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EIGHTH ITEM ON THE AGENDA

Reports of the Committee on Freedom of Association

359th Report of the Committee on Freedom of Association

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 3, 4 and 11 March 2011, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Mexican, Pakistani and Peruvian nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2702, 2725 and 2776), Mexico (Case No. 2694), Pakistan (Case No. 2799) and Peru (Cases Nos 2639 and 2771), respectively.

* * *

3. Currently, there are 145 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 31 cases on the merits, reaching definitive conclusions in 17 cases and interim conclusions in 14 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 2254 (Bolivarian Republic of Venezuela), 2445, 2540 and 2609 (Guatemala), 2528 (Philippines), 2591 (Myanmar) and 2655 (Cambodia), 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), 2516 (Ethiopia), 2571 (El Salvador), 2708 and 2709 (Guatemala), 2712, 2713 and 2714 (Democratic Republic of the Congo), 2745 (Philippines), 2780 (Ireland), 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 2822, 2823 and 2824 (Colombia), 2825 and 2826 (Peru), 2827 (Bolivian Republic of Venezuela), 2828 (Mexico), 2829 (Republic of Korea), 2830 (Colombia), 2831, 2832 and 2833 (Peru), 2834 (Paraguay), 2835 (Colombia), 2836 (El Salvador), 2837 (Argentina), 2838 (Greece), 2839 (Uruguay), 2840 (Guatemala), 2841 (France), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

Observations requested from governments

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2177 and 2183 (Japan), 2318 (Cambodia), 2620 (Republic of Korea), 2648 (Paraguay), 2660 (Argentina), 2704 (Canada), 2710 (Colombia), 2715 (Democratic Republic of the Congo), 2723 (Fiji), 2729 (Portugal), 2733 (Albania), 2739 (Brazil), 2740 (Iraq), 2788 (Argentina), 2789 (Turkey), 2794 (Kiribati), 2795 (Brazil), 2797 (Democratic Republic of the Congo), 2798 (Argentina), 2800 (Colombia), 2806 (United Kingdom), 2808 (Cameroon), 2814 (Chile), 2815 (Philippines), 2817 (Argentina), 2819 (Dominican Republic), 2820 (Greece) and 2821 (Canada).

Partial information received from governments

8. In Cases Nos 2265 (Switzerland), 2522 (Colombia), 2673 (Guatemala), 2684 (Ecuador), 2706 (Panama), 2741 (United States), 2749 (France), 2765 (Bangladesh), 2768 (Guatemala), 2772 (Cameroon), 2778 (Costa Rica), 2785 (Spain), 2792 (Brazil), 2796 (Colombia), 2811 (Guatemala), 2812 (Cameroon) and 2816 (Peru), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

9. As regards Cases Nos 2422 (Bolivarian Republic of Venezuela), 2533 (Peru), 2664 (Peru), 2674 (Bolivarian Republic of Venezuela), 2717 (Malaysia), 2726 (Argentina), 2727 (Bolivarian Republic of Venezuela), 2743 (Argentina), 2746 (Costa Rica), 2757 (Peru), 2758 (Russian Federation), 2761 (Colombia), 2763 (Bolivarian Republic of Venezuela), 2766 (Mexico), 2770 (Chile), 2774 (Mexico), 2775 and 2777 (Hungary), 2779 (Uruguay), 2781 (El Salvador), 2784 (Argentina), 2787 (Chile), 2790, 2791, 2793 and 2801 (Colombia), 2802 (Mexico), 2803 (Canada), 2804 (Colombia), 2805 (Germany), 2809 (Argentina), 2810 (Peru), 2813 (Peru) and 2818 (El Salvador), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Article 26 complaints

10. The Committee is awaiting the observations of the Government of Belarus in respect of its recommendations relating to the measures taken to implement the recommendations of the Commission of Inquiry. In light of the time that has elapsed since its previous examination of this case and the additional information provided by the national trade unions, the Committee requests the Government to send its observations as a matter of urgency so that it may examine the follow-up measures taken with respect to the recommendations of the Commission of Inquiry at its next meeting.
11. As regards the article 26 complaint against the Government of the Bolivarian Republic of Venezuela, the Committee deeply regrets that the Government has still not given any follow-up to the recommendations the Committee has been consistently and repeatedly making for the past five years for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation. Against this background, and in light of the observations, conclusions and recommendations issued by the ILO supervisory bodies, the Committee invites the Governing Body to take a decision in relation to this item on its agenda at its March 2011 meeting.

Transmission of cases to the Committee of Experts

12. The Committee draws the legislative aspects of the following case to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Pakistan (Case No. 2799).

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

Case No. 2718 (Argentina)

13. The Committee examined this case (in which it was alleged that the authorities of the Corrientes Municipal Loan Fund decided not to deduct union dues for trade union members, or to provide office accommodation for the conduct of trade union activities, or to allow workers to hold assemblies, while suspending a delegate of the Association of State Workers (ATE), Ms María Elena Villalba, for 30 days, and that the town council 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' wages) at its March 2010 meeting on which occasion it made the following recommendations [see 356th Report, para. 288]:
 - (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.
14. In a communication of 19 August 2010, the Government states that: (1) the judicial proceedings in question are ongoing before Labour Court No. 3 of the city of Corrientes; and (2) the Corrientes Municipal Loan Fund stated that the respective dues are being deducted from the wages of the members of the various trade unions and deposited within the first ten days following the payment of wages.
15. *The Committee takes note of this information and requests the Government to keep it informed of the outcome of the judicial proceedings regarding the case in question before Labour Court No. 3 of the city of Corrientes. Furthermore, the Committee requests the Government to keep it informed of any measures adopted to ensure that the town council of Corrientes deducts and submits 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.*

Case No. 2722 (Botswana)

16. The Committee last examined this case at its meeting in June 2010 [see 357th report, paras 230–265]. This case concerns the alleged forced retirement from his post of Mr Japhta Radibe, President of the Botswana Teachers' Union (BTU) and School Head at Sedibelo Community Junior Secondary School, by the Department of Teaching Service Management (TSM) in order to prevent him from heading the BTU, as well as other harassment and dismissals. At its June 2010 meeting, the Committee made the following recommendations: (a) in view of the fact that three years have elapsed since the lodging of

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

17. In a communication dated 18 June 2010, Education International provides a copy of the judgment of the High Court of Botswana dated 25 March 2010, which dismisses the application of Mr Radibe against the TSM for unlawful, unfair and wrongful dismissal. In addition, in their communication, the complainants express concern about the economic status of Mr Radibe's family, as he is now without resources, and about security issues, as they allege that Mr Radibe and members of his family are regularly followed.
18. In its decision dated 25 March 2010, the Court noted that several reasons were advanced by the TSM as to why the compulsory retirement of Mr Radibe was being contemplated, particularly his frequent absenteeism from work. The Court considered that since Mr Radibe was twice given the opportunity to know what prompted the consideration of his retirement and to make representations, as contemplated in section 14(3) of the Teaching Service Act and Regulation 10 of the Teaching Service Regulations, but since he decided to challenge the reasons given without making representations and without answering the factual arguments put forward by the employer, his application against the retirement decision should be dismissed. The Court nevertheless confirmed what the complainants had indicated in their first communication, namely that Mr Radibe was first forced to retire on 24 October 2006 and was then reinstated on 3 November 2006 on the ground that Regulation 10 of the Teaching Service Regulations had not been followed, since the applicant had not made representations in accordance with this regulation. The Court summarizes the subsequent stages of the procedure since November 2006 in the following way:

Mr Radibe requested the TSM to furnish the reasons for considering his retirement for the purpose of making informed representations; the TSM wrote back to Mr Radibe, enumerating additional reasons to the ones he had already provided in earlier correspondence as to why his retirement was under consideration; Mr Radibe once more requested further and better particulars to which the TSM replied that Mr Radibe had been afforded ample opportunity to make representations in terms of the Act and the Regulations but had chosen not to do so; and the TSM went ahead and retired Mr Radibe.

According to the letter of the TSM dated 3 November 2006, which is reproduced in the Court decision, the TSM justifies its decision in the following way:

Your continual absence from your work station is leaving your school in a state of uncertainty, which deprives your school of leadership and compromises the education of students entrusted to you. It has been reported to me that it is quite common for you to make brief appearances at school but a disproportionate amount of your time is spent in conferences, seminars, workshops in and outside the country. On several occasions in public forums you have spoken against Government's policy as reflected in your opposition to the paying of school fees, a policy which by virtue of your position you ought to support, whether you agree with it or not. While I accept that you are a trade unionist and may take the Ministry of

Education or Government to task on issues that concern the welfare of your members, the manner in which you have purported to do this has been inappropriate and contrary to the regulations governing the conduct of teachers

In addition, in a letter dated 4 December 2006, the TSM indicates that amongst other “numerous incidents”, Mr Radibe left work without permission on three occasions in August and October 2006 to attend a conference or workshop. It also appears from the letters that the Court decision reproduces, which were exchanged between the BTU and the Chief Education Officer in charge of authorizing Mr Radibe’s absence requests, and which were presented by the TSM in support of its decision dated 24 October 2006, that the activities (conferences and workshops) which Mr Radibe requested to attend were unequivocally linked to BTU activities.

19. *The Committee takes note of this information. As to the argument put forward by the Government that Mr Radibe spoke against the Government’s policy on several occasions in public forums, the Committee recalls that freedom of expression, which should be enjoyed by trade unions and their leaders, should also be guaranteed when they wish to criticize the Government’s economic and social policy. It further recalls the importance it attaches to the need to grant the necessary time-off facilities to workers’ representatives and that while the granting of such facilities should not impair the efficient operation of the undertaking concerned, Paragraph 10(1) of the Workers’ Representatives Recommendation, 1971 (No. 143), provides that workers’ representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions. Subparagraph 2 of Paragraph 10 also specifies that, while workers’ representatives may be required to obtain permission from the management before taking time off, such permission should not be unreasonably withheld [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 157 and 1110].*
20. *In light of these principles, the Committee notes that, while the main reason invoked by the TSM to justify Mr Radibe’s forced retirement is linked to his frequent absenteeism from work, which can be linked to his trade union mandate, this decision of the TSM was also taken on the ground of certain public statements made by Mr Radibe against the Government’s policy. The Committee understands that the conferences and workshops mentioned in the Court decision dated 25 March 2010, which Mr Radibe requested to attend, were linked to legitimate trade union activities. The Committee also notes that the Court found that, on some occasions, Mr Radibe left his work position without permission to attend such activities. The Committee further notes, from the Court decision, that Mr Radibe failed to make representations in accordance with the relevant regulation as to the decision of the TSM to retire him and did not answer the factual arguments put forward by the TSM to justify his retirement (in particular as to his unauthorized absences from work). Finally, the Committee notes the complainants’ allegations that Mr Radibe and members of his family are regularly followed and fear for their safety.*
21. *The Committee is of the view that the clear determination between the BTU and the Government on time-off facilities for the exercise of legitimate trade union activities – which would balance the granting of such facilities with the need for the efficient operation of the educational institution Mr Radibe was teaching – would help to avoid further conflicts in this regard. The Committee therefore requests the Government to engage the parties with a view to achieving a joint negotiated settlement of the dispute, including the possible reinstatement of the trade union leader affected, and to keep it informed in this respect. The Committee also requests the Government to immediately undertake an inquiry into the allegation that Mr Radibe and members of his family are regularly followed and to keep it informed on the outcome.*

Case No. 2470 (Brazil)

22. The Committee last examined this case at its meeting in March 2010, and on that occasion asked the Government to send information with respect to the refusal to recognize the National Trade Union Committee of Unilever Brazil and the establishment of a parallel body of workers' representatives, as well as with respect to the new allegations 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; and (3) it is failing to comply with the collective agreement by not providing the union with documentation on industrial accidents [see 356th Report, paras 26–29].
23. In its communication of August 2010, the Government sent a report from the enterprise Unilever in which the enterprise indicates, with regard to the alleged failure to recognize the National Trade Union Committee of Unilever Brazil, that legislation provides for a trade union structure comprised of confederations, federations and trade unions and does not provide for the existence of employees' committees in factories or enterprises. It also indicates that it has 12 factories and dozens of distribution centres and it maintains relations with 15 different trade unions. The enterprise also indicates that it has 13,000 employees throughout Brazil and that the Unified Trade Union of Chemical Industry Workers (Vinhedo Region) represents only 3 per cent of the workers. Furthermore, the enterprise indicates that, taking into account its Code of Business Principles, it has established a dialogue and channels of communication with all legitimate workers' representatives. With regard to the new allegations that have been presented, the enterprise indicates that: (1) with regard to trade union official Mr José Santana de Lima, he was dismissed on grounds of poor performance; the judicial authority considered that he did not have trade union immunity and the union suspended him from his duties until the end of his mandate; (2) with regard to the taking of trade union leave, there are 25 union officials in the enterprise and 70 per cent of them are afforded paid leave and those who are not benefiting from paid leave may take leave of absence from work to participate in trade union activities; and (3) with regard to the failure to comply with the collective agreement by not providing the union with documentation on industrial accidents, a workplace accident report is prepared for 100 per cent of the accidents that take place in the enterprise and the procedures to ensure that the trade unions have such reports are improving. In 2009, the enterprise invested 3.5 million Brazilian reais in the area of occupational health and safety and the accident rate is ten accidents per year for 12,300 workers.

24. *The Committee notes with interest this latest information.*

Case No. 2626 (Chile)

25. In its previous examination of the case in March 2010, the Committee made the following recommendations on matters still pending [see 356th Report, para. 399]:
- (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.
26. In its communication of 8 October 2010, the Government states that there are no records in the registry of the Public Ministry of Juan Carlos Miranda or of Francisco Javier Díaz Herrera, and adds that the latter is currently working for a company that provides services for CODELCO and is president of the union at that company. *The Committee notes this information.*
27. The Government also states that during the strike in 2007, a number of workers and trade unionists were convicted of offences but the great majority of them had their sentences suspended. The offences were those of damage to property, theft, threats, public disorder, or obstruction of access to the mine. *The Committee notes this information.*
28. As regards the proceedings to strip certain union officials of trade union immunity (which would permit their dismissal), the Government states that the judicial authority rejected the application to remove immunity from Emilio Zárate and Patricio Rocco, and that neither the company of Luis Garrido Garrido nor that of Juan Francisco González Bugueño applied to the judicial authority to remove their immunity. *The Committee notes this information.*
29. With regard to Patricio Alejandro García Barahona, Ramón Segundo Salazar Vergara and Viviana Andrea Abud Flores, the Government states that case no. 94720 concerning removal of immunity is currently before the lower-level Labour Court of Rancagua. According to the employer (the contracting enterprise Mc Lean), on 4 June 2008, at around 7.20 a.m. at the CODELCO facilities in the Colón Alto sector, the individuals in question interfered with the free passage of vehicles and persons by placing themselves underneath workers' buses at the head of the convoy headed for the mine, thereby preventing 48 buses carrying around 2,000 workers from CODELCO and contracting enterprises from getting to the mine, seriously endangering their own lives and causing major losses to the El Teniente division. As a result of these actions, the company Mc Lean applied to have the individuals in question stripped of their immunity for contravening section 160, paragraph 5, of the Labour Code (acts or omissions or reckless actions that affect the safety or functioning of the establishment, the safety and activity of the workers, or their health). The Government adds that on 11 March 2010, a lower court ruling agreed to the lifting of the workers' immunity and thus authorized the employer to dismiss them. On 21 April 2010, the workers lodged an appeal against that ruling, which is still pending. *The Committee requests the Government to inform it of the outcome of the appeal.*
30. As regards the right of union officials to visit workplaces, the Government states that according to Chilean labour legislation, trade union officials employed at a contracting enterprise may visit dependent areas of the main contractor provided that members of the union are employed at those sites and the purpose of the visit is trade union activity. Thus,

section 255 of the Labour Code provides that: “Ordinary or extraordinary meetings of trade union organizations shall be held in any union premises outside working hours and shall have the purpose of enabling their members to discuss matters of relevance at the entity in question ... They shall, however, be entitled to hold meetings during working hours if they have been agreed in advance with the employer or employer’s representative.”

31. The Government adds that as a result of the legal framework described above, if one or more of the union officials in question work normally for a contracting company and have duly authorized passes or cards, they can visit production areas in the various subsidiary divisions of the company, as does any worker performing his duties, in strict compliance with safety and health requirements, and can carry on their trade union functions within the terms of section 255 of the Labour Code. On the other hand, if the union officials in question are not providing actual services in their respective enterprise, or if the civil or commercial contract between the contracting enterprise and the principal contractor enterprise has expired and they consequently no longer have normal authorization to enter the workplace, CODELCO, in order to protect the health and safety of persons and the security of its facilities, as required by section 184 of the Labour Code, shall authorize admission to workplace provided that authorization is sought in advance. In accordance with section 183-E of the Labour Code, the principal contractor has the obligation, together with the contracting company, to adopt any measures needed to protect the lives and health of subcontracted workers at the workplaces in question.
32. In this context, the Government goes on to state that the mining enterprise CODELCO has implemented a vigorous and efficient system of health, safety and protection at the workplace, including, among others, the provision according to which every person seeking admission to work including the CODELCO union officials and those of the corresponding contracting enterprise, must be in possession of respective cards or passes that are issued following a rigorous administrative procedure, wherever there is restricted access to the industrial areas or other dependent areas of CODELCO. The Government draws attention to the fact that in accordance with its legal prerogatives, the National Labour Directorate has issued an order concerning access to the company for trade union officials.
33. On that basis, and in accordance with the recommendations made by the Committee on Freedom of Association of the ILO’s Governing Body, the prevailing national and international labour standards in the area of freedom of association and occupational safety and health, given the diversity of labour rights which converge in this area, and with a view to ensuring the full implementation and respect for workers’ rights, trade union activities at CODELCO work sites can be carried out under the following conditions: (1) there must be workers at the site in question who are members of the union and represented by the officials seeking access to the workplace, a fact which must be certified by the competent labour inspector; (2) where union officials are not employed at the site or in the activities concerned, they must give advance notice to CODELCO of the date, time and reasons for the visit; (3) the visitors must adhere to the applicable company rules, especially as regards entry to restricted areas; and (4) the trade union activity within the company’s dependent areas must not entail any disruption to the normal processes of work, meals, rest and recreation of workers employed there, above all of those who are not union members.
34. *The Committee notes this information.*
35. *As regards the Committee’s question as to whether the union officials have been refused work, the Government, in the context of requests made for such information, has received no new information regarding the circumstances of alleged refusals involving any official*

named in the complaint. Since the complainant organizations have not provided any information on this question, the Committee will not pursue its examination.

Case No. 2692 (Chile)

36. The Committee last examined this case at its March 2010 meeting, when it made the following Recommendations within the context of actions taken by the Metropolitan South Regional Public Prosecution Service as a result of the establishment of the Association of Public Employees of the Metropolitan South Regional Public Prosecution Service (AFFRMS) [see 356th Report, para. 472]:

- (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 Anguita 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.

37. In its communication dated 18 October 2010, the Government states that the present complaint against the Office of the Public Prosecutor was made as a result of various situations which arose at the time of the establishment of the AFFRMS, and during the period that immediately followed that event, between March 2007 and August 2008. Furthermore, subsequent to this period the said association of public employees had carried out its functions and exercised its rights without any restrictions whatsoever, maintaining a relationship of mutual respect with the regional authorities. The directors of the association made use of the trade union leave granted them by law and the facilities afforded them to allow them to meet with their members and to renew their executives and were received by the authorities of the Regional Public Prosecution Service. Furthermore, the AFFRMS came together with other regional associations of public employees to form the National Federation of the Office of the Public Prosecutor, fulfilling its purposes and exercising its rights without any restrictions. Both the AFFRMS and the abovementioned National Federation work with the national authorities of the Office of the Public Prosecutor and are regularly received by those authorities, which encourage their participation in official bodies in their capacity as representatives of the public employees. *The Committee notes with interest the information relating to the application of Recommendations (a)–(c).*

38. As to an eventual administrative or judicial decision adopted in the light of the procedures instituted by the Public Prosecutor Mr Pedro Orthusteguy Hinrichsen for anti-union

practices, the Government states that Mr Orthusteguy has not instituted any administrative or judicial procedures regarding his change in responsibilities. Mr Orthusteguy was appointed Assistant Public Prosecutor grade VI, and while he worked as Head Public Prosecutor of a local Office of the Public Prosecution Service he received grade IV remuneration. In May of 2008 he was transferred to another local Office of the Public Prosecution Service, where he no longer carried out the functions of a Head of Office, and he again received the remuneration corresponding to the grade of his appointment. The Government states that, by legislation, the Regional Public Prosecutor is the sole authority with the power to appoint or maintain prosecutors in the post of Head Prosecutor and, therefore, the Regional Public Prosecutor cannot be accused of anti-union conduct as he was exercising his legal powers. *The Committee notes this information, and given that Mr Pedro Orthusteguy has not instituted proceedings for anti-union practices, it will not continue with its examination of this aspect of the case.*

39. Finally, the Committee regrets that the complainant organizations have not sent the information requested in Recommendations (d)–(e) since March 2010.

Case No. 2490 (Costa Rica)

40. In its November 2009 meeting, the Committee made the following recommendation on a matter still pending [see 355th Report, para. 66]:

At its November 2008 meeting, the Committee made other recommendations relating to existing restrictions on the right to bargain collectively in the public sector [see 351st Report, para. 671]. In its reply, the Government sends observations in this respect and includes the opinion of the Supreme Court of Justice. The Government indicates that it will inform the Committee which other authorities it consults and that it has taken measures to move along the processing of the bills on collective bargaining in the public sector and on the ratification of Conventions Nos 151 and 154. *The Committee will examine these matters when it receives the comments from the other authorities consulted by the Government (including the Legislative Assembly, which is the competent state authority on these matters) and has all the necessary information at its disposal.*

41. In its communications dated 15 June and 29 September 2010, the Government states that the Minister of Labour requested the Minister of the Office of the President to move forward with the draft of bills contributing to the strengthening of the right to collective bargaining, including the bill on the approval of ILO Conventions Nos 151 and 154.
42. *The Committee takes note of this information and requests the Government to keep it informed of any developments in the processing of these bills and hopes, given that they have been submitted to the Legislative Assembly on several occasions over the last few years, that they will be adopted in the near future.*

Case No. 2518 (Costa Rica)

43. In its previous examination of the case in March 2010, the Committee made the following recommendations on the questions still pending [see 356th Report, para. 666]:

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.

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.

44. In its communication of 29 September 2010, the Government provides information on the status of the judicial proceedings involving the trade union officials Teodoro Martínez Martínez (first instance ruling to be handed down shortly), Amado Díaz Guevara (enforceable judgement in the worker's favour), Peck Montiel (ruling being appealed), and Manuel Murillo de la Rosa (enforceable judgement in the worker's favour).
45. The Government adds that it would appear from the foregoing information that the judicial cases have been dealt with in the appropriate manner and resolved in strict compliance with the existing guarantees of access to justice and the principle of due process as provided for in Costa Rican law.
46. *The Committee takes note of this information and requests the Government to keep it informed of the outcome of the judicial proceedings instigated by the union official Teodoro Martínez Martínez following his dismissal, and of the appeal lodged in connection with the dismissal of union official Peck Montiel.*
47. As regards the recommendation concerning the possibility of the ILO Subregional Office undertaking an independent investigation in the banana sector into the allegations concerning the keeping of blacklists, the Government cautions that this is an issue of which the new labour and social security authorities have been informed only recently. For this reason, before agreeing to the possibility of carrying out the mission in question in the country, the Government considers it advisable to reconsider, from a different viewpoint, the request made initially by the supervisory body for an independent investigation in the banana sector. It should be borne in mind that labour inspection is a priority area for the current administration and is being strengthened by institutional projects and the support of international cooperation. Consequently, the Government wishes to formally reconsider its agreement to allow the mission, as it considers that the competent authorities are meeting their obligations and carrying out their functions with regard to supervision and will continue to give particular importance to this sector of the national economy.
48. *The Committee takes note of this information, and considers that there is no disadvantage in allowing the labour inspectorate to conduct the investigation into the alleged use of blacklists in the banana sector. The Committee trusts that the Government will be in a position to communicate the results of that investigation before long.*

Case No. 2604 (Costa Rica)

49. The Committee last examined this case at its November 2009 meeting when it made the following recommendations on the matters still pending [see 355th Report, para. 79]:

The Committee looks forward to hearing the ruling that is handed down on Dr Sonia Román's (trade union leader of the National Medical Union) trade union leave. The Committee requests the Government to indicate whether, following the Constitutional Chamber's ruling on the dismissal of the trade union official Mr Salas Sarkís (of the UPINS trade union), Mr Sarkís has filed new administrative or judicial appeals.

50. In its communications dated 29 September 2010, the Government refers to communications dated 22 January and 30 August 2010 (not received by the ILO) which, according to the Government, show that the actions of the authorities complied with national law and the principles of the ILO.

51. *The Committee takes note of this information provided by the Government but must point out that the communications of 22 January and 30 August 2010 have not been received and requests that they be resent.*

Case No. 2755 (Ecuador)

52. The Committee last examined this case at its June 2010 meeting and on that occasion requested the Government, in line with the practice which it had followed previously, to immediately restore the deductions of dues of UNE members who had authorized that deduction, and to keep it informed in this respect [see 357th Report, paras 415–429].
53. In its communication of 14 September 2010, the complainant organization states that it lodged an appeal before the Guayas Criminal Guarantees Court on 15 May 2010 with a view to annulling Circular No. 0082 of 19 August 2009 (suspending the deductions of union dues of members of the teaching profession); the Court on 22 May 2010 ruled in the union's favour. The complainant organization adds that, on 28 May 2010, an appeal was lodged against that ruling before the Provincial Court of Justice of Guayas. On 21 July 2010, the First Chamber for Labour, Children and Adolescents revoked the ruling and declared null and void the protection proceedings initiated by the union. On 6 August 2010, the complainant lodged an extraordinary action for protection before the Constitutional Court which is still pending.
54. In its communications dated 15 July and 13 October 2010, the Government reiterates the information provided previously to the effect that there has never at any time been a decision to suspend deductions of union dues from members of the teaching profession. There were instructions that Ministry of Education facilities should not be used to effect (automatic) deductions of sums for the UNE through the payroll of the Ministry and its departments. The law currently in force prohibits deductions that are not authorized by the official or by legislation.
55. *The Committee takes note of the information provided by the complainant organization and regrets that the Government has not sent any updated information on the case. The Committee observes that the complainant organization lodged an extraordinary application for protection with the Constitutional Court, and this application is still pending. The Committee therefore hopes that the Constitutional Court will give a ruling in the near future, and requests the Government to keep it informed in that regard and to communicate a copy of the ruling when it is handed down. The Committee recalls that withdrawal of a check-off facility which has been in use for a number of years may seriously harm the union and its activities, and therefore hopes that the employer and the union will reach an agreement in order to maintain the system that was being used, provided that the union shows that its members have authorized such deductions of trade union dues from their wages.*

Case No. 2482 (Guatemala)

56. The Committee last examined this case at its November 2007 meeting, when it requested the Government to keep it informed of the ongoing investigations to identify and sanction without delay those responsible for breaking property and stealing property and documents from the Unified Trade Union Confederation of Guatemala (CUSG) and for the threatening phone calls to the trade unionist Carlos Humberto Carballo Cabrera (events that occurred in 2006) [see 348th Report, paras 113–115].
57. In its communication of 4 June 2010, the Government indicates that on 24 March 2009 the International Affairs Department requested the Office of Crimes against Journalists and

Trade Unionists at the Office of the Public Prosecutor to supply information to enable it to indicate the progress made in the investigations. In response to its request, the Government indicates that on 1 April 2009 the Office of the Secretary-General of the Ministry of Labour and Social Security received a communication from the Office of Crimes against Journalists and Trade Unionists indicating that the case had been dismissed by the competent judge.

