was forced to leave the union and her position as trade union leader.

B. The Committee's conclusions

- 786.** *The Committee regrets that, despite the time that has elapsed, the Government has not sent the requested observations, even though it has been invited on several occasions, including by means of an urgent appeal, to present its observations on this case.*
- 787.** *In these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to present a report on this case without the benefit of the information which it had hoped to receive from the Government.*
- 788.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for this freedom in both law and practice. The Committee is convinced that, if the procedure protects governments from unreasonable accusations, governments should on their side recognize the importance of formulating, for objective examination, detailed replies concerning the substance of the allegations made against them.*
- 789.** *The Committee notes that in this case the complainant organization alleges the transfer on two occasions (18 September and 25 January 2009) of several trade union leaders representing its organization to other more remote posts, in violation of the provisions of section 9 of the collective agreement in force in the institution which provides that trade union leaders may not be removed or transferred from their posts without their consent. The Committee notes that the decision to transfer these trade union leaders was taken by the joint board, a body established under section 11 of the collective agreement in force, which has to be composed of three regular members and two alternate members representing the union and an equal number of members representing the Directorate General for Migration. The Committee notes that, according to USIGEMIGRA, when the decisions were taken, the board was not composed in accordance with the provisions of section 11 mentioned above.*
- 790.** *The Committee notes that, according to the allegations, amparo actions were filed against the dismissal decisions, which were allowed in some cases and rejected in others, and that some of the amparo actions filed were the subject of an appeal which is currently pending. The Committee further notes that, according to USIGEMIGRA and to the documents*

enclosed, the Labour Inspectorate confirmed the failure to comply with section 9 of the collective agreement. Despite all this, the Directorate General for Migration transferred the trade union leaders, following which new amparo actions were filed which are currently pending. The Committee also notes that despite the fact that the Ministry of Labour and the Human Rights Prosecutor organized conciliation and mediation meetings to resolve the dispute, the Directorate General for Migration did not attend the meetings.

- 791.** *Under these circumstances, recalling that a deliberate policy of transfers of persons holding trade union office may seriously harm the efficiency of trade union activities, the Committee requests the Government, taking into account that the transfers were decided without the consent of the trade union leaders concerned, in violation of section 9 of the collective agreement in force (a circumstance confirmed by the Labour Inspectorate), to take the necessary steps to cancel these transfers. Taking into account the problems that exist on the border of the country and the particular characteristics of work in customs, which may require transfer measures in certain cases, the Committee invites the complainant organization and the Directorate General for Migration, in the context of the conciliation proposed by the Ministry of Labour and the Human Rights Prosecutor, to endeavour to find a negotiated solution to the dispute, including the issue of the composition of the joint board when decisions affecting the trade union are taken. The Committee requests the Government to keep it informed in this regard and to provide the final outcome of the amparo appeals pending. The Committee further reminds the Government that it may avail itself of technical assistance from the Office in respect of these matters.*
- 792.** *With regard to the allegations concerning the intimidation of Lucrecia Cuellar Castillo, a member of the union's advisory board who was forced to leave the union and her position as trade union leader, the Committee requests the Government to carry out an investigation into this matter and to keep it informed of the outcome thereof.*

The Committee's recommendations

- 793.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) With regard to the allegations concerning the transfer on 18 September and 25 January 2009 of several USIGEMIGRA trade union leaders, taking into account that these transfers were decided without the consent of the trade union leaders concerned, in violation of section 9 of the collective agreement in force, the Committee requests the Government to take the necessary steps to cancel these transfers.*
 - (b) Taking into account the problems existing on the country's border and the particular characteristics of work in customs, which may require transfer measures in certain cases, the Committee invites the complainant organization and the Directorate General for Migration, in the context of the conciliation and mediation proposed by the Ministry of Labour and the Human Rights Prosecutor, to endeavour to find a negotiated solution to the dispute, including the issue of the composition of the joint board when decisions affecting the trade union are taken. The Committee requests the Government to keep it informed in this regard and to provide the final outcome of the amparo appeals pending and reminds the Government that it may avail itself of technical assistance from the Office in respect of these allegations.*

- (c) *With regard to the allegations concerning the intimidation of Lucrecia Cuellar Castillo, a member of the union's advisory board who was forced to leave the union and her position as trade union leader, the Committee requests the Government to carry out an investigation into this matter and to keep it informed of the outcome thereof.*

CASE NO. 2700

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

**Complaint against the Government of Guatemala
presented by
the Union of Statistics Workers of the National Institute
of Statistics (STINE)**

Allegation: The Union of Statistics Workers of the National Institute of Statistics (STINE) alleges non-observance by the National Institute of Statistics of the of the collective agreement concluded in August 2007

- 794.** This complaint is contained in a communication dated 16 February 2009 from the Union of Statistics Workers of the National Institute of Statistics (STINE).
- 795.** In its meeting in November 2009, the Committee observed that despite the time that had passed since the presentation of the complaint, it had not received the observations requested from the Government. The Committee made an urgent appeal to the Government and indicated that, in accordance with the procedural rules set out in paragraphs of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case even if the observations requested had not been received in due time. The Committee accordingly requested the Government to transmit its observations as a matter of urgency [see 354th Report, para. 9]. Since then the Government's complete observations have still not been received.
- 796.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 797.** In its communication of 16 February 2007, the STINE alleges that the National Institute of Statistics (INE) refuses to apply and adhere to the terms of the collective agreement concluded on 9 August 2007, formally endorsed by the Ministry of Labour on 30 October 2007 and approved by the Ministry on 14 December 2007 upon rejecting an administrative appeal lodged by the Executive Board of the INE. The complainant indicates that the various proceedings engaged to get the INE to comply with the agreement were unsuccessful, and the Executive Board initiated judicial proceedings to annul the formal endorsement of the collective agreement. The union explains that after a number of hearings and appeals, the First Chamber of Labour and Social Security on 11 November 2008, during the annulment proceedings brought by the INE, upheld the motion by the

STINE to dismiss the application by the INE on grounds of insufficiency. The union adds that the INE then lodged an appeal for constitutional protection (*amparo*) with the Supreme Court, and provides a copy of the court decision of 5 November 2009 rejecting that request for *amparo*.

B. The Committee's conclusions

798. *The Committee regrets that, despite the time that has passed, the Government has not sent the observations requested, although it has been invited on a number of occasions, including through an urgent appeal, to present its observations on the case.*

799. *Under these circumstances and in accordance with the applicable rules of procedure [see the 127th Report, para. 17, approved by the Governing Body in its 184th Session], the Government is bound to present a report on the substance of the case without the information it had hoped to receive from the Government.*

800. *The Committee reminds the Government that the purpose of the whole procedure established by the ILO for the examination of allegations of violations of freedom of association is to promote respect for trade union rights, in law and in fact. The Committee remains convinced that if the procedure protects governments from unreasonable accusations, governments on their side should recognize the importance of formulating, so as to allow objective examination, detailed replies to the allegations brought against them.*

801. *The Committee observes that in the present case, the complainant alleges the refusal by the INE to comply with the collective agreement concluded on 9 August 2007 and formally endorsed by the Ministry of Labour on 30 October 2007. The Committee notes that the INE appealed against the Ministry's decision to endorse the agreement and the appeal was rejected on 14 December 2007. The Committee notes that the Institute then sought the judicial annulment of the collective agreement, and the STINE appealed against that application on grounds of insufficiency; the latter appeal was upheld by the First Chamber of Labour and Social Security on 11 November 2008. The Committee notes that according to the documents supplied by the union, the INE lodged an appeal for constitutional protection (*amparo*) against the Supreme Court decision, and the appeal was rejected on 5 November 2009. Under these circumstances, while regretting the time that has passed since the collective agreement was concluded without it being applied, and recalling that agreements must be binding for both parties, the Committee urges the Government to take the necessary measures without delay to ensure that the INE applies in full the collective agreement concluded with the STINE on 9 August 2007. The Committee expects the Government to keep it informed in this regard.*

The Committee's recommendations

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

While regretting the time that has passed since the conclusion of the collective agreement, without that agreement being applied, and recalling that agreements must be binding for both parties, the Committee urges the Government to take the necessary measures without delay to ensure that the INE applies in full the collective agreement concluded with the STINE on 9 August 2009, and expects the Government to keep it informed of developments in this regard.

**Complaint against the Government of Malaysia
presented by
the Malaysian Trades Union Congress (MTUC)**

Allegations: The complainant organization alleges that the British American Tobacco Company (Malaysia) Berhad (BAT Malaysia) reclassified existing posts within the company in order to prevent employees who were members of the British American Tobacco Employees Union (BATEU) from retaining their union membership. Following this re-designation exercise, a 2007 decision of the Director-General of the Department of Trade Union Affairs and Industrial Relations ruled that the BATEU could represent only 15 employees out of the company's total workforce of 1,000, rendering the union effectively unable to function.

- 803.** The complaint is set out in a communication of 22 May 2009 from the Malaysian Trades Union Congress (MTUC).
- 804.** The Government submitted its observations in a communication of 8 September 2009.
- 805.** Malaysia has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. The complainant's allegations

- 806.** In its communication of 22 May 2009, the complainant states that, on 28 August 2006, the British American Tobacco (Malaysia) Berhad (BAT Malaysia) announced vacancies for the new position of "process specialist" in the management category of employees. The weekend following this announcement, members of the British American Tobacco Employees Union (BATEU) holding the position of process technician were harassed to apply for the newly created positions.
- 807.** Subsequently, the union met with the employer's Human Resource Director and expressed its disappointment over these developments. It also raised the following concerns: (1) despite the existence of a collective agreement, the union was not notified of any job creations; (2) the new job positions are supplanting positions within the union's scope and denying the rights of the union to represent this group of employees; (3) the "process specialist" and "process technician" occupations are similar, i.e. they entail the operation of machinery and do not have managerial, executive or supervisory functions, and as such should be within the union's scope; and (4) the implementation of this new job category, under the pretext of career promotion, was intended to eliminate 60 per cent of the total

union membership. The complainant indicates that although the employer made a feeble attempt to justify the actions referred to, the union was not convinced that any significant differences between the two job descriptions existed.

- 808.** The employer subsequently went through with the re-categorization of the posts of 31 out of 175 process technicians, all of whom were members of the union, and insisted that they could no longer be represented by the union. It further threatened to dismiss those employees who refused to accept the new designation. On 29 December 2006, the employer issued a letter announcing its intent to eliminate 109 positions through the voluntary separation scheme (VSS) exercise, or if need be through forced terminations.
- 809.** On 9 January 2007 the employer, having successfully removed a large number of employees from trade union membership, initiated another exercise to remove all trade marketing and distribution representatives from trade union membership and the collective agreement's coverage. Although these practices were brought to the attention of the Director-General of Industrial Relations, the latter concurred with the employer's actions.
- 810.** The complainant adds that on 29 October 2007 the Director-General of the Department of Trade Union Affairs (DGTU), on the urging of the employer, arbitrarily ruled that the 46-year-old BATEU could no longer represent the employees of the two wholly owned subsidiary companies of BAT Malaysia, namely the Tobacco Importers and Manufacturers Sdn Bhd (TIM) and the Commercial Marketing and Distributors Sdn Bhd (CMD). The registered rules of the union explicitly state that its membership is "open to all employees of British American Tobacco (BAT) [Malaysia] Bhd and its subsidiaries". The complainant states that as a result of this ruling and the company's actions, the BATEU's membership now stands at 15 out of the total workforce of 1,000.

B. The Government's reply

- 811.** In its communication of 8 September 2009, the Government states that BAT Malaysia is one of the largest companies in the country in the manufacture, sale, import and distribution of tobacco products, and also owns two subsidiaries, TIM and the CMD.
- 812.** In 2006, BAT Malaysia announced a restructuring exercise whereby three new positions were created: the process specialist position, to replace the process technician position at TIM and which the employer states is an executive position; and the sales and distribution representative (SDR) and trade marketing representative (TMR) positions, both within the CMD and both of which are, according to the employer, executive positions.
- 813.** The Government states that according to BAT Malaysia the restructuring was necessary and intended to upgrade employees' personal development and provide career enhancement, as well as to remain competitive in a rapidly changing business environment. BAT Malaysia also maintains that many employees, including ordinary BATEU members were attracted to the positions and none of them were forced to apply, particularly to the process specialist positions. BAT Malaysia claims that better terms and conditions of work are attached to the three newly created positions, so that they cannot fall within the scope of the union's representation. As BATEU was against this position, BAT Malaysia through their letter of 6 September 2006, filed an application under section 9(1A), Industrial Relations Act, 1967 (IRA 1967) to determine the classification of the TMR and SDR positions.
- 814.** The Government states that the restructuring exercise and its implementation was strongly opposed by the BATEU, especially the creation of 38 process specialist positions as it would eliminate 60 per cent of the union membership. The union claimed that the new posts created were a pretext to exclude the employees from union membership, and also

contended that the process specialist position did not possess the necessary executive authority and functions and should therefore still fall within the membership scope of the union. Accordingly, the union lodged applications under the IRA 1967 to determine the classification of the process specialist, TMR and SDR positions.

- 815.** The Government indicates that BAT Malaysia then filed an application with the Department of Trade Union Affairs (DTU) to determine the union's competence to represent all employees in the two subsidiary companies. The DGTU, with the powers vested in him under the Trade Union Act, 1959 (TUA), and after examining the statute and the relevant case law, made a decision on 29 October 2007 that the BATEU was "not competent" to represent employees employed in the subsidiary companies of BAT Malaysia. The decision made by the DGTU was based on the membership scope of BATEU which is not in line with the definition of a trade union as stipulated in section 2(1) and section 26(1A) of TUA, which provides that a trade union can only represent workers who are employed within a particular establishment.
- 816.** The Government states that the Department of Industrial Relations (DIR) categorically denies the allegation by the MTUC or BATEU that it, "in collusion with BAT Malaysia and the Department of Trade Union Affairs has crippled the 47-year-old BATEU". The 29 October 2007 ruling of the DGTU that the BATEU is not competent to represent employees in TIM and the CMD was based on the interpretation of both statute and the prevailing case law; the BATEU's membership scope was not consonant with the trade union law, notwithstanding the fact that there had been a practice where the BATEU had employees from both TIM and the CMD since its constitution was erroneously approved by the DGTU in 2000. Furthermore, the DIR was never involved in any manner whatsoever in the DGTU's ruling.
- 817.** The Government adds that verification of the process specialist position was conducted through visits at the workplace by the DIR. Based on the DIR's report, the Minister of Human Resources, on 7 March 2007, decided that the process specialist position falls within the managerial, executive, confidential or security category, hence employees holding the process specialist position fall outside of the scope of union representation. Dissatisfied with the Minister's decision, the union appealed to the High Court on 20 April 2007. The matter is still pending; the union has also obtained a conditional stay order from the High Court to enable it to continue managing its affairs.
- 818.** The Government maintains that the BATEU has not been crippled since the recognition accorded by BAT Malaysia to it remains intact and therefore it is still competent in law to conduct collective bargaining with the company, albeit with less members now. The union, nevertheless, has not taken any positive steps to pursue a new collective agreement with the employer for the benefit of the workers it currently represents.
- 819.** According to the Government, it is the right of the employer to reorganize its business in the way it sees fit, provided it acts in good faith. BAT Malaysia is therefore free to create the necessary positions, assign the required responsibility for the job and fix the rates of pay. Many employees, including members of the BATEU, voluntarily took up the process specialist position as it is a promotion for them that comes with higher pay and better benefits. The Government adds that it is a common practice for companies intending to consolidate the workforce in turbulent times to do so by way of the VSS, which makes termination of employment less painful by offering a higher rate of redundancy benefits to employees. All employees, including BATEU members, were free to make their choice to leave the company in consideration for a retrenchment sum over and above the statutory rate; there is not an iota of evidence that BATEU members had been forced to accept the VSS.

- 820.** A communication of 27 July 2009 from the employer BAT Malaysia is attached to the Government's communication. The employer states that it has not violated ILO conventions and allows its employees the freedom to join and form trade unions. As a responsible corporate citizen in Malaysia, BAT Malaysia has strictly complied with all relevant ILO Conventions and all relevant legislation and labour practices in Malaysia. BAT Malaysia is a holding company which is not involved in manufacturing or marketing activities; manufacturing activities are carried out by a company known as TIM, a wholly owned subsidiary of BAT Malaysia, while marketing and distribution activities are carried out by a company known as the CMD, also a wholly owned subsidiary of BAT Malaysia. The union, the BATEU, was formally known as the Rothmans Employees Union (REU) and represented employees in all three companies stated above.
- 821.** The employer indicates that, formerly, its manufacturing operations were carried out by process technicians who were essentially machine operators; each machine had to be manned by a process technician. Over the years, the company had looked into the prospect of enhancing production efficiency and introduced more sophisticated machines to enhance efficiency, given the changing and challenging environment. Pursuant thereto, there was a need to replace process technicians with a smaller group of more highly skilled specialists who would not be purely machine operators, but would manage the entire process: thus the evolution of the concept of process specialist, which has been implemented in many developed countries. Process specialists are highly skilled specialists who constitute a self-managing team.
- 822.** According to the employer, the role profile for process specialist had been evaluated via the Hays Methodology and the said position was deemed to carry executive functions and responsibilities pursuant to the evaluation. On 28 August 2006, the position of process specialist was advertised through the company's internal email. The employer states that it is not true that members of the BATEU were harassed to apply for this position nor that no information had been given to the BATEU earlier.
- 823.** About 150 process technicians, including members of the Executive Committee of the BATEU, applied for the position as process specialists. About 70 of them who possessed specialized technical knowledge (holders of certificates and diplomas) were deemed suitable for the new position, were appointed as process specialists and subsequently given specialized training. With the implementation of the new production process and the appointment of process specialists, the company had seen an improvement of 17 per cent in productivity, a reduction by 25 per cent of wastage and rejects, no drop in quality and an enhanced continuous plan.
- 824.** The employer states that the BATEU was not officially notified of the process specialist position, as it was a management position that falls outside the scope of the collective agreement. The specialist role carries executive functions and responsibilities, and the wages and terms and conditions of employment offered for the said position are much higher than that provided for in the collective agreement between itself and the BATEU.
- 825.** The employer indicates that immediately after the announcement of this position via internal email, its management had a meeting with the BATEU, in September 2006. The BATEU had refused to discuss the issue and, instead, made allegations of union busting by the company and issued circulars to all its members alleging the same with false information. The BATEU had also insisted that there was no difference between the functions of process technicians and process specialists.
- 826.** Under the Malaysian IRA 1967, a dispute over the capacity in which a person is employed may be referred to the Director-General for Industrial Relations (DGIR) for investigation. The result of his investigation would be referred to the Minister of Human Resources for a

decision. The BATEU had reported this issue to the DGIR; pursuant thereto, the Minister of Human Resources held on 8 March 2007 that the position of process specialist was an executive position falling outside the scope of the collective agreement. The BATEU was unhappy with the decision of the Minister of Human Resources and, together with the MTUC, has accused the Minister of Human Resources of conspiring with the company to bust the union. The employer maintains that since this decision had never been challenged by the BATEU, they should not now question its legality as they are deemed to have accepted the decision and waived their rights; all parties should now abide by the decision.

827. The employer states that following the appointment of process specialists, several employees, particularly those without the relevant skills, had to be made redundant. This led to the decision that a reduction of manpower in TIM would be necessary, and the BATEU was duly notified of this intention. In view of the redundant employees, the company made a VSS offer that was sufficiently generous to the employees concerned. As a result, all of the employees offered the VSS voluntarily accepted the scheme despite the BATEU's campaign against it.

828. As stated above, the employer's marketing and distribution activities are carried out by the CMD. Although the distribution of its tobacco products is under the purview of the CMD, much of the actual distribution and sale of its products have been handled by third party independent dealers and distributors who have their own personnel. In carrying out marketing and distribution activities, the company employed a large number of trade marketing and distribution representatives (TM&D reps) whose functions are essentially to plan, organize, coordinate and implement cost-effective sales and distribution activities aimed at ensuring the quality and timely availability of BAT Malaysia's range of products, and to pursue proactive initiatives designed to support and advance BAT Malaysia's trade marketing activities. Given the changing environment, the company realized that, moving forward, the present system would not be an ideal method because it was not cost effective and the independent dealers and distributors were not sufficiently committed to ensuring that all the retail outlets were sufficiently supplied with the company's products. The company decided that to have a more dynamic system of distribution and marketing, it would directly market and distribute its products and have its own personnel to do so. The sales personnel employed by the independent dealers and distributors would be absorbed by the CMD. To support such change and for business efficacy, the company needs to reorganize and restructure its current sales and distribution division to give more focus to both the trade marketing and sales and distribution activities and enable structured capability development in both fields. As such, the functions and responsibilities of the existing TM&D reps will also change to reflect the level of professionalism and sales mastery required by the company of the TM&D reps for now, and in the future to provide more professional and dynamic service in marketing and distribution activities.

829. The employer indicates that it decided that the TM&D reps need to be divided into two groups, i.e., TMRs and SDRs. The current TM&D reps would be re-designated as either TMRs or SDRs. Both TMRs and SDRs will be handling managerial, executive and confidential functions, with multi-skill requirements in managing the operational and leadership aspects of their roles. The TMRs and SDRs currently execute a number of executive responsibilities which is evidenced in the daily requirements of their jobs such as: (a) the need for decision-making in day-to-day business activities, including deciding on effective methods and means to achieve their trade marketing and sales and distribution targets in segmented outlets; (b) the need to provide problem-solving solutions and advice to retailers and various stakeholders in their daily jobs; (c) providing constructive feedback and ideas which will help the CMD make better decisions in marketing execution; (d) planning their activities to achieve the CMD's targets within budgets; (e) to have direct supervision and leadership of sales teams, and providing performance coaching where necessary to sales teams; and (f) conducting performance appraisals for sales teams,

dealing with disciplinary issues and resolving daily people issues among sales teams. The employer attaches, as an appendix, a summary of the key functions and responsibilities of TMRs and SDRs.

- 830.** The employer indicates that it applied to the Director of Industrial Relations for an opinion on the TMR and SDR positions, and on 14 December 2006 the company received a decision from the Ministry of Human Resources that the TMR and SDR positions fall within the executive category. In January 2007, the company offered the new positions to all existing TM&D reps; all relevant employees accepted their positions. Among those who accepted the new positions were the President of the BATEU and several Executive Committee members.
- 831.** According to the employer, although the rules of the BATEU's constitution provide that its membership is open to all employees of BAT Malaysia and its subsidiaries, TUA does not allow this. The BATEU's constitution was erroneously approved by the DGTU in the year 2000 when the union was established. Section 2 of the latter law provides that membership in a trade union is only open to workers within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries. Furthermore, in one decision the High Court had determined that an establishment, as defined under section 2(1) of TUA, included a branch or division of the company concerned but did not include its subsidiary companies; in that same decision the High Court had also held that a union registered to cater for one establishment could not grow out of itself to represent employees in another establishment. In view of the above, the BATEU can only represent employees in BAT Malaysia and not those belonging to the latter's subsidiary companies. The company thus decided, in accordance with the relevant law, to seek a decision from the DGTU on the BATEU's competence to represent all employees of BAT Malaysia including its subsidiaries. On 29 October 2007, the DGTU ruled that the BATEU could only represent employees in BAT Malaysia, and not in TIM or the CMD.
- 832.** The employer states that on 15 November 2007 the union applied to the High Court for judicial review of the DGTU's decision. On 27 November 2007, the High Court granted the BATEU leave to commence judicial review proceedings; the leave application was heard *ex parte*. Apart from the leave application, BATEU had also applied for a stay order against all proceedings and any effect related to or arising from the DGTU's decision, so as to enable the BATEU to still carry out its duties and functions, including the use of its bank account, until the conclusion of its application or any such directions of the High Court. The foregoing stay application has yet to be heard. The High Court had declined to give an interim stay order save for a limited order, handed down on 7 December 2007, enabling the three existing cheque signatories of the BATEU to sign cheques solely for the purposes of paying the union's monthly utility bills and the monthly allowance of its part-time clerk. Aside from this limited order, the DGTU's decision still stands and all parties are compelled to comply with the same.
- 833.** The employer indicates that article 10(2) of the collective agreement between itself and the union provides for the right of the company to operate and manage its business in all respects for the well-being of the company. Additionally, articles 15 and 17 of the collective agreement provide for recruitment and promotions and require the company to advertise, among existing employees, vacancies for positions, within the scope of the agreement. However, in the case of management positions article 17(2) provides that the company would consider promoting employees from within the scope of the agreement to junior management positions; in such cases there is no requirement to advertise internally. In filling the position of process specialist the company was therefore not obliged to advertise internally, but had done so to offer opportunities to a large number of employees who would otherwise have no opportunity to apply for management positions. The actions of the company, therefore, cannot be construed as union-busting.

- 834.** The employer states that it has always recognized the right of employees to be represented by trade unions. Although the DGTU has ruled that the BATEU cannot represent employees in TIM and the CMD, the company is always willing to work with trade unions that have the capacity under the law to legitimately represent employees from TIM and the CMD, and has never refused or failed to negotiate with the BATEU. The decision of the DGTU does not permit the current union officials, including the President and General Secretary, to be members of the BATEU. However, the BATEU has not been disbanded by the DGTU and remains very much alive. It is for the existing members in BATEU to elect a new General Secretary and President and negotiate with the company.
- 835.** The employer maintains that it has not undertaken union-busting activities and has at all times acted within the parameters of local legislation and fair industrial relations practices. Its decisions were undertaken in order to adapt to changing global market conditions and, to date, the overall restructuring undertaken by the company had resulted in a workforce of approximately 500 potential union members as well as career development opportunities for its employees. Furthermore, all initiatives taken by the company to date have been approved by the relevant authorities in Malaysia. The employer adds, finally, that in relation to the pending proceedings before the High Court it is able to submit only the information provided above, as any further details may be sub judice to the court proceedings.

C. The Committee's conclusions

- 836.** *The Committee notes that the present case involves allegations that BAT Malaysia reclassified existing posts within the company in order to prevent employees who were members of the BATEU from retaining their union membership. According to the complainant, out of 175 existing process technician posts, 31 were reclassified as process specialist ones; following the announcement of the posts, union members were allegedly harassed into applying for them and 109 process technicians positions were subsequently made redundant. The complainant also states that there are no significant differences between the duties and functions of the two.*
- 837.** *The Committee notes the information transmitted by the Government, particularly as concerns the 7 March 2007 ruling of the Minister of Human Resources and the 29 October 2007 decision of the DGTU. The Committee further notes the employer's statement that the process specialist post had been introduced to replace that of the process technician within its wholly owned subsidiary, TIM, in order to increase production efficiency, and that the said post had been evaluated and deemed to possess executive functions and responsibilities, with wages and terms of employment much higher than that provided for in the collective agreement with the BATEU. Furthermore, as management positions, the process specialist positions are not required to be advertised internally, as per the collective agreement. According to the employer, following the announcement of the new posts on 28 August 2006 about 150 process technicians, including members of the BATEU's executive committee, applied for them and approximately 70 were appointed and given specialized training. Subsequently, several employees had to be made redundant and were given VSS offers that were sufficiently generous, and which all of the employees concerned voluntarily accepted. The employer indicates that no union members were harassed to apply for the positions.*
- 838.** *The Committee notes that a disparity exists between the complainant's and the employer's statements with respect to the number of posts reclassified. The Committee nevertheless notes that the Minister of Human Resources, on 7 March 2007, decided that the process specialist position falls within the managerial, executive, confidential or security category and – by virtue of section 2(1) of TUA, which requires that trade unions be associations or combinations of workers within "similar" trades, occupations or industries – thus fell*

outside the scope of union representation. The Government indicates that the union appealed the Minister's decision to the High Court on 20 April 2007, and that the matter is pending.

839. The employer had also created two new posts, TMR and SDR, to replace the TM&D rep post within its other wholly owned subsidiary, the CMD. In this respect the Committee notes that, as with the process specialist post in the employer's TIM subsidiary, the TMR and SDR posts were designated as falling within the executive category by the Ministry of Human Resources (on 14 December 2006), and furthermore that, following a petition by the employer, the DGTU ruled on 29 October 2007 that by virtue of section 26(1) of TUA, the BATEU could no longer represent employees employed by BAT Malaysia's subsidiaries, TIM or the CMD; the BATEU appealed the DGTU's decision to the High Court, and the matter is still pending. Finally, the Committee notes that according to the complainant, following these rulings the BATEU's membership currently stands at 15 out of a total workforce of approximately 1,000.
840. The Committee observes that the 14 December 2006 decision of the Ministry of Human Resources and the 7 March 2007 decision of the Minister of Human Resources, which respectively determined that the TMR/SDR posts and the process specialist posts were executive positions and thus fell outside the scope of union representation, were apparently based on section 9 of the IRA 1967. The said provision states that no trade union, the majority of whose membership consists of "workmen in the managerial, executive, confidential or security capacities", may seek recognition or invite the employer to engage in collective bargaining in accordance with section 13 of the IRA. The Committee further notes that the IRA provides no definitions for the above noted categories, but stipulates rather that whether a particular occupation falls into any of the said categories is a matter to be determined by either the Director-General of Industrial Relations (section 9(4)) or the Minister of Human Resources (section 9(5)).
841. As concerns managerial and supervisory staff, the Committee recalls that it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to establish their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 247]. Moreover, the Committee has taken the view that the expression "supervisors" should be limited to cover only those persons who genuinely represent the interests of employers [see **Digest**, op. cit., para. 248]. The Committee has previously recognized that limiting the definition of managerial staff to persons who have the authority to appoint or dismiss is sufficiently restrictive to meet the condition that these categories of staff are not defined too broadly, and that a reference in the definition of managerial staff to the exercise of disciplinary control over workers could give rise to an expansive interpretation which would exclude large numbers of workers from workers' rights. It recalls, furthermore, that an excessively broad interpretation of the concept of "worker of confidence", which denies such workers their right of association, may seriously limit trade union rights and even, in small enterprises, prevent the establishment of trade unions, which is contrary to the principle of freedom of association [see **Digest**, op. cit., paras 249, 250 and 251]. In view of the principles cited above, the Committee requests the Government to take the necessary measures to amend the IRA 1967 so as to ensure that: (1) the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers, including, for example, those who have the authority to appoint or dismiss; and

(2) managerial and supervisory staff have the right to establish their own associations for the purpose of engaging in collective bargaining.

- 842.** *On the basis of the information on the process specialist position submitted by the employer and the complainant, the Committee queries whether this newly created position, which entirely replaces the previous process technician post, can be genuinely seen as meeting the criteria for managerial staff as set out in the principles noted above, particularly as the indications provided make no reference to the authority to appoint, dismiss or exercise disciplinary control over others. In these circumstances, the Committee requests the Government to take the necessary measures, including a review of the 14 December 2006 and 7 March 2007 decisions of the Ministry of Human Resources, so as to ensure that the exclusions from the BATEU's union membership are limited to supervisory staff genuinely representing the interests of employers. The Committee requests to be kept informed of the progress made in this respect.*
- 843.** *The Committee observes that other causes for the reduction in the BATEU's membership lie within the country's labour legislation – sections 2(1) and 26(1) of TUA specifically – and its application, which, as the Committee has noted in another case before it concerning Malaysia, has resulted in serious and ongoing violations of the right to organize and bargain collectively. In that case, the Committee had been referring for many years to the fundamental deficiencies in the legislation (including section 2(1) of TUA, which limits the definition of trade unions to associations or combinations of workers within “similar” trades, occupations or industries) and, in its most recent examination of the said case, had once again urged the Government to incorporate its long-standing recommendations on the need to amend the legislation so as to ensure, inter alia, that all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels [see Case No. 2301, 353rd Report, para. 137].*
- 844.** *The Committee further observes that section 26(1) of TUA, on which the DGTU's 29 October 2007 ruling was based, provides that “no person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered”. As in its previous examinations of Case No. 2301, the Committee recalls with respect to sections 2(1) and 26(1) of TUA that under Article 2 of Convention No. 87, workers have the right to establish organizations of their own choosing, including organizations grouping together workers from different workplaces and different cities. [see *Digest*, op. cit., para. 335].*
- 845.** *In these circumstances the Committee, recalling its long-standing recommendations on legislative reform in Case No. 2301, urges the Government to take the necessary measures to amend sections 2(1) and 26(1) of TUA so as to ensure that all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels. Further noting that the BATEU appealed the decisions of the Minister of Human Resources and the DGTU to the High Court over two years ago, and that in the interim the BATEU is only permitted limited action as a union, the Committee firmly expects that its conclusions will be drawn to the High Court's attention when it reviews these cases and that its rulings be issued in the near future and will ensure the right of all workers to form and join the organization of their own choosing, including those workers in BAT Malaysia's wholly owned subsidiaries. It requests the Government to keep it informed of developments in this regard and to transmit a copy of the judgements once they have been handed down.*

The Committee's recommendations

846. *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 amend the Industrial Relations Act, 1967 so as to ensure that: (1) the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers, including, for example, those who have the authority to appoint or dismiss; and (2) managerial and supervisory staff have the right to establish their own associations for the purpose of engaging in collective bargaining.*
- (b) *The Committee requests the Government to take the necessary measures, including a review of the 14 December 2006 and 7 March 2007 decisions of the Ministry of Human Resources, to ensure that the exclusions from the BATEU's union membership are limited to supervisory staff genuinely representing the interests of employers. The Committee requests to be kept informed of the progress made in this respect.*
- (c) *The Committee, recalling its long-standing recommendations on legislative reform in Case No. 2301, urges the Government to take the necessary measures to amend sections 2(1) and 26(1) of TUA so as to ensure that all workers, without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels.*
- (d) *Noting that the BATEU appealed the decisions of the Minister of Human Resources and the DGTU to the High Court over two years ago, the Committee firmly expects that its conclusions will be drawn to the High Court's attention when it reviews these cases and that its rulings will be issued in the near future and will ensure the right of all workers to form and join the organization of their own choosing, including those workers in BAT Malaysia's wholly owned subsidiaries. It requests the Government to keep it informed of developments in this regard and to transmit a copy of the judgements once they have been handed down.*

CASE NO. 2478

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

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

- **the International Metalworkers' Federation (IMF) and**
- **the National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (SNTMMSRM)**

Allegations: Deaths of trade unionists, acts of violence and death threats against trade unionists, removal from office of the complainant union's National Executive Committee, establishment by the enterprise and the authorities of a parallel union, the freezing of the accounts of the union and of union members, violations of the right to strike with the intervention of the forces of order, detention of trade unionists

- 847.** The Committee examined this case at its meeting in June 2008 and presented an interim report to the Governing Body [see 350th Report, paras 1242–1408, approved by the Governing Body at its 302nd Session (June 2008)].
- 848.** In communications dated 19 November 2008 and 13 August 2009, the International Metalworkers' Federation (IMF) sent a complaint against the authorities of the Secretariat of Labour and some decisions taken by the authorities concerning this case.
- 849.** The Government sent new observations in communications dated 24 November 2008, 29 June 2009 and 22 February 2010.
- 850.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 851.** At its June 2008 meeting, the Committee made the following recommendations on pending issues [see 350th Report, para. 1408]:
- (a) In light of the new information provided by the Government, the Committee regrets the acknowledgement or registration by the administrative authority of the interim executive committee imposed by the union's General Vigilance and Justice Council (and the consequent removal from office of the executive committee presided over by Napoleón Gómez Urrutia) and considers that the labour authorities engaged in conduct that is incompatible with Article 3 of Convention No. 87, which establishes the right of workers to elect their representatives in full freedom.
 - (b) Observing that the Government does not refer in detail to the various flaws in the election process mentioned by the complainant, except with regard to the alleged forgery of the signature of a member of the General Vigilance and Justice Council, in relation to

which it indicates that the injured party initiated penal action, the Committee requests the Government to send its observations in this regard.

- (c) The Committee deplores the excessive length of the judicial procedures relating to various aspects of this case and the grave prejudice that this has caused to the complainant union and it requests the Government to examine measures with the social partners – legal or other reforms – to guarantee expeditious justice in relation to the exercise of trade union rights. The Committee urges for a rapid conclusion of the judicial procedures.
- (d) The Committee deeply deplores the death of the worker, Reynaldo Hernández González, expects that the judicial proceedings will be completed as soon as possible and requests the Government to provide a copy of the ruling.
- (e) The Committee requests the Government to indicate whether the trade unionists captured on 11 August 2007 were released.
- (f) The Committee requests copies of the decisions handed down by the courts concerning the ballot for the union accreditation for collective agreements in eight enterprises.
- (g) The Committee requests the Government to provide more detailed information on the alleged violent expulsion of strikers who were in the entrances to the Cananea mine and in general on the intervention of the public security forces in the present collective dispute.
- (h) Noting with concern the gravity of the other pending allegations in relation to which the Government has not replied in detail and which include arrest warrants, the freezing of union accounts, threats and acts of violence, including the death and injury of trade unionists, the Committee urges the Government to reply to these allegations without delay, to conduct a full and independent investigation and to keep it informed in this respect.
- (i) The Committee calls on all the parties concerned to continue to make efforts within the existing round of negotiations to resolve the collective dispute to which this case relates.

B. New information provided by the complainant federation

852. In its communication dated 19 November 2008, the complainant federation sent a complaint (unsigned and undated) against the authorities of the Secretariat of Labour and Social Insurance to the Attorney-General of the Republic. In its communication dated 13 August 2009, the complainant federation sent the following documents:

- A decision of the Eighteenth Criminal Court of the Federal District, of 13 March 2009, in the criminal case against Napoleón Gómez Urrutia et al. for the offence of aggravated management fraud, which revokes the arrest warrant against Napoleón Gómez Urrutia on the ground of failure to establish the *corpus delicti*.
- A decision of the Ninth Criminal Chamber of the Supreme Court of Justice of the Federal District, of 8 December 2008, which confirms a decision revoking the arrest warrant against José Ángel Rocha Pérez (a member of the technical committee of the trust and a member of the executive committee of the National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (SNTMMSRM)) for the offences of management fraud and criminal association.
- A decision of the Fourth Collegiate Labour Court of the First Circuit, of 26 March 2007, granting *amparo* (protection of constitutional rights) to the members of the National Executive Committee of the SNTMMSRM, headed by Napoleón Gómez Urrutia, against the acknowledgement by the administrative authority of the interim appointment of another national executive committee and of the President of

the union's General Vigilance and Justice Council; this decision confirms the stay of proceedings issued in the first instance in respect of the administrative authority.

C. New reply from the Government

853. In its communications of 24 November 2008 and 22 February 2010, the Government requests that the Committee on Freedom of Association (CFA) take into account the information provided earlier, which shows that Case No. 2478 is an internal union matter and therefore should not continue to be examined. The Government reiterates that the labour authority, as the information provided on the case also demonstrates, has refrained from any action that would limit or hinder the legal exercise of the right of SNTMMSRM members to elect their representatives in full freedom in accordance with the law and the union's statutes, which is consistent with Articles 3 and 8 of ILO Convention No. 87. The Government points out that the apparent and "excessive" length of the judicial procedures relating to various aspects of this case are attributable neither to the labour authority nor to the courts, but to the complainants, which have exercised various legal means and remedies at the corresponding levels to defend the interests of the organization that they represent.

854. These observations are formulated with reference to the statement made by the Government at the 302nd Session of the Governing Body, on 13 June 2008, during the adoption of the Committee's recommendations regarding Case No. 2478, and the additional observations provided to the International Labour Standards Department of the ILO in note No. OGE-03386 of 1 July 2008 on the same issue (the text of the statement is annexed).

Recommendation (a) of the Committee on Freedom of Association

- (a) In light of the new information provided by the Government, the Committee regrets the acknowledgement or registration by the administrative authority of the interim executive committee imposed by the union's General Vigilance and Justice Council (and the consequent removal from office of the executive committee presided over by Napoleón Gómez Urrutia) and considers that the labour authorities engaged in conduct that is incompatible with Article 3 of Convention No. 87, which establishes the right of workers to elect their representatives in full freedom.

855. The Government reiterates that this recommendation is inadequate and subjective, since in Case No. 2478 the Government has not infringed the provisions of Convention No. 87 concerning freedom of association and protection of the right to organize, as the observations provided in July 2008 demonstrate with regard to the actions of the General Directorate of the Registry of Associations of the Secretariat of Labour and Social Insurance (the labour authority), and they even confirm its consistency with Article 3 of Convention No. 87.

856. As shown by the information transmitted to the Committee for its consideration, on various occasions throughout the process leading to the election of officers of the SNTMMSRM, the labour authority's actions have been attentive to the principle of absolute respect for the wishes of the workers to determine freely and independently who should represent them, in conformity with the statutes of this Organization. This principle is envisaged in article 123, subparagraph (A)(XVI), of the Political Constitution of the United Mexican States, in the related sections of the Federal Labour Act (sections 365(III), 371 and 377(II)) and in the internal rules of the Secretariat of Labour and Social Insurance (article 19(I) and (III)), which call for action by the labour authority, bearing in mind the statutes that govern the internal affairs of the mining union SNTMMSRM.

857. Action by the labour authority also arises in connection with the case law and legal opinion referred to below:

Trade unions. The labour authority is empowered to check the records of proceedings relating to an election or change of officers in order to ascertain whether the procedure adhered to the statutes or, alternatively, to the Federal Labour Act. ... Admittedly, the Federal Labour Act contains no legal provision that expressly empowers the responsible labour authority to acknowledge a change of officers of the trade unions in order to ascertain whether or not the records and documents submitted to it by the trade union representatives comply with the statutory rules; however, such power is clearly inferred from the harmonious and linked interpretation of sections 365(III), 371 and 377(II) of the aforesaid Act, since they establish that, in order to obtain their registration, trade unions must present a copy of their statutes, which must govern fundamental aspects of the union's internal affairs, and must provide notice of changes in their officers "accompanied by authorized copies in duplicate of the respective records of proceedings", requirements which, overall, warrant that the labour authority ascertain whether the procedure for changing or electing officers adhered to the statutory rules reflecting the free will of the union members – especially given the importance of the acknowledgement, since certification confers on those to whom it is granted not only the right to manage the union's assets, but also the responsibility for defending its members and the fate of trade union interests. Accordingly, it is not true that such checking constitutes an intrusion by authority to the detriment of the freedom of association enshrined in the Constitution; nor is it true that the denial of acknowledgement and withholding of certification overturns the election, since that could only be declared by a Conciliation and Arbitration Board through a proceeding in which it hears the affected parties, who in any case can challenge such denial through a petition of rights.

Source: Ninth Edition. Level: Second Chamber. Source: Federal Judicial Weekly and its Gazette. Volume: XII, September 2000. Argument: 2a./J. 86/2000. Page: 140. Subject: Labour issues. Case law.

[Precedents: Counter-argument 30/2000-SS. Among those upheld by the First Collegiate Labour Court of the First Circuit and the Second Collegiate Court of the Third Circuit. 6 September 2000. Five votes. Rapporteur: Juan Díaz Romero. Secretary: Raúl García Ramos. Case law argument 86/2000. Approved by the Second Chamber of this High Court in a private session held on 13 September 2000.]

Trade unions. Acknowledgement. The registering authority shall review only formal aspects of the documentation annexed for that purpose, not questions of fact, as grounds for nullification of the election. In relation to the acknowledgement of a change of trade union officers, in case law 2a/J 86/2000, published in the Federal Judicial Weekly and its Gazette, Ninth Edition, Volume XII, September 2000, p. 140, under the heading "Trade unions. The labour authority is empowered to check the records of proceedings relating to an election or change of officers in order to ascertain whether the procedure adhered to the statutes or, alternatively, to the Federal Labour Act", the Second Chamber of the Supreme Court of Justice established that although the Federal Labour Act does not expressly empower the registering authority to check whether the records and documents submitted by applicants for registration comply with the statutory rules, this power is inferred from the interpretation of sections 365(III), 371 and 377(II) of the legislation in question, from which it concluded that the labour authority can ascertain whether the procedure for changing or electing the officers adhered to those rules. Now, it must be considered that the aforesaid power has as its objective to verify, by checking the records and documents, compliance with the formal aspects of the procedure indicated by the statutes for the election or change of officers, such as whether there was a convocation, whether a meeting was held and whether the leadership whose acknowledgement is requested was elected by a vote of the majority of union members. However, such power does not involve the possibility for the registering authority to decide on questions of fact which some dissatisfied persons might invoke as factors determining the nullification of the election, such as the absence of identification of the workers, the fact that the meeting was not held, that persons voted who were not entitled to vote, among others, since the declaration of nullification or overturning of the election in question is not within the purview of the registering labour authority, but of the Conciliation and Arbitration Board when a labour court proceeding is brought, that is, a dispute between parties in which the latter

have an opportunity to present their claims and offer evidence in defence of their respective interests. Fifteenth Collegiate Labour Court of the First Circuit.

Source: Ninth Edition. Level: Collegiate Circuit Courts. Source: Federal Judicial Weekly and its Gazette. Volume: XXIII, February 2006. Argument: I.15o.T.10 L. Page: 1921. Subject: Labour issues. Single argument.

[*Amparo* action for review 1875/2005. Aurelio Trejo Tinal. 11 November 2005. Unanimous vote. Rapporteur: Juan Manuel Alcántara Moreno. Secretary: Víctor Carrasco Iriarte.]

858. The foregoing shows that the labour authority, by checking records and documents, has confined itself to verifying compliance with the formal aspects of the union's election procedure based on its statutes.

859. Likewise, the labour authority's actions have met the criteria established by the Committee in the *Digest of decisions and principles of the Freedom of Association Committee* (fifth revised edition, International Labour Office, 2006) with regard to challenges to trade union elections:

440. Measures taken by the administrative authorities when election results are challenged run the risk of being arbitrary. Hence, and in order to ensure an impartial and objective procedure, matters of this kind should be examined by the judicial authorities.

442. In cases where the results of trade union elections are challenged, such questions should be referred to the judicial authorities in order to guarantee an impartial, objective and expeditious procedure.

860. In accordance with the foregoing, throughout the electoral process, the complainants have exercised the various legal means and remedies envisaged by the legal system to defend the interests of the organization that they represent; hence, the individual guarantees of the complainants involved have been respected in accordance with the principles of legal certainty and the right to a hearing.

861. In this connection, pursuant to a judicial warrant, on 16 April 2007 the labour authority complied with the ruling handed down in *amparo* action No. 397/06 by restoring the validity of the decisions in which Napoleón Gómez Urrutia was recognized as Secretary-General of the SNTMMSRM.

862. The labour authority carried out this administrative decision completely independently of the other penal proceedings instituted and relating to Napoleón Gómez Urrutia, Elías Morales Hernández and co-defendants, which will have to be examined under the terms of the law. In so doing, it adhered to Article 8 of Convention No. 87, which provides the obligation for workers, employers and their respective organizations to respect the law of the land.

863. For the reasons expressed earlier, it is considered that the Committee's assessment concerning this case may not conflict with its own decisions and the principles it has adopted.

864. Thus, the Government confirms that the acknowledgement by the labour authority complied with the statutes of the SNTMMSRM and that it is consistent with ILO Convention No. 87, particularly Articles 3 and 8, concerning the right of workers to elect their representatives in full freedom, the obligation for the labour authority to refrain from any action that would limit or hinder the legal exercise of that right, and the obligation of workers, employers and their respective organizations to respect the law of the land.

Recommendation (b) of the Committee on Freedom of Association

- (b) Observing that the Government does not refer in detail to the various flaws in the election process mentioned by the complainant, except with regard to the alleged forgery of the signature of a member of the General Vigilance and Justice Council, in relation to which it indicates that the injured party initiated penal action, the Committee requests the Government to send its observations in this regard.

865. In paragraphs 1389 et seq. of its conclusions, the Committee points out irregularities.

866. As already indicated in its communication of 1 July 2008, the Government is willing to provide information, to the extent that the Committee requests, in order to clarify Case No. 2478. Accordingly, in a spirit of continued cooperation with the Committee as a supervisory body, a response is provided below to the alleged irregularities pointed out in the Committee's conclusions.

First irregularity

867. The complainant organizations allege that the General Directorate of the Registry of Associations of the Secretariat of Labour and Social Insurance violated Convention No. 87 by "acknowledging" and registering in a flawed and illegal manner an alleged decision – contrary to the statutes – of the complainant union's General Vigilance and Justice Council to remove from office the executive committee presided over by Napoleón Gómez Urrutia and replace it on an interim basis with another executive committee presided over by Elías Morales Hernández.

868. In paragraph 1392 of its conclusions, the Committee deplores the excessive length of the judicial procedures relating to this case and the grave prejudice that this has caused to the complainant union. It requests the Government to examine measures together with the social partners – legal or other reforms – to guarantee expeditious justice in relation to the exercise of trade union rights.

869. The Government states that this issue covers the same ground as the recommendation in subparagraph (a). In the light of the foregoing, the Committee is requested to consider the observations made in that context.

Second irregularity

870. The labour authorities failed to rectify that the Secretary-General (Elías Morales Hernández, allegedly expelled from the union in May 2002) and other officials were not active members of the union, as well as the absence of participation by the plenary of the National Executive Committee in the removal from office of the Secretary-General (the complaint indicates that the General Vigilance and Justice Council did not hear the executive committee that it removed from office, and that this was not taken into account by the labour authorities, thereby violating its right of defence).

871. The Government indicates that, as may be inferred from the information it provided to the Committee in note No. OGE-05535 of 1 November 2006, on 17 February 2006, the members of the General Vigilance and Justice Council of the SNTMMSRM requested the labour authority to acknowledge the decisions adopted on 16 February 2006, consisting of sanctions and the removal from office of the titular and substitute members of the National Executive Committee, as well as the President of the General Vigilance and Justice Council and his substitute, and the appointment of new members of the committee and of the President of the General Vigilance and Justice Council, with other persons appointed

on an interim basis to fill the executive positions, under the leadership of Elías Morales Hernández.

- 872.** The labour authority, respecting the wishes of the workers as expressed through the decisions of their competent internal body, after examining in good faith the documentation submitted and ascertaining that it complied with the legal requirements and the terms of the union's statutes, decided to acknowledge the decisions taken on 16 February on an interim basis until the appointments were approved or amended by the next national assembly. Lastly, the labour authority, complying with the decision issued by the judicial authority on 16 April 2007, set aside the acknowledgement granted to the interim national executive committee of the SNTMMSRM under the leadership of Elías Morales Hernández, as a result of which Napoleón Gómez Urrutia was definitively reinstated in his trade union rights as Secretary-General of the SNTMMSRM. Thus, the Committee is requested to disregard this irregularity.

Third irregularity

- 873.** The labour authorities were unaware that one of the two signatories of the decision removing the National Executive Committee from office certified before a notary that he had not signed the document and an expert examination of the handwriting found that the signature was false.
- 874.** In paragraph 1393 of the conclusions, the Committee requests the Government to keep it informed of the outcome of the criminal action for the falsification of documents brought by one of the members of the union's General Vigilance and Justice Council.
- 875.** In order to place its response in context, the Government refers to paragraph 1285 of the report, relating to the allegations made by Napoleón Gómez Urrutia, which reads as follows:

The Government indicates that it gave full support and provided the facilities so that an expert examination could be carried out by [sic] the Office of the Attorney-General of the Republic to determine whether or not a fake signature of Juan Luis Zúñiga Velásquez was contained in the documentation submitted for the removal from office and appointment of members referred to in the acknowledgement issued on 17 February 2006. The Government nevertheless fails to mention that, on 3 March 2006, Juan Luis Zúñiga Velásquez notified the General Directorate of the Registry of Associations that, in his capacity as first member of the General Vigilance and Justice Council, he never signed any document for the removal from office and penalization of Napoleón Gómez Urrutia or any member of the National Executive Committee, nor did he appoint on an interim basis other persons to executive posts in the union. The General Directorate never took these facts into account.

- 876.** In this respect, the Government stresses that in *amparo* action No. 397/06, filed in the Fourth Collegiate Labour Court of the First Circuit, by which the alleged unconstitutionality of the decision of 17 February 2006 was contested, the evidence presented was inadequate to establish the alleged falsification of the signatures of Zúñiga Velásquez; therefore the labour authority, not perceiving that there was an obvious discrepancy between the signatures that were submitted to it and those contained in its files, was not empowered to order that expert examinations be carried out or to contest *ex officio* the signatures submitted. Nevertheless, in accordance with section 604 of the Federal Labour Act, the Federal Conciliation and Arbitration Board is empowered to address labour disputes between various groups of workers, such as internal union disputes. Therefore, the authenticity of Zúñiga Velásquez's signatures could have been established in the corresponding procedural phases of a labour court proceeding. It must be pointed out that, in the final decision of 26 March 2007, the Fourth Collegiate Labour Court of the First Circuit granted *amparo* and the protection of the federal courts (file

No. RT 64/2007) to Napoleón Gómez Urrutia and other co-complainants on the ground of formal aspects of the decision of 17 February 2006, but it did not examine issues relating to the alleged falsification of Zúñiga Velásquez's signatures. Furthermore, to date there is no court ruling which finds that Zúñiga Velásquez's signatures were falsified or invalid.

Fourth irregularity

- 877.** The complainant organizations denounce the negative attitude of the authorities towards the two general assemblies, one ordinary and the other extraordinary, which in March and May 2006 came out in favour of the return of the executive committee that had been removed and, in particular, deny that the quorum was not achieved, referring in this respect to a union census from the year 2000 which was outdated.
- 878.** With regard to this allegation, the Government notes that, in paragraph 1394 of its conclusions, the Committee sets aside this aspect of the allegations, taking into account the contradictions between the complainants' version and that of the Government on whether or not the statutory quorum was met for these assemblies to be validly constituted, and as these matters are no longer timely, the Committee considers that it is not necessary to pursue its examination of the allegations relating to the assemblies.

Fifth irregularity

- 879.** The allegation of the misappropriation of the union's trust fund of US\$55 million, which was alleged to be at the origin of the removal from office of the executive committee by the General Vigilance and Justice Council, was based on false documents; there was also the failure to disclose a report by the National Banking and Currency Commission which confirmed that the union leader Napoleón Gómez Urrutia had not committed the offence of money laundering in relation to the trust fund of US\$55 million, and an investigation is being carried out of the former Federal Prosecutor of Mexico and the Deputy Prosecutor-General for the alleged failure to disclose the report.
- 880.** The Government states that, according to information provided by the Units Specializing in Investigation of Fiscal and Financial Offences and Offences Committed by Public Employees, Including Obstruction of Justice, of the Office of the Attorney-General of the Republic, after carrying out an analysis, they reported that they have no information on the matters in question.
- 881.** Nevertheless, it must be noted that the Federal Conciliation and Arbitration Board is dealing with various legal actions against the union SNTMMSRM in relation to the provisional seizure of accounts of the mining union's trust fund of US\$55 million, the procedural phase of which consists of the following:
- (1) The principal action consists in the payment of the proportional share of 5 per cent of the shares, amounting to US\$55 million, negotiated to the benefit of the workers of the Compañía Minera de Cananea SA de CV in the agreements dated 24 August 1990, in compliance with the actions taken by the First Bankruptcy Court on 16 August 1989 and 24 August 1990.
 - (2) The dispute is currently being examined in 21 cases, most of which are filed with Special Board No. 10, except for one which is filed with Special Board No. 47, located in Cananea, Sonora. The cases involve approximately 5,900 workers. It must be noted that there are four cases filed with Special Boards Nos 10 and 47 in which the actors have abandoned legal action.
 - (3) None of the 22 cases that are being processed has been able to lead to a preliminary decision, since in none of them has a hearing begun for the taking of evidence. It must

be emphasized that the delay in the procedure is not attributable to the Board, since these judicial proceedings were brought by several actors against defendants and co-defendants, in addition to which various delaying actions have been lodged, among which are the following:

- In three judicial proceedings, a procedural issue concerning lack of legal personality was raised against the SNTMMSRM delegation. The personality of the trade union delegation headed by Napoleón Gómez Urrutia was recognized under the terms of the final decision dated 26 March 2007, issued by the Fourth Collegiate Labour Court of the First Circuit in review No. RT 64/2007.
- In three judicial proceedings, a motion for consolidation was made.
- In four judicial proceedings, summonses were issued to third parties allegedly concerned.
- In eight judicial proceedings, a procedural issue was raised concerning material competence, in the course of which it became clear that Special Board No. 10 has decided to uphold it. The possibility cannot be excluded that the competence issue is the reason for challenging the findings on the merits, since it may be considered that the competence to resolve these disputes falls to the administrative and/or fiscal authorities.
- Fifteen cases originate from Special Board No. 47, located in Cananea, Sonora; four from Special Board No. 34, located in San Luis Potosí, San Luis Potosí; and two cases originate from Special Board No. 19, located in Guadalupe, Nuevo León, as a result of which Special Board No. 10 has ordered 21 personal notifications to be served by means of a warrant through the aforesaid special boards.
- On various occasions, hearings have been postponed at the request of the parties, on the ground that they were involved in conciliatory discussions.

882. In this regard, various provisional decisions have been taken:

- In Special Board No. 19, two actions were brought against the SNTMMSRM in which a provisional decision was requested, consisting in the provisional seizure of the mining union's accounts. These actions were filed under Cases Nos 295/06 and 1488/06.
- The provisional seizures were processed and authorized by the President of Special Board No. 19, in the amount of US\$196,090,713 and US\$18,363,618, respectively. The National Banking and Currency Commission reported that the seized accounts of the SNTMMSRM were treated as if they were combined, up to the amount required.
- As a result of the procedural issues concerning territorial competence, Cases Nos 295/06 and 1488/06 were transmitted to Special Board No. 10, which assigned to them Cases Nos 216/06 and 498/07, respectively.
- In Case No. 498/07, an application for review of implementing acts was submitted to the President of the Special Board, and therefore it was not admitted. The case subsequently came before the Special Board, but not in due time, and therefore it was dismissed. The decision on dismissal was not appealed.
- In Case No. 216/06, an application was lodged for review of implementing acts, which was declared not receivable. In this case there is an indirect *amparo* action,

which was filed in the Fifth District Labour Court of the Federal District under No. 191412007. The SNTMMSRM brought a complaint before the Fourth Collegiate Labour Court of the First Circuit against the decision issued by the District Court which is addressing the indirect *amparo* action, in which the motion requesting clarification of the impugned act was held not to have been submitted; this appeal was declared not receivable, as a result of which processing of the indirect *amparo* action continued. No ruling has been issued; however, the parties, who will be under the jurisdiction of the collegiate courts, have a remedy of review.

Recommendation (c) of the Committee on Freedom of Association

(c) The Committee deplores the excessive length of the judicial procedures relating to various aspects of this case and the grave prejudice that this has caused to the complainant union and it requests the Government to examine measures with the social partners – legal or other reforms – to guarantee expeditious justice in relation to the exercise of trade union rights. The Committee urges for a rapid conclusion of the judicial procedures.

883. In addition to what is stated in the Government's observations sent in July 2008, the Government points out that this issue is also discussed in subparagraph (a) of the recommendations. In the light of the foregoing, the Committee is requested to consider as recapitulated here the points made in relation to the legal deadlines that judicial proceedings in Mexico must observe.

Recommendation (d) of the Committee on Freedom of Association

(d) The Committee deeply deplores the death of the worker, Reynaldo Hernández González, expects that the judicial proceedings will be completed as soon as possible and requests the Government to provide a copy of the ruling.

884. As reported to the Committee in note No. OGE-05415 of 27 November 2007, the Government deplores the death of Reynaldo Hernández González, and reiterates that both the federal and the local authorities will continue their efforts to conclude preliminary investigation No. 208/07 into the person or persons responsible for the criminal manslaughter of Reynaldo Hernández González, which investigation, once it has been concluded, will be brought to the Committee's attention.

Recommendation (e) of the Committee on Freedom of Association

(e) The Committee requests the Government to indicate whether the trade unionists captured on 11 August 2007 were released.

885. In its note No. OGE-02191 of 2 May 2008, the Government informed the Committee that, according to preliminary investigation No. 208/07 by the Agency of the Public Prosecutor located in Cumpas, Sonora, seven persons were detained on the scene of the events. They were detained solely in accordance with the terms and conditions established by the legal provisions and were released shortly afterwards. During the adoption of the 350th report of the Committee, on 13 June 2008, it was considered that there was information provided by the Government that apparently had not been considered by the Committee. In note No. OGE-03386 of 27 June 2008, the Government stated that it did not concur with the significance that was being given to this issue. It recalled that the Committee had been informed in due time that the persons in question had been released. It explained that the

detention had lasted a few hours, as provided by law, and that once that period had elapsed, they had been released. In this connection, the Government wishes to reiterate that the information it provided was not fully appreciated by the Committee and therefore the recommendations in its report concerning Case No. 2478 are unwarranted and hardly objective. In the light of the foregoing, the Committee is requested to annul this recommendation.

Recommendation (f) of the Committee on Freedom of Association

- (f) The Committee requests copies of the decisions handed down by the courts concerning the ballot for the union accreditation for collective agreements in eight enterprises.

886. In paragraph 1401 of the conclusions, the Committee notes that the complainant union lodged *amparo* actions against the corresponding decisions of the Federal Conciliation and Arbitration Board which are currently under review. Accordingly, it requests the Government to provide copies of the respective rulings of the judicial authorities.

887. The Government states that, as in the case of subparagraph (e) of the recommendations, relating to the release of the trade unionists detained on 11 August 2007, the Committee failed to take into account the information transmitted by the Mexican Government in its note No. OGE-02191, of 2 May 2008, in which it provided information related to the registration by the National Union of Mine Exploration, Exploitation and Production Workers of the Republic of Mexico (SNTEEBMRM) of eight collective labour agreements concluded by the SNTMMSRM and the enterprises Industrial Minera México, SA de CV (Planta San Luis, Planta Nueva Rosita, Refinería Electrolítica de Zinc and Unidad Charcas); Mexicana de Cobre, SA de CV (Planta Beneficiadora de Concentrados, Planta de Cal and Unidad la Caridad); and Minerales Metálicos del Norte, SA de CV

888. The information on this process is reiterated chronologically below in the expectation that the Committee will take it into consideration this time. Detailed information can be consulted in the Government's submission of 2 May 2008.

- On 29 June 2007, before the Federal Conciliation and Arbitration Board, the SNTEEBMRM requested the registration of eight collective labour agreements.
- On 5 September 2007, the Federal Conciliation and Arbitration Board issued the certification of the ballot in which the workers in each of the eight work centres freely and transparently cast their votes to choose the union to which they wished to belong.
- On 15 October 2007, the Federal Conciliation and Arbitration Board notified the parties of its findings, in which it declared the SNTEEBMRM to be the new accredited party to the collective labour agreements in eight enterprises of the Grupo Minera México, in place of the SNTMMSRM, which was replaced as of that date as the accredited trade union in those work centres.
- In order to contest the foregoing, the SNTMMSRM lodged direct *amparo* actions against the decisions of the Federal Conciliation and Arbitration Board, which are currently under review before the competent jurisdictions and which, once they have been resolved, will be brought to the Committee's attention.

Recommendation (g) of the Committee on Freedom of Association

- (g) The Committee requests the Government to provide more detailed information on the alleged violent expulsion of strikers who were in the entrances to the Cananea mine and in general on the intervention of the public security forces in the present collective dispute.
- 889.** In paragraph 1405 of the conclusions, the Committee reiterates its previous conclusions on justice delayed and the need for expeditious judicial procedures, and also requests the Government to provide more detailed information on the alleged violent expulsion of strikers who were in the entrances to the Cananea mine and in general on the intervention of the public security forces in the present collective dispute (in respect of which the Government has only denied the intervention of the army and refers to the presence of public security forces to guarantee the right to work of non-strikers).
- 890.** The Government states that the strike in the Cananea mining unit in Sonora began on 30 July 2007, as a result of the proceedings brought by the SNTMMSRM before the Federal Conciliation and Arbitration Board. The existing disputes between the SNTMMSRM and the enterprises holding the mining concessions, Industrial Minera México, SA de CV. and Mexicana de Cananea, SA de CV, led to the unjustified calling of the strike in question, which in due course was declared illegal by the Federal Conciliation and Arbitration Board because it was in conformity with neither the letter nor the spirit of the provisions laid down in respect of strikes in the Political Constitution of the United Mexican States and the Federal Labour Act. This strike was declared legal by the federal judiciary. In the light of the foregoing, the Federal Conciliation and Arbitration Board complied with the judicial decision.
- 891.** With a view to seeking a solution to this dispute, during 2007 and 2008, at the invitation of the labour authority, more than 30 working meetings were held in which representatives of the parties, jointly or separately, government conciliators and the Secretary of Labour and Social Insurance participated. In addition, Sergio Tolano, secretary of Branch No. 65 of the SNTMMSRM in Cananea, was invited to a meeting in order that, with the participation of federal and local authorities, a solution might be found for the Cananea mine, a meeting which Mr Tolano did not attend. Against the backdrop of the efforts to settle this dispute, the particular interest of the SNTMMSRM in conditioning the negotiations on labour issues on the penal problems of its former Secretary-General, Napoleón Gómez Urrutia, invariably made itself felt.
- 892.** The labour authority regrets that the work stoppage in this mine is still continuing, while reiterating its willingness to address the labour disputes between the aforesaid enterprises and the SNTMMSRM so that they might give priority to dialogue in the search for a solution, as the SNTMMSRM was urged to do by its secretary of labour, Javier Zúñiga García, who was elected at the recent Ordinary General Assembly held in May 2008, although that exhortation went unheeded.
- 893.** The labour authority reiterates its entire willingness to address this matter, to which end it has urged the parties on various occasions to resume negotiations with a view to achieving a satisfactory solution to the existing labour issues. This is the case with regard to the strike in the Cananea mining unit, in which the labour authority, on 8 October 2008, again invited Sergio Tolano, the local leader in Cananea, to a meeting to be held at the state government offices in Hermosillo, Sonora, for the purpose of holding talks aimed at resolving the dispute.
- 894.** However, Mr Tolano reiterated his position that this invitation would have to be addressed to his Secretary-General, Napoleón Gómez Urrutia. In taking this position, the

SNTMMSRM seeks to condition a solution to the labour issue on recognition of Gómez Urrutia as Secretary-General of the union, when it is public knowledge that the labour authority denied his request for acknowledgement owing to his infringement of various provisions of the Political Constitution of the United Mexican States, the Federal Labour Act and the union's statutes.

- 895.** This new sign of intransigence on the part of the SNTMMSRM shows a lack of commitment to its members and their families, whose economic circumstances have been affected more than a year after the strike was called. In order to put an end to a strike movement, the labour laws require that the workers express a wish to do so; the participation of the authorities alone is not sufficient to resolve a dispute of this nature. It is therefore incumbent upon the SNTMMSRM and the aforesaid enterprises to adopt a proactive attitude towards negotiation so that agreements on a solution can be reached, since the labour authority does not have direct powers to resolve disputes unless the parties so wish. It must be considered that the economic and social consequences arising from the suspension of activities in these mines have seriously affected the mineworkers and their families, as well as Mexico's mining and metallurgy production, and therefore it is essential to end the strikes.
- 896.** With regard to the alleged violent expulsion of strikers from the mine in question, in the aforementioned note of 2 May 2008, the Government provided information in this respect. It also wishes to reiterate its categorical denial of the allegation in the IMF's communication that 700 members of the armed forces of the army and the federal security forces were called to expel the strikers.

Recommendation (h) of the Committee on Freedom of Association

- (h) Noting with concern the gravity of the other pending allegations in relation to which the Government has not replied in detail and which include arrest warrants, the freezing of union accounts, threats and acts of violence, including the death and injury of trade unionists, the Committee urges the Government to reply to these allegations without delay, to conduct a full and independent investigation and to keep it informed in this respect.

- 897.** In paragraph 1395 of the conclusions, the Committee notes with concern that the Government has not replied in the context of the present case to other grave allegations made by the complainants. The Committee therefore urges it to reply without delay to the allegations concerning:

Pending allegation 1

- the armed assault on the main offices of the complainant union by Elías Morales and armed accomplices, including the ransacking, theft and destruction of confidential information; four of the attackers are alleged to have been arrested, but then released two hours later;

- 898.** The Government states that the Offices of the Central Investigators for Financial Offences, Minors, Vehicle Theft and Transport and Special Matters, of the Office of the Attorney-General of the Federal District, reported that they have no record of any preliminary investigations opened in connection with such incidents, and that there is no record of any investigation of Elías Morales on the ground of the alleged incidents that occurred in the main offices of what is now the SNTMMSRM in the city of Mexico on 17 February 2006. Because of the gravity of the case, the Government is surprised that no legal representative of the SNTMMSRM has presented any complaints to the corresponding authorities

regarding the incidents mentioned, which may be reflected in a certain inconsistency in the interest shown by that union.

Pending allegation 2

- the illegal freezing of the bank accounts of the union, of Napoleón Gómez Urrutia and other union leaders;
- the maintenance of charges against the Secretary-General of the union, Napoleón Gómez Urrutia, for the misappropriation of the union's trust fund of US\$55 million on the basis of false documentation and the manipulation of the legal system;
- the arrest warrants issued against the union leader, Napoleón Gómez Urrutia, based on the failure of the authorities to disclose reports and despite the fact that an independent hearing had exonerated him of all charges in relation to the US\$55 million fund referred to above (the criminal charges have been withdrawn by four federal judges, but remain pending in Sonora and San Luis Potosí).

899. In paragraph 1396 of the conclusions, the Committee emphasizes that, in view of the long period that has elapsed since the arrest warrants were issued and the fact that the investigation is still continuing, in at least two jurisdictions, into matters related to the trust fund of US\$55 million, justice delayed is justice denied, and urges for a rapid conclusion of the judicial procedures. The Government states that, as shown by the information provided in connection with the fifth irregularity of paragraph (b) of the recommendations, there are legal grounds which demonstrate that the freezing of the bank accounts of the SNTMMSRM is lawful, as is the provisional seizure of the union's trust fund of US\$55 million by the Federal Board of Conciliation and Arbitration. It must be recalled, moreover, that Napoleón Gómez Urrutia has not two, but three arrest warrants pending against him: one from 3 July 2006, issued by the Thirty-second Criminal Court of the Federal District for the offence of management fraud; one from 12 July 2006, issued by the Fifth Criminal Court in San Luis Potosí (currently the Eighteenth Criminal Court of the Federal District as the substitute authority) for the offence of specific fraud in the degree of co-participation; and one from 18 May 2006, issued by the Second Criminal Court of First Instance in Hermosillo, Sonora, for the offence of specific fraud in the form of management fraud and criminal association. Against these warrants, Gómez Urrutia brought *amparo* action No. 907/2008, filed in the Eighth District Criminal Court of the Federal District. On 15 October 2007, the District *Amparo* Court granted him *amparo* and the protection of the federal courts, a decision that was, in turn, appealed by the Agent of the Federal Public Prosecutor. The remedy of review was filed under No. RP201/2007 in the Eighth Collegiate Criminal Court of the First Circuit, which, on 24 March 2008, decided to rescind the ruling and order the reinstatement of the proceeding; accordingly, the decision granting *amparo* was set aside, and the arrest warrants remain in force.

900. In its communication of 22 February 2010, the Government challenges once again the receivability of the complaint. The Government explains that, up to January 2010, four arrest warrants have been issued against Mr Gómez Urrutia, two at the federal level and two at the local level. The competent authorities ordered the freeze of the bank accounts of the SNTMMSRM to protect the workers affected by a presumed fraud.

- At the local level, Penal Courts Nos 32 and 51 of the Federal District have issued one arrest warrant each against Mr Napoleón Gómez Urrutia and Mr Juan Linares Montufar, for, inter alia, fraudulent administration of trust fund No. 9645-2. Mr Linares Montufar lodged a remedy of review (*amparo*), which was refuted in May 2009 by Criminal District Court No. 13 of the Federal District, thus confirming that there were elements pointing to the responsibility of the accused persons as regards the charges filed against them. On 18 January 2010, the Ninth Chamber of the High Court of Justice of the Federal District decided to quash the arrest warrant issued for

fraudulent administration by Penal Court No. 51 of the Federal District, although the decision did not close the case and the competent authorities might appeal it.

- At the federal level, District Court No. 1 for Federal Penal Proceedings of the Federal District (hereinafter District Court No. 1 FPPFD) issued on 3 September 2008 an arrest warrant against Mr Napoleón Gómez Urrutia and two other persons for the federal offence of mismanagement of the aforementioned trust fund. In turn, District Court No. 9 for Federal Penal Proceedings of the Federal District also issued on 3 September 2008, in penal case No. 105/2009, an arrest warrant against Mr Gómez Urrutia for the offence of activities with funds of illicit origin such as acquisition, exchange, deposit and transfer.
- The Prosecutor-General of the Republic informed, via Notice of 21 June 2009, that District Court No. 7 for Penal *Amparo* Proceedings of the Federal District has issued the *amparo* ruling No. 866/08 and its annexed cases Nos 867/08, 883/08 and 884/08, granting *amparo* to Mr Héctor Félix Estrella, Mr Napoleón Gómez Urrutia, Mr Juan Linares Montufar and Mr José Ángel Rocha Pérez against the arrest warrants issued by District Court No. 1 FPPFD. However, the ruling of District Court No. 7 indicates that the competent court shall issue a new decision with full jurisdiction, which means that District Court No. 1 FPPFD would be able to issue new arrest warrants against the accused persons, once the established irregularities have been rectified.

901. The Government adds that, in December 2008, the extradition of Mr Napoleón Gómez Urrutia has been formally requested from the Government of Canada, based on the arrest warrant issued by District Court No. 1 FPPFD, although the warrant was subject to appeal. This has been done in view of the fact that the offence for which extradition has been requested is a federal offence that is considered as a serious one, in conformity with section 113bis in conjunction with section 112(4) of the Financial Institutions Act. Mr Napoleón Gómez Urrutia, then Secretary-General of the SNTMMSRM and member of the technical committee of the abovementioned trust fund, is presumably responsible for the inappropriate use and securing of the resources of the clients of a financial institution, in that he fraudulently disposed of US\$55 millions that constituted the trust fund and were the property of the workers affiliated to the said trade union. The measures taken by the Government of Mexico regarding the arrest warrants against Mr Napoleón Gómez Urrutia and others, are strictly in line with the principles of legality and transparency.

902. The Government considers that the information supplied in the last communication of FITIM shows that the legal remedies provided for in the national legal system have been exhausted, which means that the actions undertaken by the Mexican authorities are in conformity with the principle of legality laid down in Convention No. 87. There are four valid arrest warrants against Mr Napoleón Gómez Urrutia and other members of the SNTMMSRM for various offences, following the claim of 6,464 mine workers requesting reimbursement of US\$55 million that were unduly debited from the trust fund of which they are beneficiaries. The objective of the request addressed at the Government of Canada for the extradition of Mr Napoleón Gómez Urrutia, is that he finally faces the charges filed against him before Mexican courts according to national law.

903. As may be observed, the alleged excessive delay in the administration of justice was not attributable to the competent authorities, but rather to the various remedies used by the complainant in the courts.

Pending allegations of the IMF

904. In paragraphs 1406 and 1407 of the conclusions:

The Committee requests the Government to reply without delay to the remaining allegations of the IMF of 28 January 2008 relating to:

- the death threats, abductions, illegal arrest and beating of miners belonging to the union and their families;
- the abduction, beating and death threats against the wife of Mario García Ortiz, member of the executive committee of the complainant union, on account of “her husband’s errors”; she was able to escape, but there was no investigation.

The Committee urges the Government to carry out a full and independent investigation without delay into all of the pending allegations and to keep it informed in this respect.

905. The Government states that, following a review of the communication submitted by the IMF to the International Labour Office on 29 January 2008, including its annexes, it is necessary to reiterate what was stated in the observations transmitted by the Government to the Committee in note No. OGE-02191 of 2 May 2008, in the sense that none of these documents contain new allegations relating to Case No. 2478, since they are not related to the facts that gave rise to the complaint, for which reason it again requests the Committee to disregard the communication. It is appropriate to recall that Case No. 2478 had its origins in a complaint alleging that the Mexican Government had intervened in the appointment of the Secretary-General of the SNTMMSRM, allegedly to the prejudice of Napoleón Gómez Urrutia, who had been occupying that post. Nevertheless, with a view to contributing in good faith to the work of the Committee, the Government provides the following information:

- In relation to the alleged death threats, abductions, illegal arrest and beating of miners belonging to the union and their families, the Government has no reliable documentation that would enable it to conduct a full and independent investigation into these matters. In this connection, it would be grateful if the Committee could provide additional information in that regard, if it has any.
- With respect to the case concerning the wife of Mario García Ortiz, from the documentation provided by the IMF in its communication, it may be inferred that there is a preliminary investigation No. 65/2007, which was initiated on 2 February 2007 by the First Agency of the Public Prosecutor’s Office, located in Lázaro Cárdenas, Michoacán. The Government will again consult with the corresponding authority in this regard.

Pending allegation of the IMF

- the assault on 20 April 2006 by the forces of order on strikers engaged in protest action in the Sicausta steelworks in the city of Lázaro Cárdenas in which the police and soldiers injured over 100 workers and killed two after opening fire.

906. The Government states that in note No. 02191 of 2 May 2008, it transmitted to the International Labour Office preliminary comments on this issue. Of the incident which occurred on 20 April 2006 at the Sicartsa [sic] steelworks in the city of Lázaro Cárdenas, State of Michoacán, three elements stand out which refute the IMF’s statement:

- With reference to the alleged intervention of troops, the Government reports that there is no record of the participation of elements of the Mexican army in this confrontation, since the incident involved the participation of the Federal Preventive Police of the Federal Secretariat of Public Safety and Security and the police of the State Government of Michoacán, which refutes the statement referring to the participation of soldiers.

- One cannot speak of an assault on or a confrontation with strikers, since notice of the strike referred to by the SNTMMSRM had not been issued, as shown by the certification of 18 April 2006, drawn up by the Secretary of Agreements attached to the Deputy Secretariat of Strike Notices of the Federal Conciliation and Arbitration Board, by which it is established that no record of any strike notice issued by the SNTMMSRM, Branch No. 271, against the enterprise Servicios Siderúrgica Lázaro Cárdenas – Las Truchas, SA de CV appears in the strike notice information and monitoring system or in the logbook of the Deputy Secretariat of Strike Notices after a search was conducted from 1 January 2006 to 18 April 2006.
- According to the Political Constitution of the United Mexican States, “An assembly or a meeting the purpose of which is to present a petition or a protest against an act or authority shall not be deemed illegal and may not be dissolved unless insults are addressed to such authority or violence or threats are used to intimidate it or compel it to take the desired decision” (article 9).

Participation of the Federal Preventive Police

907. With respect to the events that occurred on 20 April 2006 as a result of the confrontation between the federal and local public security forces and workers employed by the enterprises Siderúrgica Lázaro Cárdenas – Las Truchas, SA de CV, Asesoría Técnica Industrial del Balsas, SA de CV, and Administración de Servicios Siderúrgicos, SA de CV (Sicartsa), the Federal Secretariat of Public Safety and Security provides the following information.

908. The intervention of the Federal Preventive Police was due to:

- (a) The criminal charges filed with the Office of the Attorney-General of the State of Michoacán by the legal representatives of the affected enterprises against various workers on the ground of their alleged responsibility for the offences of unlawful exercise of their rights, attacks on communication routes, damage to property, plunder and criminal association; and
- (b) The powers expressly conferred on the Federal Preventive Police by the respective Act, which empowers it to prevent the commission of offences and administrative faults; to intervene in matters of public safety and security; to ensure, maintain and restore public order and peace; to safeguard personal integrity; to prevent the commission of offences against communication routes; to participate in joint operations with other police agencies; and to cooperate in high-risk situations at the request of the competent authorities.

909. In this sense, the actions of the Federal Preventive Police responded to the flagrantly illegal actions of the strikers, which affected not only the operation of the enterprises but also general communication routes, such as federal highways, the Port of Lázaro Cárdenas, and communication routes in the city, through permanent blockades, which resulted in the alleged criminal responsibility defined in the corresponding sections of Title V of the Federal Penal Code, relating to offences against communication routes and connections, as well as those provided in the General Communication Routes Act.

910. The intervention of the Federal Preventive Police also arose from the flagrancy of the possession by the demonstrators of explosives such as Molotov cocktails, firecrackers and other firearms, which is in contravention of the Federal Firearms and Explosives Act and its regulations. In addition, the use and detonation of these firearms was established by the testimony of the police officers who participated, which is included in the ministerial statements contained in preliminary investigation No. 199/2006-VII/06-VII of the Office of the Attorney-General of the State of Michoacán.

- 911.** According to the statement given to the Public Prosecutor's Office on 20 April 2006 by ministerial police officer Roberto Cuellar Jiménez, in which he declares that the miners were armed with handguns and shotguns, it may be inferred that there were workers who carried and activated firearms; this is also corroborated by the statements of some police officers and is covered by articles 7 and 8 of the Federal Firearms and Explosives Act, which provide for the obligation to report and register such weapons with the Secretariat of National Defence, and by the prohibition against possession and carrying of the weapons prohibited by this act and those reserved for the exclusive use of the army, navy and air force. The flagrancy also fits the hypothesis envisaged in article 160 of the Federal Penal Code, since in addition the workers used stones and homemade pellets, which are solid metal balls of various dimensions and sizes that are launched in waves and act as highly dangerous and sometimes lethal projectiles. Various workers also used machetes, sticks and other objects, including a backhoe, which was used by one miner solely for the purpose of assaulting the police; accordingly, several members of the Federal Preventive Police sustained injuries, including contusions, fractures and blunt force wounds, from the attacking workers.
- 912.** It was also considered that the industrial facilities of the enterprises involved are regarded as strategic, and that the failure to maintain them would pose a high risk of causing fatal and irreversible harm to the civilian population and the environment, and therefore the Federal Preventive Police also had an obligation to monitor compliance with the provisions contained in the General Ecological Balance and Environmental Protection Act, the General Civil Defence Act and any other legislation applicable in cases of in flagrante delicto.
- 913.** Had the Federal Preventive Police and other bodies not intervened, other strategic facilities, such as the coker plant, the high fumes plant and the light and power plant, could not have been reclaimed and safeguarded by the Secretariat of the Navy. It must be pointed out that any explosion of such facilities or contamination of water, air, soil and biodiversity and/or detonation of Molotov cocktails and other firearms in the workers' possession near other industrial facilities that are also strategic, including those belonging to Petróleos Mexicanos (PEMEX), the fertilizer terminal, the container terminal, the multiuse terminal, the metals and minerals terminal, the municipal pier, the Mexican Navy pier, the training centre pier, the grain storage terminal, fishing ports, naval yards, warehouses and silos that are in proximity to the scene of the conflict could, in turn, have caused a practically incalculable number of injuries, and therefore the intervention of the public security forces was necessary, effective and timely, and prevented much greater damage.
- 914.** From the date of the events to August 2006, the public security forces intervened to the extent strictly necessary to achieve what was laid down in the various agreements for resolving disputes between workers and enterprises.

Participation of the State Government of Michoacán

- 915.** Likewise, the Federal Secretariat of Public Safety and Security reported that the Attorney-General of the State of Michoacán had informed the National Human Rights Commission (CNDH) of the participation of 172 members of the Ministerial Police in the operation of 20 April 2006 in Lázaro Cárdenas, Michoacán, and it draws attention to:
- The unnumbered official letter of 20 April 2006, signed by the commander of the State Ministerial Police responsible for the region of Lázaro Cárdenas, Michoacán, addressed to the Fourth Investigating Agent of the Public Prosecutor of the Office of the Attorney-General of Michoacán, in which he explains that he participated in the operation for the purpose of aiding and supporting the Federal Preventive Police in the evacuation of the facilities of the enterprise Sicartsa;

- Official letter No. 389, of 28 April 2006, signed by the Head of Investigating Agents of the Public Prosecutor of the Regional Prosecutor's Office of Morelia, Michoacán, addressed to the Inspector-General of the Office of the Attorney-General of the State of Michoacán, transmitting to the Inspectorate a copy of the documentation comprising preliminary investigations Nos 199/2006-VII and 083/2006, the first of these having been initiated against police officer No. 1 and law enforcement agencies for crimes of homicide, the first of which was perpetrated against Mario Alberto Castillo Ramírez and the second against society; and the second investigation, initiated against police officer No. 2 and police officer No. 3 for crimes of homicide and firing of a weapon, the first of which was perpetrated against Héctor Álvarez Gómez and the second against society, so that the Inspectorate, within its area of competence and if deemed necessary, could initiate the appropriate administrative proceeding.
- Official letter No. SUB/MOR/295/2006, of 28 April 2006, signed by the Regional Prosecutor of Morelia, addressed to the Secretariat of Financial Control and Administrative Management of the State Government of Michoacán, transmitting a certified copy of preliminary investigation No. 194/2006-IV against the then Coordinator-General of the Ministerial Police, for offences involving abuse of authority, and against law enforcement agencies and courts, so that they could be included in the administrative liability proceeding that was initiated against the aforesaid public servant.
- Official letter No. SUB/MOR/292/2006, of 28 April 2006, signed by the Regional Prosecutor of Morelia, addressed to the Secretariat of Financial Control and Administrative Management of the State Government of Michoacán, transmitting a copy of preliminary investigation No. 83/2006-III-AEH, which was conducted of police officer No. 2 for committing the crime of homicide against Héctor Álvarez Gómez, and of police officer No. 3 for committing the offence of firing a weapon, so that an administrative liability proceeding could be initiated against the aforesaid public servants.

916. The Federal Secretariat of Public Safety and Security also reported that the Secretary of the Interior of the State of Michoacán informed the CNDH that:

- (1) The State Government participated in the operation to evacuate the aforementioned enterprise Sicartsa, on 20 April 2006, in order to assist and cooperate with the Federal Preventive Police of the Federal Secretariat of Public Safety and Security, specifying that only one person was detained in connection with these events, whose name, Flavio Romero Flores, was submitted by the State Secretariat of Public Safety and Security to the State Attorney-General's Office, and that once he had given a statement he was released, because his alleged responsibility for the events in question had not been proven;
- (2) On 21 April 2009, the Secretary of Public Safety and Security of the State Government of Michoacán and the Coordinator of the Ministerial Police of the State Attorney-General's Office tendered their resignations;
- (3) On 28 April 2009, the State Government of Michoacán provided economic assistance to the relatives of the persons who lost their lives in the aforementioned events.

917. Added to this information are various records, among which the following stand out:

- The 11 medical certificates issued on 20 April 2006 by the Mexican Social Security Institute for the care it provided to 11 members of the preventive police of the State Government of Michoacán who were injured during the operation;

- Official letter No. SNR-660-202/2006, of 28 April 2006, signed by the Under-Secretariat of Standards, Liabilities and Financial Position of the Secretariat of Financial Control of the State Government of Michoacán, addressed to the State Secretary of the Interior, reporting that administrative liability proceeding No. SNRSP-PAR-90/2006 had been instituted on that date against the then Coordinator of the Ministerial Police of the State of Michoacán;
- Two unnumbered official letters, of 28 April 2006, signed by the Secretariat of Social Development of the State Government of Michoacán, addressed to Martha Danelia Farías Torres and Ana María Rodríguez Nieto, respectively, transmitting to each of them cheques in the amount of 300,000 Mexican pesos (MXN) for economic assistance pursuant to the deaths of Héctor Álvarez Gómez and Mario Alberto Castillo Rodríguez, who regrettably lost their lives in the events that occurred on 20 April 2006.

918. Likewise, the Federal Secretariat of Public Safety and Security reported that, on 18 and 19 August 2006, the enterprises reached agreement with the workers and their trade union representatives on, among other things, the payment of MXN1 million in compensation to each of the families of the deceased workers.

919. In the light of the foregoing, the Committee can see that the intervention of the public security forces did not include the presence of the Mexican army, nor did this action signify an attack on the Sicartsa steelworks; that the workers acted outside the context of the right to strike, since there was no prior notice of their exercise of such right, and that the workers involved were not unarmed, as the SNTMMSRM indicates (paragraph 1292(l) of the report).

Recommendation (i) of the Committee on Freedom of Association

- (i) The Committee calls on all the parties concerned to continue to make efforts within the existing round of negotiations to resolve the collective dispute to which this case relates.

920. The Government states that, since July 2007, the labour authority has emphasized the resumption of conciliation discussions aimed at resolving the dispute in the mines. Nevertheless, it has met with intransigence towards negotiation on the part of the SNTMMSRM, since its representatives insist that a solution to this dispute must be comprehensive, involving all the pending legal issues, beginning with penal issues, moving on to commercial and civil issues, and only then addressing labour issues. As may be observed from its list of demands, submitted in August 2007, the vast majority are not related to the alleged violations of the collective labour agreements relating to safety and hygiene that were the basis on which the strikes were called. The intransigence on the part of the mining union shows a lack of commitment to its members and their families, whose economic circumstances have been affected more than a year after the strike was called.

921. The Government draws the following conclusions:

- Throughout the process leading to the election of officers of the SNTMMSRM, the labour authority's actions have been in conformity with the union's statutes and consistent with the provisions of ILO Convention No. 87, particularly Articles 3 and 8, concerning the right of workers to elect their representatives in full freedom, the obligation for the labour authority to refrain from any action that would limit or hinder the legal exercise of that right, and the obligation of workers, employers and their respective organizations to respect the law of the land. The complainants have also exercised the various legal means and remedies envisaged by the Mexican legal

system to defend the interests of the organization that they represent; hence, the individual guarantees of the complainants involved have been respected in accordance with the principles of legal certainty and the right to a hearing.