58. *The Committee takes note of this information and regrets that the investigations conducted did not enable the perpetrators to be identified and punished.*

Case No. 2540 (Guatemala)

59. The Committee last examined this case at its November 2008 meeting and called the Governing Body's attention to this case given the extreme seriousness and urgency of the issues raised. On that occasion it made the following recommendations [see 351st Report, paras 885–897]:

- The Committee regrets that the Government has sent limited information and, in particular, that it has sent no new information on developments in the criminal proceedings relating to the murder of trade union official Pedro Zamora. The Committee must therefore once again deeply deplore the murder of this trade union official and the injury caused to one of his children. It urges the Government to do everything within its power to step up the current investigations and actions to arrest, prosecute and punish the perpetrators of the murder of trade union official Pedro Zamora. The Committee urges the Government to keep it informed in this regard. The Committee once again urges the Government to take all necessary steps to protect the members of STEPQ's executive committee who are being threatened and to keep it informed in this respect.
- Observing that in recent years it has had to examine recurring allegations of violence against trade unionists and trade union officials, the Committee once again draws the Government's attention to the principle whereby a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty; 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.
- The Committee stresses that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. Moreover, the Committee recalls that the absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights.

60. In its communication of 1 September 2010 the Government indicates that on 15 April 2009 the Office of Crimes against Journalists and Trade Unionists filed a criminal charge and a motion to initiate a trial before the Criminal Court of First Instance of the Department of Escuintla against Mr Wilfredo Waldemar Valiente García as a possible suspect for the murder of the trade union official Mr Pedro Zamora. The Government adds that the motion was admitted and was then brought before the Criminal Trial Court of the Department of Escuintla, which proceeded to acquit Wilfredo Waldemar Valiente García of the offence of which he was accused. Consequently the Public Prosecutor lodged a special appeal through the abovementioned Office against the decision of the Trial Court, an action that is still pending. The Government also indicates that, according to the current results of the investigation, the murder is not a direct consequence of the victim's trade union activities.

61. *The Committee notes this information and requests the Government to keep it informed of the outcome of the abovementioned special appeal and to send a copy of the decision when*

it is handed down. In view of the seriousness of the allegations in this case, the Committee once again wishes to draw the Government's attention to the principle whereby a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty and 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 decision and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 43 and 45]. The Committee highlights the importance of identifying those responsible for murdering the trade union official Pedro Zamora and of imposing severe punishments on them, and requests the Government to ensure that all necessary measures are taken in this regard.

62. The Committee also notes that the Government has not sent any information on the steps taken to protect the members of STEPQ's executive committee who are being threatened and requests it to provide information in this respect.

Case No. 2700 (Guatemala)

63. The Committee last examined this case at its March 2010 meeting, on which occasion it requested the Government to take the necessary measures without delay to ensure that the National Union of Statistics (INE) applied in full the collective agreement concluded with the Union of Statistics Workers of the National Institute of Statistics (STINE) on 9 August 2007, and to keep it informed in this regard [see 356th Report, paras 794–802].
64. In its communication dated 24 June 2010, the complainant organization states that the Government lacks the will to enforce the collective agreement on working conditions, with the STINE consequently submitting a list of claims with the Labour Court. The Conciliation Court issued a decision recommending a 1,000 Guatemalan quetzal (GTQ) wage increase but the executive committee of the INE failed to comply with that decision.
65. In its communications dated 5 May and 1 September 2010 the Government indicates that the Chamber of Constitutional Protection and Pre-trial Investigation of the Supreme Court of Justice issued a ruling concerning an *amparo* (appeal for protection of constitutional rights) which was challenged. The Constitutional Court is due to issue a ruling on this appeal. As for the declaration of a new collective socio-economic dispute, this is at the conciliation stage and two hearings have been held in this respect. During the first hearing, the judicial body recommended that the defendant institution should grant a wage increase and two additional bonuses. The second hearing could not be held because one of the delegates from the employer sector failed to provide identification documents. The Conciliation Court therefore ordered the defendant institution to present documents proving its economic capacity with the necessary supporting elements. This request was not met and, therefore, the judicial authority ordered the worker party to appear and to set out the requests it made to the employer party before the corresponding instances so that a decision could be issued regarding the case.
66. The Committee takes note of the information provided by the Government and the complainant organization. The Committee observes that in the present case the judicial body recommended that the defendant should grant a wage increase and two additional bonuses and that the procedure is currently pending, awaiting a second hearing. The Committee deeply regrets the time which has passed since the signing of the collective agreement without that agreement being implemented and recalls once again that collective agreements must be binding for both parties. The Committee urges the Government to take measures to ensure that the ongoing procedures are concluded in the very near future and to keep it informed of any developments in this regard.

Case No. 2512 (India)

67. The Committee last examined this case, which concerns alleged acts of anti-union discrimination and interference in trade union affairs through the creation of puppet unions, dismissals, suspensions and transfers of active trade union members, arbitrary reduction of wages, physical violence and lodging of false criminal charges against its members, at its June 2009 meeting [see 354th Report, paras 120–136]. On that occasion, the Committee noted with deep concern new allegations of anti-union discrimination against the MRF United Workers' Union (MRFUWU); requested that the Government provide its observations on a variety of matters, including previously reported incidents of anti-union discrimination and interference in the complainant union's internal affairs, as well as the current status of pending criminal cases against union workers; expressed regret that the Government had not provided the observations that the Committee had previously requested; requested that the Government actively consider adoption of essential legislative provisions in furtherance of trade union rights; and once again called on the Government to take appropriate measures to obtain the employer's recognition of the MRFUWU for collective bargaining purposes.
68. In a communication dated 8 October 2009, the MRFUWU provides additional follow-up information in support of its original complaint. The complainant describes a writ petition it filed in 2008, by which it sought implementation of the recommendations of the Committee contained in its 348th Report in Case No. 2512, specifically the recommendation relating to the recognition of the union by MRF Limited, the employer. The complainant also sought interim relief to prevent the employer from entering into a settlement with the MRF Arakonam Workers' Welfare Union (MRFAWWU), a union allegedly sponsored by the employer, during the pendency of its writ. The Madras High Court granted and later extended interim relief in July of 2008, but in April 2009, the MRFAWWU filed a petition to vacate the interim order, which would clear the way for a settlement between the MRFAWWU and the employer. On 5 May 2009, the Madras High Court vacated the interim order. By 8 May 2009, the complainant had prepared all papers necessary to file an appeal challenging the vacation order, and had served the employer and the MRFAWWU with these papers. However, the complainant was not able to file the appeal on 8 May 2009 because a copy of the order issued by the Madras High Court on 5 May 2009 had not been issued to the parties, despite orders from the ruling judge of the Madras High Court to the contrary. The complainant alleges that, despite their knowledge that the complainant was in the process of appealing the vacation of the interim order, the employer and the MRFAWWU entered into a settlement on 9 May 2009. The complainant further alleges that, in order to force its employees to comply with the terms of this settlement, the employer's management officials began threatening workers with dismissal unless they signed documents indicating their acceptance. The complainant also indicates that, in response to the conduct of the management, its members engaged in a spontaneous protest by staging a strike. In response to this strike, the employer and the MRFAWWU filed criminal petitions with the Madras High Court, claiming that the complainant union had illegally detained several workers inside the factory premises against their wills, and that the complainant union was obstructing the movement of men, materials, and vehicles to and from the factory.
69. In order to break the complainant's strike, the complainant alleges that, in the guise of acting in furtherance of a court order permitting the police to remove finished goods from the factory, and at the behest of the employer, the police attacked and injured members of the complainant union who were peacefully protesting outside the factory. Additionally, the complainant alleges that the employer resorted to a lockout of the factory from 17 May to 27 May 2009. Furthermore, the complainant alleges that the employer filed false criminal charges against members of the complainant union, claiming that they had broken bus windows and caused injuries to a co-worker. The complainant then filed its appeal

with the Madras High Court against that court's decision to lift the interim order, and filed a concurrent petition requesting that the employer and the MRFAWWU be prevented from giving effect to their settlement of 9 May 2009. On 8 September 2009, the Madras High Court ruled on both the appeal and the petition. The court held that the Industrial Disputes Act contemplates that workers have an independent and truly representative collective bargaining agent, that it is the right of the workers to decide which union should be their representative, and that once they make that decision by a procedure accepted by law, the management has no right to refuse to recognize that union. As regards the mode of determining the representative status of the unions operating in the factory, and in the absence of any relevant statutory provisions in the State of Tamil Nadu, the court held that the verification procedure prescribed under the Code of Discipline would be the appropriate method, and that secret ballot would not be appropriate. According to the complainant, the court rejected the ballot system previously mentioned by the Committee as inconsistent with statutes which had been brought to the court's attention, and inferior to the method of verification mandated by the court. It then directed the complainant to submit an application to the Labour Commissioner within a period of two weeks from the date of pronouncement of the order presenting its claimed membership figures for the previous six months, a period stretching from 1 March to 31 August 2009. On receipt of this application, the Labour Commissioner would issue notice to the complainant and the MRFAWWU, calling upon them to submit their membership registers and all supporting documents within two weeks of receipt of the notice. The Labour Commissioner would thereafter decide which of the two unions was more representative of the employer's workers, based on which union was able to establish evidence of a larger membership. As related to the complainant's challenge to the settlement reached by the employer and the MRFAWWU on 9 May 2009, the court noted that the complainant could challenge the validity and legality of the settlement by raising an industrial dispute.

70. The complainant alleges that the High Court ignored the following salient aspects of the case: (1) that the employer extended the "check off system" to the MRFAWWU but not the MRFUWU, putting the former in an unfairly advantageous position if the court's verification procedure is adopted; (2) that the employer has been deducting subscription against the will of the workers, also putting the MRFAWWU in an unfairly advantageous position in the verification process; and (3) that the settlement reached by the employer and the MRFAWWU on 9 May 2009 will be immediately imposed on the workers, while the proceedings in the suggested industrial dispute challenging the settlement will take no less than two years, causing injury to the workers in the meantime and affording only a remote remedy. Nevertheless, on 23 September 2009, the complainant submitted an application to the Commissioner of Labour in accordance with the order of the High Court, which contained the complainant union's membership figures for the previous six months, and which was without prejudice to the possibility of the complainant's filing an appeal to the Supreme Court against the High Court's order regarding the court's preference against the secret ballot method. On 14 September 2009, members of the complainant union called off their strike and resumed work.
71. The complainant asserts that the employer and the MRFAWWU then filed petitions before the High Court on 8 October 2009, seeking a stay of the operation of the court's order for one month, until 7 November 2009, to enable them to file a special leave petition before the Supreme Court against the High Court's order. According to the complainant, the MRFAWWU has claimed that the directions given by the High Court were not in line with the Code of Discipline, and that there would be chaos and confusion if the court's orders were to be implemented. The MRFAWWU has also claimed that verification of its membership was unnecessary, as it was the majority union for the employer's workers.
72. By a communication dated 15 October 2010, the complainant organization submits additional information on the alleged acts of anti-union discrimination committed by the

management against office bearers and members of the MRFUWU. In particular, the complainant refers to show cause notices that were issued by the management following a one-day strike on 26 May 2010 to protest against the practice of engaging contract workers in direct production. It further alleges that, 12 members of the complainant trade union were placed under suspension, including Mr S. Manoharan, its executive committee member, following a strike on 11 and 12 October 2010 to protest against the management's practices of paying piece-rate wages, the management's unilateral action of installing cameras, and the practice of engaging contract workers in direct production process.

73. The complainant also alleges that, earlier, on 25 March 2010, at the behest of the management, a member of the management's puppet union attacked a member of the complainant union with a knife in the canteen, after the latter had voiced his protest against the quality of food served in the canteen. While a complaint in this regard was lodged with the Arakkonam Taluk police station, the management issued charge memos to the person attacked and two other members of the MRFUWU. Disciplinary proceedings against them are in progress. While the management also issued a charge memo to the attacker and placed him under suspension, the suspension order was revoked after a week and he was allowed to resume duty in the factory as usual.
74. The complainant reiterates that its members face great hardship by reason of failure of the management to recognize the union and to collectively bargain with it. It further states that, beyond workers of the MRF Limited, workers in various other industries and establishments in the state of Tamil Nadu face hardship on account of the lack of any central or state law on the subject of recognition of trade unions. It stresses that there is an urgent need for such a legislation to be passed in consultation with representative workers' organizations.
75. The complainant indicates that criminal charges lodged by the management in 2005 against its three activists (Manivannan, P.N. Ravinder and Subramani) accusing them of breaking the glass panes of the company's bus were dropped on 19 May 2010 as groundless. The said workers had also been dismissed on the basis of the said false criminal complaints and the industrial disputes raised by them against their dismissals are pending before the Labour Court, Vellore. Furthermore, on 10 March 2010, S.I. Syed Ghouse, K. Raghupathy and G. Ghandrasekhar were acquitted by the Special Judicial Magistrate of the criminal complaints brought against them by the management of the factory in 2009.
76. In a communication dated 27 October 2010, the Government reiterates the findings of the three-member committee established to inquire into the allegations of anti-union discrimination and employer's interference in trade union affairs, which concluded that there have been no violations of trade union rights, but that the allegations related to the continuing trade union rivalry. The Government indicates that the committee, having completed its duty on 28 May 2008, was not entrusted with any new work.
77. As concerns the nine cases of suspension, the Government indicates that the aggrieved parties have to raise proposer industrial dispute before the conciliation authority under section 2(k) of the Industrial Disputes Act, 1947. No such case has been filed. The Government also indicates that the three-member committee also looked into disciplinary matters and reported that it pursued the disciplinary cases relating to termination of Thiru G. Shankar, General Secretary, and Thiru Muralikrishnan, the Joint Secretary of the MRFUWU. The committee revealed that they were charged with misconduct and low production, despite repeated instructions, warning letters and memos. Since these charges were not proved, they were dismissed. The inquiry also revealed that memos were issued

concerning other workers who deliberately were slowing down the production and instigating other workers to slow down the production.

- 78.** With regard to the court cases concerning dismissed workers, the Government indicates that 31 dismissal cases are still pending before the Labour Court, Vellore.
- 79.** With regard to the allegation of false criminal charges brought against members and office bearers of the complainant organization, the Government indicates that criminal charges are made by the police against anybody who indulges in criminal activities. With regard to the death of S. Suresh Kumar on 16 December 2008, referred to as suspicious by the complainant in its communication dated 4 February 2009, the Government indicates that, following an inquiry, the death was declared to be a suicide. According to the Government, this incident and consequential violence that was displayed by some workers have led to the filing of criminal cases, as normal life at Arakonam and work at the plant were disrupted. The Government refutes the union's allegation that some outsiders entered the factory and indulged in violence.
- 80.** With regard to the alleged transfers of trade union members which had been referred by the Government for adjudication, the latter reiterates that the said transfer cases were referred for adjudication to the Industrial Tribunal and are still pending.
- 81.** With regard to the legislation and the Committee's recommendation to consider adopting legislation aimed at facilitating trade union recognition, the Government reiterates that industrial relations in Tamil Nadu are governed by a well-drafted legislation, namely the Industrial Disputes Act, 1947, and the Trade Unions Act, 1926. There is no law on trade union recognition. The Government points out that the fundamental freedom of association rights include the right to establish an association subject to reasonable restrictions in the interest of sovereignty or integrity of India, public order and morality. The State has no authority to pass executive orders to amend eligibility criteria for contesting union election. Only legislature can amend the existing law. So far, no legislative changes have taken place in this regard, since it involves several processes. As to the proposal to amend the relevant provisions of the Industrial Disputes Act so as to ensure that suspended workers and trade unions may approach the court directly, without being referred by the State Government, the Government indicates that any proposed amendment has to be deliberated by members of the State Labour Advisory Board, be examined by the Government and placed before the Parliament. Only then can an amendment be carried out.
- 82.** With regard to the Committee's request to take measures to obtain the employer's recognition of the MRFUWU for collective bargaining purposes, the Government reiterates that it is not in a position to accord recognition to the complainant trade union as there is no legal obligation on the part of the management to confer recognition to the union. The Government indicates that the Commission of Labour has advised the union to approach the State Evaluation and Implementation Committee (SEIC), the authorized body to confirm the position of any union based in the strength of its membership. The union, however, instead of approaching the SEIC, chose to file a writ petition before the Honourable High Court of Madras (WP No. 17991/08) seeking recognition without going through the prescribed process before the SEIC. The court pronounced its judgement on 5 May 2009 vacating the stay granted on 28 July 2008 against the enterprise's management restraining it from entering into any settlement relating to wages or any other issue with the MRFAWWU. The Court considered that there is no bar for the management to enter into wage settlement with the other union, namely the MRFAWWU. Pursuant to this decision, the enterprise's management and the MRFAWWU signed a bipartite wage revision settlement on 9 May 2009. The complainant trade union filed a writ of appeal questioning the validity of the settlement. The court verdict is awaited. Nearly 922 out of 1,400 workers of the enterprise have consented to the settlement.

83. The Government indicates that, following the settlement, members of the complainant trade union refused to leave the plant, stopped working and prevented other workers from entering into the factory. On 12 May 2009, the High Court appointed an advocate commissioner to visit and report on the situation. The advocate commissioner reported that he was not allowed to interview the workers and only four workers stated that they wanted a secret ballot to be conducted. On 17 May 2009, the management declared a lockout and the agitating workers were removed by the police. Following a meeting of the District Collector with all the stakeholders, the management lifted the lockout on 27 May 2009. While 378 workers, members of the complainant trade union, have not returned to work, no disciplinary action had been initiated by the management.
84. The Government concludes by stating that trade union rights are well protected in Tamil Nadu. It requests the Committee to close this case which it considers to be one of an inter-union rivalry.
85. *The Committee notes with deep regret that over four years have passed since the complainant first filed allegations with the Committee in the case at hand, yet during this time the situation of trade union rights at MRF Limited does not appear to have improved while the Government, despite certain efforts, has failed to adequately address the legitimate concerns raised by the complainant's communications.*
86. *The Committee notes the information provided by the Government. It further notes with deep concern the new allegations provided by the complainant, which include assertions that the High Court has prematurely lifted the writ of petition it previously issued and extended; that the employer has entered into a settlement with the MRFWWU (which the complainant alleges is a puppet union); that the employer has threatened workers with dismissal in order to ensure compliance with the terms of the settlement; that police acting at the behest of the employer attacked and injured members of the complainant union while the members were peacefully protesting the settlement; and that the employer initiated a lockout and frivolously filed criminal charges against union members in response to the strike. Furthermore, the complainant alleges that the High Court has mandated an inherently unfair verification procedure to determine whether the complainant or the MRFWWU is the more representative union, and that this verification procedure does not include a secret ballot process. While the Committee notes the information provided by the Government with regard to these events, the Committee requests the Government to provide its observations on the abovementioned allegations of threats and violence contained in communications dated 8 October 2009 and 15 October 2010. The Committee observes that these allegations, if they are proven true, would infringe upon the principles of freedom of association and collective bargaining, and reminds the Government that when a State decides to become a Member of the ILO, 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].*
87. *With regard to the cases of allegedly false criminal charges, the Committee regrets that the Government merely reiterates the information it had previously provided and generally states that criminal charges are made by the police against anybody who indulges in criminal activities. The Committee recalls from the complainant's communication dated 4 February 2009 that the following charges appear to be still pending:*
- *Criminal case lodged in the Sholingur police station in February 2007 under instructions from the management of MRF Limited, by Mr Mahendran, a member of the management-sponsored MRFWWU against three members of our union – P. Parthiban, P. Balaji, P. Amaesan and B.M. Baskaran, a member of our union and the Vice-President of the MRF Cycle Tyre Unit Employees Association, falsely*

alleging that they had intimidated and threatened the workers to obtain their signatures on certain papers and thus have committed the offence under section 506(2) of the Indian Penal Code.

- *Criminal case lodged in the Arakkonam town police station in February 2007 against D. Christopher, Executive Committee member, and I. Raja, an active member of our union, falsely alleging that they had intimidated and threatened the workers to obtain their signatures on certain papers and thus have committed the offence under section 506(2) of the Indian Penal Code.*
- *Criminal case (Crime No. 441 of 2008) lodged in the Arakkonam Taluk police station on 9 July 2008 by the management of MRF Limited against 262 office bearers and members of the MRFUWU for the offences under sections 143, 341 and 188 of the Indian Penal Code, read with section 30(2) of the Police Act and section 7(1)(a) of the Criminal Law Amendment Act alleging that they had engaged in a road blockade on 9 July 2008.*
- *Criminal case (Crime No. 73712008) lodged on 17 December 2008 in the Arakkonam Taluk Police Station against 25 members of the MRFUWU for the commission of offences under sections 147, 148, 307, 336, 436 and 448 of the Indian Penal Code and section 3 of the Tamil Nadu Public Property (Prevention of Destruction) Act, 1992, alleging that they had destroyed the property of the company.*

88. *Referring to its previous examination of this case, the Committee urges the Government to provide the following without further delay:*

- *measures taken to ensure industrial peace at the undertaking;*
- *updated information on the status of all pending court cases concerning dismissed workers;*
- *detailed observations regarding all pending cases of allegedly false criminal charges brought against members and officers of the MRFUWU, including an explanation of the concrete facts that formed the basis of these charges;*
- *updated information on the status of the cases concerning alleged transfers of trade union members because of their membership in union activities, and regarding actions taken by the State Government in this regard; and*
- *any new information concerning the steps taken by the Government to obtain the employer's recognition of the MRFUWU for collective bargaining purposes, particularly in light of the complainant's most recent allegations.*

89. *The Committee recalls that it had previously requested the Government to actively consider the adoption of legislative provisions in furtherance of trade union rights. While noting the Government's position in this respect, the Committee regrets that the absence of a clear objective and precise procedure for determining the most representative union has led to the lack of resolution of this matter and only fomented continuing conflict at MRF. The Committee therefore requests the Government to encourage the Government of Tamil Nadu to address this matter urgently and to provide information on all measures taken in order to bring legislation into conformity with freedom of association principles, and more specifically, to indicate whether consideration has been given to the adoption of legislative provisions that further the goal of preventing anti-union discrimination and the infringement of trade union rights, amend all relevant provisions of the Industrial Disputes Act, and establish objective rules for the designation of the most representative union for collective bargaining purposes.*

Case No. 2567 (*Islamic Republic of Iran*)

90. The Committee last examined this case, which concerns allegations of government interference in the elections of the Iranian Confederation of Employers' Associations (ICEA), the subsequent dissolution of the ICEA by administrative authority and the official backing of a new and parallel employers' confederation (the Iranian Confederation of Employers (ICE)), at its June 2010 meeting [see 357th Report, paras 693–708]. On that occasion, the Committee made the following recommendations:

- (a) The Committee once again calls on the Government as a matter of urgency to amend the Labour Law in order to ensure protection against government interference in the exercise of freedom of association by employers, and as regards the need to ensure the right of all workers and employers to establish more than one organization at the enterprise, sectoral and national levels, and to do so in a manner that does not prejudice the ICEA or the freedom of association rights of its members or prospective members.
- (b) In light of the public ruling of the Tehran Public Court, and given that three years have passed since the first examination of this case, the Committee expresses its expectation that the Government will immediately register and recognize the ICEA as constituted following its General Assembly of 5 March 2007 and ensure that it can exercise its activities without hindrance, until such time as its membership, in accordance with its by-laws, holds elections or makes other decisions in relation to its structure. The Committee expects the Government to adopt a position of non-interference and neutrality in the exercise of freedom of association of employers and, in this particular case, the ICEA's right to exist free of prejudice and acts of favouritism. The Committee further expects the Government to remedy any remaining effects of past discriminatory acts arising out of the favouritism it had demonstrated towards the ICE.
- (c) More generally, the Committee urges the Government to amend the Labour Law and the Council of Ministers' Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions, so as to ensure that employers and workers are able to freely choose the organization they wish to represent them and so that these organizations may fully exercise their right to elect their representatives freely and without interference by the public authorities. It requests the Government to transmit a copy of any additional amendments proposed in this regard and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.
- (d) Recalling the Government's previous acceptance of a mission relating to outstanding freedom of association cases, the Committee expects that this mission will be able to visit the country shortly and have full access to all the concerned parties, so as to enable a full investigation into and dialogue on all freedom of association matters in the country including the aspects raised in the present case.
- (e) The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.

91. In a communication dated 25 August 2010, the Government recalls that the employers' organizations have reached an agreement on the issue of the representation of the employers at the International Labour Conference (ILC), following a meeting which was held at the initiative of the Minister of Labour and Social Affairs in April 2010, in the presence of the two employers' confederations (the ICEA and ICE). The ICEA and ICE also agreed on that occasion to undertake negotiations to reach a common decision with respect to the establishment of a single employers' confederation. The Government further indicates that employers' elections were planned to take place in autumn 2010. Pursuant to the agreement dated 6 July 2010 concluded between the employers' confederations, which is attached to the Government's communication, these elections aim at "serving a pervasive confederation encompassing all employers' associations nationwide" and at ensuring the participation of employers' organisations from all over the country, including provincial employers' associations and employers' confederations of a specific career or

industry. In these circumstances, the Government requests the sealing of the case, considering that all the problems in this respect have been eliminated.

- 92.** In a communication dated 15 June 2010, the ICEA provides copies of a number of judicial decisions: (i) Judgment No. 3061 dated 17 January 2006 issued by the Supreme Administrative Justice Court, nullifying the Labour Ministry's order for the dissolution of the ICEA; (ii) Judgment No. 3311 dated 3 March 2007 issued by the First Verification (Revision) Branch of the Supreme Administrative Justice Court, rescinding the Labour Ministry's Order on the dissolution of the ICEA; (iii) Decree No. 39 dated 4 May 2010 issued by the Ultimate Appellate Branch (Second Verification Branch) of the Supreme Administrative Justice Court cancelling the judgment issued by the Revision Branch of the Supreme Administrative Justice Court (endorsed dissolution of the ICEA) and verifying the decree issued by branch 19 of the Supreme Administrative Justice Court No. 96700 dated 2 November 2006 (rescinding the Labour Ministry's order for dissolution of the ICEA); (iv) Judgment No. 880575 dated 16 October 2009 issued by the Tehran Public Legal Court, ruling on the dismissal of the Labour Ministry's claim, the nullity and invalidity of the ICE and annulling the measures taken by the Labour Ministry for the registration of the ICE; and (v) Verdict No. 1754-1753 dated 17 February 2010 issued by the "Tehran Appellate Court" of the Justice Administration of the Islamic Republic of Iran, rescinding the registration of the ICE.
- 93.** In a communication dated 30 September 2010, the ICEA provides an officially translated copy of a communication sent on 29 August 2010 by the Ministry of Labour and Social Affairs to the ICE, requesting the ICE to take into account the Tehran courts' judgments regarding the dissolution of the ICE and the necessity to go into a liquidation procedure and to report back. The complainant expresses the hope that the dissolution of the ICE will be effective soon in order to implement part of the recommendations adopted by the Committee.
- 94.** In a communication dated 19 February 2011, the Government provides additional information in respect of the matters addressed in this case. In response to the recommendation of the Committee urging the Government to amend the Labour Law and the Council of Ministers' Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions – so as to ensure that employers and workers are able to freely choose the organization they wish to represent them and so that these organizations may fully exercise their right to elect their representatives freely and without interference by the public authorities – the Government supplies a copy of a draft Bill amending the Labour Law. The Government further indicates that the employers' elections took place on 27 October 2010 and that the members of the new Board of Directors were elected with the direct votes of the employers' delegates. The Government adds that the results of the elections will be announced to the ILO Standards Department, once it will receive the full report on the elections from the ICEA Secretary-General and the official introduction of the Board of Directors for registration. As to the recommendation of the Committee concerning the need for the Government to immediately register and recognize the ICEA, the Government provides copies of the letters sent by the direction of the ICEA concerning the holding of the elections. Finally, as to the recommendation of the Committee relating to the Government's previous acceptance of an ILO mission to the country in order to address the outstanding freedom of association cases, the Government confirms its readiness to receive a high-level mission.
- 95.** *The Committee notes that the Government recalls that the ICEA and the ICE have reached an agreement on the issue of the representation of the employers at the ILC and have agreed to engage in negotiations with a view to establish a unique confederation of employers' organizations. The Committee notes the complainant's information that on 29 August 2010, the Ministry of Labour and Social Affairs requested the ICE to take into*

account the Tehran courts' judgments regarding the dissolution of the ICE and the necessity to go into a liquidation procedure and to report back. The Committee notes that the holding of employers' general elections by the ICEA took place on 27 October 2010 in a way that was aimed at ensuring the participation of employers' organizations from all over the country, including provincial employers' associations and employers' confederations of a specific career or industry. The Committee notes that the Government indicates that the results of the elections will be announced to the ILO Standards Department, once the full report on the elections will be received from the ICEA Secretary-General and after the official introduction of the Board of Directors for registration. The Committee notes that, against this background, the Government requests the sealing of the case. The Committee welcomes the implementation of the final court judgement giving rise to the dissolution of the ICE and enabling the ICEA to resume its activities. As to the employers' general elections organized on 27 October 2010, the Committee is concerned that four months after the elections, no results have apparently been announced and trusts that the ICEA has been able to elect its officers and to carry out its activities without interference. The Committee requests the Government to keep it informed of the ICEA newly elected executive committee. As to its previous recommendations of a legislative nature, the Committee takes note of the draft Bill amending the Labour Law provided by the Government and taking into account the concerns it has expressed in a case concerning similar issues [see 359th Report, paras 684–705], the Committee calls on the Government to take the necessary measures to ensure that the Labour Law, as well as the Council of Ministers' Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions, will: (i) ensure protection against government interference in the exercise of freedom of association by employers; (ii) ensure the right of all workers and employers to establish more than one organization at the enterprise, sectoral and national levels, and will do so in a manner that does not prejudice the ICEA or the freedom of association rights of its members or prospective members; and (iii) ensure that employers and workers are able to freely choose the organization they wish to represent them and so that these organizations may fully exercise their right to elect their representatives freely and without interference by the public authorities. The Committee recalls that the Government may avail itself of the technical assistance of the ILO in this respect and further takes note that the Government confirms its acceptance of an ILO high-level mission to the country. The Committee trusts that such a mission will be able to review all of the outstanding matters in all of the serious and urgent cases that are pending before it, as previously requested.

Case No. 2575 (Mauritius)

96. The Committee last examined this case, which concerns allegations of violations of ILO Conventions in the setting up, composition, and appointment of members of the National Wages/Pay Council (NPC), at its March 2010 meeting. On that occasion, the Committee expressed the hope that the Government and the Trade Union Common Platform (TUCP) would soon find a solution to the current impasse and that the Government would continue to pursue full and frank consultations on ways to improve the NPC, including the basis on which the salary compensation should be decided. Furthermore, the Committee once again requested the Government to provide further information on the Government's response to the TUCP recommendations that the Government accept or reject in total those recommendations of the NPC that may be decided by consensus and to clarify whether workers might go on strike against an NPC decision should it lack consensus [see 356th Report, paras 86–90].
97. In its communication dated 15 October 2010, the Government states that it has progressively phased out the NPC and, following consultations with the tripartite constituents, has set up a National Tripartite Forum intended to provide advice and make recommendations on industrial and labour issues and on social and economic policy. The

Government states that commissions will be set up within the National Tripartite Forum to examine and formulate proposals on issues of economic and social development, the labour market, and job creation, as well as the calculation of annual wages on the basis of the inflation rate. The Government states that it will keep the Committee informed of any new developments as soon as the commission dealing with the question of annual pay is fully operational.

- 98.** *The Committee takes note of the information. It requests the Government to provide, as it has indicated its intention to do, detailed information on the establishment and functioning of the commission dealing with the question of annual pay within the National Tripartite Forum. The Committee expects that the TUCP will be fully consulted in this process.*

Case No. 2478 (Mexico)

- 99.** When it last examined this case at its March 2010 meeting, the Committee made the following recommendations on the issues pending [see 356th Report, para. 959]:

- (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 SNTTEBMRM 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.

- 100.** In its communications dated 27 May and 26 August 2010, the International Metalworkers' Federation (IMF) sent a series of documents on the acknowledgement of the executive committee of the National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (SNTMMSRM), a summary of the alleged facts and a copy of the Supreme Court of Justice's decision of 2 December 2009 to claim jurisdiction in the case of the acknowledgement of the abovementioned executive committee.

- 101.** *The Committee regrets that the complainant organization has not provided the information requested contained in recommendation (f) and that the Government has not provided any*

of the information requested when the case was last examined. The Committee underlines that the issues involved are very serious and requests the Government and the complainant organization to transmit the information requested without delay. Given that it seems that the issue of the acknowledgement of the executive committee of the mining trade union is still before the Supreme Court, the Committee firmly hopes that this issue will be rapidly resolved in accordance with the principles of Convention No. 87 and requests the Government to keep it informed in that regard.

Case No. 2679 (Mexico)

102. The Committee last examined this case in June 2010, when it made the following recommendations on the matters still pending [see 357th Report, para. 758]:

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

103. In its communication dated 9 September 2010, the complainant trade union refers to developments concerning the various legal procedures.

104. In its communication dated 18 October 2010, the Government states that the request submitted to the Fifth Special Conciliation and Arbitration Board of Jalisco State by several insurance companies seeking the cancellation of the registration of the insurance sales agents' trade union was ruled on in the first instance through a decision dated 11 May 2010, in which the action for cancellation brought by the insurance companies was declared inadmissible. In conclusion, in accordance with Mexican law, the insurance companies still have the option of lodging various legal appeals and, therefore, the decision dated 11 May 2010 cannot be held to be definitive. The Federal Government is fully confident that the judicial authority that hears the appeal will act in accordance with national law and the principles of freedom of association. *The Committee takes note of this information and requests the Government to inform it of any new legal appeal against the decision upholding the registration of the complainant trade union.*

105. *As to the legal claims made by the members referred to in the Committee's recommendations, the Government provides information on developments concerning the cases (except regarding Mr Javier Badillo Flores) which indicates that the cases are still pending. The Government adds that it will provide the Committee with the judicial rulings once the cases have been rendered.*

106. *The Committee awaits the rulings to be handed down regarding those trade union members. The Committee requests the complainant organization to provide details of the legal claim made by the trade union member Mr Javier Badillo Flores so that the Government can provide observations in that regard.*

Case No. 2268 (Myanmar)

- 107.** The Committee last examined this case at its March 2010 meeting [see 356th Report, paras 95–100] and recalls that it concerns several issues linked to the absence of freedom of association both in law and in practice in the country: (i) allegations relating to legislative issues: unclear legislative framework covering freedom of association; serious discrepancies between legislation and Convention No. 87; repressive texts, in particular military orders and decrees, detrimental to freedom of association and which contribute to a climate of denial of fundamental freedoms and to annihilate and destroy any form of labour organization; and (ii) allegations relating to factual issues: total lack of legally registered workers' organizations; systematic practice of repression by public authorities of any form of labour organization; the Federation of Trade Unions of Burma (FTUB) cannot function freely and independently on the Myanmar territory and its General Secretary has to face criminal prosecution because of his legitimate trade union activities; murder, detention and torture of trade unionists; continuing repression of seafarers for the exercise of their trade union rights; arrest and dismissal of workers in connection with collective labour protests and claims, in particular at the Unique Garment Factory, the Myanmar Texcamp Industrial Ltd and the Myanmar Yes Garment Factory; and intervention of the army in labour disputes. At its March 2010 meeting, the Committee urged 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, and requested it to keep it informed of all developments in this respect. The Committee once again requested 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.
- 108.** In communications dated 3 March, 17 August and 7 October 2010, the Government indicates, notably, that a new Trade Union Law is being drafted and recalls that the draft had been discussed with the ILO mission in January 2010. The Government also indicates that the Pyidaungsu Hluttaw (Parliament) will take the necessary measures regarding the repealing of Orders Nos 2/88, 6/88, the Unlawful Association Act and Declaration No. 1/2006, after the elections of November 2010. As to the dispute settlement mechanisms, the Government reiterates information previously submitted and adds that in 2009, 475 labour disputes were settled and 5,017 workers benefited from 409.47 million kyats (approx. US\$63 million (sic)) and that there were 22 compensation cases. In addition, from January to August 2010, 450 labour disputes were settled and 2,983 workers benefited from 300.74 million kyats (US\$47 million (sic)) and there were 15 compensation cases. As regards the right of seafarers to establish and join organizations of their own choosing and afford them adequate guarantees against acts of anti-union discrimination, the Government indicates that the Constitution of Myanmar Overseas Seafarers Association clearly provides that seafarers have the right to establish and join organizations of their own choosing and that the model agreement in this respect has been dispatched. Finally, as to the recommendations concerning the factual issues of the case, the Government reiterates the information provided previously to the Committee.
- 109.** *The Committee takes note of the information provided by the Government. As regards its recommendations of a legislative nature, 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. It also recalls that the 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. In light of these principles, the Committee welcomes the information provided by the*

Government that the Parliament will take the necessary measures regarding the repealing of Orders Nos 2/88, 6/88, the Unlawful Association Act and Declaration No. 1/2006 (which the Committee understands as being Declaration No. 1/2006 pronouncing the FTUB to be a terrorist group). The Committee trusts that this means that these orders and the Declaration will indeed be effectively repealed in the very near future and requests the Government to keep it informed in this regard. Noting that the elections have taken place and that the draft legislation which had been discussed with the ILO mission in 2010 is being prepared, the Committee urges the Government in the strongest of terms to enact legislation guaranteeing freedom of association to all workers and employers; to provide a copy of the legislation guaranteeing these rights to seafarers (including the model agreement that was dispatched in this respect); to explicitly protect workers' and employers' organizations from any interference by the authorities, including the army (and to provide a copy of the relevant legislation once adopted); 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.

110. As to its recommendations relating to factual issues, the Committee once again expresses its deep regret that the Government does not provide any new information in this respect. It is therefore bound to repeat its previous recommendations and urges the Government to take all necessary measures to ensure that they are given full effect and to provide concrete, updated and detailed information on the situation of all the persons concerned by the allegations:

- 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.*

Case No. 2591 (Myanmar)

111. The Committee last examined this case at its March 2010 meeting [see 356th Report, paras 101–103]. This case concerns the arrest of six labour activists, their trial for sedition and association with the Federation of Trade Unions of Burma (FTUB) and the extremely harsh prison sentences which were handed down against them after they had tried to organize celebrations and a seminar on labour issues for International Labour Day on 1 May 2007. At its March 2010 meeting, the Committee, in particular, urged the Government to take the necessary measures for the immediate release of Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min and to keep it informed in this respect.
112. In communications dated 17 August 2010, 31 August 2010 and 7 October 2010, the Government replies to the recommendations of the Committee in this case. The Government provides the following information in respect of the outstanding recommendations: as to the recommendation of the Committee 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 FTUB as a legitimate trade union organization, the Government, while indicating once again that new legislation would be drafted in conformity with Convention No. 87, reiterates that the FTUB is considered to be a terrorist organization. As to the recommendation of the Committee to carry out an independent investigation without delay into the allegation of ill treatment of the detained persons, the Government provides general information related to the efforts made by the Department of Prison under the Ministry of Home Affairs to be in line with the 1988 United Nations Standard Minimum Rules for the Treatment of Prisoners, on the basis of which it considers that the allegation of ill treatment of the detained persons concerned in this case is unfounded. As to the recommendation to release Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min without delay, the Government reiterates that these persons “were not workers and never worked in any factories and establishments” and that they have been punished only for breaching existing laws, not for their labour-related activities. As to the recommendation to ensure that no person will be punished for exercising his or her rights to freedom of association, opinion and expression, the Government indicates that people shall be punished for breaching existing laws. Finally, as to the recommendation of the Committee 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, the Government provides that the rights of citizens, including the freedoms of expression, peaceful assembly and association, are guaranteed in the Constitution but that the drafting process of legislation will not open the door for any unlawful association or terrorist organization which is not allowed to exist anywhere in the world.
113. *The Committee takes note of the information provided by the Government and in particular, once again, the information concerning its intention to draft new legislation in conformity with Convention No. 87. The Committee, however, once again deeply regrets that the Government’s communications essentially repeat those previously submitted, while failing to provide any new concrete information or present any evidence that it has taken concrete measures in respect of the serious matters presented in this case. It therefore deplores that the Government has failed to implement its recommendations and*

finds itself obliged to refer to its previous examination of this case and to firmly urge the Government to fully implement as a matter of urgency its previous recommendations. The Committee requests the Government, in particular, to provide specific and detailed information on the situation of Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min. It requests the Government to take all the necessary measures to ensure their immediate release, as well as their access to legal and medical assistance while detained. Finally, the Committee urges the Government to immediately undertake real and concrete steps to ensure full respect for freedom of association in law and in practice.

Case No. 2590 (Nicaragua)

114. The Committee last examined this case at its March 2010 meeting. The Committee urged 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 [see 356th Report, paras 110–113].
115. In a communication dated 3 November 2010, the Government states that the case of Mr Donaldo José Chávez Mendoza has been heard in two instances: (1) the First Court of the District of Managua, No. 000358-1001-2007LB; and (2) before the Labour Chamber of the Court of Appeal of Managua, No. 000784-ORM1-2010LB. The first stage of the labour procedure was exhausted in this regard. The competent legal authority, the First Judge of the Constituency of Managua, consequently ordered the reinstatement of Mr Chávez Mendoza through a ruling of 28 April 2010. Making use of the rights conferred upon the parties by labour law, the employer party (the defendant in this case) appealed against the ruling in question, thus initiating the second and definitive stage of the labour court proceedings. According to labour legislation, once an appeal has been accepted, the ruling in the first instance remains unenforced, with the decision issued by the highest labour body, in this case, the Labour Chamber of the Appeal Court of the Constituency of Managua, resolving the case. The case of Mr Chávez Mendoza is currently at this stage. Any ruling issued by this legal body will be respected by the Directorate General of Revenues (DGI), the employer party and defendant in the labour procedure. The Government states that, throughout the proceedings which took place before the corresponding judicial bodies, Donaldo José Chávez Mendoza made use of the rights and guarantees granted him by the Political Constitution and the national labour laws.
116. *The Committee takes note of this information. While regretting that such a long time has elapsed since the dismissal of the trade union leader Mr Chávez Mendoza (July 2007), the Committee expresses the firm hope that the judicial authority in the second instance will issue a ruling in the very near future. The Committee requests the Government to keep it informed of any rulings handed down.*

Case No. 2096 (Pakistan)

117. The Committee last examined this case, which concerns alleged restrictions on trade union and collective bargaining rights for employees of the banking sector, at its meeting in June 2010. On that occasion, the Committee urged the Government: (1) to give effect to its long-standing recommendation to repeal section 27-B of the Banking Companies Act; (2) to provide a copy of the report of the inquiry which revealed that none of the ex-employees of the United Bank Limited (UBL) had been dismissed for anti-union motives, as well as to specify the members of this inquiry; and (3) to indicate whether the UBL employees' trade union, whose members had been dismissed, was appropriately consulted [see 357th Report, paras 50–53].

- 118.** In its communications dated 3 August and 30 October 2010, the UBL Employees' Union asserts that no progress has been made by the Government in addressing issues raised in this case. It stresses, in particular, that the UBL Employees' Federation of Pakistan and all other trade unions in the banking sector have ceased to exist following the enactment of section 27-B of the Banking Companies Act. The complainant also indicates that Mr Maqsood Ahmad Farooqui, former President of the UBL Employees' Union, dismissed in 1999, died on 7 December 2009. According to the complainant, none of the trade union leaders in the banking sector have been reinstated due to the long-lasting proceedings in national courts. Moreover, the union further alleges four new dismissals of junior UBL officers (Mr Assad Shahbaz Bhatti, Mr Arshad Mehmood, Mr Zulfiqar Awan and Mr Mazhar Iqbal Sial) in Sargodha occurred in 2010.
- 119.** In its communication dated 29 October 2010, the Government indicates that the repeal of section 27-B of the Banking Companies Act has been approved by the Cabinet of Pakistan on 1 May 2010 and that the new draft Banking Companies (Amendment) Bill is being vetted and, after consultation with the legal experts, will be placed before the legislature for approval/enactment.
- 120.** *The Committee notes the information provided by the Government. It expects that the Banking Companies (Amendment) Bill will soon be adopted so as to repeal section 27-B and to lift restrictions on the exercise of trade union rights in the banking sector. The Committee requests the Government to keep it informed in this respect.*
- 121.** *The Committee regrets to note that the resolution of the issues raised in this case have been pending for over ten years now and that the former President of the UBL Employees' Union, Mr Maqsood Ahmad Farooqui, allegedly dismissed following the enactment of section 27-B of the Banking Companies Act has since died without having been able to see these matters come to a solution. The Committee expects that, should it be found that his dismissal was for anti-union motives, that his heirs will receive the relevant compensation. The Committee notes with regret that the Government has not provided any further information on the inquiry conducted on numerous dismissals of trade union leaders and members. It further notes with concern the information provided by the complainant on the new cases of dismissal of junior UBL officials which occurred in 2010. In these circumstances, the Committee reiterates its previous request and once again urges the Government to provide a copy of the report of the inquiry without delay, which reveal that none of the ex-employees of the UBL had been dismissed for anti-union motives, as well as to specify the members of this inquiry and to indicate whether the UBL employees' trade union, whose members had been dismissed, was appropriately consulted. It further requests the Government to provide its observations on the complainant's recent allegation of four new cases of dismissal of UBL officers.*

Case No. 2400 (Peru)

- 122.** The Committee made the following recommendations on matters still pending at its March 2010 meeting [see 356th Report, para. 120]:

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.

- 123.** In its communication dated 11 March 2010, the Single Trade Union of Workers of Crediscotia Financiera (previously known as SUTRABANTRA) alleges that its secretary

general, Arnaldo Calle Flores, and its defence secretary, William Alburquerque Zevallos (22 June 2009), remain dismissed in violation of trade union immunity despite court orders for their reinstatement. Over the past few years, members have been dismissed in order to bring about a situation whereby the trade union has less than the legal minimum number of members. It also indicates that in the framework of the dissolution procedure against the SUDEBANTRA union, the decision taken was in favour of this organization.

124. In its communication dated 7 February 2011, the Government states that, according to the employer, the company *Crediscotia Financiera SA* did not establish conditions, benefits or other incentives not to join the union. It is therefore not established that it intervened in the workers' decision to join the union. The employer adds that it has never prohibited the union's constitution or the holding of assembly meetings to make decisions. As to the right to collective bargaining, the company states that it has established collective bargaining procedures together with the regularly constituted union, which represents the workers in Lima and the provinces. In this sense, the company indicates that it has never committed acts which violate the freedom of association of the organization or its members, and that it recognizes the complainant as a representative trade union.
125. With regard to the legal proceedings, the company states that several appeals were filed by some of its members and that the judiciary concluded that there had been no violation of the freedom of association. These proceedings, which are now closed, reached the final stage.
126. As to the situation of the trade union leaders William Alburquerque Zevallos and Arnaldo Calle Flores, the employer indicates that following the decisions of the judiciary, workers were reinstated in their jobs. However, following their reinstatement, the employees have not shown any willingness to comply with the obligations imposed on them, which led to sanctions and a further breach of the employment relationship. Following this, Mr Alburquerque Zevallos and Mr Calle Flores brought new complaints against the bank, which are currently pending. The applicants found their jobs again following an injunction. The union is aware that they now come to work normally. However, the employer indicates that Mr Alburquerque Zevallos does not fulfil his duties.
127. *The Committee notes the information provided by the Government and the complainant. It notes in particular that: (1) the company recognizes the complainant as a representative trade union; (2) several lawsuits have been triggered by some of its members and the judiciary concluded that there had been no violation of the freedom of association; (3) following their transfer and dismissal for failing to obey the obligations imposed on them, Mr Alburquerque Zevallos and Mr Calle Flores brought new legal actions against the bank, and these procedures that are still pending; and (4) the unionists obtained by injunction their reinstatement in their original jobs. The Committee requests the Government to keep it informed of the current process and to provide a copy of the decision once adopted. In addition, the Committee once again requests the Government to report on the results of the legal proceedings concerning the dismissal of the trade unionists Miguel Moreno Avila and Felipe Fabián Fernández Lopez and to provide copies of the decisions once adopted.*

Case No. 2638 (Peru)

128. The Committee last examined this case at its June 2010 meeting, when it made the following recommendations on the matters still pending [see 357th Report, para. 801]:

... with regard to the allegation concerning the dismissal of 25 workers of the municipality of Surquillo for forming a trade union and demanding the payment of their wages for December 2007, the Committee notes with regret the Government's statement to the effect that the labour

inspectorate established that 23 of the 25 workers in question had been dismissed arbitrarily. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings instituted by a number of workers (one worker has been reintegrated and compensated) and, if the dismissals prove to have been of an anti-union nature, to take steps to ensure that the dismissed workers are reinstated in their posts, without loss of pay or benefits. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that they are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals.

129. In its communications dated 20 October 2010 and 7 February 2011, the Government sent information on the status of the judicial proceedings instituted by the workers in question. In the first instance, the majority of the workers obtained a ruling that partially upheld the petition but appeals or judicial reviews were lodged.

130. *The Committee takes note of this information and requests the Government to transmit the outcome of the appeals or judicial reviews regarding the dismissal of the trade unionists in question.*

Case No. 2671 (Peru)

131. In the previous examination of the case during its June 2010 meeting, the Committee made the following recommendations on matters still pending [see 357th Report, para. 835]:

- (a) The Committee expects that the judicial authority will hand down a decision in the very near future with regard to the recognition of SUTCUNHEVAL and requests the Government to keep it informed in this regard.
- (b) The Committee expects that the judicial authority will hand down a decision in the very near future in regard to the non-renewal of the service provider contract of the trade union leader, Mr Franklin Reategui and, in the case that it is found that the non-renewal was based on anti-union grounds, that measures for compensation and sanction are taken as provided by national law. The Committee requests the Government to keep it informed in this regard and to send it a copy of the decision as soon as it is handed down.

132. In its communication of 20 October 2010, the Government attaches a copy of the ruling of the judicial authority ordering that recognition be granted to the union in question and its officials. *The Committee notes this information with interest.*

133. The Government adds that the judicial authority ruled that the application filed as a provisional measure with regard to Mr Reategui was inadmissible, as the main case had been settled by the order granting the union recognition.

134. *The Committee notes this information and requests the Government to clarify whether the union official Mr Franklin Reategui is currently providing services to the university.*

Case No. 2687 (Peru)

135. The Committee last examined this case at its June 2010 meeting. On that occasion, recalling that the cleaners of Coronel Portillo Municipality should enjoy the guarantees provided for in Convention No. 87, and in particular the right to establish organizations, the Committee indicated that it expected that the authorities would take full account of this principle in their ongoing examination of the right to organize of employees of public bodies employed under the administrative service contract system, and that the Government's decision would be taken without delay and would enable the Coronel

Portillo Municipal Services Workers' Trade Union to obtain registration. The Committee urged the Government to keep it informed in this regard [see 357th Report, para. 892].

136. In communications of 29 September and 20 October 2010, the Government indicates that the Constitutional Court ruled that the special arrangements governing administrative service contracts established by Legislative Decree No. 1057 are constitutional, recognizing the right of the workers governed by these arrangements to organize and to strike. Furthermore, this ruling provided that the State of Peru should regulate these arrangements and deemed it necessary to set limits on the recruitment of staff under these arrangements, establishing criteria that are reasonable in that regard.
137. *The Committee takes note of this information with satisfaction and trusts that the Government will take with immediate effect the necessary measures to register the Coronel Portillo Municipal Services Workers' Trade Union.*

Case No. 2695 (Peru)

138. The Committee last examined the substance of this case at its March 2010 meeting and on that occasion requested the Government to keep it informed of the outcome of the judicial appeal to overturn his dismissal lodged by Mr Mauro Chipana Huayhuas, representative of La Victoria District Council Workers' Union (SOCODIVIC), and to provide the text of the ruling as soon as it is available [see 356th Report, para. 1116].
139. In a communication dated 20 October 2010, the Government indicates that the 25th Labour Court of Lima declared that the appeal lodged by Mr Mauro Chipana Huayhuas to overturn his dismissal was unfounded and that the complainant has lodged a further appeal, which is being examined by the Higher Labour Court of Lima.
140. *The Committee takes note of this information. The Committee trusts that the Higher Labour Court of Lima will hand down a ruling in the near future and requests the Government to provide it with a copy of the ruling that is handed down.*

Case No. 2697 (Peru)

141. The Committee last examined this case at its June 2010 meeting and on that occasion: (a) expected that, with the promotion of appropriate mechanisms as proposed by the Government, the Union of Workers of Registry Zone No. IX, Lima Office, and the bargaining committee of Registry Zone No. IX, Lima Office, would be able finally to conclude a collective agreement; and (b) taking note that the labour inspector indicated that there had been no violation of the legal rules on freedom of association, requested the Government to keep it informed of any legal action that the trade union leaders, Mr Elías Vilcahuamán, Secretary-General of the National Federation of Workers of the National Public Registries System, Ms Adriana Delgado Angulo, Secretary of the SUNARP organization and Ms María Yolanda Zaplana Briceño, Deputy Secretary-General and union members Ms Rosemary Almeida Bedoya, Ms Elizabeth Mujica Valencia, Ms Miriam Reyes Candela, Ms Nelly Marimón Lino Montes and Ms Rocío del Carmen Rojas Castellanes, may have initiated in relation to their dismissals [see 357th Report, para. 985].
142. In a communication dated 21 October 2010, the Government states that Mr Elías Vilcahuamán initiated judicial proceedings against dismissal at the Labour Court of Huancayo, those proceedings being currently at the preliminary stage, and that Adriana Delgado Angulo, María Yolanda Zaplana Briceño, Rosemary Almeida Bedoya, Elizabeth Mujica Valencia, Miriam Reyes Candela, Nelly Marimón Lino Montes and Rocío del

Carmen Rojas Castellanes, have lodged an application to overturn their dismissals in April 2010; the application is currently before the 29th Labour Court of Lima.

143. *The Committee notes this information. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings currently under way. It also requests the Government to inform it whether, with the promotion of appropriate mechanisms as proposed by the Government, the Union of Workers of Registry Zone No. IX, Lima Office, and the bargaining committee of Registry Zone No. IX, Lima Office, have finally been able to conclude a collective agreement.*

Case No. 2703 (Peru)

144. The Committee last examined the substance of this case at its June 2010 meeting and on that occasion expected that the Constitutional Court would issue a final ruling in the very near future in connection with the dismissal of the leaders of the Union of Workers of Hogar Clínica San Juan de Dios, Mr Lamberto Óscar Babetón Venancio, Mr Lucio Cuya Pullo, Ms Mónica Elisa Meneses La Riva and Mr Ángel Teófilo Tarazona Rodríguez [see 357th Report, para. 1010].
145. In its communications dated 20 October 2010 and 7 February 2011, the Government indicates that the *amparo* proceedings relating to the dismissals are still pending and that it will send a copy of the decision that is handed down.
146. *The Committee takes note of this information. The Committee trusts that the Constitutional Court will hand down a ruling in the near future and requests the Government to provide it with a copy of the ruling that is handed down.*

Case No. 2546 (Philippines)

147. 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 2010 meeting [see 356th Report, paras 150–157]. On that occasion, recalling that this case refers to the decision to drop from the payroll Annie Geron, Mitzi Barreda, Rafael Saus, Luz DG Galang and Conrado Maraán Jr and noting the Government’s statement that measures for the reinstatement of Annie Geron, Mitzi Barreda and Rafael Saus were being considered, the Committee reiterated 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. The Committee also expected that the pending motion concerning Ramon Geron would soon be heard by the Civil Service Commission (CSC). As to its other recommendations, the Committee repeated 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 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; 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.
148. In a communication dated 4 January 2011, the Public Services Labor Independent Confederation (PSLiNK) indicates that the TESDA, through the consistent follow-up of

the Department of Labor and Employment Secretary, Ms Rosalinda D. Baldoz, the PSLiNK and Public Services International (PSI), is currently implementing the recommendations of the Committee, as well as the follow-up of the high-level mission which visited the country in September 2009. More particularly, the complainant indicates that in April 2010, Ramon L. Geron was reinstated as Director III in TESDA Region IV-A and received back salaries and benefits. It also indicates that in 2009 and 2010, Ms Luz DG Galang and Mr Conrado Maraán Jr returned to TESDA Central Offices, on the basis of the CSC invalidated work transfer orders. Moreover Ms Annie Geron and Mitzi Barreda were paid the equivalent of three months salaries, after having been penalized with preventive suspension by the then TESDA Director-General, Augusto L. Syjuco Jr. The payments were made in December 2010. Furthermore, the complainant indicates that Ms Mitzi Barreda and Mr Rafael Saus have been reinstated in TESDA Region IV-A under job order appointments, pending a permanent appointment to the same or to an equivalent position (the appointments are now undergoing administrative processes). In conclusion, the complainant indicates that what remains to be implemented, is the full payment of back wages, benefits and entitlements to Ms Annie Geron, Mitzi Barreda and Mr Rafael Saus covering the period February 2007–December 2010. It adds that Ms Geron decided not to return to TESDA under the same pay and conditions prior to the case.