- The Government considers that the apparent and “excessive” length of the judicial procedures relating to various aspects of this case are attributable neither to the labour authority nor to the courts, but to the complainants, who have exercised various legal means and remedies at the corresponding levels to defend the interests of the organization that they represent.
- The Government deplors the death of Reynaldo Hernández González, and reiterates that both the federal and the local authorities will continue their efforts to conclude preliminary investigation No. 208/07 into the person or persons responsible for the criminal manslaughter of Reynaldo Hernández González.
- The Government reiterates that, since 2 May 2008, confirmation has been provided to the Committee that the persons detained at the scene of the events on 11 August 2007 were released shortly afterwards.
- As in the preceding case, the Government reiterates the information provided on 2 May 2008 to the effect that, on 15 October 2007, the Federal Conciliation and Arbitration Board notified the parties of its findings, in which it declared the SNTEEBMRM to be the new accredited party to the collective labour agreements in eight enterprises of the Grupo Minera México, in place of the SNTMMSRM, which was replaced as of that date as the accredited trade union in those work centres.
- The labour authority regrets that the work stoppage in this mine is still continuing, while reiterating its willingness to address the labour disputes between the aforesaid enterprises and the SNTMMSRM so that they might give priority to dialogue in the search for a solution. In order to put an end to a strike movement, the labour laws require that the workers express a wish to do so; the participation of the authorities alone is not sufficient to resolve a dispute of this nature. It is therefore incumbent upon the SNTMMSRM and the aforesaid enterprises to adopt a proactive attitude towards negotiation so that agreements on a solution can be reached, since the labour authority does not have direct powers to resolve disputes unless the parties so wish. The continued intransigence on the part of the SNTMMSRM, in seeking to condition a solution to the labour issue on recognition of Gómez Urrutia as Secretary-General of the union, despite his infringement of various provisions of the Political Constitution of the United Mexican States, the Federal Labour Act and the union’s statutes, has demonstrated a clear lack of commitment to its members and their families, whose economic circumstances have been affected more than a year after the strike was called.
- As may be observed from the information provided earlier, there are legal grounds which demonstrate that the freezing of the bank accounts of the SNTMMSRM is lawful, as is the provisional seizure of the union’s trust fund of US\$55 million by the Federal Board of Conciliation and Arbitration, whose actions were lodged in 2006 and 2007 on behalf of around 6,500 workers belonging to the aforesaid union. Moreover, as a result of the remedy of review brought by the Agent of the Federal Public Prosecutor against the decision of the District *Amparo* Court, dated 15 October 2007, which granted *amparo* and the protection of the federal courts to Napoleón Gómez Urrutia, on 24 March 2008, the Eighth Collegiate Criminal Court of the First Circuit decided to rescind the ruling and order the reinstatement of the proceeding; accordingly, the decision granting *amparo* was set aside, and the three arrest warrants against Gómez Urrutia remain in force. With regard to the incident which occurred on 20 April 2006 at the Sicartsa steelworks in the city of Lázaro

Cárdenas, State of Michoacán, the Government concludes that: (a) there was no record of the participation of elements of the Mexican army; (b) the incident involved the participation of the Federal Preventive Police of the Federal Secretariat of Public Safety and Security and the police of the State Government of Michoacán; (c) the actions of these authorities were consistent with the decisions of the Committee on Freedom of Association concerning police intervention during a strike; (d) the workers acted outside the context of the right to strike, since there was no prior notice of their exercise of such right, and the workers involved were not unarmed, as the SNTMMSRM indicates, since there were workers who carried and activated firearms; (e) the public security forces intervened to the extent strictly necessary to achieve what was laid down in the various agreements for resolving disputes between workers and enterprises; and (f) in the case of the two workers who died, the State Government of Michoacán has proceeded to implement the corresponding penalties and compensation.

- The labour authority has emphasized the resumption of conciliation discussions aimed at resolving the dispute in the mines. Nevertheless, it has met with intransigence towards negotiation on the part of the SNTMMSRM, which has conditioned a solution to the labour disputes on recognition of Gómez Urrutia, who is incapable of acting in that capacity.

922. The Government is annexing the statement made by the delegation of the Government during the adoption of the Committee's recommendations concerning Case No. 2478 by the Governing Body at its 302nd Session, on 13 June 2008. In this statement, the delegation declares that it does not concur with the Committee's analysis and therefore does not share its conclusions and recommendations.

923. In particular, the delegation of the Mexico made the following statements.

924. Firstly, in relation to the recommendation contained in subparagraph (a), the Government considers that it did not infringe the provisions of Article 3 of Convention No. 87. The Government proceeded in good faith to register the interim executive committee designated by the complainant union's General Vigilance and Justice Council after it had removed the executive committee from office for acts contrary to the provisions of its statutes. This registration was set aside by the labour authority in compliance with a decision by the judiciary, the only authority competent to take decisions of this type, which reinstated the former leaders in their posts.

925. The then leader of the complainant union, Napoleón Gómez Urrutia, has a number of legal actions against him lodged by workers belonging to the same union, among which is the charge that he misappropriated US\$55 million from the mining trust fund. There are three arrest warrants against Gómez Urrutia, who is currently a fugitive from justice. Article 8 of Convention No. 87 provides that "workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land".

926. The Government reiterates that this case is an internal union dispute and should not have been examined by the Committee. The Government showed its willingness to cooperate with the Committee and provided *ad cautelam* the information and comments which it believed to be related to the alleged violation of the principle of freedom of association and the right to collective bargaining.

927. Secondly, with regard to the recommendation contained in subparagraph (c), the judicial procedures have been carried out with strict adherence to the applicable legal norms, in observance of the deadlines prescribed by law and with respect for the right of the parties

to present evidence, allegations and legal remedies. To have violated the legal procedures would have been contrary to the absolute respect that must exist between the executive and judicial branches.

- 928.** There is information that was provided by the Government that appears not to have been considered fully by the Committee, probably because of lack of time. As a telling example, and without wishing to open a debate, the Government was requested to provide information on some unionists who had been detained. In that connection, the Government informed the Committee from the very first day that the unionists had been detained; that is to say, “had been” implies that they were no longer detained.
- 929.** The Government has promoted negotiation and dialogue and has offered its good offices in the search for a solution to the internal union dispute, with due respect for the principles of trade union independence and freedom under the terms of ILO Convention No. 87, which of course include the principle of the rule of law.
- 930.** The Government will transmit to the Committee, through the International Labour Office, detailed supplementary information on the points mentioned in this statement, as well as other issues.
- 931.** In its communication dated 23 June 2009, the Government states that it has noted the information submitted by the IMF as new allegations in relation to Case No. 2478, but indicates that the document allegedly referred to as “new allegations” turns out to be a mere transcription (an exact copy) of the report on the facts submitted to the Office of the Attorney-General of the Republic, which finally decided, on 5 March 2009, not to bring criminal charges; nor was the file on this investigation addressed to the Committee. Therefore, it is not constituted as a formal remedy that must be examined by the Committee. The document submitted by the IMF does not constitute new allegations, since aspects of the facts described in the aforesaid communication have already been addressed on various occasions by the IMF and the SNTMMSRM before the ILO, examined by the Committee and responded to by the Government in its replies. In view of the foregoing, the Government requests the Committee to completely disregard the document in question.

C. The Committee’s conclusions

- 932.** *The Committee notes the Government’s statement contesting the receivability of a document of the complainant union entitled “Criminal charges against the labour authorities before the Office of the Attorney-General for acts related to pending issues”. The Committee notes that a complaint was transmitted to it that was unsigned and undated and therefore considers it not receivable.*

Recommendations (a), (b) and (c) of the Committee on Freedom of Association

- (a) *In light of the new information provided by the Government, the Committee regrets the acknowledgement or registration by the administrative authority of the interim executive committee imposed by the union’s General Vigilance and Justice Council (and the consequent removal from office of the executive committee presided over by Napoleón Gómez Urrutia) and considers that the labour authorities engaged in conduct that is incompatible with Article 3 of Convention No. 87, which establishes the right of workers to elect their representatives in full freedom.*
- (b) *Observing that the Government does not refer in detail to the various flaws in the election process mentioned by the complainant, except with regard to the alleged forgery of the signature of a member of the General Vigilance and Justice Council, in relation to*

which it indicates that the injured party initiated penal action, the Committee requests the Government to send its observations in this regard.

- (c) *The Committee deplors the excessive length of the judicial procedures relating to various aspects of this case and the grave prejudice that this has caused to the complainant union and it requests the Government to examine measures with the social partners – legal or other reforms – to guarantee expeditious justice in relation to the exercise of trade union rights. The Committee urges for a rapid conclusion of the judicial procedures.*

933. *The Committee notes that the Government reiterates that: (1) this case is an internal union matter; (2) the State Secretariat of Labour and Social Insurance has not infringed Convention No. 87 or its Article 3, since its actions in proceeding to check records and documents are in conformity with law, case law and the rules of the statutes and with absolute respect for the wishes of the workers; (3) the mining union has been able to exercise the legal relief and remedies envisaged by the legal system, and in this connection, as indicated earlier, pursuant to a judicial warrant, on 16 April 2007 the labour authority complied with the ruling handed down in amparo action No. 397/06 by restoring the validity of the decisions in which Napoleón Gómez Urrutia was recognized as Secretary-General of the SNTMMSRM; (4) the Government considers that the apparent and “excessive” length of the judicial procedures relating to various aspects of this case are attributable neither to the labour authority nor to the courts, but to the complainants, which have exercised various legal means and remedies at the corresponding levels to defend the interests of the organization that they represent.*

934. *The Government refers to the Committee’s conclusion according to which the labour authorities failed to discover that the Secretary-General (Elías Morales Hernández, allegedly expelled from the union in May 2002) and other leaders were not active members of the union, nor the absence of participation by the plenary of the National Executive Committee in the removal from office of the Secretary-General (the complaint indicates that the General Vigilance and Justice Council did not hear the executive committee that it removed from office, and that this was not taken into account by the labour authorities). In this regard, the Committee notes that the Government reiterates that: (1) the members of the General Vigilance and Justice Council of the SNTMMSRM requested the labour authority to acknowledge the decisions adopted on 16 February 2006, consisting of penalties and the removal from office of the titular and substitute members of the National Executive Committee, as well as the President of the General Vigilance and Justice Council and his substitute, and the appointment of new members of the committee and of the President of the General Vigilance and Justice Council, with other persons appointed on an interim basis to fill the executive positions, under the leadership of Elías Morales Hernández; (2) the labour authority, in accordance with the wishes of the workers as expressed through the decisions of their competent internal body, after examining the documentation submitted and once it had been ascertained that it complied with the legal requirements and the terms of the union’s statutes, decided to acknowledge the decisions taken on 16 February on an interim basis until the appointments were approved or amended by the next national assembly; (3) lastly, the labour authority, complying with the decision issued by the judicial authority on 16 April 2007, set aside the acknowledgement granted to the interim national executive committee of the SNTMMSRM under the leadership of Elías Morales Hernández, as a result of which Napoleón Gómez Urrutia was definitively reinstated in his trade union rights as Secretary-General of the SNTMMSRM.*

935. *The Committee appreciates the detailed information provided by the Government and wishes to point out that at no time did it question whether the labour authority had examined in good faith the documentation submitted by the General Vigilance and Justice Council of the complainant union. The Committee observes in this regard that the complainant union has sent the final ruling handed down by the Fourth District Labour Court of the Federal District on 26 March 2007 in favour of the National Executive*

Committee of the complainant union, presided over by Napoleón Gómez Urrutia, confirming in the second instance an aspect of the previous ruling in which it exonerated the responsible authority of the Ministry of Labour. The Committee emphasizes, however, that in this ruling of 6 [sic] March 2007 there are several sections stating that, in taking its impugned decision (to replace the National Executive Committee headed by Napoleón Gómez Urrutia), the labour authority failed to “duly verify” the legislation and the union statutes, which “is in violation of the law”(page 106 of the ruling), that the labour authority decided to remove the executive committee from office by administrative act, without giving the affected parties an opportunity to be heard with due process, “and that the labour authority assumed, without having the power to do so, the jurisdictional authority that the labour laws... expressly reserve for the Conciliation and Arbitration Board” (page 118 of the ruling), which is a judicial body. In view of the foregoing, the Committee concludes that the conclusions which it reached regarding the merits of the allegations (replacement of the executive committee) of the complainant union remain entirely valid.

- 936.** *With regard to the allegation that the labour authorities were unaware that one of the two signatories of the decision to remove the National Executive Committee certified before a notary that he had not signed the document and an expert graphologist certified that the signature was false (an allegation on which the Committee requested the Government to keep it informed of the outcome of the criminal action for the falsification of documents brought by one of the members of the union’s General Vigilance and Justice Council), the Committee notes that the Government emphasizes that: (1) in amparo action No. 397/06, filed in the Fourth Collegiate Labour Court of the First Circuit, by which the alleged unconstitutionality of the decision of 17 February 2006 was contested, the evidence presented was inadequate to establish the alleged falsification of the signatures of Zúñiga Velásquez and therefore the labour authority, not perceiving that there was an obvious discrepancy between the signatures that were submitted to it and those contained in its files, was not empowered to order that expert examinations be carried out or to contest ex officio the signatures submitted; (2) nevertheless, in accordance with section 604 of the Federal Labour Act, the Federal Conciliation and Arbitration Board is empowered to address labour disputes between various groups of workers, such as internal union disputes; therefore, the authenticity of Zúñiga Velásquez’s signatures could have been established in the corresponding procedural phases of a labour court proceeding; (3) in the final decision of 26 March 2007, the Fourth Collegiate Labour Court of the First Circuit granted amparo and the protection of the federal courts (file No. RT 64/2007) to Napoleón Gómez Urrutia and other co-complainants on the ground of formal aspects of the decision of 17 February 2006, but it did not examine issues relating to the alleged falsification of Zúñiga Velásquez’s signatures; (4) furthermore, to date there is no court ruling which finds that Zúñiga Velásquez’s signatures were falsified or invalid.*
- 937.** *The Committee requests the Government to keep it informed of the outcome of the criminal action for the falsification of documents brought by one of the members of the union’s General Vigilance and Justice Council.*
- 938.** *The Committee notes that, according to the allegations, the alleged misappropriation of the union’s trust fund of US\$55 million, which had been at the origin of the removal from office of the executive committee by the alleged General Vigilance and Justice Council, was based on false documents; there was also, according to the allegations, the failure to disclose a report by the National Banking and Currency Commission which confirmed that the union leader Napoleón Gómez Urrutia had not committed the offence of money laundering in relation to the trust fund of US\$55 million; according to the allegations, an investigation is being carried out of the former Federal Prosecutor of Mexico and the Deputy Prosecutor-General for the alleged failure to disclose the report. In this regard, the Government states that: (1) according to information provided by the Units*

Specializing in Investigation of Fiscal and Financial Offences and Offences Committed by Public Employees, Including Obstruction of Justice, of the Office of the Attorney-General of the Republic, after carrying out an analysis, they reported that they have no information on the matters in question; (2) nevertheless, it must be noted that the Federal Conciliation and Arbitration Board is dealing with various legal actions against the union SNTMMSRM in relation to the provisional seizure of accounts of the mining union's trust fund of US\$55 million, the procedural phase of which consists of the following:

- *The principal action consists of the payment of the proportional share of 5 per cent of the shares, amounting to US\$55 million, negotiated to the benefit of the workers of the Compañía Minera de Cananea SA de CV in the agreements dated 24 August 1990, in compliance with the actions taken by the First Bankruptcy Court on 16 August 1989 and 24 August 1990.*
- *The dispute is currently being examined in 21 cases, most of which are filed with Special Board No. 10, except for one which is filed with Special Board No. 47, located in Cananea, Sonora. The cases involve approximately 5,900 workers. There are four cases filed with Special Boards Nos 10 and 47 in which the actors have abandoned legal action.*
- *None of the 22 cases that are being processed has led to a preliminary decision, since in none of them has a hearing begun for the taking of evidence. The delay in the procedure is not attributable to the Board, since these judicial proceedings were brought by several actors against defendants and co-defendants, in addition to which various delaying actions have been lodged, among which are the following:*
 - *In three judicial proceedings, a procedural issue concerning lack of legal personality was raised against the SNTMMSRM delegation. The personality of the trade union delegation headed by Napoleón Gómez Urrutia was recognized under the terms of the final decision dated 26 March 2007, issued by the Fourth Collegiate Labour Court of the First Circuit in review No. RT 64/2007;*
 - *In three judicial proceedings, a motion for consolidation was made;*
 - *In four judicial proceedings, summonses were issued to third parties allegedly concerned;*
 - *In eight judicial proceedings, a procedural issue was raised concerning material competence, in the course of which it became clear that Special Board No. 10 has decided to uphold it. The possibility cannot be excluded that the competence issue is the reason for challenging the findings on the merits, since it may be considered that the competence to resolve these disputes falls to the administrative and/or fiscal authorities;*
 - *Fifteen cases originate from Special Board No. 47, located in Cananea, Sonora; four from Special Board No. 34, located in San Luis Potosí, San Luis Potosí; and two cases originate from Special Board No. 19, located in Guadalupe, Nuevo León, as a result of which Special Board No. 10 has ordered 21 personal notifications to be served by means of a warrant through the aforesaid special boards;*
 - *On various occasions, hearings have been postponed at the request of the parties, on the ground that they were involved in conciliatory discussions.*
- *In this regard, various provisional decisions have been taken:*

- *In Special Board No. 19, two actions were brought against the SNTMMSRM in which a provisional decision was requested, consisting in the provisional seizure of the mining union's accounts. These actions were filed under Cases Nos 295/06 and 1488/06;*
- *The provisional seizures were processed and authorized by the President of Special Board No. 19, in the amount of US\$196,090,713 and US\$18,363,618, respectively. The National Banking and Currency Commission reported that the seized accounts of the SNTMMSRM were treated as if they were combined, up to the amount required;*
- *As a result of the procedural issues concerning territorial competence, Cases Nos 295/06 and 1488/06 were transmitted to Special Board No. 10, which assigned to them Cases Nos 216/06 and 498/07, respectively;*
- *In Case No. 498/07, an application for review of implementing acts was submitted to the President of the Special Board, and therefore it was not admitted. The case subsequently came before the Special Board, but not in due time, and therefore it was dismissed. The decision on dismissal was not appealed;*
- *In Case No. 216/06, an application was lodged for review of implementing acts, which was declared not receivable. In this case there is an indirect amparo action, which was filed in the Fifth District Labour Court of the Federal District under No. 191412007. The SNTMMSRM brought a complaint before the Fourth Collegiate Labour Court of the First Circuit against the decision issued by the District Court which is addressing the indirect amparo action, in which the motion requesting clarification of the impugned act was held not to have been submitted; this appeal was declared not receivable, as a result of which processing of the indirect amparo action continued. No ruling has been issued; however, the parties, who will be under the jurisdiction of the collegiate courts, have a remedy of review.*

939. *The Committee also notes the Government's conclusions in which it emphasizes, based on the information provided earlier, that there are legal grounds which demonstrate that the freezing of the bank accounts of the SNTMMSRM is lawful, as is the provisional seizure of the union's trust fund of US\$55 million by the Federal Board of Conciliation and Arbitration, whose actions were lodged in 2006 and 2007 on behalf of around 6,500 workers belonging to the aforesaid union. Moreover, as a result of the remedy of review brought by the Agent of the Federal Public Prosecutor against the decision of the District Amparo Court, dated 15 October 2007, which granted amparo and the protection of the federal courts to Napoleón Gómez Urrutia, on 24 March 2008, the Eighth Collegiate Criminal Court of the First Circuit decided to rescind the ruling and order the reinstatement of the proceeding; accordingly, the decision granting amparo was set aside, and the three arrest warrants against Gómez Urrutia remain in force. The Committee will examine at a later date the question of the arrest warrants against the union leader Napoleón Gómez Urrutia.*

940. *With regard to the delay in the judicial proceedings relating to the present case, the Committee notes, based on the detailed information provided, that the Government indicates that this is due to the numerous delaying actions of the parties (lack of legal personality, consolidation of proceedings, issuance of summonses to third parties concerned, postponement of hearings, procedural issues, provisional decisions, remedies, among others). The Committee notes that the Government also states that the judicial procedures have been carried out with strict adherence to the applicable legal norms, in observance of the deadlines prescribed by law and with respect for the right of the parties*

to present evidence, allegations and legal remedies. To have violated the legal procedures would have been contrary to the absolute respect that must exist between the executive and judicial branches.

- 941.** *The Committee notes the explanations regarding the reasons for the delay in the proceedings initiated against members of the executive committee headed by Napoleón Gómez Urrutia in relation to the alleged misappropriation of US\$55 million of the mining trust fund and possible offences of fraud and management fraud, because what is involved is a hugely complex matter, the delay which is due largely to actions on the part of the defendants and co-defendants. The Committee considers, however, that the judicial proceedings relating to the replacement of the complainant union's executive committee, which the Government characterizes as an internal union dispute, should have been resolved more rapidly since the fundamental issues were questions of legality that the complainant union had raised in 2006. Accordingly, the Committee reiterates its invitation to a tripartite discussion on the advisability of expediting the labour court proceedings relating to matters of this type.*

Recommendation (d) of the Committee on Freedom of Association

- (d) The Committee deeply deplores the death of the worker, Reynaldo Hernández González, expects that the judicial proceedings will be completed as soon as possible and requests the Government to provide a copy of the ruling.*

- 942.** *The Committee notes that the Government deplores the death of Reynaldo Hernández González, and reiterates that both the federal and the local authorities will continue their efforts to conclude preliminary investigation No. 208/07 into the person or persons responsible for the criminal manslaughter of Reynaldo Hernández González, which investigation, once it has been concluded, will be brought to the Committee's attention. The Committee awaits the ruling that will be issued in relation to the death of the worker Reynaldo Hernández González.*

Recommendation (e) of the Committee on Freedom of Association

- (e) The Committee requests the Government to indicate whether the trade unionists captured on 11 August 2007 were released.*

- 943.** *The Committee observes that the Government informed the Committee that, according to preliminary investigation No. 208/07 by the Agency of the Public Prosecutor located in Cumpas, Sonora, seven persons were detained on the scene of the events; they were detained solely in accordance with the terms and conditions established by the legal provisions and were released shortly afterwards. The Committee takes note of this information.*

Recommendation (f) of the Committee on Freedom of Association

- (f) The Committee requests copies of the decisions handed down by the courts concerning the ballot for the union accreditation for collective agreements in eight enterprises.*

(The complainant union lodged amparo actions against the corresponding decisions of the Federal Conciliation and Arbitration Board which are currently under review.

Accordingly, the Committee requests the Government to provide copies of the respective rulings of the judicial authorities.)

944. *The Committee observes that the Government reiterates that in its note No. OGE-02191, of 2 May 2008, it provided information related to the registration by the National Union of Mine Exploration, Exploitation and Production Workers of the Republic of Mexico (SNTEEBMRM) of eight collective labour agreements concluded by the SNTMMSRM and the enterprises Industrial Minera México, SA de CV (Planta San Luis, Planta Nueva Rosita, Refinería Electrolítica de Zinc and Unidad Charcas); Mexicana de Cobre, SA de CV (Planta Beneficiadora de Concentrados, Planta de Cal and Unidad la Caridad); and Minerales Metálicos del Norte, SA de CV. The Government reiterates in particular that:*

- *On 29 June 2007, before the Federal Conciliation and Arbitration Board, the SNTEEBMRM requested the registration of eight collective labour agreements;*
- *On 5 September 2007, the Federal Conciliation and Arbitration Board issued the certification of the ballot in which the workers in each of the eight work centres freely and transparently cast their votes to choose the union to which they wished to belong;*
- *On 15 October 2007, the Federal Conciliation and Arbitration Board notified the parties of its findings, in which it declared the SNTEEBMRM to be the new accredited party to the collective labour agreements in eight enterprises of the Grupo Minera México, in place of the SNTMMSRM, which was replaced as of that date as the accredited trade union in those work centres;*
- *In order to contest the foregoing, the SNTMMSRM lodged direct amparo actions against the decisions of the Federal Conciliation and Arbitration Board, which are currently under review before the competent jurisdictions and which, once they have been resolved, will be brought to the Committee's attention.*

The Committee requests the Government to keep it informed of the outcome of these judicial proceedings brought by the complainant union.

Recommendation (g) of the Committee on Freedom of Association

- (g) *The Committee requests the Government to provide more detailed information on the alleged violent expulsion of strikers who were in the entrances to the Cananea mine and in general on the intervention of the public security forces in the present collective dispute.*

(In its conclusions, the Committee had requested the Government to provide more detailed information on the alleged violent expulsion of strikers who were in the entrances to the Cananea mine and in general on the intervention of the public security forces in the present collective dispute (in respect of which the Government has only denied the intervention of the army and refers to the presence of public security forces to guarantee the right to work of non-strikers).)

945. *The Committee takes note of the Government's statements according to which: (1) the strike in the Cananea mining unit in Sonora began on 30 July 2007, as a result of the proceedings brought by the SNTMMSRM before the Federal Conciliation and Arbitration Board.; (2) the existing disputes between the SNTMMSRM and the enterprises holding the mining concessions, Industrial Minera México, SA de CV and Mexicana de Cananea, SA de CV, led to the unjustified calling of the strike in question, which in due course was declared illegal by the Federal Conciliation and Arbitration Board because it was in*

conformity with neither the letter nor the spirit of the provisions laid down in respect of strikes in the Political Constitution of the United Mexican States and the Federal Labour Act; this strike was declared legal by the federal judiciary and, accordingly, the Federal Conciliation and Arbitration Board complied with the judicial decision; (3) during 2007 and 2008, the labour authority held more than 30 working meetings and made numerous efforts to resolve the dispute (the strike is continuing to date), but the SNTMMSRM is conditioning the negotiations on labour issues on the legal problems of Napoleón Gómez Urrutia.

946. More specifically, with regard to the alleged violent expulsion of strikers from the mine, the Committee observes that in its aforementioned note of 2 May 2008, the Government reiterates the information that it provided in this regard and again denies the IMF's statement that 700 members of the armed forces of the army and the federal security forces were called to expel the strikers. The Committee concludes that the Government does not deny the expulsion of the strikers from the Cananea mine, but places it in the context of the judicial decision in the first instance which declared the strike illegal (a decision that was subsequently revoked).

Recommendation (h) of the Committee on Freedom of Association

- (h) Noting with concern the gravity of the other pending allegations in relation to which the Government has not replied in detail and which include arrest warrants, the freezing of union accounts, threats and acts of violence, including the death and injury of trade unionists, the Committee urges the Government to reply to these allegations without delay, to conduct a full and independent investigation and to keep it informed in this respect.

947. With regard to the alleged armed assault on the main offices of the complainant union by Elías Morales and armed accomplices, including the ransacking, theft and destruction of confidential information (four of the attackers are alleged to have been arrested, but then released two hours later), the Government states that the Offices of the Central Investigators for Financial Offences, Minors, Vehicle Theft and Transport and Special Matters, of the Office of the Attorney-General of the Federal District, reported that they have no record of any preliminary investigations opened in connection with such incidents, and that there is no record of any investigation of Elías Morales on the ground of the alleged incidents that occurred in the main offices of what is now the SNTMMSRM in the city of Mexico on 17 February 2006. Because of the gravity of the case, the Government is surprised that no legal representative of the SNTMMSRM has presented any complaints to the corresponding authorities regarding the incidents mentioned, which may be reflected in a certain inconsistency in the interest shown by that union.

948. With regard to the allegations concerning (1) the illegal freezing of the bank accounts of the union, of Napoleón Gómez Urrutia and other union leaders; (2) the maintenance of charges against the Secretary-General of the union, Napoleón Gómez Urrutia, for the misappropriation of the union's trust fund of US\$55 million on the basis of false documentation and the manipulation of the legal system; (3) the arrest warrants issued against the union leader, Napoleón Gómez Urrutia, based on the failure of the authorities to disclose reports and despite the fact that an independent hearing had exonerated him of all charges in relation to the US\$55 million fund referred to above (the criminal charges have been withdrawn by four federal judges, but remain pending in Sonora and San Luis Potosí), the Committee notes that the Government states that there are legal grounds which demonstrate that the freezing of the bank accounts of the SNTMMSRM is lawful, as is the provisional seizure of the union's trust fund of US\$55 million by the Federal Board of Conciliation and Arbitration. Moreover, the Committee notes that the Government

states that Napoleón Gómez Urrutia has various arrest warrants pending against him: one from 3 July 2006, issued by Criminal Court No. 32 of the Federal District for the offence of management fraud; one from 12 July 2006, issued by the Fifth Court of the Criminal Branch in San Luis Potosí (currently the Eighteenth Criminal Court of the Federal District as the substitute authority) for the offence of specific fraud in the degree of co-participation; and one from 18 May 2006, issued by the Second Criminal Court of First Instance in Hermosillo, Sonora, for the offence of specific fraud in the form of management fraud and criminal association; against these warrants, Gómez Urrutia brought amparo action No. 907/2008, filed in the Eighth District Criminal Court of the Federal District; on 15 October 2007, the District Amparo Court granted him amparo and the protection of the federal courts, a decision that was, in turn, appealed by the Agent of the Federal Public Prosecutor. The remedy of review referred to above was filed in the Eighth Collegiate Criminal Court of the First Circuit under No. RP201/2007; that court decided to rescind the ruling and order the reinstatement of the proceeding; accordingly, the decision granting amparo was set aside, and the arrest warrants remain in force. The Government reiterates that the alleged excessive delay in the administration of justice was not attributable to the competent authorities, but rather to the various remedies used by the complainant in the courts. The Committee wishes to refer, however, to the judicial rulings recently provided by the complainant federation:

- A decision of the Eighteenth Criminal Court of the Federal District, of 13 March 2009, in the criminal case against Napoleón Gómez Urrutia et al. for the offence of aggravated management fraud, which denies the arrest warrant against Napoleón Gómez Urrutia on the ground of failure to establish the *corpus delicti*;
- A decision of the Ninth Criminal Chamber of the Supreme Court of Justice of the Federal District, of 8 December 2008, which confirms a decision denying the arrest warrant against José Ángel Rocha Pérez (a member of the technical committee of the trust and a member of the executive committee of the mining union SNTMMSRM) for the offences of management fraud and criminal association.

The Committee observes that the Government refers to a ruling of the Ninth Chamber of the High Court of Justice of the Federal District, which decided on 18 January 2010 to quash the arrest warrant issued for fraudulent administration by Criminal Court No. 51 of the Federal District (a decision that might be appealed, according to the Government). The Government also refers to rulings issued by District Court No. 7 for Penal Amparo Proceedings of the Federal District, granting amparo to Mr Héctor Félix Estrella, Mr Napoleón Gómez Urrutia, Mr Juan Linares Montufar and Mr José Ángel Rocha Pérez against the arrest warrants issued by District Court No. 1 FPPFD (the amparo ruling aims at the rectification of the established irregularities by District Court No. 1 FPPFD, which would then be able to issue new arrest warrants against the accused persons). The Committee concludes that, according to the information supplied by the Government, there are at least two arrest warrants that remain presently in force (one issued by Criminal Court No. 32 of the Federal District and one issued by District Court No. 9 for Federal Penal Proceedings of the Federal District). The Committee observes that the situation of Gómez Urrutia and other members of the executive committee of the complainant union in respect of the arrest warrants against them has evolved in different directions in the penal and labour court proceedings relating to the trust, and requests the Government to supply information on the situation with regard to the arrest warrants and the freezing of the bank accounts of the complainant union and to keep it informed of further developments in these proceedings.

- 949.** *In relation to the alleged death threats, abductions, illegal arrest and beating of miners belonging to the union and their families and the abduction, beating and death threats against the wife of Mario García Ortiz, member of the executive committee of the complainant union, on account of “her husband’s errors” (she was able to escape, but*

there was no investigation), the Committee notes that the Government reiterates that none of these documents contain new allegations relating to Case No. 2478, since they are not related to the facts that gave rise to the complaint, for which reason it again requests the Committee to disregard the communication. The Committee wishes to recall, firstly, that it is the usual practice for complaints relating to the same union to be part of the same case, even if they deal with different issues. The Committee appreciates that the Government, with a view to contributing in good faith to the work of the Committee, indicates that it has no reliable documentation that would enable it to conduct a full and independent investigation into these matters. The Committee invites the complainant organization to provide further information on the alleged death threats, abductions, illegal arrest and beating of miners belonging to the union.

950. *With respect to the case concerning the wife of Mario García Ortiz, from the documentation provided by the IMF in its communication, it may be inferred that there is a preliminary investigation No. 65/2007, which was initiated on 2 February 2007 by the First Agency of the Public Prosecutor's Office, located in Lázaro Cárdenas, Michoacán. The Government will again consult with the corresponding authority in this regard. The Committee awaits the outcome of these consultations.*

951. *With regard to the alleged assault on 20 April 2006 by the forces of order on strikers engaged in protest action in the Sicartsa steelworks in the city of Lázaro Cárdenas in which the police and soldiers injured over 100 workers and killed two after opening fire, the Committee notes that the Government emphasizes three elements which, in its view, refute the IMF's statement:*

- *With reference to the alleged intervention of troops, there is no record of the participation of elements of the Mexican army in this confrontation, since the incident involved the participation of the police;*
- *One cannot speak of an assault on or a confrontation with strikers, since notice of the strike referred to by the SNTMMSRM had not been issued, as proven by the certifications provided by the authorities, which show that there is no record of any strike notice issued by the SNTMMSRM, Branch No. 271, against the enterprise Servicios Siderúrgica Lázaro Cárdenas – Las Truchas, SA de CV;*
- *According to the Political Constitution of the United Mexican States, "An assembly or a meeting the purpose of which is to present a petition or a protest against an act or authority shall not be deemed illegal and may not be dissolved unless insults are addressed to such authority or violence or threats are used to intimidate it or compel it to take the desired decision" (article 9).*

The Committee concludes that what was involved was not a strike declared in accordance with the law and that the alleged expulsion of the workers took place in this context.

952. *With respect to the events that occurred on 20 April 2006 as a result of the confrontation between the federal and local public security forces and workers employed by the enterprises Siderúrgica Lázaro Cárdenas – Las Truchas, SA de CV, Asesoría Técnica Industrial del Balsas, SA de CV, and Administración de Servicios Siderúrgicos, SA de CV (Sicartsa [sic]), the Committee notes that, according to the authorities, the intervention of the Federal Preventive Police was due to: (a) the criminal charges filed with the Office of the Attorney-General of the State of Michoacán by the legal representatives of the affected enterprises against various workers on the ground of their alleged responsibility for the offences of unlawful exercise of their rights, attacks on communication routes, damage to property, plunder and criminal association, and (b) the powers expressly conferred on the Federal Preventive Police by the respective Act, which empowers it to prevent the commission of offences and administrative faults; to intervene in matters of public safety*

and security; to ensure, maintain and restore public order and peace; to safeguard personal integrity; to prevent the commission of offences against communication routes; to participate in joint operations with other police agencies; and to cooperate in high-risk situations at the request of the competent authorities. The Committee notes that, according to the Government, the actions of the Federal Preventive Police responded to the flagrantly illegal actions of the strikers, which affected not only the operation of the enterprises but also general communication routes, such as federal highways, the Port of Lázaro Cárdenas, and communication routes in the city, through permanent blockades, which resulted in the alleged criminal responsibility defined in the corresponding sections of Title V of the Federal Penal Code, relating to offences against communication routes and connections, as well as those provided in the General Communication Routes Act; the intervention of the Federal Preventive Police also arose from the flagrancy of the possession and use by the demonstrators of explosives such as Molotov cocktails, firecrackers, pellets and other firearms, which is in contravention of the Federal Firearms and Explosives Act and its regulations. In addition, the use and detonation of firearms was established by the testimony of the police officers who participated, which is included in the ministerial statements contained in preliminary investigation No. 199/2006-VII/06-VII of the Office of the Attorney-General of the State of Michoacán; various workers also used machetes, sticks and other objects, including a backhoe, which was used by one miner solely for the purpose of assaulting the police; accordingly, several members of the Federal Preventive Police sustained injuries, including contusions, fractures and blunt force wounds, from the attacking workers.

- 953.** *The Committee observes that the Government points out that from the date of the events to August 2006, the public security forces intervened to the extent strictly necessary to ensure that the various agreements be signed to resolve the dispute between the workers and the employer.*
- 954.** *The Committee also notes in this matter the proceedings initiated by the authorities on the ground of violent acts against workers; specifically, it notes: (a) preliminary investigations Nos 199/2006-VII and 083/2006, transmitted to the Inspector-General of the Office of the Attorney-General of the State of Michoacán, the first of these having been initiated against police officer No. 1 and law enforcement agencies for crimes of homicide, the first of which was perpetrated against Mario Alberto Castillo Ramírez and the second against society; and the second investigation, initiated against police officer No. 2 and police officer No. 3 for crimes of homicide and firing of a weapon, the first of which was perpetrated against Héctor Álvarez Gómez and the second to the prejudice of society; (b) preliminary investigation No. 194/2006-IV against the then Coordinator-General of the Ministerial Police, for offences involving abuse of authority, and against law enforcement agencies and courts, so that they could be included in the administrative liability proceeding that was initiated against the aforesaid public servant; and (c) preliminary investigation No. 83/2006-III-AEH, which was conducted of police officer No. 2 for committing the crime of homicide against Héctor Álvarez Gómez, and of police officer No. 3 for committing the offence of firing a weapon, so that an administrative liability proceeding could be initiated against the aforesaid public servants.*
- 955.** *The Government further indicates that the Federal Secretariat of Public Safety and Security also reported that the Secretary of the Interior of the State of Michoacán informed the CNDH that, in the evacuation of the enterprise Sicartsa, only one person was detained in connection with those events, whose name, Flavio Romero Flores, was submitted by the State Secretariat of Public Safety and Security to the State Attorney-General's Office, and that once he had given a statement he was released, because his alleged responsibility for the events in question had not been proven; on 21 April 2009 the Secretary of Public Safety and Security of the State Government of Michoacán and the Coordinator of the Ministerial Police of the State Attorney-General's Office tendered their resignations, and*

on 28 April 2009, the State Government of Michoacán provided economic assistance to the relatives of the persons who lost their lives in the aforementioned events. The Committee notes that the Government indicates that on 20 April 2006 the Mexican Social Security Institute issued 11 medical certificates for the care it provided to 11 members of the preventive police of the State Government of Michoacán who were injured during the operation; administrative liability proceeding No. SNRSP-PAR-90/2006 was instituted against the then Coordinator of the Ministerial Police of the State of Michoacán; the Michoacán authorities delivered to Martha Danelia Farías Torres and Ana María Rodríguez Nieto, respectively, cheques in the amount of MXN 300,000 for economic assistance, pursuant to the death of Héctor Álvarez Gómez and Mario Alberto Castillo Rodríguez, who regrettably lost their lives in the events that occurred on 20 April 2006; on 18 and 19 August 2006, the enterprises reached agreement with the workers and their trade union representatives on, among other things, the payment of MXN 1 million in compensation to each of the families of the deceased workers; the intervention of the public security forces did not include the presence of the Mexican army, nor did this action signify an attack on the Sicartsa steelworks; the workers acted outside the context of the right to strike, since there was no prior notice of their exercise of such right, and the workers involved were not unarmed, as the SNTMMSRM indicates. The Committee duly notes these compensations.

- 956.** *The Committee deplores all the acts of violence that took place and recalls in general that, while workers and their organizations have an obligation to respect the law of the land, the intervention by security forces in strike situations should be limited strictly to the maintenance of public order [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 645], and also that the principles of freedom of association do not protect abuses while exercising the right to strike [see **Digest**, op. cit., para. 667]. The Committee requests the Government to inform it of the outcome of the proceedings relating to these acts of violence in the State of Michoacán.*

Recommendation (i) of the Committee on Freedom of Association

- (i) *The Committee calls on all the parties concerned to continue to make efforts within the existing round of negotiations to resolve the collective dispute to which this case relates.*

- 957.** *The Committee notes that the Government states that: (1) since July 2007, the labour authority has emphasized the resumption of conciliation discussions aimed at resolving the dispute in the mines; countless actions and efforts have been undertaken to resolve the dispute through conciliation, and this applies not only to the cases described in the preceding paragraphs, but also to the disputes in the enterprises Industrial Minera México, SA de CV and Mexicana de Cananea; (2) nevertheless, it has met with intransigence towards negotiation on the part of the SNTMMSRM, since its representatives insist that a solution to this dispute must be comprehensive, involving all the pending legal issues, beginning with penal issues, moving on to commercial and civil issues, and only then addressing labour issues; (3) in its list of demands, submitted in August 2007, it may be observed that the vast majority are not related to the alleged violations of the collective labour agreements relating to safety and hygiene that were the basis on which the strikes were called; (4) the mining union shows a lack of commitment to its members and their families, whose economic circumstances have been affected more than a year after the strike was called; (5) the labour authority regrets that the work stoppage in the Cananea mine is still continuing, while reiterating its willingness to address the labour disputes between the aforesaid enterprises and the SNTMMSRM so that they might give priority to dialogue in the search for a solution, but in order to put an end to a strike movement, the labour laws require that the workers and the parties in general express a wish to do so;*

and (6) the continued intransigence on the part of the SNTMMSRM, in seeking to condition a solution to the labour issue on recognition of Gómez Urrutia as Secretary-General of the union, despite his infringement of various provisions of the Political Constitution of the United Mexican States, the Federal Labour Act and the union's statutes, has shown a clear lack of commitment to its members and their families, whose economic circumstances have been affected more than a year after the strike was called.

958. *The Committee appreciates the Government's efforts to foster a solution to the dispute in the mining units. It recalls that it is not for the Committee to issue an opinion on the attitudes of the parties to the negotiations, and hopes that they will soon reach an agreement. The Committee requests the Government to pursue its efforts to resolve the dispute in the mining sector.*

The Committee's recommendations

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

- (a) The Committee requests the Government to keep it informed of the outcome of the criminal action for the falsification of documents brought by one of the members of the complainant union's General Vigilance and Justice Council.*
- (b) The Committee reiterates its invitation to a tripartite discussion on the advisability of expediting the labour court proceedings in the case of internal union disputes.*
- (c) The Committee awaits the ruling that will be issued in relation to the death of the worker Reynaldo Hernández González.*
- (d) The Committee requests the Government to keep it informed of the outcome of the proceedings initiated by the complainant union against the decision of the Federal Conciliation and Arbitration Board to declare the SNTEEBMRM to be the accredited party to the collective agreements in place of the complainant union.*
- (e) The Committee requests the Government to continue to supply information as to the situation with regard to the freezing of the accounts of the complainant union and – given that there are judicial decisions which point in different directions – concerning the arrest warrants against Napoleón Gómez Urrutia and other members of the executive committee of the complainant union, as well as to keep it informed of further developments in the penal proceedings.*
- (f) The Committee invites the complainant organization to provide further information concerning the allegations of death threats, abductions, illegal arrest and beating of miners belonging to the union.*
- (g) The Committee awaits the outcome of the consultations with the First Agency of the Public Prosecutor's Office of Lázaro Cárdenas concerning the case of alleged abduction, beating and death threats against the wife of the trade unionist Mario García Ortiz.*

- (h) *The Committee requests the Government to inform it of the outcome of the proceedings relating to acts of violence against trade unionists in the State of Michoacán.*
- (i) *The Committee requests the Government to pursue its efforts to resolve the dispute in the mining sector.*

CASE NO. 2665

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

**Complaint against the Government of Mexico
presented by
the World Federation of Trade Unions (WFTU)**

Allegations: Interference by the authorities to prevent recognition of the executive committee voted in by the general assembly of the Trade Union of Workers in the Service of the State Authorities (STSPE), excessive delays in legal proceedings, anti-union dismissals and the start of “preliminary investigations” into alleged fraud at the union’s Loans and Savings Fund

- 960.** The complaint is contained in a communication from the World Federation of Trade Unions (WFTU) dated 28 August 2008. The Government sent its observations in communications dated 19 January 2009 and 25 February 2010.
- 961.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant’s allegations

- 962.** In its communication of 28 August 2008, the WFTU states that the Trade Union of Workers in the Service of the State Authorities (STSPE) brings together 4,300 public sector workers working in various departments of the executive, judicial and legislative authorities in the State of Querétaro, as well as several decentralized bodies, namely: the College of Bachelors of the State of Querétaro (COBAQ), the College of Science and Technology Studies of the State of Querétaro (CECyTEQ), the Querétaro Technology University (UTEQ), the State System for All Round Family Development (SEDIF), the Querétaro Institute for Culture and the Arts (IQCA), the Labour Training Institute of the State of Querétaro (ICATEQ), the State Road Commission (CEC) and the State Water Commission (CEA).
- 963.** The complainant states that, on 31 July and 1 August 2006, in accordance with the internal statutes of the STSPE and the formalities of Mexican labour legislation, an electoral process was held to appoint an executive committee for the period 2006–09. Five teams, registered under the names green, blue, purple, red and tricolour, participated in the election, which was scrutinized and monitored throughout by independent STSPE

commissions such as the vigilance committee, the honour and justice commission, and the electoral commission, as well as by representatives of the teams, who approved the various stages of the electoral process up to the vote counting, and also signed the election report and certified that the team registered as “tricolour” had won on the basis of the following results (the appropriate documents were signed for the record):

	Team				
	Green	Red	Purple	Blue	Tricolour
Total votes	369	526	281	754	1 045

- 964.** Despite the fact that the election candidates accepted the victory of the tricolour team and signed the scrutiny documents, on 4 August 2006, the green, purple and blue teams, acting under government influence, filed claims with the Conciliation and Arbitration Court of the State of Querétaro, subsequently followed by the red team, to have the election annulled, citing as their principal arguments the fact that the tricolour team had used one of the colours of an opposing team in its logo, as well as the fact that some members of the committee elect had served on the outgoing committee, which is, however, permitted by the aforementioned internal statutes of the STSPE (copies of the annulment claims are attached to the complaint). Thus began Case No. 242/2006-1, comprising the various claims filed, together with other legal actions referred to below.
- 965.** On 7 August 2006, the outgoing executive committee received notification of a decision by the Conciliation and Arbitration Tribunal of the State of Querétaro informing the union’s serving representative body that the members of the green, red, purple and blue teams had filed claims for the election to be annulled. It should be noted that, when the Conciliation and Arbitration Tribunal receives a request, it takes 45 days on average between the request being officially registered and the respondents being notified. In this case, it took only three days to complete all procedures and issue a decision. In addition, the Tribunal illegally rectified shortcomings of form in the claims, which was not in accordance with procedure, as the dispute is between equals, i.e. between workers (by law, the courts can and must rectify shortcomings in claims when they are submitted by workers against enterprises, but not in this case, where, because the workers have equal standing, there should be no duty of protection towards either party). This can be verified from the annulment claims, in which the tricolour team is not mentioned as a respondent; however, the Tribunal has overstepped its authority by citing the tricolour team as a respondent rather than as an interested third party, displaying flagrant interference in the activities of the union through the biased application of judicial procedures, thereby violating the independence, freedom of association and free will of the workers.
- 966.** On 7 August 2008 (actually 2006, as corrected by the Government in its reply), the president of the Conciliation and Arbitration Tribunal of the State of Querétaro, Mr Jesús Lomeli Rojas, resolved to appoint the vigilance committee to run the union, in accordance with section 60 of its internal statutes, which states:

Section 60 – Once the mandated term of an executive committee expires, if for any reason the elections have not been verified, or the result thereof is still pending legal resolution, the vigilance committee shall assume the running of the union from that date, in the first instance calling elections within 30 days, and in the second, if necessary, seeking a decision from the relevant authority within 15 days.

- 967.** The complainants consider that this decision is illegal under Mexican law, since its interpretation fails to recognize that the appropriate internal bodies of the STSPE to examine and resolve such claims are the committee for honour and justice, the vigilance committee, the electoral committee, the executive committee itself and, principally, the

union's highest authority, i.e. the general assembly. Nevertheless, the much-cited Tribunal issued a decision that states:

... by virtue of the fact that the electoral process undertaken to elect an executive committee for 2006–09 has been contested under the terms of section 60 of the current statutes of the Trade Union of Workers in the Service of the State Authorities, and that the corresponding legal decision is therefore subject to the present procedure, as of today the vigilance committee shall assume the running of the union until the current dispute has been settled.

- 968.** As well as interrupting the management activities of the serving executive committee, since the term of the outgoing committee was due to expire on 15 August 2006, this restricted the exercise of the right to trade union autonomy by imposing an executive body that had not been democratically elected by the workers. In addition to the fact that it contravenes the time limits set out in the statutes, given that the mandate of the vigilance committee expired on 16 August 2008, attempts have been made, based on the above agreement, to extend the term of this spurious representative body imposed by the Tribunal.
- 969.** As a result, at the time of presenting this complaint, no general assembly has been held since the Tribunal installed the union's executive body, as both the labour court and the vigilance committee, serving as the union's executive body, state that an assembly will not be called until the dispute has been resolved. This violates trade union autonomy: an executive body has been imposed by means of an administrative order issued by the authorities, altering the union's statutes by extending the executive body's term, and even deliberately delaying the process for airing grievances. In this regard, since October 2007, the Conciliation and Arbitration Tribunal has neither provided evidence nor fixed a date for continuing the examination of the case.
- 970.** The aforementioned decision by the Tribunal was amended and a new version was issued on 13 August 2006, clarifying that the vigilance committee would assume the role of executive body for the union once the current executive committee's mandate expired, invalidating the decision of 7 August 2006, on the basis of which all the subsequent actions had been taken. This demonstrates the illegality of the Tribunal's behaviour and its interference in trade union activities in order to promote the interests of the Mexican Government.
- 971.** On 8 August 2006, based on the results of the electoral process, the serving executive committee requested the Conciliation and Arbitration Tribunal for the State of Querétaro to recognize the executive committee elected by vote for the period 15 August 2006 to 15 August 2009 and register it officially for legal purposes; this request was accompanied by the necessary supporting documentation, including the notice of election, scrutiny documents and the decision of the electoral committee. In the light of this request, the Tribunal ruled that, as the electoral process had already been contested, it would deny the committee official registration and would enforce its decision of 7 August to appoint the vigilance committee of the STSPE as the union's executive body.
- 972.** The complainant also alleges that, on 15 August 2006, a commemorative assembly of the STSPE was held, in accordance with the provisions of the union's internal statutes, section 26 of which states:

Section 26 – The union shall hold an annual commemorative assembly to mark the anniversary of its constitution between 10 and 15 August, which shall be presided over by a president, two secretaries and two scrutineers, who shall be appointed by the members of the assembly and assisted by the executive committee. The purpose of this assembly shall be:

- I. To commemorate the date officially.

- II. To consider the general reports of the executive and vigilance committees, its other committees, and the union's representatives on the Joint Committees.
- III. To discuss and to approve or reject the reports referred to in paragraph II, in particular any matters relating to the financing of the union.
- IV. To consider the result of any elections to the governing bodies.
- V. To swear in any officials who have been elected.
- VI. Any other business stated in the relevant notice of convocation.

973. At the assembly, the number of those present was sufficient for the quorum required for the assembly to be legal. The assembly ratified the win by the tricolour team and declared it the executive committee elect for 2006–09, certifying this before a public notary and producing the appropriate notarized record. The confirmation of the committee by the commemorative assembly on 15 August 2006 and the notarized record produced by the same assembly on the same date are attached as annexes.

974. In line with the assembly's endorsement of the results of the election, which was won by the tricolour team, as well as the swearing-in of the executive committee elect and the decision taken by the general assembly held on 15 August, the union's representative body, in accordance with the provisions of section 95 of the Act on workers in the service of the state and local authorities of the State of Querétaro, submitted, on 17 August 2006, the request referred to by the Tribunal to recognize the STSPE's executive committee for the period 2006–09 and to grant the appropriate official registration for legal purposes. This request was accompanied by the necessary supporting documentation, which consisted of: the notice of convocation for the assembly of 15 August 2006; the report on the activities of the executive committee; the report of the vigilance committee; the report of the electoral commission on the process of electing the executive committee for 2006–09; the decision of the electoral commission; and the attendance list for the assembly held on 15 August 2006. Faced with this request, the Conciliation and Arbitration Tribunal on 24 August 2006 decided that, because the electoral process had already been contested, the request for registration would be added to Case No. 242/2006-1 covering the annulment claims, despite the fact that, in itself, it concerned a new act separate from the electoral process. The Tribunal glossed over the decision of the legally constituted assembly, deciding to deny official registration to the union's executive body. In other words, the authorities are refusing to recognize the wishes of the "grass-roots" workers, the electoral process, and the union's legally and formally elected leadership, thereby violating the right to freedom of association.

975. On 6 September 2006, the government departments in the State of Querétaro, where the union members work, informed them, at the instigation of the Conciliation and Arbitration Tribunal, that trade union dues and other trade union deductions levied on an individual basis, along with economic benefits, would be deposited with the Tribunal and only transferred to whichever body acquired legal personality. As legal personality was denied to the executive committee elect by the Tribunal, the dues were accordingly not transferred to it. These economic resources were deposited with the vigilance committee, acting as the union's executive body, in November 2006.

976. From 7 September 2006, the various government departments in the State of Querétaro where some of the members of the executive committee elect and of the outgoing committee work informed them, at the instigation of the Conciliation and Arbitration Tribunal, that the union's licences were being revoked, despite the fact that they had been issued for an indefinite period, in accordance with the provisions of section 33 of the General Labour Conditions and the Act on workers in the service of the state and local authorities.

977. Against this background, the members of the executive committee elect returned to their employment to find that a tactic of harassment and intimidation had been established in every workplace, for example, preventing them from performing activities that their union members requested of them, as well as unilaterally changing their hours of work or increasing their workload, and even posting people to supervise and intimidate every member of the committee elect. This was denied by both the labour authorities and management. Proof of this can be seen in a request submitted by the General Secretary elect for reinstatement of her working hours, unilaterally altered when she returned to her duties, which has been registered by the Local Conciliation and Arbitration Board for the State of Querétaro.

978. In a clear act of repression against union activism, on 9 February 2007, seven members of the executive committee elect were dismissed without just cause, among them Ms María del Carmen Gómez Ortega. The dismissals took place simultaneously and under different pretexts. The following representatives elect were dismissed:

Name	Union position	Department	Alleged cause of dismissal
María del Carmen Gómez Ortega	General Secretary	COBAQ	Abandoned post
Luis Guerrero Dávila	Internal Affairs Secretary	CECyTEQ	Failure to fulfil duties
Guillermo Alonso Gervacio	External Affairs Secretary	Executive Authority	None, but was pressurized to take early retirement
María Mercedes Hernández Uribe	Pensions and Housing Secretary	Executive Authority	None, but was pressurized to retire
Raúl Silva Menéndez	Political Action Secretary	CECyTEQ	None, but was threatened with dismissal of family members in other departments and obliged to resign
María Guadalupe Rodríguez Badillo	Minutes and Decisions Secretary	Executive Authority	Abandoned post
Luis Fernando Briseno Guasti	President of the Committee on Legislation	Executive Authority	Quarrel at work

A request for reinstatement was therefore submitted to the labour authorities, but the process has been drawn out by the repeated submission of improper claims, such as proceedings for annulment, lack of legal personality, accumulation, etc., with the sole objective on the part of management representatives of delaying the proceedings, in complicity with the labour authorities, by failing to comply with the provisions of Mexican labour law or to respect the principle of delivering justice promptly and expeditiously. The management's representative has stated, before the same Local Conciliation and Arbitration Board, that he was instructed by the governor, Mr Francisco Garrido Patrón, to keep the courts busy until the term of the committee elect expired, to enable the current state government's term to expire likewise without further conflict.

979. The complainant further alleges that, in March 2007, the General Secretary elect, Ms María del Carmen Gómez Ortega, along with other members of the committee elect, was named as a possible culprit in the preliminary investigation No. DP/07/2007 against five members of the executive committee that served until the vote in August 2006, for alleged fraud at the union's Loans and Savings Fund, an allegation that was signed by 15 workers under pressure from their immediate bosses, according to the workers themselves.

- 980.** In response to each and every action by the Tribunal that it considers to violate freedom of association, the union has invoked various remedies, all of which, rather suspiciously, have been transmitted to the same Second District Court, which always exhausts the time allowed, ignoring the principle of applying the law quickly and expeditiously.
- 981.** In the complainant's view, the allegations it makes violate both Convention No. 87 and national legislation, including sections 92 and 99 of the Act on workers in the services of the state and local authorities and section 370 of the Federal Labour Act, as no labour authority may order the cancellation, dissolution or suspension of a trade union, which is the sole preserve of unions. Furthermore, no authority may change, modify or establish the working methods of a trade union organization, as this is detrimental to the fundamental rights of workers.

B. The Government's reply

- 982.** In its communications of 19 January 2009 and 25 February 2010, the Government, referring to the complainant's allegations concerning the victory of the tricolour team in the elections to the executive committee of the STSPE held on 31 July and 1 August 2006, states that it is not true that the candidates accepted the tricolour team's win, as each of the green, blue, purple and red teams filed a claim contesting the electoral process and requesting that the election be annulled and that a new one be ordered, as set out in Cases Nos 242, 243, 244 and 249/2006/1, which are consolidated in Case No. 242/2006/1. In accordance with section 158(III) of the Act on workers in the service of the state and local authorities, it was the responsibility of the Conciliation and Arbitration Tribunal for the State of Querétaro to examine the dispute, at the request of the parties. It cannot, therefore, be alleged that there has been government interference.
- 983.** The complainant's claim concerning the illegality of the Tribunal's actions is false because, in accordance with the claims procedure, all parties and co-respondents must be notified and, if they are not, the Tribunal must arrange a new date and time for a hearing. Furthermore, this Tribunal did not resolve the case in three days, as the complainant states, but applied the statutes of the STSPE in accordance with section 60, which stipulates that, in the event of elections pending legal resolution, the vigilance committee is to assume the running of the union until the decision of the relevant authority is known. Moreover, the case has not been resolved, as is mistakenly claimed; on the contrary, this action began the case, which is currently at the stage of examination of evidence.
- 984.** The complainant is incoherent in its allegations, as it incorrectly cites the decision of the Conciliation and Arbitration Tribunal to appoint the vigilance committee to run the union, which was handed down on 7 August 2006, not 7 August 2008. Under section 158(III) of the Act on workers in the service of the state and local authorities, the Conciliation and Arbitration Tribunal is the competent body to examine and resolve the dispute, at the request of the dissenting teams that brought the case before the Tribunal, not, as the complainant wrongly states, the honour and justice, monitoring or electoral committees. This was confirmed by the Fourth District Court of the State of Querétaro in *amparo* Case No. 1019/2006-I, brought by Ms María del Carmen Gómez Ortega (tricolour team) and a third party in which it refused the provisional suspension of the action contested, as well as the protection and justice offered by federal *amparo*, thereby confirming the decision of the Conciliation and Arbitration Tribunal of 7 August 2006 to appoint the vigilance committee as executive body until the Tribunal had given a final ruling.
- 985.** Furthermore, the Conciliation and Arbitration Tribunal did not impose leadership on the union, but stuck strictly to the union's internal statutes in deciding to take note of the fact that the vigilance committee would assume the running of the union until the annulment claim had been settled, as provided for in section 60 of the statutes.

- 986.** The Tribunal did not deliberately delay the process of airing grievances. It should be pointed out that tribunals are not obliged to rule immediately, nor in favour of one of the parties specifically, as their decisions are taken after analysing and assessing the evidence submitted by the parties to the dispute. At the appropriate point in the proceedings, therefore, if the complainant receives a ruling contrary to its interests, it can appeal the decision, exercising the remedies provided for by the country's legal system.
- 987.** With regard to the allegation that, on 15 August 2006, a commemorative assembly was held by the STSPE in accordance with section 26 of its statutes, and that, on 17 August 2006, the union's representatives submitted a request for recognition of the STSPE executive committee for 2006–09 to the Conciliation and Arbitration Tribunal, together with the corresponding request for official registration, the Government underlines that the convocation notice for the commemorative assembly included publicizing the results of the election but did not invite it to elect a new committee. It also omitted to state that proceedings to contest the legality of the elections had already been brought before the Conciliation and Arbitration Tribunal. The Tribunal received the parties to give evidence and the dissenting teams opposed the renewed request from the tricolour team, led by Ms María del Carmen Gómez Ortega, and requested that the case before the Tribunal should continue, on the grounds that the election process had been vitiated and was therefore invalid. It would therefore be improper to grant official registration to the supposed executive committee elect, as it was necessary to continue the proceedings brought before the Tribunal, during which time the vigilance committee would act as executive committee until the final ruling was given. The Government states that the decisions of the Conciliation and Arbitration Tribunal have been confirmed by the Fourth District Court of Querétaro, which has ruled official registration to be inadmissible, and the Third District Court, which has confirmed both the refusal to grant provisional suspension and the denial of protection through the federal legal system.
- 988.** With regard to the allegation concerning the transfer of trade union dues to the vigilance committee, acting as the union's executive body, in November 2006, the Government states that the vigilance committee requested the Tribunal, in union registration document No. 01, to effect the real and material transfer of the union's premises, real and personal property, and economic assets. In response to this request, on 3 July 2007, the Tribunal ordered the actuary to arrange the transfer of the articles requested to the legal representative of the STSPE.
- 989.** With regard to the alleged dismissal of and "preliminary criminal investigations" against trade union members, the Government states that the complaint does not constitute an actual allegation, as it does not make the necessary connection between its arguments and the documentary evidence it refers to. In other words, even though the relevant annexes are physically provided, none of them gives the reasons why the dismissals took place, because the names of the workers who were allegedly dismissed or who have allegedly been victims of intimidation and violence are simply listed, but the complaint does not succeed in proving anything, as none of its claims are substantiated by evidence. Of course, without conceding that the dismissals alluded to in the complaint have taken place, the workers affected could exercise their rights before the appropriate administrative or legal authorities at any time. This has not happened.
- 990.** The Government also refers to the allegation that, in response to the actions by the Tribunal related to a violation of freedom of association, various remedies have been invoked, all of which, rather suspiciously, have been transmitted to the same Second District Court, which always exhausts the time allowed, ignoring the principle of applying the law quickly and expeditiously, and invariably the ruling goes in favour of the union, requiring protection to be sought under federal law by filing appeals against the rulings. In this respect, the Government states that the information given is false, as the Conciliation

and Arbitration Tribunal has acted in accordance with the law, grounding all its decisions in the union's own statutes and in the Act on workers in the service of the state and local authorities. All the rulings given by this Tribunal have been confirmed by the judicial authorities.

991. The Government concludes by stating that:

- None of the facts or actions mentioned in the complaint presented amount to the alleged failure by the Government of Mexico to respect the principle of freedom of association and the right to unionize enshrined in ILO Conventions Nos 87 and 135, as it has not been demonstrated that any Mexican authority has violated the labour rights of the union's members or their freedom to belong to a trade union.
- The Conciliation and Arbitration Tribunal of the State of Querétaro cannot be accused of interference in the internal activities of the STSPE, as each of the green, blue, purple and red teams filed a claim contesting the electoral process, as set out in consolidated Case No. 242/2006/1, and, in accordance with section 158(III) of the Act on workers in the service of the state and local authorities, it was the responsibility of the Conciliation and Arbitration Tribunal for the State of Querétaro to examine the dispute, at the request of the parties.
- The alleged failure to respect the decision of the assembly is not attributable to the Conciliation and Arbitration Tribunal but to the green, blue, purple and red teams who requested that the electoral process be annulled and that new elections be held.
- The Conciliation and Arbitration Tribunal has not refused recognition to any union representative group or restricted the activities thereof, because, as a result of the requests submitted by the green, blue, purple and red teams, the proceedings brought are still at the stage of examination of evidence.
- In this respect, the Conciliation and Arbitration Tribunal has acted in strict compliance with judicial and legal safeguards, following the procedure laid down in the statutes of the STSPE, particularly section 60 thereof, which stipulates that, in the event of elections pending legal resolution, the vigilance committee is to assume the running of the union until the decision of the relevant authority is known.
- All decisions of the Tribunal in question have been confirmed by the appropriate judicial authorities.
- There is no evidence to demonstrate that the Querétaro authorities have carried out any act of repression against the union's elected leaders.
- The Conciliation and Arbitration Tribunal has not changed, modified or prescribed the working methods of the union, but has acted in strict accordance with the provisions of the STSPE's own statutes and the Act on workers in the service of the state and local authorities.

992. Lastly, the Government attaches as an annex information provided by the Conciliation and Arbitration Tribunal for the State of Querétaro, and requests that the complaint be rejected.

C. The Committee's conclusions

993. *The Committee observes that, in the present complaint, the WFTU basically alleges interference by the authorities in elections to the executive committee of the STSPE, particularly through the decision of the Conciliation and Arbitration Tribunal for the State*

of Querétaro to: (1) ignore the results of the vote in favour of the tricolour team and appoint the vigilance committee to run the union, in place of the executive committee elect; and (2) ignore the request of the serving executive committee (whose mandate had not expired) for the authorities to register the executive committee elect, as well as the confirmation by the commemorative assembly of the win by the tricolour team and its request to register the executive committee elect. The allegations also refer to the refusal to issue trade union licences and transfer union dues to the executive committee elect, at the decision of the Tribunal.

994. The Committee takes note of the fact that the Government denies any government interference and maintains that the decisions of the Conciliation and Arbitration Tribunal are consistent with legislation and have been confirmed by the appropriate higher judicial authorities, in particular the decision to appoint the vigilance committee to run the union (in place of the executive committee elect), in accordance with the union's statutes. The Committee takes note of the fact that these legal decisions may have led to other subsequent decisions preventing the transfer of union dues to the executive committee elect and denying trade union licences. The Committee takes note of the fact that, according to the Government, the courts have resolved the issue of the union's economic assets (including union dues) in favour of the union's representative, i.e. the vigilance committee. The Committee observes that the complainant itself recognizes that claims have been brought by various teams that participated in the union elections, and that these claims state that the tricolour team used some of the opposing teams' colours in its logo, as well as the fact – entirely permissible under the statutes, according to the complainant – that some members of the committee elect had served on the outgoing committee. This being the case, the Committee concludes that the complainant has not demonstrated government interference and that the Tribunal's appointment of the vigilance committee to run the union until the Tribunal had ruled on the internal dispute concerning the union elections seems to conform to legislation and the union's statutes.
995. The Committee points out, however, that the elections were completed on 1 August 2006, that the claims were submitted a few days later, that the present complaint to the Committee on Freedom of Association was presented on 28 August 2008, that the complainant objects to the delay in proceedings, and that no order to hold an assembly has been issued (which, according to the Government, is desired by the teams contesting the electoral process). According to the complainant, by the date on which the complaint was submitted, there had been no instruction to provide evidence since October 2007, nor had any date been set to continue the hearings. The Committee observes that the Government states that the Tribunal has not deliberately delayed the process for airing grievances and that the courts "are not obliged to rule immediately, nor in favour of one of the parties specifically, as their decisions are taken after analysing and assessing the evidence submitted by the parties to the dispute". The Committee also notes the Government's confirmation, in its reply of January 2009, that the proceedings are still at the stage of examination of evidence and observes that more than two-and-a-half years have passed since the electoral process was contested.
996. The Committee concludes that, regardless of the claims brought by the parties in 2006, the legal proceedings to contest the union elections of the STSPE have been excessively delayed and considers that this delay is detrimental not only to the trade union sector that the complainant organization represents, but also to other sectors that contested the elections. The Committee regrets this delay and wishes to draw attention to the danger presented to the exercise of trade union rights by excessive slowness in the administration of justice, underlining the principle that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 105]. The Committee expects that the court will issue its ruling without further delay and requests the Government to keep it informed in this regard.

997. *Furthermore, the Committee observes that, in its complaint, the complainant alleges the use of tactics of harassment and intimidation against members of the executive committee elect (claims having been brought against the committee from other quarters): unilateral changes to working hours or increases in workload, and supervision at work by third parties. The Committee observes that the complainant also alleges that a case has been brought by the General Secretary elect, Ms María del Carmen Gómez Ortega, against unilateral changes to her working hours. Moreover, the complainant alleges that, on 9 February 2007, five members of the executive committee elect (whose names are listed) were dismissed without just cause, and that two others were pressurized to take early retirement; according to the complainant, the reinstatement in their posts of the five workers dismissed has been delayed by a stream of procedural matters and remedies invoked by management representatives (according to the allegations, the management representative at the Conciliation and Arbitration Tribunal received instructions from the governor of Querétaro to drag out the dismissal proceedings). Lastly, according to the allegations, the authorities have named Ms María del Carmen Gómez Ortega and other union members in connection with alleged fraud at the (union's) Loans and Savings Fund based on a statement made by 15 workers under pressure from their immediate bosses. The Committee observes, however, that, since the complaint was presented, the complainant has not mentioned the result of this action.*

998. *The Committee takes note of the Government's statements to the effect that the complainant does not provide evidence to support its claims of dismissals or acts of intimidation. The Committee takes note of the Government's statements to the effect that there is no evidence of any acts of repression by the Querétaro authorities, and that the workers in question may approach the administrative or judicial authorities at any time to exercise their rights but have not done so. The Committee observes that the Government does not confirm or deny that the dismissals and acts of repression have taken place and that it states, at the same time, that the alleged victims have not approached the administrative or judicial authorities. Given the complainant's statement affirming at least the existence of the legal proceedings concerning the dismissal of union members and a change to working hours, the Committee requests the complainant to provide the text of the legal proceedings it has initiated and any ruling handed down in that regard so that the Government can send its observations.*

The Committee's recommendations

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

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

CASE NO. 2601

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

**Complaint against the Government of Nicaragua
presented by
the Confederation of Trade Union Unity (CUS)**

Allegations: The Confederation of Trade Union Unity (CUS) alleges that trade union officials have been dismissed, as part of a campaign to get rid of trade union organizations that do not agree with the Government; in addition it is alleged that collective agreements are being broken

1000. The Committee examined this case at its May–June 2009 session, when it presented an interim report to the Governing Body [see 354th Report, paras 993–1018, approved by the Governing Body at its 305th Session].

1001. The Confederation of Trade Union Unity (CUS) presented new allegations in a communication dated 12 March 2009.

1002. The Government sent its observations in a communication dated 23 July 2009.

A. Previous examination of the case

1003. When it examined this case at its May–June 2009 meeting, the Committee made the following recommendations [see 354th Report, para. 1018]:

- (a) The Committee stresses the importance of the allegations and regrets that the Government has not sent its observations on this case despite having been invited to do so on several occasions and despite an urgent appeal in that respect; the Committee urges the Government to be more cooperative in the future with regard to its procedural rules.
- (b) The Committee urges the Government to promote dialogue and negotiation between the Ministry of Transport and the trade unions in order to overcome the various problems that have been raised in this case – including with regard to compliance with the current collective agreement and the bipartite agreement on wage adjustment. The Committee requests the Government to keep it informed in this regard. In these circumstances, the Committee considers it necessary to conduct an independent investigation into the allegations that should cover – with particular attention – the alleged failure by the Ministry of Transport to comply with the judicial and administrative decisions and judgements in favour of the unionists.
- (c) The Committee urges the Government to send without delay detailed observations on the new allegations by the complainant organization, also including copies of the administrative and judicial decisions concerning the different allegations.
- (d) Finally, in the absence of any reply from the Government concerning the recommendations it made in May–June 2008, the Committee reiterates the recommendations it made at that time:
 - With regard to the alleged disregard for and suspension of the bilateral agreement reflected in a memorandum signed on 28 March 2005 between workers and the

Ministry of Transport and Infrastructure with regard to the recognition by way of a salary adjustment of the equivalent of 80 additional hours per month for all the drivers, the Committee, while noting that the MTI and the trade union organizations concerned agreed to extend the validity of the collective agreement in the MTI, expects that this matter will be the object of future negotiations if it has not been dealt with yet in the current collective agreement.

- With regard to the alleged dismissal of Mr José David Hernández Calderón, secretary of promotion and advertising of the Union of Employees of the MTI “Andrés Castro” (SEMTIAC) on 4 May 2007, the Committee urges the Government to implement the administrative resolutions and to take the necessary measures without delay to ensure that the dismissed union official is reinstated in his post, with payment of outstanding wages and other benefits. The Committee requests the Government to keep it informed in that regard.
- With regard to the alleged persecution and harassment in order to later on proceed to the dismissal of Mr González Gutiérrez, finance secretary of the SINATRA–DGTT–MTI, the Committee requests the Government to keep it informed of any legal appeal that the union official, Mr González Gutiérrez, may have presented against the resolution of the General Labour Inspectorate.
- The Committee requests the Government to provide information on the specific reasons behind the request to cancel the employment contract of the union official, Mr Javier Ruiz Alvarez, and to inform it of the final outcome of the proceedings before the Departmental Labour Inspectorate.
- The Committee requests the Government to communicate its observations with regard to the following allegations: (i) dismissal, without respect for trade union immunity or legal process, of Mr José María Centeno, leader of the SINATRA–DGTT–MTI on 26 April 2007; (ii) transfer of Mr Marcos Mejía López, a member of the Executive Committee of the Union of Employees of the MTI “Andrés Castro” (SEMTIAC); and (iii) workplace harassment of union official Mr Alvaro Leiva Sánchez, Secretary for Labour Matters of the Union of Employees of the MTI “Andrés Castro” (SEMTIAC) – he was dismissed on 11 May and reinstated the same day and is currently again at risk of dismissal.

B. New allegations

1004. In its communication dated 12 March 2009, the CUS states that the Government has not complied with the earlier recommendations of the Committee, since the employees of the Ministry of Transport and Infrastructure (MTI) are still confronted by the abuse of authority in the form of violations of their freedom of association. The CUS alleges that the current administration of the Ministry is infringing article 12 of the collective agreement in force concerning the resources that trade unions need to carry out their activities (computer with access to Internet, printer, office supplies, use of a vehicle, etc.) and that these facilities are made available only to a trade union that follows the party line. The CUS also states that stability of employment is not respected in the MTI and that instability is encouraged regardless of workers’ competence and years of service. It alleges that the following employees have been dismissed for anti-union reasons: Ms Perla Marina Corea Zamora, Secretary-General of the Independent Workers Trade Union of the MTI, Ms Yerigel Zúñiga Izaguirre, the finance secretary of that union, Lila Carolina Alvarado Muñoz, first spokesperson of the watchdog unit of the Union of Employees of the MTI “Andrés Castro” (SEMTIAC), Mr Freddy Antonio Velásquez Luna, Secretary-General of the MTI Workers’ Trade Union (SITRAMTI) and Secretary-General of the Democratic Federation of Public Service Workers (FEDETRASEP), Mr Jorge Boanerges Cruz Berríos, organization and information secretary of SITRAMTI and spokesperson for FEDETRASEP, Mr Byron Antonio Tercero Ramos, organization, records and agreements secretary of the union SINTESESIP–MTI and Mr Francisco Zamora Vivas, finance secretary of SITRAMTI.

C. The Government's reply

- 1005.** In a communication dated 29 June 2009, the Government sent its observations in response to the recommendations formulated by the Committee in June 2008 and June 2009.
- 1006.** With regard to the memorandum dated 18 March 2005 concerning the payment of 80 additional hours on a permanent basis, whether worked or not, the Government states that on 14 July 2005 a collective agreement was signed between workers' organizations and the MTI, which in clause 35 stipulates that "additional hours shall be paid to workers when so authorized by their immediate chief, payable in the first week of the month after they have occurred" and in clause 44 establishes that the undertaking "shall every year pay all workers a bonus based on the average number of additional hours that were due for the three previous months, irrespective of their entitlement to an end-of-year bonus". The collective agreement thus rendered null and void the terms established unilaterally in the memorandum.
- 1007.** Concerning Mr José David Hernández Calderón, a senior officer of the SEMTIAC, whose reinstatement in his post with payment of outstanding wages and other benefits the Committee requested, the Government states that the request submitted by the union official on 24 May 2009 is currently before the First District Labour Court of Managua, where it is awaiting the Court's ruling. The Government states that it will in due course inform the Committee of the decision taken by the Court.
- 1008.** With respect to Mr Guillermo González Gutiérrez, the Government states that, in a decision rendered on 22 January 2008, the Civil Chamber No. 1 of the Court of Appeals of the constituency of Managua declared that his appeal for legal protection was irreceivable and dismissed the case.
- 1009.** As regards Mr Javier Ruiz Álvarez, the Government states that in a notarized, written statement addressed to the ad hoc Civil Court, he withdrew his appeal. Mr Ruiz Álvarez is currently working at the MTI in the General Directorate of Water Transport.
- 1010.** Relating to the alleged dismissal without respect for trade union immunity or legal process of Mr José María Centeno, leader of the National Workers' Trade Union of the DGT-MTI (SINATRA-DGTT-MTI), on 26 April 2007, the Government states that it requested information on the subject from the MTI, which informed it that Mr Centeno had been working as the MTI's departmental delegate for transport in Nueva Segovia and that his contract, which was for a position of trust, had been terminated in accordance with article 14 of the Civil Service and Administrative Career Act.
- 1011.** With regard to the alleged transfer of Mr Marcos Mejía López, a member of the Executive Committee of SEMTIAC, the Government states that he had lodged an appeal for legal protection against alleged threats of dismissal with Civil Chamber No. 1 of the Court of Appeals of the constituency of Managua. Subsequently, on 30 January 2008, the secretariat of the Civil Chamber informed the Director of Human Resources of the MTI of the decision that had been handed down in connection with the appeals for legal protection involving trade unions of the MTI and directed against MTI officials. By decision of 2.11 p.m. of 17 May 2007, the Civil Chamber informed Mr Mejía López that he needed to ratify his appeal for legal protection in person or through a duly appointed specialized lawyer. Mr Mejía López was notified of this decision at 3.30 p.m. on 28 May 2007 but failed to comply with the order to appear issued by the Civil Chamber, which in accordance with article 28 of the Legal Protection Act decided to treat the matter as if the appeal had not been lodged and so closed the case.

1012. Concerning the alleged workplace harassment of union official Mr Alvaro Leiva Sánchez, Secretary for Labour Affairs of SEMTIAC, who is said to have been dismissed on 11 May 2007 and reinstated the same day and to be again at risk of dismissal, the Government states that it requested information from the MTI, which indicated that the Constitutional Chamber of the Supreme Court of Justice handed down its decision on 16 March 2009. After reviewing the administrative action taken by the impugned MTI officials, the Constitutional Chamber found that, far from having been threatened with dismissal, Mr Leiva Sánchez had been encouraged by the MTI to take part in trade union activities abroad, despite the fact that the file on the case listed a number of memorandums drawing attention to his negligence and irresponsibility in the performance of his duties, without him actually having been dismissed, since he was still employed at the MTI. There are therefore no valid grounds for the appeal for legal protection, or technically speaking, in Mr Leiva Sánchez's case two of the criteria for lodging an appeal for legal protection are missing, namely, direct, personal and actual (rather than potential) prejudice, and consequently a violation of the Political Constitution. That being so, the Constitutional Chamber is of the opinion that the impugned officials acted in keeping with the law and that, if they resorted to disciplinary measures, it was because the complainant engaged in activities that had nothing to do with the free exercise of his trade union duties, and that he is in no imminent danger of being dismissed for being a member of the Executive Committee of the trade unions at the MTI but merely at the early stages of a procedure that is provided for and authorized by the law. The Constitutional Chamber of the Supreme Court of Justice decided that the appeal for legal protection lodged by Mr Leiva Sánchez in his capacity as Secretary-General of the SEMTIAC was therefore dismissed.

1013. With respect to the new allegations presented by the CUS on 12 March 2009, the Government states the following:

- the case of Ms Perla Marina Corea Zamora, port engineer in the port standards department of the MTI's General Directorate of Water Transport, is currently awaiting a decision by the Constitutional Chamber of the Supreme Court of Justice, as the appeal lodged by the complainant on 2 July 2008 was contested by the MTI's division of human resources on 29 August 2008;
- the case of Ms Yerigel Zúñiga Izaguirre is currently pending with the Constitutional Chamber of the Supreme Court of Justice; the file on the case contains the MTI division of human resources' response of 23 December 2008 to the appeal lodged by Ms Zúñiga Izaguirre on 14 November 2008;
- the case of Ms Lila Carolina Alvarado Muñoz has been dealt with at two levels of jurisdiction: (i) the Standing Committee on Human Rights (CPDH) and the Office of the Public Prosecutor, which have both ruled in favour of the MTI; and (ii) the Constitutional Chamber of the Supreme Court of Justice, where the case is currently pending; the file contains the reply on 27 June 2008 of the division of human resources of the MTI concerning the appeal for legal protection lodged by Ms Alvarado Muñoz on 21 May 2008;
- the case of Mr Freddy Antonio Velásquez Luna, Mr José Boanerges Cruz Berríos, Mr Byron Antonio Tercero Ramos and Mr Francisco José Zamora is before the Constitutional Chamber of the Supreme Court of Justice.

D. The Committee's conclusions

1014. *The Committee notes that the Government has sent its observations on pending issues and on the new allegations presented by the complainant organization.*

- 1015.** *With regard to the alleged disregard for and suspension of the bilateral agreement reflected in a memorandum signed on 28 March 2005 between the workers and authorities of the MTI relating to the recognition by way of a salary adjustment of the equivalent of 80 additional hours per month for all the drivers, the Committee had noted that the MTI and the trade union organizations concerned had agreed to extend the validity of the collective agreement in the MTI and expected that the matter would be the object of future negotiations if it had not been dealt with yet in the collective agreement in force. The Committee notes the Government's statement that: (1) on 14 July 2005 a collective agreement was signed between workers' organizations and the MTI, clause 35 of which stipulates that additional hours are paid to workers when so authorized by their immediate chief, payable in the first week of the month after they have occurred, and clause 44 of which establishes that the undertaking pays all workers every year a bonus based on the average number of additional hours that were due for the three previous months, irrespective of their entitlement to an end-of-year bonus; and (2) the collective agreement thus rendered null and void the terms established unilaterally in the memorandum. The Committee takes note of this information with interest.*
- 1016.** *Concerning the alleged dismissal of Mr José David Hernández Calderón, secretary of promotion and advertising of the SEMTIAC on 4 May 2007, the Committee had urged the Government to implement the administrative resolutions and to take the necessary measures without delay to ensure that the dismissed union official was reinstated in his post, with payment of outstanding wages and other benefits. The Committee notes the Government's statement that the request submitted by the union official on 24 May 2009 is currently before the First District Labour Court of Managua, where it is awaiting the Court's ruling, and that the Government will in due course inform the Committee of the decision taken by the Court. The Committee requests the Government to keep it informed of the decision handed down in this regard.*
- 1017.** *With respect to the alleged persecution and harassment in order to later proceed to the dismissal of Mr González Gutiérrez, finance secretary of the SINATRA–DGTT–MTI, the Committee had requested the Government to keep it informed of any legal appeal that the union official, Mr González Gutiérrez, might have presented against the resolution of the General Labour Inspectorate. The Committee notes the Government's statement that, in a decision rendered on 22 January 2008, the Civil Chamber No. 1 of the Court of Appeals of the constituency of Managua declared that his appeal for legal protection was irreceivable and dismissed the case. In the light of this information and the fact that the complainant organization has not commented on the dismissal of the case, the Committee will not pursue its examination of these allegations any further.*
- 1018.** *As regards the alleged request to cancel the contract of employment of union official Javier Ruiz Álvarez, the Committee had requested the Government to provide information on the specific reasons behind that request and to keep it informed of the final outcome of the proceedings before the Departmental Labour Inspectorate. The Committee notes the Government's statement that Mr Ruiz Álvarez withdrew the appeal that he had lodged with the courts. The Committee takes note with interest that he is currently working at the MTI in the General Directorate of Water Transport.*
- 1019.** *Relating to the alleged dismissal without respect for trade union immunity or legal process of Mr José María Centeno, leader of the SINATRA–DGTT–MTI on 26 April 2007, the Committee notes the Government's statement that the MTI had informed it that Mr Centeno's contract, which was for a position of trust, had been terminated in accordance with article 14 of the Civil Service and Administrative Career Act. While the Committee appreciates that workers in positions of trust can be freely appointed and removed, it observes that the Government does not deny that Mr Centeno held a trade union post and recalls the following: "One of the fundamental principles of freedom of*

association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom." [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth (revised) edition, 2006, para. 799]. In these circumstances, the Committee calls upon the Government to conduct an inquiry into the reasons for terminating the contract of union official Mr Centeno and, in the event it is found that it was due to his legitimate trade union activities, to endeavour to have him reinstated.

- 1020.** *With regard to the alleged transfer of Mr Marcos Mejía López, member of the Executive Committee of SEMTIAC, the Committee notes the Government's statement that Mr Mejía López had lodged an appeal for legal protection against alleged threats of dismissal with Civil Chamber No. 1 of the Court of Appeals of the constituency of Managua but that since he did not appear in court to ratify his appeal, it was decided to treat the matter as if the appeal had not been lodged. The Committee observes that the Government does not deny that union official Mr Mejía López was transferred, and calls on it to take the necessary measures to conduct an inquiry into the reasons for his transfer and, in the event it is found that the transfer was due to his exercise of trade union activities, to ensure that he is transferred back to his previous post.*
- 1021.** *Concerning the alleged workplace harassment of union official Mr Alvaro Leiva Sánchez, secretary for labour affairs of the SEMTIAC, who is said to have been dismissed on 11 May 2007 and reinstated the same day and to be again at risk of dismissal, the Committee notes the Government's statement that the union official had lodged an appeal for legal protection with the judicial authorities and that the Constitutional Chamber of the Supreme Court of Justice, in ruling on the matter, found that, far from receiving threats of dismissal, the complainant had been encouraged by the institution to take part in trade union events abroad and had eventually dismissed the appeal. In the light of this information, the Committee will not pursue the examination of this allegation any further.*
- 1022.** *With respect to the alleged anti-union dismissals of Ms Perla Marina Corea Zamora, Secretary-General of the Independent Workers Trade Union of the MTI, Ms Yerigel Zúñiga Izaguirre, the same union's finance secretary, Ms Lila Carolina Alvarado Muñoz, first spokesperson of the watchdog unit of the SEMTIAC, Mr Freddy Antonio Velásquez Luna, Secretary-General of the SITRAMTI and Secretary-General of FEDETRASEP, Mr Jorge Boanerges Cruz Berríos, organization and information secretary of SITRAMTI and spokesperson for the FEDETRASEP, Mr Byron Antonio Tercero Ramos, organization, records and agreements secretary of SINTESESIP-MTI and Mr Francisco Zamora Vivas, finance secretary of the SITRAMTI, the Committee notes the Government's statement that they had lodged appeals which were awaiting the decision of the Constitutional Chamber of the Supreme Court of Justice. The Committee expects that the judicial authority will shortly hand down its decision and requests the Government to keep it informed of the outcome.*
- 1023.** *Finally, as regards the allegation that the current administration of the MTI is infringing article 12 of the collective agreement in force concerning the resources that trade unions need to carry out their activities (computer with access to Internet, printer, office supplies, use of a vehicle, etc.) and that these facilities are made available only to a trade union that follows the party line, the Committee recalls that "agreements should be binding on the*

parties” [see *Digest*, *op. cit.*, para. 939] and notes that both the authorities and the employers must avoid any form of discrimination among trade union organizations that have signed the same collective agreement. That being so, the Committee calls on the Government to conduct an inquiry into the matter and, should it find the allegation to be true, to take steps to bring the parties together and ensure full compliance with the clauses of the collective agreement cited by the complainant organization.

The Committee’s recommendations

1024. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *With regard to the alleged dismissal of Mr José David Hernández Calderón, secretary of promotion and advertising of SEMTIAC, and while noting the Government’s statement that the request before the First District Labour Court of Managua is awaiting the Court’s ruling, the Committee requests the Government to keep it informed of the decision that is handed down.*
- (b) *Concerning to the alleged dismissal without respect for trade union immunity or legal process of Mr José María Centeno, leader of the SINATRA–DGTT–MTI on 26 April 2007, the Committee calls on the Government to conduct an inquiry into the reasons for terminating his contract and, in the event it is found that the dismissal as due to his legitimate trade union activities, to endeavour to have him reinstated.*
- (c) *With respect to the alleged transfer of Mr Marcos Mejía López, member of the Executive Committee of the SEMTIAC, the Committee calls on the Government to conduct an inquiry into the reasons for his transfer and, in the event it is found that the transfer was due to his exercise of trade union activities, to take steps to have him transferred back to his previous post.*
- (d) *As regards the alleged anti-union dismissal of Ms Perla Marina Corea Zamora, Secretary-General of the Independent Workers Trade Union of the Ministry of Transport and Infrastructure, Ms Yerigel Zúñiga Izaguirre, the union’s finance secretary, Ms Lila Carolina Alvarado Muñoz, first spokesperson of the watchdog unit of the SEMTIAC, Mr Freddy Antonio Velásquez Luna, Secretary-General of the SITRAMTI and Secretary-General of the FEDETRASEP, Mr Jorge Boanerges Cruz Berríos, organization and information secretary of the SITRAMTI and spokesperson for the FEDETRASEP, Mr Byron Antonio Tercero Ramos, organization, records and agreements secretary of the SINTESESIP–MTI and Mr Francisco Zamora Vivas, finance secretary of the SITRAMTI, and while noting the Government’s statement that they had lodged appeals with the courts and that the appeals were awaiting the decision of the Constitutional Chamber of the Supreme Court of Justice, the Committee expects that the judicial authority will shortly hand down its decision and requests the Government to keep it informed of the outcome.*
- (e) *Relating the allegation that the current administration of the Ministry is infringing article 12 of the collective agreement in force concerning the resources that trade unions need to carry out their activities (computer with access to Internet, printer, office supplies, use of a vehicle, etc.) and that*

these facilities are made available only to a trade union that follows the party line, the Committee calls on the Government to conduct an inquiry into the matter and, in case of the veracity of the allegation, to take steps to bring the parties together and to ensure full compliance with the clauses of the collective agreement cited by the complainant organization.

CASE NO. 2681

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

**Complaint against the Government of Paraguay
presented by
the Trade Union Confederation of State Employees
of Paraguay (CESITEP)**

Allegations: The complainant organization alleges anti-union transfers of workers for participating in demonstrations in support of claims, and acts of violence against a woman union member

- 1025.** The complaint is set out in a communication of the Trade Union Confederation of State Employees of Paraguay (CESITEP) dated 2 December 2008.
- 1026.** The Government sent its observations in a communication of 19 June 2009.
- 1027.** Paraguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1028.** In its communication of 2 December 2008, the CESITEP states that it is presenting the complaint on behalf of the Trade Union of Workers of the Ministry of Public Health and Social Welfare. The CESITEP indicates that Ms Angelina Concepción Ortiz de Pessutto, Ms Juana Sosa and Ms Elsa Benítez are delegates of the union at the Itá District Hospital (which comes under the Ministry of Public Health and Social Welfare). The delegates were recognized as such by the assembly and by Resolution No. 1246 of 25 November 2008 of the Ministry of Justice and Labour. That means they are union representatives of the workers at the hospital in question, which has become a difficult environment for union members because of the harassment by the new management. The CESITEP alleges that the delegates in question were removed from the workplace where they are supposed to represent the union because they had taken action to defend workers and participated in three demonstrations in support of claims in front of the National Parliament. According to the CESITEP one of these marches was brutally crushed on 25 November 2008 (these allegations are the subject of Case No. 2693).
- 1029.** The CESITEP indicates that the new management wants to break up the existing trade union representation recognized by the workers and by the authorities, because action to defend workers' interests in a highly sensitive public sector such as the health sector does

not suit the new authorities, which prefer to fall back on the same strategies as those they complained of before they came to power; that is, to exclude those who do not share their views from the public administration in favour of tame officials who will allow them to act as they wish. According to the CESITEP, existing laws and regulations are being violated, for example, Law No. 1626/00, section 124 of which stipulates that: “the [job] security of the trade union official as provided for in the Constitution shall be guaranteed in those cases and subject to those limitations set out in this law, the labour law also being applicable”, and section 317 of the Labour Code according to which: “trade union stability shall mean the guarantee enjoyed by certain workers not to be dismissed, transferred, suspended or subjected to modified working conditions, without a valid reason approved in advance by a competent judge”.

- 1030.** According to the CESITEP, law is absolutely clear and does not allow for interpretation. No effort of study is needed to deduce the violation of any norm relating to relations between the State and its servants through action undertaken without any consultation and aimed solely at breaking up the union organization and harming its members. What is more, Ms Elsa Benítez suffers from ailments due to her nursing activity and is prone to health problems that prevent her from working the long hours that would be required to commute to the location where she has been transferred to, which is some 15 km from her present home and not served by public transport.