149. *The Committee takes note with interest of the information provided by the complainant as to the measures taken by the Government in respect of the trade unionists involved in this case. It notes in particular that the TESDA, through the consistent follow-up of Department of Labor and Employment Secretary, Rosalinda D. Baldoz, the PSLiNK and Public PSI, is now implementing its recommendations, as well as the follow-up of the high-level mission. As to the situation of the trade unionists, the Committee notes the complainant's indication that: (i) in April 2010, Ramon L. Geron was reinstated as Director III in TESDA Region IV-A and received back salaries and benefits; (ii) in 2009 and 2010, Ms Luz DG Galang and Mr Conrado Maraán Jr returned to TESDA Central Offices on the basis of the CSC invalidated work transfer orders; (iii) Ms Annie Geron and Mitzi Barreda were paid the equivalent of three months' salaries, after having been penalized with preventive suspension by the then TESDA Director-General, Augusto L. Syjuco Jr. The payments were made in December 2010; and (iv) Ms Mitzi Barreda and Mr Rafael Saus were reinstated in TESDA Region IV-A under job order appointments, pending a permanent appointment to the same or to an equivalent position (the appointments are now undergoing administrative processes). Finally, the Committee notes the complainant's indication that the remaining element being discussed is the full payment of back wages, benefits and entitlements to Annie Geron, Mitzi Barreda and Rafael Saus covering the period February 2007–December 2010. It also notes that Ms Geron decided not to return to TESDA under the same pay and conditions prior to the case. In these circumstances and welcoming these developments, the Committee expects that the Government will continue to use its good offices to find a solution to the pending issues.*

Case No. 2291 (Poland)

150. 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 meeting in March 2010 [see 356th Report, paras 158–161]. On that occasion, the Committee had requested the Government to indicate whether Mr Jedrejek, member of the NSZZ “Solidarnosc” Inter-Enterprise Organization from SIPMA SA, was reinstated following the decision of the District Court and to provide information on the progress made in the case against 19 senior managers of SIPMA SA, as well as to transmit a copy of the judgment once handed down.

151. With regard to the question of reinstatement of Mr Jedrejek, the Government indicates in its communication dated 31 August 2010 that neither the Ministry of Justice nor the labour courts collect the data on employers' compliance with the legally binding decisions on the reinstatement of their employees. The Government also explains that if employers fail to comply voluntarily with the judicial order on reinstatement, the claims for judicial enforcement can be brought before a court. The Government states that no such claims have been registered in respect of this case.
152. With regard to the case against 19 senior managers of SIMPA SA, the Government indicates that the case in the District Court in Lublin is still pending due to the necessity to get the additional evidentiary material, as well as due to the absence of parties and witnesses during the trial while their presence was compulsory (during the period from 24 August 2009 to 28 July 2010, 17 out of 37 trial dates were deferred due to the justified absence of persons whose presence was necessary for carrying out evidentiary procedures). The Government also indicates that the trial has been adjourned until 31 August 2010 due to the illness of the defendant. The Government also states that the preliminary date for the ending of the court proceedings was set for 19 September 2010 and that 20 and 27 September were reserved for closing speeches.
153. *The Committee notes the information provided by the Government. With regard to the issue of reinstatement of Mr Jedrejek, the Committee regrets that the Government provides no substantive information in this regard. The Committee recalls from its previous examination of the case that the District Court in Lublin ordered the reinstatement of Mr Jedrejek and that this decision became final after the appeal filed by the enterprise had been dismissed by the Regional Court. The Committee therefore once again urges the Government to indicate whether Mr Jedrejek was reinstated, and, if not, it urges the Government to take the necessary steps to ensure his full reinstatement pursuant to the Court's decision.*
154. *With regard to the case against 19 senior managers of SIMPA SA, the Committee notes the Government's indication that the case in the District Court is still pending and that the preliminary date for ending the court proceedings was set for 19 September 2010. The Committee once again recalls with regret that this case has been pending since 2003 and emphasizes 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 therefore firmly expects that the judicial proceedings in the case against 19 senior managers of SIMPA SA will be concluded without any further undue delay and once again requests the Government to keep it informed of its final outcome.*

Case No. 2474 (Poland)

155. The Committee last examined this case at its meeting in March 2010 [see 356th Report, paras 165–167]. On that occasion, the Committee had 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, and to indicate whether he was reinstated pending appellate proceedings.
156. In its communication dated 31 August 2010, the Government indicates that the case filed by Mr Zagrajek against Frito Lay Ltd has not yet been completed. It further indicates that appeal proceedings in the Regional Court in Warsaw have been deferred until 16 June 2010 due to a large number of files of the case (17 volumes) that had to be handed over by the District Prosecutor's Office of Wola in Warsaw to the court for retrial. The Government also indicates that the court had heard nine witnesses but due to the absence of one witness, the trial has been adjourned until 28 July 2010. The Government further

indicates that the court ordered the representative of the Frito Lay Ltd to submit the list of employees of the plant within 14 days as of 30 September 2005.

157. With regard to the question of reinstatement of Mr Zagrajek, the Government indicates that neither the Ministry of Justice nor the labour courts collect the data on employers' compliance with the legally binding decisions on the reinstatement of employees. The Government explains that if employers fail to comply voluntarily with the judicial order on reinstatement, the claims for judicial enforcement can be brought before a court. The Government states that no such claims have been registered in respect of this case.
158. *The Committee notes the information provided by the Government. With regard to the case concerning the reinstatement of Mr Zagrajek pending before the Regional Court in Warsaw, the Committee once again recalls with regret that the facts of this case date back to 2005 and emphasizes that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 105]. It further recalls that the membership of a State in the International Labour Organization carries with it the obligation to respect in national legislation and practice freedom of association principles and the Conventions which the State has freely ratified, and that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [see **Digest**, op. cit., paras 16–17]. The Committee emphasizes that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned. The Committee considers that the longer it takes for such a procedure to be completed, the more difficult it becomes for the competent body to issue a fair and proper relief, since the situation complained of has often been changed irreversibly, people may have been transferred, etc., to a point where it becomes impossible to order adequate redress or to come back to the status quo ante. The Committee recalls that, in a case in which proceedings concerning dismissals had already taken 14 months, the Committee requested the judicial authorities, in order to avoid a denial of justice, to pronounce on the dismissals without delay and emphasized that any further undue delay in the proceedings could in itself justify the reinstatement of these persons in their posts [see **Digest**, op. cit., paras 821, 826 and 827]. The Committee therefore expects that the judicial proceedings in the case of dismissal of Mr Zagrajek will be concluded without further delay and once again requests the Government to keep it informed of its final outcome. The Committee further requests the Government to indicate whether Mr Zagrajek was reinstated pending the appellate proceedings, and if not, it urges the Government to take the necessary steps to ensure his full reinstatement without loss of pay.*

Case No. 2383 (United Kingdom)

159. The Committee last examined this case at its March 2008 meeting [see 349th Report, approved by the Governing Body at its 301st Session, paras 254–260]. On that occasion, the Committee noted with regret that little progress had been made with respect to its recommendation to improve the current mechanisms for the determination of prison officers' pay in England, Wales and Northern Ireland and on the establishment of appropriate mechanisms to compensate private custody officers in private sector companies for the limitation of the right to strike and once again requested the Government to vigorously pursue its efforts in this respect.
160. In communications dated 26 August 2008 and 18 March 2010, the complainant POA submits that the Government has failed to follow the Committee's recommendations and

indicates that the absence of a right to strike coupled with the absence of an acceptable disputes resolution procedure covering all relevant matters continues to have a seriously deleterious effect on the union's ability to protect its members' interests. This was particularly evident in respect of the proposals for workforce modernization, where the union feared that the proposals would simply be imposed if no agreement was reached, particularly given that neither strike action nor a binding dispute settlement mechanism was available.

- 161.** The complainant underlines that it does not challenge the Committee's decision that the right to strike may be restricted or prohibited in the prison service. However, given the use by the Committee of the word "may" rather than "must", the decision of the Government to prohibit rather than only restrict the right to strike and the choice of several European countries not to do so, the POA considers it legitimate to continue to campaign for the full restoration of its members' right to take industrial action. In any event, the prohibition of the right to strike can only be legitimate if there are adequate compensatory measures, which the complainant continues to contest.
- 162.** As regards the information provided by the Government reflected in the Committee's previous examination, the complainant emphasizes that, while it agrees that the parties had reached a draft agreement for the reform of the Prison Service Pay Review Body (PSPRB) that would have involved: the abolition of the remit letter; the appointment of a trade union representative to the selection panel for members of the PRB; a commitment to changing the make-up of those appointed to the PSPRB so that its membership would contain equal numbers of representatives from business, academia and trade unions and provisions which ensured that there would be no undue influence exerted by either party on the PSPRB; and that the agreement was endorsed by the POA conference on 7 and 14 September 2006, it does not accept the contention that the POA sought further clarification of the agreement which amounted to an attempt to renegotiate. The complainant cites a number of letters that it believes show that it was the Government who refused to put the terms of the agreement into place. After the Government stated that it was unable to implement the agreement approved in September, further less attractive proposals were put to the POA which were rejected at a conference held in November 2006.
- 163.** With regard to the mechanism for the determination of prison officers' pay, the complainant recalls that in England and Wales, prison officers' pay is not subject to collective bargaining or binding arbitration. Instead the PSPRB has been established to make recommendations to the Secretary of State. The powers of the PSPRB are limited to making recommendations. The Secretary of State has no duty to accept its recommendations, and may override or reject them "as he thinks fit" (Regulation 8 of the 2001 Prison Service Pay Review Body Regulations). In this regard, the complainant denounces the manner in which recommended pay increases have been implemented (in stages resulting in a reduction of the annual increase) and how questions of affordability are systematically used to determine pay.
- 164.** The complainant rejects the Government's conclusion that the adverse impact of staging PSPRB awards was temporary and minimal and maintains that for the year of the award the staging amounts to a permanent abatement involving sums that are significant for those who sustain them. Moreover, the complainant stresses that the Government has failed to prove that the economic reasons invoked to justify the staging were truly exceptional. In addition, the complainant states that a review of industrial relations in the prison service conducted in 2008, at the Government's request, found the question of pay withdrawn from its remit. The report had however proposed that there should be a legally binding Trade Union Dispute Resolution and Recognition Agreement, which would provide for a formal process for resolving disputes underpinned by two-stage binding arbitration. The complainant reiterates in this regard that the situation in Scotland provides for procedures

for deciding pay disputes, which include legally binding arbitration, thus demonstrating that binding independent arbitration in matters of pay is entirely workable.

165. As regards the independence of the PSPRB, the complainant states that neither the qualities required for public appointments under the Commissioner's Code of Practice nor the newly approved final selection criteria for PSPRB members listed in the Government's reply include "impartiality" and "independence" and highlights that the Government rejected its proposal to allow a trade union member to form part of the selection panel for PSPRB members. According to the complainant, the only concession that has been made is the suggestion that appointments made to the PSPRB no longer be made by the prison service, which is also one of the parties before the PSPRB. Instead, the Government has offered that the appointments process be handled by the officials in the core Ministry of Justice, thereby taking the direct employer out of the process. Yet, since the Ministry controls the prison service in every respect, the complainant contends that this is a change of form but not of substance.
166. In addition, the complainant criticizes the remit letter by which the Secretary of State has the power to give directions to the PSPRB as to the considerations to which they are to have regard (Regulation 4 of the PSPRB Regulations). In its view, such directions may fetter the PSPRB's discretion, exclude considerations to which it would otherwise have regard, and influence the PSPRB recommendations. By contrast, the permitted role of the unions in relation to the PSPRB is confined to that of submitting evidence and making representations (Regulation 5). Since 2001, ministers have decided to issue a remit letter to the PRB each year, while the information imparted by the Government to the Chair is not made available to all parties to the process, thus depriving the unions of an opportunity to address the substance.
167. According to the complainant, the PSPRB has recognized in its 2008 report that faith in its independence has been severely damaged: "We make recommendations: decisions on the remuneration of our remit group rest with Government. However, it has been made clear to us during our visits to establishments and in our discussions with staff and their representatives that the decisions to stage out evidence-based recommendation has damaged confidence in our independence and the review body process. In the context where industrial action may be unlawful, this loss of confidence has undermined the trust of the workforce in arrangements set up by Parliament to examine their pay. We are disappointed, as is our remit group, with the decision not to implement our recommendation in full".
168. The complainant further raises its concern that pay and working conditions of prison officers in the private sector are far less favourable than in the public sector. While the Government has claimed that consultations had taken place in the private sector, the complainant indicates that this has not included the POA, despite the fact that it has 1,000 members in the private sector and is formally recognized for collective bargaining by one private sector company. The complainant maintains that, contrary to the Government's contention, it does have collective bargaining rights for prison custody officers in the private sector, and enumerates the establishments where it has sole negotiating rights. It contests the Government's contention that binding independent arbitration procedures are in place or operational in dispute situations in the private sector with other unions (e.g. by Arbitration, Conciliation and Advisory Service (ACAS)) and adds that the Government had not sought its views when seeking to clarify this information.
169. The complainant adds that developments in the private sector are particularly important at this juncture, in that the Government plans a significant expansion of private sector prisons. Three "titan" prisons holding 2,500 prisoners are being planned, the first of which

will be built and operational by 2012. The POA has been informed that the first two titan prisons will be run entirely in the private sector; the third will open to competitive bidding by the prison service. The Government has so far given no assurances that the tender document to be utilized in the competition for the contracts to operate these prisons will contain a requirement that the private companies competing will, if successful, be contractually obliged to provide compensatory mechanisms compliant with the ILO recommendations for the resolving of industrial disputes and the setting of pay rates.

170. In its communications of 19 February 2009 and 2 June 2010, the Government maintains that it has complied with the Committee's recommendations. With reference to the POA's 12 months' notice of withdrawal from the Joint Industrial Relations Procedural Agreement (JIRPA) in May 2007 and the POA strike action on 29 August 2007, which was considered in breach of the JIRPA by the court, the Government regrets that the POA continues to assert the right to strike and still does not appear to accept the Committee's finding that it is in conformity with freedom of association principles to restrict or prohibit the right to take industrial action in the prison service. The Government indicates that, since the POA refuses to enter into a binding agreement constraining its members' right to strike, the statutory prohibition of strike action in the prison service (section 127 of Criminal Justice and Public Order Act 1994) had to be brought back into force.
171. As to the proposals for workforce modernization, of which the purpose is to ensure compliance of prison service pay and grading structures with equal pay legislation, the Government indicates that the PRB process for 2008 was delayed to allow for extensive negotiations with the POA over the issue. The POA negotiating team recommended the deal of 19 November 2008 to its Special Delegates' Conference, which rejected it. Further negotiations in January 2009 have also proven unsuccessful. The Government contests the complainant's suggestion that, in the absence of an agreement, the proposed changes will be imposed and assures that the issues will be referred back to the PSPRB.
172. The Government recalls that the PSPRB is one of several independent bodies set up to regulate pay for public sector workers, including some who are also prohibited from taking industrial action. These bodies operate according to the same basic model: both parties submit evidence to an independent body comprising members from a wide range of backgrounds, which makes recommendations to the Secretary of State, who retains ultimate discretion over the pay award.
173. As regards the status of the PSPRB awards, the Government asserts that the Committee has explicitly recognized that the Government was not bound to comply with the PSPRB recommendations, and that it has not requested any legislative change but merely to continue to ensure that the PSPRB awards could only be departed from in exceptional circumstances. As previously indicated, one of those circumstances can include affordability, given the potentially significant impact of PSPRB recommendations on public finances.
174. The Government also maintains that, in seven years of operation, the PSPRB pay award has never been abated but merely staged (i.e. implemented in two steps) on two occasions, in response to exceptional pressure on public finances (in 2002, the recommended 6 per cent increase required cutbacks and reduction in recruitment even after staging, and in 2007, macroeconomic reasons such as a high inflation rate imposed the staging of several pay awards in the public service). The Government stresses that the distinction between staging and abating is significant, given that staging only has an impact on the employees' earnings in the year of the award but not in subsequent years; the adverse impact on the small minority of staff retiring prior to the staged increase is deemed minimal.

175. The Government recognizes that in Scotland, the prison service negotiates pay with its recognized trade unions through collective bargaining, and that, in the absence of agreement, the matter is referred to the ACAS for conciliation and, ultimately, independent binding arbitration. It draws, however, attention to the fact that the Scottish Executive retains the right to overrule the arbitration award for reasons of national security or public interest. While it has never been exercised, the Government contends that this power resembles the discretion of the Secretary of State in relation to the PSPRB award.
176. Concerning the composition of the PSPRB, the Government recalls that appointments to the PSPRB are regulated by the Office of the Commissioner for Public Appointments (OCPA) and must be made in accordance with the Commissioner's Code of Practice, and that an OCPA appointed independent assessor takes part in the recruitment process and issues a validation certificate. The Government also indicates that the Code of Practice includes a formal complaint procedure for the appointment process, which has never been used by the POA. It adds that, in the latest appointment process, drafts of the person specification (experience, skills and competencies required of candidate), job specification, advertisement and media schedule (to ensure the most diverse field of applicants possible) were placed before the POA and other stakeholders for comment prior to vacancies being advertised. The final selection criteria as specified in the reply have been agreed upon.
177. The Government recalls the measures it has taken since 2005 to safeguard the independence of the PSPRB. For example, the appointment process is now supported by the public appointments team in the Ministry of Justice thus removing all direct involvement of the prison service in the process; in this context, the Government contests the complainant's assertion that the Ministry of Justice controls the prison service given that the National Offender Management Service (NOMS), of which the prison service forms a part, is an autonomous executive agency of the Ministry entitled to set the terms and conditions of employment applicable to its civil servants. Moreover, the selection panel for appointments is now comprised of the Director of the Office for Manpower Economics (OME), an OCPA independent assessor and the Ministry of Justice HR Director. The participation of the OME was introduced in response to negotiations with the POA, and its independence was implicitly recognized by the POA when it agreed that its Director should chair the panel.
178. As regards the remit letter, the Government states that this power allows the Secretary of State to direct the PSPRB to take specific factors into account in its deliberations. According to the Government, it is a useful mechanism, which does not threaten the impartiality of the PSPRB, as it does not bind it; the weight to be attributed to the considerations is a matter for the PSPRB. By letter of 20 November 2007, following representations from the POA, the Government has agreed, that, while not able to suspend the issue of the annual remit letter permanently, it will not issue it in future years unless specific circumstances require to do so, and that, should this be the case, it would write to the POA to explain the reasons for doing so. The Government concludes with the affirmation that the PSPRB is a statutory body independent of Government which can be seen to act independently.
179. As regards the matters raised by the complainant concerning the private sector, the Government asserts that the POA does not have collective bargaining rights but is one of a number of unions which represents prisoner custody officers. Since pay and employment matters in private sector prisons are the responsibility of providers, the Government has sought and been provided with assurances from each of the three private sector companies currently providing custodial services that appropriate negotiation and dispute resolution procedures are in place. The Government refers to a number of companies which privately contract prison services, the recognized unions, their collective agreements and the provisions relating to dispute resolution and binding arbitration. It concludes that the

private sector companies operating prisons have appropriate mechanisms in place to compensate prisoner custody officers in private prisons for the limitation on the right to strike under section 127 of the 1994 Act. Furthermore, it indicates that it has reviewed its procurement provisions for private prisons and henceforth, will require all private contractors to provide compensatory measures to prison custody officers.

180. *The Committee takes note of the detailed information provided by the complainant and by the Government. It regrets to note that the relations between the concerned parties do not appear to have improved since its previous examination of the case and that numerous accusations have been made on both sides that inaccurate information has been supplied to the Committee and blame has been placed for the failure of past negotiations. The Committee further regrets that no recent consultations appear to have taken place with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland, and that, accordingly, little progress has been achieved in this regard since March 2008.*
181. *With regard to the binding nature of PSPRB pay awards, the Committee notes the Government's statement that matters of public finances are for the Government to decide and that departures from PSPRB recommendations might on occasion become necessary to ensure acceptable award levels. The Committee recalls that the reservation of budgetary powers to the legislative authority should not have the effect of preventing compliance with the terms of awards handed down by a compulsory arbitration tribunal. Any departure from this practice would detract from the effective application of the principle that, where strikes by workers in essential services are prohibited or restricted, such prohibition should be accompanied by the existence of conciliation procedures and of impartial arbitration machinery, the awards of which are binding on both parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 597]. The Committee further observes that, according to the complainant's indication which the Government did not contest, a review conducted in 2008 concerning industrial relations in the prison service proposed that there should be a legally binding Trade Union Dispute Resolution and Recognition Agreement providing for a formal process for resolving disputes underpinned by two-stage binding arbitration. While observing that pay was withdrawn from the remit of this review, the Committee is of the opinion that such an agreement could assist in the normalization of relations with the POA and requests the Government to provide information on the follow-up given to these recommendations. The Committee would also request the Government once again, in the interests of harmonious labour relations with prison officers and with a view to achieving a satisfactory solution to the need to provide for an appropriate mechanism to compensate for the strike prohibition, to reinstitute consultations with the complainant and the prison service in relation to the determination of prison officers' pay in England, Wales and Northern Ireland and to keep it informed of the progress made in this regard.*
182. *With regard to the independence of the PSPRB, the Committee notes with regret that the complainant has not been able to obtain representation on selection panel for the Board, despite the Government's previous declared intention to satisfactorily respond to the POA's request and recalls that 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 can take part at every stage and in which the awards, once made, are fully and promptly implemented [see **Digest**, op. cit., para. 596].*
183. *The Committee notes with interest, however, that, following representations from the POA, the Government has agreed that, while not able to suspend the issue of the annual remit letter permanently, it will not issue it in future years unless specific circumstances require*

it to do so, and that, should this be the case, it would write to the POA to explain the reasons for doing so. The Committee also observes that certain measures that are considered by the Government as appropriate (meetings of Chancellor with the PSPRB chairperson to inform about national economic context) or even as steps forward (e.g. consultation of the POA, during the latest appointment process, on drafts of the person specification in terms of experience, skills and competencies, job specification, advertisement and media schedule, and the agreed final selection criteria for PSPRB members; replacement on the selection panel of the Director of Personnel of the Prison Service with the HR Director of the Ministry of Justice), are considered by the complainant as inappropriate (information about economic context not made available to all parties to the process) or as still insufficient (absence of the qualities “impartiality” and “independence” among the newly approved final selection criteria; closeness of ties between NOMS and the Ministry of Justice). 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]. The Committee therefore requests the Government to reinitiate consultations with the complainant and the prison service with a view to improving the current mechanism for the determination of prison officers’ pay in England, Wales and Northern Ireland by finding mutually satisfactory solutions likely to build up confidence in the process of all parties concerned. The Committee requests to be kept informed in this respect.

184. With regard to prisoner custody officers employed by private sector companies to which certain of the functions of the prison have been contracted out, the Committee notes the conflicting information provided by the parties regarding the procedures in place. The Committee requests the Government to conduct tripartite consultations together with the three relevant private contractors and the recognized trade unions including the POA, in order to take stock of the compensatory measures in place, jointly assess their appropriateness and discuss possible ways of improving the existing mechanisms so as to compensate private custody officers in private sector companies for the statutory prohibition of their right to strike. The Committee requests the Government to keep it informed in this regard and to supply further information in respect of the procurement provisions for private prisons in relation to the requirement of compensatory measures for prison custody officers.
185. The Committee once again requests the Government to pursue vigorously its efforts in respect of all the above and to keep it informed of developments. It refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.

Case No. 2642 (Russian Federation)

186. The Committee last examined this case, which concerns allegations of violations of trade union rights of the primary trade union organization of the Russian Trade Union of Dockers (RPD) by the management of the Murmansk Commercial Sea Port (MMTP), at its meeting in June 2010. On that occasion, the Committee once again requested the Government to provide information with regard to the measures taken: (1) to encourage the enterprise management and the RPD primary trade union to strive reaching an agreement on access to the workplaces, during and outside working hours, without impairing the efficient functioning of the enterprise; (2) to ensure that the trade union’s occupational health and safety inspectors are granted access to the enterprise in order to exercise their rights to oversee the observance of labour, health and safety legislation, conferred on them by the Law on trade unions; (3) to facilitate finding a mutually acceptable solution on the

question of premises to be granted to the RPD primary trade union; and (4) to ensure that the port management provides the RPD primary trade union with all information on social and labour issues affecting its members. Finally, the Committee once again requested the Government to indicate whether the check-off facility was restored at the port and to provide information on the outcome of a lawsuit filed by the RPD primary trade union in August 2006 before the district court regarding the withdrawal of the check-off facility [see 357th Report, paras 85–88].

- 187.** In its communication dated 17 September 2010, the Government states that the Ministry of Health and Social Development has held consultations with the management of the port and the chairperson of the RPD primary trade union Mr Klyuev. With regard to the access to the workplace, the Government reiterates that, in accordance with the security regulations of the Ministry of Transport of the Russian Federation approved by Government Decree No. 743 of 11 October 2001, the port access is conditional upon obtaining a permit. The Government indicates that Mr Klyuev is currently working as a machine operator at the port and has therefore unrestricted access to the territory of the port during and outside workings hours. The Government also indicates that the trade union's occupational health and safety inspectors are granted access to the enterprise. Finally, the Government indicates that, according to the information provided by the port management, no requests have been received for access to be granted to other trade union representatives.
- 188.** With regard to the issue of trade union premises, the Government reiterates that, in accordance with the 10 July 2006 ruling of the Leninsky District Court of Murmansk and the requirements of the legislation, premises have been provided by the employer to the RPD primary trade union at the Moryak Hotel building, room 919, but that this offer has been rejected by the representatives of the union. The Government states that the premises complied with the provisions of collective agreement, i.e. they had heating, telephone and electricity services. The Government also indicates that according to the port management, no other request for premises has been received from the RPD primary trade union.
- 189.** With regard to the issue of withdrawal of the check-off facility, the Government reiterates the information it has previously provided on the procedure for deduction and transfer of trade union dues and indicates that the issue of deduction of trade union dues has been dealt with by the union. The Government further indicates that within the last two years, no allegations of infringement of the rights of the RPD primary trade union have been made and no requests for transfer of trade union dues have been received from workers of the port.
- 190.** *The Committee notes the information provided by the Government. It notes, in particular, the Government's indication that it has held consultations with the management of the enterprise and the union. The Committee further notes that according to the information provided by the Government, the RPD primary trade union, as well as its occupational health and safety inspectors have unrestricted access to the workplace and that no requests to provide access to the workplace to other trade union representatives have been made.*
- 191.** *With regard to the issue of trade union premises, the Committee notes that the Government reiterates the information it had previously provided, i.e. that the premises offered (a hotel room) were not accepted by the union. It also notes the Government's indication that the RPD primary trade union has not made any request for other premises. Likewise, with regard to the issue of withdrawal of the check-off facility, the Committee notes that, according to the Government, within the last two years, no allegations of infringement of the rights of the RPD primary trade union in the enterprise have been made and no requests for transfer of trade union dues have been received from members of the union. In these circumstances, the Committee will not pursue the examination of these matters,*

unless the complainant organization raises further allegations with regard to the issue of premises and the check-off facility.

- 192.** *The Committee notes with regret that the Government provides no information with regard to the measures taken in order to ensure that the port management provides the RPD primary trade union with all information on social and labour issues affecting its members. The Committee recalls that the Workers' Representatives Recommendation, 1971 (No. 143), provides that the management should make available to workers' representatives such material facilities and information as may be necessary for the exercise of their functions. Noting that this principle has been translated into the national legislation, the Committee trusts that the Government will ensure its effective application by the management of the port.*

Case No. 2744 (Russian Federation)

- 193.** The Committee last examined this case at its meeting in June 2010 [see 357th Report, paras 1137–1158]. On that occasion, the Committee made the following recommendations:

- (a) The Committee requests the Government to bring the parties – the management of the corporation and the FPAD of Russia – together in order to facilitate their reaching an agreement in relation to the access to be provided to the representatives of the FPAD of Russia and its primary trade union and to keep it informed in this respect.
- (b) The Committee requests the Government to ensure that the FPAD of Russia has recuperated its documents, seals and other property from the office it had previously occupied. It requests the Government to keep it informed in this respect.
- (c) The Committee expects that the State Corporation of Russia for the Organization of Air Traffic has complied with the Inspectorate's instruction to index workers' wages in accordance with the collective agreement and requests the Government to keep it informed in this respect.

- 194.** In a communication dated 17 September 2010, the Government indicates that the Ministry of Health and Social Development has carried out consultations with the Federal Air Traffic Controllers' Union of Russia (FPAD) and the State Corporation of Russia for the Organization of Air Traffic. The Government further indicates that on 16 February 2010 the corporation approved the instruction on access arrangements to the administrative building of the enterprise. Under the instruction, the access to the enterprise premises is granted to the chairperson of the FPAD primary trade union, Mr Kovalev; one-time access permits can be provided to visitors, including members of the trade union committees of both, the FPAD of Russia and its primary trade union organization. Therefore, according to the Government, members of the primary trade union organization are provided with unrestricted access to the premises of the enterprise.

- 195.** As concerns the documents, seals and other property of the FPAD of Russia, the Government indicates that, pursuant to the 11 June 2010 decision of the Savelov District Court, workers of the executive committee and trade union committee of the FPAD of Russia were provided access to the office it had previously occupied and that trade union documents and seals were recuperated. The Government also indicates that the Moscow City Court set aside the decision of the Savelov District Court and that, while the case is pending, workers of the executive committee and trade union committee of the FPAD of Russia and its primary organization have no access to the premises they had previously occupied.

- 196.** As regards the Committee's recommendation concerning the Moscow State Labour Inspectorate's instruction to index workers' wages in accordance with the collective agreement in force, the Government points out that the enterprise has complied with the

Inspectorate's instruction and workers' wages have been indexed as required by paragraph 4.2 of the 2007–10 collective agreement.

197. *The Committee notes with interest the information provided by the Government with regard to the issues of access to the enterprise premises (recommendation (a)) and the indexation of workers' wages in accordance with the collective agreement (recommendation (c)). With regard to the documents, seals and other property of the FPAD of Russia (recommendation (b)), the Committee notes the Government's indication that following the Savelov District Court's decision of 11 June 2010 ordering that the FPAD of Russia be allowed to have access to its previously occupied office, the documents and seals have been recuperated by the union. The Committee notes, however, that the decision of the district court was set aside and that this case is still pending in the Moscow City Court. It further notes the Government's indication that until the decision is made, the workers of the executive committee and the trade union committee of the FPAD of Russia and its primary organization are not allowed to have access to the previously occupied premises. The Committee requests the Government to clarify whether following the decision of the Savelov District Court, the FPAD of Russia has indeed recuperated all of its documents, seals and other property from the office it had previously occupied. The Committee also requests the Government to provide information on the outcome of the case pending before the Moscow City Court.*

Case No. 2634 (Thailand)

198. The Committee last examined this case, which concerns obstruction and violation of the right to organize and bargain collectively, at its March 2010 session [see 356th Report, paras 184–188]. On that occasion, the Committee once again 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. Moreover, the Committee once again requested 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.
199. In a communication dated 20 September 2010, the Government states that the resignation procedure concerning the 178 trade unionists was conducted without illegal actions or discrimination and that the labour officers have informed the concerned trade unionists of their right to file a complaint against the employer before the Labour Protection and Welfare Provincial Offices of the Labour Court, should they feel dissatisfied with the treatment proposed by the employer. The Government indicates that according to section 121 of the Labour Relations Act B.E. 2518, which provides protection against unfair labour practices, an employee has the right to file a complaint against the acts of an employer within 60 days of the violation. According to the Government, since the employees did not exercise their rights, the case has reached its conclusion and therefore, the case before the Committee should be closed.
200. *The Committee notes the information provided by the Government. The Committee recalls, however, that this case concerns not only the situation of the 178 trade unionists who had resigned from their jobs, allegedly on the ground of acts of anti-union discrimination, but also the dismissal of ten trade unionists, which the Committee has already indicated it was inclined to consider to have been discriminatory in nature, as well as a collective bargaining process which was interrupted when the abovementioned dismissals and resignations took place.*
201. *As to the situation of the 178 trade unionists, the Committee requests the complainant organization to provide information on the reasons why the concerned employees decided*

not to exercise their right to file a complaint against the acts of their employer. As to the other allegations, the Committee once again requests the Government to provide information on whether the Labour Court, in its hearing of the dismissal of the ten trade unionists (No. 780–787/2008), was in full possession of all the material facts referred to in the Committee's previous conclusions, including the report of the Thailand National Human Rights Commission, and requests the Government to transmit a copy of the judgement once handed down. It also requests the Government once again to initiate discussions in order to review the possible reinstatement of the ten workers or, if reinstatement is not possible, the payment of adequate compensation. Finally, the Committee 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 any development in respect of all these issues.

Case No. 2192 (Togo)

202. The Committee last examined this case, which involves allegations of anti-union discrimination and interference in trade union activities by the company New Seed Processing Industry Oil of Togo (NIOTO), at its March 2007 meeting [see 344th Report, paras 210–212]. On that occasion, the Committee took note, with regard to the legal proceedings concerning the dismissal of Mr Awity Boko, General Secretary of the National Trade Union of Food and Agriculture Industries (SYNIAT), of Ruling No. 122/05 of 20 December 2005 of the Labour Court of Lomé, according to which his dismissal by the company NIOTO was lawful and legitimate.
203. The Committee notes that, in a communication dated 13 November 2009, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) reports with concern the delays encountered by SYNIAT, an affiliated union, with regard to the processing of the file relating to the dismissal of Mr Awity Boko. The IUF states, for example, that the factual conclusions by the judge in the case were not communicated to the individual concerned until February 2009, four years after the case was discussed and a ruling given, and then only thanks to the intervention of the Office of the United Nations High Commissioner for Human Rights. The information was necessary for Mr Awity Boko to lodge an appeal. The IUF adds that Mr Awity Boko lodged an appeal in April 2009, and complains that the handing down of a judgement by the appeal court was postponed on many occasions, most recently on 3 December 2009.
204. The Committee notes that, according to the IUF, these postponements appear to reflect a wish to delay proceedings in the matter of the dismissal of Mr Awity Boko, which took place eight years ago. The IUF adds that the duration of the proceedings has not only been prejudicial to Mr Awity Boko and his family on a personal level, but also to the union, whose membership has fallen as a result of fear of anti-union repression and demobilization after many years. The Committee notes, lastly, that the Government has not supplied any observations on these most recent allegations, despite a number of reminders.
205. *The Committee notes with deep concern the information provided by the IUF. Recalling the principle that justice delayed is justice denied, the Committee urges the Government to inform it without delay of any ruling given by the appeals court concerning the dismissal of Mr Awity Boko and to give clarification regarding any follow-up to such a ruling. The Committee requests the Government in particular to report on the current employment situation of Mr Awity Boko, and to indicate whether he is still the leader of SYNIAT. The Committee also requests the Government to indicate whether SYNIAT is pursuing its activities within the company NIOTO, and to take any measures that may be necessary to ensure that it can operate in an environment free of discrimination and anti-union interference.*

Case No. 2699 (Uruguay)

- 206.** The Committee last examined the substance of this case at its March 2010 meeting and on that occasion made the following recommendations [see 356th Report, para. 1391]:
- (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.
- 207.** The Committee notes that the complainants, in their communication of 23 September 2010, basically allege that the Government has not complied with the recommendations that were made in this case and request a direct contacts mission.
- 208.** The Committee notes that in its communications of 10 September and 1 November 2010, the Government does not respond to that request, although, following a lengthy examination of the Committee's recommendations, it emphasizes that the Committee had overlooked certain points and indicates that it has convened a meeting of the social interlocutors concerned, including the complainant organizations, in connection with the Collective Bargaining Act (No. 18566).
- 209.** In its communication dated 16 February 2011, the Government declared that a tripartite commission took place on 7 February 2011, where the parties discussed Act No. 18566 and the Ministry of Labour and Social Security proposed to address the issues mentioned in the recommendations of the Committee on Freedom of Association, following the consultation of the social partners who have accepted the creation of a tripartite commission. In this regard, it was agreed that the social partners would inform the Ministry of Labour on the integration of the delegations represented within ten days and that the Tripartite Commission should prepare a report within 30 days agreeing to submit to the Ministry a work schedule proposal containing the substantive issues mentioned in the aforementioned report of the Committee on Freedom of Association, without prejudice to other topics of interest to the Government and social partners in the field of labour politics and/or draft legislation.
- 210.** *In these circumstances, while noting that the Government convened a tripartite meeting on 7 February 2011, where the parties discussed Act No. 18566 and agreed to create a tripartite commission that would prepare a report on the issues mentioned in the report of the Committee, the Committee requests the Government to agree to accept a mission. It is proposed that this case be further examined in the light of the report of such a mission.*

* * *

- 211.** 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
2006 (Pakistan)	November 2000	June 2010
2086 (Paraguay)	June 2002	–
2173 (Canada)	March 2003	June 2010
2257 (Canada)	November 2004	November 2010
2267 (Nigeria)	June 2004	November 2010
2304 (Japan)	November 2004	November 2010
2356 (Colombia)	November 2009	November 2010
2428 (Bolivarian Republic of Venezuela)	March 2006	November 2010
2430 (Canada)	November 2006	November 2010
2433 (Bahrain)	March 2006	March 2010
2434 (Colombia)	March 2009	November 2010
2459 (Argentina)	June 2007	November 2010
2488 (Philippines)	June 2007	March 2010
2502 (Greece)	March 2007	June 2009
2522 (Colombia)	June 2010	–
2576 (Panama)	November 2007	–
2592 (Tunisia)	March 2009	November 2010
2595 (Colombia)	June 2009	March 2010
2616 (Mauritius)	November 2008	November 2010
2622 (Cape Verde)	November 2008	March 2010
2625 (Ecuador)	March 2009	June 2010
2630 (El Salvador)	March 2010	November 2010
2646 (Brazil)	November 2010	–
2652 (Philippines)	March 2010	–
2654 (Canada)	March 2010	–
2661 (Peru)	November 2010	–
2678 (Georgia)	June 2010	–
2683 (United States)	June 2010	–
2685 (Mauritius)	November 2009	November 2010
2686 (Democratic Republic of the Congo)	November 2009	November 2010
2690 (Peru)	June 2010	–
2701 (Algeria)	June 2010	–
2707 (Republic of Korea)	June 2010	–
2716 (Philippines)	November 2010	–
2730 (Colombia)	November 2010	–
2732 (Argentina)	November 2010	–
2735 (Indonesia)	November 2010	–
2737 (Indonesia)	November 2010	–

Case	Last examination on the merits	Last follow-up examination
2742 (Bolivia, Plurinational State of)	November 2010	–
2748 (Poland)	June 2010	–

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

213. In addition, the Committee has just received information concerning the follow-up of Cases Nos 1787 (Colombia), 1865 (Republic of Korea), 1914 (Philippines), 2153 (Algeria), 2160 (Bolivarian Republic of Venezuela), 2169 (Pakistan), 2229 (Pakistan), 2249 (Bolivarian Republic of Venezuela), 2301 (Malaysia), 2302 (Argentina), 2355 (Colombia), 2362 (Colombia), 2382 (Cameroon), 2399 (Pakistan), 2506 (Greece), 2527 (Peru), 2559 (Peru), 2594 (Peru), 2601 (Nicaragua), 2603 (Argentina), 2611 (Romania), 2614 and 2651 (Argentina), 2658 (Colombia), 2667 (Peru), 2669 (Philippines) 2675 (Peru), 2676 (Colombia), 2680 (India), 2677 (Panama), 2698 (Australia), 2705 (Ecuador), 2711 (Bolivarian Republic of Venezuela), 2719 (Colombia), 2736 (Bolivarian Republic of Venezuela), 2724 (Peru) and 2764 (El Salvador), which it will examine at its next meeting.

CASE NO. 2702

INTERIM REPORT

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

***Allegations: The complainant organization
alleges acts of anti-union harassment and the
dismissal of a trade union officer***

214. The Committee last examined this case at its May–June 2010 meeting, when it presented an interim report to the Governing Body [see 357th Report, paras 143–164, approved by the Governing Body at its 308th Session (June 2010)].

215. The Government sent its observations in a communication dated 12 July 2010.

216. 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

217. In its previous examination of the case, the Committee made the following recommendations [see 357th Report, para. 164]:

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

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

B. The Government's reply

218. In its communication of 12 July 2010 the Government states that, in accordance with its previous partial reply, it is reproducing the reply sent by the employer, Supermercados Toledo SA, which reads as follows:

Firstly, we hereby state that the complaint submitted by the CTA to the ILO is riddled with fallacies and we therefore need to describe the real situation concerning the company, the work therein and the dispute in question.

As stated when summoned to the La Plata headquarters of the Ministry of Labour of Buenos Aires Province (file No. 21504-28069-08), we consider that the complainant (CTA) has no legal authority to make demands involving our company inasmuch as it is a third-level organization and none of the trade unions which represent the workers of our enterprise is affiliated to this confederation per se or through any particular federation.

Accordingly, we are bound to reiterate that we consider it deplorable that a submission to the highest international body for the defence of workers, the ILO, is as riddled with fallacies as the communication to which we have to respond. We are therefore obliged to describe as clearly as possible the situation referred to in this libel, which we reject totally for its untruthfulness. The company denies the existence of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers and indicates that this was merely a meeting of a number of workers from a single shift (the morning shift) at a single plant (located at the Industrial Estate) belonging to a single company (Supermercados Toledo SA), at which, moreover, there is adequate trade union representation. In general terms, the company rejects all the complainant organization's allegations.

Specifically:

- I. The company. The poultry processing plant. Our company has a number of supermarkets, various farms (including a pig farm) and a pork product processing plant. The Mar del Plata Industrial Estate has a bakery, a poultry processing plant and an egg incubation plant. Supermercados Toledo SA has a total staff of over 2,400. The location with which the complaint is concerned is the poultry processing plant, which has 160 workers, of which 150 are employed in slaughtering, with 90 on the morning shift and 60 on the afternoon shift. The plant in question is a model establishment equipped with hi-tech equipment imported from Italy in 1998. At the end of last year the tenth anniversary of its inauguration was celebrated, in the presence of the directors and senior staff of the firm, all the plant staff and their families, at a gathering of more than 300 persons who, far from dwelling on the temporary nature of the dispute in question, are continuing their important day-to-day work at the plant, fostering their individual and collective development.

Conditions of employment at the processing plant. Discussions concerning the trade union framework and worker representation. In stark contrast to the claims of "very poor" conditions made elsewhere by the complainants, the staff work under optimum safety and health conditions at the plant. The other conditions of work more than fulfil the requirements of the law, being more favourable than any of the collective agreements in force. Since the outset, the applicable agreement was CCT No. 130/75 concerning employees in commerce (this being the principal activity of the company), though there have been specific requests for the application of CCT No. 398/05 concerning foodstuffs. In this connection a dispute arose between the Trade Union of Commercial Employees of the Atlantic Zone (SECZA) and the Trade Union of Foodstuff Industry Workers (STIABA), which gave rise to MTESS procedure No. 1226424/07. As evidence

of the improved conditions beyond the minimum requirements laid down by collective agreement, an agreement was signed on 28 March 2008 between the Ministry of Labour and Social Security (procedure No. 1164383/06) and the representative trade union (SEZCA), awarding workers at the plant greater benefits, a new pay scale and higher classification. Prior to the agreement being signed, the workers signed an affidavit approving the implementation of the agreement, despite which – as will be seen – a group of workers subsequently provoked an unprecedented situation absolutely contrary to any legitimate labour claim without the slightest attempt at dialogue.

The dispute of April 2008. 1. Occupation of the works canteen. After the agreement between the Ministry and the workers' representatives (including the trade unions and staff delegates) had been signed, improving the workers' conditions of employment (especially pay), a series of actions followed which we consider had nothing whatsoever to do with labour or union activity at the plant. On 9 April 2008 a group of workers on the morning shift decided to stop work, occupying the works canteen and denying people access, with some of the group claiming to belong to the executive committee of a non-existent trade union and effectively obliging their colleagues also to stop work and remain on the premises. Having been sent by the company, the human resources manager informed the workers that if there was any disagreement over payments or any particular problem or grievance, he proposed to deal with them one by one until they were resolved. This was rejected by the group in question. Seemingly – in the absence of any written presentations or minimum formalities – one of the persons involved in the occupation happened to be Mr Rubén Godoy, who had been the defeated candidate at the elections held at the plant by one of the trade unions (foodstuffs) and was now the self-proclaimed leader of the non-existent union. Five hours after the canteen had been occupied, the notary Oscar Pagni appeared and – at the request of the company and seeing that the situation was unchanged – asked the workers to resume their work on threat of dismissal, an instruction which was ignored. Subsequently, with the entry of the afternoon shift, a small group remained on the spot to ensure that the workers on the new shift adopted the same attitude, forcing most of them into a position which they were evidently reluctant to adopt.

- II. Dismissal of a number of workers. Having established that there had been several serious instances of non-compliance, such as refusal to perform company duties without any justification, unlawful occupation of the works canteen, incitement of colleagues to adopt the same attitude, including those on a different (afternoon) shift, and remaining at the plant outside working hours in order to prolong the occupation, the company considered at the time, quite reasonably and proportionately, that misconduct as defined in section 242 of the Employment Contract Act (LCT) had occurred and dismissed 11 workers on justified grounds (those who had continued to occupy the premises, who had incited their colleagues, etc.).
- III. Subsequent situation. Affidavit drawn up by the two unions vying for representation of the workers. Although attempts were made initially to reach some kind of negotiated solution, this was not possible owing to a series of violent actions directed not only at the plant itself but also at various branches of the company by the dismissed workers with the participation of a number of outsiders, including the lawyer supposedly representing the workers in question. This ended any possibility of conciliation or interaction with the persons concerned and led to the series of violent actions of which the company was the main victim. From the outset the representative trade unions (namely, the two unions which assumed the role of representation, the Trade Union of Commercial Employees of the Atlantic Zone (SECZA) and the Trade Union of Foodstuff Industry Workers (STIABA)) and the Ministry of Labour of Buenos Aires Province were informed of the situation. A hearing was held on 14 April 2008 at which – something vitally important to this presentation – the representatives of both trade unions declared that they had nothing to do with the dispute and the demands submitted, making the following statement in an affidavit (procedure No. 21528-42604/08 of 14 April 2008): "... there is no union or inter-union dispute, the workers having submitted a complaint on an individual basis without it being authenticated through the trade union organizations presented here, thus necessitating continuation of the same through the appropriate channels ...". Signed by: Mr Jorge Trovato, SEC union secretary, Mar del Plata, and Mr Marcelo Wagner, STIABA union secretary.

It should be noted that both trade unions are discussing the matter of worker representation, including at ministerial level; the membership of both unions accounts for the vast majority of staff at the plant; staff delegates have been elected both by SECZA and STIABA and are still performing their duties today; the dismissed workers participated in the delegate elections, one of the candidates (Mr Godoy) failed to be elected, and in his regard the guarantee laid down by section 50 of Act No. 23551 concerning trade union associations expired.

- IV. Features of the dispute. Non-existent dialogue. Ministerial hearings. Refusal of procedure. Interference by the CTA. Given this situation and following the dismissal, various attempts were made through different interlocutors to converse with the dismissed staff but on each occasion they all refused to participate in any talks, stating that they would only act through their lawyers. Thereupon the dismissed workers plus a number of other employees and various persons not employed by the company and having no connection with it (for example, political activists who had also taken part in other disputes in the zone) occupied the entrance to the industrial estate, preventing the entry or exit of people, transport and/or goods, especially those intended for the company. Their main aim was to prevent the plant from resuming operations and they were thus responsible for preventing their colleagues, even when the latter had police assistance, from returning to work (for example, they pelted the buses carrying the workers with stones and threatened the people travelling on them). We reiterate that constant attempts were made to dialogue with the dismissed workers but they refused, saying that it was necessary to speak to their lawyer, who, as can be seen from various actions, personally assumed the role of leader in the dispute, going far beyond his duties as a lawyer. All that most of the workers wanted was to return to work. After a couple of attempts to allow the workers to enter with police protection had failed, the entrance gate to the industrial estate was cleared by the police on the express orders of the Public Prosecutor's Office and the plant finally reopened completely (a few days earlier it had re-opened partially), whereupon almost all the workers (with the obvious exception of those who had been dismissed) returned to work. The CTA – which is apparently a third-level trade union organization and whose interest or participation in this matter we fail to understand – did not act until many days after the situation had begun (25 April), when all the workers had already resumed work. This was when a newspaper cutting stated that it was a “union and political ...” matter and that one of its goals was to “... force the hand of the executive authority ...” (*El Atlántico* newspaper, Saturday 26 April 2008). Clearly this was all totally unrelated to the activity of the company, which has always wanted simply to work in peace and harmony with its workers. Incidentally, what is now being referred to as the “strike” was never declared as such, even by the CTA, regardless of the fact that neither the CTA nor the bogus, non-existent trade union possessed the authority to make such a declaration.
- V. Legal framework of the matter, according to our company. A number of questions arise apart from the factual issues (basically relating to the attitudes of the parties, in the exercise of their rights). Act No. 23551 concerning trade union associations cannot be classified as restrictive but simply as governing trade union activity at the company, accepting representation of organizations that have official trade union status (in the large majority of cases) and those that are merely registered (in those cases that have been settled). However, the “pseudo-union” of workers on the morning shift at the plant concerned did not contain the minimum number of workers required when established, did not have approved statutes and was not officially registered, let alone not having legal personality. Despite CTA claims, it was a non-existent trade union organization without participation or membership.
- VI. Trade union activity. As is well known, trade union activity can occur inside or outside the organizational sphere of the union. However, for the special protection of the law to apply (see, for example, *ATE v. Ministry*), a number of requirements have to be met, and the recommendation made by the ILO Committee of Experts in its analysis of Convention No. 87 should be observed, namely: “the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism”. But then what role should be played by an organization which is not even in the process of being recognized and which seeks to participate in industrial action ordered by itself, without the approval

of the other workers and/or the recognized organizations and/or the stewards freely elected by their own colleagues? Perhaps it can engage in trade union activity, but only in the form of simple demands or complaints, without bypassing the representatives elected by the workers or arrogating to itself representative functions or protections which the law has reserved for those who comply with the minimum requirements. Exaggeration of the necessary protectionism (with a clearly protective character vis-à-vis possible excesses or discriminatory acts) cannot and must not go to the other extreme, namely creating the possibility that every worker could be designated either by himself or by a colleague as a union representative of the majority.

- VII. The strike. National and supranational standards, case law and doctrine have all been concerned with defining who shall be entitled to the right to strike, establishing it in our country at the base of the system of freedom of association, whose pyramid is to be found in the National Constitution and which has been expressed in Act No. 23551 in terms of organizations with official trade union status, regardless of the fact that strike action (a collective refusal to perform duties) may appear legitimate (as in certain cases) or be absolutely unlawful (as in this case and with regard to the question concerning who is officially responsible for a strike which has not even been declared). Even the text of the complaint itself shows that there was no strike and/or industrial action declared according to the terms of the law. Not even the labour authorities (provincial and national Ministries of Labour) whose officials are now being accused accepted that there was a collective dispute (since none existed in reality); they therefore rejected the request for compulsory conciliation and accepted the simple “refusal of procedure” on our part. The workers involved and their legal representatives subsequently requested a hearing at the provincial Ministry of Labour (procedure No. 21528-42558/08) but did not attend the first hearing that was scheduled, at which our party established the position of “refusal of procedure”, according to the terms of provincial Act No. 10149.

The Ministry then scheduled a new hearing, of which we were not informed but also which we were not obliged to attend on account of the “refusal of procedure” already established. Here one of the workers and their lawyer (17 April 2008), after formulating a series of incongruent requests, “considered the administrative procedure to have been exceeded”, whereupon all action by the Ministry was ended at the request of both parties (first the company and then the workers). Nevertheless, after both “refusals of procedure”, to our surprise we were summoned to La Plata at the request of the CTA, whose presentation to you actually predated this hearing. At the hearing, preceded by a written “refusal of procedure”, we repeated our refusal to recognize the CTA representatives and reiterated the company’s absolute compliance with the law, and the fact that the disciplinary measures taken had nothing whatsoever to do with any trade union activity on the part of the dismissed workers. Nor do we accept that this was a collective dispute and, given the damaging false charges of non-compliance brought against us (including MTESS Decision No. 481/02), we emphasize that the company fully complied with the legislation in force.

The intention of the CTA, in a dispute with which it had nothing to do whatsoever, was to exclude the workers and the company from the benefits of abovementioned MTESS Decision No. 481/02 and from the subsidies awarded by the “Productive recovery programme”, thereby threatening the very survival of the jobs concerned, and for this reason their plan was rejected by all the parties concerned. Hence we requested the Minister to recognize that the present situation had acquired political overtones and was improper, and that it had been treated like a test case or something similar. It is time to stop confusing the Ministry, public opinion and even the international labour organizations [sic] since Supermercados Toledo SA has acted wholly in accordance with the law and its conduct has been beyond reproach in both legal and moral terms. It is not certain that there has been any discrimination or anti-union activity. The plant in question has stewards from the two unions which are vying for representation of the workers, including workers who indicated that they belonged to the trade union which was not even officially registered and who continue to work normally.

Conclusions

The complainant has sought to “validate” the existence of a trade union, the existence of anti-union action, and the existence of a collective dispute. As has been seen, when a trade union is referred to, it is done in general, almost abstract terms, where reference should perhaps rather be made to an “attempt to establish a trade union”, to which only some workers from a single shift at a specific establishment appear to belong. In other words, in order to make it clear who is being referred to, the complainant should perhaps have used the name “Union of workers of the morning shift at the Supermercados Toledo SA poultry processing plant.” Its simple registration procedure and its claimed affiliation to a multi-activity organization without trade union status, such as the CTA, do not change its status since a union in the process of registration is not considered a trade union under the terms of Act No. 23551 and therefore does not exist as such. Perhaps in terms of *lege ferenda* it is possible to speak of the rights of the founder etc. but this is not even the issue here since the would-be “trade union” had no possibility of being viable given the prior existence of two entities having official trade union status which had even participated in discussions at the Ministry about representation (file No. 1226424/07 being processed at the MTESS Labour Relations Department). Incidentally, as previously stated, the person who now presents himself as general secretary of the “trade union”, Mr Hugo Godoy, stood for election as a STIABA union steward in 2007 and was defeated. Hence he did not even meet the requirements laid down by Act No. 23551 (less than a year as a member) but the company did not challenge his action or (as they now claim) take any reprisals, even when the six-month period of immunity had expired. In other words, there was no trade union as such, there was no anti-union action and there was no reason why we should adopt such an attitude.

Finally, as regards the alleged collective dispute, we must answer the question: Is every labour dispute collective? If it is, the difference between a collective dispute and a “multi-individual” dispute disappears, the right to strike is transferred from the representative trade union organization to the individual worker, and Acts Nos 23551, 14250 and 14786, in both their current texts and their implementing regulations, must of course be labelled as unconstitutional. Naturally we do not share the CTA’s view in this regard and, even though we have heard it in other settings, we can state categorically that a dispute may have existed but in no way could it be classified as collective. Finally, we underline the fact that the justified dismissal of the workers – some of whom have been denounced as belonging to this “pseudo-union” while others have not (the causes and reasons for which we have explained) – was not illegal, unlike the supposed declaration of a “strike” or “industrial action” undertaken by persons having no legal authority to do so.

Finally, with regard to the complainant’s arguments concerning the rights of the alleged trade union association which they claim to defend (and in respect of whose legal basis we have seen no documentary evidence whatsoever), it should be noted that the labour courts have already had the opportunity to take a decision in this regard, in *amparo* proceedings [for protection of constitutional rights] instituted by the workers themselves and by the alleged trade union association in the process of registration, in the case “*Bravo Juan Santos et al v. Supermercados Toledo SA, s. amparo*”, Mar del Plata Labour Tribunal No. 3, in which it was decided to reject the action *in limine* and the lack of constitutional protection applicable to the association was unanimously emphasized by the judges. In the light of all the above, we consider that we have given a concise and adequate reply to the authorities requesting the facts and to the legal issues arising in this matter.