B. The Government’s reply

- 1031.** In its communication of 19 June 2009, the Government indicates that it has sent notes to the authorities mentioned in the note presented by the CESITEP. In this regard, the Government states that the report of the Collective Relations and Union Registration Section under the office of the Deputy Minister for Labour and Social Security indicates that: (1) Ms Angelina Concepción Ortiz de Pessutto, Ms Juana Sosa and Ms Elsa Benítez are not representatives of the Union of Employees of the Itá District Hospital (SIFUHDI), which was recognized by Resolution No. 23 of 23 May 2008; (2) the persons mentioned are delegates of the Decentralized Council of the Workers’ Union of the Ministry of Public Health and Social Welfare (SITRAMIS) for the Itá District Hospital, under Resolution No. 465 of 7 July; and (3) Resolution No. 1246 of 25 November 2008, mentioned in the note, is not in the registry of the Collective Relations and Union Registration Section (the Government also transmits information on the allegations regarding acts of violence that are being examined under Case No. 2693).

C. The Committee’s conclusions

- 1032.** *The Committee notes that in this case, the complainant organization alleges that in the context of anti-union harassment, Ms Angelina Concepción Ortiz de Pessutto, Ms Juana Sosa and Ms Elsa Benítez, delegates of the Union of Workers of the Ministry of Public Health and Social Welfare at the Itá District Hospital, were transferred to a distant location not served by public transport, thus removing them from the workplace where they act as union representatives, for having taken part in three marches in front of the National Parliament in support of workers’ claims.*
- 1033.** *The Committee notes the Government’s statements to the effect that the delegates in question are not representatives of the Union of Employees of the Itá District Hospital, but delegates of the Decentralized Council of the Trade Union of Workers of the Ministry of Public Health and Social Welfare for the Itá District Hospital, and that Resolution No. 1246 of 25 November 2008, mentioned in the allegations (and which according to the allegations recognizes their status as union representatives of another union) is not in the*

records of the Collective Relations and Union Registration Section of the Ministry of Labour.

- 1034.** *The Committee notes with regret that the Government has not communicated its observations on the allegations concerning the anti-union transfer of the union delegates in question. The Committee recalls that, when examining allegations on various forms of discrimination, it has highlighted on numerous occasions that “protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 781].*
- 1035.** *Under these circumstances, the Committee requests the Government to conduct an investigation without delay into alleged anti-union transfers of trade union delegates Ms Angelina Concepción Ortiz de Pessutto, Ms Juana Sosa and Ms Elsa Benítez, of the Itá District Hospital, and if the transfers are found to have been motivated by the trade union status of the employees in question, or by their exercise of legitimate trade union activities (for example, the exercise of the right to demonstrate, as the complainant organization alleges), to take the necessary measures to ensure that they are reinstated in the posts they occupied before their transfers. The Committee requests the Government to keep it informed in this regard.*

The Committee’s recommendation

- 1036.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

The Committee requests the Government to conduct an investigation without delay into alleged anti-union transfers of the union delegates Ms Angelina Concepción Ortiz de Pessutto, Ms Juana Sosa and Ms Elsa Benítez of the Itá District Hospital, and, if the transfers are found to have been motivated by the trade union status of the individuals in question, or by their exercise of legitimate union activities (such as the exercise of the right to demonstrate, as the complainant organization alleges), to take the necessary measures to ensure that they are reinstated in the posts they occupied before their transfers. The Committee requests the Government to keep it informed in this regard.

CASE NO. 2693

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

**Complaint against the Government of Paraguay
presented by
the Trade Union Confederation of State Employees of Paraguay (CESITEP)**

***Allegations: The complainant organization
alleges physical assault against a female union
official***

- 1037.** The complaint is set out in a communication from the Trade Union Confederation of State Employees of Paraguay (CESITEP) dated 10 January 2009.
- 1038.** The Government sent its observations in a communication of 19 June 2009.
- 1039.** Paraguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1040.** In its communication of 10 January 2009, the CESITEP alleges that a group of individuals broke into the regional hospital of Encarnación, in the Department of Itapúa and physically assaulted hospital officials and medical and paramedical staff working there at the time. The violence resulted in injury to one of the women employees, nurse Marcia Rivas, 60 years of age, who was dragged by the hair and beaten by a fully identified heavily built individual claiming to represent the local Liberal Party, and was then left lying injured on the floor. During the assault, she also was robbed of her mobile phone and personal papers. The injured woman is a union representative of CESITEP in the health district in question and the Chairperson of the Council in the Department of Itapúa. The assault therefore has connotations of anti-union persecution against the general background of the escalation of action by the Government against the Independent Trade Union Movement, which began with the brutal assault by security forces against peaceful demonstrators in front of the National Congress on 24 November 2008, as a result of which many people suffered injuries, including fractures in both legs sustained by Ms Zulma Rojas, union official and Vice-President of the Union of Nurses and Health-Care Staff of the Clinical Hospital (SDEHC).
- 1041.** The CESITEP adds that the assault against the workers and trade union officials is an open attack on fundamental human rights, including freedom of association and on the freedom to exercise activities that enable citizens to develop their creativity or, in this case, the freedom to provide humanitarian assistance at locations as sensitive and essential to the country as the public assistance and health centres.

B. The Government's reply

- 1042.** In its communication of 19 June 2009, the Government states that it sent notes to the authorities mentioned in the communication presented by the CESITEP, which refer to the situations of Ms Marcia Rivas and Ms Zulma Rojas. In this regard, the Government states that, according to the report of the Collective Relations and Union Registration Section

under the office of the Deputy Minister for Labour and Social Security: (a) Ms Zulma Rojas occupies the post of Vice-President of the SDEHC, registration No. 563, dated 4 August 2008; and (b) Ms Marcia Rivas is a regular member of the electoral tribunal of CESITEP under the terms of Resolution No. 467 of 4 May 2005. She is also a member of the Decentralized Council of Delegates of the Workers' Union of the Ministry of Health and Social Welfare (SITRAMIS) for the Department of Itapúa (Seventh Health District – Encarnación Regional Hospital), under the terms of Resolution No. 465 of 7 July 2008.

- 1043.** The reports of the National Police Command make it clear that: (a) national police report No. 75 notes that on 25 November 2008, at the metropolitan police precinct No. 5, no complaint made in connection with the alleged theft of a mobile phone has been recorded. As regards allegations of police repression, the report states that the demonstrators, comprising mainly employees of the Association of Union Employees of ANDE, attempted to force their way into the National Congress via 14 May Street. Finding that they were unable to do so, they threw stones at police officers posted in the area, hitting one of them (junior police officer Fabio Vargas Gallardo) in the face, while another junior police officer, Fredy Abel Benítez, was cut in the right leg as a result of firecracker detonations. The demonstrators were contained by warning shots of rubber bullets fired by anti-riot police. On that occasion, several boxes of firecrackers as well as knives and blunt weapons were confiscated. Some of the demonstrators suffered minor injuries and were taken to an emergencies centre; (b) according to national police report No. 85, the assault against Ms Marcia Rivas was perpetrated by a mob of demonstrators, not by the police. According to the police headquarters of the Department of Itapúa, Ms Marcia Rivas was assaulted in a corridor of the regional hospital at the hands of a mob of individuals led by Mr Dionisio Ibáñez, who repeatedly kicked her. She was kept in hospital for 24 hours and lodged a complaint at the police precinct No. 4 which is subordinate to Itapúa police headquarters.
- 1044.** According to the report of the Clinical Hospital, Ms Zulma Rojas sustained a unimaleolar fracture of the right fibula and a grade II sprain in the left ankle. She was treated by the emergency service at the abovementioned hospital and is still undergoing treatment there.
- 1045.** In conclusion, the Government states that according to the reports received from the competent authorities, Ms Marcia Rivas did indeed sustain injuries but as a result of action by other demonstrators, not because of the police. The Government notes that a demonstration was held in front of the National Congress, on the date referred to above, and the police acted to bar the demonstrators from entering Congress for reasons connected with the need to ensure the security of the Legislature.

The Committee's conclusions

- 1046.** *The Committee notes that in this case, the complainant organization alleges that in a general context of anti-union persecution, the police attacked demonstrators in front of the National Congress on 24 November 2008, causing many casualties, including fractures in both legs suffered by the Vice-President of the SDEHC, Ms Zulma Rojas, as well as the physical assault by a group of individuals in the Regional Hospital of Encarnación against Ms Marcia Rivas, Chairperson of the Council of the Department of Itapúa and union representative in the Itapúa health district, during the course of which she sustained injuries and was robbed of her mobile phone and personal papers.*
- 1047.** *As regards the alleged assault against peaceful demonstrators in front of the National Congress on 24 November 2008, which resulted in many casualties including fractures in both legs suffered by Ms Zulma Rojas, Vice-President of the SDEHC, the Committee notes that according to the Government: (1) the national police reported that demonstrators from the Association of Union Employees of ANDE attempted to enter the National*

Congress and, when unable to do so, threw stones at police officers posted in that area, injuring two of them; (2) on that occasion a number of boxes of firecrackers were confiscated, as well as knives and blunt weapons; and (3) a number of demonstrators were left with minor injuries and taken to the emergencies centre. The Committee further notes that according to the Government, Ms Zulma Rojas sustained a fracture in the right fibula and sprained her left ankle and was treated in the Clinical Hospital. While deploring the climate of violence, the Committee recalls that the exercise of the right to demonstrate must not include resorting to acts of violence against property or persons, and that the police should not go beyond their mandate of maintaining order, preferably using methods of crowd dispersal that do not cause injuries to demonstrators. The Committee also recalls that it has emphasized on numerous occasions that in cases in which the dispersal of public meetings by the police has involved serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities. Under these circumstances, the Committee urges the Government to take the necessary measures to conduct without delay an investigation into these allegations for the purpose of determining responsibilities. The Committee requests the Government to keep it informed of the final outcome of this investigation.

- 1048.** *As regards the physical assault allegedly suffered by Ms Marcia Rivas, Chairperson of the Council of the Department of Itapúa and union representative in the Itapúa health district, at the hands of a group of individuals when they entered the Regional Hospital of Encarnación, as a result of which she suffered injuries and was robbed of a mobile phone and personal papers, the Committee notes that according to the Government, the national police has stated that the assault was perpetrated by a mob of demonstrators, not by the police, and that no complaint had been lodged in connection with the alleged theft of the mobile phone. The Committee notes that the Government also transmits information from the Department of Itapúa police headquarters according to which: (1) Ms Marcia Rivas was the victim of the physical assault in question, and the mob responsible for it was led by Mr Dionisio Ibáñez, who kicked her repeatedly; and (2) she was kept in hospital for 24 hours and lodged a complaint at the police precinct No. 4 which comes under the Department of Itapúa police headquarters. In this regard the Committee requests the Government to keep it informed of the outcome of the complaint lodged by the union official Ms Marcia Rivas and in particular whether the individual identified as the author of the physical assaults has been tried and punished.*

The Committee's recommendations

- 1049.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) As regards the alleged assault against demonstrators in front of the National Congress on 24 November 2008, resulting in numerous injuries and, in particular, the fracture in both legs sustained by Ms Zulma Rojas, Vice-President of the SDEHC, the Committee urges the Government to take the measures needed to conduct without delay an investigation into these allegations with the aim of determining responsibilities. The Committee requests the Government to keep it informed of the final outcome of this investigation.*
 - (b) As regards the alleged physical assault suffered by Ms Marcia Rivas, President of the Council in the Department of Itapúa and union representative in the Itapúa health district, at the hands of a group of*

individuals as they forced their way into the Regional Hospital of Encarnación, during the course of which she suffered injuries and was robbed of a mobile phone and personal papers, the Committee requests the Government to keep it informed of the outcome of the complaint lodged by the union official Ms Marcia Rivas with the police and, in particular, whether the individual identified as the author of the assaults has been tried and punished.

CASE NO. 2533

INTERIM REPORT

Complaints against the Government of Peru presented by

- **the Federation of Fishing Industry Workers of Peru (FETRAPEP)**
- **the National Federation of Mine, Metal and Steel Workers of Peru (FNTMMSP) and**
- **the General Confederation of Workers of Peru (CGTP)**

Allegations: The complainant organizations allege dismissals and suspensions of trade union officials and members, and also obstruction of collective bargaining in fishing industry enterprises; collective bargaining with minority unions in a mining enterprise; and violations of trade union rights in a textile enterprise

1050. The Committee last examined this case at its meeting in March 2009 and on that occasion submitted an interim report to the Governing Body [see 353rd Report, paras 1054–1090, approved by the Governing Body at its 304th Session]. In a communication dated 13 April 2009, the Federation of Fishing Industry Workers of Peru (FETRAPEP) sent new allegations.

1051. The Government sent its observations in communications dated 25 February, 28 April and 3 November 2009.

1052. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1053. When it examined this case at its meeting in March 2009, the Committee made the following recommendations [see 353rd Report, para. 1090]:

- (a) With regard to the allegations concerning Pesquera San Fermín SA in relation to the dismissal of the last general secretaries of FETRAPEP, Mr Eugenio Caritas and Mr Wilmert Medina Campos, and of member Mr Richard Veliz Santa Cruz, and the pre-dismissal letters sent to Mr Juan Martínez Dulanto, records and archives secretary, Mr Ronald Díaz Chilca, discipline, culture and sport secretary, and Mr Freddy Medina Soto, member, the Committee notes with regret that the information provided by the

Government only refers to Mr Richard Veliz Santa Cruz, and urges the Government to carry out an in-depth investigation at the company to obtain information on the dismissals of and pre-dismissal letters sent to the union officials and members, and the reasons for them.

- (b) With regard to the allegations relating to Tecnológica de Alimentos SA Grupo SIPESA (after pressure was put on the workers, all workers at all the plants were dismissed on 25 July 2006) and Alexandra SAC (non-recognition of the union and harassment of its members), the Committee urges the Government to inform it whether those inspection visits have already been carried out and, if so, what the outcome was.
- (c) With regard to the allegations concerning Pesquera Diamante SA relating to the dismissal of 37 unionized workers who refused to sign a six-month contract, and the forcible detention of all unionized workers until they signed a new contract containing a clause requiring the union to remain inactive for one year, which they eventually signed, the Committee requests the Government to send copies of the contravention notices drawn up during the inspections and the records relating to any fines imposed, in order to determine whether the fines were imposed for violations of trade union rights or for other violations of labour legislation that were covered by the inspection.
- (d) With regard to the allegations concerning CFG Investment SAC (dismissal of 16 workers who were members of the Union of Workers of CFG Investment SAC at the Chancay plant, including eight members of the executive committee and the members of the committee negotiating the list of claims; the sanction imposed on the enterprise for these anti-union acts; the reinstatement of the officials and members following a petition for protection of constitutional rights (amparo) and their subsequent transfer to a plant in a different region; and, finally, the dismissal of the union's General Secretary, Mr Abel Rojas Villagaray, and two other workers), the Committee requests the Government to carry out an in-depth investigation without delay into the new allegations and, if it is confirmed that new anti-union acts are taking place, to take appropriate measures to impose further sanctions on the enterprise that are sufficiently dissuasive to ensure that, in the future, it refrains from anti-union acts against trade union officials, reinstates the official, and revokes the transfers. With regard to the other dismissed workers, the Committee requests the Government, if the allegations of anti union dismissal are proven true, to have them reinstated or where this is not possible for objective and compelling reasons, to ensure that they are adequately compensated so as to constitute sufficiently dissuasive sanctions. The Committee requests the Government to keep it informed in that regard, as well as of the outcome of the appeal lodged by the enterprise against the sanction imposed previously.
- (e) With regard to the new allegations presented by FETRAPEP regarding the revocation of the registration of the national executive committee for the period 2008–10, the amendments to the union's by-laws, and its official records through Directive No. 118-2008-MTPE/2/12.2 issued by the Department for Conflict Prevention and Resolution, the Committee requests the Government to indicate any ongoing judicial actions concerning this matter.
- (f) With regard to the allegations presented by the FNTMMSP that the Southern Peru Copper Corporation is seeking to impose a six-year period of validity on collective bargaining, by using five minority unions representing 350 out of a total of 2,500 workers, the Committee requests the Government to provide information as to whether the fine of 103,500 nuevos soles proposed by the National Labour Inspection Directorate has already been imposed.
- (g) With regard to the allegations presented by the CGTP (non-recognition of the Single Union of Workers of Textiles San Sebastián SAC, refusal to apply the check-off facility for the collection of union dues, refusal to provide a noticeboard, refusal to bargain collectively, outsourcing of production with a view to restricting the exercise of freedom of association, transfer of unionized workers, and dismissal of the union's General Secretary, secretary for workers' rights and another member), the Committee, while taking note of the fine of 103,500 nuevos soles (US\$36,315.79) imposed on the enterprise, and taking into account the fact that the veracity of the allegations has been confirmed by the administrative authority, once again requests the Government, in addition to implementing the sanction imposed, to take the necessary measures without

delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the anti-union measures taken against it, and refrains from adopting any such measures in the future. The Committee further requests the Government to promote collective bargaining between the parties and to keep it informed of developments.

- (h) With regard to the judicial revocation of the registration of the Pesca Perú Huarney SA Trade Union, requested by the enterprise, for falling below the legal minimum membership, the Committee again asks the Government to confirm whether the judicial authority was able to determine that the reduction in the union's membership to a level below the legal minimum membership was not the result of dismissals or anti-union pressure exerted on union members.

B. The complainants' new allegations

1054. In its communication dated 13 April 2009, FETRAPEP refers to the dismissals of the unionized workers of the enterprise CFG Investment SAC (16 workers who were members of the Union of Workers of CFG Investment-Chancay-SITRACICH, including all the members of the executive committee and of the committee negotiating the list of claims for the 2006–07 period), 15 of whom were reinstated in light of a temporary reinstatement order within the framework of an application for *amparo* (protection of constitutional rights), and reports that, in August 2008, as the proceedings relating to the *amparo* action continued, the Judicial Authority of Chancay issued a ruling in favour of the workers, ordering the enterprise to reinstate the affected workers in their posts. The enterprise appealed against the ruling and the case went before the Civil Chamber of the Judicial Authority of Huaura, based in the city of Huacho. In December, the Civil Chamber issued a final ruling upholding the ruling issued by the Judicial Authority of Chancay. Following delays on the part of the enterprise, which lodged a series of appeals before the court in Chancay, on 26 March 2009 the reinstatement order was implemented by the court secretary, but to the surprise of the workers, on the following day (27 March) the 11 reinstated workers received pre-dismissal letters informing them of their imminent dismissal on Friday, 3 April 2009.

C. The Government's response

1055. In its communication dated 25 February 2009, the Government states that, with regard to the steps taken by the Ministry of Labour and Employment Promotion concerning the FETRAPEP complaint involving alleged violations of trade union rights in Peru, it should also be pointed out that through circular No. 069-2008-MTPE/2/11.4 the Ministry's National Labour Inspection Directorate requested information from the various Regional Directorates of Labour and Employment Promotion throughout the country. In particular, the Government states that:

- The enterprise Pesquera Diamante SA. The following information was verified as a result of the inspection activities undertaken: (1) the enterprise Pesquera Diamante SA merged with the enterprises: Consorcio Malla SA, Pesquera Polar SA, Pesquera Atlántico SRL, Icapesca SA, and Pesquera Leirici SA, as stated in the document detailing the merger; (2) as a result of this merger, the enterprise Pesquera Diamante SA stated that it would assume, on a universal basis and as a single block, the entire equity of the absorbed enterprises, which would become legally extinguished. Thus, the enterprise Pesquera Diamante SA would increase its equity; (3) the enterprise Pesquera Diamante SA signed new contracts with all the workers of the extinguished enterprise Pesquera Polar SA despite the fact that when the latter merged with the inspected enterprise, those workers on fixed-term contracts should have been on indefinite contracts and the initial dates of entry of the previously signed contracts respected. The inspection activities revealed that: the inspected enterprise credits

wage payments to all the current workers, including 40 former Pesquera Polar SA workers; on assuming the assets and liabilities of the absorbed enterprises the inspected enterprise was obliged to honour the commitments made to the workers of those enterprises, something it failed to do in the case of the former Pesquera Polar SA workers. Furthermore, the inspected enterprise signed new contracts with the former Pesquera Polar SA workers on 1 November 2007, disregarding the dates of entry of the abovementioned workers, most of whom had completed more than five years' service and had had their contracts repeatedly renewed, meaning that they should have been on indefinite rather than fixed-term contracts. Section two of point IV (contravention classification) of a contravention notice arising from inspection order No. 033-2007-TR dated 31 August 2007 (naming Pesquera Polar SA) refers to an extremely serious contravention – “non-compliance with the provisions relating to indefinite contracts, irrespective of what the contracts are called and their fraudulent use ...”, sanctioned with a fine of 34,500 nuevos soles (PEN) for non-compliance with the provisions relating to modal contracts. This sanction applies in the case of 81 workers, including the 40 former workers of the abovementioned enterprise on the payroll of the enterprise Pesquera Diamante SA, in light of the fact that that enterprise, having assumed the assets and liabilities of the enterprise Pesquera Polar SA is also now responsible for the former Pesquera Polar SA workers and the abovementioned fine. Given that the latter enterprise is extinguished, the fine is not, however, doubled as a result of this approach.

- The enterprise CFG Investment SAC. The following was noted with regard to inspection order No. 069-2007-DNIT and the inspection activities undertaken: the employer reports that it employs 36 workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant. The enterprise carries out acts of discrimination regarding wage increases which are only granted to workers not belonging to the trade union organization. The enterprise brought negotiations concerning a list of claims to a standstill when it dismissed 16 members of the trade union organization, including members of the negotiating committee. Finally, investigations revealed non-compliance by the employer with the social and labour laws currently in force regarding constitutional rights concerning freedom of association and discrimination. This non-compliance affected the 36 workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant, with the corresponding contravention notice being issued as a result.
- The enterprise Tecnológica de Alimentos SA. Under inspection order No. 0301-2008 of 20 February 2008, inspection activities were undertaken to check payrolls and payslips, employment contracts, labour intermediation and freedom of association. According to the final inspection report, it has been established that the inspected enterprise employs 98 workers at the premises visited in Calle A, No. 193, Callao district, Callao constitutional province, of whom 79 are *obreros* (generally carrying out manual tasks and paid on a weekly basis) and 19 are *empleados* (generally carrying out non-manual tasks and paid on a monthly basis). The enterprise's 98 workers have been listed on the payroll since their dates of entry. Furthermore, the enterprise has proof of wage payments dating back to November 2007 for those workers entitled to such treatment owing to their dates of entry, as well as proof that it signed intermittent contracts with 29 of its workers. It maintains indefinite contracts with the rest of its workers with more than five years' service. It was verified that the enterprise signed contracts subcontracting services to: the enterprise Eulen del Perú Servicios Complementarios SA, with the latter undertaking to provide staff to perform complementary activities in the form of cleaning services; the enterprise SGF Servicios Generales SA, also for complementary activities in the form of cleaning services, and with the enterprise Protección Personal SA, for complementary activities in the form of private security and surveillance services. It was also verified that the inspected enterprise signed a contract subcontracting services to the enterprise

Eulen del Perú Servicios Generales SA for the provision of fish selection services, under article 4 of Supreme Decree No. 003-2002-TR. The abovementioned enterprise has 516 workers working on the premises visited. However, it was noted that during the three visits carried out to the premises of the inspected enterprise the area where fish selection is carried out was empty of workers. It was explained that no fish had been received for selection on those days, therefore it was not possible to check on site whether the workers provided by Eulen del Perú de Servicios Generales SA exclusively carried out fish selection work. Finally, with regard to verification of freedom of association, the inspectors (inspection order No. 0301-2008) concluded that, based on the facts and the inspection activities carried out, there was no non-compliance on the part of the enterprise inspected.

- The enterprise Pesquera Diamante SA. An inspection visit to the workplace identified (located in Quebrada Agua Lima, Carretera Matarani Kilometre 6.5, Mollendo District, Islay Province, Department of Arequipa) was requested by the National Labour Inspection Directorate of the Ministry of Labour and Employment Promotion and ordered by the Arequipa Regional Office for Labour and Employment Promotion through inspection order No. 017-2008-DDT-MOLL-ARE. Among other things, the inspection established the following: with regard to freedom of association, the workers admitted that they had not been threatened with non-renewal of their contracts by the enterprise Pesquera Diamante SA should they attempt to form a trade union organization. The date of entry of each worker was established and it was found that the 55 workers at the plant had signed and registered intermittent contracts. The enterprise provided proof of the intermittent contracts, these being presented for registration by the Administrative Labour Authority.
- The enterprise Textiles San Sebastián SAC. With regard to the enterprise's refusal to recognize the right of its workers to unionize, its refusal to bargain collectively, and the outsourcing of production with a view to restricting the exercise of freedom of association, among other things, the Government states that given that the Administrative Labour Authority confirmed the veracity of the allegations made by the complainant organization, it imposed a fine of PEN103,500. As yet no up to date information has been provided regarding the enforcement of the abovementioned fine. A request was made for information (through official letter No. 127-2009-MTPE/9.1 (355/389)) regarding any steps recently taken by the administrative authority in relation to this case, in particular as to whether the sanction imposed through directorial decision No. 130-2008-MTPE/2/12320 of 7 February 2008 had been implemented. The response to our request will be taken into account as soon as it has been received.
- The enterprise Southern Peru Copper Corporation. The Government states that in accordance with the information provided by the National Labour Inspection Directorate in its official letter No. 964-2008-MTPE/2/11.4, dated 27 May 2008, the relevant inspections were carried out under inspection order No. 052.2007-DNIT. As a result of these inspections it was established that violations of the social and labour laws had occurred with regard to: the failure to credit wage payments to 190 workers; anti-union practices affecting 2,446 trade union members and failure to comply with the inspection requirement in a timely manner (a contravention notice being issued with this aim on 5 November 2007) with the inspectors concerned declaring that a fine of PEN103,500 should be imposed. No information has to date been provided regarding the implementation of sanctions for anti-union practices. A request has therefore been made for the information, the results of which will be communicated in due course.
- The enterprise Southern Peru Copper Corporation. The Government states that the allegations (imposition of a six-year period of validity on collective bargaining by

using minority unions) are without basis in fact or in law given that a bargaining process was actually carried out and a final agreement reached during an informal meeting on 9 October 2007, at which the parties agreed to sign a final agreement regarding the 2007 draft collective labour agreement. As a result of the arbitration requested by the parties a ruling was issued on 26 October 2007 aimed at resolving the four points on which the parties had until then failed to reach an agreement, the points being: (i) a general increase and adjustment in pay; (ii) closure bonus; (iii) working hours; and (iv) annual adjustment of benefits. The ruling was issued in accordance with point 2 of article 28 of the Political Constitution of Peru and article 60 of the single consolidated text of the Industrial Relations Act, regulations which allow the parties to have recourse to a valid means of labour dispute resolution, be the dispute collective or individual.

- The enterprise Pesquera San Fermín SA. As to the alleged dismissal of the last general secretaries of FETRAPEP, Mr Eugenio Ccaritas and Mr Wilmert Medina Campos, and of member Mr Richard Veliz Santa Cruz, and pre-dismissal letters sent to Mr Juan Martínez Dulanto, records and archives secretary, Mr Ronald Díaz Chilca, discipline, culture and sport secretary, and Mr Freddy Medina Soto, the Government states that it has learnt that the enterprise Pesquera San Fermín SA merged with and was absorbed by the enterprise Corporación Pesquera Inca SA (COPEINCA) in the first quarter of 2008. In light of this development, the Administrative Labour Authority was requested to carry out an inspection visit in order that the abovementioned enterprise might clarify the situation regarding the charges levelled against Pesquera San Fermín SA concerning alleged anti-union practices.
- The enterprise Pesca Perú Huarmey SA. The Government reiterates with regard to the alleged judicial revocation of the registration of the enterprise's trade union that the legal ruling was based on the provisions of article 20 of the single consolidated text of the Industrial Relations Act – Supreme Decree No. 010-2003-TR, according to which if it is found that one of the legal requirements for a union's existence is no longer met (in this case, the minimum legal membership), the judicial authority must issue the appropriate ruling. Finally, having verified that the union no longer had 20 members from the enterprise, the judicial authority therefore upheld the company's application (a ruling that still stands as no appeal has been submitted by the trade union organization) and the labour authority, pursuant to the court ruling, revoked the trade union registration of the workers in question. Nevertheless, it should be pointed out that the Administrative Labour Authority stated that the inspection activities carried out did not uncover any anti-union practices linked to the abovementioned ruling.

1056. With regard to the new allegations presented by FETRAPEP regarding the revocation of the registration of the national executive committee for the period 2008–10, the Government states that through report No. 03-2009-MTPE/9120 (254/254), of 20 January 2009 a decision was issued on this subject concluding that for reasons of legal certainty the public administration is obliged to establish mechanisms and parameters that make it possible to determine with regard to an ongoing administrative procedure whether the public interest has been infringed, a circumstance which could constitute grounds for invalidating an administrative act in the course of the procedure. Within the framework of the abovementioned supposition, the Administrative Labour Authority, while in the process of recognizing amendments to the by-laws of FETRAPEP, detected signs of infringement of the public interest and in light of the provisions of National Directive No. 002-2005-MTPE/DVMT/DNRT, and in application of the provisions of article 202 of Act No. 27444 – the General Administrative Procedure Act – it was decided to carry out the necessary administrative proceedings in order to be sure of the facts highlighted in the aforementioned administrative process. The status of this process will be reported on in

due course. Given that there are no objectively demonstrable legal grounds for the acts of interference in the internal affairs of FETRAPEP attributed to the Administrative Labour Authority in light of Directorate Decision No. 118-2008-MTPE/2/12.2 of 30 July 2008, it would be very difficult to argue that violations of national and international law had occurred and even more so relating to freedom of association.

1057. The Government states that its response takes account of the active participation of the Administrative Labour Authority in the process of dealing with the issue raised by the complainants and adds that various inspection activities were carried out, the results of which (contained in the present report) demonstrate that when the enterprises concerned have violated social and labour laws they have been sanctioned, it being recommended that the corresponding fines be imposed (the Government will report on the implementation of the fines as soon as it has received the information it has requested in this regard from the corresponding departments). The Government states that, in light of the results of the various inspection actions carried out, it is clear that, in most cases, the fines were imposed not for violations of trade union rights but rather for other violations of labour law which were verified. As to the cases involving alleged arbitrary dismissals currently before the courts, it should be pointed out that, under the consolidated text of the Organic Act on the Judiciary, the Administrative Labour Authority shall refrain from issuing an opinion on the matter as to do otherwise would mean that any officials who did not comply with this provision might be held liable, in accordance with paragraph 2 of article 139 of the Political Constitution of Peru, which is based on respect for the independence of the judiciary. The Government will therefore request the judiciary to report on the result of all the legal proceedings relating to the complaint presented and this information will be duly communicated to the ILO.

1058. In its communication dated 28 April 2009, the Government states that with regard to the additional information sent by FETRAPEP regarding the enterprise Textiles San Sebastián SAC, it has already transmitted the corresponding observations. It adds that in accordance with report No. 24-2009-MTPE/9.120 of 26 February 2009, the Regional Directorate of Labour and Employment Promotion of Lima-Callao was requested through official letter No. 127-2009-MTPE/9.1 (355/389) of 19 February 2009, to provide information on any recent steps taken by the Administrative Labour Authority regarding this case, in particular with regard to whether the sanction imposed on the enterprise Textiles San Sebastián SAC through subdirectorial Resolution No. 130-2008-MTPE/2/12.320, dated 7 February 2008, arising from inspection order No. 9532-2007-MTPE/2/12.3, imposing a fine of PEN103,500 on the said enterprise, had been implemented. The Government states that the Regional Directorate of Labour and Employment Promotion of Lima-Callao states in official letter No. 450-009-MTPE/2/12.1 of 12 March 2009 that it submitted a copy of the proceedings to the Office for the Administration of Fines for enforcement of said fine, thus concluding that procedure No. 1756-2007 had been completed and was closed.

1059. In its communication of 3 November 2009, the Government states the following:

- Allegations concerning the enterprises Pesquera San Fermín SA and Alexandra SAC. With regard to the allegations concerning Pesquera San Fermín SA in relation to the dismissal of the last general secretaries of FETRAPEP, Mr Eugenio Caritas and Mr Wilmert Medina Campos, and of member Mr Richard Veliz Santa Cruz, and the pre-dismissal letters sent to Mr Juan Martínez Dulanto, Mr Ronald Díaz Chilca and Mr Freddy Medina Soto, and with regard to the allegations concerning the non-recognition of the union and the harassment of its members by the enterprise Alexandra SAC, it should be noted that the Regional Directorate of Labour and Employment Promotion of Lima-Callao was requested through official letter No. 962-2009-MTPE/9.1 to provide up to date information regarding this case, which will be reported in due course.

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- Allegations regarding the anti-union acts against the Union of Workers of CFG Investment SAC at the Chancay plant. In procedure No. 035-2007-PS-MTPE/2/12.621 concerning the contravention notice of 23 November 2007 issued to CFG Investment SAC, pursuant to the provisions of the General Labour Inspection Act No. 28806 and its regulations approved by Decree No. 019-2006-TR, the Huacho administrative authority issued on 1 July 2009 area resolution No. 046-2009-MTPE/2/12.621, establishing that the enterprise had committed three serious contraventions and imposing the respective fine of up to PEN18,216. It is established that the enterprise carried out acts of hostility against the Union of Workers of CFG Investment SAC at the Chancay plant, preventing it from exercising its constitutional rights relating to freedom of association, by having dismissed the members of the negotiating committee without justification on objective grounds. This measure also coincided with the establishment of the trade union organization and the collective bargaining process it initiated; as a result, the rights of 36 workers have been affected. It is also established that the enterprise in question demonstrated wage discrimination against the members of the Union of Workers of CFG Investment SAC at the Chancay plant by granting wage increases exclusively to non-unionized workers, without any objective justification, thereby committing acts that have led to the withdrawal of members from the union in question and have also affected 36 workers who are members of the union. Lastly, the enterprise is considered to have committed a third, extremely serious contravention in relation to labour inspection, because it did not comply with the order to adopt measures to ensure compliance with the current social and labour legislation concerning the reinstatement of the workers who were affected by the staff cuts, thereby affecting 16 workers. As a result of these contraventions, an overall fine of PEN18,216 was imposed, which has been the subject of an appeal (file No. 3629 of 30 July 2009) by CFG Investment SAC; a decision is still pending to date. With regard to the adoption of measures to reinstate all those workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant who were dismissed for anti-union reasons, including eight members of the executive committee and the members of the committee negotiating the list of claims and the 11 union members who were reinstated only to be dismissed again, as the mentioned inspection did not cover these issues and as an order was issued at that time, official letter No. 963-2009-MTPE/9 has been sent to the National Labour Inspectorate so that appropriate measures can be taken with regard to the verification of the facts in question.
 - Allegation relating to the recognition of the FETRAPEP national executive committee: with regard to recognition of the amendments to the by-laws of FETRAPEP, through report No. 255-2009-MTPE/2/12.1 dated 12 May 2009, the Regional Directorate of Labour and Employment Promotion of Lima-Callao provides information on the status of file No. 101-974-915310 on recognition of the amendments to the by-laws of FETRAPEP, in which it is indicated that, on that date, according to the certificate of automatic registration of 20 February 2009, the organization in question has an executive board led by Mr Wilmert Medina Campos in his capacity as general secretary for the period 19 February 2008 to 18 February 2010. Notwithstanding the above, by official letter No. 946-2009-MTPE/9.1 dated 23 October 2009, a request has been made for up to date information on the status of the file on the recognition of amendments to the by-laws of FETRAPEP, which will be reported in due course.
 - Allegations concerning the enterprise Southern Peru Copper. In relation to the allegations made by the complainant in this case, the Government indicates that under the procedure for imposing sanctions (file No. 003-2008-SDILSST-RG/DRTPE.MOQ and report No. 021-2009-SDILSST-RG/DRTPE.MOQ dated 18 May 2009), the party at fault has paid the financial penalty that was imposed.

- Allegation concerning the enterprise Textiles San Sebastián SAC. With regard to the claim by FETRAPEP concerning the enterprise's refusal to recognize the right of its workers to unionize, its refusal to bargain collectively and the outsourcing of production with a view to restricting the exercise of freedom of association, among other things, it should be noted that the Administrative Labour Authority, having confirmed that the allegations made by the complainant organization were well-founded, imposed a sanction in the form of an overall fine amounting to PEN103,500. As yet no up to date information has been provided regarding the enforcement of this measure, and a request to this effect has been made through official letter No. 963-2009-MTPE/9.1 for information regarding any recent steps taken by the Administrative Labour Authority in relation to this case, in particular with regard to whether the sanction imposed through directorial decision No. 130-2008-MTPE/2/12.320 of 7 February 2008 had been enforced, as well as with regard to the enterprise's refusal to apply the check-off facility for the collection of union dues, its refusal to bargain collectively, the transfer of unionized workers and the dismissal of the union's general secretary and the secretary for workers' rights. The outcome of these inspections will be reported in due course.

- Allegations relating to the workplace Tecnológica de Alimentos SA: with regard to the allegations made by the complainant in this case, the Government refers to the final inspection report arising from inspection order No. 9517-2009-MTPE/2/12.3 presented to the workplace known as Tecnológica de Alimentos SA, as according to the events under investigation, this enterprise is responsible for dismissing the workers at all its plants on 25 July 2006. The investigations have made it possible to determine: first, that the enterprise produced payrolls for May 2009 and also for June, July and August 2006; second, that the payroll for May 2009 shows that the enterprise concerned has 4,139 employees and 32 branches nationwide; third, that payrolls, employment contracts, letters of resignation, agreements for termination by mutual consent and social benefits settlements demonstrate that over the months of June, July and August 2006, 211 workers were dismissed from the enterprise Grupo Sindicato Pesquero del Perú SA (Grupo-SIPESA); fourth, with regard to the validity of authority relating to the merger by absorption of Grupo-SIPESA with the enterprise Tecnológica de Alimentos SA on 1 January 2007, it was noted that the enterprise known as Grupo Sindicato Pesquero del Perú SA took over the enterprise Tecnológica de Alimentos SA and that the acquiring enterprise subsequently changed its name to Tecnológica de Alimentos SA and acquired a new Single Register of Taxpayers (RUC) number; fifth, according to the statements by the enterprise in its letter dated 19 June 2009, sent by the enterprise to the Ministry of Labour and Employment Promotion, and by legal representatives in the hearing conducted on 10 July 2009, of the 211 workers who were dismissed, only 12 were union members and 199 did not belong to any union. It was also noted that the following unions are currently still in existence: the Union of Workers of the Tecnológica de Alimentos SA Enterprise, the Committee of Fishing Workers of Ático Port (CODEPTA), the Committee of Non-manual and Manual Workers of Tecnológica de Alimentos SA (Shipyard); and the Committee of Day Labourers at Tecnológica de Alimentos SA (Chimbote Norte); it is established that no acts have been carried out with the aim of undermining the freedom of association of the workers who belong to these unions and that all the enterprise's workers have not been dismissed. It can be concluded from the inspections carried out by the Labour Inspectorate that there have been no detected contraventions of the standards identified in the inspection order and which were the subject of the inspection. It should be added that the final inspection report, issued on 7 April 2008 by the subdirectorate of labour inspection of the Ministry of Labour and Employment Promotion of Libertad, as set out in administrative file no. 312-08-SDILSST/TRU, contains a ruling that no acts of hostility have been used

as a means to undermine freedom of association and that there had been no violations of social and labour standards.

D. The Committee's conclusions

1060. *The Committee recalls that the present case, last examined in March 2009 [see 353rd Report, paras 1054–1090] refers to allegations regarding: (1) dismissals and suspensions of trade union officials and members, and also obstruction of collective bargaining in fishing industry enterprises; (2) collective bargaining with minority unions in a mining enterprise; and (3) violations of trade union rights in a textile enterprise.*

Clause (a) of the recommendations

1061. *As to the allegations regarding the enterprise Pesquera San Fermín SA concerning the dismissals of the last general secretaries of FETRAPEP, Mr Eugenio Caritas and Mr Wilmert Medina Campos, and of member Mr Richard Veliz Santa Cruz and the pre-dismissal letters sent to Mr Juan Martínez Dulanto, records and archives secretary, Mr Ronald Díaz Chilca, discipline, culture and sport secretary, and Mr Freddy Medina Soto, member, the Committee urged the Government to carry out an in-depth investigation at the company to obtain information on the dismissals of and pre-dismissal letters sent to the union officials and members, and the reasons for them. The Committee notes that the Government reports that it has learnt that the enterprise in question merged with and was absorbed by the enterprise COPEINCA in the first trimester of 2008 and in light of this the Administrative Labour Authority was requested to carry out an inspection visit in order that the enterprise might clarify the situation regarding the allegations made against the enterprise Pesquera San Fermín SA concerning alleged anti-union practices and that the Regional Directorate of Labour and Employment Promotion of Lima-Callao was requested to provide up to date information regarding this allegation. In these circumstances, the Committee hopes that the inspection of the enterprise referred to by the Government will be carried out without delay and that it will cover all the pending allegations. The Committee requests the Government to keep it informed in this regard.*

Clause (b) of the recommendations

1062. *With regard to the allegations relating to the enterprise Tecnológica de Alimentos SA – Grupo SIPESA (according to the complainants, after pressure was put on the workers, all workers at all the plants were dismissed on 25 July 2006) and the enterprise Alexandra SAC (non-recognition of the union and harassment of its members), the Committee urged the Government to inform it whether the inspection visits that the National Labour Inspection Directorate had been requested to undertake had already been carried out and, if so, what the outcome was. In this regard, the Committee notes that the Government states: (1) with regard to the allegations relating to the enterprise Tecnológica de Alimentos SA – Grupo SIPESA, that inspection activities were carried out in various areas (payroll and payslips, employment contracts, labour intermediation and freedom of association) and that with regard to verification of freedom of association, the inspection authority that carried out the activities in question noted the existence of a trade union and four workers' committees, that no acts of hostility have been used as a means to undermine freedom of association and that there have been no violations of social and labour standards and (2) with regard to the Alexandra SAC enterprise, the Regional Directorate of Labour and Employment Promotion of Lima-Callao was requested to provide up to date information. The Committee yet again urges the Government to inform it of the outcome of the inspection visits to the enterprise Alexandra SAC regarding the allegations of non-recognition of the union and harassment of its members.*

Clause (c) of the recommendations

1063. *With regard to the allegations concerning the enterprise Pesquera Diamante SA, relating to the dismissal of 37 unionized workers who refused to sign a six-month contract, and the forcible detention of all unionized workers until they signed a new contract containing a clause requiring the union to remain inactive for one year, which they eventually signed, the Committee requested the Government to send copies of the contravention notices drawn up during the inspections and the records relating to any fines imposed, in order to determine whether the fines were imposed for violations of trade union rights or for other violations of labour legislation that were covered by the inspection. In this regard, the Committee notes that the Government reports that: (1) under inspection order dated 31 August 2007, it was determined that an extremely serious contravention had been committed involving non-compliance with the provisions relating to indefinite contracts and a sanction was imposed in this regard, and (2) under inspection order No. 017-2008 an inspection visit was carried out as a result of which it was established that with regard to freedom of association, the workers admitted that they had not been threatened with non-renewal of their contracts by the enterprise Pesquera Diamante SA should they attempt to form a trade union organization.*

Clause (d) of the recommendations

1064. *With regard to the allegations concerning the enterprise CFG Investment SAC (dismissal of 16 workers who were members of the Union of Workers of CFG Investment SAC at the Chancay plant, including eight members of the executive committee and the members of the committee negotiating the list of claims; the sanction imposed on the enterprise for these anti-union acts; the prior reinstatement of the officials and members following a petition for amparo and their subsequent transfer to a plant in a different region; and, finally, the dismissal of the union's General Secretary, Mr Abel Rojas Villagaray, and two other workers), the Committee requested the Government to carry out an in-depth investigation without delay into the new allegations and, if it was confirmed that new anti-union acts were taking place, to take appropriate measures to impose further sanctions on the enterprise that were sufficiently dissuasive to ensure that, in the future, it refrained from anti-union acts against trade union officials, reinstated the trade union official Mr Abel Rojas, and revoked the transfers. With regard to the other dismissed workers, the Committee requested the Government, if the allegations of anti-union dismissal were proven true, to have them reinstated or, where this was not possible for objective and compelling reasons, to ensure that they were adequately compensated so as to constitute sufficiently dissuasive sanctions.*

1065. *Furthermore, the Committee notes that in its new allegations FETRAPEP states that: (1) within the framework of the amparo action initiated regarding the alleged dismissals in August 2008, the Judicial Authority of Chancay issued a ruling in favour of the workers ordering the enterprise to reinstate the affected workers in their posts; (2) the enterprise appealed against the ruling issued by the Judicial Authority of Chancay, which was upheld by the Civil Chamber of the Judicial Authority of Huaura in December 2008; and (3) on 26 March 2009 the reinstatement order was implemented in the enterprise, but on 27 March, 11 of the reinstated workers received pre-dismissal letters.*

1066. *With regard to inspection order No. 069-2007-DNIT and the inspection activities undertaken, the Committee notes that the Government reports that: (1) in accordance with the information provided by the employer, the enterprise employs 36 workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant; (2) the enterprise carries out acts of discrimination regarding wage increases, which are only granted to workers not belonging to the trade union organization; (3) the enterprise brought negotiations concerning a list of claims to a standstill when it dismissed 16 workers who*

were members of the trade union organization, including members of the bargaining committee; (4) the employer failed to comply with the social and labour laws currently in force regarding constitutional rights linked to freedom of association and discrimination, affecting the 36 workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant, with the corresponding contravention notice being issued as a result; (5) on 1 July 2009, the Huacho administrative authority issued a resolution establishing that the enterprise had committed three serious contraventions (acts of hostility against the union, dismissal of members of the negotiating committee and wage discrimination against unionized workers, and it had failed to comply with the order to reinstate 16 dismissed workers), imposing a fine of PEN18,216, a sanction that was the subject of an appeal by the enterprise on 30 July 2009; and (6) with regard to the requested reinstatement of all dismissed workers, including the eight members of the executive committee of the negotiating committee and 11 union members, the National Labour Inspection Directorate was asked to take measures to verify the facts.

- 1067.** Taking into account all the information, in particular the fact that the Government confirms the allegations of anti-union discrimination on the part of the enterprise affecting members of the union, the Committee requests the Government to: (1) take the necessary steps, as ordered by the judicial authority, to reinstate all those workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant dismissed for anti-union reasons – including eight members of the executive committee and the members of the committee negotiating the list of claims and the 11 union members who were reinstated only to be yet again dismissed; (2) put an end to the acts of anti-union discrimination involving wage increases granted exclusively to non-unionized workers; (3) reinstate negotiations concerning the list of claims, should the trade union organization so wish; and (4) report on the enforcement of the fine imposed on the enterprise for anti-union acts. The Committee requests the Government to keep it informed regarding any steps taken in this regard.

Clause (e) of the recommendations

- 1068.** With regard to the allegations presented by FETRAPEP regarding the revocation of the registration of the national executive committee for the period 2008–10, the amendments to the union's by-laws, and its official records through Directive No. 118-2008-MTPE/2/12.2 issued by the Department for Conflict Prevention and Resolution, the Committee requests the Government to indicate any ongoing judicial actions initiated by the trade union concerning this matter. The Committee notes that the Government states that: (1) for reasons of legal certainty the public administration is obliged to establish mechanisms and parameters that make it possible to determine with regard to an ongoing administrative procedure whether the public interest has been infringed, a circumstance which could constitute grounds for invalidating an administrative act in the course of the procedure; (2) within the framework of the abovementioned supposition, the Administrative Labour Authority, while in the process of recognizing amendments to the by-laws of FETRAPEP, detected signs of infringement of the public interest and in light of the provisions of National Directive No. 002-2005-MTPE/DVMT/DNRT, and in application of the provisions of section 202 of Act No. 27444 – the General Administrative Procedure Act, it was decided to carry out the necessary administrative proceedings in order to be sure of the facts highlighted in the aforementioned administrative process. The status of this process will be reported on in due course; (3) given that there are no objectively demonstrable legal grounds for the acts of interference in the internal affairs of FETRAPEP attributed to the Administrative Labour Authority in light of Directorate Decision No. 118-2008-MTPE/2/12.2 of 30 July 2008, it would be very difficult to argue that violations of national and international law had occurred and even more so relating to freedom of association; (4) on 12 May 2009, the Regional Directorate of Labour and Employment Promotion of Lima-Callao indicates that FETRAPEP has an executive board

led by Mr Wilmert Medina Campos in his capacity as general secretary for the period 19 February 2008 to 18 February 2010; and (5) on 23 October 2009, a request was made for up to date information on the status of the file on the recognition of amendments to the by-laws of FETRAPEP, which will be reported in due course.

- 1069.** *In these circumstances, the Committee takes due note of the fact that a solution has been found regarding the registration of the FETRAPEP national executive committee for the period 2008–10, expresses the hope that the process of registering the amendments to the union's by-laws and its official records will be completed as quickly as possible and requests the Government to keep it informed in this regard.*

Clause (f) of the recommendations

- 1070.** *With regard to the allegations presented by the FNTMMSP that the Southern Peru Copper Corporation is seeking to impose a six-year period of validity on collective bargaining, by using five minority unions representing 350 out of a total of 2,500 workers, the Committee requested the Government to provide information as to whether the fine of PEN103,500 proposed by the National Labour Inspection Directorate has already been imposed. In this regard, the Committee notes that, according to the Government, the enterprise in question has paid the fine that was imposed.*

Clause (g) of the recommendations

- 1071.** *With regard to the allegations presented by the General Confederation of Workers of Peru (CGTP) (non-recognition of the Single Union of Workers of Textiles San Sebastián SAC, refusal to apply the check-off facility for the collection of union dues, refusal to provide a noticeboard, refusal to bargain collectively, outsourcing of production with a view to restricting the exercise of freedom of association, transfer of unionized workers, and dismissal of the union's General Secretary, secretary for workers' rights and another member), the Committee, while taking note of the fine of PEN103,500 (US\$36,315.79) imposed on the enterprise, and taking into account the fact that the veracity of the allegations has been confirmed by the administrative authority, once again requested the Government, in addition to implementing the sanction imposed, to take the necessary measures without delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the anti-union measures taken against it, and refrains from adopting any such measures in the future. The Committee further requested the Government to promote collective bargaining between the parties and to keep it informed of developments. In this regard, the Committee notes that the Government states that: (1) the Regional Directorate of Labour and Employment Promotion of Lima-Callao states in official letter No. 450-009-MTPE/2/12.1 of 12 March 2009 that it submitted a copy of the proceedings to the Office for the Administration of Fines for enforcement of said fine, thus concluding that procedure No. 1756-2007 had been completed and was closed; and (2) its response takes account of the active participation of the Administrative Labour Authority in the process of dealing with the issue raised by FETRAPEP and the CGTP, referring to various inspection activities that were carried out, the results of which demonstrate that when the enterprises concerned have violated social and labour laws they have been sanctioned, it being recommended that the corresponding fines be imposed, with the corresponding enforcement processes currently ongoing.*

- 1072.** *In these circumstances, while noting that instructions have been issued regarding the collection of the fines imposed, the Committee once again requests the Government to take the necessary measures without delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the*

anti-union measures taken against it, refrains from adopting any such measures in the future and promotes collective bargaining between the parties. The Committee requests the Government to keep it informed of developments in this regard.

Clause (h) of the recommendations

1073. *With regard to the judicial revocation of the registration of the Pesca Perú Huarney SA Trade Union, requested by the enterprise, for falling below the legal minimum membership, the Committee requested the Government to confirm whether the judicial authority was able to determine that the reduction in the union's membership to a level below the legal minimum membership was not the result of dismissals or anti-union pressure exerted on union members. In this regard, the Committee notes that the Government states that: (1) having verified that the union no longer had 20 members from the enterprise, the court upheld the company's application; (2) the ruling still stands as no appeal has been submitted by the trade union organization; and (3) the Administrative Labour Authority stated that the inspection activities carried out did not uncover any anti-union practices.*

The Committee's recommendations

1074. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) As to the allegations regarding the enterprise Pesquera San Fermín SA concerning the dismissals of the last general secretaries of FETRAPEP, Mr Eugenio Caritas and Mr Wilmert Medina Campos, and of member Mr Richard Veliz Santa Cruz and the pre-dismissal letters sent to Mr Juan Martínez Dulanto, records and archives secretary, Mr Ronald Díaz Chilca, discipline, culture and sport secretary, and Mr Freddy Medina Soto, member, the Committee hopes that the inspection of the enterprise referred to by the Government will be carried out without delay and that it will cover all the pending allegations. The Committee requests the Government to keep it informed in this regard.*
- (b) The Committee yet again urges the Government to inform it of the outcome of the inspection visits to the enterprise Alexandra SAC regarding the allegations of non-recognition of the union and harassment of its members.*
- (c) The Committee requests the Government to: (1) take the necessary steps, as ordered by the judicial authority, to reinstate all those workers belonging to the Union of Workers of CFG Investment SAC at the Chancay plant dismissed for anti-union reasons – including eight members of the executive committee and the members of the committee negotiating the list of claims and the 11 union members who were reinstated only to be yet again dismissed; (2) put an end to the acts of anti-union discrimination involving wage increases granted exclusively to non-unionized workers; (3) reinstate negotiations concerning the list of claims, should the trade union organization so wish; and (4) report on the enforcement of the fine imposed on the enterprise for anti-union acts. The Committee requests the Government to keep it informed regarding any steps taken in this regard.*

- (d) *The Committee expresses the hope that the process of registering the amendments to FETRAPEP's by-laws and its official records will be completed as quickly as possible, and requests the Government to keep it informed in this regard.*
- (e) *With regard to the allegations presented by the CGTP (non-recognition of the Single Union of Workers of Textiles San Sebastián SAC, refusal to apply the check-off facility for the collection of union dues, refusal to provide a noticeboard, refusal to bargain collectively, outsourcing of production with a view to restricting the exercise of freedom of association, transfer of unionized workers, and dismissal of the union's General Secretary, secretary for workers' rights and another member), the Committee notes that fines have been imposed on the enterprise due to the challenges filed, and instructions have been issued regarding their collection. The Committee once again urges the Government to take the necessary measures without delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the anti-union measures taken against it, and refrains from adopting any such measures in the future. The Committee requests the Government to keep it informed of developments.*

CASE NO. 2667

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

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

- **the General Confederation of Workers of Peru (CGTP) and**
- **the National United Trade Union of Workers of Nestlé Perú SA (SUNTRANEP)**

Allegations: The complainant organizations allege: (1) the dismissal of Mr David Elíaz Rázuri, secretary for defence of SUNTRANEP; (2) failure to adhere to the collective agreement in 2007 and three-day suspensions imposed on workers who had protested against non-observance of the collective agreement during their meal breaks; (3) that during the process of drawing up the collective agreement for 2008 the company Nestlé Perú SA displayed anti-union attitudes and used delaying tactics which prompted the workers to resort to strike action on a number of occasions, leading to acts of intimidation and coercion by the employer and replacement of workers during the strike in October 2008

- 1075.** The present complaint is contained in communications from the General Confederation of Workers of Peru (CGTP) and the National United Trade Union of Workers of Nestlé Perú SA (SUNTRANEP) dated 18 August 2008. In communications dated 24 October and 28 November 2008, SUNTRANEP sent new allegations.
- 1076.** The Government sent its observations in communications dated 4 March 2009 and 25 February 2010.
- 1077.** 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

- 1078.** In a communication of 18 August 2008, the CGTP and SUNTRANEP allege the dismissal of Mr David Elíaz Rázuri, Secretary for Defence of SUNTRANEP and member of the workers' committee that negotiated the list of demands for 2007, owing to the complaints he made on the union's behalf concerning non-observance by the company of the collective agreement in force. According to the complainant organization, the company cited as grounds for dismissal the worker's abandonment of his workplace, stoppage of work and various breaches of discipline, but the real motives for the dismissal were the various complaints made by the official regarding numerous instances of failure to adhere to the terms of the collective agreement, including the following instances: requiring

workers to work on Sunday and take another day off during the week; failure to adhere to established work schedules; and failure to recognize different categories of workers, as a result of which various benefits under the collective agreement were not paid. Some of the complaints are being examined by the judicial authority and a decision is still awaited; in other cases the claims have been rejected. The complainant organization indicates that as a result of these instances of non-observance, a number of workers on 22 May 2007 carried out a protest and stopped work during a meal break, to which the company responded by suspending them for three days.

1079. In its communications of 24 October and 28 November 2008, SUNTRANEP sent new allegations indicating that as part of the negotiations on a list of demands for 2007, the company refused to give the union any information on the company's economic situation and refused to allow any leave or financial assistance for union officials appointed to take part in the talks (benefits which were granted to the other unions affiliated to the Federation of Nestlé Workers, from which SUNTRANEP withdrew as a result of disagreements). The complainant organization adds that in December 2007, the labour authority initiated the process of negotiation and after a number of failed attempts the parties met on 13 February 2008 to negotiate the union's list of demands but that the company was intransigent and dragged its feet, seeking to impose terms and conditions less favourable than the current ones. For this reason, on 8 April 2007, the complainant organization declared that the direct negotiation stage had failed and asked the labour administrative authority to initiate conciliation proceedings and have an economic statement drawn up by the Ministry of Labour. This request triggered an anti-union attitude on the part of the company, which led to a ruling by the administrative authority in May 2008 calling on the company not to interfere with the process or take action against the workers. Owing to the failure of the conciliation process, the workers in August 2008 decided to resort to strike action, which was not authorized by the administrative authority. The company then applied a range of measures of coercion and intimidation against workers, which in turn gave rise to a further request for authorization of strike action, which was also refused. That decision was appealed and upheld by the higher administrative authority. The complainant organization also initiated legal action against the company seeking the annulment of certain clauses of the internal regulations.

1080. The complainant organization adds that the circumstances referred to and the company's stance have persisted, and that it has not been possible to negotiate a collective agreement for 2008. For that reason, the workers decided to resort to strike action which was finally authorized by the Ministry of Labour following various approaches by the workers and refusals by the administrative authority. The workers began their strike on 29 October 2008 and it continued for more than 30 days. The complainant organization adds that the company called on the striking workers to abandon the strike and replaced them with other workers (a state of affairs confirmed by the Labour Inspectorate).

B. The Government's reply

1081. In its communications of 4 March 2009 and 25 February 2010, the Government indicates that under the terms of official communication No. 1104-2008-MTPE/9.1 the alleged facts of the complaint were brought to the attention of the company Nestlé Perú SA which, in reports dated 20 January and 3 March 2009, made the following observations: as regards the dismissal of Mr David Elíaz Rázuri, the worker in question was a former employee of the company who was dismissed for serious misconduct which occurred on 22 and 23 May 2007 and as a result of which the company did not consider it reasonable to continue his employment; and the complaint brought by the former worker before the Sixth Labour Court of Lima (case file 00299-0-2007) questioning the reasons for the dismissal is currently being considered by the court of first instance and no ruling has been given.

- 1082.** As regards the alleged disregard of existing collective agreements by Nestlé, the Government states that the company claims to have respected the collective rights of its staff at all times, as well as the agreements it has concluded with the various unions that co-exist in the company, and explains that SUNTRANEP, a minority union, is the only one to claim that the company has failed to comply with those agreements. As these disputes are being examined in procedures currently in progress in different labour courts in Lima, it is not possible to express a definitive position on these aspects of the complaint.
- 1083.** The Government adds that through official communication No. 1103-2008-MTPE/9.1 it requested information from the Regional Directorate for Labour and Employment Promotion of Lima-Callao on the measures adopted in response to the complaint. That authority, in report No. 22-2009-MTPE/2/12.1 of 13 January 2009, states that the Labour Inspection Directorate reported (in report No. 002-2009-MTPE/2/12.3 dated 7 January 2009) that in accordance with the complaint made by the workers of Nestlé Perú SA, in the context of the right to strike exercised by the union in response to alleged infringements of freedom of association, inspection order No. 18136-2008-MTPE/2/12.3 was issued on 3 November 2008. As a result of the inspections conducted, the labour inspectors found that the company had violated freedom of association by hiring workers to replace those on strike; it also found that work shifts and assignments had been changed and working hours increased in order to replace the workers on strike.
- 1084.** In response to this, contravention notice No. 2752-2008 was issued and a fine of 105,000 nuevos soles (PEN) imposed, and sanctions procedures have been initiated before the Second Subdirectorato for Labour Inspection. The sanctions procedure was initiated on 2 December 2008. A procedure for demanding compliance (file No. 1243-09) was initiated on 22 October 2009, and the company sought the suspension of this procedure since it had appealed the decision imposing the fine to court 19 of the Supreme Court of Justice of Lima. Thus, the procedure for demanding compliance had been suspended through decision No. 02-2009-MTPE/4/10.101 of 9 November 2009. The Government states that in the light of all this, it can be concluded that the labour administrative authority intervened directly in matters relating to the complaint by carrying out inspections and a series of timely out of court meetings, which facilitated the adoption of the record of the out-of-court meeting which brought an end to the 37-day general strike, and the conclusion of the 2008 collective agreement with SUNTRANEP.
- 1085.** The Government adds that through the collective agreement referred to above, agreements were reached in matters such as those relating to the list of demands for one year and increases of between 2 and 4.71 per cent of basic pay for different categories, as well as an undertaking to review wage categories in January 2009, etc. In addition, agreement was reached on reclassification of workers who joined the company in 2001 and 2007 and an increase of 5 per cent in collateral benefits such as school attendance allowances, childbirth allowances, education benefits, death benefits, retirement benefits, long-service bonuses, and mobility grants in connection with the death of a worker or family member.
- 1086.** Lastly, the Government indicates that up to date information is being sought on the status of the sanctions proceedings that have been under way before the Second Subdirectorato for Labour Inspection. Information has also been requested on the status of the proceedings in connection with the alleged failure to comply with the terms of collective agreements which have been examined in the judicial context, and a report to be issued in due course will enable the Government to adopt a definitive position on the matter.

B. The Committee's conclusions

- 1087.** *The Committee observes that, in the present complaint, the CGTP and the SUNTRANEP allege the following: (1) the dismissal of Mr David Elíaz Rázuri, Secretary for Defence of*

SUNTRANEP; (2) failure to adhere to the collective agreement in force in 2007 and three day suspensions imposed on the workers who had protested against non-observance of the collective agreement during their meal breaks; and (3) that during the process of drawing up the collective agreement for 2008 the company displayed anti-union attitudes and used delaying tactics which prompted the workers to resort to strike action on a number of occasions, leading to acts of intimidation and coercion by the company and replacement of workers during the strike in October 2008.

- 1088.** *As regards the allegations relating to the dismissal of Mr David Elías Rázuri, Secretary for Defence of SUNTRANEP and member of the workers' committee that negotiated the list of demands for 2007, the Committee notes that, according to the complainant organizations, the dismissal was due to the complaints he made on the union's behalf concerning non-observance by the company of the collective agreement in force. In this regard, the Committee notes that, in its reply, the Government refers to the information transmitted by the company according to which Mr Rázuri was dismissed for serious misconduct which occurred on 22 and 23 May 2007 (no further details are supplied on the subject), and that the former employee lodged a complaint with the Sixth Labour Court of Lima, which is currently awaiting a decision. The Committee urges the Government to keep it informed of the final outcome of these legal proceedings.*
- 1089.** *With respect to the alleged failure to adhere to the collective agreement in force in 2007 and the three-day suspensions imposed on the workers who had protested against the non-observance of the collective agreement during their meal breaks, the Committee notes that, according to the Government, the company claims to have respected the collective rights of its staff at all times, as well as the agreements it has concluded with the various unions that coexist in the company, and indicates that the dispute with SUNTRANEP, a minority union, which is the only one to claim that the company has failed to comply with the collective agreement, is being examined in procedures currently before various courts and awaiting decision. The Committee urges the Government to keep it informed of developments in the legal proceedings referred to and to send copies of any decisions that are handed down.*
- 1090.** *As regards the allegations according to which, during the process of drawing up the collective agreement for 2008, the company displayed anti-union attitudes and used delaying tactics, which prompted the workers to resort to strike action on a number of occasions, leading to acts of intimidation and coercion by the company and the replacement of workers during the strike of October 2008, the Committee notes that according to the Government: (1) the Regional Directorate for Labour and Employment Promotion reported on 7 January 2009 that, in response to the complaint made by workers concerning alleged violation of freedom of association in the context of the right to strike exercised by the union in question, inspections were conducted and found that the company had hired workers to replace those on strike, and had altered work shifts and assignments and increased working hours in order to replace the striking workers; a contravention notice was duly issued and a fine of PEN105,000 imposed, and sanctions proceedings have been initiated before the Second Subdirectorate for Labour Inspection which are still in progress; (2) the procedure for demanding compliance had been suspended following the company's appeal of the decision imposing the fine; and (3) when the administrative authority intervened, the parties concluded an out of court agreement which ended the 37-day general strike at the end of 2008 and resulted in the adoption of the collective agreement for 2008 for a period of one year; the collective agreement provided for wage increases, an undertaking to review wage categories at the beginning of 2009, reclassification of certain workers and an increase of 5 per cent in various benefits. In this regard, the Committee requests the Government to keep it informed of the company's appeal of the decision imposing the fine, as well as of the sanctions*

proceedings initiated against the company following the replacement of workers on strike, which are currently under way before the Second Subdirectorate for Labour Inspection.

The Committee's recommendations

1091. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) As regards the allegations concerning the dismissal of Mr David Elíaz Rázuri, Secretary for Defence of the National United Trade Union of Workers of Nestlé Peru SA (SUNTRANEP) and member of the workers' committee which negotiated the 2007 list of demands, the Committee requests the Government to keep it informed of the final outcome of the legal proceedings before the Sixth Labour Court of Lima initiated by the union official in question.*
- (b) As regards the allegations concerning failure to adhere to the terms of the 2007 collective agreement and alleged anti-union attitudes displayed by the company, the Committee urges the Government to keep it informed of developments in those proceedings and to send a copy of any rulings that have already been handed down.*
- (c) As regards the allegations of anti-union attitudes and delaying tactics on the part of the company during negotiations on the collective agreement and intimidation and replacement of striking workers during the strike that occurred in October 2008, the Committee requests the Government to keep it informed of the company's appeal of the decision imposing the fine, as well as of the sanctions proceedings initiated against the company for failure to comply with the collective agreement and the replacement of striking workers, currently under way before the Second Subdirectorate for Labour Inspection.*

CASE NO. 2695

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

Allegations: The complainant organization alleges notice of dismissal against five trade unionists of the municipality of La Victoria, interference by the authorities in certain changes to the union executive committee membership and the boarding up of one of the main entrances to the union premises

1092. The complaint is contained in a communication from the General Confederation of Workers of Peru (CGTP) dated 29 December 2008. The Government sent its observations in communications dated 2 September 2009 and 2 March 2010.

1093. 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

1094. In its communication dated 29 December 2008, the CGTP alleges that the district council of La Victoria municipality, as a result of a work stoppage held in protest by the La Victoria District Council Workers' Union (SOCODIVIC) on 2 October 2008, calling for the payment of wages for September, gave notice of dismissal to union leaders Mr Mauro Chipana Huayhuas, Mr Eustaquio Falcón Morales, Mr Luis Alberto Moya Castro and Mr Teófilo Machaca Mamani, and also to union member Mr Luis Huanza Apaza, giving them six days to present their defence against a charge of serious misconduct involving alleged acts of violence in connection with the attempted illegal occupation of the premises. The trade unionists were prevented from entering their workplace as from 6 November 2008.

1095. However, the complainant organization also claims that the labour authority did not establish the existence of any violent act (it merely declared the work stoppage to be illegal).

1096. As a result of a complaint from the trade unionists, the labour authority intervened and the mayor ordered the reinstatement of all the trade unionists except Mr Mauro Chipana Huayhuas, who was barred from entering the premises.

1097. The complainant organization further alleges that on 11 September 2008, a few weeks before the events described above, a vote was held from the list headed by Mr Mauro Chipana Huayhuas and resulted in the adoption of certain changes to the membership of the union executive committee. The Ministry of Labour and Promotion of Employment (Ministry of Labour) registered the executive committee on 21 October 2008, recognizing Mr Mauro Chipana Huayhuas as General Secretary. The municipality subsequently adopted an aggressive policy of anti-union intimidation resulting in the five letters giving

notice of dismissal referred to above. However, former union General Secretary Mr Marcelino Muñoz Rodríguez (who had been expelled from the union and therefore had no representative capacity) filed an application to overturn the registration of the union executive committee, and the Trade Union Registration Office at the Ministry of Labour issued a decision on 19 November 2008 declaring the registration of the executive committee headed by General Secretary Mr Mauro Chipana Huayhuas to be null and void, without giving him an opportunity to defend himself. The complainant organization considers that there is clear interference in the union's autonomy by the Ministry of Labour, probably in collaboration with the mayor and other municipal officials.

1098. Finally, the complainant organization alleges that on 16 November 2008, officials from the mayor's office boarded up and sealed off, without any reason, one of the main entrances to the union premises, supposedly on the mayor's orders, in order to obstruct union activities.

B. The Government's reply

1099. In its communication dated 2 September 2009, the Government refers to the allegations made by SOCODIVIC regarding unfair dismissal and anti-union actions against its union leaders and states that article 28 of the political Constitution of Peru establishes the right to organize and the right to collective bargaining. The provisions contained in international instruments, such as ILO Conventions Nos 87 and 98, are binding on national territory.

1100. The Government attaches the observations of La Victoria municipality regarding the complaint, to the effect that:

- Mr Mauro Chipana Huayhuas has no authority to act or representative capacity as General Secretary of SOCODIVIC since an executive committee represented by Mr Marcelino Muñoz Rodríguez was elected to serve from 1 October 2007 to 30 September 2009;
- the dismissal of worker Mr Mauro Chipana Huayhuas had nothing to do with any political orientation or an attack on trade union rights but was concerned with proven and documented serious misconduct arising from the orchestration and conduct of an unscheduled work stoppage declared illegal by the Ministry of Labour which involved taking control of the main entrance to the district council building with flags and signs obstructing the entry of the staff and the provision of services by the municipality, with banners and flags containing abusive and denigratory messages directed at the mayor and other municipal officials;
- the municipality stated that Mr Chipana lodged an appeal against dismissal through legal channels on 16 December 2008. The 25th Labour Court is currently the competent judicial authority for ruling on the case (No. 597-2008);
- furthermore, as regards the boarding up of the entrance to the union premises, the municipality indicated that, under a ruling from the Sixth Specialist Chamber for Criminal Proceedings (Case No. 961-08) concerning the charge of aggravated usurpation, the higher prosecutor issued a writ dismissing any possible investigative proceedings against the mayor for the offence of aggravated usurpation. Considering the writ to be confirmed, the municipality believed that this aspect of the complaint should therefore also be dismissed.

1101. The Government emphasizes that Supreme Decree No. 003-97-TR, adopting the single consolidated text of the Labour Productivity and Competitiveness Act (Legislative Decree No. 728), states that it is essential that good grounds as prescribed by law are proven with respect to the dismissal of a worker employed on a private sector contract. Good grounds

may relate to the worker's capacity or conduct, and it is up to the employer to demonstrate the existence of those grounds in the context of any judicial proceedings instituted by the worker to challenge his dismissal. Section 24 of the above Act states that good grounds for dismissal are: (a) serious misconduct; (b) criminal conviction for international criminal acts; or (c) disqualification of the worker.

1102. Section 25 adds that serious misconduct is the violation by the worker of the essential duties arising from the contract of employment in such a way as to make any continuation of the employment relationship unreasonable. Section 25(a)–(f) defines serious misconduct as:

- (i) failure to meet work obligations resulting in the loss of good faith in the working relationship, the repeated resistance to orders issued with regard to the work concerned, the repeated unscheduled stoppage of work and the failure to observe internal workplace rules or occupational safety and health rules. This must be duly verified with the support of the administrative labour authority, or otherwise by the police or prosecutor's office, which are obliged to provide the necessary assistance for ascertaining the facts, with the identification of the workers guilty of misconduct in the record in question;
- (ii) acts of violence, serious indiscipline, verbal or written insults or abuse against the employer or his representatives, the worker's superiors or other workers, whether inside or outside the workplace, when such acts are directly connected with the employment relationship.

1103. The Government explains that the law stipulates that such serious misconduct is established by being objectively proven in labour proceedings, regardless of any criminal or civil aspects of the facts in question.

1104. Furthermore, section 22 of the Collective Labour Relations Act provides that the powers of the general assembly include electing the executive committee and amending the union rules. Moreover, section 23 establishes that the executive committee is the legal representative of the union and shall be constituted in the form and with the powers determined by union rules.

1105. Section 22 of the Act also states that the registration of trade unions shall be effected automatically merely on presentation of the application in the form of a sworn statement. Section 25 states that any decisions of the labour authority which refuse union registration, provide for the cancellation thereof or any other similar measure can be appealed against during the three days following notification.

1106. The Government explains that in the case in question the administrative labour authority exercised its competence through the Labour Inspection Directorate and the General Records Subdirectorate. On 21 October 2008 the certificate of automatic registration was issued, recording the changes in the membership of the executive committee of the La Victoria municipality workers' union, at the request of Mr Mauro Chipana Huayhuas as new General Secretary due to serve until 30 September 2009. However, that action was challenged by Mr Marcelino Emilio Muñoz Rodríguez, who claimed that the union rules had not been observed. The Trade Union Registration Division verified the union's file and declared the automatic registration certificate issued on 21 October 2008 to be null and void for non-compliance with the terms of section 25 of the single consolidated text of the Administrative Proceedings of the Ministry of Labour, in accordance with section 10(c) of the single consolidated text of the Collective Labour Relations Act and section 10(3) of the General Administrative Proceedings Act.

- 1107.** For this reason the file was referred to the next hierarchical level, the General Records Subdirector, which analysed the documentation relating to writs and stated that administrator Mr Mauro Chipana Huayhuas failed to attach the certified copy of the record of the general assembly, at which the members of the electoral committee are elected, for the purpose of verifying whether the regulatory quorum was observed. The copy of the record of the extraordinary general assembly dated 14 August 2008 legalized by a Peruvian notary shows that the appointment in question was made without the regulatory quorum, thereby failing to comply with the terms of sections 21 and 56 of the union rules. For any assembly to be valid the requisite quorum for the first or second convocation, as the case may be, must be achieved, otherwise the union's own rules and Article 8(1) of ILO Convention No. 87 are breached. Accordingly, the position of the Trade Union Registration Division having been corroborated, the labour administrative authority declared the automatic registration certificate of 21 October 2008 recording the changes to the membership of the union executive committee null and void, thereby invalidating the representative capacity of General Secretary Mr Mauro Chipana Huayhuas (who headed one of the lists). Moreover, by means of inspection order No. 15885-2008-MTPE/2/12.3, it was verified that 217 workers of La Victoria municipality on private sector employment contracts did not work on 2 October 2008. Hence, by means of sub-directorate order No. 205-2008-MTPE/2/12.350, it was decided to declare the work stoppage of 2 October 2008 involving these workers illegal since, under the terms of section 81 of the single consolidated text of the Collective Labour Relations Act, an unscheduled work stoppage constitutes an irregularity not protected by that law.
- 1108.** Furthermore, by means of inspection order No. 13517-2008-MTPE/2/12.3, the labour administrative authority established that the serious misconduct, of which Mr Mauro Chipana Huayhuas was accused by the municipality for committing violent acts during the work stoppage on 2 October 2008, was not substantiated or proven, and, after detecting non-compliance with the socio-labour legislation concerning freedom of association, instructed on 4 December 2008 the party concerned to take the necessary steps within two working days to ensure that the non-compliance ceased. However, no action was taken by expiry of the deadline to rectify the non-compliance and consequently the following penalty was imposed: (a) a fine of 81 per cent of 11 UIT (tax units) for discrimination towards a worker due to the free exercise of his trade union activity (an offence defined by law as very serious), since the party concerned had dismissed Mr Mauro Chipana Huayhuas in his capacity as a member of SOCODIVIC, the fine amounting to 31,185 Peruvian nuevos soles (PEN); and (b) a fine of 81 per cent of 11 UIT for failing to adopt the necessary measures in time (an offence defined by law as very serious), as indicated in the instruction of 4 December 2008 to ensure compliance with the labour regulations, the fine amounting to PEN31,185.
- 1109.** Subsequently, by means of subdirector decision No. 118-2009-MTPE/2/12.320 of 11 March 2009, the labour administrative authority decided – in view of the fact that the application to overturn the dismissal in the 25th Labour Court of Lima was admitted, that it was shown that the matters elucidated in the legal dispute include the facts on the basis of which the acting inspectors determined the existence of a labour offence with regard to the discrimination shown towards the worker Mr Mauro Chipana Huayhuas, and that the provisions of article 139(2) of the Constitution apply, whereby no authority may address cases pending before the judicial authority or interfere in the exercise of its functions – to refrain from any pronouncement, in accordance with the provisions of the Constitution (otherwise criminal liability would be incurred on the part of the officials concerned), thereby leaving intact the evidentiary value of the established facts.
- 1110.** The Government concludes by stating that it requested the judicial authority to advise it of the outcome of the legal proceedings connected with the complaint lodged and that this will be communicated to the ILO in due course in order to ensure observance by the State,

in its judicial activity, of the national and international labour legislation in force. In its communication of 2 March 2010, the Government indicates that it had once again requested the Secretariat general of the judicial authority to provide information on the situation with regard to judicial procedures by means of a magistrate appointed by the Supreme Court of Lima as coordinator for judicial questions concerning complaints before the ILO.

C. The Committee's conclusions

- 1111.** *As regards the allegations concerning notice of dismissal given to five members of SOCODIVIC as a result of certain changes in its executive committee and a work stoppage held in protest on 2 October 2008 calling for the payment of wages for September, with the municipal authorities accusing them of acts of violence and the illegal occupation of premises, the Committee notes that four of the five workers who were given notice of dismissal were not dismissed in the end and the remaining worker, Mr Mauro Chipana Huayhuas, who had been elected General Secretary of the union, reported the situation to the Ministry of Labour, according to the Government. The labour administrative authorities then established that there was no proof of any acts of violence committed by Mr Mauro Chipana but that the municipality had failed to comply with the legislation on freedom of association. The Committee notes the Government's statement to the effect that the labour administrative authority therefore instructed the municipality to stop its non-compliance with the regulations regarding the dismissal of trade unionists, and that since the municipality failed to obey the instruction, two fines were imposed on it for serious misconduct.*
- 1112.** *The Committee notes the Government's emphasis that, according to the legislation, it is up to the employer to demonstrate the existence of good grounds for dismissal in the context of the judicial proceedings and that Mr Mauro Chipana Huayhuas lodged an appeal to overturn his dismissal. The Committee requests the Government to keep it informed of the outcome of the appeal and to send the text of the ruling as soon as it is available.*
- 1113.** *Concerning the allegation that on 16 November 2008 officials from the mayor's office boarded up and sealed off, without any reason, one of the main entrances to the union premises, supposedly on the mayor's orders, in order to obstruct union activities, the Committee notes the Government's reference to the municipality's indication that the higher prosecutor issued a writ dismissing any possible investigation against the mayor for the offence of aggravated usurpation. The Committee also observes that the complainant organization has not sent any new communication indicating disagreement with the decision of the prosecutor's office and it will therefore not proceed with an examination of this allegation.*
- 1114.** *Finally, as regards the allegations that the Ministry of Labour initially registered the changes to the executive committee membership (with the appointment of Mr Mauro Chipana as General Secretary) but, when the registration was subsequently challenged by another worker (the former union General Secretary whose name appeared on a different list from that of Mr Mauro Chipana and who, according to the complainant, had been expelled from the union) claiming that the union rules had not been observed, the labour administrative authority analysed the documentation and concluded that the appointment of certain members of the executive committee (from the list headed by Mr Mauro Chipana) had been undertaken without observing the quorum required by the union rules, and that the registration of the changes to the executive committee membership was therefore cancelled, the Committee concludes that the situation described includes, firstly, elements of an internal dispute within the union, as confirmed by various appendices sent by the Government and, secondly, according to the Government's statement, elements of non-compliance with the union rules governing the procedure to change the membership*

of the executive committee, since the requisite quorum had not been achieved. The Committee observes that the complainant organization has not furnished proof of the existence of the quorum. The Committee recalls the principle according to which it is not competent to make recommendations on internal dissensions within a trade union organization, so long as the government does not intervene in a manner which might affect the exercise of trade union rights and the normal functioning of an organization [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, para. 1114], and also that, when internal disputes arise in a trade union organization, they should be resolved by the persons concerned (for example, by a vote), by appointing an independent mediator with the agreement of the parties concerned, or by intervention of the judicial authorities [see *Digest*, *op. cit.*, para. 1122].

1115. *The Committee further notes that the complainant organization has given no indication that it submitted this matter to the judicial authority despite the existence of legal channels of appeal, or at least has provided no information in this respect. The Committee therefore considers that no further examination of this allegation of internal disputes is necessary.*

The Committee's recommendation

1116. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

The Committee requests the Government to keep it informed of the outcome of the judicial appeal lodged by trade unionist Mr Mauro Chipana Huayhuas and to send the text of the ruling as soon as it is available.

CASE NO. 2528

INTERIM REPORT

Complaint against the Government of the Philippines presented by the Kilusang Mayo Uno Labor Center (KMU)

Allegations: The complainant alleges killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels

1117. The Committee last examined this case at its November 2008 meeting, when it presented an interim report to the Governing Body [351st Report, paras 1180–1240 approved by the Governing Body at its 303rd Session (November 2008)].

1118. The complainant organization, Kilusang Mayo Uno Labor Center (KMU), sent new allegations in communications dated 30 September and 10 December 2009.

1119. The Government forwarded its response to the allegations in various communications dated 15 January, 5 February and 1 March 2010.

1120. 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. Previous examination of the case

1121. At its November 2008 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:

- (a) The Committee requests the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all acts of extrajudicial killings advance successfully and without delay. In particular, the Committee requests the Government to send further information on the steps taken to fully investigate the 39 extrajudicial killings alleged by the complainant, so that all responsible parties may be identified and punished before the competent courts as soon as possible and a climate of impunity be avoided. The Committee hopes that the recommendations made by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions will be taken into account in this framework and requests to be kept informed of developments.
- (b) The Committee also requests the Government to provide additional information and clarifications on: further progress made by the Task Force USIG of the Philippine National Police in investigating complaints of killings and identifying the suspects; the methods of work of USIG and in particular, the definition of cases of "slain militant members" which are considered by USIG as falling within its competence; what is meant by "filed" and "settled" cases; the process followed once the investigation is concluded with a view to bringing the accused to justice; the activities of other bodies currently in charge of investigating killings; the rate of successful prosecutions and the sentences pronounced.
- (c) The Committee once again urges the Government to institute an independent inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and enforced disappearances of trade union leaders and members with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The Committee requests to be kept informed in this respect.
- (d) Noting once again that the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the recurrence of human rights violations, the Committee requests the Government to keep it informed of steps taken to amend the Witness Protection, Security and Benefit Act and in general, to strengthen the Witness Protection Programme. The Committee hopes that the extensive recommendations made by all parties, including the Melo Commission, the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, will be taken into account in this process.
- (e) The Committee once again requests the Government to take all measures with a view to ensuring full implementation of the recommendations of the Melo Commission on the adoption of legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority. The Committee requests to be kept informed of developments in this respect.
- (f) The Committee requests the Government to take all necessary measures without delay to ensure that the armed forces receive adequate instructions, orientation and training conducive to promoting a social climate where respect of the law reigns as the only way of guaranteeing respect for and protection of the right to life. The Committee hopes that

the recommendations made by all parties, including the Melo Commission, the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, will be taken into account in this regard and requests to be kept informed of developments.

- (g) The Committee requests the Government to take all necessary measures to ensure that the police receive the training and facilities necessary to ensure that extrajudicial killings can be effectively and swiftly investigated and elucidated and that the responsible parties are identified, brought to justice and punished. The Committee requests to be kept informed of developments in this respect.
- (h) Noting with interest the initiatives taken and proposals made at the national level to combat the problem of extrajudicial killings, abductions and enforced disappearances, the Committee requests the Government to keep it informed of the further measures taken with a view to maintaining an ongoing, open and constructive dialogue on the basis of the recommendations of the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances and the Melo Commission, with the participation of all interested parties, so as to identify and implement further ways of combating the problem of extrajudicial killings, abductions and enforced disappearances.
- (i) With regard to the Hacienda Luisita incident, which claimed the lives of at least seven trade union leaders and members and led to the injury of 70 others, the Committee once again requests the Government to take all necessary measures so that the judicial proceedings on this case advance without further delay with a view to identifying and punishing those responsible. Furthermore, it once again urges the Government to give adequate instructions to the law enforcement authorities so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations. The Committee requests to be kept informed in this respect.
- (j) The Committee reiterates its previous requests concerning:
 - (i) the adoption of measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations;
 - (ii) the issuance of instructions to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security;
 - (iii) the issuance of instructions to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations;
 - (iv) the communication of the Government's observations in respect of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.

The Committee urges the Government to reply to these requests without further delay.

- (k) The Committee calls the Governing Body's attention to this serious and urgent case.

B. The complainant's new allegations

1122. In its communications dated 30 September and 10 December 2009, the complainant organization alleges that trade union violations continue to occur with impunity in the country and hinder the full exercise of the workers' rights to organize, collectively bargain and strike under Conventions Nos 87 and 98.

1123. The KMU then goes on to list the following highlighted cases.

Extrajudicial killings and attempted murders of trade union leaders, members, organizers and union supporters and informal workers

1124. The complainant describes the extrajudicial killings and attempted murders of trade union leaders, members, organizers and union supporters and informal workers at the height of the Government's scheme to prevent the workers and informal workers from exercising their freedom of association and their right to organize and collectively bargain.

- (1) Carlito B. Dacudao, organizer of the National Federation of Sugar Workers (NFSW) – KMU in Negros, was killed on 21 August 2009 in Negros Occidental.
- (2) Sabina Ariola, Chairperson of the semi-workers and urban poor group Mamamayan ng Sta Rosa para sa Kagalingan, Kaunlaran, Kapayapaan, Tungo sa Magandang Kinabukasan ng Bayan (MSRK3 or People of Sta Rosa for Welfare, Development and Peace for a Better Society), was killed on 23 March 2009 on top of a pickup truck on the way to the municipal hall of Sta Rosa, Laguna, to conduct a protest.
- (3) Armando Dolorosa, Vice-Chairperson of NFSW–KMU Hda Myrienne Chapter, municipality of Manapla, Negros Occidental, was killed on 6 June 2008.
- (4) Gerardo “Gerry” Cristobal, former union President and organizer of the Samahan ng Manggagawa sa EDS Mfg., Inc.–Independent (SM–EMI–Ind), was killed on 10 March 2008 in Imus, Cavite.
- (5) Attorney Gil Gojol, legal counsel of the Association of the Democratic Labor Organizations – KMU (ADLO–KMU) in Bicol, was killed on 12 December 2006.
- (6) Jesus Buth Servida, union President of the SM–EMI–Ind, was killed on 11 December 2006 in front of the factory's main gate.
- (7) Jerson Lastimoso, union member of the Nagkahiusang Mamumuo sa Suyapa Farm (NAMASUFA), an affiliate of the National Federation of Labor Unions (NAFLU) – KMU, was killed on 10 December 2006 in Compostela Valley, Southern Mindanao Region.
- (8) Attempted murder of Joel Ascutia, President of the jeepney drivers' group Condor Piston–Bikol and National Deputy Secretary of PISTON, on 13 July 2009 during a nationwide transport strike.
- (9) Attempted murder of Liza Alo, President of the Packing Plant 92 Workers' Union, on 16 May 2009.
- (10) Attempted murder of Vicente Barrios, President of NAMASUFA–NAFLU–KMU, on 10 December 2006, where his companion, Jerson Lastimoso, died.

Abduction, failed abduction and enforced disappearances of trade union leaders, members, organizers and union supporters and informal workers

1125. The complainant indicates that the abductions, failed abductions and enforced disappearances of trade union leaders, members, organizers and union supporters and informal workers are committed by elements of the military and police, not only to intimidate and/or terrorize the workers and informal workers from continuing their

economic and political activities, but to ultimately paralyse and render the union or organization futile.

- (1) Jaime “Jimmy” Rosios, Board of Directors and spokesperson of the Yellow Bus Line Employees’ Union (YBLEU), was abducted on 11 August 2007 and remains missing up to now.
- (2) Failed abduction of Roy Velez, Chairperson of KMU, National Capital Region, on 20 May 2007 by suspected military agents.

Harassment, intimidation, witch-hunting and grave threats committed by the military and police forces against trade union leaders, members, organizers and union supporters and informal workers

1126. Listing of trade union leaders in the military’s order of battle; vilification of union leaders as members and supporters of the armed group New People’s Army (NPA).

- (1) The 10th Infantry Division of the Armed Forces of the Philippines (AFP) in the Southern Mindanao Region leaked out a list of individuals of alleged “enemies of the state” and target for surveillance, harassment and neutralization (killing). The following persons are included in the list: Romualdo Basilio (KMU–SMR Chairperson), Omar Bantayan (KMU–SMR Secretary-General) and Congressman Joel Maglungod (ANAKPAWIS Partylist Representative, former KMU–SMR Secretary-General and also former KMU Secretary-General).
- (2) Rene “Boyot” Galang, President of the United Luisita Workers’ Union (ULWU) and of the Unyon ng mga Manggagawa sa Agrikultura (UMA, Agricultural Workers’ Union), was vilified by the AFP Northern Luzon Command (NOLCOM) as being a New People’s Army (NPA) member, during the height of the Hacienda Luisita strike in 2005, forcing him to leave his home and seek refuge somewhere else.
- (3) Gaudencio Garcia, President of the Universal Robina Corporation Employees’ Union – Farm Division, was harassed and intimidated by military elements, approached on several occasions and invited to become a military agent. He was forced to sign a paper confessing that he was an NPA member and was included in the “Rizal 26” accused of murder.

1127. Death threats, blacklisting and other forms of harassment.

- (1) Vicente Barrios, union President of NAMASUFA–NAFLU–KMU, received anonymous death threats via text messages. Since March 2007, armed men on motorbikes are regularly seen outside his workplace, asking the security guards about his whereabouts and the activities of the union.
- (2) Arman R. Blase, a former worker at Sumitomo, Board of Directors member of the Nagkahiusang Mamumuo sa Osmiguel (NAMAOS) and current spokesperson of the KMU, Southern Mindanao. On 3 December 2008, unidentified persons on motorbikes came to the plant inquiring about his and other union leaders’ whereabouts. On two separate occasions, military men followed him and visited his parent’s house inquiring as to his whereabouts.
- (3) Belen Navarro Rodriguez, wife of Ariel Rodriguez (active member of the Pacific Cordage Workers’ Association). On 13 July 2009, four soldiers with high-powered rifles approached her, asked about a house where the KMU supposedly have meetings

and told her that the KMU are NPA members. The soldiers were also looking for Leo Caballero, spokesperson of the KMU Bicol.