219. The Government states that the company’s reply, which is reproduced above and refers to the statements made in its previous reply, is the statement made regarding the intervention of the provincial Ministry of Labour in relation to the strike. It adds that, through the territorial agency, it requested the case “*Bravo Juan Santos et al v. Supermercados Toledo SA, s. amparo*”, brought before Mar del Plata Labour Tribunal No. 3, to be referred to it, in which the judges unanimously voted to reject *in limine* the *amparo* appeal in view of the lack of constitutional protection applicable to the association.

C. The Committee's conclusions

220. *The Committee recalls that, as part of its examination of this case in June 2010, it asked the Government: (1) to carry out an investigation without delay into all the facts of discrimination and interference mentioned in the complaint, to determine the reasons for the dismissal of trade union officer Mr Rubén Óscar Godoy and other union members (15 altogether) employed by the Supermercados Toledo SA company after holding a strike and, if the above acts proved to be based on anti-union motives, to take steps to bring the parties together with a view to reinstating the dismissed workers (the Committee asked the Government to inform it whether those adversely affected had taken legal action in this respect) and (2) with regard to the allegation that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), to take the necessary steps to ensure that an investigation was carried out by an authority independent from those involved, and to inform it of the outcome (the Committee asked the Government to inform it of the outcome of the complaints filed by the trade union against those acts with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province).*
221. *The Committee observes the complainant's allegation in the present case that once the company became aware that the administrative procedure had started for official registration of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers, it began to harass the union leaders and members and that, following a strike which had arisen as a result of various demands being ignored, the company, in an anti-union climate and interference, dismissed trade union officer Mr Rubén Óscar Godoy and another 15 union members. At the same time, the Committee observes that the complainant alleges that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously) and the union's lawyers filed complaints relating to these events with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province.*
222. *The Committee observes that the Government has sent the reply from the company concerned relating to the allegations made in this case.*
223. *As regards the acts of discrimination and interference mentioned in the complaint which supposedly motivated the dismissal of trade union officer (Mr Rubén Óscar Godoy) and another 15 union members following a strike, the Committee notes the company's statement that: (1) on 28 March a collective agreement was signed with the Trade Union of Commercial Employees of the Atlantic Zone (SECZA) representative trade union, awarding improved benefits; (2) after the agreement was signed, a series of actions took place which had nothing to do with labour or trade union activity at the workplace concerned; (3) on 9 April 2008 a group of workers from the morning shift decided to stop working, "occupying" the works canteen, denying people entry, claiming to belong to the executive committee of a non-existent trade union and practically obliging their colleagues to also stop work and remain on the spot; (4) having been sent by the company, the human resources manager informed the workers that if there was any disagreement over payments or any particular problem or grievance, he proposed to deal with them one by one until they were resolved. This was rejected by the group in question, which included Mr Rubén Godoy, who had been the defeated candidate in the elections held at the workplace by one of the trade unions (foodstuffs) and was now the self-proclaimed "leader" of the non-existent union; (5) five hours after the canteen had been "occupied", the workers were asked to resume their work on threat of dismissal, an instruction which was ignored (subsequently, with the entry of the afternoon shift, a small group remained on the spot to ensure that the workers on the new shift adopted the same attitude, forcing most of them into an attitude which they were evidently reluctant to adopt); (6) consequently, having established that there had been several serious instances of*

labour non-compliance, such as: refusal to perform company duties without any justification, unlawful occupation of the works canteen, incitement of colleagues to adopt the same attitude, including those on a different (afternoon) shift, and remaining at the plant “outside” working hours in order to prolong the occupation, the company considered that misconduct as defined in section 242 of the Employment Contract Act (LCT) had occurred and dismissed 11 workers on justified grounds; (7) although attempts were made initially to reach some kind of negotiated solution, this was not possible owing to a series of violent actions directed not only at the plant itself but also at various branches of the company by the dismissed workers with the participation of a number of outsiders; (8) from the moment they became aware of the situation, representative trade unions (SECZA and the Trade Union of Foodstuff Industry Workers of Buenos Aires Province (STIABA)) and the Ministry of Labour of Buenos Aires Province, a hearing was held on 14 April 2008, when – something vitally important to this presentation – the representatives of both trade unions stated that they had nothing to do with the dispute and the demands submitted (SECZA and STIABA are both vying for representation of the workers); (9) following the dismissal, various attempts were made through different interlocutors to converse with the dismissed staff, but on each occasion they all refused to participate in any talks, stating that they would only act through their lawyers. Thereupon the dismissed workers plus a number of other employees and various persons not employed by the company and having no connection with it (for example, political activists who had also taken part in other disputes in the “zone”) occupied the entrance to the industrial estate, preventing the entry or exit of people, transport and/or goods, especially those intended for the company; (10) in the present case there was no strike and/or industrial action declared in accordance with the terms of the law, and even the labour authorities (provincial and national ministries of labour) did not accept that this was a collective dispute and therefore refused the request for compulsory conciliation, accepting the company’s straightforward “refusal of procedure”; (11) the complainant organization has sought to “validate” the existence of a trade union, the existence of anti-union activity and the existence of a collective dispute. The registration procedure and the claimed affiliation to a multi-activity organization without trade union status, such as the CTA, do not change its status since a union in the process of registration is not considered a “trade union” under the terms of Act No. 23551 and therefore does not exist as such (in this regard the Committee recalls that it has been urging the Government for many years to issue a ruling on the CTA’s application for trade union status (see Case No. 2477, Reports Nos 346, 348, 349, 350, 351 and 353); (12) in the present case a dispute might have existed but this cannot be classified as a collective dispute, and it should be noted that the justified dismissal of the workers, some of whom were reported as belonging to the “pseudo-union” while others were not, was not illegal, unlike the supposed declaration of a “strike” or “industrial action” taken by persons who had no legal authority to do so; and (13) the judicial authority for labour matters has already made a decision regarding amparo proceedings instituted by the workers concerned and by the trade union association in the process of registration, in the case “Bravo Juan Santos et al v. Supermercados Toledo, s. amparo”, Mar del Plata Labour Tribunal No. 3, in which the amparo application was rejected in limine and the judges unanimously emphasized the lack of legal protection applicable to the association.

224. The Committee notes this information and in particular observes the complainant’s allegation that once the company became aware that the administrative procedure had started for official registration of the Trade Union of Poultry Slaughtering and Processing Plant and Allied Workers, it began to harass the union leaders and members, and that following a strike it dismissed a trade union officer and a number of union members (a total of 15, according to the complainant); the company claims that the dismissal of 11 workers was due to serious labour misconduct at work and not due to participation in a strike. This being the case, taking into consideration the contradictory versions of the complainant and the company and with a view to reaching a decision based on all the

information, the Committee regrets that the Government has not conducted the requested investigation into all the allegations of discrimination and anti-union dismissals and urges it to do so immediately and to keep it informed in this regard. Furthermore, while noting the company's statement that the judicial authority rejected an amparo appeal filed by the representatives of the union being established, the Committee requests the Government to inform it whether the dismissed workers, including trade union officer Mr Rubén Óscar Godoy, have taken legal action and invites the CTA to forward any additional information.

- 225.** *As regards the allegation that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), the Committee notes the company's denial that these acts were instigated by it and/or that they occurred with the complicity of the State and declares that: (1) the dismissed workers plus a number of other employees and persons not employed by the company occupied the entrance to the industrial estate and violently prevented the entry or exit of people and goods to/from the company; and (2) the intervention of law enforcement officers, by means of an explicit order from the Public Prosecutor's Office, enabled the plant to be reopened. While noting this information, the Committee regrets that the Government has not launched the requested investigation and has not sent information on the progress made as regards processing the complaints against these acts filed by the trade union with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province. The Committee therefore reiterates its recommendations and urges the Government to send the requested information.*

The Committee's recommendations

- 226.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) the Committee urges the Government to conduct the requested investigation immediately into all the allegations of discrimination and anti-union dismissals (14 trade union members and one union officer according to the complainant; 11 workers according to the company) and to keep it informed in this regard. Furthermore, while noting the company's statement that the judicial authority rejected an amparo appeal filed by the representatives of the union being established, the Committee requests the Government to inform it whether the dismissed workers, including trade union officer Mr Rubén Óscar Godoy, have taken legal action. In addition, the Committee invites the CTA to forward any additional information.*
 - (b) As regards the allegation that on 18 April 2008, the day of the strike, the police used force against the strikers, leaving seven injured (one of them, Mr José Lagos, seriously), the Committee urges the Government to take steps to ensure that an investigation is launched into this matter, to send information on its outcome and to send information on the outcome of the complaints against these acts filed with the Public Prosecutor's Office of Mar del Plata, Buenos Aires Province.*

CASE NO. 2725

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

Complaint against the Government of Argentina presented by

- **the Mendoza Association of Health Professionals (AMPROS) and**
- **the Trade Union Federation of Health Professionals of the Argentine Republic (FESPROSA)**

Allegations: The complainant organizations allege that, following work stoppages and trade union actions, compulsory conciliation was called for in an admissible manner, salaries were docked and dismissals and suspensions were carried out

227. The complaint appears in a communication from the Mendoza Association of Health Professionals (AMPROS) dated 10 July 2009. The Trade Union Federation of Health Professionals of the Argentine Republic (FESPROSA) endorsed this complaint in a communication of 13 July 2009. FESPROSA presented new allegations in communications dated 24 November 2009, 7 January 2010 and 4 May 2010. AMPROS presented new allegations in a communication dated 3 August 2010.
228. The Government sent its observations in communications dated 15 February and 21 September 2010.
229. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

230. In its communications of 10 July 2009, AMPROS states that, after months of collective bargaining, agreement was reached with the State as the employer on a collective labour agreement, which was ratified by Law No. 7759 on 8 May 2007, published in the *Official Gazette* on 5 October 2007, with amendments to section 27 and 48, and ratified by the professional workers' subcommittee of the provincial bargaining committee for the health sector. The agreement signed in the context of collective bargaining put an end to the existing industrial dispute, although the means required for its implementation remained to be provided by the relevant regulations. This gave rise to a new dispute. The complainant organization adds that, while the rule in question had been in effect since July 2007, the transitional provisions contained in section 105 to 113 of the collective labour agreement established a period in which the State undertook to implement the measures required for the effective application of the agreement.
231. For this reason, AMPROS granted the State an extension of 60 days, according to the minutes of the wage bargaining committee dated 30 January 2008. The complainant organization states that the period agreed on for resolving the additional points of the agreement elapsed without the slightest response from the administration, so the assembly decided to declare a state of alert and mobilization for the period from 8 to 10 October 2008. This culminated in a one-day work stoppage on 17 October 2008, a measure that was

determined, in accordance with section 1201 of the Civil Code, because of the serious and repeated defaults committed by the employer. Nevertheless, the State docked workers' wages for the day, even though the work stoppage was characterized as withdrawal of services because of the default by the employer (the State). Faced with such a reaction, the trade union organization, in a note dated 30 October 2008, reported the existence of a labour dispute and requested the Subsecretariat of Labour to order compulsory conciliation. It attached a list of defaults on the collective agreement, which gave rise to administrative report No. 12521-A-08.

- 232.** The complainant organization adds that, while the compulsory conciliation hearings were being held, it requested the establishment of the Standing Bargaining Committee on Interpretation, Application, Wages and Labour Relations in a note dated 5 December 2008, which gave rise to administrative report No. 14627-A-08. Between 13 November 2008 and 11 March 2009, the Subsecretariat of Labour and Social Security of the province held 13 hearings in the context of administrative report No. 12521-A-08 and three hearings in the context of case No. 14627-A-08, both of which originated with the agency. Needless to say, the hearings were fruitless, since after five months of bargaining little progress had been made in dealing with the additional points, which were limited to just three (critical and semi-critical activity, disaster zones and promotion zones). These additional points have not been paid by the Government.
- 233.** This being the case, the trade union organization regarded the compulsory conciliation stage as having ended at the hearing on 11 March 2009, and considered that the time was now right for the use of direct action. In the context of administrative report No. 14627-A-08, three hearings were held to address the "proposal" for a salary increase in 2009. Not only was no agreement reached at these hearings, but, in addition, the Mendoza Government's proposal was limited to the implementation of the collective labour agreement, which it had not complied with for over a year. Therefore, at a hearing on 16 April 2009, notification was given that "at the hearing called on today's date, we consider that there has been no proposal from the Government of the province for a general salary increase covering all health professionals. For this reason, the work stoppage involving absence from the work place is confirmed for 22 and 23 April 2009, and it is announced that there will be a work stoppage of similar scope, with mobilizations and assemblies, on 29 and 30 April 2009".
- 234.** After this notice was given, the work stoppages announced for 22 and 23 April took place without incident, and, on 28 April 2009, the Subsecretariat of Labour and Social Security issued ex officio, by means of Resolution No. 2754/09, a new call for compulsory conciliation. This call for conciliation was questioned by the trade union organization, which considered it untimely and inadmissible in the light of the repeated delays in the regulatory activity entrusted to the executive branch and the unchangeable stance of seeking to make the salary increase dependent on the implementation of the collective labour agreement, subjects that had been discussed at length while the trade union had obtained no satisfactory response to its demands.
- 235.** The complainant organization indicates that the notification of direct action was sent to the controlling authorities 12 days before the call for compulsory conciliation was issued and that the second direct action was reported 11 hours before it began (28 April at 1 p.m.). On 29 April, with the direct action in progress, the Subsecretariat of Labour, arguing that it had learned from the media that the trade union organization would not comply with the call for compulsory conciliation, issued a notice ordering the trade union to comply immediately with the compulsory conciliation procedure and to refrain from carrying out direct actions under penalty of law. The complainant considers that as it involves direct action in progress, and as the complainant has been enjoined to refrain from carrying out direct actions, this task becomes impossible to fulfil, because the notice says nothing about

the immediate cessation or suspension of the direct action under way, nor does it order the suspension of the action within a legal deadline.

236. According to the complainant organization, “refrain” refers to the direct actions which the trade union organization might take in the future, not those in progress. For this reason, in view of the decisions adopted by the competent authority, the executive committee of the trade union had called an assembly of its members. The assembly took a final decision to suspend the direct actions planned for 7 and 8 May 2009. This was the context in which the union’s executive committee appeared at the conciliation hearing on 4 May 2009, whereby it was simply complying with Resolution No. 2754/09, non-compliance with which was called for by the Subsecretariat of Labour and Social Security of the province.
237. Lastly, in the context of administrative report No. 14627-A-08, the Subsecretariat of Labour and Social Security of the province issued Resolution No. 2895/09, which reads as follows: “Mendoza, 30 April 2009. Having regard to: administrative report No. 14627-A-08, which continues the pay negotiations for the professional health sector represented by the trade union AMPROS, the compulsory conciliation procedure has been decreed in accordance with the legislation in force; ... The Subsecretariat of Labour and Social Security of the province of Mendoza hereby resolves: Section 1: To declare illegal the direct action carried out by the Mendoza Association of Health Professionals (AMPROS) for failing to comply with the compulsory conciliation procedure ordered in this decision, in accordance with section 104 and related provisions of Law No. 4974 and, by extension, Laws Nos 14786 and 25877. It therefore substantially rejects the presentation made by the trade union organization objecting to Resolution No. 2754/09. Section 2: To request the intervention of the Ministry of Labour, Employment and Social Security of the Nation in a timely manner for the pertinent legal purposes, as stipulated in Law No. 23551. Section 3: To notify the parties and order registration and filing. Signed Dr Jorge Guido Gabutti – Subsecretary of Labour and Social Security – Ministry of the Interior, Justice and Human Rights – Government of Mendoza.”
238. The complainant organization states that, under such circumstances, the assembly held on the morning of 4 May 2009 decided to attend the compulsory conciliation session, provided that the relevant legal proceedings were brought and the direct actions scheduled were suspended. It considers that the union’s conduct in this context was always lawful, and that the proven evidence in the case confirms this. In its view, the State’s conduct which it called into question involved the adoption of measures designed to curtail the union’s right to use direct action, with the resulting restriction on the exercise of freedom of association.
239. The complainant organization maintains that the declaration of the strike’s illegality by the Subsecretariat of Labour and Social Security of the province of Mendoza is null and void and constitutes an illegitimate manoeuvre by the State for the purpose of limiting the union’s freedom of association. Its illegitimacy is based in the first place on the inadmissibility of the call for compulsory conciliation. It does not appear from the administrative proceedings that the trade union organization, in spite of questioning the new call for compulsory conciliation, failed to comply with it. The recourse it used, which is based on the exhaustion of that process, did not mean disobeying the competent authority’s orders in any way; the process has been used by the State as a tool for limiting the right of the union and its members to the legitimate exercise of the constitutional right to strike.
240. Secondly, the Subsecretariat of Labour does not offer the guarantees of impartiality, independence and confidence of the parties that are required in order to act as conciliator in the industrial labour disputes to which the State is party.

241. Thirdly, from the perspective of the conciliation process, a new call has no purpose other than to suppress the right to strike, especially considering the State's lack of desire for conciliation which has lasted from 1 January 2008 to the present. In these circumstances, it is inadmissible that a strike by health professionals of the provincial state should be declared illegal by virtue of a judicial ruling, which amounts to a denial of the constitutional right to strike.
242. As regards the exhaustion of compulsory conciliation, the complainant organization states that the right to strike is one of the basic pillars of freedom of association recognized in the Constitution, and that it cannot be subject to restrictions with the appearance of legality. The manner in which the right to strike is recognized in article 14bis of the National Constitution warrants greater protection than other rights, according to national doctrine.
243. In conclusion, the call for compulsory conciliation issued by Subsecretariat of Labour and Social Security Resolution No. 2754/09 is illegitimate and untimely, and its sole purpose is to prevent the legitimate exercise of the right to strike. In the light of the records of administrative proceedings, AMPROS never stopped complying with compulsory conciliation. The conciliation notice, as drafted, imposes a task that is impossible to fulfil because it is issued and executed once the direct action has been carried out, an action that would expire 36 hours and 15 minutes after notification of it has been given, according to report No. 382330. Moreover, section 104 of Provincial Law No. 4974, which regulates the right to strike, provides for a prior injunction to normalize activity within no more than 48 hours, a period that was not taken into account; this directly contravenes the enjoyment and exercise of the right to strike.
244. AMPROS reports that it lodged an appeal for *amparo* (protection of constitutional rights) with the Seventh Labour Chamber of the first judicial district of the province of Mendoza in order to safeguard the rights which, in respect of the exercise of freedom of association, are allegedly being violated by the governmental authority. At that level of jurisdiction, the court ordered that the dispute be submitted to a mediation procedure which proved to be to no avail, as it ended in failure to achieve conciliation. Nevertheless, these negotiations carried an implicit warning from the Government of Mendoza that the trade union members and the union itself would be fined if no conciliatory agreement that satisfied its conditions was reached. In this connection, the Government proposed to revoke the declaration of illegality of the actions, subject to the abandonment of the proceedings at both the judicial and the administrative levels, as well as at the international level (in respect of the ILO), a position that is plainly coercive in its effect.
245. In its communication of 24 November 2009, FESPORA states that the Government of the province of Córdoba is responsible, as in most Argentine states, for the provision of public health services through a network of institutions of increasing complexity (primary care centres and hospitals) and that these institutions are clustered in the provincial health system, in which 15,000 professional and non-professional employees work. FESPORA alleges that, since the beginning of April, the workers, through first-level assemblies, began trade union actions, invoking ILO Conventions Nos 87 and 98, and, with the explicit endorsement of the Association of State Workers (ATE), demanded better wages and greater job security.
246. The complainant organization states that, nonetheless, the Government of Córdoba declared the direct actions illegal and began systematically persecuting the workers. At the end of October, the Government docked up to 50 per cent of the wages of 100 workers who participated in the direct actions, and suspended another 31 strikers for one day, without entering into negotiations in good faith in order to settle the dispute.

247. In its communication of 7 January 2010, FESPROSA alleges that the Government of Santiago del Estero is violating ILO Conventions Nos 87 and 98. FESPROSA indicates that, in August 2009, the Association of Health Professionals of Santiago del Estero – Capital and La Banda (ASPROSSE), the Trade Union of Outreach Professionals (SIPARSE) and the FESPROSA delegations from the cities of Frías and Añatuya began trade union actions demanding a salary review and greater job security. FESPROSA asserts that the wages paid in the province are the lowest in the public health system nationwide. Of the 8,000 workers in the system, 5,600 are in precarious job situations. None of those 5,600 workers has an income equal to the minimum wage set by the National Wage and Employment Council, which is 1,500 Argentine pesos for January 2010 (US\$390).
248. The complainant organization adds that at no time during the course of the dispute did the Government agree to negotiate with the legitimate representatives of the workers, despite the repeated requests made by them with support from the National Federation. This situation still persists. Indeed, the provincial Government implemented repressive measures, such as: (1) the suspension for 60 days without pay, plus 60 days with pay, of Dr Gustavo Cáceres, physician, Vice-President of SIPARSE and Director of the Hospital de Bandera Bajada. The suspension was extended without summary proceedings; (2) the dismissal of three trade unionists, Dr Teresa Santillán, Mr Juan C. Chazarreta, employee, and Ms Silvia Capellini, employee; and (3) the indiscriminate docking of wages, in amounts ranging from 200 to 500 pesos, of personnel who participated in the direct actions.
249. Lastly, the complainant alleges that Ms Nemesia Feiffer, a pharmacist and a delegate from the Hospital Independencia, was transferred in an untimely manner 100 kilometres from her home, and that six other professionals at the Hospital de Añatuya who were trade unionists and members of the hospital's FESPROSA delegation – Dr Carlos E. Díaz, surgeon; Dr Fernando Pedraza, paediatrician; Dr Matías Fernández, general practitioner; Dr Sergio Alderete, obstetrician/gynaecologist; Valeria Páez, surgical technologist; and José Cañete, anaesthesia technician – were dismissed.
250. In its communication of 4 May 2010, FESPROSA alleges that a prolonged dispute in the province of Tucumán had reached a preliminary settlement in an agreement signed on 26 November 2009, but that the Government of Tucumán nonetheless defaulted on this agreement and issued Resolution No. 06/10, which violates the right to strike by unilaterally declaring all health services to be essential services.
251. In its communication of 3 August 2010, AMPROS states that it is supplementing the complaint which gave rise to the case and alleges that, on 18 June 2010, the Government of the province of Mendoza (Subsecretariat of Labour), with the obvious intention of persecuting the trade union, drew up a violation report against AMPROS, No. 401316 (non-compliance with the call for compulsory conciliation), on account of incidents that had occurred more than a year earlier and had already been subject to sanctions (the declaration of the strike as illegal). The complainant adds that all of this is in clear violation of the principle “non bis in idem” and due process. This means that the action in question, besides being tainted by gross defects which render it legally non-existent in the light of the National Constitution – according to the complainant, under Law No. 25212, fines of 1,000 to 5,000 pesos can be imposed for each worker affected by the infraction – and the ILO Conventions, has a clearly threatening and intimidating objective and therefore blatantly violates freedom of association.
252. According to AMPROS, the aim is simply to intimidate the union representatives in order to prevent them from properly defending the rights of their workers. In other words, and in sum, Violation Report No. 401316 was drawn up on account of incidents that had already

been subject to sanctions. That report, besides containing irremediable defects which render it null and void, was drawn up in a manner involving a clear abuse of authority.

253. After Resolution No. 2895/09 had been issued and report No. 382330, ordering the union to comply with the conciliation decree, had been drawn up, AMPROS contested that measure. This proceeding was finally settled through the imposition of serious criminal and administrative punitive sanctions, such as declaring the strike illegal and notifying the national authority for the purposes of empowering it to request the judicial suspension or revocation of the trade union's legal personality, or to order its intervention (section 56, paragraph 3, of Law No. 23551); in the end, no sanction was imposed for the alleged non-compliance with Law No. 25212 as the outcome of this proceeding. Trying to impose other sanctions more than a year and a half after these penalties were adopted, in respect of incidents for which AMPROS was served notice, under penalty of sanctions under Law No. 25212, implicates a clear violation of the principle of "non bis in ídem".

B. The Government's reply

254. In its communication of 15 February 2010, the Government states that, upon consultation with the Labour Ministry of the province of Mendoza, the Ministry transmitted a copy of the judgment handed down in the case captioned "*AMPROS, Mendoza Association v. Government of the province of Mendoza, for amparo [constitutional protection]*", report No. 361 of 3 December 2009. The judgment denies the trade union constitutional protection and dismisses the action on grounds of unfair practice, rejecting any violation of the right to strike by the Government of the Mendoza province (the text of the judgment indicates that the strike was illegal because it failed to comply with the provision concerning minimum services, that the conciliation procedure was not exhausted, and that there was no requirement to return the deductions for the strike days). This judgment has been appealed, and therefore it is deemed appropriate to await the decision of the provincial court, a matter on which the Committee will be kept informed.
255. In its communication of 21 September 2010, the Government states, with regard to the allegations concerning the province of Córdoba, that upon consultation with the Secretariat of Labour of the province, the Secretariat replied that the action and intervention of the provincial labour authority were recorded under cases Nos 0322-0150040/09 and 0322-015001/09, and that, on 21 September 2009, the compulsory conciliation procedure was opened in accordance with Provincial Law No. 7565, in order to channel the dialogue between the parties into a tension-free phase, under penalty of declaring the strike illegal, inasmuch as the direct actions were continuing during this period. In this context, and at this point in the dispute, both the Trade Union of Public Employees (SEP) and the Association of Health Workers (ATSA) accepted the effects and scope of the compulsory conciliation procedure ordered by the labour administrative authority; the two organizations are endowed with legal personality, which guarantees their status as trade unions with the power of representation, as recognized by law and by the Government in its capacity as employer. The provincial labour authority advises that FESPROSA has only recently appeared in these proceedings, and rejects the measure without attaching any documentation that confirms its representative capacity, simple registration and/or legal personality. Under such circumstances, the Provincial Secretariat of Labour obtained information on the extent of FESPROSA's sphere of action. It was found that, by means of Resolution No. 1157/07 of the Ministry of Labour, Employment and Social Security of the Nation, FESPROSA was registered in the Registry of Workers' Trade Union Associations as a second-level trade union association, serving as an umbrella organization for first level trade union associations with legal personality which are recognized or simply registered, and which represent health professionals employed in public and private health institutions and organizations operating in the province of Mendoza. It also serves as an umbrella organization for trade union associations in the public sector operating in the provinces of

Buenos Aires, Salta and Jujuy. Its sphere of action in the rest of the country is recognized as being merely statutory.

256. The provincial authority adds that FESPROSA did not appear in any proceeding in the dispute, nor did it confirm the scope of its representative capacity. That is, it did not participate in different administrative proceedings, and did not intervene or take part in the negotiation or request any formal participation. It did not comply with compulsory conciliation, nor did it agree to the different negotiating phases, in contrast to the two trade unions with legal personality, with which an agreement was finally reached.
257. Lastly, the Government states that the analysis of the complaint should be reconsidered, bearing in mind that, on the basis of the facts and the law, the negotiation was conducted with two trade unions operating in the province of Córdoba with sufficient legal personality to represent the workers affiliated with them, both of which negotiated and reached an agreement with their employer, and that neither of them complained; FESPROSA, however, did so independently, having appeared in the dispute almost at the last minute and with no authority to act in the province of Córdoba.