- (4) Leo Caballero, spokesperson for the KMU–Bicol human rights desk. Military elements have conducted surveillance operations on him and announced over the radio that he instigates and forces people to go to protest rallies.
- (5) AMADO KADENA–NAFLU–KMU union of the company Dole Philippines. Harassment and intimidation of union officers and active members.
- (6) Union of Filipino Employees (UFE–DFA–KMU) – Nestlé Cabuyao union. Since the start of the union’s strike on 14 January 2002, there were continuous surveillance, intimidation, threat and harassment against the officers and active members. Union activities such as meetings, protest actions and peaceful picketing are kept under watch and harassed by police and military in uniform and some in civilian clothes. Two uniformed army officers “visited” the Nestlé workers’ picket line in October 2008. On 4 December 2008, confirmed police intelligence operatives harassed and threatened the Nestlé workers from Laguna to Manila. In addition, more than 250 members of this Nestlé union were charged with false criminal charges and are unable to obtain clearances from the National Bureau of Investigation (NBI) eventually barring them from employment locally and abroad. The sons and daughters of striking workers are also blacklisted from job employment.
- (7) Luz Fortuna, wife of slain Nestlé Cabuyao union leader Diosdado “Ka Fort” Fortuna. Reported cases of military intimidation to her.
- (8) Workers of Tritran Union-Independent. Union officers continuously experience various intimidation tactics such as surveillance from suspected military agents.

Militarization of workplaces where a labour dispute exists and where existing unions, or unions being organized, are considered progressive or militant

1128. The complainant indicates that the militarization of workplaces in strike-bound companies, or where a labour dispute exists between management and workers, and where existing unions or unions being organized are considered progressive or militant, is undertaken under the pretext of counter-insurgency operations, by means of military detachments and/or deployment of police and military elements.

- (1) Massive military deployment from the 66th Infantry Battalion (IB) of the AFP since September 2008. Reported incidents of harassment including those committed against the Maragusan United Workers’ Union (MUWU), NAMAOS, NAMASUFA and Nagkahiusang Mamumuo sa San Jose (NAMASAN), all affiliated with the NAFLU–KMU. The Packing Plant 92 Workers’ Union and Rotto Freshmax Workers’ Union, two independent unions, suffer the same military harassment.
- (2) In September 2009, the military conducted meetings at the Universal Robina Corporation Employees’ Union – Farm Division, and lectured the workers that they should dissociate from the KMU and other progressive militant groups such as Anakpawis Party List, etc.
- (3) Since 3 November 2008, elements of the 66th IB, headed by Lieutenant Mark Tina, were deployed in the vicinity and started entering the Sumitomo Fruits Corporation premises on a daily basis. This was during the management’s refusal to implement the latest Collective Bargaining Agreement (CBA) with NAMAOS. Military elements

conducted daily forums and showed videos vilifying the KMU and NAMAOS as NPA supporters. The forum instructors were leaders of the Workers for Industrial Peace and Economic Reforms (WIPER), a group that is organized and run by the military. The military conducted a survey in the local community to identify the whereabouts of union leaders and members for the whole month of January 2009.

- (4) In 2006, elements of the 28th IB of the AFP were deployed in the vicinity of the Suyapa Farm to watch over the union. After the killing of Jerson Lastimoso, armed men on motorbikes have been regularly patrolling the vicinity of the workplace, asking the whereabouts of union President Vicente Barrios and about union activities.
- (5) On February 2008, government troops from the 71st IB, 48th IB and 69th IB were deployed in the different barangays (villages) surrounding the Hacienda Luisita. Each barangay has 20 CAFGU (Civil Auxiliary Force Geographical Unit) who conduct meetings with film screenings. According to them “communism” is behind unions and strikes. They regularly monitor the activities of ULWU leaders.
- (6) The military conducts film screenings of “Knowing Your Enemy” to farm workers in the Cagayan Valley, Bukidnon and Davao del Sur. The film tags the different militant organizations like the KMU, KMP, Bayan, Gabriela and many others as communist fronts.
- (7) Deployment of AFP elements in Polomolok, Cotabato where AMADO KADENA–NAFLU–KMU union of Dole, Philippines, is active. The military openly accuse leaders of the KMU as NPA recruiters, conduct programmes such as the “integrated territorial defence system” or psy-war operations in the community and red-baiting and smear campaigns against the KMU and Anakpawis Partylist. AFP–CMO, 27th IB and Dole, Philippines, management conducts “social awareness programmes, industrial safety focus seminars” to espouse anti-KMU and anti-union orientation. The management assisted the formation and hate campaign of the Alliance for Democratic Progress (formed by the military personnel and anti-communist group) against the incumbent union. The management supported a group of anti-union employees in filing cases against the union and its leaders.
- (8) In Bicol, the military deployed the AFP Community Organizing, Recovery and Development (ACORD) Team and the Barangay Defense System (BDS) in worker communities near the Pacific Cordage Corporation.

Arrest and detention of, and subsequent filing of, criminal charges against trade union leaders, members, organizers and union supporters and informal workers

1129. The complainant indicates that trade union leaders, members, organizers and union supporters and informal workers are victims of arrest and detention and subsequent filing of criminal charges, due to their involvement and active participation in legitimate economic and political activities of the trade unions and informal workers’ associations.

- (1) Detention of 20 workers of Karnation Industries since 10 May 2007 for merely exercising their right to unionize and struggle against the unjust and illegal practices of their employer. Workers are still imprisoned, in appalling conditions, at the Karangalan jail. Two workers – Melvic Lupe and Leo Paro – died in jail.

- (2) Illegal arrest, detention and filing of trumped-up criminal cases against Vincent Borja, KMU national council member and KMU Eastern Visayas Regional Coordinator. To date, Vincent Borja remains in jail since his arrest on 7 May 2007.
- (3) Filing of criminal cases against AMADO KADENA officers and members.
- (4) PAMANTIK–KMU chairman, Romeo Legaspi, and other union officers charged with attempted murder, multiple murders, and multiple attempted murder in various courts.
- (5) About 250 workers of Nestlé Cabuyao were criminalized and charged with an average of 37 criminal cases each before the Municipal Trial Court–Cabuyao (MTC–Cabuyao) and Regional Trial Court–Biñan (RTC–Biñan). This militarization against workers is the continuing consequence of the Assumption of Jurisdiction Order and Deputization Order by the Secretary of the Department of Labor and Employment (DOLE).
- (6) Refiling of the trumped-up murder and attempted murder cases in Calapan City, Mindoro Oriental that accused 72 individuals, wherein 12 of the accused are trade union leaders and advocates.
- (7) Illegal arrest and detention of attorney Remigio Saladero Jr, chief legal counsel of the KMU, on trumped-up charges of arson, murder, multiple murder and attempted multiple murder among others.

1130. Finally, the KMU indicates that several documents pertaining to the listed violations have been submitted to the high-level ILO mission to the Philippines on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), conducted from 22 September to 1 October 2009, such as fact sheets; executive summaries provided by the unions UFE–DFA–KMU, SM–EMI–Ind and NFSW–KMU; police blotter; medical certificates, etc. As regards the report of the high-level ILO mission and the recommendations contained therein, the complainant wishes to highlight that it considers the statement made by Mr Lagman (Undersecretary, DOLE) as highly inaccurate. The KMU also wishes to reiterate its view that 93 trade unionists have been killed in the country for reasons related to their trade union work.

C. The Government’s reply

1131. In a communication received on 15 January 2010, the Government refers to the information provided to the high-level ILO mission on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which visited the Philippines from 22 September to 1 October 2009. Following the mission and by way of response, the Government outlines four major commitments towards the full application of the principles of freedom of association.

1132. Firstly, the Government will ensure expeditious investigation, prosecution and resolution of pending cases concerning alleged harassment and assassination of labour leaders and trade union activists. To this end, the Government has: (i) evaluated and built a comprehensive inventory of the cases with identified future actions required in each case; (ii) provided the necessary institutional funds to the Philippine National Police (PNP) for Task Force Usig and to the Department of Justice (DOJ) for Task Force 211, to further strengthen their operational capability; and (iii) entered into a technical agreement with the European Union to enhance the country’s criminal justice system, the EU–Philippines Justice Support Program (EPJUST), in partnership with the DOJ, Department of National Defense (DND), Department of the Interior and Local Government, Office of the Ombudsman, the AFP, PNP, Commission on Human Rights of the Philippines (CHRP),

and Civil Society Organizations (CSOs). The DOLE Secretary has requested the concerned government agencies to prioritize for fast investigation, prosecution and resolution of the cases raised before the ILO. The request included the case of attorney Remigio Saladero and has produced positive results with the dismissal of all three charges against him. Certified copies of the resolutions of the cases will be provided to the ILO.

- 1133.** Secondly, the Government will create a high-level tripartite case monitoring committee and will constitute the National Tripartite Industrial Peace Council (NTIPC), chaired by the DOLE Secretary, with clear terms of reference as to its mandate and membership from federations and national unions regardless of affiliations to serve the purpose. In this regard, the Government informs, in its communication of 1 March 2010, that Resolution No. 1, Series of 2010, “Constituting the National Tripartite Industrial Peace Council as the High-Level Tripartite Monitoring Body on the Application of International Standards, in particular the ILO Convention on Freedom of Association and Protection of the Right to Organise Convention” was adopted on 20 January 2010, together with the Operational Guidelines. The Tripartite Executive Committee (TEC), which serves as the technical working committee of the Council, had its first meeting on 23 February 2010 to review and evaluate the first batch of cases involving alleged extrajudicial killings. Upon the request of the labour representatives of the TEC, a sectoral consultation will be conducted where the KMU representative will be invited to provide more information and submit additional evidence, before undertaking a thorough tripartite technical review on these cases. According to the Operational Guidelines, the recommendations of the TEC embodied in individual resolutions will be submitted to the NTIPC for approval.
- 1134.** Thirdly, the Government will work closely with the ILO, the social partners and other stakeholders, to establish a technical cooperation programme that will raise the awareness and strengthen the capacity of all relevant government institutions including the social partners in the promotion and protection of labour rights. A three- to four-year programme has been subjected to a multi-stakeholder review and is being finalized by the ILO for submission to potential donors including the US Department of Labor. Pending the implementation of the programme, the Government and the ILO have started conducting a short-term awareness programme on the principles of Freedom of Association. The first was the three-day National Tripartite Conference on the Principles of Freedom of Association held last December which resulted in the signing of joint statements by the social partners with the PNP, AFP and PEZA. Two regional conferences focusing on the economic zones will be conducted before the end of March 2010.
- 1135.** Lastly, the Government is working on the proposed legislative reforms to further strengthen trade unionism and remove obstacles to the effective exercise of labour rights. The Executive Branch has, inter alia, drafted a bill seeking to amend section 263(g) of the Labour Code which authorizes the DOLE Secretary to assume jurisdiction over labour disputes imbued with national interest. It limits the assumption of jurisdiction to the ILO’s concept of “essential services”. The bill is currently undergoing tripartite consultations for submission to the NTIPC prior to filing with the appropriate committees of both houses of the 15th Congress by June 2010. In view of the possible delay in the passage of this bill into law, taking into account the forthcoming electoral exercise, the executive branch will implement the following administrative interim measures: (i) the joint guidelines on the conduct of PNP personnel and private security guards during strikes/lockouts, effective March 2010; and (ii) revised Department Order No. 40, series of 2003, to include procedural requirements prior to the assumption of jurisdiction by the DOLE Secretary.
- 1136.** In a communication dated 5 February 2010, the Government transmits additional comments received from the PNP and the DILG concerning the ILO high-level mission report.

- 1137.** As regards the conclusion of the high-level mission that each case must be thoroughly investigated, even in the absence of a formal filing of charges, the PNP restates that every crime merits police investigation the very instant it is reported or brought to the attention of the local police jurisdiction. Police investigators try their utmost to solve the cases based on recovered forensic evidence and available witnesses. Investigations are done painstakingly and properly to ensure that the cases to be filed are strong and can withstand the scrutiny of the court and eventually lead to conviction. However, there are certain types of incidents such as alleged threats, harassments or abductions of trade unionists that are not reported to the police. In these instances, even without a formal blotter, alarm or report, the PNP commences investigation so long as it is brought to its attention through other means such as newspaper accounts, reports aired in the broadcast industry (e.g. radio or television) or by queries or reports from concerned civil society organizations. However, in any criminal investigation, testimonial evidence should support forensics in order to achieve a guilty verdict beyond reasonable doubt. Certain types of crimes such as threats, harassments, or abductions, leave no trace evidence. Therefore, to ensure the progress and success of the investigation, the participation and cooperation of witnesses and family of the victim is crucial and decisive.
- 1138.** Concerning the high-level mission's conclusion that the investigations need to focus not only on the individual author of the crime but also on the intellectual instigators in order for true justice to prevail, the PNP points out that instigators can be indicted if there is proof to establish their authorship of the crime. However, Rule 130, Sec. 30 of the Rules of Court provides that "the act or declaration of a co-conspirator relating to the conspiracy and during its existence, may be given in evidence against the co-conspirator, after the conspiracy is shown by evidence other than such act or declaration". The police thus needs independent evidence to establish the culpability of the masterminds. It cannot charge or incriminate any person based on hearsay, speculations, surmises or conjectures. Otherwise, that person can seek the courts for redress in the event that it is established that he or she is innocent of the crime as charged. The PNP is therefore cautious in charging prematurely the masterminds without hard and convincing evidence.
- 1139.** With reference to the high-level mission's recommendations, the DILG indicates that the PNP is well cognizant of Executive Order No. 226 of 17 February 1995, concerning the institutionalization of the doctrine of "command responsibility" in all government offices, particularly at all levels of command in the PNP and other law enforcement agencies. The DILG further points to the built-in preventive mechanisms against violations of civil liberties and human rights, such as the supervision and control over the PNP exercised by the National Police Commission and by local government executives, as well as the existing disciplinary mechanisms before the Internal Affairs Service, the National Police Commission and the Forum for Citizens' Complaints.

D. The Committee's conclusions

- 1140.** *The Committee recalls that the present case concerns allegations of killings, grave threats, continuous harassment and intimidation and other forms of violence inflicted on leaders, members, organizers, union supporters/labour advocates of trade unions and informal workers' organizations who actively pursue their legitimate demands at the local and national levels.*
- 1141.** *The Committee deplores the gravity of the allegations made by the KMU and the fact that almost two decades after the filing of the last complaint on this issue (Case No. 1572, 292nd Report, paras 297–312), inadequate measures have been taken by the Government with regard to putting an end to killings, abductions, disappearances and other serious human rights violations which can only reinforce a climate of violence and insecurity and have an extremely damaging effect on the exercise of trade union rights. The Committee*

further observes that, since the last examination of the case in November 2008, the complainant has submitted new allegations concerning the following acts of violence: (i) extrajudicial killings and attempted murders of trade union leaders, members, organizers and union supporters and informal workers; (ii) abduction or enforced disappearance and failed abduction of trade union leaders, members, organizers and union supporters and informal workers committed by elements of the military and police; (iii) harassment, intimidation and grave threats committed by the military and police forces; (iv) militarization of workplaces where labour disputes exist and where existing unions or unions being organized are considered progressive or militant; and (v) arrest and detention of, and subsequent filing of, criminal charges against trade union leaders, members, organizers and union supporters and informal workers for their involvement and active participation in legitimate economic and political activities of trade unions and informal workers' associations.

- 1142.** *However, the Committee notes the steps indicated by the Government in recognition of the gravity of the allegations. In particular, it notes with interest that a high-level ILO mission to the Philippines on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), was finally accepted and took place from 22 September to 1 October 2009. According to its report, the high-level ILO mission was, inter alia, able to meet with representatives of: Congress; the Supreme Court; the CHRP; DOLE; law enforcement and security agencies, notably the DOJ, the DND, the AFP and the Philippine National Police (PNP); as well as the KMU, the complainant in this case.*
- 1143.** *In its reply dated 15 January 2010, the Government refers to the relevant parts of the report of the high-level ILO mission. The Committee notes that, according to the report, with respect to the initial allegations of the KMU, the Government provided details drawing from PNP reports concerning the killings of the 39 trade unionists, 11 abductions or forced disappearances and 16 identified incidents of harassment, totalling 66 cases of violence alleged in the initial complaint. In the Government's view, only 13 cases were possibly labour related, that is, the victim was either an organizer or a union member regardless of whether or not there was a strike or labour dispute at the time of death and the circumstances indicate a possible relation to labour issues and concerns. The Government stressed that many of the cases of alleged violence against unionists were not labour related but common crimes, since, in the absence of any dispute, strike, bargaining deadlock, or collective bargaining agreement negotiations, no connection with a trade union had been proven. In this regard, the Committee stresses that all allegations of violence against workers who are organizing or otherwise defending workers' interests should be thoroughly investigated and full consideration should be given to any possible direct or indirect relation that the violent act may have with trade union activity.*
- 1144.** *The Committee further notes from the mission report the Government's indication that the difficulties faced in the investigation and prosecution of the alleged killings, abductions and harassment included difficulties in distinguishing between activities in the exercise of legitimate trade union rights, and activities arising from insurgency operations. The Government indicated that 24 of the 66 cases were related to the counter-insurgency efforts. On the other hand, the Committee notes the indication of the CHRP to the high-level mission, that the Government was waging a propaganda war putting labour in the camp of the communists, and drawing a grey line between labour and security matters.*
- 1145.** *While emphasizing that persons engaged in trade union activities, or holding trade union office, cannot claim immunity in respect of the criminal law, the Committee recalls that the Committee of Experts on the Application of Conventions and Recommendations has emphasized that the freedom of association Conventions do not contain any provision permitting derogation from the obligations arising under the Convention, or any suspension of their application, based on a plea that an emergency exists [see **Digest of***

*decisions and principles of the Freedom of Association Committee, fifth edition, 2006, para. 193]. All appropriate measures should therefore be taken to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind [see **Digest**, op. cit., para. 35]. Workers should have the right, without distinction whatsoever, in particular without discrimination on the basis of political opinion, to join the organization of their own choosing. They should have the right to establish the organizations that they consider necessary in a climate of complete security irrespective of whether or not they support the social and economic model of the Government, including the political model of the country [see **Digest**, op. cit., paras 212 and 213].*

- 1146.** *The Committee therefore notes with interest the Government's commitment to creating a high-level tripartite case monitoring committee and its indication, in the most recent reply, that Resolution No. 1, Series of 2010, "Constituting the National Tripartite Industrial Peace Council as the High-Level Tripartite Monitoring Body on the Application of International Standards, in particular the ILO Convention on Freedom of Association and Protection of the Right to Organise Convention" was adopted on 20 January 2010, together with the Operational Guidelines. The Committee also notes with interest that the TEC, the technical working committee of the Council, already had its first meeting on 23 February 2010 to review and evaluate the first batch of cases involving alleged extra-judicial killings, that a sectoral consultation will be conducted where the KMU representative will be invited to provide additional information and evidence, and that, according to the Operational Guidelines, the relevant recommendations of the TEC will be submitted to the NTIPC for approval. The Committee requests to be kept informed on the working of the TEC and the NTIPC. In particular, it asks the Government to supply information on the allegations reviewed, the joint determinations made as to linkages with trade unionism, the measures adopted to expedite and monitor follow-up action, and the results achieved.*
- 1147.** *Furthermore, the Committee observes that the high-level ILO mission recommended the issuance of a high-level statement confirming respect for freedom of association and the basic civil liberties of trade union leaders and members and notes with interest the keynote address made by the Honourable Executive Secretary, Eduardo R. Ermita, at the opening of the National Tripartite Conference on Principles of Freedom of Association (Manila, 2–4 December 2009). Accordingly, the Government has expressed the hope that, via the measures taken, it will dispel fears and allegations that it tolerates the persecution of labour leaders and trade union activists, which it does not, and never will, condone, since this is a reprehensible act that assaults tripartism and social dialogue. The Committee expects that this pledge will ensure that no effort is spared to guarantee that legitimate trade union activities can be exercised in a climate free of violence, pressure, fear and threats of any kind.*

Extrajudicial killings

- 1148.** *With respect to the newly alleged extrajudicial killings and attempted murders of trade union leaders, members, organizers and union supporters and informal workers, the Committee notes that, according to the report of the high-level ILO mission, the Government had indicated on numerous occasions that most killings were not labour related and thus not within the purview of Convention No. 87, and had described regrettable killings, such as in Hacienda Luisita, as the exception rather than the norm. With respect to the initial 39 cases of alleged killings of trade unionists, the Committee notes the information provided to the high-level ILO mission by the Government drawing from PNP reports. Task Force 211 had validated nine killings as falling within its mandate as related to unions. Out of the 39 cases, there had been only two convictions.*

- 1149.** *The Committee further notes the Government's indication that Task Force 211 was doing everything it could to strengthen trust among the community, and had stepped up nationwide monitoring of cases involving political violence and extrajudicial killings pending before various prosecutors' offices and courts nationwide. In that regard, it had concluded a Memorandum of Agreement (MoA) with the media and various law schools. Under the MoA, accredited volunteers from the media and law schools could attend the scheduled hearings of cases being monitored, apprise themselves of the proceedings, and record the incidents that transpire in the cases' respective monitoring kits.*
- 1150.** *The Committee also notes the Government's indication, in its reply of 15 January 2010, that the DOLE Secretary has requested the concerned government agencies to prioritize for fast investigation, prosecution and resolution, the cases raised before the ILO. The Government refers to the following measures taken: (i) establishment of a comprehensive inventory of the cases with identified future actions required in each case; (ii) provision of necessary institutional funds to the PNP for Task Force Usig and to the DOJ for Task Force 211, to further strengthen their operational capability; and (iii) conclusion of a technical agreement with the European Union to enhance the country's criminal justice system, the EPJUST, in partnership with the DOJ, DND, Department of the Interior and Local Government, Office of the Ombudsman, AFP, PNP, CHRP, and civil society organizations.*
- 1151.** *Noting the ample information provided by Task Force 211 as to the status of the 39 cases of alleged killings, the Committee requests the Government to respond without delay to the new allegations of murder, and attempted murder, brought forward by the complainant in its communications dated 30 September and 10 December 2009. The Committee expects that these cases will also be reviewed by the national tripartite monitoring body to be created and asks the Government to indicate without delay the progress made in this regard.*
- 1152.** *While noting with interest the numerous efforts made by the Government to strengthen existing structures and create new ones aimed at following through on complaints with a view to convicting the guilty parties, the Committee regrets that, at present, the advances in prosecuting and convicting perpetrators of violence against trade unionists are still entirely insufficient. In particular, the Committee is deeply concerned that the information brought to its attention only refers to two convictions pronounced so far for these acts of extreme gravity, despite the fact that the incidents date as far back as 2001. Moreover, while the Government has shown that even the military are not immune from prosecution by its recent arrest of a Private First Class of the Philippine Army for eight extrajudicial killings, the Committee notes with regret that suspects have been identified in only 16 out of 39 individual cases and that proceedings have been instituted before the courts in only nine cases. Also, the Committee notes with regret that of the 19 cases being investigated, only 11 remained under investigation, since in eight cases the complainant was no longer interested in pursuing the case or had moved to an undisclosed place.*
- 1153.** *The Committee observes that, when providing information to the high-level ILO mission as to the status of the 39 cases of alleged killings, the Government did not single out the data concerning the investigation, prosecution and judicial proceedings in the Hacienda Luisita incident/in a strike, which claimed the lives of at least seven trade union leaders and members (Jhaivie Basilio, Adriano Caballero, Jun David, Jesus Laza, Jaime Pastidio, Juancho Sanchez and Jessie Valdez) and led to the injury of 70 others. The Committee therefore refers to the comments made above regarding the cases of alleged extrajudicial killings. In particular, noting that nine police officers had previously been identified as suspects in connection with the Hacienda Luisita incident and recommended to be charged for multiple homicide, the Committee requests the Government to provide specific*

information without delay as to the institution of judicial proceedings for this incident which dates back to 2004.

- 1154.** *While noting the Government's commitment to ensuring expeditious investigation, prosecution, and resolution of pending cases concerning alleged assassination of labour leaders and trade union activists, the Committee once again recalls that justice delayed is justice denied [see **Digest**, op. cit., para. 105]. 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**, op. cit., para. 52]. The Committee recalls that the initial allegations had referred to the insufficiency of the Witness Protection Programme (WPP) and the serious impact that this had on bringing the perpetrators of violence to justice. It notes that the Government itself acknowledges the difficulties which prevent the successful conclusion of the investigations, in particular, the lack or retraction of witnesses and lengthy procedures. The Committee trusts that the Government will continue to take the measures necessary for the full protection of witnesses, and will return to these issues below.*
- 1155.** *The Committee once again recalls that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest**, op. cit., para. 48]. It urges the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all acts of extrajudicial killings advance successfully and without delay. In particular, the Committee requests the Government to supply details without delay on the comprehensive case inventory referred to by the Government, and provide further information on the steps taken to fully investigate the pending allegations of extrajudicial killings and attempted murders, so that all responsible parties may be identified and punished before the competent courts as soon as possible and to combat a climate of impunity. Noting the indication of the PNP that, even without a formal blotter, alarm or report, the PNP commences investigation as long as the incident is brought to its attention through other means, the Committee expects that, even in the absence of formal filing of charges, all cases of murder are thoroughly investigated, and requests the Government to provide additional information on the manner in which the results of the tripartite deliberations of the NTIPC are fed into the investigation and prosecution processes of the other task forces and relevant bodies, including the CHRP. The Committee continues to support the recommendations made by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and urges to be kept informed of all progress made in their implementation.*
- 1156.** *The Committee finally notes the information provided to the high-level mission that a Bill "strengthening the Commission on Human Rights and for other purposes" was before the Congress. The Bill envisages expanding the Commission's investigative powers and visitorial powers in detention centres and, in particular, providing it with new concurrent prosecutorial powers. In this regard, the Committee notes with interest that, under section 26(b), the CHRP would, in cases of extrajudicial killings, summary executions and "massacres" or mass killings, be able to formally recommend prosecution and ask the Government either to dismiss or to act on the recommendation. If the Government failed to act within 90 days, the CHRP would carry out the preliminary investigation itself and send the results to prosecution; if the Government persisted in its inaction for 30 days, the CHRP would deputize a prosecutor to pursue the case. The Committee notes from the high-level ILO mission report that the CHRP has raised the matter of prosecutorial powers because of the dismally low number of prosecutions. The Committee considers that the relevant state institutions for combating impunity need to continue to be strengthened and, in this regard, sees the proposed Act as an important step for bolstering the powers of this*

independent constitutionally-based national human rights body. The Committee requests the Government to keep it informed of the developments in relation to the adoption of further statutory support to the CHRP and to supply details of any new developments in the framework of EPJUST.

Abductions and enforced disappearances

- 1157.** *The Committee notes the complainant's new allegations regarding the abduction of Jaime "Jimmy" Rosios and the attempted abduction of Roy Velez, of trade union leaders or members.*
- 1158.** *With respect to the initial 11 cases of alleged abductions and enforced disappearances of trade unionists, the Committee notes the information from PNP reports provided to the high-level ILO mission that: six are under investigation; in one case, the alleged victim's organization is non-existent; in two cases, victims moved to undisclosed places; no complaint was filed in one case; and there was no report of incident in another case. Furthermore, Task Force 211 could apparently only monitor cases of political violence, and did not deal with abductions. In addition, government agencies had been asked to prioritize for fast investigation, prosecution and resolution, all cases raised before the ILO.*
- 1159.** *The Committee observes with regret that the information supplied as to the status of the 11 cases of previously alleged abductions or enforced disappearances is scant, and that the Government has not yet replied to the additional cases of alleged abduction and attempted abduction brought forward in the complainant's latest allegations. The Committee urges the Government to institute an independent inquiry and proceedings before the competent courts as soon as possible with regard to the allegations of abductions and enforced disappearances of trade union leaders and members with a view to shedding full light onto the relevant facts and circumstances, and to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. It asks the Government to indicate the progress made in this regard and to provide any relevant court judgements.*
- 1160.** *Furthermore, the Committee notes the information provided to the high-level mission that a Bill "defining and penalizing the crime of enforced or involuntary disappearance and for other purposes" was before the Congress. It notes with interest that the Bill defines the term "enforced or involuntary disappearance" (section 3), and provides that the right against enforced or involuntary disappearance shall not be suspended under any circumstances including political instability, threat of war, state of war or other public emergencies (section 4). In addition, the Bill imposes heavy penalties upon persons who directly committed the act of enforced or involuntary disappearance, who directly forced, instigated, encouraged or induced others to commit the act, or who cooperated in the act. The Committee considers that the adoption of this Bill could represent an important step in acknowledging the existence of enforced disappearances and ensuring significant and dissuasive sanctions, and requests the Government to keep it informed of the progress made in its adoption, or of that of any other relevant legislative measures.*

Witness protection

- 1161.** *The Committee recalls that during the previous examination of this case, it had requested the Government to keep it informed of steps taken to amend the Witness Protection, Security and Benefit Act and, in general, to strengthen the WPP. The Committee notes from the report of the high-level ILO mission that the Government has identified the absence of witnesses or unwillingness to cooperate by members of the immediate families*

and the absence of a complaint or report filed before competent authorities as major obstacles to investigation and prosecution. Delays in prosecuting cases related to Convention No. 87 were, inter alia, due to the procedure which relies heavily on testimonial rather than forensic evidence and was impeded when witnesses retracted their statements because of threats or settlements reached with offenders or where witnesses were otherwise absent.

- 1162.** *The Committee also notes the statement of the PNP, in the Government's communication dated 5 February 2010, that the participation and cooperation of witnesses and families of victims is crucial to ensure the progress and success of the investigation. Although certain types of incidents such as alleged threats, harassments or abductions of trade unionists were not reported to the police, the PNP commenced investigation as long as the case was brought to its attention, e.g. through media or civil society organizations. However, in any criminal investigation, testimonial evidence was needed to support forensics, in order to achieve a guilty verdict beyond reasonable doubt, in particular in case of crimes that leave no or only weak trace evidence.*
- 1163.** *The Government had indicated, however, that the criticisms of the WPP were inaccurate and often the result of incomplete media reporting. The Government affirmed that of the 450 witnesses in a wide range of cases currently covered by the programme, only one witness had been lost and that was because the person had refused the security coverage. The Committee, however, notes with deep regret from the report of the high-level ILO mission that some of the meetings with the numerous individuals who had travelled long distances to explain their case took place in unknown locations due to the witnesses' clear fear for their safety.*
- 1164.** *The Committee further notes from the high-level ILO mission report that the Supreme Court considered that the WPP was shown to be insufficient in some aspects. The Supreme Court, together with the CHRP, was reviewing the WPP on the writ of amparo adopted in 2007, and hoped that the "Proposed Rule to Strengthen Protection and Security of Aggrieved Parties Availing of the Writ of Amparo or their Witnesses, and Guidelines in the accreditation of persons and private institutions as sanctuary providers under the Writ of Amparo" would be adopted by the end of 2009.*
- 1165.** *Furthermore, the Committee notes with interest from the high-level ILO mission that the Bill seeking to strengthen the CHRP included the aspect of witness protection. While to date the WPP is administered by the DOJ, witnesses would be able to choose protection from either the DOJ or the CHRP. According to section 36 of the Bill, the Commission shall, in the conduct of its investigations, implement and manage a witness protection programme, including the provision of security, shelter, relocation and livelihood assistance to witnesses and their families.*
- 1166.** *The Committee recalls, once again, that the Government is under a responsibility to take all necessary measures to have the guilty parties identified and punished – in particular by ensuring that witnesses, who are crucial for the successful identification and prosecution of suspects, are effectively protected – and to successfully prevent the recurrence of human rights violations. In this regard, the Committee considers that, even in the absence of a formal filing of charges, each case should be thoroughly investigated and, where witnesses have come forward, appropriate and adequate protection should be provided.*
- 1167.** *The Committee requests the Government to indicate the progress made in respect of the Bill relating to the powers of the CHRP and to supply the final text of the Act as soon as it is adopted. Moreover, the Committee requests to be kept informed on any further developments regarding the adoption and implementation of the proposed rule to*

strengthen protection and security of aggrieved parties availing of the writ of amparo or their witnesses, currently being elaborated by the Supreme Court and the CHRP.

Lengthy procedures

- 1168.** *From the high-level ILO mission report, the Committee notes the Government's indication that prosecution delays were, inter alia, due to case overload. Each prosecutor handled an average of 650 cases, and some courts had no assigned prosecutor. Some 30 to 40 criminal cases were calendared per day in court, and three to four criminal cases proceeded to trial on the same day. As a result, a criminal case was fortunate to have three trial sittings in one year.*
- 1169.** *In view of the above, the Committee wishes to recall, where legal proceedings are overly lengthy, the importance it attaches to such proceedings being concluded expeditiously, as justice delayed is justice denied [see **Digest**, op. cit., para. 104]. The Committee requests the Government to take the necessary measures to ensure the expeditious conclusion of proceedings in allegations of labour-related violence. In this regard, the Committee observes that the recommendations of the Melo Commission had, inter alia, emphasized the need for the creation of a special team of competent and well-trained prosecutors to handle the trials and of special courts to hear and try these cases. The Committee also observes that, as a result, the President of the Philippines had given instructions that special courts for the trial of charges involving unexplained killings of an ideological/political nature be created. The Supreme Court responded to the request by designating 99 regional trial courts as special tribunals to expeditiously resolve or decide the cases of extrajudicial killings. Trials would be terminated within 60 days and a judgement rendered within 30 days, priority would be given to cases of activists and media personnel and any dilatory pleadings or motions would be prohibited. The Committee requests the Government to supply information on the working of the 99 regional trial courts designated by the Supreme Court, and to provide detailed information on steps taken to create a special team of competent and well-trained prosecutors.*
- 1170.** *The Committee further notes from the report that the CHRP is finalizing its procedural "Omnibus Rules", collating them with the "Anti-Red Tape Law". Those rules would require cases to be treated within a maximum of one year. The Committee asks to be kept informed of any further developments regarding the adoption and implementation of the "Omnibus Rules" currently being elaborated by the CHRP.*

Chain of command

- 1171.** *The Committee recalls that it had previously requested the Government to take all measures with a view to ensuring full implementation of the recommendations of the Melo Commission on the adoption of legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offences committed by personnel under their command, control or authority.*
- 1172.** *The Committee notes the statement of the PNP, in the Government's communication dated 5 February 2010, to the effect that instigators can only be indicted if there is proof to establish their authorship of the crime, and that, pursuant to Rule 130, Sec. 30 of the Rules of Court, the police need independent and convincing evidence to establish the culpability of masterminds and cannot prematurely charge or incriminate any person based on hearsay or speculation.*

- 1173.** *The Committee considers that investigations should focus not only on the individual author of the crime but also on the intellectual instigators in order for true justice to prevail and to meaningfully prevent any future violence against trade unionists. It is crucial that the responsibility in the chain of command also be duly determined when crimes are committed by military personnel or the police so that the appropriate instructions can be given at all levels and those with control held responsible in order to effectively prevent the recurrence of such acts. With reference to the recommendations made by the Melo Commission, the UN Special Rapporteur, and the National Consultative Summit, the Committee asks the Government to indicate the measures envisaged to implement the doctrine of command responsibility, as it is understood in international law, in respect of all acts of violence.*
- 1174.** *Also, the Committee had previously requested the Government to take all necessary measures to ensure that the police receive the training and facilities necessary to ensure that extrajudicial killings can be effectively and swiftly investigated and elucidated and that the responsible parties are identified, brought to justice and punished. In this regard, the Committee notes with interest the Government's indication that it has provided the necessary institutional funds to the PNP for Task Force Usig and to the DOJ for Task Force 211, to further strengthen their operational capacity.*

Harassment and intimidation: Militarization of workplaces

- 1175.** *The Committee had previously requested: (i) the adoption of measures, including the issuance of appropriate instructions, to bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (ii) the issuance of instructions to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; (iii) the issuance of instructions to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers' organizations can 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 (iv) the communication of the Government's observations on the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.*
- 1176.** *With respect to the initial allegations of harassment and intimidation, the Committee notes the information provided to the high-level ILO mission that 16 cases of alleged harassment had been identified, of which, in three cases, arrest warrants were issued; in three cases no harassment had occurred; six cases were under investigation; in three cases the complainant has moved overseas or to an undisclosed place; and in one case the alleged victim's organization did not exist. Five out of the 16 identified cases have been referred to the CHRP.*
- 1177.** *The Committee observes that the new allegations of harassment and intimidation refer to: (i) listing in the military's Order of Battle (Romualdo Basilio – KMU–SMR Chairperson, Omar Bantayan – KMU–SMR Secretary-General; and Joel Maglungod – ANAKPAWIS Partylist Representative, former KMU–SMR Secretary-General and also former KMU Secretary-General); (ii) vilification of Rene "Boyot" Galang, President of ULWU and UMA, as member of the NPA; (iii) harassment and intimidation of Gaudencio Garcia, President of the Universal Robina Corporation Employees' Union – Farm Division, by military elements who approached him inviting him to become a military agent, forced him*

to sign a paper confessing NPA membership and included him in the “Rizal 26” accused of murder; (iv) death threats against, and surveillance of, Vicente Barrios, President of NAMASUFA–NAFLU–KMU; (v) surveillance and tailing of Arman Blase, Board of NAMAOS and spokesperson of the KMU, Southern Mindanao; (vi) harassment of Belen Navarro Rodriguez, wife of Ariel Rodriguez (active member of the Pacific Cordage Workers’ Association); (vii) surveillance of Leo Caballero, spokesperson of the KMU–Bicol Human Rights Desk; (viii) harassment and intimidation of officers and active members of AMADO KADENA–NAFLU–KMU; (ix) continuous surveillance, intimidation, threat and harassment against officers and active members of the UFE–DFA–KMU Nestlé Cabuyao union since the start of its strike in 2002, including surveillance and harassment of union activities such as meetings, protest actions and peaceful picketing by police and military in uniform or civilian clothes and false criminal charges against, and blacklisting from employment of 250 union members; (x) military intimidation of Luz Fortuna, wife of slain Nestlé Cabuyao union leader Diosdado Fortuna; and (xi) continuous intimidation and surveillance of officers of Workers of Tritran Union-Independent by the military. The Committee requests the Government to communicate its observations on the above allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU.

- 1178.** *The Committee supports the conclusion of the high-level mission that incidents of intimidation by the armed forces need to be independently investigated and rapidly redressed. In this context, the Committee notes with interest that, according to section 26(a) of the Bill strengthening the CHR, its expanded powers would also come into play in case of use of physical, psychological and degrading punishment, torture, force, violence, threats and intimidation. The Committee requests to be kept informed of the progress made in ensuring the full and swift investigation of the alleged acts of harassment and intimidation.*
- 1179.** *As regards the alleged listing of trade unionists in so-called “order of battle”, the Committee notes with concern from the report of the high-level mission the indications, including from government bodies, that the AFP does maintain “order of battle” lists featuring trade unionists. While the army often denied this, and the actual practice depended on the army commander in charge, the high-level mission was told that this fact had been admitted by an army general in recent cases. The Committee considers that such measures go against the duty to take all appropriate measures to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind. In this regard, it notes with interest that, according to section 17 of the Bill concerning enforced or involuntary disappearance, an “order of battle” or any order from a superior officer or a public authority causing the commission of enforced or involuntary disappearance is unlawful and cannot be invoked as a justifying circumstance. Any person receiving such an order shall have the right to disobey it. The Committee requests to be kept informed on further developments in this respect and on any additional measures taken to suppress “order of battle” which lead to the commission of acts of violence against trade unionists on the basis of their purported ideology.*
- 1180.** *As regards militarization of workplaces, the Committee observes that the new allegations concern: (i) massive military deployment from the 66th IB of the AFP since September 2008 and incidents of military harassment against MUWU, NAMAOS, NAMASUFA and NAMASAN, Packing Plant 92 Workers’ Union and Rotto Freshmax Workers’ Union; (ii) conduct of meetings by military in September 2009 at the Universal Robina Corporation Employees’ Union – Farm Division, lecturing workers that they should dissociate from the KMU; (iii) since November 2008, deployment of the 66th IB in the vicinity of Sumitomo Fruits Corporation with military entering the premises on a daily basis during the management’s refusal to implement the latest CBA with NAMAOS,*

conducting daily forums, showing videos vilifying the KMU and NAMAOS as NPA supporters, and conducting a survey to identify the whereabouts of union leaders and members in January 2009; (iv) in 2006, deployment of the 28th IB of the AFP in the vicinity of the Suyapa Farm to watch over the union, with armed men on motorbikes patrolling the vicinity of the workplace and asking the whereabouts of union President Vicente Barrios and of the union's activities; (v) in February 2008, deployment of the 71st, 48th and 69th IBs in the different barangays (villages) surrounding the Hacienda Luisita, conducting meetings with film screenings saying that "communism" is behind unions and strikes, and monitoring activities of ULWU leaders; (vi) the military conducting film screenings of "Knowing Your Enemy" to farm workers in the Cagayan Valley, Bukidnon and Davao del Sur, tagging the different activist organizations like the KMU as communist fronts; (vii) deployment of AFP elements in Polomolok, Cotabato, where AMADO KADENA-NAFLU-KMU is active, openly accusing the KMU leaders as NPA recruiters, conducting programmes such as the "integrated territorial defence system" or psy-war operations in the community, red-baiting and smear campaigns against the KMU and Anakpawis Partylist, "social awareness programme, industrial safety focus seminars" to espouse anti-KMU and anti-union orientation; and (viii) in Bicol, deployment of the AFP Community Organizing, Recovery and Development (ACORD) Team and the BDS in worker communities near the Pacific Cordage Corporation. The Committee urges the Government to communicate its observations on these new allegations.

- 1181.** *The Committee notes from the high-level mission report that the AFP has indicated that it handled insurgencies and did not carry out functions related to labour relations. Law enforcement authorities would step in only when all peaceful means of resolving disputes were exhausted. If a labour dispute led to unrest, then the police would come in to ensure nobody got hurt. Rules of engagement had been developed for the police forces to deal with acts of violence at rallies. Police forces could not just intervene at will, but had to be deputized by DOLE for labour disputes, unless violence or a specific crime was involved. The AFP had a crowd dispersal unit, which the police, when deputized by DOLE, would call upon if it could not cope. The military had admitted, however, to the holding of community meetings in relation to trade unions and worker representation. An AFP representative explained that the AFP was facing an insurgency, which focused on workers for recruitment. In order to insulate workers, the AFP was implementing the Integrated Area Security and Public Safety System and the Integrated Territorial Defence System, teaching people how to protect themselves from false awareness campaigns. One of the system measures involved the military conducting humanitarian activities, as well as public information campaigns to keep people out of communist hands. The first step in successful counter-insurgency was to engage the community and establish good relations, and it was possible that this might lead to perceptions of harassment. The AFP saw it as its role to protect people and keep them from joining the insurgency. Involvement in labour disputes was not part of the DND-AFP mandate, but there were times that the DND-AFP thought a link with their mandate existed, and investigated further. Talking to trade union members was not harassment, but was simply talking to a group of community members, which was much easier and time and cost efficient.*
- 1182.** *The Committee stresses that, while the military clearly has a key role to play in ensuring law and order in the country, blanket linkages of trade unions to the insurgency had a stigmatizing effect and often placed union leaders and members in a situation of extreme insecurity. In this context, the Committee notes from the report that the military officers with whom the high-level mission met, recognized their lack of experience or knowledge in respect of trade union rights and their links to civil liberties and welcomed training in this regard.*
- 1183.** *The Committee welcomes the Government's commitment within the framework of the technical cooperation proposal to elaborate a combined human rights, trade union rights*

and civil liberties programme for the forces of order (in particular PNP and the AFP) and expects that such activities can be conducted in the near future and in coordination with the CHRP. The Committee urges the Government to keep it informed of the progress made in this regard, as well as of any progress made in updating the Guidelines for the Conduct of the PNP, Private Security Guards and Company Guard Forces during Strikes, Lockouts and Labor Disputes.

- 1184.** *The Committee further expects that the Government will take the necessary accompanying measures, including the issuance of appropriate high-level instructions, to: (i) bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (ii) to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; and (iii) to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers' organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against their leaders and members. The Committee requests to be kept informed in this regard.*

Arrest and detention

- 1185.** *The Committee notes the new allegations of arrest and detention, and subsequent filing, of criminal charges against trade unionists brought forward by the complainant, including: (i) the detention of 20 workers of Karnation Industries since 10 May 2007 at the Karangalan jail for exercising their right to unionize and struggle against allegedly unjust and illegal practices of their employer; (ii) the illegal arrest, detention since 7 May 2007, and filing of a trumped-up criminal case against Vincent Borja, KMU national council member and the KMU Eastern Visayas Regional Coordinator; (iii) the filing of fabricated criminal cases against AMADO KADENA officers and members; (iv) the filing of trumped-up charges of multiple murder, attempted murder, and multiple attempted murder against PAMANTI-KMU Chairman, Romeo Legaspi, and other union officers; (v) the criminalization of some 250 workers of Nestlé Cabuyao, charged with an average of 37 criminal cases each, before the Municipal Trial Court in Cabuyao and the Regional Trial Court in Biñan; (vi) the re-filing of trumped-up murder and attempted murder cases in Calapan City, Mindoro Oriental, against 72 persons, of which 12 are trade union leaders and advocates; and (vii) the illegal arrest and detention of attorney Remigio Saladero Jr, chief legal counsel of the KMU, on fabricated charges of arson, murder, multiple murder, and attempted multiple murder.*
- 1186.** *In particular, the Committee notes with deep concern from the complainant's allegations, that, for more than two and a half years, the workers of Karnation Industries had been imprisoned, without judgement, in allegedly appalling conditions (prison cell not allowing 20 persons to sleep at the same time; inadequate food and medical care, etc.). Two of the 20 workers – Melvic Lupe and Leo Paro – died in jail of tuberculosis. In November 2009, under the counsel of attorney Remigio D. Saladero of the Pro-Labor Legal Assistance Center (PLACE), the Regional Trial Court in Morong, Rizal, granted the workers' petition for bail. Fourteen out of the 18 Karnation workers have been temporarily released after posting bail (through a surety bond). However, the release of the remaining four workers was put on hold by the court after the complainant filed, on 28 December 2009, a motion for reconsideration to revoke the granting of bail. The court is scheduled to hear the motion on 11 January 2010.*

- 1187.** *The Committee notes with interest the Government's indication that the request of the DOLE Secretary for the concerned government agencies to prioritize the fast investigation, prosecution and resolution of the cases raised before the ILO, included the case of attorney Remigio Saladero and has produced positive results with the dismissal of all three charges against him. However, the Committee expresses deep regret that the Government does not provide any information on the remaining allegations of illegal arrest and detention and subsequent filing of fabricated charges. It requests the Government to communicate its observations in respect of the allegations regarding the 20 workers of Karnation Industries and, in particular, as regards the continuing detention of four of these workers; the KMU national council member and Eastern Visayas Regional Coordinator Vincent Borja; the AMADO KADENA officers and members; the PAMANTIK–KMU Chairman Romeo Legaspi and other union officers; the 250 workers of Nestlé Cabuyao; and the 72 persons in Calapan City/Mindoro Oriental, of which 12 are trade union leaders and advocates.*
- 1188.** *As regards the alleged instances of arrest, with subsequent filing of charges, the Committee emphasizes that the arrest of trade unionists against whom no charge is brought involves restrictions on freedom of association, and governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests [see **Digest**, op. cit., para. 70]. As for the alleged link between the illegal arrests and detentions and the exercise of legitimate trade union activities, the Committee is not in a position to determine, on the basis of the information brought before it, whether these cases concern trade union activities. 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 [see **Digest**, op. cit., para. 64]. The Committee requests the Government to submit further, and as precise, information as possible in relation to these arrests and the legal or judicial proceedings upon which they are based.*
- 1189.** *As regards the considerable delays in the judicial process, the Committee reiterates that justice delayed is justice denied [see **Digest**, op. cit., para. 105]. It also wishes to emphasize that, although the exercise of trade union activity, or the holding of trade union office, does not provide immunity as regards the application of ordinary criminal law, the continued detention of trade unionists, without bringing them to trial, may constitute a serious impediment to the exercise of trade union rights [see **Digest**, op. cit., para. 82]. The Committee requests the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all cases of alleged illegal arrests and detention proceed in full independence, and without further delay, so as to shed full light on the current situation of those concerned and the circumstances surrounding their arrest.*
- 1190.** *Regarding, in particular, the workers of Karnation Industries, the Committee wishes to recall that preventive detention should be limited to very short periods of time, intended solely to facilitate the course of a judicial inquiry [see **Digest**, op. cit., para. 78]. The prolonged detention of persons without bringing them to trial, because of the difficulty of securing evidence under the normal procedure, is a practice which involves an inherent danger of abuse; for this reason it is subject to criticism [see **Digest**, op. cit., para. 81]. The Committee notes with deep regret that the workers of Karnation Industries have been detained without judgement for more than two and a half years, and urges the Government to take the necessary measures to ensure that any of those workers still imprisoned are immediately released.*
- 1191.** *Should the investigation of the pending allegations lead to the determination that the persons concerned were detained in relation to their legitimate trade union activities*

(including the holding of a lawful strike), the Committee requests the Government to take the necessary measures to ensure that all remaining charges are dropped. It also requests the Government to communicate the texts of any judgements handed down in the above cases, together with the grounds adduced therefore.

1192. *In conclusion, while observing that problems of impunity and insufficient guarantees for the respect of the rule of law still persist, the Committee is encouraged by the positive attitude demonstrated by the Government in accepting the high-level ILO mission and commencing a series of concrete steps, including the elaboration of a three- to four-year technical cooperation programme aimed at, among other things, the awareness raising and information dissemination in relation to trade union rights and civil liberties and the combating of impunity. The Committee expects that the steps taken and envisaged by the Government will make an important contribution to progressively ensuring a climate of justice and security for trade unionists in the Philippines, and requests the Government to continue to keep it informed of all progress made in this regard.*

The Committee's recommendations

1193. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee deplores the gravity of the allegations made in this case and the fact that, almost two decades after the filing of the last complaint on similar allegations, inadequate progress has been made by the Government with regard to putting an end to killings, abductions, disappearances and other serious human rights violations which can only reinforce a climate of violence and insecurity and have an extremely damaging effect on the exercise of trade union rights.*
- (b) As regards the alleged extrajudicial killings, abductions and enforced disappearances, the Committee:*
 - (i) requests the Government to respond without delay to the new allegations of murder, attempted murder, abduction and attempted abduction brought forward by the complainant;*
 - (ii) trusts that the Government will continue to take the measures necessary for the full protection of witnesses;*
 - (iii) urges the Government to take all necessary measures so as to ensure that the investigation and judicial examination of all pending allegations of extrajudicial killings, attempted murder, abduction and attempted abduction advance successfully and without delay, and to provide any relevant court judgements;*
 - (iv) requests the Government, in particular, to supply details without delay on the comprehensive case inventory referred to by the Government, and provide further information on the steps taken to fully investigate the pending allegations of extrajudicial killings, attempted murders, abductions and attempted abduction, so that all responsible parties may be identified and punished before the competent courts as soon as possible and to combat a climate of impunity;*

- (v) *requests the Government to take measures to ensure that, even in the absence of a formal filing of charges, all cases are thoroughly investigated;*
 - (vi) *requests the Government to indicate the measures envisaged to implement the doctrine of command responsibility in respect of all acts of violence;*
 - (vii) *asks the Government to supply details of any new developments in the framework of EPJUST;*
 - (viii) *requests the Government to keep it informed of the progress made in the adoption of the Bill concerning enforced disappearances.*
- (c) *Noting with interest the constitution of the NTIPC as the high-level tripartite monitoring body, the Committee requests the Government:*
- (i) *to keep it informed on the working of the TEC and the NTIPC;*
 - (ii) *to supply information on the allegations reviewed, the joint determinations made as to linkages with trade unionism, the measures adopted to expedite and monitor follow-up action, and the results achieved;*
 - (iii) *to provide additional information on the manner in which the results of the tripartite deliberations of the NTIPC are fed into the investigation and prosecution processes of the other task forces and relevant bodies, including the CHRP.*
- (d) *With respect to the Hacienda Luisita incident, the Committee, noting that nine police officers had previously been identified as suspects and recommended to be charged for multiple homicide, requests the Government to provide specific information as to the institution of judicial proceedings for this incident which dates back to 2004.*
- (e) *The Committee requests the Government to indicate the progress made in respect of the Bill relating to the powers of the CHRP, and to supply the final text of the Act as soon as it is adopted. Moreover, the Committee requests to be kept informed on any further developments regarding the adoption and implementation of the proposed rule to strengthen protection and security of aggrieved parties availing of the writ of amparo or their witnesses, being elaborated by the Supreme Court and the CHRP.*
- (f) *As to the issue of lengthy procedures, the Committee requests the Government to take the necessary measures to ensure the expeditious conclusion of proceedings in allegations of labour-related violence. The Committee requests the Government to supply information on the working of the 99 regional trial courts designated by the Supreme Court, and to provide detailed information on the steps taken to create a special team of competent and well-trained prosecutors. The Committee asks to be kept informed on any further developments regarding the adoption and implementation of the “Omnibus Rules” being elaborated by the CHRP.*

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- (g) *As regards the alleged harassment and intimidation of trade union leaders and members affiliated to the KMU, the Committee:*
- (i) *requests the Government to communicate its observations on the new allegations;*
 - (ii) *requests to be kept informed of the progress made in ensuring the full and swift investigation of the alleged acts of harassment and intimidation;*
 - (iii) *noting with interest section 17 of the Bill concerning enforced or involuntary disappearances, requests to be kept informed on any developments in relation to its adoption and on any additional measures taken to suppress “order of battle” which lead to the commission of acts of violence against trade unionists on the basis of their purported ideology.*
- (h) *With respect to the militarization of workplaces, the Committee:*
- (i) *urges the Government to communicate its observations on the new allegations;*
 - (ii) *welcomes the Government’s commitment within the framework of the technical cooperation proposal on training and capacity building, to elaborate a combined human rights, trade union rights and civil liberties programme for the forces of order (in particular PNP and the AFP), and expects that such activities can be conducted in the near future and in coordination with the CHRP. The Committee requests to be kept informed of the progress made in this regard;*
 - (iii) *urges the Government to keep it informed of the follow-through given to implementing the Guidelines for the Conduct of the PNP, Private Security Guards and Company Guard Forces during Strikes, Lockouts and Labor Disputes, and of any progress made in updating them;*
 - (iv) *further expects that the Government will take the necessary accompanying measures, including the issuance of appropriate high-level instructions, to bring to an end prolonged military presence inside workplaces, to ensure that any emergency measures aimed at national security do not prevent the exercise of legitimate trade union rights and activities, including strikes, by all trade unions, irrespective of their philosophical or political orientation, in a climate of complete security, and to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers’ organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against their leaders and members. The Committee requests to be kept informed in this regard.*
- (i) *The Committee requests the Government:*

- (i) to communicate its observations in respect of the new allegations of illegal arrest and detention;*
 - (ii) to submit further, and as precise, information as possible in relation to these arrests and the legal or judicial proceedings upon which they are based;*
 - (iii) to take all necessary measures so as to ensure that the investigation and judicial examination of all cases of alleged illegal arrests and detentions proceed in full independence and without further delay, so as to shed full light on the current situation of those concerned and the circumstances surrounding their arrest;*
 - (iv) to communicate the texts of any judgements handed down in the above cases, together with the grounds adduced therefore.*
- (j) As regards the prolonged detention of 20 workers from Karnation Industries, the Committee urges the Government:*
- (i) to ensure that any of the workers of Karnation Industries that are still imprisoned, are immediately released;*
 - (ii) to take the necessary measures to ensure that all remaining charges are dropped, should the investigation of the pending allegations lead to the determination that the persons concerned were detained in relation to their legitimate trade union activities.*
- (k) The Committee expects that the steps taken and envisaged by the Government, including within the framework of the three- to four-year technical cooperation programme, will make an important contribution to progressively ensuring a climate of justice and security for trade unionists in the Philippines, and requests to be kept informed of developments in this regard.*
- (l) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2652

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

**Complaint against the Government of the Philippines
presented by
the Toyota Motor Philippines Corporation Workers' Association
(TMPCWA) by a communication dated 12 May 2008**

Allegations: The complainant alleges the Government's failure to secure the effective observance of Conventions Nos 87 and 98, which led to several infringements of the right to organize and collective bargaining on the part of Toyota Motor Philippines Corporation, such as interference in the trade union's establishment and activities, refusal to bargain collectively despite the certification of the union as the sole and exclusive bargaining agent, anti-union discrimination through the dismissal of union members further to their participation in union activities and in particular in strike action, restrictions on the exercise of the right to strike which includes the intervention of the Secretary of Labor and Employment to put an end to the strike

- 1194.** The complaint is set out in a communication of 12 May 2008 from the Toyota Motor Philippines Corporation Workers' Association (TMPCWA). The complainant submitted additional information in support of its complaint in communications dated 26 August 2008 and 8 January 2010.
- 1195.** The Government submitted its observations in a communication of 15 January 2010.
- 1196.** 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).
- 1197.** The complaint was sent in the framework of another case before the Committee concerning the Philippines, Case No. 2252, which also concerned labour conflicts at the Toyota Motor Philippines Corporation (TMPC) and the continued refusal by the management to recognize and negotiate with the complainant TMPCWA. The Committee considered that the new and detailed allegations made by the complainant with respect to the matters under examination were of such gravity that they called for a more detailed examination in the framework of the present complaint.
- 1198.** The Committee last examined Case No. 2252 at its May–June 2008 session [see 350th Report, paras 160–179] and made the following recommendations:

- The Committee once again requests the Government to initiate discussions in order to consider the possible reinstatement of the 122 workers who did not previously accept the compensation package offered by the company, in their previous employment or, if reinstatement is not possible, as determined by a competent judicial authority, the payment of adequate compensation. The Committee requests the Government to pursue its efforts in this respect and to keep it informed of the decision of the Supreme Court on the motion for reconsideration by the Supreme Court *en banc*, as soon as it is rendered.
- On the criminal charges laid against 18 trade union members and officers for grave coercion against workers who were not involved in the strike of 18–31 March 2001, the Committee notes that, according to the complainant, a new hearing had been scheduled for 24 March 2008 and requests the Government to transmit a copy of the court judgement as soon as it is rendered.
- Noting that according to the complainant, the Fourth Division of the Court of Appeals instructed the parties to submit a memorandum on the certification dispute which has been pending for seven years now, the Committee expresses the hope that the Court of Appeals will issue its decision on this issue of certification without further delay and requests the Government to communicate the court judgement as soon as it is rendered.
- Noting with grave concern the allegations of the complainant with regard to unidentified individuals asking for information regarding the whereabouts of the officers of the TMPCWA and its office, the Committee requests the Government to take all necessary measures to guarantee the security of the TMPCWA officials and to keep it informed in this respect.
- The Committee requests the Government to solicit information from the employers' organization concerned so that it may have at its disposal their views as well as those of the enterprise concerned on the matters at issue.

Background

A. The complainant's allegations

Judicial procedures

1199. In its communication of 12 May 2008, the complainant refers to a decision of the Supreme Court of the Philippines rendered on 19 October 2007, with regard to the question of the dismissal of 227 workers (121 of which had decided not to settle their case with the employer, the TPMC). According to that decision, the dismissals of 227 trade union officers and members were lawful because of their participation in an illegal strike and for having committed other “illegal acts” during that strike, like coercion, committed in particular by obstructing free ingress to or egress from the company premises, badmouthing people, shouting invectives, and pounding the vehicles of Toyota officials. The Supreme Court also included among the illegal acts, the fact that the dismissed workers (who were on “payroll reinstatement” ordered by the courts) staged rallies or pickets in front of the Bicutan and Santa Rosa plants, in “patent” violation of the 10 April 2001 assumption of jurisdiction order issued by the Department of Labor and Employment (DOLE) Secretary, which proscribed the commission of acts that might lead to the “worsening of an already deteriorated situation”. Moreover, the court ordered that separation pay should not be provided to the workers, because these illegal acts constituted

serious misconduct. The complainant indicates that its motion for reconsideration of this decision was denied by the Supreme Court on 17 March 2008, in a one-page decision.

- 1200.** The complainant refers to an appeal it had made to the Court of Appeals regarding the certification election of 2000. The complainant maintains that that vote should have excluded the votes of 105 employees, who were managerial and therefore not part of the rank-and-file bargaining unit; minus those votes, the complainant would have secured a majority of the votes (503 out of 958) and thus been certified as the sole and exclusive bargaining agent. The complainant indicates that on 2 April 2008, the Court of Appeals ruled that since the Toyota Motor Philippines Corporation Labour Organization (TMPCLO) was designated as the sole and exclusive bargaining agent by the 2006 certification election, the question of whether TMPCWA had won the 2000 certification election had been rendered moot. In its judgement, the Court of Appeals also ruled that the 105 employees whose votes were challenged by the complainant were, from the evidence before it, including the affidavits of the 105 employees concerned, not “managerial” employees but members of the rank-and-file as defined in article 212(m) of the Labour Code. A copy of the judgement of the Court of Appeals is attached to the complaint. The complainant alleges that the question of whether it won the 2000 election is still very important, as it may determine whether TMPC infringed labour laws by refusing to negotiate with it, and maintains that it is still the sole and exclusive bargaining agent. The complainant also alleges that the TMPC exercised influence with both the Supreme Court and the Court of Appeals so as to ensure favourable decisions for itself, and that the Court of Appeals, which took seven years to render its decision, waited for the Supreme Court’s decision concerning the legality of the dismissals to hand down its judgement respecting certification of the sole bargaining agent.
- 1201.** On 23 April 2008 the complainant filed an urgent plea before the Supreme Court, requesting it to review its 19 October 2007 and 17 March 2008 decisions on the basis that they were contrary to labour law. On 6 May 2008, it filed a motion for reconsideration to the Court of Appeals, asking it to review its 2 April 2008 decision.

Anti-union monitoring, intimidation and harassment

- 1202.** The complainant denounces the strong army presence and surveillance of the trade union. It specifically refers to two incidents, on 24 January and 4 February 2008, when three military members of the 202nd Infantry Brigade came to the complainant’s office without nameplates and asked questions concerning the whereabouts of union members. While the soldiers stated that their visit was prompted by information they had received that members of the “New People’s Army”, were among the workers, the complainant alleges that these interventions are rather a form of monitoring from the Government and constitute trade union repression.
- 1203.** The complainant indicates that a detachment of the Philippine National Police (PNP) is present at the company’s gate, that headquarters of the Laguna Industrial Park Police Assistance Group (LIPPAG) were established inside the company’s premises, and that military members of the 202nd Infantry Brigade can freely enter the premises. The complainant alleges that these measures constitute harassment and repression to the union and all its leaders, and that the establishment of soldiers in a peaceful community is a tactic by the TMPC to destroy the union.
- 1204.** In its communication of 26 August 2008, the complainant states that two unidentified men, who appeared to be military personnel, were spotted lurking in front of the house of union President Ed Cubelo. The complainant states that Ed Cubelo fears for his life, as this development is part of a larger pattern of intimidation and violence against trade unionists, including the murders of trade union leaders Diosdado Fortuna and Gerry Cristobal. The

complainant alleges that on 11 July 2008, Pablo Sario, a very active member of the TMPCWA, was pushed, insulted and prevented to speak at a meeting. He subsequently filed a complaint, but a month later his complaint was dismissed by the foreman, on the grounds that it was unfounded. The complainant alleges that many witnesses confirm Mr Sario's account. The complainant further indicates that on 20 and 22 August 2008, the management distributed leaflets linking the TMPCWA to the Communist Party of the Philippines, and that on 22 August 2008, Wenecito Urgel (the TMPCWA Vice-President inside the factory) was sent away from the factory, as Toyota officials were coming to visit it and the managers feared Mr Urgel would create chaos. During the visit, more than 50 guards were deployed inside the production line.

1205. In a communication dated 8 January 2009, the complainant alleges that many trade unionists (none of whom are TMPCWA members) were arrested and many others were in hiding due to fabricated charges of murder and accusations of membership in the New People's Army. Finally, the complainant alleges that TMPC officials have stopped attending conciliation–mediation conferences that were to be held at the National Conciliation and Mediation Board (NCMB), and that the latter body lacks the power to compel the TMPC to attend the meetings. A copy of a notice for a conciliation–mediation conference scheduled for 9 December 2008, issued by the NCMB and addressed to the TMPC, is attached to the communication.

B. The Government's reply

1206. In its communication of 15 January 2010, the Government states that a high-level ILO mission, the terms of reference of which covered all cases before the Committee concerning the Philippines, was carried out on 22–29 September 2009. The mission identified four areas for future action on Convention No. 87, including: (1) a three to four-year technical cooperation programme on training and capacity building to strengthen labour market governance; (2) rapid response such as the setting up of a high-level tripartite, interagency monitoring body for alleged trade union rights violations; (3) pushing for legislative amendments to certain Labor Code provisions; and (4) the resolution of longstanding CFA cases through innovative approaches and the resolution of active cases pertaining to alleged extra-judicial killings and the militarization of economic zones.

1207. The Government states that it will work closely with the ILO, its social partners and other stakeholders to establish a Technical Cooperation Program (TCP) that will raise the awareness and strengthen the capacity of all relevant government institutions including the social partners in the promotion and protection of labour rights. A three to four-year TCP has been subjected to a multi-stakeholder review and is currently being finalized by the ILO for submission to potential donors including the US Department of Labor (USDOL). Pending the implementation of the TCP, the Government and the ILO has started the conduct a of short-term awareness programme on the principles of Freedom of Association. The first was the three-day National Tripartite Conference on Principles of Freedom of Association held last December which resulted in the signing of Joint Statements by the social partners with the Armed Forces of the Philippines (AFP), Philippine National Police (PNP) and the Philippine Economic Zone Authority (PEZA). Copies of the Joint Statements and Report of Proceedings are attached as Annex B. Two more regional conferences focusing on the economic zones will be conducted before end of March 2010.

1208. Finally, the Government is working on the proposed legislative reforms to further strengthen trade unionism and remove obstacles to the effective exercise of labour rights. Towards this end, the Executive Branch has drafted two bills which are currently undergoing tripartite consultations for submission to the National Tripartite Industrial

Peace Council (NTIPC) prior to the filing with the appropriate committees of both Houses of the 15th Congress by June 2010. The first bill seeks to amend Section 263(g) of the Labor Code which authorizes the Secretary of Labor (and the President) to assume jurisdiction over labour disputes concerning the national interest. It limits the assumption of jurisdiction to the ILO's concept of "essential services". The second bill, on the other hand, incorporates the amendments that further liberalize the exercise of trade union rights, repeal the requirement of prior authorization for receipt of foreign assistance and remove the criminal sanction for mere participation in illegal strike on ground of non-compliance with the administrative requirements. In view of the possible delay in the passage of these bills into law, taking into account the pendency of the bills earlier reported to the ILO covering the same subject matter, the processes involved and the forthcoming electoral exercise, the Executive Branch will implement the following administrative interim measures: (1) the joint guidelines on the conduct of PNP personnel, private security guards during strikes/lockouts effective March 2010; and (2) Revised Department Order No. 40, series of 2003, to include procedural requirements prior to the assumption of jurisdiction by the Secretary of Labor.

- 1209.** The Government indicates that as concerns the alleged military harassment of the TMPCWA, the mission had been provided with information on this matter and had met with the parties, visited the Toyota Plant in Santa Rosa, Laguna and had discussions with representatives of the AFP, PNP, the local mayor and PEZA. The mission had also proposed a combined awareness-raising and capacity-building initiative on human rights, trade union rights and civil liberties programme for the military and the police, which could be co-conducted with the Commission on Human Rights of the Philippines (CHRP), including the updating of the guidelines for the conduct of the PNP, private security guards and company guard forces during strikes, lockouts and labor disputes.
- 1210.** The Government states that the dismissal of the 227 workers has already been decided with finality by the Philippine Supreme Court in April 2008. Pursuant to the report of the TMPC, 135 of the dismissed workers have requested and received financial assistance from the company. The incumbent bargaining representative of the rank-and-file union, the TMPCLO, made representations on this issue.
- 1211.** As regards the TMPCWA's claim that a total of 26 members were implicated in three criminal lawsuits as a result of the illegal strike, one case was already dismissed in 2001 and the union's proposal to dismiss the other two cases has been included in the exploratory talks on the conciliated "out-of-the-box" solution. The Government, through the DOLE, has initiated separate discussions with the TMPC, the TMPCWA (President Ed Cubelo) and with the two incumbent unions for "out-of-the-box solutions" (i.e., the dismissal of the remaining criminal cases against the members of TMPCWA and livelihood assistance for interested dismissed members). The criminal cases were initiated by individual employees because of grave coercion, harassments and threats made allegedly by the members of TMPCWA (Ed Cubelo group) to them and to their families as a consequence of the labour dispute.
- 1212.** The Government states that the supervisory union, the TMPCSU, has extended support to work out the dismissal of the criminal cases to put an end to Toyota workers' divisiveness. Criminal Case No. IS No. 01-1-3536, 02B-605, 02-1237, which was initiated by the members of the supervisory union, has already been withdrawn by the complainants, Messrs R. de Guzman and L. Tejano, in 2001 in the spirit of reconciliation. The withdrawal of the two remaining cases is being worked out. The supervisory union has held meetings with the complainants but the reluctance was largely due to the lack of assurance that the threats will stop and the absence of an apology from the respondents. The DOLE will facilitate a settlement agreement between the parties to bring about the

dismissal of the criminal charges and to move forward the “out-of-the-box solution” on the dismissal case.

C. The Committee’s conclusions

- 1213.** *The Committee first wishes to recall the context of its examination of these matters under Case No. 2252. The Committee recalls that that case concerned labour conflicts at the TMPC enterprise and the alleged continued refusal by the management to recognize and negotiate with the complainant TMPCWA, despite the union’s certification by the DOLE as sole and exclusive bargaining agent. The enterprise moreover dismissed 227 workers. Criminal charges were filed by certain employees against officers and members for having staged strikes in protest at this refusal. The National Labor Relations Commission (NLRC) later on found these dismissals valid but nevertheless required the enterprise to grant one month’s separation pay for every year of service. Approximately 100 workers have not accepted the compensation package. In February 2006, the DOLE authorized a new certification election, which took place on 16 February 2006, and led to the certification of the TMPCLC – which the complainant alleged was established under the dominance of the employer – as sole and exclusive bargaining agent of all the rank and file employees. Several legal appeals were pending before the courts filed by both parties (the enterprise and the TMPCWA). The Committee further takes note of the report of the high-level ILO mission to the Philippines that took place from 22 September to 1 October 2009.*
- 1214.** *The Committee notes that the complainant’s motion for reconsideration of the 19 October 2007 decision of the Supreme Court was denied on 17 March 2008, and that on 23 April 2008 the complainant filed an urgent plea before the Supreme Court requesting it to review its 19 October 2007 and 17 March 2008 decisions on the basis that they were contrary to the labour law. In respect of this matter, the Committee also notes the Government’s statement that the dismissal of the 227 workers has already been decided with finality by the Philippine Supreme Court in April 2008; pursuant to the report of the enterprise, 135 of the dismissed workers have requested and received financial assistance from the enterprise. The incumbent bargaining representative of the rank-and-file union, the TMPCLC, made representations on this issue.*
- 1215.** *In respect of the Supreme Court’s denial of the complainant’s motion for reconsideration of its 19 October 2007 decision, the Committee recalls that during the first examination of this case, both the complainant and the Government indicated that the strike in question was peaceful and the Government even referred at one point in its reply to the dismissal of participants in the peaceful demonstration [332nd Report, para. 884]. The Committee had found in the past, with regard to the reasons for dismissal, that the activities of trade union officials should be considered in the context of particular situations which may be especially strained and difficult in cases of labour disputes and strike action [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 811]. The Committee further recalls that sanctions, such as massive dismissals in respect of strike actions, should remain proportionate to the offence or fault committed [see 329th Report, para. 738 and 332nd Report, para. 886]. The Committee recalls with regard to the TMPCWA officers in particular, that they were declared to have forfeited their employment status by the NLRC because they decided to organize the strike of 23 and 29 May 2001 contrary to the Secretary of DOLE’s assumption of jurisdiction order of 10 April 2001. However, as noted by the Committee during the first examination of this case, such an order is not compatible with the principles of freedom of association and therefore, the union officers concerned cannot be sanctioned for having ignored it [332nd Report, para. 886]. The Committee recalls that it has always considered that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association [see 332nd Report, para. 886] and had emphasized that the same holds with regard to trade union members.*

- 1216.** *In its last examination of the case, the Committee had expressed its regret that the Supreme Court appears to consider that the staging of peaceful pickets should be sanctioned as a violation of an assumption of jurisdiction order, itself contrary to freedom of association principles, and as liable to lead to a worsening of an already deteriorated situation; it had also emphasized that the action of picketing organized in accordance with the law should not be subject to interference by the public authorities, and that the prohibition of strike pickets is justified only if the strike ceases to be peaceful [see **Digest**, op. cit., paras 648–649]. Bearing in mind the serious consequences of the dismissals for the workers concerned, the Committee had once again requested the Government to initiate discussions in order to consider the possible reinstatement of the 122 workers who did not previously accept the compensation package offered by the company, in their previous employment or, if reinstatement is not possible, as determined by a competent judicial authority, the payment of adequate compensation [350th Report, para. 173]. In light of the above, the Committee is bound to express its regret that the Supreme Court denied the complainant’s motion for reconsideration of the 19 October 2007 decision. The Committee notes from the mission report that the complainant had expressed to the mission its willingness to negotiate a solution with respect to the dismissed workers. Further noting from the report that representatives of the company had informed the mission that the company was not in a position to hire any of the dismissed workers, under any circumstances, the Committee – recalling once again the serious consequences of the dismissals for the workers concerned – once again requests the Government to initiate discussions in order to reach a solution regarding reinstatement with respect to some 100 workers who did not previously accept the compensation package offered by the company in their previous employment including, if their reinstatement is not possible as determined by a competent judicial authority, the payment of adequate compensation. The Committee further requests the Government to inform it of the outcome of the complainant’s urgent plea before the Supreme Court requesting a review of the latter’s 19 October 2007 and 17 March 2008 decisions.*
- 1217.** *The Committee notes the Government’s indications respecting the criminal charges against the 18 trade unionists, including that the supervisory union, the TMPCSU, has extended support to work out the dismissal of the criminal cases. Of the three criminal lawsuits resulting from the strike, one case was dismissed in 2001 and the TMPCWA’s request to dismiss the other two cases has been included in the exploratory talks on the conciliated “out-of-the-box” solution. The Government further states that, through the DOLE, it has initiated separate discussions with the enterprise, the TMPCWA (President Ed Cubelo) and with the two incumbent unions for “out-of-the-box solutions” with a view to the dismissal of the remaining cases. The Committee requests the Government to keep it informed of developments regarding the abovementioned undertakings, as well as on the judicial proceedings relating to the two criminal cases.*
- 1218.** *Previously, the Committee had noted with interest the adoption of Republic Act No. 9481 entitled “An Act strengthening the workers’ constitutional right to self-organization, amending for the purpose Presidential Decree No. 442, as amended, otherwise known as the Labor Code of the Philippines”. The Committee noted that the law in question contains several improvements in relation to the previous legislative provisions and that, in particular, section 12 of the Act amends section 258 of the Labor Code to read as follows:*

Employer as Bystander – In all cases, whether the petition for certification election is filed by an employer or a legitimate Labor organization, the employer shall not be considered a party thereto with a concomitant right to oppose a petition for certification election. The employer’s participation in such proceedings shall be limited to: (1) being notified or informed of petitions of such nature; and (2) submitting the list of employees during the pre-election conference should the Med-arbiter act favourable on the petition.

- 1219.** *Observing that if this provision were in force at the time when the TMPCWA requested certification as majority union, the dispute which is the object of the present case might have been avoided since the enterprise would not have had the right under the law to oppose the union's petition for certification before the courts (on grounds relative to the segregation of the votes of supervisory employees), the Committee expressed the hope that the Court of Appeals, in rendering its decision, would bear in mind the spirit of this new provision of the Labor Code combined with the fact that, as the Committee had previously noted, during the latest certification election the enterprise did not pursue the matter of the segregation of the votes of the supervisory employees with any insistence and therefore seemed to have changed position on this issue, which constituted the basis for its initial appeal against the TMPCWA and lies at the heart of the dispute with that union.*
- 1220.** *The Committee notes with regret that in its 2 April 2008 decision, the Court of Appeals appears not to have given consideration to the Committee's previous comments as set out above, but ruled rather that since the TMPCLO was designated as the sole and exclusive bargaining agent by the 2006 certification election, the question of whether the TMPCWA had won the 2000 certification election had been rendered moot. In its judgement, the Court of Appeals also ruled that the 105 employees whose votes in the 2006 certification election were challenged by the complainant were, from the evidence before it, including the affidavits of the 105 employees concerned, not "managerial" employees but members of the rank-and-file as defined in article 212(m) of the Labor Code. The Committee recalls, from its previous examinations of Case No. 2252, that the employer had challenged the complainant's certification in 2000 on the grounds that the 105 employees concerned were managerial staff, and thus not entitled to vote – only to change its position on this very issue in the 2006 certification elections. Noting that on 6 May 2008 the complainant filed a motion for reconsideration to the Court of Appeals, asking it to review its 2 April 2008 decision, the Committee requests the Government to inform it of developments in this respect. Moreover, the Committee expresses the firm expectation that the Court of Appeals, should it grant the complainant's motion, will give due consideration to the Committee's previous comments on the issue of certification.*
- 1221.** *Previously, the Committee had expressed grave concern over the complainant's allegations with regard to unidentified individuals asking for information regarding the whereabouts of the officers of the TMPCWA and its office. In this regard, the Committee must once again express deep concern over the complainant's indication that two unidentified men were spotted lurking in front of the house of union President Ed Cubelo. The Committee further notes the complainant's allegation that a detachment of the PNP is present at the company's gate, that the headquarters of the LIPPAG were established inside the company's premises, and that military members of the 202nd Infantry Brigade can freely enter the premises; these measures allegedly constitute harassment and repression to the union and all its leaders. The Committee also notes from the mission report that the mission had heard stories of intimidation by the armed forces that need to be investigated and redressed.*
- 1222.** *The Committee notes from the mission report the indications provided by the employer with regards to this matter, including that the police station referred to by the complainant serves not just the employer, but the entire community, and that the only time the armed forces had entered company premises was when President Arroyo held a cabinet meeting on the premises. The Committee also notes the information provided by a representative of the armed forces to the mission, stating that the role of the PNP in the Laguna Technopark, where the employer's premises are located, was to maintain peace and order, carry out community development programmes, including livelihood programmes, and safeguard the community's security. Furthermore, the Committee takes note of the Government's indication that the mission had identified four areas for future action to ensure the implementation of Convention No. 87, including one dedicated to the resolution*

of active cases pertaining to alleged extra-judicial killings and the militarization of economic zones.

1223. *In this connection, the Government has committed itself to ensuring the expeditious investigation, prosecution, and resolution of pending cases concerning alleged harassment and assassination of labour leaders and trade union activists. In affirming the mission's proposal that the matter of trade union violence be addressed through a combined human rights, trade union rights and civil liberties programme for the forces of order, the Committee requests the Government to continue to pursue the measures it has indicated and all other measures necessary to ensuring that freedom of association may be exercised by all workers' organizations, including the complainant, in a climate free from violence, harassment, and threats of intimidation of any kind, and to keep it informed of the progress made in this regard.*

1224. *The Committee notes, finally, the complainant's allegation that on 20 and 22 August 2008 the management distributed leaflets linking the TMPCWA to the Communist Party of the Philippines. The complainant alleges that on 22 August 2008, Wenecito Urgel (the TMPCWA Vice-President inside the factory) was sent away from the factory, as officials were coming to visit it and the managers feared Mr Urgel would create chaos. The complainant further alleges that on 11 July 2008, Pablo Sario, a very active member of the TMPCWA, was pushed, insulted and prevented to speak at a meeting. He subsequently filed a complaint, but a month later his complaint was dismissed by the foreman, on the grounds that it was unfounded. In this connection, the Committee observes from the mission report that the mission had received numerous stories of impediments and obstacles to the full exercise of freedom of association. The complainant alleged various situations where they had been effectively blocked from exercising trade union rights for nearly two decades, and where any advances in this respect were few and far between; in particular, the unions described a scenario wherein trade union rights are rarely respected by the employer, who is reported to prefer a non-union workplace or one where unions are generally submissive. The Committee also notes that the employer's representatives had informed the mission that they had no knowledge of the leaflet referred to by the complainant. The representatives also stated that fairness towards all employees was the company's policy, and that "even TMPCWA members who had been unkind in the past had been given promotion opportunities". Noting the divergence of points of view with respect to this issue, the Committee requests the Government to initiate a full, in-depth and independent inquiry into the complainant's allegations of discrimination against its members and, if they are found to be true, to take the necessary measures to ensure that the persons concerned are adequately compensated so as to constitute sufficiently dissuasive sanctions against future acts of anti-union discrimination. It further requests the Government to keep it informed in respect of any court proceedings concerning these matters.*

The Committee's recommendations

1225. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

(a) The Committee once again requests the Government to initiate discussions in order to reach a solution with respect to approximately 100 workers who did not previously accept the compensation package offered by the company in their previous employment including, if their reinstatement is not possible as determined by a competent judicial authority, the payment of adequate compensation. The Committee further requests the Government to inform it of the outcome of the complainant's urgent plea before the Supreme Court

requesting a review of the latter's 19 October 2007 and 17 March 2008 decisions.

- (b) The Committee requests the Government to keep it informed of developments regarding the initiatives to find "out-of-the-box solutions" with a view to dismissing the criminal cases involving members of the TMPCWA, as well as on the judicial proceedings relating to the two criminal cases.*
- (c) The Committee requests the Government to inform it of the outcome of the complainant's motion for reconsideration of the Court of Appeals' 2 April 2008 decision confirming the TMPCLC's certification as the sole and exclusive bargaining agent. The Committee further expresses the firm expectation that the Court of Appeals, should it grant the complainant's motion, will give due consideration to the Committee's previous comments on the issue of certification.*
- (d) The Committee requests the Government to continue to pursue measures to ensure the expeditious investigation, prosecution, and resolution of pending cases concerning the alleged harassment and assassination of labour leaders and trade union activists, and all other measures necessary to ensuring that freedom of association may be exercised by all workers' organizations, including the complainant, in a climate free from violence, harassment, and threats of intimidation of any kind, and to keep it informed of the progress made in this regard.*
- (e) The Committee requests the Government to initiate a full, in-depth and independent inquiry into the complainant's allegations of discrimination against its members and, if they are found to be true, to take the necessary measures to ensure that the persons concerned are adequately compensated so as to constitute sufficiently dissuasive sanctions against future acts of anti-union discrimination. It further requests the Government to keep it informed of any court proceedings concerning these allegations.*

CASE NO. 2669

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

**Complaint against the Government of the Philippines
presented by
the International Wiring Systems Workers Union (IWSWU)**

Allegations: Military threat and harassment against IWSWU officers and their families; interference by the armed forces of the Philippines in trade union affairs by dissuading trade union members to engage in collective bargaining; and vilification campaign against IWSWU members and families to the detriment of their safety and security

1226. The complaint is contained in a communication of the International Wiring Systems of Workers Union (IWSWU), dated 29 September 2008.

1227. The Government sent its observations in a communication dated 15 January 2010.

1228. The Government of 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 complainant's allegations

1229. In its communication dated 29 September 2008, the IWSWU alleges violations by the Government of the Philippines of Conventions Nos 87 and 98. In particular, it alleges military threat and harassment against IWSWU officers and their families; interference by the armed forces in trade union affairs by dissuading trade union members to engage in collective bargaining; and vilification campaign against IWSWU members and families to the detriment of their safety and security.

1230. The complainant alleges that those acts are being committed by the Government through the armed forces of the Philippines (AFP), especially those based in the Northern Luzon Command, Camp Aquino, Tarlac City and facilitated by the collaboration of *barangay* officials (village councils), the Department of Labor and Employment (DOLE) and the management of the International Wiring Systems (Phils) Corporation (IWSPC).

1231. The IWSWU explains that it is a legitimate labour organization active at the IWSPC since 1996 and registered by the DOLE. Out of 6,048 company workers, 3,116 are union members. It is governed by the General Membership Assembly, its highest policy-making body, and the Board of Directors and Executive Committee composed of 50 elected officers.

1232. According to the IWSWU, for over 12 years, it endures attempts by the company and the DOLE to weaken the union through supporting and directly campaigning for workers competing against the union's leadership. Despite these attempts, the IWSWU leadership not only remained committed to promoting the welfare of its members, but also embraced the task of helping other workers from nearby factories in the province of Tarlac through

education and free legal assistance in respect of work-related issues. Promotion and defence of legitimate workers' rights and helping residents of neighbouring communities are the primary objectives of the union.

- 1233.** The IWSWU alleges that threats and harassment by the military began in 1998 when Ms Angelina Ladera was the President of the union. Since 1998, unidentified men, believed to be military, had tried to abduct her but failed. She had been under intense surveillance and in 2005 her name was included by the military in the "Order of battle and knowing the enemy", a PowerPoint presentation of the military tagging several organizations as fronts for the communist party. Fearing for her life and safety, Ms Ladera resigned from the IWSWU in 2005. Even after her resignation, Ms Ladera continued her organizing work and remained under surveillance and was forced to live on the run. Mr Norly Pampoza, another former President of the IWSWU also resigned by the end of 2006, following the inclusion of his name in the list prepared by the military.
- 1234.** The complainant alleges that in 2008, the military threat and harassment of its leaders and their families worsened. In particular, the IWSWU alleges that in March 2008, the military from the AFP based in the Northern Luzon Command, began visiting trade union officers at their homes to invite them to the seminars organized by the military on the labour and trade union-related issues. On 6 March 2008, Ricardo Sosa, the IWSWU Chairperson of the Board, received an invitation from the military to come to the *barangay* hall to attend an anti-insurgency orientation organized by the military on 7 March 2008. At that meeting, the military directly linked the IWSWU to the leftist group (communists). He received further invitations on 11 and 12 March and 29 April 2008 when the military visited his house. In July 2008, he and another union Board member were approached by the military personnel and told not to ask too much during the forthcoming collective bargaining because it would cause the closure of the factory. The complainant states that such visits created fears in the families of the two trade union activists.
- 1235.** On 7 June 2008, Mr Dexter P. Datu, union President, and Mr Ramon Lopez, its Vice-President, were threatened by four men who introduced themselves as military and DOLE representatives and were allegedly told that if they loved their families, they must stop their activities. On 10 August 2008, a forum was organized by the military to discuss such issues as the relationship between the management of the company and its employees; the upcoming collective bargaining; and a support of the union by workers. The complainant alleges that men in civilian clothes who introduced themselves as military and DOLE representatives regularly visited houses of trade union officers either early in the morning or at night to discredit the union President by asserting that he is supporting the Communist Party and the New People's Army. They were also told not to ask much during the next negotiation for a collective agreement so as not to cause the closure of the enterprise.
- 1236.** The IWSWU alleges that the military, through the *barangay* officials, were asking the IWSWU officers and members to attend the seminars and meetings. As residents, trade unionists were not expected to refuse the invitations. At the so-called seminars, the military discussed labour-related issues, the problems of the union and failure of the union to address workers' concerns. According to the IWSWU, the military has always claimed that their seminars were coordinated with the Tarlac City government and the DOLE.
- 1237.** The complainant believes that the company knows or is involved in the military operations against the trade union and its officers. In this respect, it considers that the fact that the addresses and personal information on all union members are known to the military, and that this information is only available to the company's management, points out to connivance between both.

- 1238.** The IWSWU further alleges that the management of the IWSPC interferes in trade union internal affairs so as to weaken the union. According to the complainant, the management refused to recognize the union and appointed its own, so-called provisional union officers. In November 2001, during the collective bargaining between the company management and the IWSWU, the management organized a workers' meeting inside the plant. To ensure that workers would attend the meeting, the management stopped the production for one hour. The purpose of the meeting was to impeach the duly elected officers of the union, then led by Mr Pamposza, and to appoint their own provisional union officers. The management then recognized the appointed group of persons as union representatives and signed a collective agreement for the period of 1 July 2001 to 30 June 2004 within a week time. The national President of the Federation of Democratic Trade Unions (FDTU), to which the union was affiliated at the time, sent a letter to the enterprise management stating that the appointed provisional officers were the FDTU's recognized officers. The management also requested the DOLE to recognize the legitimacy of the appointed trade union leadership.
- 1239.** Meanwhile, the duly elected officers continued to assert the rights to represent workers of the company through various means. They filed a complaint with the DOLE regional office questioning the impeachment and, with the support of the workers, conducted protest actions inside the company and at the vicinity of Luisita Industrial Park. To stop the IWSWU operations led by the duly elected leadership, the management withheld the union dues deducted from the union members and refused to pay the salaries of two union full-time officers as provided for in the collective agreement.
- 1240.** In response to the cases filed, the DOLE regional Director intervened in November 2001 and, with the management's approval, called for a referendum to resolve what they called a union leadership crisis. To make the election valid, the referendum needed to obtain the votes of 50 per cent of union members. The referendum failed to get the required amount of votes. The DOLE regional Director then assumed the position of the union caretaker and acted like the union President. All transactions between the management and the union, including the collection of monthly union dues, passed through him. On 20 August 2002, the DOLE conducted another union election. The duly elected officers participated in the election except for the union President because of the pending appeal to the court. The result of the election was overwhelming and the right of the elected officers to represent the union was again reaffirmed.
- 1241.** In February 2004, a few months before the expiration of the collective agreement, the Court of Appeals rendered a decision on the impeachment complaint filed by the elected officers. According to the decision, "... the election conducted in August 2002 is set aside and the petitioners are reinstated as the lawful officers of the union until they are lawfully removed".
- 1242.** On 5 March 2005, the IWSWU disaffiliated from the FDTU and applied for an independent union registration with the DOLE. The FDTU did not accept the disaffiliation. Its national President sent a letter to the plant management insisting on its recognition of a certain Victoria Tigco as the provisional President of IWSWU-FDTU and asked the company to transact any union-related business with her instead of the duly elected officers led by the union President Pamposza.
- 1243.** Capitalizing on the letter from the FDTU, while ignoring the court decision on the legitimacy of the union, the management filed a case with the DOLE regional office requesting the issue between the independent IWSWU and the FDTU be settled before the beginning of the collective bargaining. The DOLE facilitated a conciliation meeting and an agreement was reached on 30 August 2006 to proceed with the collective bargaining. A new collective agreement was signed on 25 October 2006.

- 1244.** The IWSWU states that while the DOLE issued an order affirming the legitimacy of its current officers led by Dexter Datu, in the wake of negotiations for a new collective agreement to begin on 30 June 2009, it fears the renewal of harassment which usually accompanied collective bargaining. It further indicates that the company management appealed the decision of the DOLE to the Court of Appeals.
- 1245.** As a pre-emptive measure, the union wrote to the Tarlac City government and its city council in July 2008 asking to immediately conduct an investigation on the continuing threats and harassments against the IWSWU officers and members, and for an intervention to immediately halt harassments against them. The union also sought the city government's assistance to provide them with an immediate protection against any possible physical violence by the military and its agents. However, the Tarlac City government has not done anything regarding the union's request in spite of the series of follow-ups.
- 1246.** On 13 August 2008, the union participated in a dialogue with the Commission on Human Rights (CHR) and formally lodged a complaint before it. Its chairperson vowed to investigate the complaints and promised to conduct a dialogue with the AFP. On 26 September, CHR investigators came to investigate the case; however, most of the members of the union executive committee were not at the factory, as another hearing was being held in the neighbouring province in Pampanga. In September, the Center for Trade Union and Human Rights (CTUHR) sent an urgent appeal to the Committee on Labor and Employment and the Committee on Human Rights of the House of Representatives urging both committees to look into the cases. On 26 September the Committee on Human Rights conducted an on-site investigation on human rights violations in Central Luzon. The union is yet to hear back from the Committee on Labor and Employment. The CTUHR has been following up the matter, but has been told that the Committee has difficulty convening due to budget constraints and thus has not yet discussed the case.
- 1247.** The IWSWU calls for an immediate end to the military harassments of its officers and to the vilification campaign against the IWSWU and its officers; immediate pull-out of the military personnel from the Hacienda Luisita; an end to the state interference in trade union affairs; a thorough investigation of the cases regarding the interference of state forces, particularly the military, in labour and industrial relations. It urges the Government to take legislative measures to formulate labour laws that are in compliance with international labour standards and to immediately allow (invite) an ILO high-level mission to the Philippines to look into the labour rights violations, particularly in the free trade zones.

B. The Government's reply

- 1248.** In its communication dated 15 January 2010, the Government indicates that a high-level ILO mission was carried out to the Philippines from 22 to 29 September 2009. In this respect it indicates that following the mission, four major commitments were outlined by the Government to ensure the full compliance with the principles of freedom of association in the country:
1. The Government will ensure expeditious investigation, prosecution and resolution of pending cases concerning alleged harassment and assassination of labour leaders and trade union activists.
 2. The Government will create a high-level tripartite case-monitoring committee and will constitute the National Tripartite Industrial Peace Council (NTIPC), chaired by the Secretary of Labor and Employment.
 3. The Government will work closely with the ILO, its social partners from labour and employers sectors, and other stakeholders to establish a technical cooperation programme that will raise the awareness and strengthen the capacity of all relevant

government institutions including the social partners in the promotion and protection of labour rights.

4. The Government is working on the proposed legislative reforms to further strengthen trade unionism and remove obstacles to the effective exercise of labour rights.

1249. With regard to the allegations of militarization and military interventions in this case, the Government indicates that the DOLE regional office has submitted a report on its extensive engagement in the area in terms of livelihood assistance and training of trade unions and in the informal sector. The report reiterated that there had been no instances where it had authorized personnel to interfere in union activities or be a part of the alleged singling out of the IWSWU as a communist front or interfering in their union activities. In fact, its decisions in the various cases favoured the complainant trade union.

1250. The Government further indicates that the high-level mission has proposed a combined awareness raising and capacity building programme on human rights, trade union rights and civil liberty for the military and the police, which could be co-conducted with the Commission on Human Rights of the Philippines (CHRP). It also proposed updating of the Guidelines for the conduct of the Philippine national police (PNP), private security guards and company guard forces during strikes, lock-outs and labour disputes (“the Guidelines”). Responding to the suggestions of the mission, the Government held a National Tripartite Conference on Principles of Freedom of Association from 2 to 4 December 2009 in collaboration with the ILO with a specific focus on the PNP, the AFP and the Philippine Economic Zone Authority (PEZA). The joint statement by the tripartite partners, the PNP and the AFP outlined the need for awareness raising in the PNP and the AFP by: integrating trade union rights module in the human rights module for new recruits and for promotion; making known the existence of PNP administrative discipline mechanism for violation of trade union rights by its personnel; and providing for a section for trade union rights in the existing human rights desks at the PNP and the AFP. Through the joint statement on economic zones, the parties agreed to intensify the conduct of labour-management education seminars in the economic zones to ensure compliance with the Philippine labour laws.

1251. The Government further indicates that the Guidelines are being reviewed at the level of executive agencies and with the tripartite constituency at industry, regional and national levels. The Guidelines will be effective in March 2010 and will be included in the training and awareness-raising module to be developed with the ILO and will be implemented by the second semester of 2010.

C. The Committee’s conclusions

1252. *The Committee notes that the present case concerns allegations of military threat and harassment against IWSWU officers and their families; interference by the AFP in trade union affairs by dissuading trade union members to engage in collective bargaining; and vilification campaign against the IWSWU members and families to the detriment of their safety and security.*

1253. *From the outset, the Committee recalls that the rights of workers’ 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. All States have the undeniable duty to promote and defend a social climate where respect of the law reigns as the only way of guaranteeing respect for and protection of life [see **Digest of decisions***

and principles of the Freedom of Association Committee, fifth edition, 2006, paras 44 and 58].

- 1254.** *The Committee notes with interest the report of the high-level ILO mission which was carried out in the Philippines from 22 September to 1 October 2009. The Committee appreciates the cooperation demonstrated by the Filipino authorities which allowed the mission to meet with a wide range of senior government officials and army officers; representatives of employers' and workers' organizations, including those involved in the cases pending before the Committee; and representatives of Congress, the Supreme Court and the Court of Appeals, the CHR, the PEZA, agencies in charge of labour dispute settlement, law enforcement agencies (including the AFP and the PNP), etc. The Committee notes with interest that the mission visited the IWSPC to meet with its management and the IWSWU and that it had discussions with the AFP, regional authorities, DOLE and PEZA in Tarlac.*
- 1255.** *In this respect, the Committee notes that the management of the company demonstrated a positive attitude and a will to conclude a collective agreement in October 2009. According to the company representatives, the management finds the dialogue with a few representatives much easier than negotiating with workers individually and was committed to cooperatively engaging with the IWSWU in the upcoming collective bargaining process. With regard to the IWSWU's concerns about insecurity, the company representatives denied any involvement and assured that the company had never released any confidential information on trade unionists. They also acknowledged there had been some problems of division among workers, but these were matters of the past, most of which had occurred under previous management of the company. Despite bargaining deadlocks that have occurred in the past, the parties had always been able to settle. In general, the company was very open to capacity building and training.*
- 1256.** *The Committee further notes with interest that following the mission, a National Tripartite Conference on Principles of Freedom of Association was jointly held in the Philippines in December 2009 by the Government and the ILO. The activity specifically focused on the AFP, PNP and PEZA. The Committee welcomes the joint statement made by the participants, which outlined the need for awareness raising among the PNP and AFP personnel on the subject of human rights, civil liberties and trade union rights, and the means to achieve it. In this respect, the Committee also notes with particular interest the Government's indication that the Guidelines for the conduct of the Philippine national police, private security guards and company guard forces during strikes, lock-outs and labor disputes are being reviewed at the level of executive agencies and with the tripartite constituency at industry, regional and national levels. According to the Government, the Guidelines, which will enter into force in March 2010, will be included in the training and awareness-raising module to be developed with the ILO and will be implemented by the second semester of 2010.*
- 1257.** *The Committee welcomes the information provided by the Government on four concrete measures it intends to take to ensure the full compliance with freedom of association principles. In this respect, it expects that the Government will carry out expeditiously an independent investigation of all alleged cases of interference in trade union affairs, as well as the threats and harassment of trade unionists by the state authorities and the military, and ensure a full and appropriate redress and, in particular, requests the Government to ensure that the IWSWU members are no longer harassed due to their union membership. It further expects that the Government will take the necessary measures to prevent in the future any cases of threats and harassment of trade unionists and their families, as well as cases of interference in trade union affairs by the state officials and the personnel of the AFP and the PNP.*

- 1258.** *The Committee recalls in this regard that respect of principles of freedom of association requires that the public authorities and employers exercise great restraint in relation to intervention in the internal affairs of trade unions [see **Digest**, op. cit., para. 859]. With regard to the specific allegation of the DOLE organizing and participating in the trade union election, the Committee recalls that the presence during trade union elections of the authorities is liable to infringe freedom of association and, in particular, to be incompatible with the principle that workers' organizations shall have the right to elect their representatives in full freedom, and that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof [see **Digest**, op. cit., para. 438].*
- 1259.** *Noting from the mission report that the representatives of armed forces with whom the mission has met have confirmed to the holding of community meetings where the military set out to educate workers on the exercise of their trade union rights, as had been alleged by the complainant organization, the Committee encourages the Government, in collaboration with the social partners and the ILO, to hold further trainings on human rights, civil liberties and trade union rights so as to assist the AFP and PNP personnel in better understanding the limits of their role in respect of freedom of association rights and to ensure the full and legitimate exercise by workers of these rights and liberties in a climate free from fear.*
- 1260.** *The Committee further encourages the Government to pursue its efforts in strengthening of the relevant state institutions for combating impunity and, in particular, establishing a high-level tripartite case-monitoring committee within the framework of the NTIPC.*
- 1261.** *The Committee requests the Government to keep it informed of the developments in respect of the measures it has committed to undertake in order to ensure full compliance with Conventions Nos 87 and 98 ratified by the Philippines. The Committee requests the Office to continue providing its technical cooperation to the Government of the Philippines in this respect.*

The Committee's recommendations

- 1262.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee expects that the Government will carry out expeditiously an independent investigation of all alleged cases of interference in trade union affairs, as well as the threats and harassment of trade unionists by the state authorities and the military, and ensure a full and appropriate redress and, in particular, requests the Government to ensure that the IWSWU members are no longer harassed due to their union membership. It further expects that the Government will take the necessary measures to prevent in the future any cases of threats and harassment of trade unionists and their families, as well as cases of interference in trade union affairs by the state officials and the personnel of the AFP and the PNP.*
- (b) *The Committee encourages the Government, in collaboration with the social partners and the ILO, to hold further trainings on human rights, civil liberties and trade union rights so as to assist the state authorities, the AFP and PNP personnel in better understanding the limits of their role in respect of freedom of association rights and to ensure the full and legitimate exercise by workers of these rights and liberties in a climate free from fear.*

- (c) *The Committee further encourages the Government to pursue its efforts in strengthening the relevant state institutions for combating impunity and, in particular, establishing a high-level tripartite case-monitoring committee within the framework of the NTIPC.*
- (d) *The Committee requests the Government to keep it informed in respect of all measures taken to implement the above recommendations.*

Annex to Philippine cases

High-level ILO mission to the Philippines on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (22 September–1 October 2009)

I. Background and terms of reference

The Philippines ratified Convention No. 87 (C. 87) on 29 December 1953.

The Philippines' application of C. 87 was specifically discussed in the Committee on the Application of Standards at the 96th Session (June 2007) of the International Labour Conference (ILC) arising from a number of trade union complaints and long-standing issues raised by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the application of C. 87. On this basis, the 2007 Conference Committee on the Application of Standards requested the Government to accept a high-level ILO mission. This mission was accepted by the Government during the 98th Session of the ILC in June 2009, at the Committee on the Application of Standards.

In addition, eight cases were pending before the ILO Governing Body Committee on Freedom of Association, notably **active cases** involving:

- the Toyota Motor Philippines Corporation (Cases Nos 2252 and 2652);
 - the Kilusang Mayo Uno Labor Center (KMU) (Case No. 2528);
 - the Dusit Hotel and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) (Case No. 2716);
 - International Wirings Systems (Case No. 2669);
- and follow-up cases involving:
- Telefunken Semiconductors (Case No. 1914);
 - the University of San Agustin and the Federation of Free Workers Visayas Council (Case No. 2488);
 - Technical Education and Skills Development Authority (TESDA) and Public Services Labor Independent Confederation (PSLINK) supported by Public Services International (PSI) (Case No. 2546)

- the University of San Agustin and the Federation of Free Workers Visayas Council (Case No. 2488);

The high-level mission (HLM) set out with the following objectives:

- To obtain a greater understanding of the application of C. 87 in law and practice by the Philippines and to provide detailed information on the trade union situation on the ground to the ILO supervisory bodies.
- To clarify issues and gaps in the application of C. 87 as well as identify areas in which the Office could provide support and technical assistance, with the objective of proposing solutions in line with comments made by the ILO supervisory bodies.
- To identify further areas for training and capacity building to improve the application of C. 87 and the principles of freedom of association.

The HLM was undertaken by Ms Cleopatra Doumbia-Henry, Director, International Labour Standards Department, ILO, Geneva; Ms Karen Curtis, Deputy Director, International Labour Standards Department, ILO, Geneva; and Mr Tim De Meyer, Senior Specialist on International Labour Standards and Labour Law, ILO Subregional Office for East Asia (Bangkok).

II. Officials and other persons met by the mission

The mission met initially with a wide range of senior government officials and army officers to explain the terms of reference of the mission; the principles and standards on freedom of association; and the functioning of the ILO supervisory system. Subsequently, the mission met with representatives of employers' and workers' organizations collectively, followed by individual sessions at which workers and employers directly involved in the pending Committee on Freedom of Association (CFA) cases were heard, and, in some cases, additional allegations were submitted to the HLM.

The mission also met separately with representatives of:

- Congress;
- the Supreme Court and the Chair of Court of Appeals Division;
- the Commission on Human Rights of the Philippines;
- the Philippine Economic Zone Authority (PEZA);
- the Technical Education and Skills Development Authority (TESDA);
- agencies in charge of labour dispute settlement, i.e. the Bureau of Labor Relations (BLR), National Labor Relations Council (NLRC), and the National Conciliation and Mediation Board (NCMB);
- law enforcement and security agencies, notably the Department of Justice (DOJ), the Department of National Defense (DND), the Armed Forces of the Philippines (AFP), and the Philippine National Police (PNP);
- the Civil Service Commission and the Public Sector Labor Management Council.

Meetings planned with the Melo Commission and with an employer representative in the Dusit Hotel Case and the Telefunken Case did not materialize.

The mission paid two plant visits, that is, the Toyota Motor Company of the Philippines (TMCP) in the Santa Rosa Estate in Laguna; and the International Wiring Systems Corp., in San Miguel, Tarlac City.

Full details of the programme are attached as Annex I.

III. Information obtained

Briefing with government officials *(22 September)*

The briefing was attended by a wide range of senior government officials representing the Departments of Labor and Employment (DOLE), Interior and Local Government (DILG), Foreign Affairs, Trade and Industry, and National Defense; the Presidential Human Rights Committee (chaired by the Executive Secretary Eduardo Ermita); regional commanders of the AFP; and the PNP.

In his opening address, Mr Romeo C. Lagman (Undersecretary, DOLE) emphasized the democratic credentials of the Philippines, referring to respect for the rule of law, the separation of powers and the protection of human rights. He recalled that the Philippines had been the first ASEAN member State to set up a constitutional body for the promotion and protection of human rights. He denied any schemes to suppress freedom of association. The KMU had existed since 1980, remained unregistered, yet had continued to represent an alleged 300,000 workers without interference for the last 29 years. Claimed killings of 66 persons were actually not labour-related but common crimes, as an actual labour dispute provided the backdrop to only 13 cases. He stressed that most of the killings were, therefore, not within the purview of C. 87. He denied there was a climate of impunity pervading in the country describing regrettable killings such as in Hacienda Luisita as the exception rather than the norm. Military police were not detached in areas with concentrations of workers and their organizations. He highlighted that the Philippines had enjoyed relative industrial peace, and that strikes were incidents of the past. Only few work stoppages had been witnessed since the beginning of the year. The large trade unions had no serious complaints, while the small militant groups could exercise their right to voice complaints without fear.

In her presentation, Undersecretary Rosalinda D. Baldoz (DOLE) summed up the **labour law reforms that had already been undertaken** with a view to giving effect to C. 87 and, in particular, the adoption of Act No. 9481, which had been noted by the supervisory bodies.

With respect to the **areas for further labour law reform**, DOLE had made the following proposals:

- amend article 234(c) to align the 20 per cent union membership requirement registration of independent unions with the registration requirement for chartering of local chapters of federations and national unions;
- amend article 237(a) to reduce the number of affiliated locals for purposes of registration of federations and national unions from 10 to five provided that a minimum aggregate membership of 1,000 is attained;

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- repeal the requirement of prior permission by the Secretary of Labor for legitimate unions to receive foreign assistance (article 270);
 - amend article 264(a) (prohibited acts) and article 272 to remove the penalty of imprisonment for participation in illegal strikes due to failure to comply with procedural requirements.
 - to retain the Secretary of Labor’s power to assume jurisdiction over labour disputes affecting national interest under article 263(g), but amend the implementing rules on strikes and picketing under Department Order No. 40/2003, so as to provide for procedural guidelines in the exercise of such power. The amended procedure would include the filing of a request for assumption of jurisdiction by either of the parties to the dispute and the conduct of a conference with the parties prior to any assumption of jurisdiction.

With respect to the **KMU case** before the CFA (No. 2528), Undersecretary Baldoz provided the details drawing from PNP reports.

The case involved alleged killings of 39 trade unionists, 16 incidents of harassment, and 11 abductions or forced disappearances, adding up to a total of 66 cases from 2001 to 2009.

The alleged killings, harassments and abductions involved difficulties in identifying the victims of killings as trade unionists or advocates of trade union rights due to a lack of official records of their union membership. As a result, only 13 were in the Government’s view possibly labour-related cases, involving 18 victims, that is, the victim is either an organizer or a union member regardless of whether or not there was a strike or labour dispute at the time of death and the circumstances indicate a possible relation to labour issues and concerns.

More serious are the difficulties faced in the investigation and prosecution due to a number of factors which include, among others, the absence of witnesses or unwillingness to cooperate by members of the immediate families; the absence of a complaint or report filed before competent authorities; and distinguishing between activities in the exercise of legitimate trade union rights, and activities arising from insurgency operations.

The PNP report shows that in the 39 cases of alleged killings of trade unionists, there are 16 cases filed, of which one involved legal arrest and no killing; one case involved a legitimate police operation; one case is considered closed; one case is an alleged abduction; and 19 cases are under investigation. The PNP report in the 16 cases filed also show that three cases involved the Communist Party of the Philippines – New People’s Army (CPP/NPA); one case involved the PNP; eight cases involved civilian suspects; three cases concerned security guards; and one case concerned the military. Regarding the status of the cases filed, the PNP report also shows that nine have been filed in court and seven are at the Prosecutor’s office. The status of the 24 identified suspects in the 16 cases filed is: ten arrested, four killed, three surrendered, seven at large. The PNP report on 19 cases under investigation also shows that in two cases, the complainant moved to an undisclosed place; in six cases the complainant was no longer interested in pursuing the cases; and 11 cases remained under investigation.

The PNP report in 11 cases of alleged abduction also shows that in two cases, victims moved to undisclosed places; no complaint filed in one case; no report of incident in one case; six are under investigation; and in one case the alleged victim’s organization is non-existent. Of the 11 cases, seven took place in 2006, three cases in 2007 and only one case in 2008. Four cases were archived, eight cases were dismissed, four cases were undergoing

trial, 20 cases were under investigation, one had no record of case filed, one case was dropped or closed, and one case was dismissed.

The PNP report on the 16 cases of alleged harassment shows that in three cases warrants of arrest had been issued; in three cases no harassment had occurred; six cases were under investigation; in three cases the complainant had moved overseas or to an undisclosed place; and in one case the alleged victim's organization did not exist.

The PNP report on the 66 cases may be summarized as follows: in six cases, the alleged victim moved overseas or to an undisclosed place; one alleged abduction; one closed; four legitimate police operations; 16 filed cases; 20 cases were under investigation; eight complainants were no longer interested in pursuing the case; four did not file complaint; in two cases, no incident was reported; in one case the victim's organization did not exist; and in three cases, no harassment occurred.

Finally, Undersecretary Baldoz formulated proposals to address **gaps in the implementation of the law** by strengthening institutional linkages of DOLE with other competent authorities:

- with PNP, under the DILG, the PEZA, under the Department of Trade and Industry (DTI), and their regional offices through the existing joint guidelines on the conduct of the PNP personnel, private security guards and company guard forces during strikes, lockouts and labour disputes in general;
- with PNP–DILG, PEZA–DTI, and their regional offices, and Civil Service Commission and the Public Sector Labour Management Council (CSC–PSLMC) through the conduct of labour education on international labour standards and in particular C. 87;
- with PNP, DOJ and the PHRC through the monitoring of cases involving trade unionists. The proposal to include trade union organizations in case monitoring is welcomed;
- with the Presidential Legislative Liaison Office (PLLO) and the congressional committees on labour through active participation in public hearings;
- with DTI and PEZA through monitoring of the implementation of the memorandum of social understanding on labour and social issues arising out of the activities of multinationals;
- with PNP–DILG, DOJ and the task forces under the PHRC, to coordinate closely in the sustained implementation of initiatives of various government agencies involved in the administration of the criminal justice system in relation to cases of alleged killing, harassment and abduction of trade unionists.

Another response is capacity building within the labour administration through training of senior officials, bureau and regional directors, med-arbiters, conciliator-mediators, labour arbiters, legal officers, labour inspectors, sheriffs and technical support staff, the secretariat to the tripartite industrial peace council at the national, regional, city and provincial level, and the industrial tripartite councils themselves.

The 2008–10 Decent Work Common Agenda under the theme “narrowing decent work deficits” serves as a useful framework for a technical cooperation and assistance programme. Some of these responses and initiatives are already included in the Decent Work Common Agenda on Strategic Objective No. 1 (fundamental rights at work) and

Strategic Objective No. 4 (tripartism and social dialogue), while other jointly agreed priority actions can be integrated based on the outcome report of the mission.

Mr Ricardo R. Blancaflor, Undersecretary of the **Department of Justice**, provided an overview of the criminal justice system in the Philippines, in particular as it related to the allegations of extrajudicial killing, abduction and harassment. He explained that the criminal justice system rested on five pillars: community, investigation, prosecution, judiciary, and correction. Many cases were dismissed by the prosecution authorities because the process of investigation had not been done in a proper manner. The PNP and the National Bureau for Investigations (NBI) handled investigations, not the prosecution authorities. Only the NBI was authorized to issue arrest warrants, not the AFP. The duty of the prosecution was to evaluate findings or evaluate complaints, and file corresponding information.

The prosecution delays in the cases related to C. 87 were due to: (1) case overload. Each prosecutor handles an average of 650 cases. Some 30 to 40 criminal cases are calendared per day in court and three to four criminal cases proceed to trial on the same day. As a result, a criminal case is fortunate to have three trial sittings in one year. Some courts have no assigned prosecutor; (2) the procedure relies heavily on testimonial evidence, rather than forensic evidence; (3) witnesses most of the time retract statements having reached settlement with offenders, and some are threatened.

Of the 12 cases that were currently considered as labour-related, three were being investigated; two had been dismissed after preliminary investigation; three had been dismissed by the court; and four were pending with the court. The impression of a culture of impunity and lack of care for witnesses had been brought about by inaccurate and incomplete reporting. The media hardly covered cases where military personnel were indeed arrested, but preferred to target cases where no progress was made in identifying and arresting the suspects. In addition, the Witness Protection Programme currently covered those involved in the prosecution of 14 sensational cases; 16 media murder cases; 26 cases of political killing; and four cases of rebellion and coup d'état. The Undersecretary stressed that the Witness Protection Programme had never lost a witness except one recently, who had left security coverage. He recalled that the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions acknowledged progress in the investigations and charges filed in at least four recent cases involving killings of members of the media. In reply to queries concerning the Human Security Act, he stated that the Act was not being applied as it had been challenged as unconstitutional and the judgement had not yet been rendered.

General meeting with employers on terms of reference

Employer representatives included:

- Attorney Ancheta Tan – President Emeritus, Employers Confederation of the Philippines (ECOP)
- Attorney Rene Soriano – Honorary President, ECOP
- Mr Mario O. Mamon – ECOP
- Mr Miguel Varela – ECOP
- Mr Sabino Padilla – Padilla Law Office (attorney in the case of the University of San Agustin)

- Mr David T. Go – TMPC
- Mr Joseph Matthew Sobrevega – TMPC
- Mr Jose Maria A. Aligada – TMPC
- Mr Eric Mercado – International Wiring Systems Philippines
- Ms Stella Ninfa B. Mendoza – International Wiring Systems Philippines
- Ms Digna Remolana – International Wiring Systems Philippines
- Mr Nestor Cusi – International Wiring Systems Philippines

Mr Ancheta K. Tan (ECOP) stated that ECOP was looking forward to the closure of some cases that had been moving back and forth in the Committee of Experts and the Conference Committee, while the Philippines was one of the freest countries in the world and the last one to think of as a subject of inquiry. He felt there was no need to go into cases where the highest authority of the land had handed down a final resolution. Labour-related issues should be separated from matters already dealt with by Philip Alston, United Nations Special Rapporteur on Extrajudicial Executions.

The employers present also voiced their concern about their lack of involvement in the cases submitted to the ILO's CFA. In some cases, the employer was not even aware that a complaint had been presented to the ILO or what the subject of such a complaint was. They urged the ILO to intervene with the Government to ensure that they were duly informed in such cases so that they could defend themselves from accusation.

Some of the cases were considered by the employers to be moot as the Supreme Court had already handed down a final judgement and many of the workers had accepted severance pay. One of the cases also concerned a company which apparently no longer existed and had been split into three separate companies. In this case, the question of reinstatement was no longer valid and only the matter of pension rights could possibly be considered.

The Employers present pledged all possible cooperation and information that would help to close the pending cases. Mr Padilla recommended that a protocol be put in place so that employers are systematically notified and can closely coordinate with the Government the response to complaints which concern them.

General meeting with workers on terms of reference

The widely attended meeting focused on answering questions relating to the nature of the mission. A number of unions voiced concern about corruption in general, and about the Government's consistent position that the ILO only issues recommendations or that matters are already resolved following a Supreme Court decision. The KMU pointed out that since the visit of the Special Rapporteur extrajudicial killings had gone up further from the already high number of 64 to 92. The Alston report, which had been referred to by the supervisory bodies, should be a more active basis for the Government's consideration.

All trade unions expressed the firm hope that the mission would result in more than a paper exercise. The workers' struggle in the Philippines was extremely difficult, and expectations were high that the mission could come up with tangible results.

Meeting with the workers

The Alliance of Progressive Labor (APL) submitted a “joint position” paper on behalf of 19 trade union organizations, citing 50 incidents of violation of C. 87 (on record). In particular, it referred to restrictions in the Labour Code to workers’ freedom of association, violence against trade unionists and ineffective protection through the legal system, obstacles in the labour justice system to organizing, bargaining and peaceful concerted actions, the repression of public sector unionism and the weaknesses of policy-making and policy enforcement mechanisms for the public sector.

The Trade Union Congress of the Philippines (TUCP), which organizes 24 federations, equally read a statement.

The KMU delivered a statement of the following alleged violations of C. 87:

- the 20 per cent registration threshold laid down in article 234(d) of the Labour Code;
- Departmental Order (DO) 18-02 of 2002 which promotes labour contracting;
- the increased hiring of agency or fixed-term workers;
- the right of employers to file for conciliation of registration disputes;
- extrajudicial killings, by far the worst violation, which weakens unions by depriving unions of their members and leaders;
- the filing of fabricated cases, trumped up criminal charges and ignoring of due process (e.g. in Hacienda Luisita);
- the presence of the armed forces in workplaces, so that even fruitful bipartite talks are forestalled by the presence of the military;
- physical assaults during strikes, which prevent workers from organizing and collective bargaining;
- article 263(g) of the Labour Code, which authorizes assumption of jurisdiction over disputes and empowers employers to call on the military in case workers fail to heed return-to-work orders;
- article 263, which requires a majority vote and a seven-day strike ban, making it easy to ban unions, or to reduce the efficacy of a strike;
- docket fees in cases before courts are often too high for ordinary unions;
- interference in union election cases, and the threat of charge with criminal prosecution;
- criminalization of labour disputes, and workers who are sometimes made to languish in jail.

The FFW pointed to the violation of civil liberties, and the use of non-regular employment as a union-busting tactic. Emphasis should be given not only to changing laws, as the Government would always answer that there is a pending law, but that the matter cannot be discussed unless the President certifies. The ILO should offer more technical cooperation, particularly to the labour courts. Hurdles in the judicial system should be removed so that court procedures are shortened to a minimum – cases can

currently linger on in the courts for ten years or more. Finally, the Philippines had no shortage of tripartite bodies, yet there appears to be a lack of social dialogue in many aspects, so that issues remained undiscussed and unresolved.

Other representative trade unions reiterated many of the points made by the national centres, adding also a few new facts and recommendations:

- Very few unions are readily recognized by employers as negotiating partners, suggesting a poor climate of social dialogue.
- The mission should refer to the Alston visit of 2007 and report of 2008 as the report goes a long way towards recognizing systematic attacks on militant progressive unionists as part of counter-insurgency campaigns.
- Organizations representing contractual workers for the purpose of collective bargaining fail to be recognized as trade unions.
- More training is needed, also for judges.
- (Public sector). The highest regional president of the Confederation of Public Employees of Leite, Professor Aqui was killed in front of his students by the military. Government employees have been denied the right to strike since 1987. Meanwhile, policies of privatization have led to job losses of 40–60 per cent in government-controlled agencies. As a result of Executive Order No. 180, there is no general representation of workers in the public sector labour “management” council since all voting members come from management, while five non-voting members represent the confederation.
- DOLE is still considering the banking sector as an industry of national interest for the purpose of the right to strike.
- (PSLINK) Section 12 of the Amended Implementing Rules and Regulations of Executive Order 180 should be amended;
- Philippine Airlines (PAL) plans to spin off catering, cargo handling, reservations, medical and a range of other services, employing 4,000 ground employees. Spinning off will be to Macro Asia, owned by the same owner as PAL. Since the union was certified in 2002, no collective agreement has been negotiated as a result of a moratorium on collective bargaining.
- The HLM should look into the role of DOLE and the military in Mindanao, where witnesses of incidents regularly have to hide in the mountains and threats are continuing;
- (Public sector – PSI). The 30 per cent threshold for the registration of trade unions should be lowered to 10 per cent as there is no protection without registration. The requirement is that there should be one union representing all teachers. Bonuses cancelled by the commission of auditors should be reinstated as upheld by the Supreme Court.
- The power sector has been privatized and NAPOCOR spun off into smaller companies. Around 8,850 retrenched workers were rehired by different components (division, generation, distribution, assets–liabilities management), but had to accept wage cuts up to 30 per cent. Union moves have been curtailed since 2005 by eliminating check-off facilities. The ADB recognized in its loan agreement that a

severance package for retrenched workers is a legitimate cost of restructuring, but nothing has happened.

- A memorandum of understanding (MOU) of the Civil Service Commission categorizes mass absence by five people as concerted action.

Meeting with individual complainants

The HLM met with individual complainants and employers involved in the pending CFA cases. The following is a summary of relevant information gathered.

National Union of Workers in Hotel, Restaurant and Allied Industries (NUWHRAIN) – Dusit Hotel Nikko Chapter (CFA Case No. 2716)

The union representatives suspected that funds earmarked from service charges for reinstatement of dismissed workers had been spent on bribes. At any rate, millions of pesos had already been spent on bribes and the union had therefore requested an audit of the fund. The then manager of the Dusit Hotel Nikko had meanwhile been transferred to Dusit Dubai. Another motion pending with the Supreme Court challenged the fact that a judge which had retired since 2004 had participated in the February 2009 resolution. That resolution had hurriedly refused reconsideration, deciding not to elevate the deliberations to the *banc*, despite an *en banc* resolution being the normal rule for overturning precedent. An attorney clerk who had admitted to making a “human error” had taken early retirement in June 2009. The union submitted that it followed the rule of law, but that, in its view, none of the decisions in this case were following the rule of law. The union noted that no less than three cases were pending before the bar of the Philippines considering disbarment of lawyers for falsification of documents, or producing unethical documents. In the case at hand, the court did not answer the question why women workers were also dismissed although they had not cut their hair short. The union suspected that the Supreme Court had tried to evade the arguments of the union. It considered, for example, that the union had committed a violation of ingress or egress, while the Secretary of Labor had testified to the contrary, and the Ayala Center – where the hotel is located – had been cordoned off at the time by security guards and police in full battle gear making this impossible.

Toyota Motor Philippines Corporation Workers Association (TMPCWA) (Cases Nos 2252 and 2652)

The case concerns the continued refusal by Toyota Motor Philippines Corporation (TMPC) to recognize and negotiate with the complainant Toyota Motor Philippines Corporation Workers’ Association (TMPCWA) despite the union’s certification by the Department of Labor (DOLE) as sole and exclusive bargaining agent; the TMPC moreover dismissed 227 workers and filed criminal charges against other officers and members for having staged strikes in protest at this refusal. The National Labor Relations Commission (NLRC) later on found these dismissals valid but nevertheless required the TMPC to grant separation pay of one month’s pay for every year of service. Some 122 workers have not accepted the compensation package. In February 2006, DOLE authorized a new certification election, which took place on 16 February 2006, and led to the certification of the Toyota Motor Philippines Corporation Labor Organization (TMPCLO) – which was allegedly established under the dominance of the employer – as sole and exclusive bargaining agent of all the rank and file employees.

At the meeting, the union submitted a written memorandum (on record). In April 2008 the Supreme Court confirmed the dismissal of the union members. Around 100 members of the union are still working at the plant, while 103 dismissed workers are

still not accepting severance pay from the company. Several complaints against the continuous violation regarding the certification election by Toyota are pending with the NCMB, but Toyota continues to ignore hearings. From the 26 members against whom a criminal lawsuit was lodged for illegal strike, nine remaining members are still not accepting severance pay and these are the ones for whom the criminal charges are yet to be dropped.

The TMPCWA alleged that some Toyota staff members are army officers and another is a consultant for Toyota. Some military members of the 202nd Infantry Unifier Brigade who had a detachment close to the union office inside the factory only left in May 2009 in connection with the acceptance by the Philippine Government of the HLM, but four members have become bodyguards of the top-level management. Around the same time, a community organizer (Ms Ka-Sabeng Arriola), who advocated the removal of the military, was killed.

The union considered the invitation of armed policemen for a tour of the factory to be a form of intimidation; further attempts were made to bribe union members with supervisory positions and to resort to bullying tactics if these were refused. The management installed seven CCTV cameras in the production line limiting the activity of the union.

Some members of the new union now certified at Toyota also participated in the TMPCWA, but the new union as such was not interested in developing a relationship with the TMPCWA. The International Metalworkers Federation (IMF) tried to unite the two unions, but the new union did not agree before the second certification election and campaigned against TMPCWA during the first certification. They have negotiated a collective agreement, and there is now a moratorium on collective bargaining.

The TMPCWA recalled a long history of attempting to set up a union at Toyota going back to 1990 and which met with systematic obstacles from the management culminating in a Supreme Court judgement broadly defining supervisory personnel and their exclusion from unions of the rank and file. The workers had persevered in their attempts to form an independent union but were constantly challenged by management and, even when they had finally won the certification election, they were rendered impotent through complex legal appeals which delayed their effective recognition and ended in the holding of a new election prior to the final determination of the substantive issue at hand.

The TMPCWA nevertheless expressed willingness to negotiate solutions to the impasse at Toyota, short of full reinstatement. While, in their view, Toyota would not accept the reinstatement of their leaders, the TMPCWA would only consider studying a proposal to reinstate its members if the criminal lawsuits against the leaders were withdrawn.

Federation of Free Workers (FFW) – Visayas Council (Case No. 2488)

The case concerns the termination of employment of the officers of the University of San Agustin Employees' Union (USAEU–FFW).

The union provided a summary of the facts (on record) that are already set out in detail in the background section of the case (see 346th Report of the Committee on Freedom of Association). A new set of union officers was, according to the union, hand-picked by the managers, while DOLE abetted this interference by the university management. Strike paraphernalia marking the strike have gradually been diminished as a result of persistent demolition attempts by the city authorities over a period of four years and nine months. A petition to the President has not provided relief, nor has a petition to

the Speaker of the Senate; and neither has a complaint filed with the ombudsperson under the DOJ. Union busting had been going on in other institutions administered by orders of the Catholic Church (e.g. Visayas hospital). To make matters worse, the dismissed union officers have felt the effects of apparent blacklisting when applying for jobs in other teaching institutions. The dismissed union officers felt it was difficult for them to accept alternatives to reinstatement and give in to a decision they felt was profoundly unjust, and would affect other workers in the country. They provided a complete file with what they viewed as evidence of tampering and irregularities in the decisions of the Supreme Court and the NLRC. The final decision in respect of the legality of their dismissals was still pending before the Court of Appeal in CEBU.

The Telefunken Semiconductors Employees' Union (TSEU) (Case No. 1914)

The case concerns approximately 1,500 leaders and members of the Telefunken Semiconductors Employees' Union (TSEU) who, after being dismissed for their participation in strike action from 14 to 16 September 1995, and failing to obtain their reinstatement, are now trying to obtain the payment of retirement benefits for the period they worked in the enterprise. The CFA had expressed its profound regret at the manifest absence of equity in this case, due to the excessively long period of time over which the issue of reinstatement was pending (five years), the final decision which reversed a series of earlier rulings in favour of the workers, including from the Supreme Court, and the particularly large number of workers dismissed (some 1,500) as well as the denial of these workers' vested rights in terms of pensions. The CFA had urged the Government to intercede with the parties, with a view to reaching without further delay a mutually satisfactory solution for the payment of retirement benefits to the dismissed workers.

The union submitted a case brief (on record), which reiterated the facts that have been documented in the many CFA reports over the years. The union stressed it had always recognized reinstating 1,500 workers would be difficult, but had hoped that DOLE could provide a mechanism for negotiating a schedule of reporting with the management. In fact, that was exactly what was done for a first batch of 800 workers. Later, no more meetings were held, and writs of execution by the then Labor Secretary (SOLE) were ignored by the management. The Supreme Court dismissed the company's petition, and issued a final and executory decision to reinstate the remaining employees. Several other orders to have the Secretary and Supreme Court's decisions executed met with defiance from the company. The company's attempts to evade its legal responsibilities by spinning off into three separate companies (Vishay, Automotive and Temic) were met by a Supreme Court resolution stating that the "Company should not be allowed to escape liability for the illegal dismissal of its employees on the basis of unsupported claims of transfer of ownership". Several other motions for reconsideration by the company were denied, ultimately with finality. Exasperated, the union occupied the office of the Secretary of Labor for nearly a month, staging a hunger strike with family members in the area, even spending Christmas in the office. Meanwhile, the union alleges that the company was lobbying the presidential palace to recognize the company as a vital industry for the economy. On 31 December 1998, the military, with tanks and fully armed soldiers forcefully evicted workers and families from the SOLE's office. Unable to have its orders executed, the SOLE then shifted its position, pinning the union down on an incident in which a number of picketing workers had forcefully entered company premises to reinstate themselves. The SOLE declared the strike illegal, but directed payment of back wages and other benefits and grant of financial assistance to the striking workers. The Court of Appeals overturned both of the SOLE's directives.

The union expressed the desire to talk about separation and retirement benefits having rendered a significant number of years in the company and in conformity with what was stated in the Company's retirement handbook. Lawyers who have computed the cost of

retirement benefits have said that the company cannot pay for everybody, but the union considered that it could not be tasked with making a selection without dividing the union. Out of the 1,500 originally dismissed workers, about 1,000 were not working at all anymore due to age restrictions.

The HLM subsequently met with representatives of the current unions of the three spin-off companies of Telefunken. The new union at Vishay/TSPIC had been able to negotiate its own collective bargaining agreements (CBAs) for the last ten years (periods 2000–02 and 2005–09). The Vishay Philippines Union had also negotiated CBAs (periods 1998–99 and 2001–03 and 2006–08).

These unions fully supported the cause of the dismissed Telefunken workers. The FFW thought there might still be a trust fund for the retirement plan for each of the dismissed employees and this could assist in finding settlement to the outstanding case.

Public Services Labor Independent Confederation (PSLINK) supported by Public Services International (PSI) (Case No. 2546)

The case concerns discriminatory acts (attempts to curtail freedom of expression, suspension without pay, work transfers, termination of employment, withholding of financial incentives and filing a libel lawsuit against a trade union leader) against trade union members in retaliation for having participated in anti-corruption proceedings and protests targeting the TESDA.

At the meeting, the HLM listened to the testimonies of five directly affected trade union leaders. The testimonies are laid out in a written “case situation brief” (on record). The trade union leaders referred to harassment; increasing fear among former colleagues for being displaced or dismissed, and alienation from these colleagues as a result; stigmatization as troublemakers; deprivation of benefits from collective agreements for causing disharmony; and general lack of protection for whistle-blowers against corruption.

One accounting officer had been dismissed for alleged grave misconduct with accessory penalties such as forfeiture of retirement benefits, forfeiture of eligibility and perpetual disqualification from working as a public officer. The Civil Service Commission ruled in July 2009 that the officer was guilty only of simple misconduct with six months suspension without pay and in accordance with this decision, he should have been back at work for some time now. The TESDA Director-General however had appealed the decision and as a result he had been out of work for two and a half years.

One senior specialist had been accused of libel for circulating flyers critical of the TESDA Director-General. The regional court hearing the case had tried to reach an amicable settlement in return for dropping the corruption charges against the Director-General. While in early 2009, she had filed a sexual harassment claim against her supervisor, the Director-General sent the case to the Office of the President, while the corruption case she had filed was pending before the presidential anti-graft committee. He had then decided to transfer her, albeit her status as a single parent, to a far-away office in Camanada district, while the person accused of harassment remained at the central office. She hoped that consideration would be given to moving her to a much closer duty station, such as the Rizal provincial training centre, in order to take into consideration her family responsibilities.

One senior specialist reported, in addition to the submission, that at some point armed men had started delivering subpoenas, although this normally would be done by mail.

In all these cases, decisions had been rendered by the CSC either fully in their favour or determining that simple misconduct had been committed and that they should now be

back in their posts. These decisions were systematically appealed and, in the meantime, they were cut off from their livelihoods and forced to develop makeshift arrangement to earn a living which had a devastating impact on their and their families' daily lives. While the presidential anti-graft committee had condemned the TESDA Director-General in relation to the charges of corruption, its decision was reversed by the Executive Secretary.

Kilusang Mayo Uno Labor Center (KMU) (Case No. 2528)

The case concerns the following allegations: (i) summary killings of 39 trade union leaders, members, union organizers and supporters and informal workers from 2001 to 2006; (ii) nine incidents of abduction and enforced disappearances of trade union leaders, members, union organizers and supporters and informal workers committed by elements of the military and police from January 2001 to June 2006; (iii) harassment, intimidation and grave threats by the military and police forces against trade union leaders, members, union organizers and supporters and informal workers; (iv) militarization of workplaces in strike-bound companies or where a labour dispute exists and where existing unions or unions being organized are considered progressive or militant, by means of establishing military detachments and/or deployment of police and military elements under the pretext of counter-insurgency operations; and (v) arrest and detention of and subsequent filing of criminal charges against trade union leaders, members, union organizers and supporters and informal workers due to their involvement and active participation in legitimate economic and political activities of trade unions and informal workers' associations.

The HLM heard additional allegations from trade union leaders and members affiliated to KMU on two separate occasions. These individuals came long distances to testify to the HLM and brought detailed documentation and affidavits to support their cases. The fear they had for their safety was evident and they had requested to meet in a safe haven. The allegations broadly fell into two categories: further allegations of murder, abduction, harassment, arrest and intimidation; and allegations of violation of the right to organize and to bargain collectively by employers, especially in economic zones. The KMU formally submitted this information as new allegations before the CFA.

Meeting at TESDA

The following officials attended the meeting:

- Ms Milagros Dawa-Hernandez – Deputy Director-General for Sectoral TVET (TESDA)
- Ms Marissa G. Legaspi – Executive Director, Planning Office
- Ms Pilar G. de Leon – Executive Director, Office of the Chief of Services for Administration (OCSA)
- Ms Rebecca C. Chato – Director, Bureau Labour Relations, DOLE
- Ms Rosalinda Baldoz – Undersecretary, DOLE
- Ms Imelda T. Ong – Attorney Legal Unit

The meeting was chaired by the Deputy Director-General. Ms Pilar explained that the TESDA Association of Concerned Employees (ACE) (affiliated with TUCP) won a certification election in 2001, which was contested by the “Annie Geron Group”. The SAMAKA TESDA union (of which Annie Geron is the President) is affiliated to PSLINK, the federation of which Annie Geron is General Secretary.

Ms Pilar explained further that TESDA was involved in disputes with Annie Geron and Rafael Saus. In May 2008, the CSC upheld the decision of the Director-General to drop Annie Geron from the rolls (because of absence without leave), and that decision was further upheld by the Court of Appeals, and the subsequent appeal dismissed by the Supreme Court on technical grounds.

Rafael Saus and two others did not comply with a reassignment as it was allegedly not in the interest of the service. After an investigation and disciplinary procedure, DOLE recommended termination in May 2008, and in October 2008 the Director-General dismissed the three for grave misconduct. The three filed an appeal against the dismissal order. The CSC ruled in favour of simple misconduct, with a disciplinary suspension of six-month without pay. An appeal against the six months suspensions is still pending with the CSC, but she wondered whether the CSC decision would take precedent over the Supreme Court's earlier confirmation of the termination. If the CSC confirms the six-month suspensions, then TESDA would need to resolve the question of reinstatement. Ms Dawa-Hernandez pointed out that TESDA provided the best benefits, but that when it came to due process its hands were tied, and it needed to follow a body of rules.

Turning to the dismissal of Ramon Geron (who was dismissed for lack of eligibility for his executive position as Provincial Director), eligibility is a requirement of executive level appointment, and TESDA cannot redefine the position of a person who is a non-presidential appointment. TESDA has to follow the CSC and the executive career service commission, who has to decide on whether he is qualified for executive career service. Currently, TESDA considers Mr Geron to be on extended vacation with his salary arrears already computed should the CSC determine that he is indeed qualified and should be reinstated. When Ramon Geron was terminated, he actually tendered his resignation and applied for retirement benefits. While reinstatement occurs automatically in the private sector following a relevant decision and pending a final determination on appeal, in the public sector it needs to be ordered. The Commission on Audit will not allow TESDA to reinstate Mr Ramon while the motion for reconsideration is still pending with the CSC. It was remarked that it may be worthwhile pursuing the matter of pending reinstatement for civil servants as the rules affect more than 7,000 executive career officials.

Meeting with the Philippine Economic Zone Authority (PEZA) and the Department of Trade and Industry (DTI)

The following persons attended the meeting:

- Ms Lilia B. De Lima, (PEZA) – Director-General
- Attorney Norma Cajulis – IR specialist, PEZA
- Ms Rachel Angeles – IR specialist, PEZA
- Mr Justo Porfirio II. Yusingco – Deputy Director General for Finance, PEZA
- Attorney Ann Claire C. Cabochan – Director
- Maria Salome C. Rebosura – Chief, Bilateral Relations Division, DTI
- Attorney Antonio Ferrer
- Mr Ronald Chua
- Ms Carina Vertucio

Ms De Lima introduced PEZA with a PowerPoint presentation (on record). She stressed that every year, 1 million people reach working age in the Philippines, hence the Special Economic Zone Act of 1995 was adopted to pursue investment promotion, employment creation and export generation. Some 86 per cent of manufacturing exports come from inside the economic zones. She described the various types of “PEZA ecozones”, highlighting the two non-negotiable areas in these ecozones, that is, the rights of Filipino workers and the protection of the environment. Republic Act (RA) 7916 provided very clearly that the Labor Code governed the relationship between labour and management in the registered enterprises in the ecozones, and a MOU with DOLE stipulated that DOLE remained responsible for labour dispute settlement within the zones. Locators and their contractors had to give a specific undertaking not to use child labour. There were 71 unions in 63 companies in 22 of the ecozones. Ms De Lima clarified in the discussion that no unions existed as yet in the IT sector – the 71 unions in 63 companies related to a total of 2,000 companies. Unions represented a total number of employees 608,387 (2.58 per cent). PEZA conducted annual company inspections in the ecozones to proactively monitor the health and safety of the workers. It had one to five staff members in each of the zones, the other inspections were carried out by private industrial experts. In the period 2004–09, there had been 195 labour complaints, 160 preventive mediation cases, 85 notices of strike, and seven actual strikes. In the same period, it carried out labour seminars covering labour standards, labour relations, gender and development, and livelihood programmes. During the crisis, electronic firms had adopted schemes to keep workers such as reduction of pay while not on work and rotational employment. In some zones, PEZA had set up One Stop Workers’ Assistance Centers (POSWACs). PEZA monitored workplace relations enhancement best practices that promotes social dialogue mechanisms such as labour–management councils/committees; employees’ round tables; and town hall meetings. It organized labour seminars with PEZA personnel on issues such as alternative dispute resolution (with NLRC/DOLE); labour relations perspectives (with DOLE); and “start your business/grow your business” training of trainers (with the ILO). Finally, it had organized a labour seminar for PEZA police and Jantro guards (with the ILO and DOLE) on C. 87, the guidelines for the conduct of PNP, private security guards and company guard forces during strikes, lockouts and labour disputes, and the basics of conflict management/conciliation–mediation.

In reply to some questions concerning union organization, Ms De Lima indicated that unions were both organized independently within zones and following campaigns from union organizers outside of the zones which had free access. As regards the serious allegations of militarization, Ms De Lima pointed out that the PNP was present in the *barangays* to maintain peace and order, as distinguished from the AFP, which was responsible for the security of the country. Sometimes the assistance of the PNP was sought, not the military. There was no military presence in the ecozones. There were 28 collective enterprise agreements in place in the zones. Wages and working conditions inside the zones were generally higher and better than those outside the zones.

University of San Augustin

Mr Padilla, whose law firm represents the University of San Augustin was joined later in the discussion by his father, a partner in the firm.

In the bargaining deadlock, the University did not want the case to be mediated by the NCMB since the CBA provided for grievance machinery and a no-strike no-lockout clause. Unfortunately, the NCMB did not act on the motion to consider the case irreceivable and refer the parties to voluntary arbitration so as to allow the parties to choose the arbitrator. So when the unions could lawfully strike and filed a notice of strike, the university was forced to request assumption of jurisdiction. The Secretary of Labor tends to favour labour in such cases and accepted the case. The University would have

preferred voluntary arbitration. In other cases involving universities, the NCMB did refer the parties to voluntary arbitration, and these cases were adjudicated without much controversy.

As regards the current status of the case, he indicated that the union had selected a new set of officers, and the University was prepared to sit down with the new union to resolve economic issues. The complainants have questioned the new officers, but they have been certified by DOLE. When the complainants filed for illegal dismissal with the NLRC, they attached the CFA recommendations, and the NLRC ruled that five of the ten were illegally dismissed. On appeal, the decision was reversed because of the illegality of the strike, rendering the dismissals no longer illegal. The Court of Appeals upheld this decision, as did the Supreme Court. The jurisprudence is such that if you have agreed to voluntary arbitration and then strike, that is illegal. While the University was prepared to discuss the matter when the case was pending, the outcome is now clear. The NCMB was reprimanded by the Supreme Court for not having given a return-to-work order and not having referred the parties to voluntary arbitration. He alleged that in cases of assumption of jurisdiction, there is often a kickback given to the Secretary of Labor, leading to bias in the decision. In addition, the complainants asked for an enormous amount of emotional compensation (that is in the order of 7 million pesos (PHP) in the Philippines). He added that it was a misrepresentation that five were dismissed for reasons of anti-union discrimination and stated that the dismissal occurred due to their insufficient qualifications. They had discussed this with the FFW, but that organization was now split.

Visit to Laguna Technopark in Santa Rosa

The following persons attended a general briefing on the Technopark:

- Honourable Arlene Nazareno, Mayor – Santa Rosa City
- Colonel Aurelio B. Baladad Inf (GSC) PA, 202nd Infantry (Unifier) Brigade, 2nd Infantry (Jungle Fighter) Division – DA, Brgy Antipolo, Rizal, Laguna
- Ms Linda Baldoz – DOLE
- Ms Norma Cajulis – PEZA
- Ms Rachel Angeles – PEZA
- Mr Justo Porfirio Yusingco – PEZA
- Superintendent Mr Labador for PNP
- Ms Rona Abien – representative of Laguna Technopark
- Mr Antonio Ferrer

Laguna Technopark was developed in 1989, covering an area of 387 hectares. It is declared a PEZA zone. Currently, it counts 134 locators, including companies catering to the local market. It is one of the biggest parks in the country.

Colonel Baladad presented the role of the AFP under the title “Community organizing and development team” (PowerPoint on record). He stressed that the AFP followed international humanitarian law and there are no cases of human rights violations. While the Brigade had been in the *barangay* from 16 January to 23 December 2008, it was no longer present, because it had done its job in giving the community villages a head start, and had now moved on to other areas needing its help. The mayor had invited the Brigade to stay in

the multi-purpose hall, which is located 1,500 metres away from the Technopark and 2,000 metres away from Toyota, so the Brigade did not reside inside the zone. The Brigade carries out community development programmes. In order to carry out its duties of safeguarding security of the community, the AFP need the cooperation of civil society and the private sector. The Brigade promotes peace and is moving away from conflict management in favour of cooperation management.

He further explained that the Brigade implemented livelihood programmes in coordination with the mayor for 200 mother beneficiaries, and a feeding programme for over more than six months in cooperation with the Church. Cleanliness drives had been organized to remove dengue fever. An information campaign had strengthened education and awareness on health issues with the local population and the out-of-school youth. Physical fitness had been promoted for the local population. A neighbourhood watch had been organized at *barangay* Tanod. The Brigade had received a certificate of recognition, village residents had issued a resolution of support, and many individual letters of support had been sent.

Colonel Baladad summed up his view on the issues and facts:

1. There was no complaint in the NLRC about anti-union harassment, and there was no such harassment. They were carrying out a military responsibility programme, on invitation.
2. The AFP did not put up a detachment, it deployed community development.
3. It is true that military officers went around asking for names in January 2008, because the AFP cannot undertake development without polling the community. It merely concerned part of an initial survey of support.
4. It is not true that the Brigade can freely enter the premises of Toyota. The Brigade undertakes social and economic work in the community at a distance of 2 kilometres from the company. No ruthless force was ever used by the military.

In the course of discussion, the Colonel clarified that he had taken courses from the Commission of Human Rights, and had been sent to undergo training on international humanitarian law in Geneva for two weeks. He thought that the AFP had a good enough understanding of human rights and trade union rights, although more training courses in rural areas could be useful. The AFP had reached out to unions to explain the role of the army in the past. A few years ago, the AFP had tried to explain that it does not only fight armed groups, but also poverty and disease. He clarified that the ecozones had their own security, and the AFP could not enter at will, but needed to seek permission first. On the relationship with the PNP, he explained that the PNP was primarily responsible for urban areas and for security in rural areas. While there was a police box just outside Laguna Technopark, there was not an army detachment.

The Superintendent explained that PNP's function was to maintain peace and order. In the event of big rallies, the PNP would require its contingents to protect those taking part in rallies as well as the management. The PNP did entertain complaints from employees and management. There were not often strikes in the Technopark, but sometimes national rallies from other areas would pass through Santa Rosa. The PNP usually kept a distance of around 100 metres from the rally venue. Only very rarely had there been cases of necessary intervention or arrest, in fact none in recent years. Human rights training was offered in the mandatory curriculum. The PNP civil disturbance units were always given instructions right before deployment. The PNP was open to training specifically on industrial relations.

The Mayor concluded by stressing that one reason why investors had come and turned Laguna into the Detroit of the Philippines was that Laguna Technopark was peaceful and had no strikes. She expressed her happiness with the fact that the AFP came upon invitation. The population of the city had increased three times because of employment. Companies paid special incentives and practised their corporate social responsibility. The Labor Code was applied, and ten out of 90 manufacturing companies were unionized. Union organizers were not hampered in their activities.

Meeting with the management of the Toyota Motor Company of the Philippines at Laguna Technopark

The following persons represented the management at the meeting:

- Mr David Go – Vice-President
- Mr Aligada
- Mr Rommel T. Gutierrez – Vice-President for corporate affairs
- Mr Lito
- Mr Leody
- Mr Joseph Sobrevega
- Ms Cristina Arevalo – Human Resources Department

Mr Lito made a PowerPoint presentation setting out the facts already documented in the CFA case (on record). In the discussion, Mr Lito explained that the police station nearby serves the community and not Toyota. There is no back entrance. In fact, the community is surrounding the ecozone, and is even not entirely fenced as settlers come and collect wood. Security guards carrying guns may have been mistaken for the military. The only time when the AFP had come in was when President Arroyo held a cabinet meeting at the premises, and needed enough space for a helicopter to land. About 100 security staff had accompanied the President, and those in charge of logistics were offered a plant tour. The PNP had also been to the plant as it is Toyota's single biggest customer. Toyota agreed on a meeting at the premises to launch the negotiations about a deal involving the purchase of more than 1,000 vehicles and training. Police technicians were trained by Toyota factories also elsewhere in Visayas, Mindanao, and Luzon. They were not disarmed on that occasion, but normally arms are kept at the front gate. As the management understood that workers could find that intimidating, the staff were told at a meeting that armed police could come in, but only for a tour of the factory. President Arroyo visited on two occasions, in 2002 and 2008. Beyond these instances, there have never been any requests for the PNP to come in.

Toyota management stated that they had no knowledge of a leaflet that TMPCWA members stated had been left behind by the management in the locker room to discredit the union.

Ms Arevalo stressed that fairness towards all employees was the paradigm. Even TCMPWA members who had been unkind in the past had been given promotion opportunities. Issues of concern to workers continue to be raised according to "party lines" as was the case with a recent workplace survey. A team leader handled the quality control amongst a team of five workers. Team leaders could be promoted to group leaders, and then to foreman. TCMPWA members had been promoted to team leader. Collective

negotiations were now ongoing with both unions for the period up to 2011. Since 2001, the supervisory union had wanted to synchronize increases with previous annual increases, so these started in July. Room for negotiations is tight. The business environment is to undergo significant change next year as a result of a new Free Trade Agreement (FTA) next year. Other brands produce more volume, and the auto industry is hit by the lack of a sizeable domestic market. The FTA will only be beneficial if Toyota remains competitive, as in the past car assembly companies left when the barriers to trade were lowered. The TMPC provided financial assistance of a humanitarian nature to 58 per cent of 233 dismissed workers. The TMPCLO requested the TMPC to do this as they still count many friends among the dismissed workers.

The TMPC noted that the severance pay ordered by the NLRC was overturned by the Supreme Court. The TMPC would not be prepared to rehire any of the dismissed workers under any circumstances, not the leaders and not the members. First, the tension ran very high when the TMPCWA barricaded the gates, so these ties cannot be repaired. Secondly, safety is probably the single most important factor in the production of cars. The TMPC management stated that the TMPCWA had engaged in sabotage on several occasions, and the TMPC was forced to terminate the worker concerned. The TMPC could not afford to take chances with the safety of its cars. The TMPC did take back some “former” members of the TMPCWA, but only those that did not engage in repeated walkouts. There was no retaliation against those rehired. The TMPC did hold disciplinary hearings for each of the 233 dismissed, because that was their right, and the TMPC had no qualms implementing the manual. The dismissed workers claimed they had the right to walk out, not the right to strike. They were protesting the decision of the BLR to conduct a check of the challenged voters. The dismissal was based on documents outlining disciplinary action and a copy of the handbook on which disciplinary action was based. New staff is trained on the manual. TMPC thought it could be useful to have training on the principles of freedom of association and collective bargaining so as to show commitment, and ensure that everyone has the same understanding of the law.

The HLM was given a tour of the production line, and had the opportunity to speak to several members of the TMPCWA working in the plant who expressed their gratitude for the attention given to their cause. One TMPCWA member complained that the union was not even recognized for the purpose of representing its members in individual grievance proceedings as in the case of the recent dismissal of 76 workers of which seven were TMPCWA members (unrelated to union activity). The management feared complaints from the TMPCLO if it were seen to be negotiating with the TMPCWA. He stressed that the AFP had a firing range near the factory. He also suspected that leaflets denouncing the TMPCWA had been produced by the management and left in the locker room.

One TMPCWA member of rank four with 16 years of service claimed anti-union discrimination as he had not been promoted, not even after taking the required examination.

In response to the question of promotions from rank four to rank five, the TMPC management mentioned that TMPCWA probably forced members to reject promotions, as promoted members would have to leave the union and join the supervisory union. The fear of dismissal amongst some workers is inspired by the LIFO rule (last in, first out) which the union actually requires when workers have to be terminated. The collective agreement has a union security clause for the majority union, except for a 60 days “freedom period” before renegotiations start. The TMPC management insisted on protecting the freedom of choice to join a minority union.

Meeting with the Toyota Motor Philippines Corporation Labor Organization (TMPCLO) and the Toyota Motor Philippines Corporation Supervisory Union (TMPCSU)

Main speakers at the meeting were Angel Dimalanta (President of the TMPCSU) and Francisco Mero (Automobile Industry Workers Alliance (AIWA) which is the federation to which the TMPC unions as well as enterprise unions of other car manufacturers are affiliated).¹

Mr Dimalanta gave a PowerPoint presentation (on record) outlining the history of the TMPCSU. He was the President of the first union at the TMPC, the Toyota Motor Philippines Corporation Labor Union (TMPCLU) founded in 1992. The TMPCLU was never recognized because it included supervisory staff, and was then overtaken by the TMPCWA, which ultimately was also denied certification as exclusive collective bargaining agent. It was this latter incident that led to the walkout and dismissal of TMPCWA leaders and members and so laid the basis of the CFA complaint. He explained that in 1998, the loyal and determined members of the defunct TMPCLU pledged to organize another labour union in order to continue the struggle until it could establish a union in the TMP. It was agreed upon that this group formed a supervisory union and later would assist the rank and file workers that are not within the bargaining unit. Since these team members are mostly level five and above, the immediate concern was to silently work to reorganize the union. The TMPCSU was formed in April 1999, won a certification election in December 2000, and concluded its first collective agreement in September 2001. The current collective agreement runs up to 2011 for political provisions, and 2009 for economic provisions.

The TMPCLO followed up with a remarkably detailed PowerPoint presentation (on record) of its history and structure and of the benefits it had negotiated with the TMPC as compared to the benefits negotiated in other car manufacturing plants. Mr Mero commented that Mitsubishi actually offered the best benefits, because it split off from Chrysler in 1965, and the union had existed ever since. At Mitsubishi, most car and other allowances had already been converted into wages. Toyota had the highest production volume in Thailand, while the lowest in the Philippines.

In the discussion, Mr Angel Dilamante pointed to the problem of the law fractioning off the supervisory employee category without properly defining the category. This was used by the management to cut the trade union organizers off from their legitimate base, but unfortunately this line of argument had never been followed by the Supreme Court. The unions were also particularly concerned by the Supreme Court's decision in the Dusit Nikko Hotel case. He felt that putting the management in a bad light was not the same as striking, but merely an expression of dissatisfaction.

With the introduction of economic zones, organizing workers had become more difficult. PEZA guards have the authority to escort trade union organizers out because the land is only leased by the Government while the property stays private (in the case of Laguna Technopark property of the Ayala family), and the rule provides that on private land no strike can take place.

With respect to the TMPCWA dismissals, Mr Dimalanta explained that only the rank and file got dismissed, because they erroneously walked off having called to a hearing and picketed for three days without filing leave, while all the union officers were on official leave. The management had earlier tried to create a union, but failed. The TMPCSU (the

¹ The TMPCLO, the TMPCSU and the AIWA are members of the Philippines Metalworkers Alliance (PMA).

union of supervisors) undertook reconciliation efforts with the TMPCWA from 2002–05, but to no avail. The Labor Code provides that you can register a trade union with 20 per cent of the workforce, so while there can be five unions, only one is to be recognized for collective bargaining purposes. Unions want control over the bargaining unit, and so trade union rivalry occurs. He also considered that there were many cases where trade union leaders were actually killed by other unions.

Meeting at Central Park Hotel in Luisita Park (Tarlac City)

- Honourable Genaro Mendoza – Mayor, Tarlac City
- PNP – Chief of Police of Tarlac City and three police superintendents
- AFP – Brigadier-General, Mr Gominto Pirino
- PEZA staff

The police authorities provided an overview of the peace and order situation, and their programmes to improve the situation with the cooperation of the community, such as a night watch programme. They pointed out that the nearest police substation was 300 metres away from Luisita Park, although it was considered a strategic area. Police forces were not authorized to enter the park without permission from the PEZA.

The representative of the AFP then briefed the meeting on its approach to industrial peace. He explained that the AFP would not tolerate harassment from either the union or the management, as mutual benefits are dependent on harmonious labour relations. The AFP only handled the insurgency, and did not carry out functions related to labour relations. Law enforcement authorities would step in only when all peaceful means of resolving disputes were exhausted. It had happened in November 2006 that the aggression at a demonstration had got out of hand and that a few protesters had thrown stones at the police, and that the police had defended themselves. If a labour dispute led to unrest, then the police would come in to ensure nobody got hurt. Rules of engagement had been developed for the police forces to deal with acts of violence at rallies. Police forces could not just intervene at will, but had to be deputized by DOLE for labour disputes, unless violence or a specific crime was involved. Last year, there were two cases of such deputization (for example, in Blooming Apparel San Rafael, where tyres were being burned and the police had to ensure that violence resulting from closure of the company did not spread outside the company).

Concerning the situation at the Hacienda Luisita, the AFP explained that the Hacienda covered 11 *barangays*, where mostly peasants and workers lived. The AFP was facing an insurgency, and the insurgency focused on workers for recruitment. In order to insulate workers, the AFP was implementing the integrated area security and public safety system and the integrated territorial defence system, teaching people how to protect themselves from false awareness campaigns. One of the system measures involved the military to conduct humanitarian activities, as well as public information and awareness campaigns in cooperation with civil authorities. There are several control measures to ensure that the staff conducts public awareness-raising programmes about the deception of the communist programme in conformity with international humanitarian law and rules of engagement in the area. The AFP representative had been surprised by the CFA case and invited training on C. 87, which he admitted to know far too little about. He further explained that the AFP had a crowd dispersal unit, which the police, when deputized by DOLE, would call upon if it could not cope. Persons who felt intimidated could turn to the police, one of the regional offices of the Commission on Human Rights or the police law enforcement board, which

administratively came within the remit of the local government. In many cases, the complainants went to local politicians, while looking for endorsement by the police.

The DOLE regional office (Mr Nathaniel V. Lacambra, Regional Director) explained that, in 2008, the AFP received training at its request on issues such labour rights and obligations; the right to organize; election certification; and conduct of armed forced strikes. The regional office had developed a complete module, but now needed to make training available to the police also. DOLE is spread rather thinly in the regions, while the PNP and AFP are on the ground everywhere, and could play a role in improving occupational safety and health, for example.

Many disputes at Hacienda Luisita do get resolved with meetings, such as a recent incident in which the management requested free ingress and egress. The “case” of Hacienda Luisita² is not considered a labour case anymore, but an agrarian dispute. The issues between the United Luisita Workers Union and the employer had already been settled.

The case of International Wiring Systems had become problematic since the renegotiation of the collective agreement. The union could have come to the regional DOLE, but apparently preferred to go to the ILO.

Unions are present in five companies in Luisita Park. In rural areas, PHP1.500 million had been earmarked for the PNP and AFP for livelihood programmes to keep people out of communist hands. DOLE entertained complaints in verbal and written form relating to labour standards and labour issues only. Allegations of crime were referred to the police.

Existing training modules for labour education with trade union officers and the AFP included labour laws, human relations, and productivity with trade union officers. The HLM inquired if maybe the union had been linked to the insurgency, with stigmatization and distrust of the Government as a result. In that regard, DOLE noted that the union had been invited to the regional tripartite industrial peace council in the region, but they did not feel that the union was truly trying to resolve its issues through cooperative engagement.

The Mayor admitted that he had actually received a complaint from the International Wiring Systems Workers Union (IWSWU). He had not yet had the opportunity to look into it, but committed to doing so.

Meeting with the management of International Wiring Systems Philippines Corporation (IWSPC) and the International Wiring Systems Workers Union (IWSWU)

On 29 September 2008, the IWSWU lodged a complaint containing allegations of infringement of trade union rights in the Philippines (Case No. 2669). More specifically, the case concerns allegations of military threat and harassment against IWSWU officers and their families; interference by the AFP in trade union affairs by dissuading trade union members to engage in collective bargaining; and stigmatization of IWSWU members and their families to the detriment of their safety and security. The case has not yet been examined by the Committee on Freedom of Association.

² In November 2004, the United Luisita Workers’ Union went on strike against the management of Hacienda Luisita and a sugar mill (Central Azucarera de Tarlac) over the dismissal of more than 300 union members and leaders. DOLE assumed jurisdiction over the dispute, and ordered the dispersal of the strike. The resulting clashes left seven workers dead.

The President of the Union (Mr Dexter P. Datu) explained that out of 3,034 employees, the union had 2,820 members. It had a closed-shop agreement, but 1,800 contractual workers at the end of 2008 – some of them regular workers rehired as contract workers did not have status to join the union.

The President of the Union, presented a written submission (on record) containing further allegations of harassment by the military, in particular the systematic calling up of union members to come to assemblies where the military discusses union organizing.

Mr Richard D. Sosa (Chairperson of the Board of IWSWU) explained that, in December 2008, he had been harassed by repeated visits at his home by military in plain clothes presenting themselves as national statisticians. He had recognized them because they had been introduced to him as such at an army forum. He had also received death threats by letter. The military officers visited without DOLE. The matter was raised with DOLE, but DOLE did not react, nor did the management.

Mr Michael Ogali (member of the board of IWSWU) explained that he had repeatedly been visited at his home by military officers to insist that he attend a *barangay* awareness forum. Each *barangay* has these forums for workers of the union, and while most attended, some did not go, and some could not be found because they live in 20 different houses to escape being tracked down. Although the management of the company does not force workers to attend the forums, he believed it cooperated with the military by providing names and addresses. Mr Ogali stated that the military had accused him of being an NPA member, at one time allegedly because his parents were pastors. His uncle had also been subject to *barangay* awareness forums. The “group of Dexter Datu” had received warnings, because Dexter Datu is allegedly a member of the CPP. The link was established following his involvement earlier in the “Luisita case”.

Ms Noel Flores also reported that the military had visited her at home to invite her to the detachment. At the meeting, the military had advised her not to raise unreasonable demands in the course of upcoming collective negotiations to prevent the company from going under. She had responded that this was peacetime, and none of the Government’s business.

Mr Rodel Licup (Assistant Vice-President, External Affairs) related another event where he was asked to explain to the military the link between IWSWU and the NPA – Tarlac City is the birthplace of Bucanos, the founder of the NPA. He was warned that the CPP/NPA attempts to infiltrate trade unions. Mr Licup had denied the accusation, assuring the officers that he did not tell workers to join the CPP, but to join the ranks of workers.

The union wondered if the management had a role in these intimidating visits. The military had apparently access to personnel files and schedules of the workers. The union had confronted the management following the military’s indication that it co-organized the awareness forums with the management; but the management had assured the union that it had nothing to do with it. The union also wondered why the city mayor never reacted to its complaint. The mayor had said that he would discuss the matter with the Northern Luzon Command Office.

The IWSPC management had once lodged impeachment proceedings against the union for trying to stop the production. It had tried to undermine the leadership by not recognizing elected union officers, and questioning the independence of the union because of its affiliation to the Federation of Democratic Trade Unions. The IWSWU was now not affiliated to any national federation. The current collective negotiations were difficult, as the management was not willing to give in to union demands citing a loss of profits as a result of the global financial crisis. The union had noticed, however, that the company was

expanding, and production was doubling, so that the company appeared to be doing well. Nevertheless, the company proposed a moratorium on benefits for two years.

If the union does not agree, it could file for conciliation by DOLE, but it has little confidence in DOLE, as decisions tend to go the company's way. Of the many cases the union filed, it managed to win only one. Last September, DOLE had called a tripartite meeting at which the military had showed a video about the Hacienda Luisita strike. IWSPC was represented by its Vice-Chairperson. The theme of the meeting was trade union supervision in Luzon by the military. They considered that the management's tacit acquiescence to this theme meant that it was associated with the military's actions in this regard.

Mr Datu welcomed training to explain in particular borderline issues between the legitimate trade union activities and purely political activities that have a bearing on security. He stressed, however, that the union also needed a recommendation that would prevent similar situations of harassment and improper conduct in the future.

Meeting with the IWSPC management at the factory premises in Luisita Park

The IWSPC was represented at the meeting by the President (Mr Takashi Takagaki), the Vice-President of Production (Mr Eric V. Mercado) and two staff members.

Mr Mercado delivered a PowerPoint presentation to introduce the company (on record).

In the course of the discussion, Mr Mercado mentioned that the company was re-hiring contract workers that had been retrenched earlier, as the production volume had recovered after a significant dip in the first half of the year. The IWSPC expected to post a net annual loss at the end of the year. Among the regular workers, only those requesting to leave had been retrenched.

Mr Mercado explained the company's approach to contract workers (that is project-based and fixed-term workers). The business environment had changed with a bigger number of specific projects of around three months, and a higher fluctuation of volume. Contract workers were, therefore, a necessity. On the other hand, a bigger number of contract workers involved more investment in training, and given the average project duration, the project was sometimes shorter than the training. Workers were updated every week on business developments.

He underlined that four collective agreements had been concluded of three years each, and that a good relationship was maintained with changing union leaderships. He expected that the current collective negotiations would be concluded in October. The company and the union had a closed-shop agreement.

Mr Mercado confirmed that the IWSWU had raised concerns about insecurity, but that the company had denied any involvement. There were 52 manufacturing companies in the neighbourhood. As far as the IWSPC was concerned, all data such as personal files and schedules were confidential, and Mr Mercado assured that the information did not come from the management. Mr Takagaki fully supported this statement and provided the HLM with a formal letter indicating that his management had never provided any such information to the military.

Bargaining deadlocks were submitted to the NCMB in the past, but after the cooling-off period the two parties had been able to settle. He confirmed that DOLE's regional

office felt that the IWSWU did not turn to them, but he thought that this might be the result of meetings DOLE had organized with the military.

He recalled that there had been divisions among the workers in the past, and at one point one union had filed a lawsuit, but that was the past. The management found the dialogue with a few representatives much easier than negotiating with workers individually and was committed to cooperatively engaging with the union in the upcoming collective bargaining.

The company was very open and supportive to capacity building and training.

Meeting with the Bureau of Labor Relations (BLR), the National Labor Relations Commission (NLRC), and the National Conciliation and Mediation Board (NCMB) on the morning of 28 September

The participants at the meeting included:

- DOLE – Usec Baldoz and Usec Padilla
- BLR – Director Chato
- NCMB – Executive Director Ubaldo
- NLRC – Commissioner Velasco, Director Ricardo Gloria, and Attorney Herminio Banico

The NLRC submitted a performance report for 2008 and some figures (on record).

Background to the labour dispute settlement system

The **National Labor Relations Commission (NLRC)** is a tripartite labour court. It is attached to the DOLE for policy coordination. The Chairperson is assisted by commissioners who sit in seven divisions. Through the labour arbiters in the regional branches, headed by executive labour arbiters, the NLRC hears and decides cases involving unfair labour practices; termination disputes; claims for reinstatement on cases involving wages, rates of pay, hours of work and other terms and conditions of employment; claims arising from any violation of article 264 on prohibited acts, including questions involving the legality of strikes and lockouts; all other claims arising from employer–employee relations; and certified cases by the Secretary of Labor.

The NLRC resolves disputes through compulsory arbitration. Decisions of labour arbiters may be appealed to the Commission whose decision may be brought on certiorari to the Court of Appeals and to the Supreme Court.

The **National Conciliation and Mediation Board (NCMB)** is an agency attached to the DOLE, both for administrative supervision and policy coordination. Through its regional branches, headed by a director and staffed with conciliator–mediators, the NCMB:

- settles labour disputes, particularly those arising from notices of strikes on grounds of unfair labour practice and bargaining deadlocks, through voluntary modes such as preventive mediation and conciliation mediation;
- promotes plant-level dispute settlement through grievance settlement and labour–management cooperation programmes;

- promotes the use of voluntary arbitration in the settlement and resolution of labour disputes and other labour cases.

The NCMB is assisted by the Tripartite Voluntary Arbitration Advisory Council (TVAAC) in the formulation of policies and programs on voluntary arbitration.

Under article 263(g) of the Labour Code, labour disputes involving industries indispensable to the national interest may be the subject of assumption of jurisdiction by the Office of the SOLE which either decides the case or certifies it to the National Labor Relations Commission. The decisions of the SOLE and the NLRC on national interest cases may be appealed on certiorari to the Court of Appeals and to the Supreme Court.

At the briefing for Government officials on 22 September, Undersecretary Baldoz (DOLE) had already expressed the government's position that the power of the SOLE under article 263(g) has been used sparingly and judiciously. Only 4 per cent of the cases involving disputes that were likely to materialize into actual strikes had been the subject of an assumption of jurisdiction. Moreover, the exercise of this power was always subject to judicial review. For the past 35 years, the more effective and wider use of voluntary modes of dispute settlement with compulsory arbitration and the use of strikes as last resort had contributed to the growing climate of stability and maturity in the labour-management relations in the country.

The NLRC explained that it received 33,000 cases per year at the regional level branches, of which 43 per cent are settled. It was able to reduce its workload by more than 3,000 cases, applying also other means such as task forcing; establishing minimum levels of performance; strictness in monitoring performance, withholding allowances after third warning. Its number of staff had roughly remained the same. Also at the level of the Commission, the workload had been reduced. The NLRC was trying hard to resolve cases at the first level within nine months, achieving a success rate of 95 per cent, while 85 per cent of the cases could be settled within eight months. On the execution side, while decisions at the level of the Commission are final, cases may be appealed on certiorari to the Court of Appeals and on to the Supreme Court. In December 2007, the Supreme Court amended the rules, extending "judicial courtesy" by ruling that lower decisions may be executed while certiorari is pending. In the course of the nine months needed to settle a case, conciliation took up to three to four months, and the NLRC provided five months for execution. Failure of execution was mostly because a company closed or had no assets, or because respondents could not be located. Reinstatement decisions were also executory pending appeal, at least if the employer was still present. The NLRC felt that closure of enterprises did not present a systematic problem, although there had been some isolated cases. In some cases, the NLRC had been able to pierce the veil of corporate identity and treat a re-establishment as a continuation of the first company. The NLRC hoped to continue seminars for legal arbiters at the first level. There had been only a few cases of adjudication.

The NCMB stated that there had been a total of 869 cases of assumption of jurisdiction, representing 2.21 per cent out of 9,320 non-strike cases handled. Certification to the NLRC had taken place in 582 cases or 1.9 per cent of the total. The Secretary of Labor and Employment (SOLE) determined the jurisdiction. Consideration was being given to amending the regulations, so that when a petition for assumption of jurisdiction was filed with the SOLE, a mandatory conference of the parties would have to be called. No thought had been given to defining "national interest" more precisely, nor to determining guidelines in that regard.

The NCMB did not have data on where petitions for assumption of jurisdiction mostly came from. The procedure started with a notice of strike, a meeting, and then a strike vote. The period after that was not restricted, as long as parties were willing to sit

down. The HLM recommended clarifying the rules on return-to-work orders and the period within which such orders had to be complied with. In the case of the University of San Agustin, there had been nine hours between the start of the strike and the posting of the order, then 0 hours to actually return. In other words, they were expected to return immediately to work. If in most cases the employer is asking for assumption of jurisdiction, then the right to strike is very quickly taken away. While the NCMB may be continuing efforts to reconcile in the meantime, it was likely to end up having to arbitrate anyway. The NCMB did not have statistics with respect to the average time that expires between a notice of strike and a petition for assumption of jurisdiction.

Meeting at the Department of Justice

The meeting took place on the 112th anniversary of the Office of the Secretary of Justice. The main representatives at the meeting included:

- Department of Justice (DOJ) – Undersecretary Blancaflor and an Assistant Chief State Prosecutor
- Department of National Defense (DND) – Undersecretary Valenzuela
- AFP – Colonel Galvez, Lieutenant Colonel Loy and Major Salgado
- PNP – General Bacalzo, General Rapal and Major Libay

The PNP presented a PowerPoint briefing on 66 labour-related cases filed with the PNP in the period 2001–09 (on record).

The Undersecretary stressed that many of the 66 cases of alleged violence against unionists were not labour-related because no connection with a trade union had been proven. There had been no dispute, no strike, no bargaining deadlock, and no collective (bargaining agreement or CBA) negotiations. In most cases, there had been no witnesses, which is an important stumbling block in the potential progress of the prosecution procedure in the Philippines.

In reply to a remark by the HLM that the very belonging to a trade union made the case a labour-related case, as in the case of the IWSWU, for example, the Undersecretary responded that the DOJ could not prosecute anybody without specific allegations such as specific details of harassment. He was informed however that the IWSWU had written to the mayor, because it did not have confidence in the PNP and AFP.

Task Force 211³ considered labour-related cases as a priority. The Task Force was already doing everything it could to strengthen trust among the community, and had stepped up nationwide monitoring of cases involving political violence and extra-judicial killings pending before various prosecutor's offices and courts nationwide. In that regard, it had concluded a memorandum of agreement (MOA) with the media and various law schools. Under the MOA, accredited volunteers from the media and law schools could personally attend the scheduled hearings of cases being monitored, apprise themselves of

³ "Task Force 211" is a presidential task force against political violence created by virtue of Administrative Order No. 211 dated 22 November, 2007. Task Force 211 is chaired by Department of Justice Undersecretary Ricardo R. Blancaflor. Its mandate is to "harness and mobilize government agencies, political groups, the religious, civil society and sectoral organizations and the public for the prevention, investigation, prosecution and punishment of political violence, the care and protection of people and communities victimized and threatened with violence, and the promotion of a culture opposed to violence and for the advancement of reconciliation and peace".

the proceedings, and record the incidents that transpire in the cases' respective monitoring kits.

Twenty-four of the 66 cases were acknowledged to be related to the counter-insurgency efforts. Task Force 211 validated that nine killings fell within its mandate as related to unions. Five cases out of the 16 harassment cases had been referred to the Commission on Human Rights. The Philippines had a Commission on Human Rights, an ombudsperson and other mechanisms which people could turn to. The Undersecretary stressed that prosecutors did not investigate, but acted on facts reported by the three agencies in charge of investigation. The DOJ could not rely only on perceptions of distrust within the community in order to carry out prosecutions.

The Undersecretary delivered a PowerPoint presentation (on record) arguing that the culture of impunity was a myth created by media reporting killings, but the follow-up, and the eventual solution were never given the same media attention. The Task Force had succeeded in speeding up the resolution of media killings, which was now down to three weeks. Nobody was spared in the process, whether they were mayors or military officers. In the case of the killing of a peasant leader in Hacienda Luisita, the AFC peacefully turned over one of its officers who had been a suspect but had evaded arrest for a long time.

The DND explained that its mandate and that of the AFP included not only territorial defence, but also internal security; community development; humanitarian assistance and disaster relief. He underlined that most cases of alleged harassment were perceived as such because counter-insurgency operations against the 5,000-strong NPA sometimes raised the possibility that people might be associated with the insurgency. Involvement in labour disputes was not part of the DND/AFP mandate, but there were times that DND/AFP thought a link with their mandate existed, and investigated further. There was a problem of public confidence in law enforcement. DND/AFP had invested heavily in the confidence of the Filipino people, and its assistance was almost always the first that people received. The first step in successful counter-insurgency was to engage the community and establish good relations. The AFP had to go out and repair schoolhouses, the military could not just live within their camps, and that might lead to perceptions of harassment. The AFP saw it as its role to protect people and keep them from joining the counterinsurgency. Talking to trade union members was not harassment, but was simply talking to members of the community. It was part of the law enforcement function to reduce the scope for people to engage in crime. Wherever there was want and danger, a trade union member could be susceptible to engaging in action against the Government.

The HLM stressed that the military had clearly a key role to play in ensuring law and order in the country, but that there needed to be a better understanding of the meaning of labour relations and the importance of not stigmatizing unions and their leaders by making blanket linkages to the counter-insurgency. The DND/AFP explained that it was much easier and time- and cost-efficient to talk to communities as a group; to talk to farmers as a farmers' group; and to talk to associations of professionals. The AFP also had to engage workers when it addressed communities, to make them aware of why the military was there. The HLM recommended having a more regular dialogue, perhaps at a regional level, providing orientation on the importance of ensuring respect for basic civil liberties within the context of legitimate trade union activity.

The Undersecretary concluded by stating that the Task Force's mandate concerned political violence, and did not deal with abduction or harassment, only killings. Of 39 labour-related killings, 20 were investigated, 16 filed and in two cases there had been convictions. The cases under investigation were problematic because of the lack of witnesses. He assured the HLM that the Witness Protection Programme had not lost a

single witness, although it currently covered 450 witnesses in wide range of cases such as murder and drug trafficking.

The four government agencies present at the meeting submitted a PowerPoint presentation (on record) outlining the individual status of alleged cases of killings, abduction and harassment pending with them.

Meeting with Supreme Court Chief Justice Reynato S. Puno and Chairperson of the Court of Appeals Vasquez

The HLM introduced its mandate and objectives. The HLM had noted the active use of the judiciary in labour disputes. One of the cases involving a Supreme Court judgement was unfortunately now before the CFA. The HLM underlined that the CFA is highly deferential to the national judiciary where it feels that there is an independent and functioning judiciary, but that its job is also to recall the guiding international principles.

Justice Puno cautioned that he did not have the freedom to discuss cases that were pending before the Supreme Court or the Court of Appeals. He underlined that although the supervisory bodies might disagree with one or two decisions, these decisions were by and large accepted by the labour sector. The judiciary decided thousands of cases arising from labour dispute settlement procedures. There were no specific statistics kept but all courts (labour tribunals, courts of appeals and the Supreme Court) were courts of record, and copies of decisions could readily be accessed.

On the question of whether the Supreme Court could refer to international Conventions, Justice Puno clarified that the Supreme Court primarily followed the Constitution, but that international law was given proper consideration and progressively implemented through interpretation. Interpretations were available on the Internet, and there was no impediment to courts using them. Justice Puno welcomed the invitation for the judiciary to participate in training programmes. The Philippines Judicial Academy was the educational arm in charge of the continuing education of judges, and could be approached through Justice Puno.

Justice Puno spoke of his proactive initiative in organizing the National Consultative Summit on extrajudicial killings of June 2007.⁴ He explained that the protection of human rights had been a high priority for him. In his first year, he had focused on the first batch of rights, that is, civil and political rights, and had spent some time thinking how the judiciary could offer an appropriate response to the situation. In 2007, he developed the writ of *amparo*⁵ and the writ of *habeas data*.⁶ In his second year, he had turned to the rights of

⁴ The National Consultative Summit on extrajudicial killings took place on 16 and 17 July 2007, at the Manila Hotel. Among the participants were representatives of the legislative, executive and judicial powers, the AFP, the PNP, the Commission on Human Rights, media, academia, civil society and other stakeholders.

⁵ The “writ of *amparo*” is a judicial remedy to help address the issue of extrajudicial killings and forced disappearances in the Philippines. The writ empowers the courts “to issue reliefs that may be granted through judicial orders of protection, production, inspection”, essentially forcing the authorities to safeguard one’s life and liberty. The Supreme Court issued the “Rule on the writ of *amparo*” *en banc* on 25 Sep. 2007.

⁶ The “writ of *habeas data*” supplements the writ of *amparo*. The writ empowers the courts to order the authorities to disclose the information that is being held about a person. The writ conveys the power not only to force the authorities to release information about disappearances, but also to grant access to military and police files. The Supreme Court issued the “Rule of the Habeas Data” *en banc* on 22 Jan. 2008.

the poor, a second generation of concerns. He had called a second forum, that is, the “Forum on Increasing Access to Justice: Bridging Gaps and Removing Roadblocks”. In 2008, he had developed the Justice on Wheels Programme (JOW), essentially mobile courtrooms driving to local prisons, and providing free legal assistance to poor prisoners involved in criminal litigation. JOW succeeded in releasing some 2,300 prisoners over a period of two years. He had also initiated the Small Claims Court Pilot Project that provided an expeditious and inexpensive means to settle disputes involving the poor. The basic idea was to establish a summary procedure for disputes over up to PHP100,000 in civil matters. In his third year now, he was concentrating on the third generation of concerns, that is, a healthy environment. He was developing a “writ of Kalikasan” to promote environmental justice and address the problem of cases filed against environmental activists. All initiatives presented good examples for other Asian countries.

In reply to a query of whether the writ of *amparo* could be extended so as to afford greater protection to labour rights and address the blurring of lines between legitimate trade union activities and genuine threats to public security, Justice Puno advised that it should be for Congress to take the initiative in developing a complete package of measures to protect the rights of people.

Justice Puno considered that the Witness Protection Programme had shown to be insufficient in some aspects. The Court was reviewing the Witness Protection Programme on the writ of *amparo*. Hearings were being held on a new rule accrediting private institutions as sanctuary providers to families and witnesses,⁷ and it was hoped the rule could be adopted by the end of the year. The Supreme Court was working with the Commission on Human Rights in this respect.

The HLM raised the issue of workers, particularly in the civil service, not being reinstated because reinstatement orders were suspended when a decision was appealed and the often devastating impact this had upon their lives as they awaited the final judgement, often for many years. Justice Puno stated that, in principle, a writ of execution was valid unless there were temporary restriction orders (TRO). He thought that, in the last two years, TROs had been issued in no more than 5 per cent of the cases. Under the Labour Code (applicable to the private sector), decisions were immediately executory, and TROs were the exception. Justice Puno considered that only in very few cases, the court had intervened in the NLRC’s decisions. The Supreme Court monitored the issuance of TROs particularly to prevent issues of discrimination.

Justice Puno explained that there were established rules for elevating decisions of a divisional court to *en banc*. The court *en banc* normally only was prepared to reconsider the interpretation of the divisional court, if new jurisprudence was involved, if a decision clashed with the interpretation of another divisional court, or if there was an impact on the industry. No additional aspects were normally considered in review. That did not mean that a particular question could not come back through a new case. Caution had to be exerted with interpreting freedom of expression in the context of the right to organize. The interpretation in the Dusit case did not only concern the workers’ haircut, but also considerations of violence being committed by the workers. It was a decision that was confirmed all the way, including the Court of Appeals. The decision had hinged on workers violating the law and the collective agreement, so that the particular aspect of freedom of expression could be lawfully suppressed. The ILO did not have to worry about misinterpretations in this area, as there were currently two former Secretaries of Labor serving on the Supreme Court, that is, Justice Quisumbing and Justice Brion.