C. The Committee's conclusions

258. *The Committee observes that, in the present case, AMPROS alleges that, following a work stoppage in the health sector of the province of Mendoza on 17 October 2008, the strikers' pay was docked, and that after two stoppages on 22 and 23 April 2009, the administrative authority called for compulsory conciliation in an untimely and inadmissible manner, and finally declared the direct action illegal for having failed to comply with the conciliation procedure (according to AMPROS, in June 2010, the Subsecretariat of Labour of the province of Mendoza drew up a violation report in this regard, and a fine could be imposed). For its part, FESPROSA alleges that: (1) in the province of Córdoba, after the health sector workers began to carry out trade union actions, the actions were declared illegal on 29 October 2009, up to 50 per cent of the strikers' pay was docked, and 31 strikers were suspended; (2) in the province of Santiago del Estero, the health sector workers began to carry out trade union actions in August 2009, the provincial Government did not agree to negotiate and, in retaliation, suspended the physician Vice-President of SIPARSE, dismissed nine trade unionists, transferred a trade union delegate, and docked the wages of employees who participated in the direct actions; and (3) in the province of Tucumán, the provincial Government issued Resolution No. 06/10, which violates the right to strike by declaring all health services to be essential services.*
259. *The Committee notes that the Government reports that: (1) with regard to the allegations by AMPROS concerning the province of Mendoza, the administrative authority of the province of Mendoza reported that the judgment rendered by the judicial authority in the case "AMPROS, Mendoza Association v. Government of the province of Mendoza for amparo" concluded that the strike was illegal because it failed to comply with the rules concerning minimum services, that the right to strike was not violated, that the conciliation procedure was not exhausted and that there was no requirement to return the wages deducted for strike days; the Government adds that, bearing in mind that an appeal has been lodged against this judgment, it deems it appropriate to await the decision of the provincial judicial body; and (2) with regard to FESPROSA's allegations concerning the province of Córdoba, the labour administrative authority of that province reported that, within the framework of the dispute in the health sector, the compulsory conciliation process was opened, and the Trade Union of Public Employees and the Association of Health Workers (which are endowed with legal personality, the status of more representative organizations) accepted the effects of conciliation, and only recently did FESPROSA appear in that proceeding, rejecting the measure – without attaching documentation confirming its simple registration and/or legal personality. The provincial*

Government adds that FESPROSA did not appear in any other proceedings in the dispute, did not confirm its representative capacity, did not participate in the negotiation and did not comply with compulsory conciliation, nor did it participate in the various negotiating phases, in contrast to the other organizations with legal personality, with which an agreement was reached.

- 260.** The Committee observes, first, that the disputes which gave rise to work stoppages and trade union actions and to calls for compulsory conciliation occurred in the health sector, and that, in Argentina, workers in the health sector may exercise the right to strike, subject to the performance of minimum services. The Committee recalls that when establishing a minimum service in the event of a strike in an essential service in the strict sense of the term not only the public authorities, but also the organizations of workers and employers concerned should be able to participate in such a determination.
- 261.** With regard to the allegations concerning the calls for compulsory conciliation in the context of collective disputes, the Committee recalls that it has stated on earlier occasions that “Legislation which provides for voluntary conciliation and arbitration in collective disputes before a strike may be called cannot be regarded as an infringement of freedom of association” and that “In general, a decision to suspend a strike for a reasonable period so as to allow the parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of the principles of freedom of association” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 549–550]. This is particularly valid when essential services in the strict sense of the term are concerned. Moreover, as regards the allegations concerning the docking of wages for the strike days (which the organizations, in their complaints, consider illegitimate), the Committee underlines that “Salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles” [see **Digest**, op. cit., para. 654].
- 262.** As regards the allegations concerning the sanctions that could have been or have been imposed in the context of disputes with health sector workers (AMPROS alleges that a fine could have been imposed for not complying with the call for compulsory conciliation; FESPROSA alleges the suspension of 31 strikers in the province of Córdoba, as well as the suspension of the physician Vice-President of SIPARSE, the dismissal of six trade unionists and the transfer of a trade union delegate in the province of Santiago del Estero), the Committee notes that the Government reports that judicial proceedings are under way in connection with the allegations presented by AMPROS. The Committee requests the Government to keep it informed of the judgment rendered in this case. With regard to the sanctions alleged by FESPROSA, the Committee has not been informed whether the penalized workers have initiated judicial proceedings in connection with the sanctions imposed, or of the possible grounds for those sanctions. Under these circumstances, the Committee requests the Government to clarify whether these workers have lodged appeals before the courts and, if so, to keep it informed of the outcome. In addition, the Committee invites the complainant to provide any additional information it considers necessary in this regard.

The Committee’s recommendations

- 263.** 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 judgement that is handed down in connection with the allegations

concerning the possibility of a sanction being imposed on AMPROS for not complying with a call for compulsory conciliation.

- (b) *As regards the allegations by FESPROSA concerning sanctions against certain trade unionists (the suspension of 31 strikers in the province of Córdoba, as well as the suspension of the physician Vice-President of SIPARSE, the dismissal of nine trade unionists and the transfer of a trade union delegate in the province of Santiago del Estero), the Committee has not been informed whether the penalized workers have instituted judicial proceedings in connection with the sanctions imposed, or of the possible grounds for those sanctions. In these conditions, the Committee requests the Government to clarify whether these workers have lodged appeals before the courts and, if so, to keep it informed of the outcome. In addition, the Committee invites the complainant to provide any additional information it considers necessary in this regard.*

CASE NO. 2776

DEFINITIVE REPORT

Complaint against the Government of Argentina presented by

- **the Argentine Judicial Federation (FJA) and**
- **the Trade Union Association of the Employees and the Officers
of the Judicial Authority of the Province of Mendoza**

Allegations: The complainant organizations object to a ruling issued by the Subsecretariat of Labour and Social Security of the Executive Authority of the Province of Mendoza instituting a compulsory conciliation process concerning a salary dispute affecting the employees of the Judicial Authority of the Province of Mendoza

264. The complaint is contained in a communication of the Argentine Judicial Federation (FJA) and the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza dated 23 April 2010. The complainant organizations sent new allegations in a communication dated 6 August 2010.
265. The Government sent its observations in a communication of September 2010.
266. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

267. In their communication of 23 April 2010, the FJA and the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza object to Ruling No. 2062/2010 of the Subsecretariat of Labour and Social Security of the Executive

Authority of the Province of Mendoza and request that it be declared that said Subsecretariat is not an impartial and independent body, nor does it have the confidence of all parties for the purposes of resolving the dispute described in the complaint. Furthermore, the complainants consider that the threat to declare industrial action illegal, carried out by said Subsecretariat (part of the local Executive Authority) on 23 April 2010, constitutes a violation of freedom of association. The complaint organizations state that, since August 2009, within the framework of a collective bargaining process, the judicial employees of Mendoza have been involved in an ongoing dispute with the provincial State over a salary increase. The main impediment to any agreement is the failure by the employer to offer an adequate pay increase, together with other obstacles put in place by the employer (the provincial Executive Authority and the Supreme Court of the Province).

268. The complainant organizations state that, in addition to the lack of an adequate offer regarding a salary increase, one of the most significant obstacles was the suspension by the Subsecretariat of Labour of the *ámbito paritario* (a meeting carried out on the basis of equality, in which decisions are taken collectively) halfway through the bargaining process. This suspension was announced in November of last year and more or less paralysed negotiations. The present complaint contains details of more recent facts (described in detail below), principally involving the said Subsecretariat (part of the provincial Executive Authority).

269. On 21 April 2010, the Subsecretariat of Labour and Social Security of the Executive Authority of the Province of Mendoza, a federated member State of the Republic of Argentina, ordered the following through Ruling No. 2062/2010:

Article 1. Declare open the compulsory conciliation procedure under national laws Nos 24185 and 14786 and provincial law No. 4974 and other applicable regulations and provincial Decree No. 955/04, so that the parties to the present dispute (the provincial Executive Authority, the Supreme Court of Justice of the Province of Mendoza and the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza), and setting a hearing for 26 April 2010 at 6 p.m.

Article 2. As of this notification the parties in dispute shall not take direct action during the period established by law and the situation which existed prior to the dispute shall be restored, with normal services being resumed immediately, safeguarding guaranteed union rights, as prescribed by law.

Article 3. Let this be duly registered, announced, and filed. Signed, Dr Javier G. Castrillejo. Legal and Technical Affairs Sector. Ministry of Government, Justice and Human Rights. Government of Mendoza.

270. The complainant organizations consider that on reading the above document it becomes clear that they are dealing with an employer which has granted itself the right to institute a compulsory conciliation process and then repeatedly to suspend the *ámbito paritario*. The ruling bears the stamp and signature of an official working for the Government of Mendoza, that is to say, the local Executive Authority (of which the employer is a part), which has the power to decide on the salary increase. The Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza, together with its umbrella organization, the FJA, have repeatedly challenged the competence of said Subsecretariat (part of the provincial Executive Authority) and refused to accept that this body, which is institutionally and functionally dependent on the Governor of the abovementioned province, could intervene as an impartial body to resolve a dispute, an issue which has arisen in a dramatic and urgent fashion as regards this case given the confrontation between the judicial employees and the state employer.

271. The complainants add that, at the time of the present complaint, the salary dispute has become ever tenser, involving the exercise of the right to strike, voted on by a workers' assembly and observed by all those workers, without ruling out the possibility of

negotiations (the sole condition of which being the respect of freedom of association). Despite this, the provincial Executive Authority, rather than participating in a process of adjustment or bargaining in good faith, chose to violate the freedom of association and the right to strike, posing as the competent (and supposedly partial and independent) body.

272. The complainants state that the judicial employees of the Province of Mendoza have been holding meetings and assemblies and organizing strikes for years without the employer, that is to say, the provincial State (including, of course, the local Judicial Authority and the Executive Authority) ever questioning their right to do so. Moreover, at the last joint meeting on Friday, 16 April 2010, the Executive Authority made a unilateral statement to the effect that it would respect the right to strike within the context of the current process. However, this statement, which of course created a positive precedent, has now been contradicted by employer interference in the form of the actions of the abovementioned Subsecretariat. According to the complainant organizations, it is not feasible for the Subsecretariat of Labour and Social Security of the Province of Mendoza to claim to regulate and intervene as an impartial and/or independent body (something that it is not), while being part of the local Executive Authority, with the Under Secretary answering to the Governor and not being worthy of the trust of the workers as regards this dispute, an essential prerequisite for an impartial body.
273. The complainant organizations therefore consider that the ruling issued by the Subsecretariat of Labour of the Province is illegal because it is a violation not only of the principles of freedom of association and of the impartial body but also of the principles of the republican form of government and the separation of powers in that: it violates the principle of the system of federal Government because it addresses issues which are delegated to the Congress of the Argentine Nation and exclusively governed by the National Executive Authority (articles 5, 121, 126, 99(2) and 75(12) of the Constitution); the provincial Executive Authority clearly exceeded its constitutional authority by taking on functions which correspond to other authorities and altering and restricting the system established under Act No. 25551 with regulatory exceptions with regard to the aspects governed by the contested instrument; it contravenes the principle of legality (articles 28 and 75(22) of the Constitution); and it violates the principle of freedom of association with restrictions breaching the principle of legality (article 75(22) of the Constitution, Articles 16 and 30 of the American Convention on Human Rights “Pact of San José, Costa Rica”, and Articles 5 and 8 of the International Covenant on Economic, Social and Cultural Rights).
274. Moreover, according to the complainant organizations, the ruling in question, issued by the abovementioned Subsecretariat, is irregular and violates freedom of association, because it: subverts the priorities of action of the standards; infringes the principle of the supremacy of the laws (article 31 of the Constitution); contravenes the guarantee of equality (article 16 of the Constitution); is clearly discriminatory (article 75(22) of the Constitution, Articles 1, 2 and 7 of the Universal Declaration of Human Rights, Article 1 of the American Convention on Human Rights “Pact of San José, Costa Rica”, and article 1 of Act No. 23592); thwarts the guarantee of protection of trade union business established under article 14bis of the Constitution and the international standards and Conventions of the ILO previously mentioned; and interferes with the normal running of trade union activities. It should be stressed that Article 8 of the Labour Relations (Public Service) Convention, 1978 (No. 151), makes it clear that the ILO establishes alternative procedures for the setting of standards governing working conditions. One such procedure is the submission of this disagreement to an independent and impartial body.
275. The complainant organizations state that the principle of “freedom of association” is enshrined in those international agreements that “enjoy constitutional status”, (article 75(22) of the Constitution), with that freedom covering the right of associations to

hold meetings or assemblies and the right to strike. In accordance with the conditions set out, the right to collective bargaining and, where appropriate, to independent and impartial procedures for the resolution of conflicts arising during the course of bargaining processes or under other circumstances, must be fundamentally guaranteed, along with the exercise of trade union rights in general. Consequently, the attempt by the abovementioned Subsecretariat to intervene in the dispute should be rejected. Therefore, provincial States must be prevented from: exercising alleged “competences” to intervene in collective labour disputes arising with officials of the administration; instituting compulsory conciliation processes in said framework; and ruling on the legitimate measures of union action which may be adopted by trade union organizations.

- 276.** The complainant organizations state that they consequently consider that, under the Constitution, the provincial States lack the authority to: intervene in collective labour disputes arising with judicial employees; impose compulsory conciliation processes and rule on the status of measures for the employer State’s own benefit, acting under the “guise” of public authority through the provincial authority, given that said scenario breaches any rules of equity in the resolution of such conflicts, while representing undue interference in the collective autonomy of trade union organizations as prohibited by article 6 of the Act on Trade Union Associations.
- 277.** In their communication of 16 August 2010, the complainant organizations recall that the judicial employees of the Province of Mendoza were involved in an ongoing unresolved dispute with the provincial State over a salary increase. They add that, on 16 July 2010, they received a contravention notice at the headquarters of the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza stating that the union had received a six-figure fine for failing to comply with the “compulsory conciliation process” imposed by the Subsecretariat of Labour of the Province of Mendoza (a body which is subordinate to the Executive Authority). As well as being inappropriate, the fine is so high that it would simply wipe out the complainant organization in question.
- 278.** The complainants add that they constantly challenged the provincial Subsecretariat as regards its competence to intervene as an impartial body to resolve a dispute, an issue which arises in a dramatic and urgent fashion in the present case given the confrontation between the judicial employees and the employer State. Thus, when the so-called “compulsory conciliation process” was announced, the judicial trade union of Mendoza challenged it. In the document presented to the abovementioned Subsecretariat of Labour, the trade union categorically rejects Ruling No. 2062/2010 of the Subsecretariat of Labour of the Executive Authority of the Province of Mendoza “in view of the fact that said Subsecretariat does not have the special character of an impartial and independent body, nor does it enjoy the trust of all the parties for the purposes of resolving the dispute set out below”.
- 279.** The complainant organizations state that, without prejudice to this profound disagreement, in the same week that they rejected the compulsory conciliation process, the Executive Authority abandoned that same process and an agreement on salaries was reached at the joint bargaining table, bringing an end to the dispute. The agreement, dated 29 April 2010, which ended said dispute, states that “with regard to the statements of the trade union concerning sanctions and transfers of workers as a result of the dispute, the Executive Authority considers that, within the framework of the law, such measures are inappropriate ...”. In addition to the joint agreement (in which the Executive Authority itself undertakes to refrain from imposing sanctions), in accordance with legislation, once a dispute has been resolved and an agreement reached regarding salaries, there shall be no further consequences.

280. The complainants allege that the Executive Authority, however, did not comply with the agreement and proceeded to violate the relevant laws and regulations in force. Following the resolution of the dispute and the establishment of the agreement that no sanctions of any kind would be imposed, the employer (the provincial State) imposed a financial sanction on the trade union (the amount of which was several times higher than the union's assets), in accordance with the contravention notice of 16 July 2010. By reactivating a notice which had become completely irrelevant in the light of the resolution of the dispute, the joint agreement and the undertaking, among other things, not to impose sanctions of any kind, the Subsecretariat claims that it is responding to the submission in which, appropriately and in the midst of the dispute over the salary increase, the trade union challenged the so-called "compulsory conciliation process" with the Subsecretariat consequently imposing a fine for non-compliance with that process.
281. The complainants state that, following various arguments which had no legal basis, the ruling dated 12 July 2010, which disregards freedom of association, states that "the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza shall be fined, taking into account, for the purposes of the calculation of the fine, the number of judicial employees represented (members and non-members) by the trade union organization". The alleged grounds are failure to participate in a compulsory conciliation process, irrelevant given that, had the process been held before an independent and impartial body as required by the ILO, the trade union would have participated. As the process was to take place before an employer body, the trade union declined to participate.
282. According to the complainant organizations, the attitude of the provincial State (the Executive Authority and the Judicial Authority) is absurd. In the same ruling in which the fine is imposed it is stated that the issue of the compulsory conciliation process will not be taken into account because the dispute was resolved jointly and therefore the process is irrelevant. It is irrelevant as regards this issue but not, according to the State, with regard to the imposition of the sanction and the fine.

B. The Government's reply

283. In its communication of September 2010, the Government states that, when consulted, the Subsecretariat of Labour of the Province of Mendoza stated that: (1) the legislative framework within which the negotiations were carried out was Act No. 24185, provincial Decree No. 955/2004, provincial act No. 4974 establishing the Subsecretariat of Labour of the Province of Mendoza and the agreement dated 17 June 2005 reached between the parties to the joint dialogue in the judicial sector; (2) the salary negotiations completed between the trade union organization, the Supreme Court of Justice of the province and the provincial Executive Authority continued into 2010; (3) the meetings were set in accordance with the wishes of the parties, or the calendar of the joint dialogue which called for two meetings per month and on 26 March 2010 the trade union organization began to carry out direct action, consisting of strikes by the staff of the Judicial Authority; (4) despite the direct action carried out, the *ámbito paritario* continued to be held, with meetings in which the parties exchanged offers and established their positions regarding salaries and other issues; (5) as a result of the fact that the judicial service of the Province of Mendoza was almost completely paralysed, the spread of the strike to the penal service and the danger posed by this situation to the general population, through Decree No. 22681 of 21 April 2010, the Supreme Court of Justice of Mendoza (SCJM) requested the Governor of the province to institute a compulsory conciliation process as regards the dispute in question; (6) at the time of the request of the SCJM, industrial action had been taken on 26, 30 and 31 March and on 5–9, 12–16, 19 and 20 April 2010; (7) on 21 April 2010, Ruling No. 2061 was issued in which the Subsecretariat of Labour instituted a compulsory conciliation process regarding the dispute in question; (8) the second article of

the ruling states that the parties in dispute shall abstain from taking direct action for the duration of the dispute, with normal services being resumed immediately. The parties were notified of that ruling but the trade union organization did not comply with it, continuing to carry out direct action. Despite all this, the *ámbito paritario* continued to function, and a salary agreement was reached on 29 April 2010 within that forum; and (9) the objections raised by the trade union regarding the compulsory conciliation process were fundamentally based on the alleged lack of competence of the labour body to issue the said ruling, as well as with regard to the joint dialogue in general and on the fact that, in the trade union's view, a number of international agreements in force prevented the State from instituting a compulsory conciliation process within the framework of a state joint dialogue.

- 284.** The provincial administrative authority adds that it should also be noted that, faced with the trade union organization's disregard for the authority of the Subsecretariat of Labour as the body within which the joint dialogue process is carried out, and for the powers granted to the administrative authority by Act No. 24185 and Decree No. 955/2004 regarding the joint dialogue, and at the request of the other parties involved in the joint dialogue, on 9 November 2009 Ruling No. 8819/09 was issued expressly establishing the scope of competence of the body as regards the joint dialogue process (the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza being notified of that ruling without lodging any kind of appeal against it).
- 285.** The Government states that the fact that Article 8 of Convention No. 151 specifically states that conciliation is a valid means of negotiation and that the complainant organization participated in that conciliation and reached an agreement should be taken into account. It states that the allegations presented are not sufficient for the attitude of the labour body to be considered as a breach of freedom of association, but rather the opposite. According to the Government, the legislation applied is appropriate and known to all the parties involved in the dispute. In particular, the trade union was informed of the measure, without the provincial administrative authority being aware at any point of its opposition until the present complaint was submitted.

C. The Committee's conclusions

- 286.** *The Committee notes that, in the present case, the complainant organizations: (1) object to the ruling issued by the Subsecretariat of Labour and Social Security of the Executive Authority of the Province of Mendoza opening a compulsory conciliation process (within the framework of a salary dispute) between the complainants, the provincial Executive Administration and the SCJM (the complainants state that they have constantly challenged the competence of the abovementioned Subsecretariat to intervene as an impartial body in order to resolve a dispute); and (2) allege that, although the dispute was resolved on 29 April 2010 and an agreement was signed under which the provincial Executive Authority undertook not to impose sanctions, the said authority did not respect the agreement, imposing a fine on the trade union organizations that was several times larger than their assets for failure to participate in the compulsory conciliation process.*
- 287.** *As to the contested compulsory conciliation process instituted by the Subsecretariat of Labour and Social Security of the Executive Authority of the Province of Mendoza within the framework of a salary dispute, the Committee notes that the Government states that it contacted the Subsecretariat in question and received the following response: (1) the legislative framework within which the negotiations were carried out consisted of Act No. 24185, provincial Decree No. 955/2004, provincial Act No. 4974 establishing the Subsecretariat of Labour of the Province of Mendoza and the agreement dated 17 June 2005 reached between the parties to the joint dialogue in the judicial sector; (2) the salary negotiations completed between the trade union, the SCJM and the provincial Executive*

Authority continued into 2010 and meetings were set in accordance with the wishes of the parties, or the calendar of the joint dialogue which called for two meetings per month; (3) on 26 March 2010, the trade union began to carry out direct action, consisting of strikes by the staff of the Judicial Authority but, despite the direct action carried out, the ámbito paritario continued to be held, with meetings in which the parties exchanged offers and established their positions regarding salaries and other issues; (4) as a result of the fact that the judicial service of the Province of Mendoza was almost completely paralysed, the spread of the strike to the penal service and the danger posed by this situation to the general population, through Decree No. 22681 of 21 April 2010 the SCJM requested the Governor of the province to institute a compulsory conciliation process as regards the dispute in question. At the time of the request of the SCJM, industrial action had been taken on 26, 30 and 31 March and on 5–9, 12–16, 19 and 20 April 2010; (5) on 21 April 2010, Ruling No. 2061 was issued in which the Subsecretariat of Labour instituted a compulsory conciliation process regarding the dispute in question. The second article of the ruling states that the parties in dispute shall abstain from taking direct action for the duration of the dispute, with normal services being resumed immediately. The parties were notified of that ruling but the trade union did not comply with it, continuing to carry out direct action. Despite all of this, the ámbito paritario continued to function, and a salary agreement was reached on 29 April 2010 within that forum; (6) it should be noted that, faced with the trade union's disregard for the authority of the Subsecretariat of Labour as the body within which the joint dialogue process is carried out, and for the powers granted to the administrative authority by Act No. 24185 and Decree No. 955/2004 regarding the joint dialogue, and at the request of the other parties involved in the joint dialogue, on 9 November 2009, Ruling No. 8819/09 was issued expressly establishing the scope of competence of the body as regards the joint dialogue process (the Trade Union Association of the Employees and the Officers of the Judicial Authority of the Province of Mendoza being notified of that ruling without lodging any kind of appeal against it). According to the Government, the legislation applied is appropriate and known to all the parties involved in the dispute. In particular, the trade union was informed of the measure, without the provincial administrative authority being aware at any point of its opposition until the present complaint was submitted.

288. As to the allegation concerning the compulsory conciliation process, the Committee notes that the salary dispute which gave rise to the strike (16 days of industrial action) and the summons to the compulsory conciliation process took place within the framework of the Judicial Authority of the Province of Mendoza and recalls that it has, on numerous occasions, stated that “Officials working in the administration of justice and the judiciary are officials who exercise authority in the name of the State and whose right to strike could thus be subject to restrictions, such as its suspension or even prohibition” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 578]. Furthermore, the Committee has stated on previous occasions that “Legislation which provides for voluntary conciliation and arbitration in industrial disputes before a strike may be called cannot be regarded as an infringement of freedom of association and, in general, a decision to suspend a strike for a reasonable period so as to allow the parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of the principles of freedom of association” [see **Digest**, op. cit., paras 549–550]. In these circumstances and bearing in mind the aforementioned principles, the Committee will not pursue its examination of these allegations.
289. As to the allegation that the provincial Executive Authority did not respect the agreement which ended the salary dispute in question, imposing a fine on the trade union organizations (the amount of which was several times higher than their assets) for failure to participate in the compulsory conciliation process, despite the fact that, according to the complainant organizations, the provincial Executive undertook not to apply sanctions, the

Committee notes that the Government has not sent its observations in that regard. In that respect, the Committee observes that the complainant organizations do not specify the amount of the fine they received. In these circumstances, while observing that the documentation sent by the complainants includes a contravention notice (under Act No. 25212 establishing the violation by any of the parties of rulings issued regarding compulsory conciliation processes as a very serious infraction) summoning the complainant organizations to defend themselves and discharge themselves of the allegations, the Committee recalls that agreements should be binding on the parties and that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest**, op. cit., paras 935 and 939], and requests the Government to take the necessary measures to ensure that the agreement in question is respected and, if the agreement effectively expresses what is alleged by the complainant organizations, that the sanctions referred to by the complainants are not imposed.

The Committee's recommendation

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

As to the allegation that the Executive Authority of the Province of Mendoza did not respect the agreement which ended the salary dispute in question, imposing a fine on the trade union organizations (the amount of which was several times higher than their assets) for failure to participate in the compulsory conciliation process, despite the fact that, according to the complainant organizations, the provincial Executive Authority undertook not to apply sanctions, the Committee requests the Government to take the necessary measures to ensure that the agreement in question is respected and, if the agreement effectively expresses what is alleged by the complainant organizations that the sanctions referred to by the complainants are not imposed.

CASE NO. 2773

DEFINITIVE REPORT

**Complaints against the Government of Brazil
presented by
the Trade Union of Construction and Furniture Industry Workers of Bento
Gonçalves
supported by
the National Confederation of Industrial Workers (CNTI)**

<i>Allegations: The complainant organization alleges the dismissal of a trade union official in the industrial sector</i>
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291. The complaint is contained in a communication from the Trade Union of Construction and Furniture Industry Workers of Bento Gonçalves dated 11 January 2010. The National

Confederation of Industrial Workers (CNTI) supported the complaint in a communication of 24 March 2010.

292. The Government sent its observations in a communication dated 29 September 2010.
293. Brazil has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

294. The Trade Union of Construction and Furniture Industry Workers of Bento Gonçalves stated, in its communication of 11 January 2010, that it is a primary trade union organization representing workers in the construction and furniture industries, based in the municipalities of Bento Gonçalves, Guaporé, Nova Arazá, Nova Bassano, Paraí, Nova Prata, Veranópolis, Cotipora, Vila Flores, Fagundes Varela, São Jorge, Vista Alegre do Prata, Protásio Alves, Dois Lajeados, Guabiju, Montebelo do Sul, Santa Teresa, São Valentin do Sul and União da Serra, all of which are located in the State of Rio Grande do Sul. The union in question is an important tradition in that region, having been founded 35 years ago and registered as a union on 30 October 1977.
295. The complainant organization alleges that on 16 July 2009, it was informed of the dismissal of one of its officials, Mr Fábio Guilherme de Oliveira, from the company Artesano Móveis Ltda, in violation of the principles of freedom of association. The official in question, who had been elected by direct workers' ballot, was a substitute member of the union's executive board since 13 January 2006 and was to have carried on his mandate until 13 January 2010. The official's candidacy, his election and assumption of the post of union official, was the subject of regular communication with the employer through official letters and published announcements in the company. He was very active and participated in representing workers, and was intensely committed to defending the interests of workers in the category in question.
296. The complainant organization indicates that, during the period in which he represented workers, the official in question was called on by the union on six occasions to deal with issues of concern for this category of workers, and the employer was informed of his absences and unpaid leave provided for under section 543(2) of the Consolidated Labour Laws, proving not only the exercise of trade union activities but also the employer's tacit acceptance of his status as a union official. Moreover, as a result of the official's conspicuous leadership in the occupational category in question, he represented the union in a number of distinct activities, either union-related (meeting with government ministers, for example) or of a social nature (campaigns and meetings organized by the union). The official participated actively in the general assemblies of this category, both as a union official with voting rights and as an ordinary collaborator at meetings.
297. The complainant organization maintains that the union official never committed any serious offences that might have justified his dismissal by the employer. In any case, even if he had committed any such offences, the correct procedure would not have been immediate dismissal but an investigation of the alleged offence, as provided for in Brazil's legislation, and his right to a defence should have been safeguarded. The complainant organization considers that the employer's insistence on dismissing the official was a punishment for his trade union activities and his unwavering defence of workers' rights. His dedicated and resolute representation of workers provoked the incomprehension and, on occasions, anger of his superiors, and he suffered discrimination for exercising his trade union mandate; all this ultimately led to his illegal and improper dismissal. The complainant organization considers that in a democratic State like Brazil, employers

cannot be allowed to take abusive advantage of their managerial authority by violating rights of freedom of association, which are extensively protected and recognized by international law.