⁷ The full title of the proposed rule is the *Proposed rule to strengthen protection and security of aggrieved parties availing of the writ of amparo or their witnesses and guidelines in the accreditation of persons and private institutions as sanctuary providers under the writ of amparo.*

Meeting with members of Congress

Main participants at the meeting were:

- Honourable Lorenzo R. Tanada III – representative, Chair House Committee on Human Rights
- Attorney Magtanggol T. Gunigundo – representative, Chair House Committee on Labor and Employment
- Ms Fely D. Parcon – Secretary of the House Committee on Human Rights

Congressman Gunigundo introduced the functioning of Congress. He addressed the question of the assumption of jurisdiction for national interest (article 263(g) of the Labor Code). He underlined that there was a prevailing notion of what national interest was in the country, and that this issue would take a lot of study. The last Congress (13th Congress) was on the right track with House Bill No. 1941. After refiling the Bill in this Congress, campaigning had started around the issue. This Congress was not able to gather the required quorums, and was anyway nearing the end of its term.

The HLM pointed out that the decisions to be taken had been on the table for a long period of time, and wondered if there was any scope for this Congress to pass an amendment. Congressman Gunigundo thought there was only a small window of opportunity, since from January onwards members of Congress would be away campaigning in the upcoming elections. Considering also that, after the elections, the committee chairs could change, it was impossible to predict how the 15th Congress would move on this matter.

Congressman Tanada summed up the long list of priorities that Congress had to cope with. Both the 13th and 14th Congresses had spent considerable time on a Bill providing compensation to victims of the Marcos regime. Both the Senate and the House had passed a version, but it had not yet been put back on the agenda of the plenary. The House Committee on Human Rights had held 16 hearings and drafted a first report on the issue of extrajudicial killings, and hoped to come out with a report by 10 December. A Bill on torture was passed by Congress and was now awaiting the President's signature. A Bill on enforced disappearances was at the plenary having been passed by the House and the Senate. Then, there was a controversial Bill seeking to strengthen the Commission on Human Rights (CHR). The Philippines had provided for the Commission in its Constitution of 1987, the only country to do so. The Bill envisaged measures such as strengthening the Commission's visitorial powers in detention centres, and giving it residual prosecutorial powers. The new prosecutorial powers were the subject of controversy. Under the new rules, the CHR could formally recommend prosecution to the Government and ask to dismiss or act on the recommendation. If the Government did not act, the CHR would carry out a preliminary investigation itself and send the results to the prosecution. If the Government persisted in its inaction, the CHR would deputize the prosecutor to pursue the case. Witness protection, which was now only administered by the DOJ was also included in the Bill. Witnesses would be able to choose protection from either the DOJ or the CHR. The Bills on enforced disappearances and on the CHR stood a fair chance of adoption by the 14th Congress. An internal displacement Bill would probably have to be re-filed. Security forces did not confront the fact that things such as enforced disappearances were happening. The DOJ was not able to prosecute any cases, rather the CHR was receiving the complaints. It proved that there was not sufficient trust in the DOJ.

The HLM inquired after other bills that could have addressed many of the outstanding issues. Congressman Gunigundo submitted a matrix showing five bills addressing the issue of assumption of jurisdiction. He explained that he had authored Bill No. 2112 as only one member of the majority, while the other authors belonged to the political arm of the KMU. He acknowledged that the Labour Code of 1974 needed numerous revisions, but was hard to take up in its entirety. A piecemeal revision was conceivable, but other bills had so far received priority, notably the promotion of employment of students; taxation of wage-earners; and lactation stations. Congressman Gunigundo felt that although many trade unions had questioned the assumption of jurisdiction before the Supreme Court, the present Secretary of Labor had used compulsory arbitration very prudently.

Congressman Gunigundo explained, with respect to abuses of contractualization, the House Committee had passed Bill No. 6532⁸ and that the Bill was now with the House Committee on Rules. The Bill raised the number of casual and contractual employees that a company can hire from the current 10 per cent to 20 per cent – but would still put a statutory cap on the number. The Bill had attracted strong opposition from foreign Chambers of Commerce.⁹ The lobbying probably explained the absence of a counterpart bill in the Senate.

Both Congressmen welcomed the offer of technical assistance and awareness raising on freedom of association matters.

Meeting with the Commission on Human Rights of the Philippines

The Commission was represented at the meeting by:

- Chairperson – Ms Leila M. De Lima
- Commissioner – Mr Jose Manuel Mamanag
- Attorney – Jessica Gambol Schuck
- Attorney – Dennis Mosquer
- Attorney – Robert Alcantara

The Chairperson explained the mandate of the Commission. The mandate of the four Commissioners and the Chairperson was expiring in 2015. The core mandate of the CHRP was civil and political rights. The CHRP monitored human rights as defined under international human rights treaties, of which the Philippines had ratified nine. The Commission engaged in human rights advocacy, and carried out human rights training, especially the security forces in collaboration with NGOs and civil society. It recommended legislative measures to Congress. The CHRP had visitorial powers within the jurisdiction of both the police and the armed forces, and these were unrestricted (that is, no prior clearance or prior notice required). The CHRP had been denied access in few cases, but there was generally a good understanding with the police, and the CHRP enjoyed cooperation from the AFP. The CHRP had an advisory mandate to the

⁸ House Bill No. 6532 concerns “An Act Strengthening the Security of Tenure of Workers in the Private Sector”.

⁹ The joint letter to the Speaker of Congress from the Chambers of Commerce of Australia, Canada, the European Union, Japan, the Republic of Korea, New Zealand and the United States may be found at www.amchamphilippines.com/print.php?publicaffairs=1&id=7.

Government on all issues, such as on militarization, or plans to cancel the ancestral domain in Mindanao.

The President had sole appointment powers, but the CHRP was fully independent and fully compliant with the Paris Principles (A status).¹⁰ The CHRP could submit independent shadow reports to the UN treaty-monitoring bodies. It had to be distinguished from the Presidential Human Rights Committee (PHRC), which had been created by an Executive Order of the President. The CHRP sat on the PHRC in its promotional capacity, and assisted in the formulation of national human rights action plans. It had 680 staff covering the whole country, 20–25 in Manila. It could even rely on forensic expertise as part of its investigative powers.

The proposed charter was seeking to give the Commission stronger investigative powers. The Commission would be given a separate Witness Protection Programme, because too few cases led to prosecution and conviction because of lack of witnesses. The proposed charter would provide resources to run safe houses for witnesses. The CHRP also expected to be given prosecutorial powers, because of the dismally low number of prosecutions. Normally, only the DOJ or the Ombudsperson for the military had such prosecutorial powers. Philip Alston was opposed to these powers being given to the Commission, because it would tend to diminish its independent status, and because a combined position as human rights defender and prosecutor could cause a potential conflict with respect to the rights of the accused. The compromise was to grant the CHRP only residual powers, giving the DOJ and the Ombudsperson the opportunity to take the lead in the prosecution process, activating the powers of the Commission only if no action is taken within 90 day.

Compared to the record numbers of 2006–07, extrajudicial killings had dropped following the visit by Philip Alston, but then had risen again, although many of the killings were related to the insurgency. The AFP had instructions to crush this long-running insurgency by 2010. Mindanao was exposed to permanent skirmishes over indigenous peoples' rights. In those areas where the communists had a shadow government, and mining operations were secured by the military, indigenous peoples often got caught in the cross-fire.

The Government's performance with respect to human rights education and training appeared in order. When it came to protection, however, not much progress was evident with respect to extrajudicial killings, illegal arrest and illegal detention, as most perpetrators were enforcement authorities. The AFP maintained "order of battle" lists featuring trade unionists and church leaders. This was often denied, and the actual practice depended on the army commander in charge, but it was also admitted by an army general in recent cases.

The CHRP felt the Government was waging a propaganda war putting labour in the camp of the communists, and drawing a grey line between labour and security matters. The CHRP provided not only a reminder of human rights principles, but also assistance in exploiting labour-related avenues. The AFP's strong arm tactics often caused the monitoring of the security situation to spill over into extrajudicial killings.

The primary jurisdiction in labour-related cases rested with DOLE, and the CHRP referred such cases to DOLE or provided resolutions on an advisory basis. The CHRP investigated and issued categorical resolutions in the event of extrajudicial killings, but even then these were archived as a result lack of witnesses. In mining operations, the

¹⁰ That is, the Paris Principles on Establishment of National Human Rights Institutions and Realization of Fundamental Rights and Freedoms.

CHRP had received complaints that managers would seek cooperation from police or armed forces in securing the operation area.

Complaints demonstrated that the Philippines also had local companies and multinational enterprises (MNEs) committing human rights violations, and shadow governments extorting a “revolutionary tax”.

The Government was almost always uncomfortable with the findings of the CHRP, although it never received negative comments from the President. The previous Secretary of Justice had occasionally been dismissive, as would be a lot of middle-level officers who see the CHRP as a stumbling block.

The CHRP had received complaints about people being summoned to military trainings (or indoctrination sessions). Some complained the AFP’s conduct amounted to spying on individual views and positions, and there were also complaints from villagers being forced to join paramilitary groups.

The CHRP was now finalizing its procedural “Omnibus Rules”, collating it with the “Anti-Red Tape Law”. Until now, there had been a mandatory period within which a complaint should get a reply. In practice, cases of investigation took only a month, while resolution drafting a little longer. Depending on the amount of information to examine, cases lasted from several months to over a year. The Omnibus Rules would require cases to be treated within a year.

The CHRP recommended in particular: a more focused tracking of investigations by all bodies including Task Force 211 and the National Bureau of Investigation; the evaluation and prioritization of pending legislative initiatives with respect to labour rights; and the support for the immediate passage of the new CHRP charter.

Meeting with the members of the Civil Service Commission (CSC) and of the Public Service Labor Management Council (PSLMC)

The CSC was described as a quasi-judicial body responsible for making rulings on appointment and adjudicating administrative cases. The PSLMC was a bipartite body in which not only members from a variety of executive departments participated, but also where local government unions were represented. It had a heavy caseload of thousands of cases with the aim of rendering decisions no later than a year from the appeal. It was indicated that the CSC did not have contempt powers if its decisions were not applied, except in the instance where a TRO had been granted. The Chairperson of the CSC was not in a position to discuss the details of the decisions in the PSLINK case and their implementation, particularly in the light of the fact that his appointment, already made over a year ago and in the capacity in which he had been acting, had just been rejected by Congress.

IV. Conclusions and recommendations

In the first instance, the HLM would like to express its deep appreciation to the Government for having facilitated its meetings with all the relevant departments and government institutions and the relevant parties to the pending complaints. The efforts made in this respect were essential to the success of the mission. The HLM was impressed by the reams of documentation and information brought to it by all parties and the demonstration of a sincere desire to be fully heard and to share views in a mature and committed manner.

The HLM observed that the issues involved in the area of freedom of association could essentially be categorized into two groups: (1) those relating to violence, intimidation, threat and harassment of trade unionists and an absence of convictions in relation to those crimes and; (2) obstacles to the effective exercise in practice of trade union rights.

Violence against trade unionists

As regards violence against trade unionists, the HLM observed that many efforts had been made by the Government to strengthen existing structures and create new ones aimed at following through on complaints with a view to convicting the guilty parties. While there remained significant differences of view as to the extent of the violence and its relation to trade unionism, the HLM was impressed by the numerous individuals who had travelled long distances to explain their cases, the relevant linkages to their trade union activities and the lack of action taken on their files. Some of these meetings took place in unknown locations as the witnesses demonstrated a clear fear for their safety.

These cases have been transmitted to the Government as new allegations and additional information in the pending case concerning violence against trade unionists brought by the KMU and will be examined by the CFA in March 2010. In the meantime, the HLM has recommended to the Government, in view of the seriousness of the information provided and the gravity of the allegations, to establish a tripartite structure to review each of the pending allegations and permit a joint determination as to the linkages with trade unionism and to expedite and monitor the follow-up action taken.

At present, the advances in prosecuting and convicting perpetrators of violence against trade unionists are still entirely insufficient. While a great deal of information was provided by Task Force 211 as to the status of these cases, there was generally no real progress in convictions. Each case must be thoroughly investigated, even in the absence of a formal filing of charges, and appropriate protection provided to witnesses so that these cases can move forward. The investigations need to focus not only on the individual author of the crime but also on the intellectual instigators in order for true justice to prevail and to meaningfully prevent any future violence against trade unionists. While the Government has shown that even the military cannot be immune from prosecution by its recent arrest of a private first class of the Philippine Army for eight extrajudicial killings, it is crucial that the responsibility in the chain of command also be duly determined when crimes are committed by military personnel or the police so that the appropriate instructions can be given at all levels and those with control held responsible in order to effectively prevent the recurrence of such acts.

Beyond the question of direct violence, the HLM heard stories of intimidation by the armed forces that need to be investigated and redressed. As part of the counter-insurgency campaign, armed forces in certain areas, in particular special economic zones, have reportedly taken it upon themselves to invite workers to community forums where they set out to educate the workers in the exercise of their organizational rights. Many workers have felt this to be particularly threatening and a warning to them not to join certain unions that may not be appreciated by the army. The holding of these community meetings was not denied by the armed forces, but the military officers with whom the HLM met also recognized their lack of experience or knowledge in respect of trade union rights and welcomed training in this regard. Such training might also assist in the forces of order better understanding the limits to their role and advice in relation to trade union rights and the need to ensure the full and legitimate exercise by workers of these rights in a climate free from fear. The HLM has proposed to follow up with a combined human rights, trade union rights and civil liberties programme for the forces of order which could be co-conducted with the CHRP. The guidelines for the conduct of the PNP, private security

guards and company guard forces during strikes, lockouts and labour disputes may also need to be updated in this regard.

The relevant state institutions for combating impunity need to continue to be strengthened. The proposed charter of the CHRP would appear to go in the right direction in this regard as it would bolster the powers of this body to respond to individual complaints and further give it the capacity to protect witnesses. As the current witness protection programme does not meet with the total and complete trust and confidence of those met by the HLM, an alternative system may provide a valuable option. The existence of a constitutionally based independent human rights commission is a formidable asset in the country and the HLM recommends that the legislative proposal to give it statutory powers should be supported by the Government and expedited through Congress before it adjourns.

Obstacles to the effective exercise of trade union rights

The HLM heard numerous stories of impediments and obstacles to the full exercise of freedom of association. The unions raised various situations where they had been effectively blocked from exercising trade union rights for decades and where any advances in this respect were few and far between. In particular, the unions painted a picture where trade union rights are rarely respected by the employer who is reported to prefer a non-union workplace or one where unions are generally submissive. Where independent unions exist, collective bargaining was said to be difficult and strike action to routinely end in the Secretary of Labor's exercise of the assumption of jurisdiction powers under section 263(g).

The HLM also learned, however, of numerous efforts on the part of the competent authorities, including DOLE, the CSC, the PSLMC, the NMCB, and the PEZA to assist in resolving disputes voluntarily and defending workers' rights in cases of anti-union discrimination or interference. The HLM was told that the Secretary of Labor and Employment was making efforts in recent times to avoid the use of his powers under section 263(g). Nevertheless, it appeared that, despite the goodwill of the parties responsible for applying the law, decisions taken were regularly appealed and long court battles ensued with appeals all the way up to the Supreme Court, which would, in some cases, make judgements on the appropriateness of a detail in the application of the law that would appear to be better left to the discretion of the implementing authority. Over the years this appears to have given rise to certain jurisprudence in the field of labour law which was complained about by many to be arcane and often incapable of meaningful application.

Numerous complaints were made about the difficulties encountered in trying to organize in the special economic zones and information was given by one of the unions for a new complaint before the CFA. The HLM observed however that the national laws are fully applicable in the zones and the head of the zone authority was categorical in the importance she attached to ensuring respect for trade union rights. In addition, the HLM noted that there were unions in 63 companies out of 2,000 in the special economic zones (representing 2.58 per cent of the workers in the zones) and that, at least in one case where it had the opportunity to meet both the union and the enterprise representation at the highest level, there appeared to be a meaningful and respectful approach to labour relations and freedom of association. The Director-General of PEZA and her staff were eager to obtain further training in the area of freedom of association so as to best ensure full respect for the Labor Code and the relevant international principles.

The HLM welcomed the interest and enthusiasm of all met to learn more about international labour standards and the principles elaborated in the area of freedom of association and commits the Office to assist the Government in elaborating an appropriate

programme of continuing education and technical cooperation in this regard. The social partners have also expressed interest and could benefit not only from awareness-raising workshops on their rights, but also from capacity-building activities to improve their ability to engage with each other and to develop strong and harmonious industrial relations at all levels.

As for the specific cases still pending, the information collected will be transmitted to the CFA for its evaluation in March 2010. In those cases where the Committee had already drawn its conclusions and recommendations and requested the Government to take appropriate action, the HLM observed that the parties have been at a stalemate for many years, incapable of finding solutions and closure. In certain of these cases this meant the loss of their livelihoods for years while decisions to reinstate were endlessly appealed. The impact upon these individuals and their families was substantial and distressing. In other cases, attempts to certify unions have been systematically blocked, appealed, elections renewed despite the absence of resolution to the questions at origin. The HLM urged the Government to review these cases in the light of the CFA's recommendations and to think outside of the box in finding ways to resolve these long-standing cases in a satisfactory manner.

The HLM was impressed by the quality and the dedication of so many in their various roles and responsibilities and their sincere interest in moving the country forward in a constructive and engaged manner. It commits to accompanying the Government and the social partners in any way it can in this regard and is convinced that, if the assurances given are effectively followed through, important progress will be made in ensuring greater application of C. 87 in law and in practice in the Philippines.

V. Acknowledgement

The HLM wishes to express its deep appreciation for the cooperation it received from the Filipino authorities in carrying out its mandate. All planned meetings could take place on time despite the tight schedule and the unforeseen additional demands that were placed on officials' availability as a result of the tropical storm that hit Manila on 26 September. The HLM further expresses its deep gratitude for all the arrangements and preparations carried out by the SRO Manila which were essential to the mission's success. In this respect, it wishes to single out in particular the Director, Linda Wirth and Senior Programme Assistant, Diane Respall.

CASE NO. 2672

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

**Complaint against the Government of Tunisia
presented by
the Liaison Committee of the Tunisian General
Confederation of Labour (CGTT)**

Allegations: The complainant organization alleges the following acts by the authorities: refusal to register a new trade union confederation; refusal to authorize the holding of press conferences by the founders of the confederation; refusal to negotiate with first-level trade unions in the Gafsa mining region; and the questioning and intimidation of a trade union leader by the police

- 1263.** The Committee last examined this case at its May–June 2009 session and submitted an interim report to the Governing Body [see 354th Report, paras 1117–1149, approved by the Governing Body at its 297th Session].
- 1264.** The Government sent its observations in a communication dated 3 September 2009.
- 1265.** Tunisia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers’ Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

1266. At its May–June 2009 session, the Committee made the following recommendations:

- (a) The Committee trusts that, in so far as the CGTT has completed the formalities laid down in the Labour Code concerning the establishment of an occupational trade union, the authorities will not fail to recognize its legal personality rapidly. The Committee requests the Government to keep it informed of any developments in this regard and, if applicable, to indicate any element taken into account by the Tunis Governorate as grounds for refusing to register the CGTT.
- (b) The Committee requests the Government to indicate the legislative provisions which provide for recourse against any obstacle to the filing of trade union by-laws, including any refusal to register a trade union.
- (c) The Committee requests the Government to guarantee fully all workers’ organizations, including the CGTT Liaison Committee, the right to organize public meetings falling within the exercise of trade union rights provided that they comply with the general provisions concerning public meetings applicable to all, and to resort to the use of force only in situations where law and order would be seriously threatened.
- (d) The Committee requests the Government to indicate why the authorities prohibited the holding of two press conferences by the CGTT on its establishment.
- (e) Taking into account the Government’s statement that it regards the CGTT as the only legally established trade union organization, the Committee urges it to indicate the

recognized status of the trade union organizations established in the enterprises of the Gafsa region which, according to the complainant organization, sent their by-laws and the list of members of their executive committees by recorded delivery to the Governor of Gafsa on 26 July 2007. If applicable, the Committee requests the Government to indicate why these organizations are not regarded as legally established.

- (f) The Committee requests the Government to indicate the objective and pre-established criteria that have been set for determining the representativeness of the social partners in accordance with section 39 of the Labour Code in the CPG enterprise or in the mining sector of the Gafsa region. If such criteria have not yet been established, the Committee hopes that the Government will take all the necessary steps to establish them in consultation with the social partners and that it will keep it informed of any developments in this regard.

B. The Government's reply

1267. In a communication dated 3 September 2009, the Government sent its observations on the Committee's recommendations.

1268. With regard to the Committee's recommendations in connection with the refusal to register the Tunisian General Confederation of Labour (CGTT), the Government reiterates that the Labour Code does not contain any particular formalities governing the establishment of a trade union and it does not stipulate recognition by the authorities to grant legal personality and financial autonomy. The Government therefore declares that the refusal to register the CGTT by the Tunis Governorate is incorrect as the administration should not interfere in a procedure to establish a trade union. The Government notes that the establishment of a trade union occurs in an individual, personal and direct manner that must not be hampered by any obstacle. If it were shown that the administration had hindered this procedure, the administrative tribunal would be the competent authority to settle any application for judicial review, in accordance with article 3 of Act No. 72-40 of 1 June 1972 concerning the administrative tribunal as amended by Act No. 2002-11 of 4 February 2002.

1269. With regard to the Committee's recommendations in connection with the right of trade unions to organize public meetings, the Government reiterates that all trade union organizations can hold public meetings provided they respect the administrative formalities set forth in Act No. 69-4 of 24 January 1969 regulating public meetings, processions, marches, demonstrations and gatherings. Also, recourse to the use of force is only required in situations where the security of individuals and property so demand. It recalls that police intervention obeys legally established rules.

1270. Once again, the Government refutes the CGTT's allegations concerning the prohibition by the authorities to hold two CGTT press conferences on its establishment. According to the Government, the complainant organization does not provide any evidence in support of this claim and no appeal has been lodged against an alleged prohibition by the authorities.

1271. Concerning trade unions established in the enterprises of the Gafsa region which, according to the complainant organization, sent their by-laws and the list of members of their executive committees by recorded delivery to the Governor of Gafsa on 26 July 2007, the Government states that these allegations have not been corroborated by any evidence. The Government states that if none of the trade unions that were allegedly set up have yet begun to operate, that tends to confirm that the registration formalities have never been completed.

1272. Lastly, the Government states that while article 39 of the Labour Code establishes the principle of the greatest representation to determine the organization that will conclude the collective agreement in a specific branch of activity and territory, the criteria for

determining this representation are currently under preparation. The Government adds that the representative workers' and employers' organizations will be consulted about the matter at the appropriate time. It concludes by stating that the provisions of article 39 only apply in the event of a dispute between legally constituted trade union organizations, which is not the situation in the present case.

C. The Committee's conclusions

- 1273.** *The Committee recalls that the present case concerns allegations of the refusal by authorities to register the establishment of the Tunisian General Confederation of Labour (CGTT) and authorize it to hold press conferences to inform the public of its establishment, and of the lack of reply from the authorities and from a public mining enterprise in the Gafsa region to the claims of newly established trade unions.*
- 1274.** *With regard to the registration of the CGTT, the Committee recalls that it had indicated that if the complainant organization complied with the formalities prescribed in the Labour Code concerning the establishment of an occupational trade union, the authorities should not fail to recognize its legal personality quickly. The Committee had asked the Government to keep it informed of any developments in this regard and, if applicable, to indicate any element taken into account by the Tunis Governorate as grounds for refusing to register the CGTT, according to the complainant organization's allegations. The Committee notes that in its reply the Government reiterates that the CGTT did not complete the legal formalities required for the establishment of a trade union and that the alleged refusal to register the CGTT by the Tunis Governorate is unfounded as the administration should not interfere in a procedure to establish a trade union.*
- 1275.** *The Committee recalls that, according to the complainant organization, the unsuccessful initiative by the founders of the CGTT to file the by-laws of the organization dates back to February 2007, namely three years, without success. The Committee can but once again express its concern at this particularly long delay, despite the Government's explanations on the declaratory nature of the registration procedure for trade unions. The Committee recalls the following principles concerning the establishment of a trade union organization: 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 constitutes an infringement of Article 2 of Convention No. 87. Furthermore, a long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to a denial of the right of workers to establish organizations without previous authorization [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 279 and 307]. The Committee once again asks the Government to keep it informed of developments regarding the registration of the CGTT and trusts that, provided that the CGTT completes the formalities prescribed in the Labour Code concerning the establishment of an occupational trade union, the authorities will not fail to recognize its legal personality quickly.*
- 1276.** *Concerning its request to the Government to indicate the reasons for the authorities prohibiting the holding of two CGTT press conferences on its establishment, the Committee notes that the Government once again rejects the complainant organization's allegations, indicating that no proof has been supplied to back them up, and that no appeal has been lodged against the administration on this point. The Committee notes that the information provided on this matter by the complainant organization and the Government remains contradictory. It recalls that the right to organize public meetings constitutes an important aspect of trade union rights. In this connection, the Committee has always drawn a distinction between demonstrations in pursuit of purely trade union objectives, which it has considered as falling within the exercise of trade union rights, and those*

*designed to achieve other ends. The requirement of administrative permission to hold public meetings and demonstrations is not objectionable per se from the standpoint of the principles of freedom of association. The maintenance of public order is not incompatible with the right to hold demonstrations so long as the authorities responsible for public order reach agreement with the organizers of a demonstration concerning the place where it will be held and the manner in which it will take place; permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused [see **Digest**, op. cit., paras 134, 141 and 142]. The Government is requested to ensure compliance with the principles recalled above, guaranteeing to all representative organizations, including the CGTT Liaison Committee, the right to organize public meetings falling within the exercise of trade union rights, in so far as they comply with the general provisions on public meetings applicable to all, and to resort to the use of force only in situations where law and order would be seriously threatened.*

- 1277.** *With regard to its recommendation concerning the status of the trade union organizations established in the enterprises of the Gafsa region which, according to the complainant organization, sent their by-laws and the list of members of their executive committees by recorded delivery to the Governor of Gafsa on 26 July 2007, the Committee notes the Government's declaration reiterating that the complainant organization's allegations have not been corroborated by any evidence and that none of the trade unions have yet begun to operate as the registration formalities have never been completed. In this regard, the Committee invites the complainant organization to communicate to the authorities all useful documentation in support of its allegations that the appropriate formalities were completed in July 2007. Provided that the complainant organization or the trade union organizations concerned supply the documentary evidence in support of their allegations, the Committee expects the Government and the competent authorities to take the necessary measures to ensure that the trade union organizations that have satisfied the relevant legal requirements are registered without delay. The Committee asks to be kept informed in this respect.*
- 1278.** *With regard to its recommendation concerning the objective and pre-established criteria that have been set for determining the representativeness of the social partners in accordance with article 39 of the Labour Code in the Compagnie des Phosphates de Gafsa (CPG) enterprise or in the mining sector of the Gafsa region, the Committee notes the Government's indication that these criteria are under preparation and that the representative workers' and employers' organizations will be consulted about the matter at the appropriate time. The Committee requests the Government to keep it informed of any new developments in this regard.*
- 1279.** *Finally, the Committee recalls that governments should recognize the importance of formulating detailed replies to the allegations brought against them and should not limit themselves to general observations, particularly when the case has been the subject of an in-depth examination by the Committee and of recommendations. The Committee's procedures require that governments respond in a detailed and expeditious manner so as to allow for an effective examination by the Committee. The Committee expects that the Government will take all necessary measures to find a rapid solution to this case in accordance with the principles of freedom of association and that it will provide detailed information on progress made in this direction without delay.*

The Committee's recommendations

- 1280.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee once again requests the Government to keep it informed of developments regarding the registration of the CGTT and trusts that provided that the CGTT completes the formalities prescribed in the Labour Code concerning the establishment of an occupational trade union, the authorities will not fail to recognize its legal personality quickly.*
- (b) *The Committee invites the complainant organization to communicate to the authorities all useful documentation in support of its allegations that the appropriate formalities were completed in July 2007. Provided that the complainant organization or the trade union organizations concerned supply the documentary evidence in support of their allegations, the Committee expects the Government and the competent authorities to take the necessary measures to ensure that the trade union organizations that have satisfied the relevant legal requirements are registered without delay. The Committee asks to be kept informed in this respect.*
- (c) *Noting the Government's indication that the objective and pre-established criteria that have been set for determining the representativeness of the social partners in accordance with article 39 of the Labour Code are under preparation and that the representative workers' and employers' organizations will be consulted about the matter at the appropriate time, the Committee requests the Government to keep it informed of any new developments in this regard.*
- (d) *The Committee expects that the Government will take all necessary measures to find a rapid solution to this case in accordance with the principles of freedom of association and that it will provide detailed information on the progress made in this direction without delay.*

CASE No. 2699

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

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

- the Uruguayan Chamber of Industries (CIU)
- the National Chamber of Commerce and Services of Uruguay (CNCS) and
- the International Organisation of Employers (IOE)

Allegations: The complainant organizations allege that at the instance of the Government, a series of labour laws were passed without taking account of the contributions of the employers' side; in addition, they object to the content of the Collective Bargaining Act, Law No. 18566 and consider that it violates Conventions Nos 98 and 154

- 1281.** This complaint is contained in a communication dated 10 February 2009 from the Uruguayan Chamber of Industries (CIU), the National Chamber of Commerce and Services of Uruguay (CNCS) and the International Organisation of Employers (IOE). Subsequently, the complainant organizations sent supplementary reports in a communication of 16 October 2009.
- 1282.** The Government sent its observations in communications of 29 December 2009 and 11 January 2010.
- 1283.** Uruguay 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. Allegations of the complainant

- 1284.** In their communication of 10 February 2009, the IOE, the CIU and the CNCS indicate that they have approached the Committee on Freedom of Association because the Government of the Oriental Republic of Uruguay has failed to fulfil the obligations that it assumed when it ratified Conventions Nos 87, 98, 144 and 154. The complainant organizations consider that the Collective Bargaining Bill put before Parliament in October 2007, item No. 1085 of the Committee on Labour Legislation of the Chamber of Representatives File No. 2159 of 2007, contains provisions which violate the provisions of the aforementioned Conventions as is explained below.
- 1285.** In addition, they consider it important to point out that the entire process of modification of labour legislation in Uruguay since 2005 has taken place with total disregard for the opinions and contributions of the employers' side, and in the total absence of the social dialogue and tripartism which drives the International Labour Organization (ILO) and which are enshrined in Convention No. 144 and Recommendation No. 152.

- 1286.** The CIU is the most representative employers' organization for the industrial sector in the country. It was formed in 1898 with the objective of promoting the interests of national industry, defending its rights and stimulating the country's industrial growth. Its organization is profoundly democratic in structure. The country's most important industries, as well as smaller industrial workshops are represented in it. The CIU has always been concerned to maintain constant dialogue with the government authorities, seeking to ensure that the private and public sectors can work together with a common aim: peace, happiness and prosperity for all the country.
- 1287.** The CIU's chief objectives, consistent with the paramount interests of the country and the Constitution of the Republic, are as follows: (a) to defend the rights and legitimate interests of national industry; (b) to stimulate the growth and improvement of industrial activity by all the means at its disposal; (c) to promote the creation and development of industrial enterprises and related services, providing employers with all possible technical tools and support services; (d) progressively to improve productivity and conditions of work; (e) to foster the internationalization of industrial enterprises; and (f) to encourage affiliation to the CIU of organizations with which it has shared objectives and interests.
- 1288.** The CIU is composed of 48 trade organizations and over 1,100 affiliated companies. Together with the CNCS, the CIU is undoubtedly the most representative organization of the employers' side in Uruguay. It is a member of the IOE, the sole organization which represents employers' interests in the social and labour sphere internationally.
- 1289.** The CNCS is the trade representative body of the Chamber of Trade, founded in 1867, since when it has represented the commercial employers' side and more recently, the developing services sector. Currently, it has some 15,000 members and 115 trade organizations, 22 of which represent business interests within the country. It thus covers the entire territory of the Republic. The CNCS and the CIU are the two employers' institutions recognized by the ILO in Uruguay, and regularly attend its annual Conference.
- 1290.** The complainant organizations consider that the Collective Bargaining Bill put before Parliament in October 2007, item No. 1085 of the Committee on Labour Legislation of the Chamber of Representatives File No. 2159 of 2007, contains provisions which violate the provisions of the aforementioned Conventions as is explained below. The complainants indicate that for greater clarity, they will divide their complaint into the various subjects concerned.
- 1291.** The complainants indicate that Uruguay 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), in 1954, the Collective Bargaining Convention, 1981 (No. 154), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), in 1987. The complainants refer in chronological order to the process of the passing of the labour law reforms from 2005 up to the present, culminating with the submission to Parliament of the Bill to create a system of collective bargaining to which we will refer.
- 1292.** According to the complainant organizations, the Uruguayan Government, which took office on 1 March 2005, embarked on a fundamental reform of labour law in total disregard for the business sector, total lack of consideration for the contributions of the sector, a total lack of recognition of employers' rights in a context where social dialogue and effective tripartite consultation was totally absent. It is against this background that they passed a series of laws which support this assertion and which are briefly described below:

- Decree of the Executive Power, No. 145, dated 2 May 2005, repeals Decree No. 512 of 19 October 1966 and Decree No. 7 of 4 October 2000, which allow the Ministry of the Interior through the police to remove workers from companies occupied by them. It should be emphasized that the said Decree was issued without any form of consultation, communication or notification of any kind or nature, amending laws which regulated that particular aspect which had been in force for 40 years. As explained below, this would bring about a true “state of defencelessness” of employers who were the subject of this unlawful measure taken by workers outside the clear and powerful constitutional provisions. Indeed, article 7 of the Constitution of the Republic enshrines the right to private ownership when it states that “the inhabitants of the Republic have the right to be protected in the enjoyment of life, honour, liberty, security, work and ownership”. Decree No. 145/2005, published in the *Diario Oficial (Official Journal)* on 6 May 2005, orders the parties to a dispute to resort to law in that “the dispute between private individuals must be heard by the Judicial Power”. The preambular paragraphs of the Decree start from the false premise that all disputes or disputes of interest must be resolved in the courts although Uruguayan legislation itself recognizes compulsory prior conciliation through the administrative process in the Ministry of Labour and Social Security. In addition, preambular paragraph III of the Decree in question provides that “it is pertinent to derogate the regulations concerned, in order that the interested parties may resort to the appropriate judicial process in order to preserve and guarantee the rights in question”, forgetting that there always was and remains the possibility of recourse to the courts to resolve a dispute between parties. In short, without achieving a consensus and betraying the tripartism much trumpeted by the Government, the applicable laws were changed after over 40 years without any kind of participation or effective consultation, and contributions were not sought from the employers’ side. Furthermore, Decree No. 145/2005 does not draw attention to the fact that it violates the Constitution when it grants primacy to the right to strike enshrined in article 57 over the right of ownership enshrined in article 7.
- Act No. 17930. Article 321 of Act No. 17930 of 19 December 2005 (National Budget Act), submitted by the Government to Parliament and published in the *Official Journal* on 23 December 2005, provides for the creation of the Register of Offending Companies in the ambit of the Inspectorate-General of Labour and Social Security (this Act was passed without any consultation with the employers’ side).
- Act No. 17940. Act No. 17940, published in the *Official Journal* on 10 January 2006, set out trade union powers, deduction of trade unions dues, trade union leave and other workers’ rights without setting out, or even contemplating, any of the employers’ rights which the sector had claimed insistently (the brief consultations held were clearly intended to “legitimize” a decision that had already been taken by the Government).
- Decree No. 66/06 of 6 March 2006, published in the *Official Journal* on 10 March 2006, regulates the provisions of Act No. 17940 on trade union activity (the contributions and suggestions by the employers’ side to which it refers were not taken into account in the content of the Decree).
- Decree No. 263/06 of 7 August 2006, published in the *Official Journal* on 16 August 2006, which regulates the Register of Offending Companies created by Act No. 17930 (without any prior consultation with the employers’ side).
- Act No. 18091, published in the *Official Journal* on 19 January 2007, which increases the prescription period for labour credits (without any prior consultation with the sector and at the same time as a committee was created and appointed by the Government to discuss labour matters).
- Act No. 18172 of 31 August 2007, on filing of accounts and a budget report for the year 2006, article 346 of which establishes the joint and several liability of owners, partners or directors or their legal representatives for breaches of safety and prevention rules, at the same time creating and appointing a committee with the Government to discuss the other subjects mentioned in the previous paragraph. Again, this is a case of another law passed without any regard for the opinion of the employers’ side.

- Act No. 18099 of 28 December 2007, referring to the subcontracting, and intermediation of labour in clear opposition to the proposal of the employers' side and without taking account of the views expressed.
- Decree No. 291/2007 published in the *Official Journal* on 20 August 2007, regulating Convention No. 155 of the ILO, was issued in the face of the expressed opposition of the employers' side, which for many months had asked for various contributions to be taken into account but which were not included in the Decree.
- Act No. 18251 of 6 January 2008, which amends Act No. 18099. Yet again, this law was passed in the face of clear opposition to what had been requested by the employers' side, and did not include any significant contribution, as the consultations did not respect the principles which, according to the ILO, should govern them, that they should be effective and in good faith.
- On 15 October 2008, a bill was put before Parliament for the creation of a system of labour relations and collective bargaining without any kind of prior consultation and containing provisions in clear violation of Conventions Nos 87, 98 and 144, as will be explained below.

1293. The complainant organizations indicate that the Government had been characterized by the casual and ineffective convocation for the formation of certain forums of a tripartite character, in which the employers' side was represented, in the ever vain hope that their contributions would be heard and respected. Far from that, the impact of the employers' side in the formation of laws was and is null. These forums or committees do not take any heed of the aspirations of the sector nor the rights of employers. Thus they create inequity, arbitrariness and consequently a dangerous imbalance in the system. In consequence, they regret to observe a lack of genuine social dialogue and effective tripartite consultations in Uruguay, despite constant efforts and interest expressed in recent years by the complainant chambers to strengthen relations and collaboration with the Government.

1294. The list of legislation introduced by this administration and the fundamental changes to labour law and labour relations involved make effective tripartite consultation a vital necessity. The complainant organizations assert and provide evidence that in Uruguay there has been limited dialogue in the convening and holding of meetings which do not seek to reach agreements or accept contributions. They state that in many cases, the invitation to consultations is sent only 24 hours in advance, based on working papers previously prepared by the Government, with no real prospect, for the employers' side, of analysing it thoroughly, consulting and introducing suggestions and contributions. In short, the legislation described, which involves enormous changes, was introduced without due and proper consultation with the employers' side.

1295. The complainants indicate that they have repeated on many occasions that it was necessary to create a proper system of labour relations. However, the Government persisted in the dangerous idea of generating a series of isolated, disorganized, general laws, and thereby generated legal uncertainty which is directly prejudicial to the employers. Moreover, it seeks to regulate only certain partial aspects of labour relations, giving rights to only one of the parties, the workers, while ignoring employers' rights.

1296. Since the Government, on 1 March 2005, communicated its intention to make fundamental labour reforms, the business chambers appearing here have been at all times ready to engage in serious, productive and effective dialogue, in order that the prospective legislation would reflect the aspirations of the social partners on an equitable basis, balancing the rights of the workers and those of the employers. In this regard, and in principle, there was a clear interest in complying with article 57 of the Constitution which recognizes and declares that trade unions have the right to strike, establishing the law that will regulate the exercise of that right.

- 1297.** The Collective Bargaining Bill sent to the national Parliament by the Government deserves special attention. In general, and as will be explained, if the Bill becomes law, companies' powers of organization and management will be compromised, efficiency and productivity will be affected together with the industrial fabric, without any benefit to the workers. As mentioned above, the Bill was not offered to the employers' organizations for consideration or tripartite consultation, thus violating the fundamental principles of the ILO.
- 1298.** According to the complainants, and as shown by the statement in support of the Bill sent to Parliament, it is intended to create a "national collective bargaining system". In consequence, it is highly significant that the law itself refers to matters such as the "express omissions", which shows Uruguay as a country governed by minimal regulation of collective labour law. The justification states that "Collective labour relations, in the traditional sense, form a triad composed of the trade union, collective bargaining and disputes". Yet, while the Bill says nothing about the first pillar of this triad, it does talk about collective bargaining and disputes. Thus it is clear that the objective of the law is to regulate collective bargaining and disputes, but not the third component of the "triad" that it mentions, namely, the trade union. This leads to an imbalance to the direct detriment of the employers.
- 1299.** As described, the law which seeks to create a "system" says nothing concerning protection of the right of ownership, which includes the right to ownership of the means of production and especially the product of the activity of the factors involved in the process. It makes no mention of protection of the company's assets. It omits to refer to the freedom of trade and industry which includes the freedom to form a company, and the right of an employer to organize and manage which implies, in turn, the right to manage the company and the right to make changes. It said nothing about the right to safeguard employers' interests against measures which are not covered by the right to strike. The law says nothing about the rights and obligations of organizations or the responsibilities of organizations or their representatives.
- 1300.** It does not contain provisions on the system for adopting decisions in disputes or the corresponding obligation of liability for damages and injuries caused by breach of agreements. It says nothing about the duty of peace, prior notice of the adoption of certain measures, nor the right to work of those workers who are not in agreement with the adoption of certain measures. In short, it seeks to create a system which fails to fulfil the constitutional requirement set out in article 57 of the Constitution of the Republic which requires regulation of the exercise of the right to strike. Moreover, it states in the justification that "the intention of the Bill is to create legislation which puts in the hands of the actors in labour relations a series of procedures to allow bargaining", but it does not seem reasonable to believe that articles 21–24 permit or allow the possibility of bargaining. They do not believe that a violation of the right of ownership "permits or allows the possibility of" bargaining.
- 1301.** The Bill contains a Chapter I concerning "Fundamental principles and rights of the collective bargaining system". This chapter is nothing more than a mere declaration of principles without the least basis in fact as stated above and which will be duly supported by evidence. Article 4 of the Bill, when it provides for the "obligation to bargain in good faith", establishes that "the parties must also exchange the necessary information to allow the normal conduct of the collective bargaining process. In the case of confidential information, the communication thereof carries with it the implicit obligation of secrecy". The complainants consider that this article alters the necessary balance between the parties.
- 1302.** The fact is that it contains the express wording "obligation of information". Notwithstanding that this was part of an agenda for discussion and bargaining which was

coordinated with the Government, it introduces this aspect in the Bill, forgetting that this obligation to bargain in good faith and to provide information is only possible if the parties are structured in a transparent and regulated organization for the reasons which will be explained below.

- 1303.** The complainants indicate that most of a company's information is confidential, since from it can be inferred the strategic plans it has drawn up to market its products or services. It is not possible to guarantee the "obligation of secrecy" which the law imposes if the trade union cannot be held liable in law for breach or non-fulfilment of this obligation. As the right to strike as set out in article 57 of the Constitution is not regulated in domestic law, it is not possible to guarantee that workers will comply with obligations, since the trade union does not have legal personality and thus does not exist in law. In consequence, it is not possible to hold workers or the trade union responsible in the event of breach of the "obligation of secrecy". In a nutshell, under the Bill, the employer is not guaranteed either compliance, or remedy or compensation or even the certainty of being able to take legal action to remedy any possible injury.
- 1304.** Chapter II of the Bill creates a body which, according to the complainants, warrants serious criticism in that it violates one of the guiding principles of tripartism and fundamentally alters the necessary balance between the parties by creating dangerous imbalances which undermine a healthy system of labour relations. It creates the Higher Tripartite Council as the "body for the coordination and governance of labour relations". It will be composed of "nine delegates of the Executive Power, six delegates of the most representative employers' organizations and six delegates of the most representative workers' organizations". The composition of this Council is seriously questioned for several reasons.
- 1305.** In the first place, as set out in the preambular paragraphs of the Bill sent to Parliament, it is granted wide powers, to the extent that it may "consider and pronounce on questions related to tripartite and bipartite bargaining (article 10, paragraph (d)). Thus, the Council, placed at the head of the system, must have an overall view of the phenomenon of collective bargaining in all its dimensions". This clearly shows that the Council will have to be established as the governing body in collective bargaining in all its dimensions, overlooking the fact that, by definition, collective bargaining is bipartite, free and voluntary. In this, the Bill demonstrates a marked "interventionist and dirigiste" vision of labour relations. There is no doubt that interventionism by the Government in labour relations, as contemplated in the Bill, not only does not foster free and voluntary collective bargaining thereby violating Conventions signed by the country, but also has a serious impact on the autonomy of the social partners in collective bargaining.
- 1306.** The complainants maintain that the powers assigned to this body violate the principle of employers' freedom of action, as it allows the Government to "pronounce" without having been requested or asked by them to do so. Secondly, the Government, through its representatives, has more votes than the social partners, nine in total, while the employers and workers each have six.
- 1307.** Even more significant, however, is that the law allows the Council to deliberate "in advance" on the "establishment, application and modification of the national minimum wage and that determined for sectors of activity which cannot fix them through collective bargaining" (article 10, Powers, paragraph (a)). Worded in this way, the power might be seen as vague and imprecise and thus diffuse and unlimited. Despite the foregoing, a reading of it leaves no room for two opinions. It implies that the Government's interventionism and dirigisme will cover the fixing of wages in any sector of activity where an agreement is not reached in bipartite collective bargaining. Collective bargaining will not be free and voluntary, as it will be conducted under the threat enshrined in this

article. In short, the Government is endowing itself with an arbitration mechanism which substitutes tripartite bargaining for bipartite, as a mechanism prior to direct intervention by the Government in collective bargaining between the company and its workers.

- 1308.** Furthermore, this pronouncement of the Council, composed as it is of a larger number of government representatives, alters the balance between the parties and transforms it in practice into compulsory arbitration on questions from which the Government should remain totally aloof.
- 1309.** Chapter III of the abovementioned Bill provides that collective bargaining may take place in wages councils which may be convened by the Executive Power “ex officio or mandatorily at the request of the organizations representative of the activity sector concerned” (article 12, Powers, second paragraph). This article, like those mentioned above, is in clear violation of the principle of free and voluntary bargaining set out in the relevant Conventions and the many pronouncements of the Committee on Freedom of Association.
- 1310.** In other words, the convening and establishment of the wages council at the request of the workers or the Government itself, given the greater number of members on the Government side and the possibility that the Council can decide by majority vote, transforms collective bargaining into compulsory arbitration. It is crystal clear that Article 4 of Convention No. 98 refers to free and voluntary negotiation and excludes coercion, and that the Committee on Freedom of Association has considered that for collective bargaining to be effective, it must be voluntary in character.
- 1311.** Wages councils as they operate in Uruguay and as they are intended to be regulated in the Bill have been in clear violation of the Conventions concerned. The Government has played an interventionist and dirigiste role in collective bargaining, forgetting that the Committee has established that the sole and mere intervention of one representative of the public authority simply in the drafting of collective agreements, if not confined to a merely technical assistance role, cannot be reconciled with the spirit of Article 4 of Convention No. 98.
- 1312.** Chapter IV concerning bipartite collective bargaining also warrants serious objections and we regard them, too, as clearly in violation of the abovementioned Conventions. The complainants consider that the Bill in question contains very considerable defects which should be addressed: deficit of representativeness, adaptability and legal certainty. Article 14 provides that “... in company collective bargaining, in the absence of a workers’ organization, bargaining authority shall pass to the most representative higher level organization ...”. It is possible that “... the absence of an organization (with all that the word entails) does not mean the absence of collective relations within the company ...”. Moreover, the organization of the branch of activity may “... be representative and strong at branch level but not present at company level ...”. The Bill gives precedence to the hierarchical principle and this, in the opinion of Professor Pérez del Castillo which we fully share “... conspires against the function of the collective agreement as a ‘bespoke suit’ for which the rules are made ...”. He maintains that the higher level may be an average of the companies of which it is composed, but it is “... very different at the specific lower level of a given company”. We agree that the proposed law sidelines the “represented collective interest”.
- 1313.** Moreover, “administrative checks to test representativeness and consultation” are missing from the Bill in question. The lack of adaptability refers to the impossibility under the Act concerning the ineffectiveness of a legal provision which prevents an agreement being a true “bespoke suit”. The deficit of legal certainty refers to the idea “... we are provided with a rapid legal process for failure to fulfil the obligations assumed under the

Convention, peace clauses, breach of confidentiality of information, settlement of disputes on questions of representativeness ...”, and this leaves serious gaps in a bill on which there was a lack of consultation.

- 1314.** When it refers to the duration of the collective agreement in its article 17, the Bill provides that “a collective agreement whose term has expired shall remain fully in force with respect to all its clauses until substituted by a new agreement”. In this regard, we must recall that, as the Committee has said, any extension of collective agreements should be following tripartite analysis of the ensuing consequences for the sector to which it applies.
- 1315.** As regards Chapter V on prevention and settlement of disputes, the complainants state that articles 21–24 are clearly in violation of international Conventions signed by Uruguay (these articles refer to the occupation of the workplace during a strike; these articles were withdrawn by the Government).
- 1316.** The complainant organizations indicate that, in short, the Bill does not enshrine a system, but a set of laws which partially regulate certain aspects in favour of only one of the parties. They assert that the Bill in question contains deliberate omissions: it regulates only workers’ rights, but does not subject them to obligations of any nature or kind, it does not refer to employers’ rights, it gives legal status to a manifestly unlawful action which violates rights enshrined in the Constitution, and it confers on the Executive Power a maximum degree of intervention in collective bargaining between employers and workers. All of this ultimately gives rise to dangerous imbalances in the system, and one-sided and thus arbitrary solutions. In conclusion, the complainants consider that the Government is acting on the fringes of what is lawful in contravention of the provisions of the international Conventions to which it is a party, namely Conventions Nos 87, 98, 144 and 154.
- 1317.** In their communication of 16 October 2009, the complainant organizations report the approval on 18 August 2009 by the national Parliament, of the Collective Bargaining Act, which is the subject of this case. They draw the attention of the Committee on Freedom of Association to the failure by the Government of the Oriental Republic of Uruguay to fulfil the obligations it assumed when it ratified Conventions Nos 87, 98, 144 and 154, by passing the Bill which is the subject of the case.
- 1318.** The complainants state that the recently passed Act, despite certain specific changes introduced in it, is in flagrant breach of the international Conventions signed by Uruguay. They state that, as has been explained, there were no “discussions” that were “free”, “detailed”, in “good faith”, in a “framework of trust” and “mutual respect” with “sufficient time to express their points of view and discuss them in depth with a view to reaching a satisfactory compromise”.
- 1319.** The Bill passed by Parliament and promulgated by the Executive Power as Act No. 18566 enshrines direct intervention by the Government in collective bargaining in accordance with the articles described below. Article 7 of the Act creates the Higher Tripartite Council as the “body responsible for the coordination and governance of labour relations”. With regard to its composition, the Act provides that the Council shall consist of nine delegates of the Executive Power, six of the most representative employers’ organizations and six of the most representative workers’ organizations.
- 1320.** According to the complainants, the above warrants the following considerations. Firstly, it is a body which will interfere directly (“coordination and governance”) in the principal aspect of labour relations, which is collective bargaining. Secondly, the greater number of delegates from the Executive Power ensures that, in nominal voting, decisions will be in accordance with the interests and vision of the Government. Indeed, article 9 establishes an

absolute majority of members, in which the sectors do not have equal representation with the Government. This is unquestionably a violation of tripartism, the guiding principle of the ILO.

- 1321.** One of the most worrying aspects for the complainant organizations, however, is that the Council has an *ex officio* power of convocation which allied to the quorum, transforms it into a powerful executing agency of the policies which the Government wishes to implement. Notwithstanding the above, special attention should be paid to article 10 which refers to the powers of the Council. The complainant organizations indicate that special consideration should be given to paragraphs (d) and (e). Indeed, paragraph (d) provides that the Council's powers will include "to consider and pronounce on questions relating to tripartite and bipartite bargaining levels". In addition, paragraph (e) provides that it may "study and adopt initiatives on subjects which it considers pertinent to promote consultation, bargaining and the development of labour relations".
- 1322.** The concern of the complainant organizations is that the new body will be able to decide on any question related to bargaining levels and adopt initiatives to develop labour relations. As conceived, with the *ex officio* right of convocation, the greater number of delegates of the Executive Power, nominal voting, and powers defined in a broad, ambiguous, confused and ill-defined manner, this is undoubtedly a case of a body whose objective is clear: state intervention and dirigisme in labour affairs and collective bargaining. It thereby violates the autonomy of the actors and parties and the principle of free and voluntary collective bargaining enshrined in Convention No. 98. In a nutshell, moreover, the provisions of the abovementioned articles are contrary to the many pronouncements of the Committee on Freedom of Association which establish that public authorities must refrain from interfering to limit the right of the parties to free negotiation.
- 1323.** Article 17 of the Act provides that "a collective agreement whose term has expired shall remain fully in force with respect to all its clauses until substituted by a new agreement". It is clear from this that it establishes a compulsory extension of the term of collective agreements, which is an interference in free collective bargaining. In article 12, when it refers to tripartite wages councils, whose functioning, according to a report of the Committee on the Application of Standards of the International Labour Conference 2009, has been the subject of observation, it provides that "decisions of wages councils shall take effect for the respective group of activity once they have been registered and published by the Executive Power". The requirement of publication for an agreement to enter into force is not fully in conformity with the principles of voluntary negotiation established in Convention No. 98, as the Committee has stated clearly.
- 1324.** Most importantly, however, is that this Act ultimately enshrines something that was precisely a reason for observation by the Committee of Experts on the Application of Conventions and Recommendations in 2008 when it examined the application by Uruguay of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). According to the complainants, the observation of the Committee of Experts acquires special relevance since it was in response to the considerations of the Government itself. In short, the Act ultimately enshrines intervention and interference by the public authorities in clear violation of the abovementioned international Conventions. In conclusion, according to the complainant organizations, the Collective Bargaining Act passed by the national Parliament constitutes a violation of those Conventions.

B. The Government's reply

- 1325.** In its communication of 29 December 2009, the Government states that it must respond to the complainant proceeding filed by the IOE, the CIU and the CNCS for alleged violations of Conventions Nos 87, 98, 144 and 154. The Government states that the focus of the

complaint is linked to the Collective Bargaining Bill submitted by the Executive Power to the national Parliament and that the complainant organizations consider that the process of amending Uruguayan labour legislation, which began in 2005, took place with total disregard of the employers' sector or their contributions, and thus in an absence of tripartism and social dialogue.

- 1326.** The Government states that it will demonstrate the lack of justification of the action, and the eventual benefits of the Bill which, as is natural in any democratic process, was subject to countless amendments from its submission to its final approval by the national Parliament, which is a crucible of all the political forces in the country and where the various sectors were invited to expound their positions.
- 1327.** The Government indicates that, before analysing the Bill, a clarification must be made which the complainants omitted to mention. Namely, the President of the Republic gave an undertaking to the employers' sector and the public (in that it was communicated to the press) to withdraw articles 21–24; i.e. those which referred to occupation of workplaces, from the original Bill. In addition, the Minister of Labour and Social Security conveyed that decision on more than one occasion to the parliamentary authorities (Committee on Labour Legislation of the Chamber of Deputies), several meetings with employers and the press in general. Consequently, the employers (by which we mean exclusively the CIU and the CNCS) should not have omitted to mention that information to the Committee. It does not seem an appropriate practice for a proceeding governed by principles so dear to democratic institutions and justice as good faith and fairness.
- 1328.** In domestic law, which obviously does not bind the Committee but which reflects a tradition or part of the cultural heritage of our country, paragraph 1 of article 5 of the General Procedures Code states: "Good faith and fairness – the parties, their representatives or assistants and, in general all participants in the proceedings, shall suit their conduct to the dignity of the law, the respect due to the litigants and fairness and good faith". In consequence, any allusion to the aforementioned articles by the employers' sector masks a spurious intent which may possibly confuse the Committee, therefore we shall make no reference to those articles or any comment thereon by the complainants.
- 1329.** Secondly, the Government reiterates its assertions in the first paragraph of this reply, namely that the employers formulated a complaint on a bill, in the drafting of which they were invited to participate as in the case of all the other bills to amend the labour system. However, as will be shown below, they initially took part in the process and then, voluntarily, withdrew. The original Bill, submitted to a bicameral parliamentary process, was subject to many changes (including some suggested by the employers themselves) and the Bill (annexed) was passed. The complainants then added new arguments, taking positions at one time or another which contradicted each other and abusing the procedural process in the case. For all these reasons, the Government requests the Committee's indulgence when considering this reply, which is due to the confusion introduced into the proceedings by the other side.
- 1330.** The Government indicates that it will try to set out its reply in a logical order following the initial list suggested by the employers' organizations, following the numbering of the chapters in their submission.
- 1331.** With regard to Chapter I which refers to the background of the complainant employers' bodies (setting out their history and action from their perspective), the Government emphasizes that these are not the only employers' organizations in the country. For example, there is the Rural Association of Uruguay which is not represented by any of these associations, the construction industry chambers, etc. Chapter II sets out the subject of the complaint which, as mentioned above, is based on the assertion that the Bill

concerned would (in the opinion of the employers) contravene certain international labour Conventions, and that the employers were not involved in the process prior to the adoption of laws passed since 2005. In Chapter III, they identify the ILO Conventions ratified by the country which the employers' organizations allege were violated by the Collective Bargaining Bill.

- 1332.** As regards Chapter IV, the Government states that in 2005, when the present administration took office, the Uruguayan labour scene was dismal. Minimum wages were at levels which were frankly appalling, collective bargaining hardly existed, freedom of association was constantly suppressed, affiliation rates both in the workers' and employers' sectors were at alarming levels. With respect to the treatment of the national minimum wage, the Government suggests that reference should be made to the observation of the Committee of Experts in 2000 and 2002 concerning the application by Uruguay of Convention No. 131.
- 1333.** With regard to the trend in real wages, the reality under the economic policies applied since the 1990s shows that of the 700,000 private sector workers in the country at that time, only 16.28 per cent had collective bargaining. Moreover, from the wages point of view, up to 1999, real wages grew by only 7.2 per cent in seven years. Up to 2001, they stagnated, and then in the last two years there was a very sharp fall. Trade unionism, without any kind of promotion, in contravention of article 57 of the Uruguayan Constitution, had collapsed to not more than 8 per cent of all employed workers.
- 1334.** According to the Government, the legislation contained flagrant contraventions of international labour Conventions. For example, rural workers or domestic workers did not have a limited working day nor the right to bargaining in wages councils. Those bodies were not convened after 1990, and the country was under constant observation by the ILO supervisory bodies for failure to comply with Convention No. 131. There were less than 100 company-only collective agreements which covered less than 10 per cent of the total workforce. Data provided by the Documentation and Records Division in the National Directorate of Labour show that: in 2000, 62 collective agreements were registered; in 2001, 77 such instruments; in 2002, 88 agreements were registered; in 2003, 115 agreements were registered; and in 2004, 55 collective agreements.
- 1335.** As regards protection of freedom of association – a fundamental human right – a trade union official or militant could be dismissed without the right to reinstatement. The Committee on Freedom of Association had referred to this matter. As regards one of the pillars of the present complaint, there was no social dialogue or tripartism, which is now demanded so stridently by the employers' sector, in disregard of the position before 2005. Minimum wages, with the exception of the national minimum wage which was set at a shameful level, were set by the market, although that market was marked by high unemployment (note that between 2002–03, unemployment was above 18 per cent in the open market) and the abundant informal work (estimated in those years at around 40 per cent).
- 1336.** In 2002 and 2004, numerous collective agreements were signed on terms which diminished workers' rights and in contempt for them. When the new Government took office in 2005, one of its first measures was to re-establish wages councils. For 15 years (from 1990 to 2005), these bodies had not been convened, despite the fact that the Act which created them (Act No. 10449 of 1943) was fully in force. Despite that, the employers' side never formulated a complaint based on the failure to convene those bodies. The reason is obvious. The employers today are still promoting a policy of deregulation and impoverishment of workers' wages and conditions of work. What are the powers of these councils? In principle, they can be described as tripartite bodies (employers, workers and

the State) whose chief responsibility is to set minimum wages by branch of activity and category.

- 1337.** They also have other powers such as to act as conciliation bodies in the case of collective disputes, fix wage increases for the remaining workers, etc. As a first step, the Higher Tripartite Council was set up, with the participation of the three sectors (note the broad social dialogue), in which it was unanimously agreed how those bodies would function. Twenty activity groups were organized which in turn, internally, also by consensus of the three sectors, established subgroups. The latter now far exceed 200 (due to the particular characteristics of the rural sector, a similar council was created at the same time which created three groups and several subgroups).
- 1338.** Similarly, a framework for discussion was established in the public sector, which reached a framework agreement and by consensus a law on collective bargaining for the public sector (which is also annexed to this reply) and which has a certain similarity to that of the private sector. Finally, a wages council was set up for domestic or homeworkers, leading to a collective agreement which is in force until next year.
- 1339.** Three bargaining rounds took place: the first in 2005 which resulted in 93 per cent of collective agreements being adopted unanimously or by a majority. The second took place in 2006, which brought the level of agreements to 96.5 per cent and the third in 2008, with agreement in 91 per cent of cases. It should be noted that in all cases, over 80 per cent of collective agreements were reached unanimously. The Government states that this shows the promotion by the Government of broad tripartism, as well as a policy based on the fullest social dialogue, which not only took place in relation to minimum wages and the National Directorate of Labour, but also extended on a cross-cutting basis to the basic spheres of the Inspectorate-General of Labour and Social Security (creating tripartite committees to implement the provisions of Convention No. 155), the National Employment Directorate (creating the National Institute of Employment and Vocational Training, also with tripartite composition), the National Social Security Directorate (where there was national social dialogue on social security leading to agreement on reform of unemployment insurance and better access to pensions) and the National Audit Office.
- 1340.** Mention should also be made of a significant growth in real wages, which rose on average by over 26 per cent, according to data provided by the National Statistical Institute. This was accompanied by a fall in unemployment to levels which, according to the latest measurement for these years, was around 6.4 per cent, one of the lowest levels since this indicator has been measured, and below the country's structural unemployment. As a consequence, the level of informal work in the labour market has declined to around 23 per cent. Today over 1,500,000 workers pay social security contributions and for the first time ever, the pensions institute showed surpluses in both 2008 and 2009. In the legislative sphere, several laws related to the world of work and social security have been passed. In particular, due to their importance, it is worth highlighting the following: (a) Act on the promotion and protection of trade union activity (its adoption was crucial in the context of promoting collective bargaining); (b) two laws on subcontracting or outsourcing of corporate services; (c) the new Act on homeworkers and domestic service; (d) the Act limiting the working day of rural workers; (e) laws on special licences; (f) the Unemployment Insurance Reform Act; (g) the Collective Bargaining (Public Sector) Act; and (h) the Act on reform of the labour process.
- 1341.** The Government indicates that it has pursued a policy of democratizing social dialogue in all possible areas, including social security, based on the purest of tripartism. Negotiating on a tripartite basis in good faith does not necessarily mean achieving unanimity or consensus. Of course, unanimity or consensus is the ideal, but it presupposes that each social interlocutor is prepared to give and take. If one of the parties to the negotiation

resorts to a systematic strategy of refusing any kind of reform, it means that the rest of the sectors involved can decide the matter by majority. The pursuit of social consensus cannot be allowed to hold up, let alone block, the reforms needed by the country to continue its progress.

- 1342.** Moreover, several political parties of all philosophical persuasions of the Uruguayan social spectrum are represented in the national Parliament, the natural body where proposed laws are sent for discussion and approval. This means that if discussions in pursuit of consensus are exhausted, the Bill is sent to the legislative body and each professional group is heard.
- 1343.** The Government indicates that with respect to the reiterated theme of occupations, articles 21–24 of the initial Bill (relating to the subject of occupations) were withdrawn by express order of the President of the Republic himself, after being requested to do so by the employers. This is another example where the employers' voice was again heard by the Government.
- 1344.** The Government states that 2009 is an election year in Uruguay and that, for this reason, the complaint seems to be framed as a political statement rather than a complaint against a bill. Indeed, a variety of statements are formulated which will be inclined to confuse the Committee on Freedom of Association. The Government states that authentic tripartism and social dialogue have been established in the country and that the complainant's assertions to the contrary depart from the facts. The Government makes reference to certain spheres of social dialogue, tripartism and collective bargaining created since 1 March 2005, the date when the Government took office: re-establishment of wages councils (considered by the doctrinaire as a fundamental instrument, perhaps the most important, of participation and social dialogue in Uruguay, since it has the potential to function as a mechanism for governing the system of labour relations); the so-called space for social dialogue, the *Compromiso Nacional*; the launching of the National Economic Council; and the tripartite membership of the following bodies: the Committee on the Eradication of Child Labour (chaired by the Inspectorate-General of Labour), the Equality and Gender Commission (which functions in the National Directorate of Labour), the Occupational Safety and Health Commission (chaired by the Inspectorate-General of Labour), the Committee on Classification and Grouping of Labour Activities (chaired by the National Directorate of Labour), the Tripartite Committee for the Construction Industry (chaired by the Inspectorate-General of Labour), the Construction Workers Unemployment and Pension Fund (chaired by the National Directorate of Labour), the Tripartite Committee for the Metal Industry (chaired by the Inspectorate-General of Labour and Social Security), the Tripartite Committee for the Shipping Industry (which has issued orders based on consensus reached in its deliberations), the Tripartite Committee for the Dairy Industry (also chaired by the Inspectorate-General of Labour), the Tripartite Committee for the Chemical Industry (also chaired by the Inspectorate-General of Labour), the Tripartite Committee for the Regulation of Convention No. 184, and the National Dialogue on Social Security which ended with agreement between the three parties. Many of these spheres enjoy or have enjoyed support or technical assistance from the ILO itself.
- 1345.** The employer sector has always been heard. It should be noted that in a climate of protection of social dialogue, and so much effective tripartism, it is impossible that some of their positions would not have been taken into account and it is reasonable to think and easy to demonstrate that in some matters they have imposed their points of view. Not in vain, either, as in the case of wages, over 80 per cent of the activities arrived at collective agreements unanimously. This is indisputable evidence that defies argument. The agreements mentioned are published in the *Official Journal* and posted on the Ministry's web site. The Government adds that what happened is that in Uruguay from 1990 to 2005, there was hardly any social dialogue, because state labour relations policy was to do

nothing. At that time, the workers were never in a position of parity to demand improvements from the employers' sector.

- 1346.** The Government also indicates that it observes a constant negative attitude on the employers' side on the majority of subjects proposed for social dialogue. If it was a negative attitude in that they offered other alternatives, it would help to enrich the instrument. However, in many cases, it was a negative attitude without a counter-proposal, or even unjustified. The Government maintains that it shows recklessness on their part to assert that the labour laws passed were not the product of social dialogue. The IOE, the CIU and the CNCS mention in their complaint a long list of laws and decrees where they were apparently not heard. The Government states that this is not true, as they are always heard; committees are set up, generally in the Ministry of Labour and Social Security, and they are received in parliamentary circles. That is, not to mention the many requests for interviews and exchanges of views with the Minister himself and other officials of the Secretariat of State.
- 1347.** The Government indicates that the employer sector was heard in the process prior to the passing of Act No. 17940 on Freedom of Association and Laws for its Protection; the passing of the laws on subcontracting and outsourcing; the passing of the laws on special licences; and the passing of Act No. 18091 on Prescription of Labour Credits. The Government maintains that opening a space for social dialogue, tripartism or collective bargaining does not necessarily require reaching an agreement. They will make every effort to do so, but when they fail, if there is partial consensus, the laws are put before Parliament with those partial agreements.
- 1348.** The Government states that the Bill was drafted on the basis of many contributions from highly qualified experts, some of them working for the Executive Power, others as parliamentarians or as parliamentary advisers, practising lawyers, officials of the Ministry of Labour and Social Security. At the time when the Bill was being drafted, none of those who participated could fail to take into account the recommendations of the ILO mission which visited the country in November 1986. The Executive Power was not, and is not, unaware that collective labour law is based on three pillars: the trade union, collective bargaining and the right to strike. This Bill does not seek to regulate those three pillars, but only to regulate one of them: collective bargaining. The complaint submitted omits to mention, maybe voluntarily, that freedom of association was regulated by Act No. 17940 by this very administration, after lengthy discussion, in which the employers opposed its regulation. This absence of regulation meant that the country was continually questioned by the ILO itself, since there were no mechanisms to generate stability for trade union officials or militants, and no action for reinstatement was available.
- 1349.** The system thus refers to one of the pillars, collective bargaining, those subject to it, organizational levels, purpose, etc. It does not talk of strikes or trade unions. There was originally a chapter on mechanisms for ending the occupation of companies, but the President of the Republic himself, as well as the Minister of Labour and Social Security, undertook before the employers themselves, the public and the parliamentary committees, that that aspect of the Bill would be dropped, and that can be seen in Act No. 18566 which was finally passed. It is therefore reiterated that the Bill refers only to collective bargaining. The Government therefore wonders why this Bill should have anything to say about protection of the right of ownership. That right is enshrined in the Constitution and the law, and its protection is essentially entrusted to the Judicial Power. It also wonders why it must refer to freedom of commerce and industry, when that is also supported by the Constitution and the law.
- 1350.** The Government reiterates that the Act left out the articles which sought to regulate occupations, it did not regulate the right to strike and, even less, measures which in the

opinion of the national employers should not be covered by it. If the workers adopt this type of measure, the employers must take action before the judicial authority and it will be that authority, and that alone, which will determine whether or not it is a case of the right to strike. They must not complain to the administrative authority, which is not competent in the matter. However, the Bill and the current Act regulate a system of collective bargaining, indicating how the institutions, of which it is made up, are structured.

- 1351.** The Government indicates that the Bill contains a model which refers to collective bargaining, not the responsibility of the parties involved (whether workers or employers). This means that if it is a company, a group of companies, or one or more employers organizations' that fail to comply with the agreement, it does not regulate their responsibility. That is not the purpose of the Act. In the latter case, it would be the subject of an act which regulates the life of trade organizations (whether workers' or employers'), and that was not, and is not, the purpose of the Bill.
- 1352.** The Government also maintains in relation to the assertion that "... it does not seem reasonable to believe that articles 21–24 permit or allow the possibility of bargaining, that it does not believe that a violation of the right of ownership 'permits or allows the possibility of' bargaining". The Government reiterates that the articles which are alluded to were excluded from the Bill a long time ago by order of the President of the Republic and are not included in the Act that was passed.
- 1353.** The Government indicates that it is proposed to analyse in rather more depth the content of the Act that was passed. The Act follows the changes that occurred in the practice of wages councils since 1985, reorganizing them and adding certain innovative solutions. It is structured in six chapters. The first refers to the fundamental principles and rights of the collective bargaining system, essentially based on Recommendations Nos 113 and 163 of the ILO. Chapters II and III set out the model of collective bargaining by branch of activity, which continues to be centralized up to the present. It basically amends certain key articles of Act No. 10449. Chapter IV is devoted to bipartite bargaining, i.e. classic collective bargaining by a company or group of companies. Chapter V introduces clauses for the prevention and settlement of collective disputes, which are not contained in current practice and the present powers of the National Directorate of Labour and the wages councils established in article 20 of the original Act No. 10449. Lastly, Chapter IV, which is the product of a last-minute political agreement, which was the subject of serious criticisms both by the trade unions and labour law doctrine, appears without a name, and refers to the peace clauses to be included in collective agreements.
- 1354.** The system is structured at three levels. The first has national or general scope, the second is branch of activity or productive chain and, finally, the last consists of the classic bipartite bargaining at company or group of companies level. A governing body is established at the first level with functions of governance of labour relations, the Higher Tripartite Council, which will act as a consultative body in the fixing of the national minimum wage and will organize the other levels (branch of activity or wages councils), etc.
- 1355.** At the second level, bargaining is structured by branch of activity or productive chain. It follows the traditional tripartite model that exists in the country; i.e. the bargaining that takes place in wages councils. The Act includes an interesting variable, albeit not defined in detail, that it can also be organized by productive chains. Lastly, at the third level, classic collective bargaining takes place.
- 1356.** Its predominant characteristic is that it is bipartite, which means that it takes place between an employer, group of employers, one or more employers' representative organizations on the one hand, and on the other, by one or more workers' organizations. In this respect,

national doctrine has underlined that “trade unions have always distrusted the company agreement, either for fear that a generalization of the bargaining model could put the activity in crisis, or because they considered that at company level the trade union is weaker and thus the workers have less bargaining power. This distrust is not capricious but feeds on a reality which showed, especially in the period 1994–2004, that the company agreement very often meant a mere formula to reduce workers’ benefits”. The provisions of article 15 of the new Act are important, to the extent that they establish that the parties may bargain by branch, sector of activity, company, establishment or at any other level that they consider appropriate, but on condition that the lower bargaining levels may not diminish the minimum provisions adopted at a higher bargaining level, “except as agreed in the respective wages council”. This means enshrining what are commonly called opt-out clauses.

- 1357.** Chapter I, as the complainants recognize, refers to the fundamental principles and rights of the collective bargaining system. These articles do no more than assemble the principles of international labour law applicable to collective bargaining, set out in countless international agreements and especially the international labour Conventions which the employers believe to have been violated. With respect to the obligation to negotiate in good faith and the right to information (article 4), it seems to be a case of the historic opposition of the Uruguayan entrepreneurial movement to any proposal to introduce collective bargaining. The right to information stems from the right to negotiate in good faith and is extensively developed in Article 7 of ILO Recommendation No. 163.
- 1358.** The Government underlines that there can be no free, serious and productive collective bargaining without the inclusion of this type of obligation. In particular, because, without reliable data, no one can be certain what the bargaining is about. If the employers’ sector in a bargaining round declares that it is in a critical state and the workers do not even have the possibility of checking that, the result could be improper bargaining. The right to information is essential for collective bargaining and bargaining in good faith includes providing information so that the other party is in a position of equality.
- 1359.** In addition, as indicated in the justification prepared by the Executive Power with its submission to the national Parliament, article 4 partially reproduces ILO Recommendation No. 161 on collective bargaining, establishing mechanisms for exchange of information and consultations, and including the obligation of secrecy. It is not sought to subjugate a company’s confidentiality and secrets, but simply to achieve a degree of transparency in matters which relate to its present and future conditions. The employers saw an absence of substance in the article if it did not impose some kind of responsibility for any breach of the duty of secrecy, but the final wording of the Act was improved to take account of those criticisms with the addition precisely of the obligation of secrecy “... breach of which shall give rise to the civil liability of those in breach”.
- 1360.** With regard to the impossibility of enforcing the responsibility of trade unions due to the fact that there was no obligation on them to possess legal personality, the Government states that this is a half truth. It is true that the system of collective law, which is abstentionist by definition, based on the utmost freedom of association, does not require trade unions to have legal personality in order to be able to act in the world of work. In other words, acquiring legal personality is a requirement in their own interest. Constitutionally, article 57 of the Constitution promotes this type of organization by offering them exemptions from fees for acquiring legal personality. It is crucial to recall here that the State does not create the trade union. It forms itself. By granting it legal personality, the State does no more than recognize a pre-existing state of affairs and comply with an international, not to mention constitutional, obligation. In practice, the majority of trade unions at branch of activity level do have legal personality, thus if it is sought to take action against them for civil liability, there would be no obstacles from the

point of national positive law. In any case, it is reiterated that the intended regulation has nothing to do with a law regulating collective bargaining. It would have to be the subject of a law on professional associations.

- 1361.** Article 5 of the Bill and the Act provides for communication and consultation between the parties, taking as a basis the principles included in ILO Recommendation No. 131 on consultation. It is not understood how this point could inconvenience the employers. Moreover, as indicated, in a climate of broad social dialogue and tripartism as developed by the current administration, there has been a surfeit of spaces for participation and consultation.
- 1362.** As regards Chapter II, to which the complainants object, creating the Higher Tripartite Council, the Government indicates that this does not involve anything new. It simply enacts in law a body created by decree of the Executive Power which has functioned on a tripartite basis in wage bargaining rounds from 2005 to the present and in which, in fact, the complainants participated as full members. As regards what happened before, Act No. 10449 did not establish this body, but refers only to the establishment of wages councils, without specifying the existence of a coordinating or governing body. However, prior to the de facto end of the Government which ruled in the country from 1973 to 28 February 1985, there was the National Programming Commission (*Comisión Nacional Programática – CONAPRO*), whose purpose was to act as a mechanism to coordinate the principal lines of action to be announced at the start of each new presidential term. Within the Commission there was a specialized group on labour relations which, among its other activities, was engaged in studying the re-establishment of wages councils, policies for setting the minimum wage, etc. Once it had concluded its work, the need emerged to keep this group and the so-called Higher Wages Council was set up. This was a body composed of high-level representatives of the labour relations system which had certain powers of governance, coordination, etc. with regard to wage matters.
- 1363.** After the end of the first post-dictatorship Government (1990), wages councils were never convened again until 2005, thus no traces of that body remained. When the present administration took office, it was decided as a matter of policy to re-establish the wages councils, issuing for that purpose Decree No. 105/2005 of 7 March 2005, which convened the bodies in question. In its article 3, the Decree created a Higher Tripartite Council with the following tasks: (a) to analyse and decide the re-classification of activity groups of wages councils and disputes arising in that respect; (b) the second task set out in the Decree was to “analyse and draft amendments to be introduced into Act No. 10449 of 12 November 1943”; and (c) in practice, the Higher Tripartite Council took on other powers: as the forum in which the Executive Power presented its economic plans for each round, it dealt with trends in each, and it sought to be a forum for initial discussion on the creation of a bill on promotion and protection of the right to organize, etc.
- 1364.** The Government states that it is impossible to analyse this body without first understanding the Bill as a whole. The Bill, which has now become the Act which establishes the national collective bargaining system, is structured basically at three bargaining levels: the first, macro, the Higher Tripartite Council, which will have the following powers: (a) to act as the consultative body prior to the fixing and/or modification of the national minimum wage and wages in those areas where they cannot be set by a collective bargaining process; (b) carry out classification of tripartite bargaining groups by branch of activity or productive chains, in each case designating the bargaining bodies in each sphere. That is what happened from 2005 onwards; (c) advise the Executive Power on the allocation of administrative resources in the light of decisions concerning the classification of companies. This function had also been fulfilled in practice, for companies in particular, by the Tripartite Commission on Classification and Grouping of Labour Activities; (d) study questions related to bargaining levels. For example, if a company

agreement can affect the minima laid down in an agreement reached at branch of activity level, etc.; and (e) study and adopt initiatives to promote consultation, collective bargaining and the development of labour relations.

- 1365.** A second level, where collective bargaining takes place by branch of activity, the purpose of which is to fix minimum wages by branch or sector of activity, conforms to the traditional type of collective bargaining in the country. The third level of collective bargaining takes place at company level.
- 1366.** As set out in the abovementioned exposition of justification for the Bill: “In this case, legal confirmation is given to a body which has been crucial to the holding of the most recent wages councils, when it achieved almost complete agreement for the formation of activity groups, an agreement subsequently confirmed by decree of the Executive Power” (another example of social dialogue and effective tripartism). According to the Government, the complainants are confusing collective bargaining with labour relations, asserting that the Council would have to take the governing role in collective bargaining in all its dimensions, forgetting that collective bargaining is by definition bipartite, free and voluntary. Anyone who is familiar with the constitutional obligations of the Uruguayan State and the international obligations it has assumed through the signature of numerous treaties in the UN, the OAS and the ILO, must realize that the State often has to intervene and direct aspects of the labour relations system. For years, the Uruguayan State was told that it was not fully in compliance with the international obligations assumed on freedom of association, by not adequately protecting trade union officials and militants through, for example, mechanisms for reinstatement or reincorporation. The obligations assumed in a multiplicity of international instruments require protection of this fundamental human right. In that case, then, (due to the particular national situation), that would require state intervention to promote it, and direction by the State to ensure compliance with these obligations of international origin, because one of the parties, the workers, found itself in a much weakened situation.
- 1367.** In speaking of state interventionism in relation to collective bargaining, the Government is thinking of a limited concept, basically involving fixing of minimum wages. Curiously, the complainants omit any reference to ILO Conventions Nos 26 and 131, also ratified by Uruguay, under which the ILO has repeatedly made observations because consultation mechanisms were not being used to fix minimum wages, and the unionization of rural, public and domestic workers was not being promoted. The State, in the light of the obligations assumed in those Conventions, decided to intervene to promote the system of labour relations. Thus, collective bargaining, for example with regard to minimum wages, ceased to be exclusively free. On this point, the provision of paragraph 1 of Article 4 of Convention No. 131 should be observed. That is, in this area, fixing of minimum wages, an inescapable international obligation is assumed by the Uruguayan State towards the ILO to guarantee increases in citizens’ minimum wages. This is achieved through the system of wages councils, thereby complying with its obligation to intervene in the system of fixing minimum wages and guaranteeing those wages and their increases.
- 1368.** If a collective agreement reached freely fixes minimum wages below the national minimum, the State must intervene in that situation and correct it to comply with international law. The Government indicates that, for 15 years, i.e. from 1990 to 2005, tripartism in the country practically disappeared, trade unions grew weak, some disappeared, and the rate of membership fell below 10 per cent. Also, wages councils were not convened during that period, real wages fell in some cases by up to 50 per cent, social security was under-financed like never before, informal labour stood at levels close to 40 per cent, etc. The fact is that at the time the employers never demanded the tripartism they advocate today.

- 1369.** The Government emphasizes that, at the branch of activity level alone, since the re-establishment of wages councils, over 700 collective agreements have been concluded, the rate of trade union membership has risen from 8 per cent to over 25 per cent, formalization of work has been given an impetus, unemployment has maintained a constant downward path, membership of and contributions to the social security system have vastly increased and, above all, companies have multiplied without losing competitiveness. It is not for nothing that the country did not fall into recession during the recent global financial crisis. In Uruguay, tripartism is manifest. An infinite number of possibilities of this kind have been created. The law seeks to guarantee them and especially modify the process of convening wages councils. Previously, convocation was a matter for the government of the day. Thus, from 1985 to 1990, they functioned. The new Government in 2000 did not convene them and this sphere of tripartism and social dialogue vanished, despite the workers' constant complaints and demands for re-establishment. The employers said nothing. Neither did the governments which took office in 1995 and 2000 recreate that possibility or apply Act No. 10449. Neither did the employers protest on those occasions. However, the reform that is now enshrined in law, makes convocation by any of the three sectors involved at primary and secondary level compulsory, thus removing the discretionary nature of convocation from here on. In this way, tripartism is endowed with the three essential characteristics of predictability, stability and continuity, and removed from the uncertainty of government policy.
- 1370.** The Government indicates that another of the allegations is the criticism of the Act based on the false dichotomy of dirigisme–interventionism versus free and voluntary negotiation. The Government indicates that this is a false comparison. The State must, on some occasions, intervene in the system of labour relations (bearing in mind that to fail to do so, as did previous governments, is also a form of intervention which can be called inaction) to ensure fulfilment of workers' fundamental human rights, for example, respect for freedom of association, the right of collective bargaining, moral conscience, private life, right to limits on working time, etc. Many of these rights are grounded in the Constitution of the Republic itself; others in international obligations assumed by the Uruguayan State, for example, with the ILO. Intervention may also fall into a third category; i.e. creating legislation and conditions to foster the promotion of freedom of association, collective bargaining, the right to organize, etc. First, by constitutional mandate and secondly, by taking a decision and adopting a policy which finds in this system healthy, constructive and strong labour relations. One such obligation is to fix minimum wages for workers, with periodic adjustments and as far as possible to allow workers, employers and the State itself to participate on an equal footing.
- 1371.** At the second level of collective bargaining (article 12 and following), it is established that wages councils shall comply with these international obligations, as they are responsible for "fixing the minimum amount of wages and conditions of work of all workers in the private sector ...". The third level establishes bipartite collective bargaining (article 14 and following), where bargaining is free, voluntary and has the characteristics of collective autonomy. The Government considers that it is therefore tendentious and reflects an erroneous interpretation, aimed at confusing the Committee, to assert that in all cases where a bilateral agreement is not reached (typical collective agreement), wage councils will resort to wage fixing. Bilateral collective bargaining, i.e. classic collective agreements will continue, as they do now, to be free and voluntary, but in the matter of fixing minimum wages, when there is no agreement, when the bargaining in a branch of activity fails or in the absence of a collective bargaining framework, the State will convene the wages councils, which are tripartite bodies, to fix minimum wages and thus comply with Article 4 of ILO Convention No. 131.
- 1372.** The Government indicates that, the comments that the decisions of the Council will not be properly balanced because the Government has more representatives than the professional

sectors, shows that they are not familiar with or reject the way in which the major ILO organs function, where delegations do not have the same number of delegates by sector. In general, the State has twice as many as the professional sectors.

1373. As regards the objections to Chapter III, that the convocation to wages councils is in violation of free and voluntary bargaining, the Government states that the Bill, on the one hand, provides for classic collective bargaining, and on the other hand, through the so-called atypical collective bargaining, fulfils the obligation to fix minimum wages, in accordance with Convention No. 131. The proposed wording clearly draws on the abovementioned international instrument, thereby overcoming the observation that has been made against the country by the ILO's own supervisory bodies (Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards of the International Labour Conference) which had repeatedly pointed out that the provisions of the Convention concerned were not being applied, because the public authorities were not consulting the most representative workers' organizations in the case of establishing, applying and modifying minimum wages.

1374. Furthermore, the collective bargaining that takes place in the wages councils continues to be free and voluntary. Although the State convenes the parties to this sphere of bargaining, it does so in order to fix minimum wages and their modifications. The professional organizations are free not to participate, but if they do not do so, they are the ones who fail to take advantage of or recognize this space for negotiation and consultation. In that case, the State can fix minimum wages without listening to them because they did not attend, or listening to only one of the parties. Attending wages councils does not involve an obligation to agree, as was said in the rounds that took place from 2005 to now, where the percentage of unanimity was over 80 per cent and those agreed by a majority, 13 per cent. In the remaining average of 7 per cent where there was no form of agreement, the State made orders setting the minimum wages, but after having been present throughout the bargaining round, mediating to try and reach agreement. In this way, it fulfilled its obligation to fix minimum wages and create mechanisms for collective bargaining and consultation. The curious thing about the whole of this complaint is that the employers are apparently opposed to the way the system of wages councils operated, yet at local level they demanded vehemently to be involved in them and, when the moment of the bargaining reached an overwhelming majority, they signed collective agreements in those bodies.

1375. As regards the objections to Chapter IV on bipartite collective bargaining, and specifically the objection to the provisions that one of the defects lies in company collective bargaining "... in the absence of a workers' organization, bargaining authority passes to the most representative higher level organization ...". The Government explains that it arises because in Uruguay almost all companies are micro-, small or medium-sized enterprises. Trade unions are essentially organized not at company level but by branch of activity. In other words, the workers join this branch union, because there is no union in their company. Thus there are a great many federations, such as the Commercial and Industrial Workers' Federation of Uruguay (FUECI), the Federation of Beverage Sector Workers (FOEB) and the Uruguayan Health Federation (FUS). That is why, historically, collective bargaining in the country has basically been by branch of activity. It also means that the collective interests of workers in a company who belong to a branch trade union may be represented by that organization.

1376. As regards the other criticism that "administrative checks to test representativeness and consultation are missing", the Government states that the criteria used are in line with those established by the ILO itself. However, the criticism may be addressed in the regulations which will undoubtedly ensue from the Act. As regards Chapter V on

prevention and resolution of disputes, the Government reiterates that articles 21–24 on occupations of workplaces were excluded from the Bill by decision of the President of the Republic, as duly communicated to the employers and announced to the public.

- 1377.** Lastly, the Government states that the complaint is based on assumptions that can be clearly seen as untrue and fallacious. To deny that social dialogue and tripartism exist in Uruguay is to deny reality, or perhaps it is to seek to confuse those who need to understand the situation. For 15 years, wages councils were not convened, with the obvious consequences for workers' wages, which undoubtedly had an effect on social values. The impoverishment of the workers undermined the social fabric, concentrating wealth in a few sectors, increasing levels of informal work and weakening the unionized social actor.
- 1378.** In its communication of 11 January 2010, the Government indicates that although it had already sent its observations concerning the case, it considered it of crucial importance to explain the reasons why the Government was delayed in formulating its observations. The Committee on Freedom of Association in its 355th Report, relating to the 306th Session held in November 2009, made an urgent call to the Government, as at the time it still had not received the requested information. In this regard and bearing in mind that the Government has always endeavoured to submit a prompt reply to cases raised, it wishes to express with respect to the present case that it relates to a Collective Bargaining Bill submitted to the national Parliament in October 2007, which since then has been the subject of various amendments.
- 1379.** Among these amendments, special mention should be made of the undertaking given by the President of the Republic to withdraw articles 21–24, which refer to occupations of workplaces, from the original Bill; a commitment made to the employers' sector and the public, in that it was communicated to the national press, and was in turn transmitted by the Ministry of Labour and Social Security to the parliamentary authorities, the employers and the various media. In addition, as regards the parliamentary processing of the Bill, it should be mentioned that it was analysed by the Committee on Labour Legislation in the Chamber of Representatives (item No. 2159 of 2007) and by the Committee of Labour Affairs and Social Security in the Senate (item No. 1591 of 2009), after hearing representations from the Merchant Chamber of Country Products, the CNCS, the CIU, the National Association of Uruguayan Broadcasters (ANDEBU), the Uruguayan Hauliers' Federation (ITPC), the Association of Private Construction Promoters of Uruguay (APPCU), the Uruguayan Construction Chamber (CCU), the Internal Press Organization (OPI), the Este Construction Industry Chamber (CICE), the Uruguayan Construction League, the Chamber of Tourism, the Navigation Centre, the National Association of Micro- and Small Entrepreneurs (ANMYPE), the Uruguayan Fishing Vessel Owners Chamber (CAPU), the Uruguayan Fishing Industry Chamber (CIPU), the National Mercantile Chamber, as well as the Director of the Institute of Labour Law and Social Security in the Faculty of Law of the University of the Republic, the Inter-Union Plenary of Workers – National Workers' Convention (PIT–CNT), and the Ministry of Labour and Social Security.
- 1380.** As can be seen from the foregoing, the study, analysis and process of the Collective Bargaining Bill took several months, underwent several amendments, for which reason the Secretariat of State considered it appropriate to await the outcome in order to formulate its reply in this case. To this should be added the fact that in July 2009, there was a change of authorities in the Ministry of Labour and Social Security, both the Minister and Vice-Minister. Finally, on 11 September 2009, Act No. 18566 was enacted on Fundamental Principles and Rights of the Collective Bargaining System, and when the Government was preparing to present its observations, it received a note from the ILO in which additional information relating to this complaint was provided, which had to be considered again. The Government reiterates that it has always formulated its observations

to the various complaints that it has received as promptly as possible. However, this case has not been typical, in that a series of instances and events arose which prevented us from honouring our obligations with the desired promptness.

C. The Committee's conclusions

1381. *The Committee observes that in this case the complainant organizations allege that, at the instance of the Government, a series of labour laws were passed without consulting or without taking into account the contributions of the employers' sector and they also object to a Bill (which subsequently became law in Act No. 18566) creating a system of collective bargaining.*

Absence of consultation in good faith in the adoption of labour legislation

1382. *With regard to the allegation that at the instance of the Government, a series of labour laws were passed without open consultations in good faith and without sufficient time for the employers' sector to express its views and discuss them in depth in order to reach an appropriate compromise (the complainant organizations refer extensively to Decree No. 145 of 2005 which revoked two decrees, one which had been in force for over 40 years, which allowed the Ministry of the Interior to clear company premises which had been occupied by the workers; Act No. 17930 which created the Register of Offending Companies within the ambit of the Inspectorate-General of Labour; Act No. 17940 on Freedom of Association and its regulations in Decree No. 66/06; Act No. 18091 which increased the period of prescription of labour credits; Act No. 18172 of August 2007 on filing of accounts and budget performance reports; Act No. 18099 of December 2007 on intermediation and subcontracting of labour; Decree No. 291/2007 regulating ILO Convention No. 155; Act No. 18251 of January 2008 which establishes rules on labour responsibility in processes of corporate decentralization; and in particular, the Collective Bargaining Act, No. 18566), the Committee notes that the Government declares that: (1) it has pursued a policy of democratizing social dialogue in all possible areas, based on the purest of tripartism; (2) negotiating on a tripartite basis in good faith does not necessarily mean reaching unanimity or consensus; (3) if one of the parties to the negotiation uses a systematic strategy of refusing any kind of reform, it means that the rest of the sectors involved can decide the matter by a majority, as the pursuit of social consensus cannot impede, let alone deny, the reforms needed by the country to continue its progress; (4) several political parties of all philosophical persuasions of the Uruguayan social spectrum are represented in the national Parliament where proposed laws are sent for discussion and approval and each professional group is heard there; (5) an example showing that the employers' sector is heard is the fact that articles 21–24 of the Collective Bargaining Bill were withdrawn by order of the President of the Republic; (6) since the arrival of the new Government in March 2005, authentic tripartism and social dialogue had been established and the employers' side had always been listened to. Proof of that was that in the case of wages, over 80 per cent of the activities reached collective agreements by unanimity; they are always heard and committees are created in the Ministry of Labour and Social Security and they are received in parliamentary circles; (7) it is not true that the labour laws adopted were not the product of social dialogue; there were hearings in the process prior to the adoption of the laws on freedom of association, subcontracting or outsourcing, special licences, prescription of labour credits and the Bill to create a national system of collective bargaining; (8) with regard to the Collective Bargaining Bill (subsequently Act No. 18566), the employers were invited to participate and began the process and then voluntarily withdrew, and in the parliamentary process, the employers' organizations, workers' organizations and representatives of*

academia were received; and (9) opening a space for social dialogue, tripartism or collective bargaining does not necessarily require an agreement to be concluded.

1383. *In this respect, the Committee notes the contradictory statements of the Government and the complainant organizations as to whether or not there was sufficient consultation in good faith with a view to reaching, as far as possible, shared solutions in the framework of the adoption of labour laws. The Committee recalls that the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), Paragraph 1, provides that measures appropriate to national conditions should be taken to promote effective consultation and cooperation at the industrial and national levels between public authorities and employers' and workers' organizations, and that under the provisions of Paragraph 5 of that Recommendation, such consultation and cooperation should aim, in particular, at ensuring that the competent public authorities seek the views, advice and assistance of employers' and workers' organizations in an appropriate manner, in respect of such matters as the preparation and implementation of laws and regulations affecting their interests. The Committee also recalls that on many occasions it has emphasized that "it is important that consultations take place in good faith, confidence and mutual respect, and that the parties have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise. The Government must also ensure that it attaches the necessary importance to agreements reached between workers' and employers' organizations". [See **Digest of the decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1071.] The Committee requests the Government to ensure respect for those principles so that legislation which directly affects the interests of workers' and employers' organizations shall be the subject of full and frank consultations and should be the result of shared solutions.*

1384. *As regards the abovementioned Decree No. 145 of 2005, which, according to the complainants, revoked two decrees, one which had been in force for over 40 years, which allowed the Ministry of the Interior to clear company premises which had been occupied by the workers, the Committee is of the view that the exercise of the right to strike and the occupation of the premises should also respect the right to work of non-strikers and the right of the management to enter its premises. In these circumstances, the Committee requests the Government to ensure respect for these principles in regulatory legislation and in practice.*

The Collective Bargaining Act, No. 18566

1385. *With regard to the impugned Act No. 18566, the Committee, firstly, takes due note that the Government informs that some articles of the Bill, which gave rise to the complaint and had been opposed by the complainant organizations relating to occupation of the workplace during a strike, were not included in the Act which was ultimately passed.*

1386. *The Committee observes that the complainant organizations allege that: (1) the Act in question provides for Government intervention in collective bargaining by virtue of the creation of the Higher Tripartite Council as the body for the coordination and governance of labour relations (article 7), with a tripartite composition, but with a majority of representatives of the Government (nine Government representatives, six representatives of the most representative employers' organizations and six of the most representative workers' organizations); (2) article 10, paragraph (d), provides that the Council's powers will include considering and pronouncing on questions related to the tripartite and bipartite bargaining levels and paragraph (e) provides that it may study and adopt initiatives to promote consultation, collective bargaining and the development of labour relations; (3) the greater number of delegates of the Executive Power, nominal voting and powers defined in a broad, ambiguous, confused and ill-defined manner, is undoubtedly a case of a body whose objective is intervention and meddling in labour affairs and*

collective bargaining; (4) article 17 of the Act, which provides for the compulsory extension of the term of a collective agreement until substituted by a new agreement, constitutes interference in free collective bargaining; (5) article 12 relating to the functioning of wages councils is not in conformity with the principles of collective bargaining when it establishes that decisions of these councils only take effect when registered and published by the Executive Power; and (6) this Act provides for intervention and interference by the authorities in violation of Conventions Nos 98 and 154, which gave rise to the observation of the Committee of Experts on the Application of Conventions and Recommendations in its observation on the application by Uruguay of Convention No. 98.

1387. *The Committee notes that the Government states that in general: (1) when the administration took office, the labour relations scene was dismal, minimum wages were appalling, collective bargaining hardly existed and freedom of association was suppressed; (2) the legislation contained flagrant contraventions of international Conventions and, for example, rural workers and domestic workers did not have a limited working day nor the right to bargaining in wages councils; (3) the wages councils were not convened after 1990, and there were less than 100 company-only collective agreements which covered less than 10 per cent of the total workforce; (4) between 2002–2004, numerous collective agreements were signed on terms which diminished workers' rights, and when the new Government took office in 2005, one of its first measures was to establish wages councils; (5) from 1990 to 2005, these bodies had not been convened, despite the fact that the Act which created them was fully in force and the employers' sector had never lodged a complaint; (6) the wages councils are tripartite bodies whose chief responsibility is to set minimum wages by branch of activity and category, but they also have other powers such as to act as conciliation bodies in the case of collective disputes, fix wage increases for the remaining workers, etc.; (7) as a first step, the Higher Tripartite Council was set up, and then 20 activity groups were organized which in turn established subgroups; (8) a framework for discussion was established in the public sector, which reached a framework agreement and by consensus a law on collective bargaining for the public sector and a wages council was set up for domestic or homeworkers, which culminated in a collective agreement; and (9) three bargaining rounds took place, over 80 per cent of all collective agreements were reached unanimously, and there was a significant rise in real wages.*

1388. *More specifically, with regard to the text of the Act, the Committee notes that the Government states that: (1) the bargaining system is structured at three levels (national scope; branch of activity or productive chain; and bipartite collective bargaining at company or group of companies level); (2) at the first level, a governing body is established, with functions of governance of labour relations, called the Higher Tripartite Council, at the second level, bargaining is structured by branch of activity and the bargaining takes place in wages councils, and at the third level, classic collective bargaining takes place (the most prominent feature of which is that it is bipartite); (3) article 15 of the new Act is important in that it establishes that lower bargaining levels may not diminish the minimum provisions adopted at a higher bargaining level, except as agreed in the respective wages council; (4) the right to information set out in article 4 stems from the right to negotiate in good faith and is extensively developed in ILO Recommendation No. 163, and partially reproduces ILO Recommendation No. 161, establishing mechanisms for exchange of information and consultations, and including the obligation of secrecy (the majority of trade unions at branch of activity level do have legal personality, thus if it is sought to take action against them for civil liability, there would be no obstacles from the point of national positive law); (5) the creation of the Higher Tripartite Council did not signify any intervention, but enacts in law a body created by the Executive Power which has functioned on a tripartite basis in wage bargaining rounds since 2005 (the Government refers to the historical evolution of wages councils in the country); (6) the complainants are confusing collective bargaining with labour relations*

when they assert that the Council would have to take a governing role in collective bargaining in all its dimensions, forgetting that collective bargaining is by definition bipartite, free and voluntary; (7) under article 12, at the second collective bargaining level, wages councils are responsible for fixing the minimum amount of wages and conditions of work for all workers in the private sector and at the third level, collective bargaining is bipartite and free and has all the characteristics of collective autonomy; (8) as regards the alleged imbalance of representatives on the Council, they show that they are not familiar with the way in which the major ILO organs function, where delegations do not have the same number of delegates by sector; (9) the convocation to wages councils fulfils the obligation to fix minimum wages, in accordance with Convention No. 131; (10) the decision that in company collective bargaining, in the absence of a workers' organization, bargaining authority passes to the most representative higher level organization arises because in Uruguay almost all companies are micro-, small or medium-sized enterprises and trade unions are essentially organized not at company level but by branch of activity; (11) as regards the criticism that administrative checks to test representativeness and consultation are missing, the criteria used are in line with those established by the ILO, but may be the subject of regulations in the future.

1389. *The Committee welcomes the Government's aim of promoting collective bargaining, increased coverage of collective agreements and the number of agreements. With regard to the content of the Act, the Committee formulates the following comments on the articles which may raise problems of conformity with the principles of collective bargaining or which warrant interpretation in accordance with those principles:*

- I. *with respect to the exchange of information necessary to allow the normal conduct of the process of collective bargaining and that in the case of confidential information, its communication carries the implicit obligation of secrecy, and breach thereof would give rise to civil liability of those who are in breach (article 4), the Committee considers that all the parties to the negotiation, whether or not they have legal personality, must be liable for any breaches of the right to secrecy of the information which they receive in the framework of collective bargaining. The Committee requests the Government to ensure that this principle is respected;*
- II. *as regards the composition of the Higher Tripartite Council (article 8), the Committee considers that an equal number of members could be taken into account for each of the three sectors, and also the appointment of an independent chairperson, preferably nominated by the workers' and employers' organizations jointly, who could break the deadlock in the event of a vote. The Committee requests the Government to hold discussions with the social partners on the modification of the law so as to arrive at a negotiated solution to the number of members of the Council;*
- III. *with respect to the powers of the Higher Tripartite Council and in particular considering and pronouncing on questions related to the tripartite and bipartite bargaining levels (article 10, paragraph (d)), the Committee has emphasized on many occasions that "the determination of the bargaining level is essentially a matter to be left to the discretion of the parties". [See **Digest of the decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 989.] The Committee requests the Government to take the necessary measures including the amendment of existing legislation to ensure that the bargaining level is established by the parties and is not subject to voting in a tripartite body;*
- IV. *as regards the possibility of wages councils establishing conditions of work for each case to be agreed by the employers' and workers' delegates in the respective wage group (article 12), the Committee recalls, firstly, that under ILO standards, the fixing of minimum wages may be subject to decisions by tripartite bodies. On the other hand, recalling that it is up to the legislative authority to determine the legal*

minimum standards for conditions of work and that Article 4 of Convention No. 98 seeks to promote bipartite bargaining to fix conditions of work, the Committee hopes that in application of those principles, any collective agreement on fixing of conditions of employment will be the result of an agreement between the parties, as the article in question appears to envisage;

- V. *with respect to the subject of bipartite collective bargaining and, in particular, that in company collective bargaining where there is no workers' organization, bargaining authority should pass to the representative higher level organization (article 14, last sentence), the Committee observes that the complainant organizations consider that the absence of a trade union does not mean the absence of collective relations in the company. The Committee considers, on the one hand, that bargaining with the most representative higher trade union level organization should only take place if it had a number of members in the company in accordance with the national legislation of each country. The Committee recalls, on the other hand, that the Collective Agreements Recommendation, 1951 (No. 91), gives pre-eminence to workers' organizations as one of the parties to collective bargaining, and refers to representatives of non-organized workers only in the case of absence of such organizations. In these circumstances, the Committee requests the Government to take the necessary measures to ensure that future legislation takes these principles fully into account;*
- VI. *as regards the effects of the collective agreement and, in particular, that the collective agreement by sector of activity concluded by the most representative organizations is of mandatory application to all employers and workers at the respective bargaining level once it has been registered and published by the Executive Power (article 16), the Committee, taking into account the concern expressed by the complainant organizations, requests the Government to ensure that the process of registration and publication of the collective agreement only involves checks on compliance with the legal minima and questions of form, such as, for example, the determination of the parties and the beneficiaries of the agreement with sufficient precision and the duration of the agreement;*
- VII. *as regards the duration of collective agreements and, in particular, the maintenance in force of all the clauses of the agreement which has expired until a new agreement replaces it, unless the parties have agreed otherwise (article 17, second paragraph), the Committee recalls that the duration of collective agreements is primarily a matter for the parties involved, but if government action is being considered any legislation should reflect tripartite agreement [see **Digest**, op.cit., para. 1047]. In these circumstances, taking into account that the complainant organizations have expressed disagreement with the whole idea of automatic continuing effect of collective agreements, the Committee invites the Government to discuss with the social partners on amendments to the legislation in order to find a solution acceptable to both parties.*

1390. *The Committee requests the Government, in consultation with the most representative workers' and employers' organizations, to take measures, including the amendment of the Collective Bargaining Act (No. 18566), to give effect to the conclusions formulated in the foregoing paragraphs in order to ensure full conformity of that Act with the Conventions ratified by Uruguay on collective bargaining. The Committee draws this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

The Committee's recommendations

1391. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *With regard to the abovementioned Decree No. 145 of 2005, which revoked two decrees, one which had been in force for over 40 years, which allowed the Ministry of the Interior to clear company premises which had been occupied by the workers, the Committee is of the view that the exercise of the right to strike and the occupation of the premises should respect the right to work of non-strikers, and the right of the management to enter its premises. In these circumstances, the Committee requests the Government to ensure respect for these principles in regulatory legislation and practice.*
- (b) *The Committee requests the Government, in consultation with the most representative workers' and employers' organizations, to take measures to amend Act No. 18566, in order to give effect to the conclusions formulated in the foregoing paragraphs and to ensure full conformity with the principles of collective bargaining and the Conventions ratified by Uruguay on the subject. The Committee requests to be kept informed in this regard.*
- (c) *The Committee draws this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

Appendix

Act No. 18566, Collective Bargaining System

Creation

The Senate and Chamber of Representatives of the Oriental Republic of Uruguay, meeting in General Assembly,

Decree:

I. Fundamental principles and rights of the collective bargaining system

Article 1 (Principles and rights). The system of collective bargaining is inspired and governed by the principles and rights which are set out in this chapter and other internationally recognized fundamental rights.

Article 2 (Right of collective bargaining). In the exercise of their collective autonomy, employers and employers' organizations, on the one hand, and one or more workers' organizations, on the other, shall have the right to freely adopt agreements on conditions of work and employment, and to regulate their mutual relations.

Article 3 (Promotion and guarantee). The State shall promote and guarantee the free exercise of collective bargaining at all levels. For that purpose, it shall adopt appropriate measures to facilitate and foster bargaining between employers and workers.

Article 4 (Duty to bargain in good faith). In any collective bargaining, the parties shall confer on their respective negotiators the necessary mandate to conduct and conclude bargaining, without prejudice to any provision concerning consultation within their respective organizations. In any case, they must provide sufficient justification of the positions that they assume in the bargaining process.

The parties must also exchange the necessary information to allow normal conduct of the collective bargaining process. In the case of confidential information, communication thereof carries with it the implicit obligation of secrecy, breach of which shall give rise to the civil liability of those in breach.

Article 5 (Collaboration and consultation). Collaboration and consultations between the parties must have the general aim of fostering mutual understanding and good relations between the public authorities and employers' and workers' organizations, and between the organizations themselves, in order to develop the economy as a whole or certain of its branches, improve conditions of work and raise standards of living.

Such collaboration and consultations shall have the objective, in particular, of:

- (A) Allowing joint examination, by the employers' and workers' organizations, of questions of mutual interest, in order to reach, to the greatest extent possible, mutually agreed solutions.
- (B) Ensuring that the competent public authorities adequately take into account the opinions, advice and assistance of employers' and workers' organizations concerning matters such as:
 - (i) the preparation and application of legislation affecting their interests;
 - (ii) the creation and functional of national bodies, such as those concerned with the organization of employment, vocational training and re-training, worker protection, occupational safety and health, productivity, and social security and well-being;
 - (iii) the preparation and application of economic and social development plans.

Article 6 (Training in bargaining). The parties to collective bargaining may adopt measures to ensure that their negotiators, at all levels, have the opportunity to receive appropriate training.

At the request of the organizations concerned, the public authorities shall provide assistance with respect to such training to employers' and workers' organizations who so request.

The content and supervision of these training programmes may be established by the relevant employers' or workers' organization concerned.

The training to be given shall not preclude the right of employers' and workers' organizations to designate their own representatives for the purpose of collective bargaining.

II. Higher Tripartite Council

Article 7 (Creation of the Higher Tripartite Council). There shall be created the Higher Tripartite Council as the body for the coordination and governance of labour relations, which will decide its own rules of procedure.

Article 8 (Composition). The Higher Tripartite Council shall be composed of nine delegates of the Executive Power, six delegates of the most representative employers' organizations and six delegates of the most representative workers' organizations, plus an equal number of substitutes or alternates for each party.

Article 9 (Functioning). The Higher Tripartite Council may be convened by the Ministry of Labour and Social Security ex officio or mandatorily at the proposal of any of the parties.

The holding of sessions shall require the presence of at least 50 per cent of the members, taking into account the tripartite representation of the body. In the event that the said quorum is not reached, there shall be a second convocation within 48 hours for which 50 per cent of the members of the Council shall be required.

To adopt a resolution, the Council shall require the vote in due form of an absolute majority of its members.

Article 10 (Powers). The powers of the Higher Tripartite Council shall be as follows:

- (A) To deliberate in advance on the establishment, application and modification of the national minimum wage and that determined for sectors of activity which cannot fix them through collective bargaining. For that purpose, the Executive Power shall submit these matters for consultation by the Council sufficiently in advance.
- (B) To effect the classification of tripartite bargaining groups by branch of activity of productive chain, designating, as applicable, the bargaining organizations in each sphere.
- (C) To provide mandatory advice to the Executive Power in the case of administrative appeals against decisions relating to disputes caused by the placement of companies in activity groups for tripartite bargaining.
- (D) To consider and pronounce on questions related to tripartite and bipartite bargaining levels.
- (E) To study and adopt initiatives on subjects which it considers pertinent to promote consultation, bargaining and the development of labour relations.

III. Collective bargaining by sector of activity

Article 11 (Wages councils). Collective bargaining at branch of activity or productive chain level may take place following convocation of the wages councils created by Act No. 10449 of 12 November 1943, or by bipartite collective bargaining.

Article 12 (Powers). Article 5 of Act No. 10449 of 12 November 1943 is substituted by the following:

Article 5. Creating wages councils which shall have the task of fixing the minimum amount of wages by labour category and revising remuneration of all workers in the private sector, without prejudice to the powers assigned by article 4 of Act No. 17940 of 2 January 2006. The wages councils may also establish conditions of work where they are agreed by the employers' and workers' delegates in the respective wages group. The decisions of the wages councils shall take effect in the respective activity group once they have been registered and published by the Executive Power.

At any time, the Executive Power may convene the wages councils ex officio or, mandatorily, at the request of the organizations representative of the activity sector concerned, in which case it must convene it within 15 days of submission of the request.

It will not be necessary to convene wages councils in those activities or sectors in which there is a collective agreement in force which has been duly agreed by the most representative employers' and workers' organizations in the activity or sector.

Article 13 (Designation of delegates). Article 6 of Act No. 10449 of 12 November 1943 is substituted by the following:

Article 6. The Higher Tripartite Council shall effect the classification by activity groups and for each there shall be a wages council formed of seven members: three designated by the Executive Power, two by the employers and two by the workers, and an equal number of alternates.

The first of the three delegates designated by the Executive Power shall act as chairperson.

The Executive Power shall designate the workers' and employer's delegates in consultation with the most representative organizations of the respective activity groups.

In sectors where there is not sufficiently representative organization, the Executive Power shall designate the delegates proposed to it by the organizations which make up the Higher Tripartite Council or, if applicable, shall adopt the electoral mechanisms proposed by it.

IV. Bipartite collective bargaining

Article 14 (Authorized persons). Persons authorized to bargain and conclude collective agreements are an employer, a group of employers, an employers' representative organization or organizations, on the one hand, and one or more workers' representative organizations, on the other. When there is more than one organization which has authority to bargain and there is no agreement between them, authority to bargain shall be attributed to the most representative organization, having regard to age, continuity, independence and number of members of the organization. In company collective bargaining, in the absence of a workers' organization, bargaining authority shall pass to the most representative higher level organization.

Article 15 (Levels and articulation). The parties may bargain by branch or sector of activity, company, establishment or any other level that they consider appropriate. Lower level bargaining may not diminish the minimum provisions adopted at a higher bargaining level, except as agreed in the respective wages council.

Article 16 (Effects of the collective agreement). Collective agreements may not be modified by an individual contract of employment or agreements with groups of workers to the prejudice of the workers. The collective agreement by activity sector concluded by the most representative organizations is of mandatory application to all employers and workers at the respective bargaining level, once it has been registered and published by the Executive Power.

Article 17 (Duration). The duration of collective agreements shall be established by the parties by mutual agreement, and they may also determine its express or tacit extension and the procedure for denunciation.

A collective agreement whose term has expired shall remain fully in force with respect to all its clauses until substituted by a new agreement, except where the parties have agreed otherwise.

V. Prevention and settlement of disputes

Article 18. The Ministry of Labour and Social Security shall have powers with respect to mediation and conciliation in the case of collective labour disputes.

Article 19 (Autonomous proceedings). Employers or their organizations and trade unions may, through collective autonomy, establish mechanisms to prevent and settle disputes, including information and consultation procedures and bargaining, prior conciliation and voluntary arbitration bodies.

The Ministry of Labour and Social Security, through the National Directorate of Labour, shall provide advice and technical assistance to the parties, with the aim of fostering and promoting the proceedings mentioned in the foregoing paragraph.

Article 20 (Mediation and voluntary conciliation). Employers and their organizations and workers' organizations may resort, at any time and as they see fit, to mediation or conciliation in the National Directorate of Labour or the wages council with jurisdiction in the activity to which the company belongs (article 20 of Act No. 10449, of 12 November 1943).

When the parties opt to submit the dispute to the competent wages council, having received the request with the relevant supporting documents, the latter must immediately be convened in order to try to achieve conciliation between the parties involved.

If after the lapse of the prudential period, it is believed, in the opinion of the majority of delegates to the wages council, that it is not possible to reach agreement by conciliation, the National Directorate of Labour will be informed for the pertinent action.

VI.

Article 21. During the term of collective agreements that they conclude, the parties undertake not to take actions which contradict what has been agreed nor to apply coercive measures of any type on those grounds. This clause applies to all matters included in the bargaining and which have been agreed in the signed agreement. Excluded from its scope is adherence to measures of a national character called by trade unions. To resolve disputes in the interpretation of the agreement, the same procedures must be established, first seeking to exhaust all instances of direct negotiation between the parties, and then, with the intervention of the competent ministerial authority, seeking to prevent disputes and the actions and effects generated thereby. Failure to comply with provisions of the first sentence of this article, except in the case of a procedure fixed by the parties, may give rise to a declaration of termination of the agreement, which must be made before the labour courts.

Chamber of Representatives, Montevideo, 2 September 2009.

CASE NO. 2254

INTERIM REPORT

**Complaint against the Government of the Bolivarian Republic of Venezuela
presented by**

- **the International Organisation of Employers (IOE) and**
- **the Venezuelan Federation of Chambers of Commerce and Manufactures' Associations (FEDECAMARAS)**

Allegations: The marginalization and exclusion of employers' associations in the decision-making process, excluding them from social dialogue, tripartism and the implementation of consultations in general (particularly in relation to very important legislation that directly affects employers), thereby not complying with the recommendations of the Committee on Freedom of Association; the arrest of Carlos Fernández in retaliation for his activities as president of FEDECAMARAS; acts of discrimination and intimidation against employers' leaders and their organizations; legislation at odds with civil liberties and the rights of employers' organizations and their members; violent assault on the FEDECAMARAS headquarters by pro-Government mobs, who caused damage

and threatened employers; bomb attack on the FEDECAMARAS headquarters; acts of favouritism by the authorities with respect to non-independent employers' organizations

- 1392.** The Committee last examined this case at its March 2009 meeting and presented an interim report to the Governing Body [see 353rd Report, paras 1360–1398, approved by the Governing Body at its 304th Session (March 2009)].
- 1393.** Subsequently, the International Organisation of Employers (IOE) sent new allegations in a communication dated 8 October 2009. The Government sent new observations in communications dated 12 May and 20 October 2009 and 1 March 2010.
- 1394.** 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

- 1395.** At its March 2009 meeting, the Committee considered it necessary to draw the attention of the Governing Body to this case due to the extreme seriousness and urgency of the matters dealt with therein and made the following recommendations on the matters still pending [see 353rd Report, paras 5 and 1398]:
- (a) Deeply deploring that the Government has ignored its recommendations, the Committee urges the Government to establish a high-level joint national committee in the country with the assistance of the ILO, to examine each and every one of the allegations and issues in this case so that the problems can be solved through direct dialogue. The Committee trusts that the Government will not postpone the adoption of the necessary measures any further and urges the Government to keep it informed in this regard.
 - (b) The Committee expects that a forum for social dialogue will be established in accordance with the principles of the ILO, having a tripartite composition which duly respects the representativeness of workers' and employers' organizations. The Committee requests the Government to keep it informed in this regard and invites it to request technical assistance from the ILO. The Committee also requests it once again to convene the tripartite commission on minimum wages provided for in the Organic Labour Act.
 - (c) Observing that there are still no structured bodies for tripartite social dialogue, the Committee emphasizes once more the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights and that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by detailed consultations with the most representative independent workers' and employers' organizations. The Committee once again requests the Government to ensure that any legislation concerning labour, social and economic issues adopted in the context of the Enabling Act be first subject to genuine, in-depth consultations with the most representative independent employers' and workers' organizations, while endeavouring to find shared solutions wherever possible.
 - (d) The Committee requests the Government to keep it informed with regard to social dialogue and any bipartite or tripartite consultations in sectors other than food and agriculture, and also with regard to social dialogue with FEDECAMARAS and its regional structures in connection with the various sectors of activity, the formulation of economic and social policy and the drafting of laws which affect the interests of the employers and their organizations.

- (e) The Committee understands that the two suspects wanted for the bomb attack on the FEDECAMARAS headquarters (28 February 2008) have still not been arrested despite the time that has elapsed. The Committee expresses its deep concern at the fact that the case relating to this attack has still not been resolved. The Committee requests the Government to take measures to step up the investigations, ensure that they are independent, clarify the facts, arrest the perpetrators and impose severe penalties on them to prevent any recurrence of such crimes. The Committee requests the Government also to step up the investigations into the attacks on the FEDECAMARAS headquarters which occurred in May and November 2007, and conclude those investigations as a matter of urgency. The Committee requests the Government to keep it informed in this respect. The Committee again deeply deplores these attacks and recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence.
- (f) The Committee regrets that the Government has not sent the information which it requested concerning other acts of violence against employers' leaders and allegations of violations of the private property of employers' leaders in the agriculture/livestock sector and repeats its previous recommendations, as follows:

With regard to the allegations of: violations of the private property of several employers' leaders in the agricultural and livestock sector; victims of invasions; the confiscation of land or expropriation without fair compensation, frequently in spite of rulings made by the judicial authorities regarding the restitution of lands to their owners, the Committee once again requests the Government to respond precisely to the specific allegations made by the IOE, including those relating to the measures taken against employers' leaders Mr Mario José Oropeza and Mr Luis Bernardo Meléndez, and the serious allegations regarding the abduction of three sugar producers in 2006 and the death of six producers following an assault.

- (g) Furthermore, with regard to the alleged harassment of employers' leaders through hostile speeches given by the President of the Republic in which he discredits and disparages employers' leaders, threatening to confiscate their property on supposed grounds of social interest, the Committee once again requests the Government to provide its observations in this regard without delay.
- (h) The Committee once again requests the Government to examine directly with FEDECAMARAS how to ensure that the application of legislation relating to "labour solvency" is accompanied by adequate guarantees of impartiality and avoids all forms of discrimination with respect to employers or their organizations that do not endorse the economic and social policy of the Government.
- (i) The Committee once again requests the Government to send information regarding the ban on leaving the country imposed on 15 employers' leaders and to revoke the warrant for the arrest of former FEDECAMARAS President Mr Carlos Fernández, so that he may return to the country without risk of reprisals.
- (j) The Committee notes the Government's statements denying any interference in the CONSEVEN but observes that those statements do not respond in detail to the allegations made by the IOE concerning the presence in the CONSEVEN of two prominent government figures, who even have responsibility for customs and taxation, and the preferential treatment given to the employers' organization FEDEINDUSTRIA (privileges in obtaining foreign currency) by comparison with independent enterprises. The Committee once again requests the Government to send precise and detailed observations on these allegations and reiterates the importance of the adoption by the Government of a neutral attitude when dealing with any workers' or employers' organizations, and to examine all the above areas of potential discrimination against employers or organizations belonging to FEDECAMARAS and to keep it informed in this regard, including with respect to the adoption of the draft act on international cooperation, the final version of which it trusts will contain provisions on rapid action in the event of discrimination.
- (k) With regard to the IOE's allegations concerning social production enterprises, with privileges granted to them by the State, the Committee once again invites the IOE to provide new information and clarification with respect to these allegations. The

Committee considers that the provision of this information is critical if it is to pursue examination of this aspect of the case and requests the Government to ensure that it adopts a neutral attitude in its treatment of and relations with all employers' organizations and their members.

- (l) The Committee notes the IOE's allegations to the effect that the recent Organic Labour Act establishing the Central Planning Commission severely restricts the rights of employers' and workers' organizations and again requests the Government to respond to these allegations.
- (m) The Committee draws the Governing Body's attention to this case due to the extreme seriousness and urgency of the matters raised therein.

B. New allegations by the IOE

1396. In its communication dated 8 October 2009, the IOE states that it wishes, together with the Venezuelan employers' community, to denounce once again the ongoing harassment on the country's free employers by the Government of the Bolivarian Republic of Venezuela and to report to the Committee on Freedom of Association of the ILO a new attack on the private sector and on the Venezuelan Federation of Chambers of Commerce and Manufactures' Associations (FEDECAMARAS), its representative organization.

1397. The IOE indicates that on 25 September 2009, in the context of the confiscation of a total of 2,500 hectares of agricultural land in the Río Turbio Valley, officials from the National Land Institute (INTI), accompanied by military personnel, seized the "Finca la Bureche" property belonging to Mr Eduardo Gómez Sigala, the director of FEDECAMARAS and former chairman of the Caracas Chamber of Commerce, the Venezuelan Chamber of Food, as well as of the CONINDUSTRIA industrial confederation.

1398. The IOE further indicates that once the farm had been occupied, the intruders destroyed 18 hectares of sugar cane due to be harvested in two months (the farm totals 29 hectares, of which six are pasture and two contain housing for the family, employees and some animals). At that time, Mr Gómez Sigala was arrested and taken to the Barquisimeto Infantry Brigade before being brought before the Office of the Fifth Prosecuting Attorney of Lara State. The Office of the Public Prosecutor, giving grounds for his detention, charged him with violence and resisting authority. The next day, the employers' leader was released on bail, with the obligation to appear before the court or the Office of the Public Prosecutor whenever summoned or as required by the investigation.

1399. The IOE requests the ILO to call with the utmost urgency upon the Government of the Bolivarian Republic of Venezuela to respect the rights enshrined in the ILO core labour standards, as ratified by that country, and in particular, the need to: cease with immediate effect the campaign of sectarian occupation of agricultural land, which will lead to falling production, unemployment and poverty; return Mr Gómez Sigala's property to him immediately; compensate the business leader for the substantial economic losses incurred; bring to justice the perpetrators of the premeditated attacks and destruction of the business leader's property.

1400. The IOE indicates that the Government of the Bolivarian Republic of Venezuela, as part of its campaign of harassment of the private sector, has sought once again to destabilize FEDECAMARAS, the representative employers' organization in the Bolivarian Republic of Venezuela, through attacks on its employers' leaders, its members and their property.

C. The Government's reply

- 1401.** In its communications dated 12 May 2009 and 1 March 2010, the Government states that before referring to the allegations made by the complainants, it considers it appropriate and necessary to stress the following points.
- 1402.** Firstly, the Government expresses its surprise and concern at the lack of account taken of the arguments and evidence it put forward, given that it has responded to each and every one of the allegations set forth by the complainants over the years that this complaint has been pursued. On the other hand, the allegations and statements made by the complainants appear to have been given considerable credence, even though, for the most part, they lack evidence and are groundless.
- 1403.** Furthermore, the Government's attention is drawn once again to the fact that the Committee on Freedom of Association employs language and terms such as those used against the Government, and even against citizens' groups, in various reports that it has published; specifically, it wishes to refer to the most recent report (No. 353) where, in paragraph 1363(b), the term "regime" is used once again to describe our system of legal and democratically established government, for which the population has shown its support through a series of elections that took place in the presence of observers from the international community and whose results are not open to question.
- 1404.** Similarly, and as expressed in communications to the Committee on Freedom of Association, the Government is struck by the fact that official documents approved by the Governing Body and submitted by the aforementioned Committee contain terms such as "pro-Government mob". In view of the use of such terms, the Committee is categorically requested to respect and acknowledge the Government and the country's system of democracy and to ensure that such situations do not arise again, ensuring also that due moderation is exercised. The Committee is also requested to call upon the complainant organization to show respect towards the working population, which for many years was excluded from political, economic and social participation in the country and to refrain from using the kinds of discriminatory terms employed for decades by the wealthy and economically powerful classes under a government which was the root cause of growing poverty and the exploitation and abuse of the working population.
- 1405.** Moreover, attention is drawn to the fact that the Committee is examining complaints of a political or economic nature, stemming from the implementation of the Constitution of the Bolivarian Republic of Venezuela, the sole Magna Carta approved by referendum. In this regard, even where a case is politically derived or political considerations are raised, the Committee should examine only alleged violations of the right to freedom of association and collective bargaining. The Committee should thus ascertain whether a complaint falls within the scope of criminal or trade union law.
- 1406.** In this regard, the Government believes that many of the allegations made in this complaint go beyond the scope of freedom of association and collective bargaining and encroach on economic issues. Other cases have exceeded the boundaries of freedom of association and collective bargaining and impinged on criminal law, an example being the Penal Code offences of civil rebellion and incitement to commit an offence with which Mr Carlos Fernández is charged.
- 1407.** It is clear that union activity in the Bolivarian Republic of Venezuela, as in the rest of the world, should take place with the necessary guarantees for union leaders. Such leaders are often required, as part of their activities, to rally their followers in support of demands and struggles for workers' rights. In view of this special and significant role, the State, via the appropriate bodies and mechanisms, has extended the right to organize to all workers, to

enable these rights to take form and to be exercised. It is for this reason that the State must not undermine the core guarantees and systems of protection of freedom of association, nor should it penalize legally sanctioned trade union activities.

- 1408.** The Committee has been very clear in distinguishing between legal and illegal or legitimate and illegitimate trade union activities, with the latter not enjoying immunity. At the same time, it has invited governments to initiate appropriate proceedings and, if necessary, prosecute those involved in illegal and illegitimate trade union activity. In this regard, the Committee has taken pains to make explicit the relationship between respect for trade union rights and the rule of law and justice (article 2 of the Constitution of the Bolivarian Republic of Venezuela), particularly with regard to the administration of justice and the judicial guarantees enjoyed by trade union members.
- 1409.** This means that a trade union mandate does not confer on its holder absolute immunity and the right to violate the law and constitutional order; i.e., there is no legal protection for trade union activities deemed to be illegal. More specifically, individuals carrying out trade union functions cannot use their position to claim protection or immunity that would allow them to violate or break national or international law, including in cases where this involves the violent dissolution of public authority or threats to a country's basic operation and economy, the result of which would be unemployment and reduced purchasing power for the people.
- 1410.** In light of the above, it can be seen that the right to due process was fully guaranteed throughout the investigation and legal proceedings, as provided for in national and international law, since international human rights treaties and conventions have constitutional rank. In addition, Mr Carlos Fernández, who has evaded justice, has prevented the elucidation of events through his contempt and obstructive attitude during the investigation and the fact that, pursuant to article 125.12 of the Venezuelan Code of Penal Procedure, a defendant has the right not to be tried in absentia.
- 1411.** At the same time, the Government considers that in, essence, the arguments levelled against it by the FEDECAMARAS organization are closely linked to the loss of privileges and prerogatives in the direct definition of relevant public policy to which the members of that organization had become accustomed. In other words, this complaint rests on the need for a sector to return to a free-market economic system based on free competition, with an oligopolic regime in which the State plays no role or is absent.
- 1412.** The Government has played and continues to play a fundamental role in regulating the country's economy and distributing wealth among all those sectors that had previously been excluded. In this regard, economic issues and the strategic direction taken by a country in this area cannot be the subject of a complaint to the Committee on Freedom of Association.
- 1413.** The Government now wishes to turn to the request to engage in social dialogue in accordance with ILO principles and to convene a tripartite commission on a minimum wage.
- 1414.** Since 2002, as has been reported extensively, fully and repeatedly, the national Government has been engaged in consultations via written requests and meetings with the different social partners concerned, at national, regional and local level, in connection with the observations and measures taken by the Government with a view to establishing a national minimum wage.
- 1415.** Ever since, the Government has held consultations with the various social partners coexisting within the country as to the establishment of a minimum wage, as evidenced by

the communications sent to trade union organizations and reported to the Committee, in which they are requested to give their opinion or comment on this matter, in accordance with article 172 of the Organic Labour Act, whereby the national executive is tasked with setting minimum wages, having listened to the most representative employers' and workers' organizations. All of the communications sent to the Venezuelan Confederation of Workers (CTV), the Confederation of Autonomous Trade Unions of Venezuela (CODESA), the General Confederation of Workers (CGT), CUTV and the National Union of Workers (UNT) workers' organizations and to the FEDECAMARAS, EMFPREVEN FEDEINDUSTRIA and CONFAGAN employers' organizations, as well as to various national bodies, in order to elicit their opinions as to the establishment of a national minimum wage, are proof of the Government's constant willingness to establish, maintain and consolidate the fairest, broadest, most inclusive and most beneficial form of social dialogue, without any exclusive rights, exclusion or discrimination based on old, outdated positions of power and favouritism.

- 1416.** In this regard, it is important to mention that in January 2009, the then Minister of Popular Power for Labour and Social Security, Mr Roberto Hernández, held a meeting at the labour and social security office with representatives of the CTV, CODESA and the CGT, to address, among other labour-related issues, the national minimum wage. The representatives of these organizations acknowledged the importance of the call for unity in the working classes issued by the national executive and in particular by the Ministry of Popular Power for Labour and Social Security. A press release to this effect is attached.
- 1417.** The national minimum wage was increased by 20 per cent via Presidential Decree No. 6660, published in *Official Gazette* No. 39151 of 1 April 2009. The increase will be made in two parts, the first of which came into effect as of 1 May 2009, with the minimum mandatory monthly salary for both the public and private sectors currently standing at 879.15 strong bolivars, the equivalent of \$409. The remainder of the increase will be implemented in September, with the minimum monthly salary to stand at 959.08 strong bolivars, equivalent to \$447. In addition, if food vouchers are added to the minimum wage, minimum monthly income in the Bolivarian Republic of Venezuela will be \$636 as of September 2009, the highest figure in Latin America and double that of Argentina, which ranks second. Furthermore, entitlement to food vouchers is broader than anywhere else in Latin America and the Caribbean. Attached are graphs charting the increase in the Venezuelan minimum wage in dollars and the mandatory minimum revenue (minimum wage plus food vouchers).
- 1418.** It is essential to stress in this connection that we are faced with a deep global crisis in a system that has ridden roughshod over the rights of workers, and in this context, the Bolivarian Republic of Venezuela is the only country in which a 20 per cent wage increase for workers has been decreed, whilst other countries are seeing discussions on wage cuts. In other words, the Bolivarian Republic of Venezuela is working to defend and enhance benefits and rights for workers, whilst in the rest of the world, workers have been severely affected by the capitalist crisis. Moreover, in January 2010, the Government asked for the opinion of FEDECAMARAS on the fixing of the minimum wage for 2010. The minimum wage was fixed with an increase of 25 per cent to be implemented in two stages. The Government has thus taken a series of measures consistent with the statement of the Officers of the ILO Governing Body during its 303rd Session held in November 2008, in which emphasis was placed on "ensuring the flow of credit to consumption, trade and investment and stimulating additional demand through public and private expenditure and investment, by the use of fiscal and wage measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability".

1419. Many employers of FEDECAMERAS have participated in the socialist forums initiated by the President of the Republic on 28 January 2010.

(a) ***With regard to the holding of consultations with employers' and workers' organizations on legislation affecting collective bargaining, employment conditions and trade union rights and concerning consultations on any legislation on labour-related, social or economic issues adopted within the framework of the Enabling Act***

1420. It should be made clear in this regard that legislation passed as a result of the Enabling Act does not concern subjects governed by or included in ILO Conventions Nos 87 and 98. The Committee on Freedom of Association does not therefore have the mandate to examine situations or legislation that do not relate to or affect freedom of association and the right to collective bargaining. It is worth mentioning, however, that the legislation announced within the framework of the Enabling Act has been the subject of consultations with citizens, various social sectors, politicians and academics within the country.

1421. The passing of the Enabling Act grants the President of the Republic the constitutional right to legislate via decree-laws, with this right clearly defined in article 203.4 of the National Constitution: "Enabling laws are those enacted by a three-fifths vote of the members of the National Assembly to establish the guidelines, purposes and framework for matters that are being delegated to the President of the Republic, with the rank and force of law".

1422. Thus, with a mandate from the Constitution of the Republic, the President of the Bolivarian Republic of Venezuela requests the National Assembly to enable him to legislate on matters of vital importance for the attainment and defence of the rights and benefits enjoyed by the population. The decree-laws stemming from the Enabling Act are strategic in nature, seeking to ensure dignity and equality of development for the inhabitants of the Republic, and are central to the progressive attainment of the human rights enshrined in the national Constitution and other international instruments.

1423. Since the initial enactment of the law granting the national executive the right to pass decree-laws in 2000, a process has been initiated involving consultation and effective participation by employers' and workers' organizations, the business sector, the productive sector, communities and citizens in general. Consultations have been conducted with countless actors in national life, including employers' and workers' organizations. Particularly noteworthy is the fact that Venezuelan democracy is participative and allows all sectors coexisting within the country to play a part.

1424. The decree-laws passed over the years by the Government pursuant to the Enabling Act reflect the spirit of the Constitution of the Republic and the ongoing process aimed at achieving what is known as "social justice", a central tenet of the universal system of human rights and, in particular, of the fundamental aims and objectives of the ILO. Such laws are of direct benefit to rural families, members of cooperatives, small and medium-sized producers and finally, to the vast segment of the Venezuelan population that has over many years suffered impoverishment and exclusion.

1425. In view of the above, it is obvious that there exists in the Bolivarian Republic of Venezuela a clear and permanent respect for labour-related human rights, particularly in relation to freedom of association and collective bargaining, and that the democracy in place is

participatory, with every sector within the country being consulted on a permanent basis. It is therefore unclear why the decree-laws passed pursuant to the Enabling Act are being attacked and criticized, in spite of the major progress and results that they have achieved for the population as a whole as part of the drive for equality and social justice, and in combating poverty and exploitation.

- 1426.** In addition, with regard to legislation concerning collective bargaining, employment conditions or the trade union and socio-labour rights of the country's workers, it is essential to point out that amendments and enactment of laws and regulations in these spheres have been the subject of broad-ranging consultations in which the needs of the majority have been heard. Consultations have taken place with employers' and workers' organizations, a case in point being the consultations on the regulation of the Organic Law on Prevention, Conditions and Work Environment, agreed upon through broad and inclusive social dialogue. Moreover, a process of discussion of the new Organic Labour Act is currently under way.
- 1427.** Similarly, consultations were held on the Workers' Food Act and its regulation, on-job protection measures, the Organic Labour Act and many other laws unrelated to the socio-labour spheres. Throughout these processes, there has been participation by large, medium and small enterprises, urban and rural populations, workers' representatives, communities, etc.; in other words, the totality of the country's social partners. This process of setting up and developing consultative and participatory mechanisms has contributed to economic recovery, the creation of new jobs, the elimination of social exclusion, an increase in social and labour benefits and ultimately, to an improved quality of life for the entire Venezuelan population.
- 1428.** In a spirit of utmost cooperation, we will continue to inform the distinguished Committee of the different laws passed pursuant to the Enabling Act wherever these pertain to the content of Conventions Nos 87 and 98.

Reform of the Organic Labour Act

- 1429.** The Committee on Integrated Social Development of the National Assembly began public consultations on the reform of the Organic Labour Act this May. The debate will begin with organizations affiliated to national and state federations, along with workers' trade unions and employers' organizations. Participants will come not only from these organizations but also from sectors previously excluded by other governments from the decision-making process, such as FEDEPETROL, FETRAHIDROCARBUROS, the Federation of Public Sector Workers (FENTRASEPT) and the Federation of Electrical Workers, among others.
- 1430.** In the course of these meetings, trade union leaders will air their proposals and suggestions concerning this legal instrument. There will also be meetings between the Members of Parliament comprising the abovementioned Committee and workers and sectors concerned by the subject matter under discussion. Trade union representatives from the iron and steel sector and the public sector will also table proposals as part of the initial debate on the new Organic Labour Act.
- 1431.** At the same time, the Committee on Integrated Social Development of the National Assembly, which is responsible for undertaking this reform, has at its disposal the relevant recommendations of the ILO Committee on Freedom of Association, which will be taken into account as part of the discussions and consultations being carried out in connection with this bill. Discussion during a full sitting of Parliament is scheduled to take place between July and September, or once the phase of broad consultation within the country has been completed.

1432. The national Government intends the new Organic Labour Act to be a fair instrument to ensure the due protection of workers' rights across all sectors. The new Organic Labour Act is intended to serve the society that is being constructed, a society built on justice and which accords priority to workers, but without excluding or weakening the rights of any other social partner, with progress on issues such as participation by workers in the management of enterprises, shortening of the working day and the fight against outsourcing and precarious work, particularly in terms of its effects on undeclared work and social security. Attached are press releases containing this information and a timetable of meetings under the National Consultation Plan on the Draft Organic Labour Act.

1433. In addition, it is important to mention that the Government will, as it has always done, keep this important international body informed of any legislation that relates to social aspects of labour.

(b) *With regard to social dialogue and consultations with sectors other than the agri-food sector, as well as all social dialogue with FEDECAMARAS*

1434. In the Bolivarian Republic of Venezuela, as has been indicated in previous communications and press digests over the years that this complaint has existed, social dialogue has been broad and inclusive. The national, regional and local governments have held countless meetings and discussions attended by many members and leaders of the country's various employers' and workers' organizations. In this regard, it is essential to recall that the Committee has been sent copies of the various communications addressed to confederations and federations of employers and workers in the Bolivarian Republic of Venezuela, as proof that they were convened to engage in national social dialogue, as well as requests for comments and opinions on a variety of issues, giving rise to inclusive, participatory and productive dialogue amongst all social partners.

1435. It is worth noting that the Venezuelan State offers the optimal conditions for social dialogue to prevail and develop, in addition to the political will and commitment on the part of the national Government. Moreover, the Government of the Bolivarian Republic of Venezuela acknowledges, and will continue to acknowledge, the existence and development of each of the country's existing organizations, including FEDECAMARAS, an organization with which the national Government has repeatedly expressed its willingness to engage in dialogue and participation and with which it has met on various occasions. It is thus clear to see that respect and recognition are accorded to all social partners and that there is a need to continue to broaden social dialogue in the public, political and social spheres within our country.

1436. As has been demonstrated through the ample and repeated replies provided as part of this complaint, the different activities undertaken by the Government have borne witness to the interest and willingness of the President of the Republic and other governmental authorities as regards dialogue and agreement with business leaders and productive sectors of the population, with no organization or union excluded or discriminated against, and to their unequivocal application of these principles. Moreover, the Government has conducted dialogue and negotiations with the small and medium-sized enterprise sectors, which had historically been excluded from the political, economic and social decision-making, formerly the preserve of a group of business leaders or organizations within a highly monopolistic and oligopolic structure subordinate to transnational interests, where the needs of the people and the Millennium Development Goals such as the commitment to fighting poverty and exclusion were relegated to the sidelines. Attached is a press digest covering the years 2001–09, as evidence of the above.

- 1437.** With this in mind, and concerning the agri-food sector, Decree No. 6071, with the rank, value and force of the Organic Law on Food Security and Sovereignty, published in *Official Gazette* No. 5889 (Extraordinary) of 31 July 2008, establishes agricultural assemblies as forums for participatory planning, with the grass-roots level organized into farmers' councils and producers' councils, thereby replacing the national boards established in the Agricultural Marketing Act of 1970. A copy of this legislation is attached.
- 1438.** In the same vein, it should be noted that the Fisheries and Aquaculture Act of 2003 was amended pursuant to the Enabling Act in 2008, one of the most significant changes being a ban on industrial trawler fishing. Specifically, article 23 of this law provides that "no industrial trawler fishing shall be undertaken within the territorial waters and within the exclusive economic zone of the Bolivarian Republic of Venezuela ... Artisanal trawler fishing shall be replaced progressively by other fishing methods with a view to ensuring the sustainable development of hydrobiological resources and the environment".
- 1439.** We might also mention, as an example of the exclusion formerly suffered by social organizations in our country, entities such as the National Economic Council (established by Decree No. 211 of 8 March 1946) and the National Costs, Prices and Wages Board (law of 2 July 1984), which made specific reference to the organizations to be included in them ["... The Federation of Chambers of Commerce and Production shall determine which chambers, associations or corporations are representative of the respective activities ...". Article 3.4.2 of the abovementioned Decree No. 211] ["The National Costs, Prices and Wages Board shall comprise ... one representative of the Venezuelan Confederation of Workers (CTV) and one from the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS) ...". Article 3 of the law establishing the National Costs, Prices and Wages Board of 2 July 1984]. Thus, there clearly existed a policy of favouritism and exclusion deriving from provisions set forth in our legal system itself.
- 1440.** For that reason, the Government has held and continues to hold dialogue and negotiations with the small and medium-sized enterprise sectors, which had historically been excluded from the political, economic and social decision-making carried out by a select and exclusive group of business leaders or organizations, with no link to the country's broader employers' sector.
- 1441.** Attention is drawn to the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), in which these enterprises are described as an essential factor in economic growth and development, with ILO Members urged to take measures to adapt national conditions and practices in order to recognize and back up the key role that such enterprises can play. At the same time, it is intended that through this instrument, member countries put into practice fiscal, monetary and employment policies to promote an optimal economic climate, as well as the establishment and application of appropriate legal measures.
- 1442.** This Recommendation also provides for the elimination of obstacles to the development and growth of small and medium-sized enterprises and the review of policy in this area, in conjunction with all interested parties and the most representative employers' and workers' organizations. On the basis of the above, it is worth highlighting the national Government's efforts and policies to promote small and medium-sized enterprises and thereby encourage and enhance productivity and job creation, leading to economic and social development for families, communities and the country.

1443. The following, from the resolution concerning the promotion of small and medium-sized enterprises, adopted by the International Labour Conference at its 72nd Session in 1986, is also noteworthy:

...

2. SMEs can play a significant role by marshalling entrepreneurial initiative into the economic and social development of all countries ...
3. SMEs are one of the vehicles for social progress, for employment creation, for stimulating investment at lower cost, for performing complementary activities to those performed by large firms and for supporting policies of regional and local decentralization of economic activities.

1444. With the above in mind, it should be noted that the Venezuelan Government has adopted policies to bring about economic and social progress in the country. For this purpose, institutions have been created and programmes established to promote SMEs. All of these national development policies and plans acknowledge the economic and social contribution made by the small and medium-sized enterprise sector, to the benefit of the population as a whole. Furthermore, the President of the Republic and other authorities within the national Government have expressed repeatedly and on a variety of occasions their willingness to engage in a process of broad and inclusive dialogue with national employers' leaders, including those sectors which for many years had been excluded from decision-making despite their absolute respect for and devotion to the Constitution and other legislation in force. It should be made clear that while the national, regional and local governments have made countless attempts to set up discussions and debate in the context of national socio-economic decision-making, these have been met with repeated rejection and reluctance by certain business sectors.

FEDECAMARAS and its political action against the national Government

1445. The national Government derives its legitimacy from the popular election of President Hugo Chávez in 1998. It has always been open to dialogue with workers, farmers, employers' leaders, manufacturers and all citizens without distinction and to the exclusion of no one. However, it should be recalled that there have been repeated instances of the Government initiating or promoting dialogue with certain groups claiming popular representativeness, the result of which have included strikes, a coup d'état, an illegal oil strike affecting the national economy and the development of the country and assassination attempts.

1446. FEDECAMARAS is an organization comprised largely of business leaders hostile to the national Government who on various occasions have sought to destabilize the country, such as during the call for a national strike and the coup d'état of 2002. The President of FEDECAMARAS proclaimed himself President of the Republic in April 2002, waived the Constitution of the Bolivarian Republic of Venezuela as endorsed by popular referendum and dissolved all national, state and local public authorities. Members of the leadership of this organization have been linked with opposition political elements and often fail to carry out their functions as representatives of chambers of commerce and associations of business leaders.

1447. The national Government's ongoing and steadfast commitment to dialogue with the abovementioned organization has been made clear and demonstrable to this international body; FEDECAMARAS leaders have held countless meetings with different government authorities, who have looked beyond the destabilizing and troublesome behaviour characterizing this organization for the purposes of building inclusive and participatory democracy, justice and equality for each and every social partner making up the new

Venezuelan State. Indeed, the policies of this State have yielded tangible results in the fight against poverty and misery, as acknowledged by United Nations specialized agencies such as UNESCO, the UNDP and the FAO. It is these sustained policies that have helped facilitate international cooperation and integration.

1448. However, if dialogue is to be constructive, it is clearly necessary for both parties to be willing to engage and to do so in a spirit of respect and legality. The Government invites this organization to choose the path of democracy and engage in the respectful dialogue required of all actors within a country for any democratic process to take place.

(c) *Regarding the events that took place at FEDECAMARAS headquarters*

1449. As to this matter, reference should be made to the constitutional principle of separation of powers that exists in the Venezuelan State. The purpose of this separation of powers is to distribute and categorize the functions of the State, with each function being held by a separate public body. Together with the fundamental rights enshrined in the Constitution, this is one of the characteristic principles of the modern rule of law.

1450. The Venezuelan Constitution of 1999 establishes institutional checks and balances through limitations on the exercise of power and the guarantee that representative bodies remain within their legal framework. In this way, public bodies are restricted to carrying out only those activities assigned to them by legal order, and it is here that the principle of separation of powers is seen as essential to ensuring and safeguarding citizens' freedom, since power allocated to a series of bodies limits the power held by an individual body.

1451. Thus, given that this principle applies within the Venezuelan State, the Attorney-General of the Republic is competent to investigate and follow up these acts and others which may affect or disturb public order. Through the actions of this organ of the Venezuelan justice system, the State has carried out all the relevant investigations with a view to shedding light on the events that took place at FEDECAMARAS headquarters. According to information from the competent prosecutor's office, this case is currently at the investigative stage.

1452. Notwithstanding our intention to meet our commitments as a member State of this international organization, the authorities competent to handle such matters were given responsibility for addressing the relevant requests. According to information from the Common Crimes Department of the Office of the Attorney-General of the Republic, the criminal proceedings pertaining to the events at FEDECAMARAS headquarters, assigned case number C01-F20-0120-08, are being handled by the offices of the Prosecuting Attorney of the 20th and 70th districts of the Metropolitan Area of Caracas and are currently in the preparatory phase. We can also report that arrest warrants have been issued for Ivonne Gioconda Márquez Burgos and Juan Crisóstomo Montoya González, in order for them to be brought before the jurisdictional court and formally charged in relation to the blast of explosive devices at the FEDECAMARAS headquarters. Attached by way of supporting documents are a communication from the Common Crimes Department of the Office of the Attorney-General of the Republic and the warrants for the arrest of the abovementioned citizens since May 2008, as a result of the proceedings initiated on the grounds of testimonies, videos of the crime scene, etc.

1453. It is also important to point out that the police are engaged in an intensive search for the suspects in this case in order to bring them to justice. The Committee will be kept informed of progress and of the outcome of this case.

(d) Regarding the allegations of violations of the private property of several employers' leaders in the agricultural and livestock sector; victims of invasions; the confiscation of land or expropriation without fair compensation

- 1454.** With regard to the alleged actions taken against the employers' leaders Mr Mario José Oropeza and Mr Luis Bernardo Meléndez and the alleged abduction of three sugar producers in 2006, according to information from the INTI of the Ministry of Popular Power for Agriculture and Land, no administrative proceedings have been brought in relation to acts that might compromise the personal safety of sugar producers, nor do there exist expropriation procedures for public, social or other purposes in which the abovementioned citizens were involved. It is however important to point out that Mr Mario José Oropeza has lodged an application for the right to remain on his land with the Institute, pending discussion and approval as appropriate. In support of the above, a communication from the INTI is attached.
- 1455.** Turning to the deaths of six producers following attacks, as alleged by the complainants, the national Government is unable to offer an appropriate reply in view of the lack of documentation and information.
- 1456.** It is important to mention that confiscation of land or any other property does not take place and is not permitted in the Bolivarian Republic of Venezuela. As to the allegations of farm invasions and other attacks that the complainants claim to have been suffered by various employers' leaders in the agriculture and livestock sector, these claims are groundless given that no information or evidence of such events has been supplied.
- 1457.** In any event, it should be stressed that the Bolivarian Republic of Venezuela is a democratic and social State based on the rule of law and justice, and that the core values of its legal system and functioning are justice and equality. It follows that in the event of a violation of their rights, the affected parties must bring their grievances before the competent body for settlement and remedy of the infringed right.
- 1458.** In the Bolivarian Republic of Venezuela, as in other nations, efforts have been made to strengthen and further the constitutional values of social development throughout the agricultural sector. To this end, a fair and equitable distribution of wealth is being sought, along with strategic, democratic and participatory planning of land ownership and the development of agricultural activity in general.
- 1459.** The Government has thus implemented the measures and mechanisms necessary to eliminate fully the regime of large estates, a system that runs counter to justice, equity, equality, the general good and social peace. In particular, the Land Act had as one of its core principles the safeguarding and protection of food security and sovereignty, to the benefit of the population as a whole.
- 1460.** To achieve these objectives and for the purposes of agri-food development, land usage has been decided upon for all land, both public and private. This land usage is in no way a legal obligation; rather, it relates to the establishment of a legal framework for the usage of such land other than that of common law and equates simply to legally derived contributions in the public or social interest to which property is subject.
- 1461.** The Tenants and Share-croppers Recommendation, 1968 (No. 132), of the International Labour Organization states that "in conformity with the general principle that agricultural workers of all categories should have access to land, measures should be taken, where

appropriate to economic and social development, to facilitate the access of tenants, sharecroppers and similar categories of agricultural workers to land”.

- 1462.** The Rural Workers Organizations Recommendation, 1975 (No. 149) states that “land reform is in many developing countries an essential factor in the improvement of the conditions of work and life of rural workers and that organizations of such workers should accordingly co-operate and participate actively in the implementation of such reform ...”.
- 1463.** Similarly, the press release of 8 December 1997 (ILO/97/32) on the issue of increasing agricultural productivity states that: “most SSA [Sub-Saharan Africa] countries are primarily rural and the agricultural economy requires a number of basic changes. The first major requirement is to abandon the age-old system whereby governments impose artificially low prices for staples such as bread and rice, a practice which feeds urban dwellers but keeps farmers in poverty. A second requirement is to diversify production away from large-scale commodity production to areas of greater export potential, such as cut flowers, tropical fruits and vegetables. A third major requirement is land reform. Land is the primary resource in rural SSA and access to land is highly restricted. Ownership is often concentrated in the hands of large proprietors, who often make very poor use of their holdings, either leaving them idle or holding them for speculative purposes, whereas it is well documented that small land holders absorb more labour per acre and are more productive”.
- 1464.** For the Bolivarian Republic of Venezuela, agricultural productivity is a legal concept that acts as a yardstick to gauge the extent to which land in ownership is fulfilling its social function. Thus, three levels of productivity have been established: idle or fallow farm, farm that could be improved and productive farm. Farms of the first level do not meet the minimum production requirements and, as such, may be subject to interventions or agricultural expropriation. The second level refers to those farms which, though not productive, could be made so within a reasonable period of time, with the owner being encouraged to implement an adaptation plan and receiving financial assistance for this purpose. The third level applies to farms operating properly and suitable for production.
- 1465.** As far as the Bolivarian Republic of Venezuela is concerned, the occupants of most of the land recovered by the State for food production to benefit the people, were unable to prove their ownership of that land, since they held either irregular title deeds or no deeds at all, while in many other cases, the land either failed to meet production requirements or was simply non-productive or lying idle. Without prejudice to the above, the Government acted in accordance with the legally established procedures, going through the appropriate channels and, in those cases, compensated landowners for improvements carried out. This is intended to show that the policies of the Bolivarian Republic of Venezuela, whose aim is to put into practice the principles of social justice enshrined in the Constitution of the Republic and international declarations, are implemented with a full set of guarantees, rights and benefits in place.

(e) *Regarding alleged harassment of employers’ leaders through hostile speeches given by the President of the Republic and alleged threats to confiscate their property on grounds of social interest*

- 1466.** The President of the Bolivarian Republic of Venezuela, citizen Hugo Rafael Chávez Frías, has on countless occasions demonstrated and reiterated his openness to dialogue with all social partners, and particularly the employers’ sector. This is also the position of the organs and authorities of the incumbent government, all of which gives little credence to

this entirely groundless allegation, especially since the various supervisory bodies of this international organization (the ILO) have received information in support of what has been stated here.

(f) *Regarding the application of legislation on labour solvency*

- 1467.** It is important to mention that during the coup d'état and oil sabotage of 2002–03, Venezuelan workers became aware of their central role in building the nation and began to defend their opportunities for participation as a means of achieving the effective implementation of their socio-labour rights. During the aforementioned coup d'état and oil sabotage, many employers of the private sector who were responsible for economic losses and have participated in the attack against democracy, have used dismissal and violation of rights as a punishment for the working class. The attainment of greater dignity in working conditions has been achieved gradually and, unlike in the past, this Government has made available and maintained wide-ranging opportunities for participation, in contrast to the exclusion and disinterest in workers' rights that formerly prevailed.
- 1468.** Many private sector enterprises that were responsible for economic losses and which participated in the attack on democracy used dismissal and violation of rights as a means to punish the working class. It was against this background that, in early 2004, the workers' sector submitted the proposed labour solvency decree, with the aim of seeking methods or tools to guarantee their rights.
- 1469.** This initiative of the UNT was widely publicized, with a petition circulated to every trade union in the country and extensive discussions with the Government leading to the approval of this decree.
- 1470.** As we can see, this request was made by a workers' organization and then endorsed and nurtured by the Government of the Bolivarian Republic of Venezuela.
- 1471.** Labour solvency is not, nor has ever been, intended to jeopardize the economic development of enterprises or trade, let alone to limit the production and sale of goods and services. Its aim is to guarantee to workers the labour and social rights which for so long were threatened.
- 1472.** Labour solvency is an administrative document issued by the Ministry of Popular Power for Labour and Social Security certifying that the employer fully respects the human, labour and social rights of his or her workers. It is a prerequisite for any employer wishing to conclude contracts or agreements with the State in the areas of finance, economy, technology, international trade and in the foreign exchange market.
- 1473.** This document can be obtained via a quick automated procedure on the Ministry's web site, www.mintra.gob.ve, which contains requirements and other information that users will need when filing their application. The employer must sign up to the National Register of Enterprises and Establishments via the appropriate web page and must submit a set of documents concerning their enterprise. Once the request has been filed and the requirements met, the Ministry, via the relevant authorities, processes that request within just five working days. The employer can then collect the solvency document at the labour inspectorate of his or her legal domicile.
- 1474.** The Ministry of Popular Power for Labour and Social Security has put in place a series of mechanisms to speed up further the formalities and procedures for obtaining labour solvency, an example being the recent launch of a single window request procedure, which will cut the time taken to issue solvency and complete special operations relating to labour

solvency and the National Register of Enterprises and Establishments. The aim of this is to facilitate the formalities for obtaining this administrative document and thereby contribute to the national productive process.

- 1475.** In addition, as part of the streamlining of formalities within the Currency Administration Commission (CADIVI) for the acquisition of capital, the solvency document is not required for a foreign currency application, since verification of that document takes place after the application process, the aim being to speed up the process of currency applications and issuance. Thus, with this set of measures, the national Government has shown its interest in contributing to the development of national productive activity.
- 1476.** According to statistics from the National Register of Enterprises and Establishments and Labour Solvency of the Ministry of Popular Power for Labour and Social Security, a total of 220,227 enterprises nationwide had registered between its creation on 29 March 2006 and 31 March 2009. The total number of labour solvencies processed during 2008 was 345,688, of which 334,228 applicants, or 97 per cent, were solvent. So far in 2009, 101,177 have been processed, of which 98,677 applicants, or 98 per cent, were solvent.
- 1477.** As can be seen from the above, labour solvency offers broad-ranging and adequate guarantees of legality and impartiality for all applicants. Moreover, the formalities and procedures involved are becoming ever more simple and quick to complete. This procedure is therefore far from being a restriction on the free operation and development of the country's enterprises and commercial activity, and much less a mechanism to discriminate against employers. On the contrary, it is an effective measure for ensuring observance and protection of the rights of all workers.

(g) *Regarding the warrant for the arrest of former FEDECAMARAS President Mr Carlos Fernández and the ban on leaving the country imposed on 15 employers' leaders*

- 1478.** The Government indicates that the Committee has repeatedly been informed that the arrest of Mr Carlos Fernández was ordered following the proper legal procedure and requested by the Office of the Attorney-General of the Republic, on charges of civil rebellion and incitement to commit an offence, in accordance with our Penal Code. This citizen was charged with these offences in the light of incriminating evidence.
- 1479.** The abovementioned offences are enshrined in the Venezuelan Penal Code as follows: civil rebellion (article 144) and incitement to commit an offence (articles 284, 285 and 286), cited below in full:

Article 144. – The following shall be punished by a term of imprisonment of between twelve and twenty-four years:

1. Persons who rebel publicly and in a hostile manner against the legitimately established and elected Government in order to depose it or prevent it from assuming its mandate.
2. Persons who, without seeking to alter the republican political system with which the nation has endowed itself, conspire or rebel with the purpose of bringing about an abrupt change in the Constitution of the Bolivarian Republic of Venezuela.

Persons who commit the offences detailed in the abovementioned provisions against State governors, State legislative councillors and State constitutions shall be subject to a prison term of half the length, and those who commit the same offences against municipal mayors, a term of one third of the length.

Concerning incitement to commit an offence:

Article 284. – Whosoever publicly incites another to commit a particular offence shall be punished for the mere fact of that instigation:

1. If the offence carries a mandatory prison sentence, by a prison term of between ten and thirty months.
2. If the offence may be punishable by a prison sentence, by a prison term of between three and twelve months.
3. In all other cases, by a fine of 50 000 bolivars, depending on the nature of the offence incited.

Article 285. – In the case of sections 2 and 3 of the previous article, under no circumstances shall the sentence exceed one third of the sentence for the incited offence.

Article 286. – Whosoever publicly incites disobedience of laws or hatred of one part of the populace against others or who shall defend an act categorized under the law as an offence, thereby threatening public order, shall be punished by a prison term of between 45 days and six months.

1480. In view of the above, once the procedures had been completed in February 2003, the warrant for the arrest and detention of Mr Carlos Fernández was issued. Subsequently, on 20 March of the same year, the Court of Appeal handed down a ruling releasing the abovementioned citizen and withdrawing the charges against him. Following this decision, Ms Luisa Ortega Díaz, at that time the Sixth Prosecuting Attorney of the Office of the Public Prosecutor, lodged an *amparo* appeal with the Constitutional Chamber of the Supreme Court of Justice, which handed down a ruling ordering that Mr Carlos Fernández be placed once again under house arrest.

1481. It can be seen from the foregoing that the proceedings brought against the abovementioned citizen were fully compliant with the right to due process, the right to appeal and the right to a defence, as provided for in the Organic Code of Penal Process and the Constitution of the Bolivarian Republic of Venezuela.

1482. Thus, Mr Carlos Fernández was accused of breaches of law set out in the Penal Code which, given that they are criminal offences, require investigation in order to determine the appropriate sanctions or, if he is proven innocent, to absolve him of all charges. It has not been possible to address this matter given that the individual has obstructed justice by fleeing the country despite the ongoing legal proceedings against him.

1483. Secondly, as to the alleged ban on leaving the country imposed on 15 employers' leaders, it is to be noted that the complainants have failed to supply adequate information or grounds to determine whether these alleged acts did indeed take place. The Committee is therefore asked to request the complainants to provide supporting information to enable the Government to furnish its replies in relation to this allegation. It should, however, be made clear that the Government of the Bolivarian Republic of Venezuela has not prevented, nor will ever prevent any person from leaving the country, since it is the responsibility of the criminal justice system to decide whether to impose a ban on leaving the country, through a judicial measure and in accordance with the appropriate procedure.

(h) Regarding the alleged presence within the Confederation of Socialist Entrepreneurs of Venezuela (CONSEVEN) of two prominent government figures, as well as the preferential treatment given to the Federation of Artisans, Micro, Small and Medium-Sized Industrialists of Venezuela (FEDEINDUSTRIA) in relation to procedures for obtaining foreign currency

- 1484.** Full freedom of association and the right to organize exist within the Bolivarian Republic of Venezuela, pursuant to the Constitution of the Republic, other legislation and the relevant ILO Conventions. Both employers' and workers' organizations are free to organize without interference. Under no circumstances does the national Government promote or intervene in the formation or operation of these organizations, let alone exercise any kind of favouritism or interference in relation to any organization.
- 1485.** In this regard, it is important to point out that since the Government led by President Hugo Chávez Frías has been in power, there has been a considerable increase in the numbers of trade union organizations registered, proof of the respect for, and promotion of, the right to organize and freedom of association within the Bolivarian Republic of Venezuela. During 2007 and 2008, 1,224 trade union organizations were registered, with 24 registered at national level during January and February of this year.
- 1486.** Turning now to the alleged presence within this organization of government officials, including some with customs and taxation responsibilities, on the basis of which the complainants claim State interference, it should be noted that there are no officials with any government role among the leaders of CONSEVEN, and certainly no officials with customs or taxation responsibilities.
- 1487.** Secondly, as to the alleged preferential treatment accorded to the FEDEINDUSTRIA in relation to the procedure for obtaining foreign currency, the Committee is informed that the procedure is the same for all enterprises and operates via an automated system, accessible through the www.cadivi.gob.ve web site, which provides information and sets out the necessary requirements for obtaining currency without any kind of discrimination. This foreign currency administration mechanism has helped to address market fragility and volatility and combat the effects of the global crisis without impacting on employment figures and workers' wages.
- 1488.** It is important to mention that as part of this procedure, the CADIVI is streamlining the process for obtaining foreign currency for basic consumer goods (medicines, food) and essential imports. In other words, it is a matter of priority for the State to acquire foreign currency for the sale of food products, medical supplies and medicines and any other goods considered essential to the wellbeing of the population on the basis of a centralized needs assessment. For this reason, enterprises importing these essential products or irreplaceable supplies required by the country are given priority in obtaining foreign currency.
- 1489.** In addition, enterprises importing certain types of goods and duly authorized by the Ministry of Popular Power for Food have available the "payment at sight" procedure. One of the advantages of this system is a significant reduction in the time taken to authorize foreign currency and with cash in hand, it is possible to obtain more favourable conditions for international market access, since the consignment is totally or partially paid for prior to nationalization of the goods.
- 1490.** At the same time, Decree No. 6168 of 17 June 2008, published in *Official Gazette* No. 38958 of 23 June 2008, set up an additional mechanism to streamline the acquisition

of foreign currency for the import of capital goods, supplies and raw materials by the country's manufacturing and processing sector. This measure specifically involves an exemption from fulfilling CADIVI requirements for enterprises applying for \$50,000 in currency or less in order to import capital goods, machinery, parts or production materials.

- 1491.** These administrative measures to streamline the system for obtaining foreign currency have been endorsed by the national Government and contribute to enhancing national production capacity.
- 1492.** In this regard, it should be mentioned that many of the mechanisms and options used to facilitate and streamline the process of obtaining foreign currency were the result of meetings and consultation between CADIVI authorities and representatives of our country's various employers' and manufacturers' organizations.
- 1493.** Similarly, it should be stressed that FEDEINDUSTRIA is comprised mainly, as its name suggests, of small and medium-sized enterprises and as such, should be seen as receiving facilitated, rather than preferential treatment. This treatment is available not only to the enterprises or industries within that federation, but also to any others requiring small sums of foreign currency for their imports.

(i) *Regarding the alleged privileges granted by the State to social production enterprises*

- 1494.** Firstly, it is important to explain what is meant by social production enterprises, which are simply "economic entities dedicated to the production of goods and services in which work is accorded its own, unalienable and genuine value, where there is no workplace social discrimination of any kind, where there are no workplace privileges connected to rank, and where there is genuine equality between workers. They are based on participatory planning and are either state-owned, in collective ownership or a combination of the two."
- 1495.** Decree No. 3895 of 12 September 2005, published in *Official Gazette* No. 38271 of 13 September 2005, also defines social production enterprises as follows:

Community-based production units established with the appropriate legal status, whose core objective is to generate goods and services to satisfy the basic and essential needs of the community and its environment, including men and women from the Bolivarian Missions, putting the values of solidarity, cooperation, complementarity, reciprocity, equity and sustainability before profitability and earnings.

Such units should at all times preserve the financial equilibrium necessary to enable them to continue investing in this socio-environmental sphere in a viable and sustainable manner.

- 1496.** Social production enterprises represent a major step forward in the construction of a new, fairer and more equitable productive model for our country, a model where people are not exploited by others and there is no longer competition between workers or between enterprises. The fundamental objective of these productive units derives from the principles of cooperation, solidarity and complementarity and amounts simply to a better distribution of income, fairer rewards for workers and greater benefits for the populace as a whole.
- 1497.** The organization of workers into social production enterprises is the key to creating a social, popular, community-based and productive economy and thereby produces the goods and services necessary to satisfy the basic needs of the whole populace. These enterprises are the cornerstone of a new productive model and herald a new era of social

relationships in production, their key objective being to generate more jobs and address community problems, rather than personal wealth alone.

- 1498.** For all of the above reasons, the Venezuelan Government is promoting these models of social production and the creation of community production networks to enable active participation led by the working population in the process of wealth generation and distribution. The creation of these enterprises empowers organized communities, enabling them to tap the potential of each agricultural and industrial sector.
- 1499.** Under the impulse of this productive model, communities have been organized and encouraged to participate in processes and projects in order to generate goods and services to meet the needs of the community, thereby helping to eradicate poverty and improving the standard of living of families and communities across the nation. It is therefore a key tool for empowering the people and freeing workers from exploitation of capital, since the organized, optimized working population takes charge of processes for the generation and distribution of wealth.
- 1500.** These new productive relationships are part of a new, fair social structure that enables wage-earning workers to be freed from exploitation of capital, thereby helping to overcome poverty, misery and social exclusion. In promoting this productive model, the Venezuelan State has taken a forward-looking step, proof of its desire to address the needs of the small productive units that formerly suffered exclusion and marginalization. However, the legal status of these enterprises is simply that of a public limited company. In other words, from a legal perspective, there has been no change in their structure; rather, their production and distribution methods, social aims and purpose have been transformed.
- 1501.** In light of the above, the Government reaffirms its impartial and fair treatment of each and every employers' and workers' organization in the country, with no specific organization being accorded preferential treatment in the past, present or future, since this would be nothing short of a discriminatory action with no place in our State governed by the rule of law, justice and equity. Nothing more can therefore be said in this regard since it is unclear to what the complainants are referring when they allege that the Venezuelan State grants privileges to these social production enterprises, given that, in the course of their promotion and development, the only privileges enjoyed by these new productive units are those enjoyed by all citizens.

(j) *Regarding allegations to the effect that the Organic Law establishing the Central Planning Commission restricts the rights of employers' and workers' organizations*

- 1502.** Decree No. 5384 with the rank, value and force of an Organic Law establishing the Central Planning Commission, published in *Official Gazette* No. 5841 (extraordinary) of 22 June 2007, establishes the abovementioned Commission with the purpose of coordinating, consolidating, monitoring and permanently evaluating strategies, policies and plans, as per the provisions of the National Economic and Social Development Plan.
- 1503.** This Organic Law, as stated in its preamble, represents a step forward compared to, inter alia, the provisions of the Organic Public Administration and Planning Acts. The Central Planning Commission, for its part, works to ensure that organs and entities of the public administration act in a harmonized and appropriate manner, in line with national development and in compliance with the human rights enshrined in the Constitution of the Bolivarian Republic of Venezuela. Article 1 contains the following provisions regarding its purpose and scope:

Article 1: The present decree with the rank, value and force of law has as its objective the establishment of the Central Planning Commission, a standing body which, mindful of an overall vision, shall prepare, coordinate, consolidate, monitor and evaluate strategies, policies and plans as per the provisions of the National Economic and Social Development Plan, establishing a standards framework enabling the harmonious integration of the totality of the constitutional and legal principles relating to planning, organization, monitoring and oversight of the public administration.

- 1504.** In light of the above, the argument put forward by the IOE that this law constitutes “... an attack on freedom of association and expression” should be disregarded as being impertinent and out of place, since the provisions cited as prejudicial to rights, particularly those relating to the approval and publication of planning guidelines (article 13), mandatory implementation of these strategies, policies and plans (article 14), mandatory reporting on their implementation (article 16) and sanctions for failure to supply information within the scope of the law, do not in any way relate to or jeopardize the rights invoked by the IOE.
- 1505.** Finally, the International Labour Office is requested to use its good offices to ensure that this document and supporting information are fully and fairly assessed.
- 1506.** In its communications dated 20 October 2009 and 1 March 2010, the Government replies to allegations from the IOE, dated 8 October 2009.
- 1507.** The Government refers in this regard to the land recovery procedure, as provided for in Chapter VII of the Land and Agrarian Development Act. Article 86 provides that the National Land Institute “is entitled to recover land owned by it where this is being illegally or illicitly occupied. To this end, it shall initiate the appropriate recovery procedure ex officio or following a denunciation, without prejudice to the guarantees set forth in articles 17, 18 and 20 of the present Decree-Law.” Article 88 provides that the land recovery procedure “shall not apply to land in optimal condition for agricultural production and fully compliant with the plans and guidelines established by the National Executive ...”. Consequently, once the procedure has been initiated, “the National Land Institute may assume control of any recovered land found to be idle or fallow, pursuant to the provisions of the present Decree-Law ...”.
- 1508.** The Government points out that article 95 of this law calls for the publication of “a notice to the occupants of the land, if their identity is known, or to any other interested party, to make themselves known and give their supporting arguments, along with the appropriate documents or deeds as proof of their rights, within a period of eight working days following the posting of the notice”.
- 1509.** The National Land Institute shall hand down its decision in the ten working days following the expiry of the time period provided for in the previous article and the occupant of the land and any interested parties involved in the procedure shall be notified, with an indication to the effect that an administrative appeal may be lodged with the Higher Agrarian Judge covering that location to seek nullification within the sixty days following notification, pursuant to articles 97 and 98 of the abovementioned Land and Agrarian Development Act.
- 1510.** Having clarified the legal procedure for land recovery, the Government, in view of the reference made by the complainants to a “campaign of confiscation of 2,500 hectares of agricultural land in the Río Turbio Valley” (in Lara State), stresses that confiscation of property or land does not take place in the Bolivarian Republic of Venezuela and is forbidden by law. The events that took place in this location relate to a procedure of land and property recovery by the national Government, carried out by the INTI on the grounds that the land was idle, non-productive or in illegal use.

- 1511.** The Bolivarian Republic of Venezuela has sought, as have other nations across the world, to enhance and further the constitutional values of social development within the agricultural sector. To this end, efforts are being made to achieve fair distribution of wealth and strategic, democratic and participatory planning in respect of land ownership and development of agricultural activity in general, as well as a complete end to the regime of large estates.
- 1512.** As provided for in article 307 of the National Constitution, the regime of large land estates is contrary to the interests of society, with the State required to take the necessary steps to ensure the development of the agricultural sector. At the same time, the Land and Agrarian Development Act provides for the elimination of “large land estates, a system that runs counter to justice, the interests of society and social peace in rural areas, thus ensuring biodiversity, food security and the effective application of environmental and agri-food rights for current and future generations”. With this in mind, the Government has set in motion the measures and mechanisms necessary for the total elimination of this regime of land ownership. It should be noted in particular that one of the basic principles behind the passing of the above Act was the safeguarding and protection of food security and sovereignty for the benefit of the populace as a whole.
- 1513.** In this connection, it important to mention that the Tenants and Share-croppers Recommendation, 1968 (No. 132), of the International Labour Organization states that “in conformity with the general principle that agricultural workers of all categories should have access to land, measures should be taken, where appropriate to economic and social development, to facilitate the access of tenants, share-croppers and similar categories of agricultural workers to land”.
- 1514.** Similarly, the Rural Workers’ Organisations Recommendation, 1975 (No. 149), states that “land reform is in many developing countries an essential factor in the improvement of the conditions of work and life of rural workers and that organizations of such workers should accordingly co-operate and participate actively in the implementation of such reform ...”.
- 1515.** Furthermore, the press release of 8 December 1997 (ILO/97/32) on the issue of increasing agricultural productivity states that: “most SSA (Sub-Saharan Africa) countries are primarily rural and the agricultural economy requires a number of basic changes. The first major requirement is to abandon the age-old system whereby governments impose artificially low prices for staples such as bread and rice, a practice which feeds urban dwellers but keeps farmers in poverty. A second requirement is to diversify production away from large-scale commodity production to areas of greater export potential, such as cut flowers, tropical fruits and vegetables. A third major requirement is land reform. Land is the primary resource in rural SSA and access to land is highly restricted. Ownership is often concentrated in the hands of large proprietors, who often make very poor use of their holdings, either leaving them idle or holding them for speculative purposes, whereas it is well documented that small landholders absorb more labour per acre and are more productive”.
- 1516.** Specifically in relation to the Bolivarian Republic of Venezuela, the occupants of much of the land recovered by the Venezuelan State for the benefit of the populace and for food production were in some cases unable to prove their ownership of that land. In many other cases, the land did not meet production requirements or was simply non-productive or idle. Notwithstanding the above, the Government acted in accordance with the legally established procedures, going through the appropriate channels. This is intended to show that the policies of the Bolivarian Republic of Venezuela, whose aim is to put into practice the principles of social justice enshrined in the Constitution of the Republic and in international declarations, are implemented with a full set of guarantees, rights and benefits in place.

- 1517.** In relation to the land in the Río Turbio Valley, which for many years comprised large estates, which are prohibited by law and by the majority of the world's jurisdictions, the Government indicates that the INTI granted a one-year grace period to allow the self-proclaimed owners of the land to prove their ownership. In the absence of title deeds and given that the majority of this land fell below the productivity thresholds laid down in legislation or was being inappropriately used, the decision was taken to initiate the process of land recovery and thereby promote development of the agricultural sector and safeguard the social interest.
- 1518.** In addition, with regard to the situation of Mr Eduardo Gómez Sigala, the Government makes clear that in the course of the valid legal procedure carried out at a number of properties in the Río Turbio Valley, officials from the INTI encountered difficulties with this individual. According to notes taken during this procedure, the abovementioned citizen assaulted a member of the military, who suffered a dislocated shoulder. The injured person was, along with other personnel, carrying out his job of accompanying INTI officials and ensuring public order.
- 1519.** In line with the appropriate established legal procedures, the Office of the Public Prosecutor subsequently charged Mr Eduardo Gómez Sigala, who had been apprehended in flagrante delicto, with committing the offences of minor bodily harm and resisting authority, pursuant to articles 418 and 216 respectively of the Venezuelan Penal Code. The case was handled by the Fifth Prosecuting Attorney of Lara State, who brought the employers' leader before Supervisory Court No. 8 of that particular jurisdiction. The court authorized ordinary proceedings and granted bail, pursuant to article 256 of the Organic Code of Penal Process. As a result, Mr Gómez Sigala is required to appear before Supervisory Court No. 8 or at the headquarters of the Office of the Public Prosecutor whenever summoned and as required by the investigation currently being carried out by the abovementioned Prosecuting Attorney of Lara State. The Office of the Public Prosecutor requested the subdivisions of San Juan and Barquisimeto of the Scientific, Penal and Criminal Investigations Body to undertake physical experiments on a piece of clothing, to analyse three compact discs presented by the defence of the accused, to provide photographic expertise and to undertake technical inspections as well as interviews of eyewitnesses, so as to reach the relevant conclusions.
- 1520.** The information given above is evidence of the fact that proceedings against the abovementioned citizen were fully in line with the procedural guarantees provided for in national and international law. This in no way constitutes "personal harassment", as alleged by the complainant organization; on the contrary, it is based on the utmost observance of legal provisions on the part of the security and justice services. As a consequence, it is not appropriate to request the national Government and the justice system to withdraw the charges against Mr Eduardo Gómez Sigala, since these charges are grounded in the appropriate legal procedures and an investigation into the matter is still ongoing.
- 1521.** As to the accusations made by the IOE in relation to an alleged campaign of harassment against the private sector by the Government of the Bolivarian Republic of Venezuela and the alleged undermining of FEDECAMARAS, the Government wishes to recall the numerous occasions on which it has initiated and promoted dialogue with certain groups claiming to represent the country, the result of which has been a coup d'état, illegal disregard for and waiving of the Constitution, dissolution of all national, state and local public authorities, an illegal oil strike that affected the national economy and the development of the country, assassination attempts, besmirchment of the President of the Republic and other government authorities, anti-government campaigns and much else besides. It is clear, therefore, that it is in fact the FEDECAMARAS organization itself that

has adopted a destabilizing, troublesome stance throughout the term of President Hugo Chavez's Government.

1522. Nonetheless, this international body has seen proof of the national Government's ongoing and steadfast commitment to dialogue with the abovementioned organization; FEDECAMARAS leaders have held countless meetings with different government authorities, who have looked beyond this organization's destabilizing and troublesome behaviour for the purposes of building inclusive and participatory democracy, justice and equality for each and every social partner making up the new Venezuelan State. Indeed, the policies of this State have yielded tangible results in the fight against poverty and misery, as acknowledged by United Nations specialized agencies such as UNESCO, the UNDP and the FAO. The Government reiterates the position expressed on various occasions before the different ILO supervisory bodies: The Government of the Bolivarian Republic of Venezuela stands behind the existence of broad-ranging and inclusive dialogue, without distinction or exclusion. By way of illustration, the Government refers to the various consultations and discussions held concerning the regulation of the Organic Law on Prevention, Conditions and Work Environment, the new Organic Labour Act, the Food Act and its regulation concerning job protection measures, as well as many other laws unrelated to the socio-labour sphere. Throughout these processes, there has been participation by large, medium-sized and small enterprises, urban and rural populations, workers' representatives, communities, etc.; in other words, the totality of the country's social partners. This process of setting up and developing consultative and participatory mechanisms has helped to salvage constitutional and legal order, in which are enshrined the existence of the democratic, social State based on the rule of law and justice.

1523. Furthermore, the Government indicates that the draft Act on International Cooperation is now passing the second reading before the Legislative Assembly. It seeks to achieve international balance and build a multisided world, as opposed to the neoliberal unidirectional model aiming at the internationalization and exponentiation of the accumulation of capital for the purpose of imposing the supremacy of its vision by means of the ideology of globalization, which is extraneous to the cultures, idiosyncracies and histories of the peoples of the world.

D. The Committee's conclusions

1524. *The Committee observes that the allegations and matters pending in relation to the present case are as follows:*

- *violence and intimidation with respect to employers' organizations and their leaders;*
- *violations of the private property rights of numerous employers' leaders in the agriculture and livestock sector, including invasions, confiscations and expropriations of land without due compensation, and penal proceedings;*
- *harassment of employers' leaders through hostile speeches made by the President of the Republic;*
- *warrant issued for the arrest of former FEDECAMARAS President Mr Carlos Fernández and ban on leaving the country imposed on 15 employers' leaders;*
- *serious shortcomings in social dialogue;*
- *interference from the Government in promoting a Confederation of Socialist Entrepreneurs and preferential treatment for the employers' organization*

FEDEINDUSTRIA; privileges granted by the State to social production enterprises; and

- *recent Organic Labour Act for the creation of the Central Planning Commission which would restrict the rights of employers' and workers' organizations and draft act relating to international cooperation.*

- 1525.** *The Committee notes the Government's statements in which it objects: (1) to the fact that in the Committee's conclusions, disrespectful expressions such as "pro-Government mobs" have been used, with the legally and democratically elected Venezuelan system described as a "regime"; (2) to the admittance of allegations that go beyond freedom of association and collective bargaining and impinge on matters of criminal law; (3) to the fact that the allegations are credited with a high degree of credibility, while the Government arguments and evidence are not accorded due validity.*
- 1526.** *In this regard, the Committee points out that the expressions "regime" and "pro-Government mobs" appear in the allegations from the complainant organizations and that the Committee takes no responsibility for them, although it is obliged to transcribe them, just as it also transcribes not entirely complimentary statements from the Government regarding FEDECAMARAS.*
- 1527.** *As to the assessment of the allegations and of the Government's reply, and the suggestion that allegations under examination go beyond the trade union sphere, the Committee wishes to recall that it comprises representatives from the employers', workers' and government sectors and that it adopts its conclusions and recommendations by consensus following extensive deliberations in full compliance with the rules governing its mandate, such that the evidence furnished by the Government was given due consideration at all times.*
- 1528.** *In the Committee's view, its repeated recommendations are due not so much to a problem of recognition of the evidence supplied, but rather to the fact that in practice, the Government does not always furnish sufficiently precise or detailed information and refuses to implement certain recommendations, as will be seen with respect to the allegations concerning social dialogue.*

Social dialogue

- 1529.** *The Committee takes note of the Government's statements concerning previous conclusions in relation to serious shortcomings in social dialogue with FEDECAMARAS. The Committee notes once again the Government's statements to the effect that its social dialogue policy is inclusive and that exclusive rights are granted to it (FEDECAMARAS) without exclusion, discrimination or favouritism, while broad-ranging and inclusive dialogue takes place with workers' and employers' organizations and small and medium-sized enterprises at local, regional and national level. The Committee notes that in its reply, the Government makes frequent reference to the consultations carried out with workers' and employers' organizations. The Committee wishes to point out that the present case relates to shortcomings in social dialogue "with the FEDECAMARAS confederation", as found in its previous examinations of the case, and that the Government's observations lead to confusion, in that it often omits dates, mixes consultations by the Executive in the preparation of draft legislation with those carried out by the Legislative Assembly to discuss draft legislation and, above all, fails to make specific reference to the FEDECAMARAS confederation, instead mentioning "consultations with workers' and employers organizations" in general, "with employers", or "with (all) social partners". The Committee underlines that the complainant organizations make reference principally to the failure of the Executive to consult with*

FEDECAMARAS or to consultations held merely for form's sake and not in good faith, in relation to social and economic policy decisions and the preparation of draft legislation affecting FEDECAMARAS interests (some of which were prepared pursuant to an enabling act authorizing the President of the Republic to hand down decree-laws on economic and social issues).

- 1530.** *Aside from the generic references to consultations with employers' organizations in general, the Committee observes that the Government makes specific reference to consultations with the FEDECAMARAS confederation in 2009 and 2010, where it mentions that it has sent communications to employers' organizations, including FEDECAMARAS, in order to seek their views on minimum wages. Other consultations (invitation to engage in national dialogue or in connection with food and industry) have already been mentioned by the Government and date from some years ago. The Committee already learned some years ago of the consultations with FEDECAMARAS as part of the preparation of the draft Regulation of the Organic Labour Act and the reforms to the Organic Labour Act, as well as consultations with that organization on the food and agri-industry sectors prior to 2009. The Committee welcomes the fact that the Government indicates in its latest replies that the draft reform of the Organic Labour Act may be discussed in the Legislative Assembly and that it will also consult with employers' organizations (press cuttings making reference to participation by FEDECAMARAS representatives in these consultations of the Committee on Social Development of the Assembly are attached). The Government indicates, without going into further detail, that the decree-laws handed down pursuant to the enabling act have been the subject of broad-ranging consultations, including with employers' organizations.*
- 1531.** *The Committee wishes to make very clear that there has been a failure to comply with the duty to consult with the FEDECAMARAS employers' federation if the Executive restricts itself merely to consultations with other employers' organizations, FEDECAMARAS organizations at the subnational level, specific employers' leaders at local, regional or national level or to employers' leaders from large, medium-sized or small enterprises. In this regard, the Government's reply does not expand sufficiently on the question of whether the consultations on the Organic Law on the Working Environment and job protection measures also involved the FEDECAMARAS confederation, nor does it mention the manner in which these consultations might have been conducted.*
- 1532.** *In summary, the Committee finds that in specific terms, the statements by the Government show little in terms of recent consultations between government authorities and the FEDECAMARAS confederation. The Committee wishes to return at this point to the question of the alleged failure to accord due recognition to the evidence invoked by the Government. Firstly, the information furnished by the Government on dialogue and specific consultations with the FEDECAMARAS confederation is confused and indicative of very modest actions. Secondly, the Committee sees once again that the Government has failed to comply with its recommendations, which in principle seem a reasonable means of resolving the problem of the current shortcomings in the area of consultations.*
- 1533.** *As an example, the Committee, in successive examinations of the case and with a view to resolving the problems in question, has made a series of recommendations calling for direct dialogue with FEDECAMARAS on each of the allegations and issues under consideration, to be done via the establishment of a high-level joint national committee in the country with the assistance of the ILO to resolve the problems. Despite this, the Government does not even make reference to the abovementioned recommendation in its reply. The Committee stresses that the Government has also ignored its recommendation to establish a forum for social dialogue in accordance with the principles of the ILO, with a tripartite composition which duly respects the representativeness of workers' and employers' organizations (the Committee even offered ILO technical assistance for this*

purpose). The Committee requested the Government to convene the tripartite commission on minimum wages, as provided for in the Organic Labour Act, and the Government has similarly failed to act on this recommendation.

- 1534.** *In these circumstances, the Committee concludes that the Government's stated willingness to engage in inclusive and non-discriminatory dialogue including the whole social spectrum without distinction at local, regional and national level, has failed to materialize for FEDECAMARAS, the most representative employers' organization. For that reason, it reiterates its recommendations on social dialogue, as it did in its previous examination of the case. Finally, the Committee wishes to make clear that the consultations must take proper account of the representativeness of FEDECAMARAS and the workers' organizations and pay heed to their points of view, since this is the only means of ensuring that society's aspirations and expectations can be realized and that measures, policies and standards in the labour and social spheres are fully satisfactory from a technical standpoint. The Committee requests the Government to ensure, as part of its policy of inclusive dialogue (including within the Legislative Assembly), that FEDECAMARAS is duly consulted in the course of any legislative debate in the Assembly that may affect employer interests, without any discrimination compared to other organizations. The Committee stresses once again that where bills submitted to the Legislative Assembly concern labour-related, social or economic matters affecting the interests of the most representative employers' and workers' organizations, it is important for these organizations to be consulted in advance so that consensual solutions can be found where possible.*

Attacks on FEDECAMARAS headquarters

- 1535.** *As to the Committee's recommendation concerning the attacks on FEDECAMARAS headquarters, the Committee takes note of the Government's statements to the effect that: (1) pursuant to the Venezuelan Constitution of 1999, there exist institutional checks and balances to ensure that public bodies are limited to undertaking only those activities assigned to them by legal order, this being an area where the principle of separation of powers is seen as essential in ensuring and safeguarding citizens' freedom, since power allocated to a series of bodies limits the power held by an individual body; (2) the Attorney-General of the Republic is competent to investigate and follow up these acts and others which may affect or disturb public order; (3) through the actions of this organ of the Venezuelan justice system, the State has carried out all the relevant investigations with a view to shedding light on the events that took place at FEDECAMARAS headquarters and that according to information from the competent prosecutor's office, this case is currently at the investigative stage; (4) according to information from the Common Crimes Department of the Office of the Attorney-General of the Republic, the criminal proceedings pertaining to the events at FEDECAMARAS headquarters, assigned case number C01-F20-0120-08, are being handled by the Offices of the Prosecuting Attorney of the 20th and 70th districts of the Metropolitan Area of Caracas and are currently in the preparatory phase, while arrest warrants have also been issued for Ivonne Gioconda Márquez Burgos and Juan Crisóstomo Montoya González, in order for them to be brought before the jurisdictional court and formally charged; and (5) the police are engaged in an intensive search for the suspects in this case in order to bring them to justice. The Government indicates in this regard that the Committee will be kept informed of progress and the outcome of this case.*
- 1536.** *The Committee regrets to observe that the investigations mentioned by the Government relate solely to one of the attacks against the FEDECAMARAS headquarters and that the two suspects have still not been arrested. The Committee requests the Government to allocate further resources to the Office of the Public Prosecutor and the police to enable the perpetrators of the attacks to be identified, tried and sentenced in line with legislation.*

The Committee stresses that this type of criminal behaviour is likely to generate a climate of fear, which is highly prejudicial to the exercise of the rights of employers and their organizations enshrined in Convention No. 87. In view of the lack of progress in relation to these attacks, the Committee reiterates the recommendations and principles set forth in its previous examination of the case and once again requests that further light also be shed on the attacks on FEDECAMARAS headquarters of May and November 2007 and February 2008 (the latter involving a bomb). The Committee expresses its deep concern at this series of attacks and observes that they have effectively resulted in a situation of impunity that is incompatible with the provisions of Convention No. 87.

Warrant for the arrest of the former president of FEDECAMARAS

- 1537.** *As to the recommendation concerning the warrant for the arrest of the former president of FEDECAMARAS, Mr Carlos Fernández, the Committee wishes to point out to the Government that the substance of this matter has already been examined by the Committee and that the information furnished by the Government was taken into account when it was concluded that the arrest of this employers' leader was related to his activities as an employers' leader, in connection with a long nationwide strike and a general strike. Furthermore, as reported by the Government, this leader was arrested, with the Court of Appeal subsequently handing down a ruling on 20 March 2003 releasing the abovementioned citizen (who left the country) and withdrawing the charges against him. Following this decision, Ms Luisa Ortega Díaz, at that time the Sixth Prosecuting Attorney of the Office of the Public Prosecutor, lodged an amparo appeal with the Constitutional Chamber of the Supreme Court of Justice, which handed down a ruling ordering that Mr Carlos Fernández be placed once again under house arrest. The Committee recalls that Mr Carlos Fernández left the country following the ruling withdrawing the charges against him. The Committee reiterates its recommendations seeking to ensure that Mr Carlos Fernández be allowed to return to the country without the risk of reprisals.*
- 1538.** *As to the alleged ban on leaving the country imposed on 15 employers' leaders, the Committee takes note of the Government's statement to the effect that the complainants have failed to supply adequate information or grounds to determine whether these alleged acts indeed took place. The Committee is therefore asked to request the complainants to furnish the evidence necessary to enable the Government to reply in relation to this allegation. The Government indicates that it has not prevented, nor will ever prevent any person from leaving the country, since it is the responsibility of the criminal justice system to decide whether to impose a ban on leaving the country, through a judicial measure and in accordance with the appropriate procedure. The Committee invites the complainant organizations to provide additional information concerning their allegations.*

Violations of the property of employers' leaders and harassment of employers' leaders

- 1539.** *As to the recommendations concerning violations of private property suffered by employers' leaders in the agriculture and livestock sectors, who were victims of invasions, land confiscation or expropriation, sometimes even without fair compensation, the Committee takes note of the Government's statements and of its measures to bring about agrarian reform and eliminate the system of large estates. More specifically, the Committee notes that in connection with the alleged measures taken against the employers' leaders, Mr Mario José Oropeza and Mr Luis Bernardo Meléndez, as well as the alleged abduction of three sugar producers in 2006, the Government indicates that according to information from the INTI of the Ministry of Popular Power for Agriculture and Land, no administrative proceedings have been brought in relation to acts that might*

compromise the personal safety of sugar producers, nor do there exist expropriation procedures for public, social or other purposes in which the abovementioned citizens were involved. However, the Government indicates that Mr Mario José Oropeza has lodged an application for the right to remain on his land with the Directorate of the Institute, and that this is pending discussion and approval; (2) as to the alleged deaths of six producers following attacks, as alleged by the complainants, the national Government reports that it is unable to offer an appropriate reply in view of the lack of documentation and information; (3) confiscation of land or any other property does not take place and is not permitted in the Bolivarian Republic of Venezuela and that as to the allegations of farm invasions and other attacks that the complainants claim to have been suffered by various employers' leaders in the agriculture and livestock sector, such claims are groundless given that no information or evidence of such events has been supplied; and (4) in the event of a violation of their rights, the affected parties must bring their grievances before the competent body for settlement and remedy of the infringed right. In these circumstances, the Committee invites the complainant organizations to supply further details of the alleged violence against producers.

1540. *In addition, the Committee takes note of the allegations of the IOE concerning: (1) the confiscation of the "La Bureche" farm property belonging to Mr Eduardo Gómez Sigala (the director of FEDECAMARAS and former chairman of the Caracas Chamber of Commerce, the Venezuelan Chamber of Food, as well as the CONINDUSTRIA confederation) by officials of the INTI accompanied by military personnel as part of an operation to confiscate 2,500 hectares of agricultural land in the Río Turbio Valley, in the course of which they destroyed 18 hectares of sugar cane due to be harvested in two months (the farm totals 29 hectares, of which six are pasture and two contain housing for the family, employees and some animals); and (2) the arrest of Mr Gómez Sigala and his transfer to the Barquisimeto Infantry Brigade before being brought before the Office of the Fifth Prosecuting Attorney of Lara State. According to the IOE, the Office of the Public Prosecutor, giving grounds for his detention, charged him with violence and resisting authority. The next day, the employers' leader was released on bail, with the obligation to appear before the Court or the Office of the Public Prosecutor whenever summoned or as required by the investigation.*

1541. *The Committee takes note of the statements by the Government, to the effect that: (1) confiscation of property or land does not take place in the Bolivarian Republic of Venezuela and is forbidden, and the facts mentioned in the complaint relate to a programme of land and property recovery on the grounds that the land was idle, non-productive or in illegal use; the Land Act provides for the elimination of the system of large land estates and the Government has taken the measures necessary to do away fully with this regime; the Land Act has as one of its core principles the safeguarding and protection of food security and sovereignty; (2) in relation to the land in the Río Turbio Valley, which for many years comprised large estates, which are prohibited by law and by the majority of the world's jurisdictions, the INTI granted a one-year grace period to allow the self-proclaimed owners of the land to prove their ownership; (3) in the absence of title deeds and given that the majority of this land fell below the productivity thresholds laid down in legislation or was being inappropriately used, the decision was taken to initiate the process of land recovery and thereby promote development of the agricultural sector and safeguard the interests of society; (4) with regard to the situation of Mr Eduardo Gómez Sigala, in the course of the valid legal procedure carried out at a number of properties in the Río Turbio Valley, officials from the INTI and National Guard personnel encountered difficulties with this individual. According to notes taken during this procedure, the abovementioned citizen assaulted a member of the military, who suffered a dislocated shoulder. The injured person was, along with other personnel, carrying out his job of accompanying INTI officials and ensuring public order. In line with the appropriate established legal procedures, the Office of the Public Prosecutor subsequently charged*

Mr Eduardo Gómez Sigala, who had been apprehended in flagrante delicto, with committing the offences of minor bodily harm and resisting authority, pursuant to articles 418 and 216, respectively, of the Venezuelan Penal Code. The case was handled by the Fifth Prosecuting Attorney of Lara State, who brought the employers' leader before Supervisory Court No. 8 of that particular jurisdiction. The court authorized ordinary proceedings and granted bail, pursuant to article 256 of the Organic Code of Penal Process. As a result, Mr Gómez Sigala is required to appear before Supervisory Court No. 8 or at the headquarters of the Office of the Public Prosecutor whenever summoned and as required by the investigation currently being carried out by the abovementioned Prosecuting Attorney of Lara State; and (5) in light of the above, it can be seen that the right to due process was fully guaranteed throughout the investigation and legal proceedings, and that these do not constitute "personal harassment".

- 1542.** *The Committee observes that while the law does provide for the recovery of land or property on the basis that it is idle, non-productive or in illegal use, and that the Land Act provides for the elimination of large land estates (associated in the legislation to an "appropriate" yield of less than 80 per cent), the Government has failed to make any reference to the statement by the IOE concerning the size of the farm owned by employers' leader Mr Eduardo Gómez Sigala (25 hectares, which can hardly be considered a "large estate" in a country the size of the Bolivarian Republic of Venezuela), or to the fact that far from being non-productive or idle, the farm in question had 18 hectares of sugar cane about to be harvested, six hectares of pasture and space for family and employee dwellings. Nor has the Government replied to the allegation that these 18 hectares of land were destroyed by the authorities. In these circumstances, and given that an important employers' leader within the country was concerned, the Committee cannot discount the possibility that the so-called "land recovery measures" to which he was subjected may have been motivated by his status as an employers' leader. The Committee underlines that such measures can have an intimidating effect on employers' leaders and their organizations and limit the free exercise of their activities, in violation of Article 3 of Convention No. 87. The Committee considers in any event that this land recovery has not been proven to be in line with the substance of the legislation and requests the Government to return the "La Bureche" farm property to the employers' leader Mr Eduardo Gómez Sigala without delay and to compensate him fully for all losses sustained as a result of the intervention by the authorities.*
- 1543.** *The Committee notes the Government's statements to the effect that Mr Gómez Sigala was arrested for attacking a member of the military, who suffered a dislocated shoulder and who was, along with other personnel, carrying out his job of accompanying officials of the INTI and ensuring public order. According to the Government, the Office of the Public Prosecutor charged Mr Eduardo Gómez Sigala with the offences of minor bodily harm and resisting authority and the judicial authority handed down precautionary measures (bail, according to the IOE) requiring him to appear before the court or at the headquarters of the Office of the Public Prosecutor when required.*
- 1544.** *The Committee does not have a detailed list of the charges against Mr Gómez Sigala, nor of the context and circumstances in which the events took place, and requests the complainant organizations and the Government to provide additional information in this regard.*
- 1545.** *As to the alleged harassment of employers' leaders through speeches given by the President of the Republic and the alleged threat to confiscate property on grounds of social interest, the Committee notes that according to the Government's statement, the President of the Republic has, on countless occasions, demonstrated and reiterated his openness to dialogue with all social partners, particularly the employers' sector. This is also the position of the organs and authorities of the Government currently in office, all of*

which gives little credence to this entirely groundless allegation. The Committee invites the complainant organizations to supply additional information concerning their allegations.

Allegations concerning the discriminatory application of certain laws

- 1546.** *As to allegations concerning legislation on labour solvency, the Government explains that with a view to seeking methods or tools to guarantee the effective application of workers' rights, including protection against dismissal, the UNT tabled the proposal for the Labour Solvency Decree in early 2004. The Government adds that labour solvency is not, nor has ever been, intended to jeopardize the economic development of enterprises or trade, let alone to limit the production and sale of goods and services.*
- 1547.** *The Committee notes that according to the Government, labour solvency is an administrative document issued by the Ministry of Popular Power for Labour and Social Security certifying that the employer is properly respecting the human, labour and social rights of his or her workers. It is a prerequisite for any employer wishing to conclude contracts or agreements with the State in the areas of finance, economy, technology, international trade and in the foreign exchange market. The Government adds that this document can be obtained via a quick automated procedure on the Ministry's web site, www.mintra.gob.ve, which contains requirements and other information users will need when filing their application. The employers must sign up to the National Register of Enterprises and Establishments via the appropriate web page and must submit a set of documents concerning their enterprise. Once the request has been filed and the requirements met, the Ministry, via the relevant authorities, processes that request within just five working days. The employer can then collect the solvency document at the labour inspectorate of his or her legal domicile.*
- 1548.** *The Committee notes also that according to the Government, as part of the streamlining of formalities within the CADIVI for the acquisition of capital, the solvency document is not required for a currency application, since verification of that document takes place after the application process, the aim of this being to speed up the process of currency applications and issuance.*
- 1549.** *The Committee notes that according to statistics from the National Register of Enterprises and Establishments and Labour Solvency of the Ministry of Popular Power for Labour and Social Security, a total of 220,227 enterprises nationwide had registered between its creation on 29 March 2006 and 31 March 2009. The total number of labour solvencies processed during 2008 was 345,688, of which 334,228 applicants, or 97 per cent, were solvent. So far in 2009, 101,177 have been processed, of which 98,677 applicants, or 98 per cent, were solvent.*
- 1550.** *As to the alleged presence within the CONSEVEN of two prominent government figures, as well as the preferential treatment given to FEDEINDUSTRIA in relation to procedures for obtaining foreign currency, the Committee notes the Government's statement to the effect that: (1) under no circumstances does the national Government promote or intervene in the formation or operation of these organizations, let alone apply any kind of favouritism or interference in relation to any organization; and (2) there are no officials with any government role among the leaders of the Confederation of Socialist Entrepreneurs of Venezuela, and certainly no officials with customs or taxation responsibilities.*
- 1551.** *As to the alleged preferential treatment accorded to FEDEINDUSTRIA in relation to the procedure for obtaining foreign currency, the Government reports that: (1) the procedure is the same for all enterprises and operates via an automated system accessible through the www.cadivi.gob.ve web site, which provides information and sets out the necessary*

requirements for obtaining currency without any kind of discrimination. This foreign currency administration mechanism has helped to address market fragility and volatility and combat the effects of the global crisis without impacting on employment figures and workers' wages; (2) any enterprises importing these essential products or irreplaceable supplies required by the country are given priority in obtaining foreign currency; (3) in addition, enterprises importing certain types of goods and duly authorized by the Ministry of Popular Power for Food have available the "payment at sight" procedure. One of the advantages of this system is a significant reduction in the time taken to authorize foreign currency and, with cash in hand, it is possible to obtain more favourable conditions for international market access, since the consignment is totally or partially paid for prior to nationalization of the goods; (4) Decree No. 6168 of 17 June 2008, published in Official Gazette No. 38958 of 23 June 2008, set up a further mechanism to streamline the acquisition of foreign currency for the import of capital goods, supplies and raw materials by the country's manufacturing and processing sector. This measure specifically involves an exemption from fulfilling CADIVI requirements for enterprises applying for \$50,000 in currency or less in order to import capital goods, machinery, parts or production materials; (5) many of the mechanisms and alternatives used to facilitate and streamline the process of obtaining foreign currency were the result of meetings and consultation between CADIVI authorities and representatives of the various employers' and manufacturers' organizations; and (6) this treatment is available not solely to the enterprises or industries within FEDECAMARAS, but also to any others requiring small sums of foreign currency for their imports. The Committee takes note of this information. The Committee believes that the procedure for acquiring foreign currency could potentially be used in a discriminatory fashion, as indicated by the complainants, and requests the Government to discuss this matter with FEDECAMARAS with a view to allaying any concerns and guaranteeing that legislation is not applied on a discriminatory basis.

- 1552.** *As to the alleged privileges granted by the State to social production enterprises, the Committee notes that according to the Government's explanation, these are simply "economic entities dedicated to the production of goods and services in which work is accorded its own, unalienable and genuine value, where there is no workplace social discrimination of any kind, where there are no workplace privileges connected to rank, and where there is genuine equality between workers. They are based on participatory planning and are either state-owned, in collective ownership or a combination of the two".*
- 1553.** *According to the Government, the organization of workers into social production enterprises is the key to becoming a popular, community-based and productive economy whose aim is to produce the goods and services necessary to satisfy the basic needs of the whole populace, and it is for that reason that such enterprises are promoted by the Government. However, the legal status of these enterprises is simply that of a public limited company. In other words, from a legal perspective, there has been no change in their structure; rather, their production and distribution methods, social aims and purpose have been transformed.*
- 1554.** *The Committee notes the Government's affirmation of its impartial and fair treatment of each and every employers' and workers' organization in the country, with no specific organization being accorded preferential treatment in the past, present or future, since this would be nothing short of a discriminatory action with no place in the Bolivarian Republic of Venezuela, which is governed by the rule of law, justice and equity. The Government states that it is unclear as to what the complainants are referring to in their allegations of privileges granted by the Venezuelan State to these social production enterprises. The Committee observes that the complainant organizations have not furnished the information requested concerning social production enterprises.*

1555. *In addition, the Committee requests the Government to inform it as to progress in the adoption of the draft act on international cooperation (which, according to the Government, is passing the second reading before the Legislative Assembly), the final version of which it trusts will contain provisions on rapid action in the event of discrimination. As to the allegation that the Organic Law establishing the Central Planning Commission restricts the rights of employers' and workers' organizations, the Committee notes the Government's statement to the effect that it exists with the purpose of coordinating, consolidating, monitoring and permanently evaluating strategies, policies and plans, as per the provisions of the National Economic and Social Development Plan, and that it represents a step forward compared to, inter alia, the provisions of the Organic Laws Public Administration and Planning. It is noted that the Central Planning Commission works to ensure that organs and entities of the public administration act in a harmonized and appropriate manner, in line with national development in compliance with the human rights enshrined in the Constitution of the Bolivarian Republic of Venezuela.*

1556. *The Committee invites the complainant organizations to supply additional information concerning the allegations of discrimination in relation to the abovementioned law.*

The Committee's recommendations

1557. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee reiterates its previous recommendations concerning social dialogue. Specifically:*
- *Deeply deploring that the Government has ignored its recommendations, the Committee urges the Government to establish a high-level joint national committee in the country with the assistance of the ILO, to examine each and every one of the allegations and issues in this case so that the problems can be solved through direct dialogue. The Committee trusts that the Government will not postpone the adoption of the necessary measures any further and urges the Government to keep it informed in this regard.*
 - *The Committee expects that a forum for social dialogue will be established in accordance with the principles of the ILO, having a tripartite composition which duly respects the representativeness of workers' and employers' organizations. The Committee requests the Government to keep it informed in this regard and invites it to request technical assistance from the ILO. The Committee also requests it once again to convene the tripartite commission on minimum wages provided for in the Organic Labour Act.*
 - *Observing that there are still no structured bodies for tripartite social dialogue, the Committee emphasizes once more the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights and that it is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by detailed consultations with the most representative independent workers' and employers' organizations. The Committee once again requests the Government to ensure that any legislation concerning labour, social and economic issues adopted in the context of the Enabling Act be first subject to genuine, in-depth consultations with the most representative independent employers' and workers' organizations, while endeavouring to find shared solutions wherever possible.*

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- *The Committee requests the Government to keep it informed with regard to social dialogue and any bipartite or tripartite consultations in sectors other than food and agriculture, and also with regard to social dialogue with FEDECAMARAS and its regional structures in connection with the various sectors of activity, the formulation of economic and social policy and the drafting of laws which affect the interests of the employers and their organizations.*
- (b) *The Committee requests the Government to ensure that as part of its policy of inclusive dialogue (including within the Legislative Assembly), FEDECAMARAS is duly consulted in the course of any legislative debate that may affect employer interests, in a manner commensurate with its level of representativeness.*
- (c) *The Committee observes that the two suspects wanted for the bomb attack on the FEDECAMARAS headquarters (28 February 2008) have still not been arrested despite the time that has elapsed. The Committee reiterates its previous recommendations and expresses its deep concern at the fact that the case relating to this attack has still not been resolved. The Committee requests the Government to take measures to step up the investigations, ensure that they are independent, clarify the facts, arrest the perpetrators and impose severe penalties on them to prevent any recurrence of such crimes. The Committee requests the Government also to step up the investigations into the attacks on the FEDECAMARAS headquarters which occurred in May and November 2007, and conclude those investigations as a matter of urgency. The Committee requests the Government to keep it informed in this respect. The Committee again deeply deplores these attacks and recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence. The Committee expresses its deep concern at this series of attacks and observes that they have effectively resulted in a situation of impunity that is incompatible with the provisions of Convention No. 87.*
- (d) *The Committee once again requests the Government to revoke the warrant for the arrest of former FEDECAMARAS President Mr Carlos Fernández, so that he may return to the country without risk of reprisals.*
- (e) *The Committee invites the complainant organizations to supply further details concerning the alleged deaths of six producers and the abduction of three sugar producers in 2006.*
- (f) *The Committee requests the Government to return the “La Bureche” farm property to the employers' leader Mr Eduardo Gómez Sigala without delay and to compensate him fully for all losses sustained as a result of the intervention by the authorities in the course of the property seizure. The Committee requests the complainant organizations and the Government to provide a detailed account of the charges against Mr Gómez Sigala, including the context and circumstances in which the events took place.*
- (g) *The Committee requests the Government to discuss with FEDECAMARAS issues relating to the application of legislation on “labour solvency” and the acquisition of foreign currency, with a view to allaying any concerns and guaranteeing that legislation is not applied on a discriminatory basis.*
- (h) *The Committee requests the Government to inform it as to progress in the adoption of the draft act on international cooperation (which is currently passing the second reading before the Legislative Assembly), the final version of which it trusts will contain provisions on rapid action in the event of discrimination.*

- (i) *The Committee invites the complainant organizations to supply additional information concerning their allegations of discrimination in relation to the Organic Labour Act establishing the Central Planning Commission and harassment of employers' leaders through speeches given by the President of the Republic.*
- (j) *The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2422

INTERIM REPORT

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

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

- 1558.** The Committee examined this case at its March 2009 meeting and submitted an interim report to the Governing Body [see 353rd Report, paras 1339–1427, approved by the Governing Body at its 304th Session (March 2009)].
- 1559.** The Government sent new observations in communications dated 25 February and 12 May 2009 and 1 and 8 March 2010.
- 1560.** 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

- 1561.** In its previous examination of the case at its March 2009 meeting, the Committee made the following recommendations on the pending issues [see 353rd Report, para. 1427]:
- (a) The Committee deeply regrets the lack of cooperation by the Government with respect to procedures, in view of the Government's disregard for the specific requests for information addressed to it by the Committee in its previous examination of the case and observes that the issues raised by the complainant are still unresolved and in some respects have worsened.

- (b) The Committee urges the health sector authorities to open a constructive dialogue with SUNEP–SAS to resolve the issues raised in the present case and to keep it informed in this regard.
- (c) Repeating its previous recommendations, the Committee emphasizes once again the seriousness of the allegations and urges the Government to stop the acts of discrimination against SUNEP–SAS and its officials, to guarantee its rights to trade union leave and to collective bargaining and to ensure that its trade union premises are not confiscated and that its officials are not dismissed or prejudiced for reasons relating to the exercise of their trade union rights (union official Yuri Girardot Salas Moreno has been dismissed; dismissal proceedings are currently under way against union officials Francisco Atagua, Nieves Paz, Arminda Mejías and Thamara Tovar; and the pay of 11 officials of the Miranda section of the complainant trade union has been illegally suspended). The Committee again urges the Government to keep it informed without delay in this regard.
- (d) The Committee requests the Government to send the decision on the dismissal of trade union official Yuri Girardot Salas Moreno, specifying the grounds for dismissal, and the outcome of the appeal for review lodged with the Ministry of Health, so that it can examine the case in full knowledge of the facts.
- (e) The Committee urges the Government to send a detailed reply without delay with respect to the allegations presented by the complainant on 10 August 2007 and 17 April and 14 October 2008, particularly the following:
- dismissals, dismissal proceedings against union officials (including María Tortoza and Jesús Alberto Verdu), non-payment of outstanding wages, refusal to grant union leave;
 - the refusal by the authorities to accept the amendments to the SUNEP–SAS statutes and the union’s financial management report for 2007;
 - the persistent refusal by the health authorities to engage in collective bargaining with SUNEP–SAS, the authorities’ failure to reply to the union’s request to subscribe to the “labour standards agreement” (sectoral collective bargaining) requested by a health federation and the refusal to appoint a representative for the negotiations concerning the draft model agreement presented by another federation; and
 - the failure to pay SUNEP–SAS the funding due for its social and education programmes for 2008, unlike in previous years.

B. New reply from the Government

1562. In its communications of 25 February 2009 and 1 and 8 March 2010, the Government states, referring to the allegation that the authorities did not accept the financial management report of the Single National Union of Public, Professional, Technical and Administrative Employees of the Ministry of Health and Social Development (SUNEP–SAS) for 2006–07, that the labour administration issued its rulings in the established form and time frame and in compliance with the established requirements. The trade union organization SUNEP–SAS did not comply with the observations made by the competent inspectorate concerning the collections of financial statements and the failure to comply with public order provisions contained in articles 430, 431, 432 and 441 of the Organic Labour Act relating to the registration and operation of trade union organizations.

1563. The Government points out that it is the obligation of the labour administration to maintain legal order and to safeguard the rights of individuals. As such, this administrative body is obliged to ensure effective compliance with the law, and its actions in the case at hand were limited to the legislation that regulates the subject. Based on this reasoning, the Government requests the Committee to set aside this allegation as the rights invoked by the complainants were certainly not infringed upon. The State – through the actions of the labour administration – guaranteed a procedure that takes due account of the interests of

the organization and the regulations governing the subject in the Bolivarian Republic of Venezuela.

1564. As to the alleged refusal by the health authorities to engage in collective bargaining with SUNEP-SAS, the Government states that the organization presented a list of demands to the national inspectorate on 8 May 2008. The national inspectorate substantiated that application in accordance with the provisions of articles 170, 171 and 172 of the regulations of the Organic Labour Act. In accordance with the provisions of article 170, it duly made observations and requested the collective trade union to rectify certain omissions. Once the deadline for rectification had elapsed, and in view of the organization's failure to do so, in compliance with article 172 of the aforementioned Act, the labour inspectorate declared the dispute procedure closed, as well as all its derived effects. The organization lodged a hierarchical appeal against this decision, about which the Committee on Freedom of Association will be duly informed.

1565. In this context, and taking up the point concerning the request to subscribe to the extension of the labour standards agreement that governs working conditions in the health sector, the Government states that it reiterates the information provided previously concerning the status of the SUNEP-SAS: the last election of its executive committee was held on 30 November 2004 and its period of office was between 2004 and 2007, in accordance with the provisions of article 24 of its own statutes. To date it has not submitted, to the competent labour administration authority, information to demonstrate that the corresponding electoral process has taken place, and for this reason the members of the executive committee are in a situation of overdue elections. Given this situation, reference should be made to the content of article 128 of the regulations of the Organic Labour Act, which establishes that the members of the executive committees of trade union organizations, whose period of office has expired, may not engage in, conduct or represent, the trade union in acts that go beyond simple administration, namely:

Article 128. Trade union elections. Expiry period. Trade union organizations are entitled to conduct their electoral processes, without any other limitations than those established in their statutes and by law. The members of the executive committees of trade union organizations whose period of office has expired, in accordance with the provisions of articles 434 and 435 of the Organic Labour Act and in their statutes, may not engage in, conduct or represent the trade union in legal acts that go beyond simple administration.

Based on all the above, the Government requests that the allegation made by the complainant be set aside, as it is unfounded.

1566. The Government adds that the action taken by the National Electoral Council (CNE) is in keeping with the voluntary request for technical advice and logistical support formulated by the workers' organizations. The CNE has dealt with the requests formulated by the SUNEP-SAS by providing a timely response in conformity with national legislation.

1567. With respect to the allegations relating to the problem of trade union leave and to that of contractual debt, the Government reiterates that the State of the Bolivarian Republic of Venezuela guarantees the effective exercise of the right to freedom of association, in both the individual and collective spheres. In the event of a possible infringement of these rights, individuals should apply to the corresponding administrative and judicial authorities using the procedures established for such action.

1568. However, the Government goes on to say that, in this case, there is insufficient documentation to be able to determine which workers have been affected in the exercise of this right. The complainants have only produced internal communications that are neither sufficient nor relevant for assessing whether the competent state authorities were aware of this situation and did not act in defence of this right.

- 1569.** Despite the above, with goodwill and in a spirit of cooperation, and in compliance with the commitments of the State of the Bolivarian Republic of Venezuela before the ILO, the Government notes that it continues to take account of the attention being paid by the Committee to the arguments of this trade union, as all its petitions have been attended to in due respect for the applicable deadlines and procedures set forth in internal legislation and in international conventions and agreements acceded to and ratified by the Bolivarian Republic of Venezuela that regulate the subject. In this specific case, reference should be made to the documentation submitted by the complainants, which demonstrates the appropriate, timely and legal conduct of the labour administration; accordingly the Government requests that these allegations be set aside for lack of legal foundation.
- 1570.** In its communications of 12 May 2009 and 1 and 8 March 2010, the Government states that the citizens Yuri Girardot Salas Moreno, Francisco Atagua, María Tortoza, Jesús Alberto Verdu, Nieves Paz, Arminda Mejías and Thamara Tovar are currently working, as the proceedings previously lodged have been ruled on and settled in their favour. The alleged situations relating to the renewal of trade union leave and the suspension of wages have also been resolved. The Government indicates that both situations have been settled. Once the proceedings established by law were concluded, the trade union leave was renewed and all the corresponding outstanding remuneration was paid. Consequently, there are currently no proceedings pending, nor measures affecting the working conditions of these workers. The Government believes that the grant of union leave bears no relation to the situation of overdue elections of the executive committee of this trade union. Union leave is a right of trade unionists arising from the collective agreement to carry out their trade union activities in or outside the enterprise. However, to be able to represent workers in the negotiation of collective agreements, it is required that the period for which the executive committee of a union was elected is still in force.
- 1571.** Concerning the alleged refusal by the authorities to accept the amendments to the SUNEP–SAS statutes and the union’s financial management report, the Government reiterates that the Department of National Inspection and Collective Labour Issues for the Public Sector responded to the application made by this organization, complying with the due procedures, during which time the trade union organization did not observe the labour inspector’s recommendations, and consequently its request was found to be inadmissible and the proceedings were concluded on 15 September 2008 (documentation is attached).
- 1572.** In view of the above, the Government asks for the case to be closed, as the alleged issues have been examined in accordance with the procedures legally established in national regulations and in international agreements, and the trade union’s applications have been responded to in a timely manner in accordance with the law.

C. The Committee’s conclusions

- 1573.** *The Committee notes with interest the Government’s statements to the effect that the trade unionists Yuri Girardot Salas Moreno (who had been dismissed), Francisco Atagua, María Tortoza, Jesús Alberto Verdu, Nieves Paz, Arminda Mejías and Thamara Tovar (whose dismissal process had begun) are currently working, since the proceedings they had initiated were settled in their favour. The Committee also notes with interest that the allegations relating to the trade union leave and to the suspension of trade unionists’ wages have been settled following the conclusion of the proceedings initiated by those concerned, and that the leave in question has been renewed and the remuneration owed paid.*
- 1574.** *Concerning the alleged refusal by the authorities to accept the amendments to the SUNEP–SAS statutes and the union’s financial management report for 2006–07, the Committee notes the Government’s statement that it happened because the trade union did*

not comply with the labour inspector's recommendations requiring respect for articles 430, 431, 432 and 441 of the Organic Labour Act (the Government attached the administrative decisions). The Committee invites the complainant organization to rectify, in form and in substance, the points signalled by the administrative authority and requests the Government, once that rectification is accomplished, to fully comply without delay, with the principle of non-interference by the authorities in trade union affairs and, in particular, with the right of negotiations to draw up their by-laws.

1575. *As to the allegation concerning the refusal by the authorities to engage in collective bargaining with SUNEP-SAS, the authorities' failure to reply to the union's request to subscribe to the "labour standards agreement" (sectoral collective bargaining for the health sector) and the refusal to appoint a representative for the negotiations concerning the draft framework collective agreement presented by another federation, the Committee recalls that, during its previous examination of the case, it urged the health sector authorities to open a constructive dialogue with SUNEP-SAS and to keep it informed in this regard.*

1576. *On these matters, the Committee notes with regret that the Government does not provide information about any activity to promote dialogue or collective bargaining with SUNEP-SAS. The Committee notes that the Government limits itself to stating that SUNEP-SAS presented a list of demands on 8 May 2008 and that the labour inspectorate made observations and requested the rectification of certain omissions, which was not done within the legal deadline and therefore the Labour Inspectorate declared the procedure closed. The Committee also notes the Government's statement that SUNEP-SAS lodged a hierarchical appeal and that it will inform the Committee of the result. Lastly, the Committee notes the Government's statement that the refusal for SUNEP-SAS to subscribe to the "labour standards agreement that governs working conditions in the health sector" (sectoral collective bargaining) is because the executive committee of SUNEP-SAS is in a situation of overdue elections as its last elections were held on 30 November 2004 (with the executive committee therefore reaching the end of its term on 30 November 2007) and to date there has been no documentation to show that further elections have been held.*

1577. *The Committee highlights certain ambiguities or contradictions in the Government's reply. The Committee observes, on the one hand, the Government's statement that it refused to allow SUNEP-SAS to subscribe to the "labour standards agreement that governs working conditions in the health sector" (sectoral collective bargaining) because the executive committee of SUNEP-SAS is in a situation of overdue elections as its last elections were held in 2004, with the executive committee therefore reaching the end of its term on 30 November 2007 and, on the other hand, its statement that while it initially cancelled the trade union leave of the officials, it has latterly recognized it again. The Committee observes that on another occasion the authorities made observations on the list of demands submitted by SUNEP-SAS on 8 May 2008, requesting the rectification of certain omissions, which – according to the Government – was not done, which is why the labour inspectorate declared the procedure closed. Consequently SUNEP-SAS lodged a hierarchical (administrative) appeal, which, it would appear from the Government's reply, is still pending. Lastly, the Committee observes that the Government has made no reference to the alleged refusal by the authorities to appoint a SUNEP-SAS representative for the negotiations concerning the draft framework collective agreement introduced by another federation.*

1578. *The Committee deeply deplores the fact that the Government has not complied with its previous recommendation that the health sector authorities open a constructive dialogue with SUNEP-SAS to resolve the issues relating to the refusal to bargain collectively with this organization. The Committee regrets that the Government is invoking "overdue elections" and recalls that in earlier examinations of the case it strongly criticized the*

interference of the National Electoral Council (which is not a judicial authority) in the elections of the executive committee of SUNEP–SAS in 2004 (the executive committee was recognized years later, following various appeals and after having lost the possibility of bargaining collectively); it also regrets the excessive delay in the processing of the appeals lodged [see 342nd Report, paras 1034 et seq. and 348th Report, paras 1344 et seq.].

- 1579.** *The Committee observes that the Government invokes another alleged electoral delay since 2007 in order not to recognize the executive body of SUNEP–SAS. The Committee urges the Government to take measures to ensure that the labour authorities and the National Electoral Council stop interfering in the internal affairs of SUNEP–SAS, such as the elections of its executive committee (the Committee recalls that both it and the Committee of Experts and the Committee on the Application of Standards have, on several occasions, criticized the role and actions of the National Electoral Council and have asked it not to intervene in the elections of trade union executive committees), and to guarantee that the right to bargain collectively of this trade union is upheld, without discriminating against it in respect of other organizations. The Committee stresses that the Government cannot invoke an allegedly voluntary resort to the CNE, whereas in practice it is the body supervising union elections, without the endorsement of which the union executive committees are considered invalid. The Committee requests the Government to keep it informed in this regard.*
- 1580.** *Finally, the Committee requests the Government to indicate whether it has implemented the Committee's previous recommendations to guarantee that SUNEP–SAS does not have its trade union premises confiscated, and requests a detailed reply to the allegation concerning the failure to pay SUNEP–SAS the funding due for its social and education programmes for 2008, unlike in previous years (the Government restricted itself to stating that SUNEP–SAS can lodge appeals before the authorities, but did not indicate the reasons for the failure to pay).*

The Committee's recommendations

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

CASE NO. 2674

INTERIM REPORT

Complaint against the Government of the Bolivarian Republic of Venezuela
presented by
the Venezuelan Workers' Confederation (CTV)

Allegations: Obstacles to collective bargaining with public sector trade unions belonging to the CTV and actions by the authorities to expropriate various trade union federations belonging to the CTV or deprive them of their premises

1582. The complaint is contained in communications from the Venezuelan Workers' Confederation (CTV) of 25 July 2008. The Government sent its observations in communications dated 9 March and 12 May 2009 and 8 March 2010.

1583. The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

1584. In its communications of 25 July 2008, the CTV alleges that the Government has refused to negotiate collective agreements in various branches of the public sector.

1585. The Venezuelan Teachers' Federation (FVM) submitted a draft collective agreement to the Ministry of Labour on 21 March 2006, to be negotiated with the Ministry of Education. This agreement provides protection for more than 200,000 educators, but it has not yet been possible to begin negotiations as the Ministry of Labour has not issued the necessary convocation.

1586. In addition, the collective agreement for workers in the national public administration expired in 2002. The National Federation of Public Employees (FEDEUNEP) submitted its last draft in February 2007, but negotiations have not yet begun because the Ministry of Labour refuses to issue the necessary convocation.

1587. The Federation of Health Workers (FETRASALUD) has been denied the right to participate in collective bargaining in its sector since 2000.

1588. The above trade unions belong to the CTV. They have all been denied the right to negotiate collective labour agreements, with negative consequences for thousands of state workers. The national Government, in outright violation of the ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98), is denying these trade unions any interlocution and attempting to fix working conditions unilaterally.

1589. Furthermore, the CTV alleges that, on 5 May 2005, the house that serves as headquarters for the Falcón State Federation of Workers (FETRAFALCON) was forcibly expropriated by the regional government. At the time when this occurred, 26 unions belonged to the

organization, altogether representing some 15,000 workers. The organization was made to accept an indemnity payment, although this has not yet been paid in full.

- 1590.** In addition, on 3 April 2006, a group of people linked to the national Government seized the headquarters of the Mérida State Federation of Workers (FETRAMERIDA), and since then, with Government support, has continued to occupy it, preventing its legitimate users from utilizing it. At the time when this occurred, 34 unions belonged to the organization, altogether representing more than 15,000 workers.
- 1591.** The CTV adds that, on 26 March 2007, the building that served as headquarters for the Miranda State Federation of Workers (FETRAMIRANDA) was seized by court order, at the instigation of the regional government, and then, on 26 March 2008, the unions were evicted from their offices, which were “taken” by government supporters belonging to official units known as “missions”. FETRAMIRANDA brings together 95 unions that occupy premises in the Federation building.
- 1592.** On 8 October 2007, the offices of the Trujillo State Federation of Workers (FETRATRUJILLO) were subjected to an eviction order, issued by a judge, at the instigation of the national Government. Some 30 unions, representing more than 10,000 workers, pursued their daily activities at these offices. This was an unconstitutional judicial seizure, with an acting judge entirely abusing his authority and with support from the security forces, pickets, national guard and national police in this invalid and illegal act committed by an acting judge, despite requests to prevent it and appeals to the appropriate legal authorities. The buildings are currently in a considerable state of disrepair.
- 1593.** The Unified Federation of Workers of the Federal District (FUTDF) and the Carabobo State Federation of Workers (FETRACARABOBO), the largest regional organizations in the country, have also been evicted from their offices.
- 1594.** All the above union organizations are CTV members and there can be no doubt that the object of these arbitrary measures, some by the national Government and others by the relevant regional governors, is to destroy the CTV.
- 1595.** According to the allegations, the incidents described are severely damaging to the principles of freedom of association enshrined in Convention No. 87 and demonstrate once more that the Government of the Bolivarian Republic of Venezuela has repeatedly violated this Convention and is failing to respect the commitments it has assumed before the ILO.

B. The Government’s reply

- 1596.** In its communication of 9 March 2009, the Government states, with respect to the allegation concerning the FVM, that meetings are currently being held under the auspices of the public sector labour inspectorate to discuss the draft collective labour agreement submitted by the Federation on 13 May 2008. The collective labour agreement under discussion covers some 350,000 educators and comprises 56 clauses, of which 28 have already been approved at meetings held at the labour inspectorate with the participation of the FVM and the Ministry of Education. Negotiations have been conducted in a peaceful atmosphere, highlighting the will of the Venezuelan Government, through the labour administration, to fulfil its functions as mediator and facilitator.
- 1597.** With regard to the allegations made by FEDEUNEP, according to which it submitted a draft framework agreement to regulate working conditions in the public sector on 21 February 2007, the Government states that the Federation last held elections on 25 October 2001, meaning that the term of its executive committee ran from 2001 to 2006, in accordance with the provisions of section 25 of its own statutes. Its term expired on

25 October 2006, and the Federation's executive committee is therefore in electoral delinquency.

1598. In this regard, the Government continues, the Federation was informed on 30 June 2007, through the National Labour Inspectorate, of the need to resolve the situation of electoral default in order to negotiate the draft framework agreement, in accordance with the provisions of section 128 of the Organic Labour Act. To date, according to information received from the competent administrative authority, FEDEUNEP has not submitted evidence that it has rectified the electoral default of the members of its executive committee.

1599. For additional information, there follows a transcript of the content of section 128 of the Organic Labour Act Regulations, which stipulates that the members of trade union executive committees whose term has expired may not organize, undertake or represent the union in procedures other than the purely administrative, as follows:

Section 128. Trade union elections. Expired term: Trade union organizations are entitled to hold their own elections, with no restrictions other than those established in their statutes and in law. Members of trade union executive bodies whose elected term has expired, in accordance with the provisions of sections 434 and 435 of the Organic Labour Act and their union statutes, shall not organize, undertake or represent the union in legal procedures other than the purely administrative.

1600. From this, it can be seen that FEDEUNEP is not in a position to negotiate the draft framework agreement submitted, as the term for which the members of its executive committee were elected has expired and the organization has not provided evidence to show that it has held further elections to rectify the situation. Once the situation has been resolved, negotiations can proceed on the draft collective labour agreement, in accordance with labour standards and in full compliance with ILO Convention No. 98.

1601. With regard to FETRASALUD, the Government reports that this organization's status is the same as in the two previous cases, i.e. its executive committee is also in electoral default as, since 21 September 2001 (when its last executive committee elections were held), no evidence has been presented to show that new elections have taken place.

1602. The Government underlines that all the above categorically demonstrates that the Ministry of Labour and Social Security has not denied any of the trade union organizations named their right to collective bargaining, much less acted in a manner detrimental to workers. The accusations of the CTV lack any basis at all, as the fact that discussion of the draft collective agreements has not begun is not attributable to the Venezuelan Government but to failure by the union organizations in question to observe legal requirements.

1603. Trade unions have full autonomy to conduct their elections, as this is a prerogative granted by section 33 of the Organic Electoral Authority Act, which states in this regard that the National Electoral Council must respect the autonomy and independence of trade unions by observing the relevant international treaties signed by the Bolivarian Republic of Venezuela and by providing them with appropriate technical and logistical support.

1604. With regard to the cases involving alleged forced expropriation of the Falcón State Federation of Workers on 5 May 2005, alleged occupation of FETRAMERIDA's headquarters in the city of Mérida on 3 April 2006, alleged occupation of FETRAMIRANDA's offices on 26 March 2007, alleged eviction of FETRATRUJILLO in October 2007, and alleged eviction of FETRACARABOBO, for which no date is given, the Government expresses great concern that these cases are presented without any foundation whatsoever; there are insufficient details to verify the information provided by the complainants. Nevertheless, with the greatest willingness to act in a spirit of

cooperation, the Government states that every effort will be made to elucidate the truth of the matters raised. Likewise, the Government makes it very clear that the Bolivarian Republic of Venezuela maintains the separation and independence of public authorities, and states that the Committee will be informed promptly of the results of consultation between the bodies competent to resolve the situation, if the allegations are found to be true.

- 1605.** More specifically, with regard to the alleged expropriation of FETRAFALCON on 5 May 2005, the Government states that, on 29 December 2005, FETRAFALCON, in accordance with a prior agreement to resolve the dispute through transaction, sold premises to the regional executive for the state of Falcón, adopting the amicable resolution mechanism provided for in the Act on expropriation for reasons of public utility, in order to comply with the procedure established in law and required by a decree of the Governor for the state of Falcón. This transaction is being processed and the regional executive for the state of Falcón has made the appropriate payments. However, in exercise of their rights, FETRAFALCON's representatives filed a claim before the Third Court of First Instance for Civil, Mercantile, Agrarian and Transport Matters against the Falcón regional executive for payment of the amount outstanding from the sale agreement to which they submitted. The claim was in turn transmitted to the Full Chamber of the Supreme Court of Justice so that it could determine which tribunal was actually competent to examine the case; the entire procedure has been carried out in accordance with sections 70–71 of the Code of Civil Procedure.
- 1606.** With regard to the alleged occupation of FETRAMERIDA's offices in the city of Mérida on 3 April 2006, the Government states that the CTV has not provided sufficient details to enable information on the allegations to be obtained.
- 1607.** With regard to the allegation concerning the seizure of FETRAMIRANDA's offices on 26 March 2007, the Government states that, on 7 March 2007, the examining court transmitted to the Political and Administrative Chamber the request for seizure prepared by the Office of the Public Prosecutor of Miranda, under section 599.2 of the Code of Civil Procedure, in the case it was bringing against FETRAMIRANDA. In ruling No. 913, published on 6 June 2007, the Chamber found the request for seizure to be admissible, and therefore ordered it to be carried out once 90 consecutive days had elapsed from the date on which official notification of the parties was recorded. On 20 February 2008, the legal representative of the Office of the Public Prosecutor for the state of Miranda requested the seizure order approved by the Chamber to be carried out; the appropriate action was duly taken. On 5 March 2008, the seizure ordered on 5 June by the Political and Administrative Chamber of the Supreme Court of Justice in its ruling in the case brought by the Bolivarian state of Miranda against FETRAMIRANDA was carried out. In order to prevent this – continues the Government – FETRAMIRANDA lodged an objection, which was examined and ruled inadmissible; once this had been decided, the order was carried out. It is necessary to point out that the principal claim relates to title to the property, an issue which has not been resolved by the seizure and can only be decided by a judgement of merit from the examining court.
- 1608.** With regard to the allegation concerning the alleged eviction from FETRATRUJILLO's offices in October 2007, the Government reports that, on 16 May 2005, the Federation, in the person of its directors (Mr Argenis Carreño Marín, Mr Orlando de Jesús Torres and Mr Óscar Orlando Rivas) brought before the Third Court of First Instance for Civil, Mercantile, Agrarian, Transport, Banking and Constitutional Matters of the Trujillo state jurisdiction proceedings to obtain protection of their premises against Mr José Santos Gil, Mr Antonio Zambrano, Mr Eleazar Buitrago, Mr Ramón Carrizo, Mr Jhonny Estrada and Mr Jorge Alexander Romero. In examining this case, the judge was required to establish certain facts and, on that basis, decide a posteriori whether FETRATRUJILLO had

tangibly and effectively fulfilled the requirements of section 782 of the Venezuelan Civil Code in accordance with the provisions of section 700 of the Code of Civil Procedure. It is important to point out that the parameters for the decision taken in this case were and are clearly defined, namely: (a) to determine with absolute certainty whether the complainants are the legitimate possessors of the property at the centre of the dispute; (b) whether their possession has lasted more than a year and a day; and (c) whether the legitimate possession claimed by the complainants has been interrupted; fulfilment of these requirements is and was indispensable in order for the interdiction claim for protection of possession brought by FETRATRUJILLO to succeed.

- 1609.** In their case, the complainants allege acts of violence, stating that: "... twenty citizens proceeded to engage arbitrarily in a series of disorderly activities, such as knocking over gates and fences ...". This situation could not be verified, as the legal inspection requested by FETRATRUJILLO's representatives revealed that the fences and gates were fully erect, the main façade was in perfect condition and the gate at the main entrance was working properly, which showed that the "disorderly" events described by the complainants had not occurred and that their allegations were false.
- 1610.** Furthermore, the Government states that the complainants have in no way demonstrated that the property is theirs, because such buildings simply are not the property of any individual, as they belong ipso jure to the Bolivarian Republic of Venezuela, since they are part of the nation's heritage; they are the property of the nation, over which there is no prescription of rights over time, much less rights of possession, and over which the Venezuelan State has ownership and possession throughout time and space. National property does not lose these attributes over time or space.
- 1611.** This case proceeded, as has been stated, in accordance with legally established procedure. During its examination, representatives of FETRATRUJILLO did not present or provide any document to show that any government agency had authorized them to remain on the premises. Based on this, on 8 February 2006, the examining judge ordered the immediate reversion of the premises to state ownership, through the appropriate measures, and there was certainly no eviction procedure, as the complainants claim: rather, the legally established procedure was followed. The parties subsequently appealed this decision and the acting judge of the Higher Court for Civil, Mercantile and Transport Affairs and Minors of the Trujillo state jurisdiction rejected the appeal on 8 October 2007, upholding the final ruling in the interdiction claim for possession that resolved to return the premises to state ownership.
- 1612.** With regard to the alleged eviction of FETRACARABOBO, the Government states that the complainants attempted to bring proceedings for constitutional protection in respect of the alleged occupation of premises to which they claim title. In the face of these proceedings, the Carabobo State Government and the Valencia town hall provided documents granting right of title to the premises in question, in a reply that was transmitted to the examining court by the Public Prosecutor for Carabobo State. In addition, the content of the ruling verifies that there is no document granting property title for the premises in question to this trade union federation.
- 1613.** In this case, the court examining the constitutional protection claim ruled that there had been ordinary proceedings of sufficient brevity and effectiveness to satisfy the plaintiff's claim, i.e. the restitution of property. It therefore ruled that the constitutional protection claim was inadmissible, as it fell within the criteria for inadmissibility set out in section 6.5 of the Organic Act on Protection for Rights and Constitutional Guarantees. Equally, it is important to note that it is well established in the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice that, in the case of eviction from or seizure of premises, the appropriate prompt, summary and effective ordinary process which the

alleged injured parties should invoke is a possession interdiction. The Third Court of First Instance for Civil, Mercantile, Agrarian and Banking Affairs of the Carabobo state jurisdiction therefore ruled, on 25 April 2005, that the above constitutional protection claim was inadmissible (rulings of the Supreme Court of Justice attached).

- 1614.** Based on the above, the Government requests that these allegations be disregarded as they lack any substance or basis in fact, given that there has been no violation of the right to freedom of association or any other right enshrined in the country's domestic law or the international standards it has ratified. Every matter raised by the complainants concerns a procedure carried out with respect for the rights of the parties involved and observing due process, in full compliance with the relevant legal standards.
- 1615.** In its communication of 8 March 2010, the Government indicates that the premises that are being utilized by the workers' federations of the States of Miranda, Trujillo and Mérida are state property and thus as essential part of the territorial integrity of the State. Having an undeniable right to those premises, the State has started recuperating this property by making use of the protective function of public order, on the understanding that this notion embodies all those standards of public interest that require unconditional compliance, are not revocable by private demand and seek to make the general interest of society prevail over the private interest of the individual. It should be noted that such actions of the State could be considered a violation of international principles enshrining the exercise of freedom of association (ILO Convention No. 87), although the State, by making use of the protective function of public order, has recuperated property, which was up to now in the hands of one single "stream" within the trade union movement; this situation having created up to now a situation of inequality as regards the rest of the trade union movement that could not benefit from the premises for its trade union activities. Thus, far from constituting the presently alleged violation of freedom of association, the State of the Bolivarian Republic of Venezuela, invoking on the one hand its legitimate interests in favour of society and, on the other hand, the strengthening of the trade union movement, contributed to the elimination of hideous inequalities among workers' organizations existing in the country. It would be unfair if one single "stream" within the trade union movement benefited from the premises of the nation to the detriment of the rest. In keeping with the guidance contained in international human rights conventions and provided by the ILO supervisory bodies, the Government has therefore acted to avoid union discrimination or favouritism of one union stream over another.

C. The Committee's conclusions

- 1616.** *The Committee observes that in this case the CTV alleges refusal by the authorities to negotiate with public sector CTV trade unions, along with actions by the authorities to expropriate various member federations or deprive them of their premises.*
- 1617.** *With regard to the authorities' refusal to negotiate with various public sector trade union federations belonging to the CTV, the Committee notes the Government's statements that meetings are being held under the auspices of the public sector labour inspectorate to discuss the draft collective agreement (which would cover some 350,000 educators) submitted on 13 May 2008 by the FVM, with 28 out of 56 clauses approved so far. The Committee regrets the fact that, despite two years having elapsed since the draft collective agreement was submitted, bargaining has still not finished, and expresses the firm hope that the collective agreement will be signed in the very near future. The Committee requests the Government to keep it informed in this regard.*
- 1618.** *With regard to the alleged refusal by the authorities to negotiate with FEDEUNEP on a draft framework agreement to regulate working conditions in the public sector, and the authorities' alleged refusal to let FETRASALUD participate in collective bargaining in its*

sector since 2000, the Committee regrets to observe that the Government justifies its refusal on the grounds that both federations have been in “electoral default” since 2006 because they have not provided evidence of executive committee elections since that year. The Committee wishes to point out, in this regard, that it has repeatedly criticized the intervention of the National Electoral Council (which is not a judicial body) in elections to trade union executive committees.

- 1619.** *In various earlier cases, the Committee has observed how this body and its activities have stymied the results of trade union elections until lengthy procedures with uncertain outcomes have been resolved, and that this type of intervention has had a negative impact on organizations belonging to the CTV; it is therefore not surprising that these union organizations disown the electoral system guided by the National Electoral Council, which has itself been the subject of many objections, not only from the Committee on Freedom of Association, but also from the Committee of Experts and the Conference Committee on the Application of Standards, for its violations of Article 3 of Convention No. 87. In particular, the Committee would like to refer to the conclusions of the Committee on the Application of Standards in its June 2009 discussion of the application of Convention No. 87, in which it urged the Government to take the necessary measures without delay to ensure that intervention of the National Electoral Council in proceedings of union elections, including its intervention in cases of complaints, was only possible when the organization explicitly so requested, and to take active steps to amend all the legislative provisions incompatible with the Convention to which the Committee of Experts had objected. The Committee on the Application of Standards also requested the Government to intensify social dialogue with representative organizations of workers and employers. This being the case, and bearing in mind that the federations within the CTV unite numerous organizations and thousands of workers, the Committee requests the Government to bargain with FEDEUNEP and FETRASALUD or to allow them to participate in bargaining in their respective sectors, and to report to it in this regard.*
- 1620.** *With regard to the alleged forced expropriation by the Falcón state government of FETRAFALCON’s offices, the Committee takes note of the Government’s statements that: (1) on 29 December 2005, FETRAFALCON, in accordance with a prior agreement to resolve the dispute through transaction, sold premises to the regional executive for the state of Falcón, adopting the amicable resolution mechanism provided for in the Act on expropriation for reasons of public utility, in order to comply with the procedure established in law and required by a decree of the Governor for the state of Falcón; (2) this transaction is being processed and the regional executive for the state of Falcón has made the appropriate payments; (3) however, in exercise of their rights, FETRAFALCON’s representatives filed a claim before the Third Court of First Instance for Civil, Mercantile, Agrarian and Transport Matters against the Falcón regional executive for payment of the amount outstanding from the sale agreement to which they submitted; (4) the claim was in turn transmitted to the Full Chamber of the Supreme Court of Justice so that it could determine which tribunal was actually competent to examine the case; and (5) the entire procedure has been carried out in accordance with sections 70–71 of the Code of Civil Procedure. The Committee concludes that the state of Falcón has still not paid FETRAFALCON the full amount for the premises expropriated for reasons of public utility through the amicable resolution mechanism. The Committee requests the Government to keep it informed of the result of the process under way and to urge the Falcón state executive to pay the debt it owes to FETRAFALCON.*
- 1621.** *With regard to the allegation that, on 3 April 2006, a group of people linked to the national Government seized the headquarters of FETRAMEERIDA, and since then, with Government support, has continued to occupy it, preventing its legitimate users from utilizing it, the Committee notes that the Government requests further details in order to be able to obtain information on the alleged occupation. The Committee deeply regrets that*

the Government has approached neither FETRAMERIDA nor the regional executive to obtain more details. The Committee invites the complainant to provide further information concerning its allegations and invites the Government to request information without delay from the regional authorities in the state of Mérida, so that the Committee can examine this allegation without delay. It also invites the Government to ensure that the occupation of trade union premises ceases.

- 1622.** *With regard to the allegation that, on 26 March 2007, the building that served as headquarters for FETRAMIRANDA was seized by court order, at the instigation of the regional government (according to the complainant, on 26 March 2008, the unions were evicted from their offices, which were “taken” by Government supporters belonging to official units known as “missions”), the Committee takes note of the Government’s extensive statements, from which it emerges that: (1) the Political and Administrative Chamber of the Supreme Court declared the request for seizure of the premises – the headquarters of FETRAMIRANDA – made by the Office of the Public Prosecutor for the state of Miranda admissible; and (2) the basic question of who holds title to the property has not been resolved. The Committee expresses its deep concern at the seizure, according to the Government under section 599.2 of the Code of Civil Procedure, without indication of the specific motive for its approval in the circumstances described. The Committee requests the Government to remove the persons occupying FETRAMIRANDA’s headquarters (Government supporters, according to the CTV) and to guarantee FETRAMIRANDA’s use of the premises until the claim over title to the property is resolved.*
- 1623.** *With regard to the allegation that, on 8 October 2007, the offices of FETRATRUJILLO were subjected to an unconstitutional seizure and eviction order, issued by a judge (who acted as both sentencer and executor), at the instigation of the national Government, the Committee takes note of the Government’s statements that: (1) since 16 May 2005, members of FETRATRUJILLO have been pursuing, through the civil courts, a claim for constitutional protection of their possession against other individuals; (2) the judge had to determine whether the complainants were the legitimate possessors of the property at the centre of the dispute, whether their possession had lasted more than a year and a day, and whether the legitimate possession claimed by the complainants had been interrupted; (3) the complainants have in no way demonstrated that the property is theirs, because such buildings are simply not the property of any individual, as they belong ipso jure to the Bolivarian Republic of Venezuela, since they are part of the nation’s heritage; they are the property of the nation, over which there is no prescription of rights over time, much less rights of possession, and over which the Venezuelan State has ownership and possession throughout time and space; no damage to the property has been verified; (4) this case proceeded, in accordance with legally established procedure, and during its examination, representatives of FETRATRUJILLO did not present or provide any document to show that any government agency had authorized them to remain on the premises; (5) based on this, on 8 February 2006, the examining judge ordered the immediate reversion of the premises to state ownership, through the appropriate measures, and there was certainly no eviction procedure, as the complainants claim: rather, the legally established procedure was followed; and (6) the parties subsequently appealed and the acting judge of the Higher Court for Civil, Mercantile and Transport Affairs and Minors of the Trujillo state jurisdiction rejected the appeal on 8 October 2007, upholding the final ruling in the interdiction claim for possession that resolved to return the premises to state ownership.*
- 1624.** *The Committee concludes that the judicial authorities have established that the property housing FETRATRUJILLO’s headquarters belongs to the State and was returned to national ownership. The Committee regrets, however, that the regional authorities have not attempted to assist in finding a provisional or definitive solution to remedy the fact that, as a result, FETRATRUJILLO has been deprived of its trade union headquarters,*

which it had been using for years, particularly in view of the complainant's statement that the building is now falling into disrepair.

- 1625.** *With regard to the allegations that the FUTDF and FETRACARABOBO have also been evicted from their offices, the Committee takes note of the Government's statements that: (1) the complainants attempted to bring proceedings for constitutional protection in respect of the alleged occupation of premises to which they claim title; (2) in the face of these proceedings, the Carabobo State Government and the Valencia town hall provided documents granting right of title to the premises in question; (3) according to the ruling, there is no document granting property title for the premises in question to this trade union federation; (4) the judicial authority that examined the constitutional protection claim ruled that there had been ordinary proceedings of sufficient brevity and effectiveness to satisfy the plaintiff's claim (i.e. the restitution of property); it therefore ruled that the constitutional protection claim was inadmissible, as it fell within the criteria for inadmissibility set out in the Organic Act on Protection for Rights and Constitutional Guarantees; (5) it is well established in the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice that, in the case of eviction from or seizure of premises, the appropriate prompt, summary and effective ordinary process which the alleged injured parties should invoke is a possession interdiction; and (6) in these circumstances, the Third Court of First Instance for Civil, Mercantile, Agrarian and Banking Affairs of the Carabobo state jurisdiction ruled, on 25 April 2005, that the above constitutional protection claim was inadmissible.*
- 1626.** *The Committee notes that, according to the Government, the Carabobo State Government and the Valencia town hall provided documents granting their right of title to the premises housing FETRACARABOBO's offices and apparently the offices of the FUTDF. The Committee once more regrets that the authorities have not attempted to assist in finding a provisional or definitive solution to remedy the fact that, as a result, FETRACARABOBO and the FUTDF have been deprived of the union offices that they had been using for years.*
- 1627.** *In general, the Committee can only highlight the fact that, in this and other cases, the CTV and its trade union federations have been the subject of actions or omissions by the authorities intended to harass or damage them, whether it be by refusing to bargain collectively with them, in some cases, or, in others, by depriving them of their offices after many years without exploring other alternatives. The Committee expresses its deep concern at the fact that the Government, in its most recent communication received shortly before the Committee's session, justifies the eviction of FETRATRUIJILLO, FETRAMIRANDA and FETRAMEERIDA from their headquarters by a presumed elimination of "hideous inequalities" among the existing workers' organizations.*
- 1628.** *The Committee must underline the fact that the spirit of Convention No. 87 calls for impartial treatment of all trade union organizations by the authorities, even if they criticize the social or economic policies of national or regional executives, as well as avoidance of reprisals for pursuing legitimate trade union activities.*

The Committee's recommendations

- 1629.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee deplores the fact that, despite two years having elapsed since the submission of a draft collective agreement by the FVM, it has still not been concluded, and expresses the firm hope that the collective agreement*

will be signed in the very near future. The Committee requests the Government to keep it informed in this regard.

- (b) The Committee requests the Government to bargain with FEDEUNEP and FETRASALUD or to allow them to participate in bargaining in their respective sectors, and to report to it in this regard.*
- (c) With regard to the allegation concerning the forced expropriation by the Falcón State Government of FETRAFALCON's offices, the Committee observes that the state of Falcón has still not paid FETRAFALCON the full amount for the premises expropriated for reasons of public utility through the amicable resolution mechanism and requests the Government to keep it informed of the result of the process under way. The Committee also requests the Government to urge the Falcón state executive to pay the debt it owes to FETRAFALCON.*
- (d) With regard to the allegation that, on 3 April 2006, a group of people linked to the national Government seized the headquarters of FETRAMERIDA and, since then, with Government support, has continued to occupy it, preventing its legitimate users from utilizing it, the Committee notes that the Government requests further details in order to be able to obtain information on the alleged occupation. The Committee deeply regrets that the Government has approached neither FETRAMERIDA nor the regional executive to obtain more details. The Committee invites the complainant to provide further information concerning its allegations and invites the Government to request information without delay from the regional authorities in the state of Mérida, so that the Committee can examine this allegation without delay. It also invites the Government to ensure that the occupation of trade union premises ceases.*
- (e) With regard to the allegation in which the CTV adds that, on 26 March 2007, the building that served as headquarters for FETRAMIRANDA was seized by court order, at the instigation of the regional government, and then, according to the complainant, on 26 March 2008, the unions were evicted from their offices, which were "taken" by Government supporters belonging to official units known as "missions", the Committee requests the Government to remove the occupiers (Government supporters, according to the CTV) and to guarantee FETRAMIRANDA's use of the premises until the claim over title to the property is resolved.*
- (f) With regard to the allegation that, on 8 October 2007, the offices of FETRATRUJILLO were subjected to an unconstitutional occupation and eviction order, issued by a judge (who acted as both sentencer and executor), at the instigation of the national Government, the Committee observes that the judicial authorities have established that the property housing FETRATRUJILLO's headquarters belongs to the State and was returned to national ownership. The Committee regrets, however, that the regional authorities have not attempted to assist in finding a provisional or definitive solution to remedy the fact that, as a result, FETRATRUJILLO has been deprived of its trade union headquarters, which it had been using for years.*

- (g) *With regard to the allegations that the FUTDF and FETRACARABOBO, which are among the largest regional organizations in the country, have also been evicted from their offices, the Committee once more regrets that the authorities have not attempted to assist in finding a provisional or definitive solution to remedy the fact that, as a result, FETRACARABOBO and the FUTDF have been deprived of the union offices that they had been using for years.*
- (h) *Observing that, as can be seen from this and previous cases, the CTV and its trade union federations have been the subject of actions or omissions by the authorities intended to harass or damage them, the Committee underlines the fact that the spirit of Convention No. 87 calls for impartial treatment of all trade union organizations by the authorities, even if they criticize the social or economic policies of national or regional executives, as well as avoidance of reprisals for pursuing legitimate trade union activities.*

CASE NO. 2727

INTERIM REPORT

**Complaint against the Government of the Bolivarian Republic of Venezuela
presented by
the Venezuelan Workers' Confederation (CTV)**

*Allegations: The Venezuelan Workers' Confederation (CTV) alleges: (1) that the Office of the Attorney General has brought charges of boycotting against six workers of the enterprise *Petróleos de Venezuela SA (PDVSA)* for staging protests to demand their labour rights; (2) that protests have been criminalized and legal proceedings initiated at various enterprises, and that union officials have been dismissed in connection with these protests; (3) the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in *El Tigre* and of two union delegates in the *Los Anaucos* district in June 2009; (4) the contract killings of more than 200 workers and union officials in the construction sector; and (5) persistent refusal by the public authorities to bargain collectively in the health, oil, electricity and national university sectors, among others*

1630. The present complaint is contained in communications from the Venezuelan Workers' Confederation (CTV) of 29 June and 4 November 2009.

- 1631.** The Government sent its observations in communications dated 20 October 2009 and 8 and 9 March 2010.
- 1632.** The Bolivarian Republic of Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1633.** In its communications of 29 June and 4 November 2009, the CTV alleges that the Office of the Attorney General has brought charges against six workers (Mr Larry Antonio Pedroza, a union delegate, Mr José Antonio Tovar, Mr Juan Ramón Aparicio, Mr Jafet Enrique Castillo Suárez, Mr Roy Rogelio Chaparro Hernández and Mr José Luis Hernández Alvarado) of the enterprise Petróleos de Venezuela SA (PDVSA) Gas Comunal for committing the offence of boycotting, as provided for in section 139 of the Act for the Defence of Persons in Accessing Goods and Services, simply for staging protests to demand their labour rights. As a result, provisional measures were ordered against the workers, who had to appear before the Second Oversight Tribunal of the state of Miranda. In this regard, the CTV states that, according to the Unitary Federation of Venezuelan Petroleum, Gas, Derivatives and Similar Workers (FUTPV), the Office of the Attorney General is being used against workers as a means of criminalizing protest.
- 1634.** In this regard, the CTV adds that criminalization of protests has also occurred at various enterprises and legal proceedings have been initiated at the state holding PDVSA (affecting 27 workers) and the “Alfredo Maneiro” Orinoco steelworks (affecting 25 workers), at the gas enterprise PetroPiar and the El Palito refinery (at the latter, 600 workers decided to stop work because of failure to abide by commitments set out in the collective agreement, which resulted in the dismissal of ten union delegates) and Gas Comunal. Legal proceedings are currently before the courts in respect of 91 workers, mostly union officials. The CTV also states that around 110 workers have been taken to court for labour protests, which criminalizes the right to strike and the right to collective bargaining. According to the complainant, the security forces have been ordered to obstruct and suppress any protests.
- 1635.** The complainant also alleges the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and of two trade union delegates in the Los Anaucos district in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran).
- 1636.** Furthermore, the union alleges that the construction sector has seen contract killings of workers and union officials (more than 200 victims among workers and officials) in an atmosphere of complete impunity.
- 1637.** Lastly, the complainant mentions persistent refusal by the public authorities to bargain collectively in the health, oil, electricity and national university sectors, among others.

B. The Government's reply

1638. In its communications of 20 October 2009 and 8 and 9 March 2010, the Government states, with regard to the charges brought against six workers at PDVSA for alleged boycotting, that, on 12 June 2009, a demonstration was held by a group of workers of the enterprise PDVSA Gas which paralysed the plant's gas canister filling activities, affecting the sale of a commodity of prime necessity for the population. As a result, the following were arrested: Mr Larry Antonio Pedroza, Mr José Antonio Tovar, Mr Juan Ramón Aparicio Martínez, Mr Jaffet Enrique Castillo Suárez, Mr Rogelio Chaparro Hernández and Mr José Luis Hernández Alvarado. These State enterprise workers appeared at a preliminary hearing before the Second Court of First Instance, acting as overseeing court for the Criminal Judicial Circuit of the state of Miranda, on 13 June 2009. At the preliminary hearing (under *flagrante delicto* procedures) of the above individuals, the 16th Prosecutor of the Office of the Public Prosecutor qualified the events as a boycott, as provided for and penalized by section 139 of the Act for the Defence of Persons in Accessing Goods and Services (which does not apply to peaceful demonstrations):

Anyone who, jointly or individually, plans or carries out an action or is responsible for an omission that directly or indirectly impedes the production, manufacture, importation, warehousing, transport, distribution or sales of commodities classified as being of prime necessity shall be liable to a prison term of between six (6) and ten (10) years.

1639. The Government states that the prosecutor also requested that the proceedings continue in accordance with ordinary procedures, and that preventive detention be ordered. The preliminary hearing before the Second Court of First Instance of the Criminal Judicial Circuit of the State of Miranda was scheduled on 23 March 2010. With reference to the accusation by the FUTPV concerning the national Government's use of the Office of the Attorney General to act against workers who have staged protests, the Government clarifies that the organization of the Venezuelan State into five branches of authority and the autonomous and interdependent functioning of each of them, together with the fact that the Office of the Attorney General is part of the civic authority, means that there are no mechanisms authorizing or endorsing Government interference in actions that other state authorities may choose to carry out. The Government underlines the fact that the actions of the Venezuelan State in relation to the acts committed by the workers in question were undertaken in strict compliance with current legislation and with respect for the workers' human rights, bearing in mind at the same time that the measures taken were appropriate to the nature of the events that took place, which went beyond a simple protest to demand labour rights, as the CTV presents them. The Government adds that the Act for the Defence of Persons in Accessing Goods and Services was published in the *Official Bulletin* of the Bolivarian Republic of Venezuela No. 39,165 of 24 April 2009. It seeks to defend, protect and safeguard the individual and collective rights and interests of people in accessing goods and services for the purpose of meeting their needs and securing social peace, justice and the right to life and health of the population.

1640. With regard to the alleged criminalization of protests staged by workers at PDVSA and the "Alfredo Maneiro" Orinoco steelworks, and to the legal proceedings brought against workers at the state holding company PDVSA, the Government states that the Office of the Public Prosecutor, as the competent body to examine this type of accusation, has received no complaints and, consequently, has not begun any investigations relating to the alleged criminalization of protests held by workers at PDVSA and the "Alfredo Maneiro" Orinoco steelworks. On the contrary, the national Government, through the Office of the Public Prosecutor, has intervened in various labour disputes that have arisen at the headquarters of PDVSA and its subsidiary enterprises located in five states across the country, assisting in resolving them, through mediation, without hearing of the practice of detention in any of the disputes, nor of criminal proceedings being brought against workers, on the

understanding that in these cases the demonstrations did not lead to the commission of offences under Venezuelan legislation.

- 1641.** Concerning the allegations concerning the accusation that 110 workers have been brought before the national courts for claiming their labour rights, which criminalizes the right to strike and the right to collective bargaining, the Venezuelan Government requires more precise information on either the workers allegedly involved or the courts examining the proceedings in order to be able to respond properly on this issue.
- 1642.** With respect to the allegations concerning failure by a contracting enterprise of PDVSA at the El Palito refinery to comply with a collective agreement, the Government states that, as the failure mentioned by the CTV was on the part of a contractor providing services to the state enterprise PDVSA at the El Palito refinery, it is consequently not a matter of any action or omission by the Venezuelan State that adversely affects the rights of these workers. However, in the event of failure to guarantee their rights and comply with labour standards, the workers may complain to the competent authority, in this case the labour inspectorate, and initiate the proceedings set out in the Organic Labour Act, specifically with reference to submitting petitions, a procedure developed for taking action on working conditions, negotiating a collective agreement or ensuring that commitments made are fulfilled (sections 475–489 of the Organic Labour Act).
- 1643.** Relating to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in the town of El Tigre, Anzoátegui state, the Government states that the Office of the 42nd Prosecutor of the Office of the Public Prosecutor (a national body with full competence), located in the city of Puerto la Cruz, Anzoátegui state, is undertaking the investigation into this case, and is currently awaiting the results of various requests made to, and actions to be taken by, the Scientific, Criminal and Criminological Investigation Force, and that it will keep the Committee informed of progress and results in the case. As regards the allegations concerning crimes against union officials in the Los Anaucos district of Miranda state, the Government reports that these events were being investigated by the Office of the Ninth Prosecutor of the Office of the Public Prosecutor in the Los Anaucos district of Miranda state, which has instructed the Scientific, Criminal and Criminological Investigation Force to take all useful and necessary steps to establish the facts and identify the circumstances and perpetrators involved. The Government adds that the Office of the Public Prosecutor requested on 25 November 2009 the closing of the case due to the decease of the accused persons, Mr Pedro Guillermo Rondón and Mr Wilfredo Rafael Hernández Avilez, in conformity with section 318(3) and in line with section 48(1) of the Organic Code of Penal Proceedings, for reasons of termination of criminal proceedings.
- 1644.** In its communications dated 8 and 9 March 2010, the Government indicates that, as regards the collective agreement for the electricity sector, the Federation of Workers in the Electric Industry (FETRAELEC) has negotiated a collective agreement with the National Electric Corporation (CORPOELEC), which was endorsed on 3 February 2010, providing protection to 33,000 workers in that sector. Concerning the collective agreement of the Central University of Venezuela, the Labour Accord for the employees and workers in superior education was signed on 28 April 2009 between the Union Federation of University Workers of Venezuela (FETRAUVE) and the National Federation of University Worker of Venezuela (FENASTRAUV), on the one hand, and the People's Ministry for Superior Education, on the other hand, providing protection to more than 45,000 employees and over 20,000 workers in that sector. With respect to the collective agreement for the petrol sector, a collective agreement was signed on 2 February 2010 between the United Federation of Gas, Oil, Derivatives and Annexes of Venezuela (FUTPV) and PDVSA Gas SA and PDVSA Petrol SA, and deposited with the Directorate of the National Inspectorate for the Public Sector of the People's Ministry of Labour and Social Security.

The collective agreement provides protection to over 47,000 workers in the sector. In relation to the Labour Accord for the health sector, the National Federation of Regional, Sectoral and Related Unions of Workers in the Health Sector (FENASITRASALUD) has negotiated and deposited with the Directorate of the National Inspectorate for the Public Sector of the People's Ministry of Labour and Social Security the Labour Accord for Employees and Workers in the Health Sector. In this regard, the national executive authority is currently waiting for the executive committee of the FENASITRASALUD recovers its legitimacy to be able to proceed with the endorsement of the aforementioned Labour Accord, which contains the most favourable economic and social benefits established in previous collective agreements for workers and employees of the health sector.

C. The Committee's conclusions

- 1645.** *The Committee notes that, in its allegations, the CTV alleges: (1) the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and of two trade union delegates in the Los Anaucos district in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran); (2) the contract killings of more than 200 workers and union officials in the construction sector; (3) that the Office of the Attorney General has brought charges of boycotting against six workers (Mr Larry Antonio Pedroza, a union delegate, Mr José Antonio Tovar, Mr Juan Ramón Aparicio, Mr Jafet Enrique Castillo Suárez, Mr Roy Rogelio Chaparro Hernández and Mr José Luis Hernández Alvarado) at PDVSA for staging protests to demand their labour rights; (4) the criminalization of protests, and initiation of legal proceedings at various enterprises and dismissal of union officials as a result of those protests; and (5) persistent refusal by the public authorities to bargain collectively in the health, oil, electricity and national university sectors, among others.*
- 1646.** *With regard to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and of two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee notes from the Government's report that: (1) investigations into the events have been pursued by the Office of the 42nd Prosecutor of the Office of the Public Prosecutor (a national body with full competence), of Anzoátegui state, and the Office of the Ninth Prosecutor of the Office of the Public Prosecutor in the Los Anaucos district of Miranda state, respectively; and (2) the Office of the Public Prosecutor requested on 25 November 2009 the closing of the case due to the decease of the accused persons, Mr Pedro Guillermo Rondón and Mr Wilfredo Rafael Hernández Avilez, in conformity with section 318(3) and in line with section 48(1) of the Organic Code of Penal Proceedings, for reasons of termination of criminal proceedings. The Committee deeply regrets the murders and recalls that freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 4]. The Committee requests the Government to explain the reasons why the criminal proceedings have been terminated, and expects that new investigations will be initiated and will yield results in the near future and will enable the perpetrators to be identified and punished. The Committee requests the Government to keep it informed of the final outcomes of the investigations.*

- 1647.** *Concerning the allegations in relation to the contract killings of more than 200 workers and union officials in the construction sector, the Committee requests the trade union to provide the Government without delay with a list of these murders and the circumstances involved so that the Government can undertake the appropriate investigations without delay. The Committee requests the Government to keep it informed in this regard.*
- 1648.** *In general, the Committee must express its grave concern at the serious allegations of murders of workers and union officials, and, in this regard, it urges the Government to act diligently and swiftly to resolve these cases fully.*
- 1649.** *As regards the allegations concerning the Office of the Attorney General's filing of criminal charges for the offence of boycotting and the subsequent detention of six workers of the PDVSA enterprise because, during a protest to demand their labour rights, they paralysed the enterprise's activities (according to the FUTPV, the Office of the Attorney General is being used by the Government), the Committee notes the Government's statement that, on 12 June 2009, a group of workers, as part of a demonstration, paralysed the plant's gas canister filling activities, affecting the sale of a commodity of prime necessity, for which they were arrested. On 13 June 2009, the Second Court of First Instance of the Criminal Judicial Circuit of the state of Miranda summoned them to appear at a hearing, during which the 16th Prosecutor qualified the events as a boycott under section 139 of the Act for the Defence of Persons in Accessing Goods and Services, which states: "Anyone who, jointly or individually, plans or carries out an action or is responsible for an omission that directly or indirectly impedes the production, manufacture, importation, warehousing, transport, distribution or sales of commodities classified as being of prime necessity shall be liable to a prison term of between six and ten years." The Committee also notes the Government's statement that the Venezuelan State is organized into five branches of authority that function autonomously and interdependently and that there are no mechanisms authorizing interference by the Government in the other branches of state authority. It further notes the Government's indication that section 139 of the aforementioned Act does not apply to the right to peaceful assembly, and that the judicial authority has scheduled the preliminary hearing on 23 March 2010.*
- 1650.** *In this regard, the Committee underlines the fact that the activity of filling and selling gas canisters does not constitute an essential service in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population), where the exercise of the right to strike or the paralysis of activities can be prohibited or restricted. The Committee also considers that the peaceful exercise of trade union rights should not be the subject of criminal proceedings or result in the detention of the union officials who have organized them, on charges of boycotting, as in the present case, by virtue of the application of section 139 of the Act for the Defence of Persons in Accessing Goods and Services. This being the case, the Committee requests the Government to take the necessary measures to discontinue the criminal proceedings brought against the six union officials at PDVSA and to ensure their release without delay. The Committee also requests the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term, and so that in no event criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard. The Committee draws this case to the attention of the Committee of Experts.*
- 1651.** *With respect to the allegations concerning the criminalization of protests and initiation of legal proceedings at various enterprises in the oil, gas and steel sectors, and the dismissal of union officials as a result of these protests, the Committee notes that, according to the CTV, judicial proceedings have been initiated against 27 workers at the state holding PDVSA and 25 workers at the "Alfredo Maneiro" Orinoco steelworks for staging protests*

in defence of their labour rights, and that ten union delegates were dismissed at the El Palito refinery after 600 workers decided to stop work as a result of failure to abide by commitments under the collective agreement; workers at the enterprises Gas PetroPiar and Gas Comunal have also been affected. The Committee also notes the CTV's allegations that around 110 workers have been taken to court for claiming their labour rights. In this regard, the Committee notes that, according to the Government, the Office of the Public Prosecutor has received no complaints and has not carried out any investigations concerning these allegations; on the contrary, the Office of the Public Prosecutor has intervened in various labour disputes at PDVSA, assisting in resolving them through mediation, without learning of any detentions or criminal proceedings in any of the disputes. Given the contradiction between the allegations and the Government's reply, the Committee requests the complainant to send the text of the accusations allegedly made against the union members in question.

1652. *Relating to the criminal proceedings against 110 workers for claiming their rights, the Committee notes the Government's statement that more precise information should be provided. The Committee requests the complainant organization to supply supplementary information concerning these allegations, specifically, the names of those involved and the activities they are alleged to have undertaken, so that the Government can send its observations in this regard.*

1653. *As regards the allegations concerning persistent refusal by the public authorities to bargain collectively in the health, oil, electricity and national university sectors, among others, the Committee notes that the Government reports the conclusion of collective agreements in these sectors (the allegations relating to the health sector are dealt with in Case No. 2422). The Committee invites the complainant organization to indicate whether the collective bargaining rights of its affiliates have been respected in the bargaining processes mentioned by the Government.*

The Committee's recommendations

1654. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expresses its grave concern at the serious allegations of murders of workers and union officials and urges the Government to act diligently and swiftly to resolve these cases fully.*
- (b) With regard to the allegations concerning the murder of three officials of the Bolivarian Union of Workers in the Construction Industry in El Tigre (Mr Wilfredo Rafael Hernández Avile, general secretary, Mr Jesús Argenis Guevara, organizational secretary, and Mr Jesús Alberto Hernández, culture and sports secretary) and of two trade union delegates in the Los Anaucos area in June 2009 (Mr Felipe Alejandro Matar Iriarte and Mr Reinaldo José Hernández Berroteran), the Committee requests the Government to explain the reasons for the termination of the criminal proceedings and expects that new investigations will be initiated and will yield results in the near future and will enable the perpetrators to be identified and punished. The Committee requests the Government to keep it informed in this regard.*

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- (c) *Concerning the allegations in relation to the contract killings of more than 200 workers and union officials in the construction sector, the Committee requests the trade union to provide the Government without delay with a list of these murders and the circumstances involved so that the Government can undertake the appropriate investigations without delay. The Committee requests the Government to keep it informed in this regard.*
- (d) *As regards the allegations concerning the Office of the Attorney General's preparation criminal charges against and detention of six workers at PDVSA because, during a protest in defence of their labour rights, they paralysed the enterprise's activities, the Committee requests the Government to take the necessary measures to have the criminal proceedings brought against the six union officials at PDVSA dropped and to ensure their release without delay. The Committee also requests the Government to take the necessary steps to amend section 139 of the Act for the Defence of Persons in Accessing Goods and Services so that it does not apply to services which are not essential in the strict sense of the term and so that in no event may criminal sanctions be imposed in cases of peaceful strikes. The Committee requests the Government to keep it informed in this regard. The Committee draws this case to the attention of the Committee of Experts.*
- (e) *Relating to the allegations concerning the criminalization of protests and the initiation of judicial proceedings at various enterprises in the oil, gas and steel sectors, and the dismissal of union officials as a result of these protests, the Committee requests the complainant to send the text of the accusations allegedly made against the union members in question.*
- (f) *With regard to the criminal court proceedings against 110 workers for claiming their rights, the Committee requests the complainant organization to supply supplementary information concerning these allegations, specifically, the names of those involved and the activities they are alleged to have undertaken, so that the Government can send its observations in this regard.*
- (g) *The Committee invites the complainant organization to indicate whether the collective bargaining rights of its affiliates have been respected in the bargaining processes mentioned by the Government.*

(h) The Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.

Geneva, 19 March 2010.

(Signed) Professor Paul van der Heijden
Chairperson

Points for decision:

Paragraph 225;	Paragraph 802;
Paragraph 260;	Paragraph 846;
Paragraph 288;	Paragraph 959;
Paragraph 312;	Paragraph 999;
Paragraph 384;	Paragraph 1024;
Paragraph 399;	Paragraph 1036;
Paragraph 472;	Paragraph 1049;
Paragraph 571;	Paragraph 1074;
Paragraph 599;	Paragraph 1091;
Paragraph 614;	Paragraph 1116;
Paragraph 630;	Paragraph 1193;
Paragraph 666;	Paragraph 1225;
Paragraph 685;	Paragraph 1262;
Paragraph 699;	Paragraph 1280;
Paragraph 717;	Paragraph 1391;
Paragraph 733;	Paragraph 1557;
Paragraph 771;	Paragraph 1581;
Paragraph 778;	Paragraph 1629;
Paragraph 793;	Paragraph 1654.