B. The Government's reply

298. In its communication of 29 September 2010, the Government transmits a copy of the minutes of a hearing before the labour court, which notes that the parties in dispute reached an agreement by which the company undertook to pay the sum of 32,500 reales (R\$) to Mr Fábio Guilherme de Oliveira as compensation for his time as a union official. The Government also attaches a report by the General Coordination Office for Labour Relations which refers to ILO Conventions Nos 98 and 135 and to the Brazilian Constitution, which guarantees freedom of professional or trade union association, and suggests that the Rio Grande do Sul Regional Superintendence for Labour and Employment invite the parties in dispute to a mediation hearing with a view to considering the possibility of settling the dispute through administrative channels.
299. The Government communicates the record of the conciliation meeting which took place on 30 August 2010 before the Rio Grande do Sul Regional Superintendence for Labour and Employment, which shows that the mediator referred to the benefits for the parties concerned of re-establishing an employment relationship. In this regard, the minutes of the meeting indicate that the worker stated that the possibility of reinstatement required some thought over each possibility, as he currently works at another company and resides in another municipality. The legal counsellor for the company stated that in his view, it was not possible to reinstate the worker in the company, given that the latter has no interest in doing so and there exists a certified agreement with the judicial authority confirming the full payment of compensation to the worker. Taking this into consideration, the mediator considered that the mediation attempt could not proceed.

C. The Committee's conclusions

300. *The Committee observes that in the present case, the Trade Union of Construction and Furniture Industry Workers of Bento Gonçalves alleges the anti-union dismissal on 16 July 2009 of the union official Mr Fábio Guilherme de Oliveira from the company Artesano Móveis Ltda.*
301. *In this regard, while recalling that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 771], the Committee takes note of the minutes, communicated by the Government, of a judicial mediation hearing which included the issue of reinstatement that took place on 3 September 2009, which indicates that the union official in question and the company had reached agreement on compensation for dismissal, taking into account his status as a union official. The Committee further recalls, as a general principle, 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 and that, if reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficient dissuasive sanction for anti-trade union dismissals [see **Digest**, op. cit., paras 837 and 845].*

The Committee's recommendation

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

CASE NO. 2655

INTERIM REPORT

Complaint against the Government of Cambodia presented by Building and Wood Workers' International (BWI)

Allegations: Unfair dismissals, acts of anti-union discrimination and the refusal to negotiate with the trade union concerned by restoration authorities: the Authority for the Protection and Management of Angkor and the Region of Siem Reap (APSARA), the Japan-APSARA Safeguarding Angkor Authority (JASA) and the Angkor Golf Resort

- 303.** The Committee last examined this case at its November 2009 meeting, when it presented an interim report to the Governing Body [see 355th Report, approved by the Governing Body at its 306th Session (2009), paras 327–357].
- 304.** The Government sent partial information on the allegations made in a communication dated 9 March 2010.
- 305.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 306.** In its previous examination of the case in November 2009, deploring that despite the time that had elapsed, the Government had not provided any information on the alleged acts of anti-union discrimination, including unfair dismissals, and the alleged refusal to negotiate with the trade union concerned, the Committee made the following recommendations regarding the matters still pending [see 355th Report, paras 327–357]:
- (a) The Committee deplores the lack of cooperation shown by the Government and strongly urges it to be more cooperative in the future.
 - (b) The Committee urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this regard.
 - (c) The Committee urges the Government to immediately carry out a full and independent investigation into all the allegations in this case and, if they are proven to be true, to take

the necessary steps to ensure that the trade unionists dismissed, or whose contracts have not been renewed, are fully 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. It requests the Government to inform it of the outcome of the investigation and of all measures of redress taken.

- (d) The Committee requests the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the JASA union may hold elections, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind. It requests to be kept informed of developments in this regard.
- (e) The Committee requests the Government to take the necessary measures to ensure that both APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions and to keep it informed in this regard.
- (f) The Committee draws the Governing Body's attention to the serious and urgent nature of this case.

B. The Government's reply

307. In its communication dated 9 March 2010, the Government sent partial information in respect of the matters examined in this case.

308. The Government indicates, as regards the dispute involving the Authority for the Protection and Management of Angkor and the Region of Siem Reap (APSARA) and the Japan–APSARA Safeguarding Angkor Authority (JASA), that the Department of Labour Dispute and Siem Reap Provincial Department of Labour and Vocational Training has tried to seek a solution with the APSARA authority and JASA organization in accordance with legal procedures, but that the case could not be reconciled and has therefore been forwarded to the Arbitration Council on 22 December 2009.

309. The Government indicates, as regards the dispute involving the Angkor Golf Resort, that the abovementioned Department of Labour Dispute could not find a solution in this case and that it forwarded it to the Arbitration Council on 11 January 2010.

C. The Committee's conclusions

310. *The Committee recalls that the present case involves allegations of acts of anti-union discrimination at three workplaces, including unfair dismissals, which, according to the complainant organization, took place in the following circumstances:*

- (a) *On 21 December 2006, the APSARA, apparently after having ignored repeated requests from the union for negotiations, issued a statement demanding that its employees renounce membership in the union concerned, should they wish to retain their employment, and on 22 December 2006, dismissed 14 union leaders and activists. The Siem Reap Provincial Labour Department attempted conciliation on 22 March and 14 September 2007; in both instances the APSARA refused to reinstate the 14 dismissed trade union leaders and activists. The APSARA also allegedly failed to attend a conciliation meeting scheduled for 25 October 2007, and neither the Provincial Labour Department nor the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY), have since undertaken further measures to resolve the dispute, including by forwarding it to the Arbitration Council.*
- (b) *On 28 February 2005, the Japanese Government Team for Safeguarding Angkor (JSA) terminated its employment contracts with trade union leaders and activists and*

closed its restoration project site. It resumed operations on 27 March 2006 at a different restoration site under its new name, the JASA, and retained 90 per cent of the workers previously employed at JSA – but did not re-employ 16 union leaders and activists. On 25 April and 5 July 2007, the Cambodian Construction Workers Trade Union Federation (CCTUF, the complainant's affiliate) addressed communications to MOSALVY, which in turn requested the Siem Reap Provincial Labour Department to take measures to resolve the outstanding issues. However, no resolution could be reached in this case.

- (c) Finally, as concerns the Angkor Golf Resort, on 28 February 2007, the President of the union concerned, Yun Sokha, was dismissed without sufficient reason – the same day on which inconclusive negotiations with the union were held. The management also suspended its operations on 7 April 2007 and resumed operations approximately three weeks later, calling back only those workers who either had not joined the union or had agreed to renounce membership therein. Yun Sokha, union Vice-President Thy Sothea and 40 others who had refused to resign from the union were not rehired. On 9 June and 5 July 2007, the CCTUF submitted complaints to the Siem Reap Provincial Labour Department seeking reinstatement of the trade union leaders and members at the Angkor Golf Resort, but the Labour Department failed to respond to the union and there had been no resolution to the issues.

311. *Submission of the cases to the Arbitration Council.* In its previous examination of the case, the Committee had considered the inadequacy of the authorities' response – in particular their failure to submit the complainant's cases to the Arbitration Council – to have been especially detrimental to the complainant's ability to secure an effective remedy for the alleged violations. Accordingly, the Committee welcomes the information provided by the Government that the Department of Labour Dispute and Siem Reap Provincial Department of Labour and Vocational Training has forwarded both the case regarding the dispute involving the APSARA authority and the JASA organization, as well as the case concerning the Angkor Golf Resort, to the Arbitration Council, respectively on 22 December 2009 and 11 January 2010. The Committee requests the Government to keep it informed of any development in this regard and to supply a copy of the decisions of the Arbitration Council once adopted. The Committee expects that a decision will be taken without delay, through an impartial and independent procedure, and that if the proceeding demonstrates the anti-union character of the dismissals, that the dismissed union leaders and activists will be immediately reinstated without loss of pay or benefits. If, while noting the anti-union nature of the dismissals, the Arbitration Council considers that the reinstatement of the dismissed trade union leaders and activists is not possible for objective and compelling reasons, the Committee urges the Government to take the necessary measures to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. Moreover, the Committee recalls that acts calculated to make the employment of a worker subject to the condition that he or she not join a union or shall relinquish their trade union membership constitutes a violation of Article 1 of Convention No. 98, and urges the Government to ensure that any infringement found in this respect will be sufficiently and appropriately sanctioned.

312. *Legislative framework.* During its previous examination of the case, the Committee had observed that the present case depicts an insufficiency of laws and procedures to protect workers against acts of anti-union discrimination and that, as with other complaints against the Government, the present allegations were similar to earlier allegations in their depiction of an industrial relations climate characterized by acts of anti-union discrimination, often culminating in dismissals, and an apparent lack of effectiveness of the sanctions provided for in the law to protect workers against such acts [see Case No. 2468, 344th Report, para. 436]. The Committee had further recalled that, in another

complaint against the Government, it had noted with deep concern the lack of an independent and effective judiciary and had consequently urged the Government to take the necessary steps to ensure the independence and effectiveness of the judicial system, including through capacity-building measures and the institution of safeguards against corruption [see Case No. 2318, 351st Report, para. 250].

313. Finally, the Committee notes with regret the considerable length of time that has elapsed since the dismissals of the workers concerned – respectively, in February 2005 (as to the dispute involving the JSA/JASA), December 2006 (as regards the dispute involving the APSARA) and April 2007 (as to the Angkor Golf Resort). The Committee once again recalls that the Government is responsible for preventing all acts of anti-union discrimination and ensuring that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. Furthermore, legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 817 and 822]. In this context, the Committee once again urges the Government, as it has in previous cases, to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this regard.
314. Trade union elections. The Committee further recalls that it had requested the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the JASA union may hold its elections, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind. The Committee notes with regret that the Government does not provide any information on this point in its communication. It therefore once again requests the Government to guarantee the right of the JASA union to elect its representatives in full freedom and without fear of reprisals of any kind, and to indicate the steps taken in this regard and to inform it as to when the elections of the JASA union officers were held.
315. Collective bargaining. In its previous examination of the case the Committee had noted that, according to the complainant, the dismissals at the APSARA and the Angkor Golf Resort were precipitated by demands to engage in collective negotiations from the unions concerned – which were both certified as most representative by MOSALVY. In this respect, the Committee once again 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 934–935]. Noting furthermore that Prakas No. 305 of 22 November 2001, lays down the obligation of the employer to negotiate with the union possessing most representative status, the Committee once again requests the Government – in the absence of any information provided on this issue in its communication – to take the necessary measures to ensure that both the APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions, and to keep it informed in this regard.

The Committee's recommendations

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

- (a) *Noting the information provided by the Government that it has forwarded the case regarding the dispute involving the APSARA authority and the JASA organization, as well as the case concerning the Angkor Golf Resort, to the Arbitration Council, respectively on 22 December 2009 and 11 January 2010, the Committee requests the Government to keep it informed of any development in this regard and to supply a copy of the decisions of the Arbitration Council once adopted. The Committee expects that a decision will be taken without delay, through an impartial and independent procedure, and that if the proceeding demonstrates the anti-union character of the dismissals, that the dismissed union leaders and activists will be immediately reinstated without loss of pay or benefits. If, while noting the anti-union nature of the dismissals, the Arbitration Council considers that the reinstatement of the dismissed trade union leaders and activists is not possible for objective and compelling reasons, the Committee urges the Government to take the necessary measures to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals.*
- (b) *The Committee recalls that acts calculated to make the employment of a worker subject to the condition that he or she not join a union or shall relinquish their trade union membership constitutes a violation of Article 1 of Convention No. 98, and urges the Government to ensure that any infringement found in this respect will be sufficiently and appropriately sanctioned.*
- (c) *As to the elections in the JASA union, the Committee once again requests the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the union may elect its representatives in full freedom, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind, and to indicate the steps taken in this regard and to inform it as to when the elections of the JASA union officers were held.*
- (d) *Furthermore, the Committee once again requests the Government to take the necessary measures to ensure that both the APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions, and to keep it informed in this regard.*
- (e) *Finally, the Committee once again urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this respect.*

- (f) *The Committee draws the Governing Body's attention to the serious and urgent nature of this case.*

CASE NO. 2783

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

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

***Allegations: The complainant organization
alleges that, following inconclusive negotiations,
the management of Naga World Co. Ltd
dismissed 14 trade union leaders and activists
and forced them to sign a severance agreement***

317. The complaint is contained in a communication dated 28 May 2010 from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) on behalf of its affiliated organization, the Cambodian Tourism and Service Workers Federation (CTSWF).
318. The Government supplied its observations in a communication dated 23 July 2010.
319. Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

320. In its communication dated 28 May 2010, the complainant indicates that the disputed dismissals of 14 union leaders and activists arose in the context of a labour dispute between the management of the Naga World Co. Ltd and the CTSWF, following the submission by the union representatives at Naga World (Support Labour Rights of Khmer workers of Naga Resort Union) of a letter to the management requesting negotiations for the 2009 annual salary increment, on the basis of the demands of the union members.
321. As to the chronology of the case, the complainant reports that the union at Naga World was formed in 2000 and is registered with the Cambodian Labour Ministry. In September 2007, the union sent an initial request to the management to negotiate a wage increment and resolve other issues. A series of negotiation meetings were conducted, but no agreement was reached on any of the issues raised by the workers.
322. In October 2008, the union formally requested negotiations for salary increments for 2009 and a number of outstanding issues such as the payment of bonus and wage equality. The last negotiation was held on 17 February 2009, with no satisfactory conclusion or agreement. On 24 February 2009, union leaders conducted a meeting with union members, in which they rejected the position of the company. The union representatives immediately informed the management of this position.

323. The complainant further indicates that on 26 February 2009, 14 union leaders and activists were summarily dismissed from their employment, having been forced to sign severance agreements under duress and since this time, they have been prohibited from entering the premises, which prevented them from fulfilling their duties as union leaders.
324. On 7 March 2009, the union submitted a complaint to the Ministry of Labour regarding the case and the outstanding bargaining issues.
325. From 19 March 2009 until 16 February 2010, the case was heard several times before the Arbitration Council and on a number of occasions, the employer failed to attend these hearings. On 16 February 2010, the Arbitration Council ordered the reinstatement of four union leaders (the remaining ten leaders and activists having withdrawn from the case): Mr Sok Narith, Mr Loek Phin, Ms Sophann Dara and Ms Pech Sovatthey. The Arbitration Council also ordered that the severance agreements be considered null and void and ordered the company to grant the union leaders access to the company in order for them to carry out union duties.
326. The complainant adds that on 23 February 2010, the employer rejected the decision of the Arbitration Council, refusing to reinstate the four union leaders. It requests the ILO to call on the Government to enforce compliance with the Arbitration Council award and to enforce dissuasive sanctions against acts of anti-union discrimination.

B. The Government's reply

327. In its communication dated 23 July 2010, the Government indicates that on 11 March 2009, the Department of Labour Dispute of the Ministry of Labour and Vocational Training received a complaint No. 27/09 dated 4 March 2009 from the CTSWF about the dismissal of 14 union leaders by the manager of Naga World. The Ministry assigned the conciliators to settle this case in accordance with the legal procedures, but no solution could be reached because the employer refused to reinstate the 14 employees for the reason that they had already accepted the payment of their indemnity for dismissal and other benefits for the employment termination in accordance with article 89, section 3 and Chapter 4 of the Labour Law.
328. On 26 March 2009, the Ministry submitted this case to the Arbitration Council. After the hearing, the Arbitration Council issued the award No. 47/09 dated 7 May 2009 ordering not to consider the request for reinstatement of the 14 union leaders and activists for the reason that the demand was made without any legal procedures.
329. On 18 December 2009, the Ministry of Labour and Vocational Training received the complaint No. 77/09 dated 15 December 2009 from the CTSWF concerning once again the request for the reinstatement of the four union leaders: Mr Sok Narith, Mr Loek Phin, Ms Sophann Dara and Ms Pech Sovatthey. The Ministry ordered the Department of Labour Dispute to seek a solution to this complaint, but the conciliation could not be reached because the employer side was absent without any reason. The Ministry's conciliator therefore decided to send the case to the Arbitration Council for further settlement.
330. On 16 February 2010, the Arbitration Council issued the award No. 10/10 ordering the company to reinstate the four union leaders as soon as the award comes into effect and provide them with full back pay, benefits and seniority since the date of dismissal. However the employer side has filed a complaint against the decision of the Arbitration Council on 23 February 2010 and the award could therefore not be enforced.

C. The Committee's conclusions

331. *The Committee notes that the allegations concern the dismissals of union leaders and activists employed in the Naga World Co. Ltd. in the framework of inconclusive negotiations between the management and the CTSWF, following the submission by the union representatives of a letter to the management requesting negotiations for the 2009 annual salary increment.*
332. *According to the complainant organization, 14 union leaders and activists employed in the company were summarily dismissed from their employment on 26 February 2009, after having been forced to sign severance agreements under duress. Since this time, they have been prohibited from entering the premises, which prevented them from fulfilling their duties as union leaders. While noting that the Government does not refer to the severance agreements in its communication, the Committee notes the Government's indication that the Ministry assigned the conciliators to settle this case in accordance with the legal procedures, but that no solution could be reached because the employer refused to reinstate the 14 employees for the reason that they had already accepted the payment of their indemnity for dismissal and other benefits for employment termination in accordance with article 89, section 3 and Chapter 4 of the Labour Law. The Ministry submitted the case to the Arbitration Council on 26 March 2009.*
333. *The Committee further notes the complainant's indication that ten union leaders withdrew from the case. As to the remaining four dismissed union leaders, Mr Sok Narith, Mr Loek Phin, Ms Sophann Dara and Ms Pech Sovatthey, the Committee observes that both the complainant organization and the Government indicate that, after unsuccessful negotiations between the concerned trade union and employer, the dispute was submitted to the Arbitration Council. In this regard the Committee notes with regret the Government's indication that the employer side, without having provided any reasons, failed to attend the conciliation meetings organized by the Department of Labour Dispute before the submission of the case to the Arbitration Council.*
334. *The Committee understands that the Arbitration Council issued two main decisions in this case, namely the Arbitral Award No.47/09 dated 7 May 2009 and the Arbitral Award No. 10/10 dated 16 February 2010. The Committee notes that the initial claim for reinstatement that forms the basis of the Arbitral Award No.47/09 was introduced by 14 dismissed union leaders, workers delegates and union activists. However the Arbitration Council, while concluding that the elements available to it demonstrated that the agreement could have been made under psychological duress placed upon the workers, declined to consider the merits of the demand for reinstatement on the basis that there still existed a legal separation agreement between the parties, which would have to be nullified before any further consideration could be given to the matter. The Arbitration Council recalled that the victimized party was entitled by law to request nullification of the contract should it so desire. Subsequently, in 2010, four of these dismissed union leaders and activists (Ms Pech Sovatthey, Mr Sok Narith, Mr Loek Phin and Ms Sophann Dara) once again called upon the Arbitration Council to request that they be reinstated and that the termination agreements which they had signed under duress be nullified. In its Arbitral Award No. 10/10, the Arbitration Council decided to nullify the agreements for the termination packages dated 27 February 2009 and 2 March 2009, recalling that any agreement made by force shall be voided:*

Based on the findings of fact, the worker party states that the signing to accept the agreement for indemnity for dismissal from the employer was made by forcing. The worker party claims that the company withdrew their entry card and directed the security guards to escort the workers to meet the Human Resources Manager; the worker party also states that the employer forced and put financial pressure on workers by not paying their wage in February to them unless they agreed to take the indemnity for dismissal; the workers had no

other choice but to accept the indemnity for dismissal to survive. Based on the above interpretation, the Arbitration Council considers that the workers have no willing to sign the agreement to accept the indemnity for dismissal. Therefore, the Arbitration Council considers that the agreement for the indemnity for dismissal shall be voided.

335. In the same decision, the Arbitration Council ordered the reinstatement of the abovementioned four union leaders with full back pay from the day of the dismissal. The Arbitration Council's finding on the basis of which it ordered the reinstatement of Ms Pech Sovatthey (Secretary-General of the Union) and of Mr Sok Narith (CTSWF Vice-President and worker delegate) was that their dismissals did not take place in accordance with the Labour Law and the jurisprudence of the Arbitration Council, since the employer did not ask for permission from the Labour Inspector. As to the dismissals of Mr Loek Phin and Ms Sophann Dara, the Arbitration Council concluded that the company dismissed them "because they both joined union activity for the workers' benefit". Accordingly, it decided that their dismissal was not lawful and ordered their reinstatement.
336. Furthermore, considering that the employer's failure to attend the hearing constituted a failure to respond to the accusation, the Arbitral Award No. 10/10 ordered the employer to cooperate and enable the union to set up its meeting place as it was prior to the dismissals and allow the union leaders access to the enterprise for fulfilling their responsibilities. The Committee notes however the Government's indication that on 23 February 2010, the employer filed a complaint against the decision of the Arbitration Council of 16 February 2010, with the consequence that the award could not be enforced.
337. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures, and that 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. It further recalls that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 799 and 804].
338. In these circumstances, the Committee requests the Government to keep it informed of the appeal lodged by the employer against the decision of the Arbitration Council dated 16 February 2010, which ordered the reinstatement of the four union leaders, Mr Sok Narith, Mr Loek Phin, Ms Sophann Dara and Ms Pech Sovatthey, and to supply a copy of the decision once adopted, which it expects will also address the issue of the severance agreements found to be signed under duress. In the meantime, and given the impact of these dismissals not only on the union leaders but also on the representation of the workers at the enterprise, the Committee urges the Government to take the necessary measures to seek their reinstatement without delay and to ensure that the union leaders are immediately authorized to carry out their trade union activities in the company (outside of working hours, as was previously the case, noted in the award), pending the conclusion of the appeals procedure.
339. In this respect, the Committee recalls that in previous similar cases, it had highlighted that the Government is responsible for preventing all acts of anti-union discrimination and ensuring that complaints against acts of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. The Committee had urged the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the

provision of sufficiently dissuasive sanctions and rapid, final and binding determinations and had invited the Government to avail itself of the technical assistance of the Office in this respect (see Case No. 2655, 355th Report, para. 353; Case No. 2262, 342nd Report, para. 233; and Case No. 2468, 344th Report, para. 436).

- 340.** *In this context, the Committee underlines that the dismissals took place in February 2009 and that no information has been provided (nor has been set out in the awards) that would demonstrate that the termination of employment of these union leaders was due to any reason other than their union activity. Accordingly the Committee once again urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination and anti-union dismissals, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to avail itself of the technical assistance of the Office in this respect.*

The Committee's recommendations

- 341.** *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 appeal lodged by the employer against the decision of the Arbitration Council dated 16 February 2010, which ordered the reinstatement of the four union leaders concerned and to supply a copy of the decision once adopted, which it expects will also address the issue of the severance agreements found to be signed under duress. In the meantime, and given the impact of these dismissals not only on the union leaders but also on the representation of the workers at the enterprise, the Committee urges the Government to take the necessary measures to seek their reinstatement without delay and to ensure that the union leaders are immediately authorized to carry out their trade union activities in the company (outside of working hours, as was previously the case, noted in the award), pending the conclusion of the appeals procedure.*
- (b) The Committee urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination and anti-union dismissals, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations; the Committee recalls that one way of doing this could be to provide that trade union officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct. The Committee invites the Government to avail itself of the technical assistance of the Office in this respect.*

CASE NO. 2602

INTERIM REPORT

Complaints against the Government of the Republic of Korea presented by

- **the Korean Metalworkers’ Federations (KMWF)**
- **the Korean Confederation of Trade Unions (KCTU) and**
- **the International Metalworkers’ Federation (IMF)**

Allegations: The complainants allege that “illegal dispatch” workers, i.e. precarious workers in disguised employment relationships, in Hyundai Motors’ Corporation (HMC) Ulsan, Asan and Jeonju plants, Hynix/Magnachip, Kiryung Electronics and KM&I, are effectively denied legal protection under the Trade Union and Labour Relations Adjustment Act (TULRAA) and are left unprotected vis-à-vis: (1) recurring acts of anti-union discrimination, notably dismissals, aimed at thwarting their efforts to establish a union; (2) the consistent refusal of the employer to bargain as a result of which none of the unions representing those workers have succeeded in negotiating a collective bargaining agreement; (3) dismissals, imprisonment and compensation suits claiming exorbitant sums, for “obstruction of business” in case of industrial action; (4) physical assaults, court injunctions and imprisonment for “obstruction of business” aimed at preventing dismissed trade union leaders from re-entering the premises of the company to stage rallies or exercise representation functions

342. The Committee last examined this case at its November 2009 meeting and on that occasion presented an interim report to the Governing Body [see 355th Report, paras 621–678, approved by the Governing Body at its 306th Session].
343. The Government sent its observations in a communication dated 7 October 2010 and 8 February 2011.
344. The Republic of Korea has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

345. At its previous examination of the case in November 2009, the Committee made the following recommendations [see 355th Report, para. 678]:

- (a) The Committee requests the Government to hold an independent investigation into allegations of pressure placed on subcontracted workers at Kiryung Electronics to make them resign from their union, as they appear regrettably not to have been taken into consideration by the Court, and, if the allegations are confirmed, to take all necessary measures to compensate the trade union members concerned and to prevent any recurrence of such acts of anti-union discrimination in future.
- (b) As regards the allegations of acts of anti-union discrimination and interference at Hynix/Magnachip and at HMC, the Committee once again requests the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests to be kept informed in this respect.
- (c) The Committee urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers in the metal sector, in particular in the Hyundai Motor Company (HMC), Kiryung Electronics, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that subcontracted workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.
- (d) The Committee requests the Government to institute an independent investigation without delay into the dismissals of the subcontracted workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed solely on the grounds that they staged industrial action against a “third party, i.e. the principal employer (subcontracting company), to ensure that they are reinstated in their posts without loss of pay as a primary remedy. If the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of developments in this regard.
- (e) Noting further with deep concern that the Government confines itself to stating that the question was already dealt with in Case No. 1865, without indicating any progress made or any specific measures taken to give effect to the recommendations made by the Committee since 2000, the Committee reiterates its recommendation that the Government should take all necessary measures without delay so as to bring section 314 of the Penal Code (“obstruction of business”) into line with freedom of association principles, and to keep it informed in this regard. While emphasizing the importance of legitimate trade union activity being carried out peacefully, the Committee reiterated that the criminalization of industrial relations is in no way conducive to harmonious and peaceful industrial relations.
- (f) The Committee requests the Government to indicate whether any of the settlement proceedings it refers to resulted in members’ withdrawals from the union. Moreover, the Committee expects that the Government and the judicial authorities will put in place adequate safeguards so as to avert in future the possible risks of abuse of judicial procedure on grounds of “obstruction of business” with the aim of intimidating workers and trade unionists, and that the courts in their rulings will take due account of the need to build a constructive industrial relations climate in the sector in the context of individual industrial relations.
- (g) The Committee once again requests the Government to institute an independent investigation into the alleged acts of violence perpetrated by private security guards

against trade unionists during rallies at HMC Asan and Ulsan and at Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered. The Committee requests to be kept informed in this respect.

- (h) The Committee notes with concern the new allegations concerning restrictions on the exercise of trade union rights based on an interpretation of the legislation, which concern a sector with regard to which the Committee has already expressed its concern regarding the denial of certain trade union rights through the use of precarious workers. The Committee requests the Government to provide its observations to the new allegations by the IMF and the KCTU so that it may examine this matter in full knowledge of the facts.
- (i) In the absence of any progress, the Committee again requests the Government to develop appropriate mechanisms, in consultation with the social partners concerned, aimed at strengthening the protection of subcontracted (“dispatch”) workers’ rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. Such mechanisms should include an agreed process for dialogue determined in advance.
- (j) The Committee recommends that the Government has recourse to ILO technical assistance.
- (k) The Committee draws the Governing Body’s attention to the serious and urgent nature of the present case.

B. The Government’s reply

346. In its communication dated 7 October 2010, the Government explains that while owner-drivers of cargo trucks, dump trucks and ready-mixed concrete trucks (hereinafter, the “owner-drivers”) can establish and join organizations representing their interests and make demands through such organizations to the Government or relevant business organizations, they are not allowed to organize or join a trade union because owner-drivers are not employees. In January and March 2009, the Government gave the Korean Construction Workers Union (KCWU) and the Korean Transport Workers Union (KTWU) the opportunity to voluntarily redress the violation. The Government indicates that while it has not yet de-registered these organizations, their persistent disregard for the Governments recommendations could lead to the cancellation of their trade union registration, which will end up hurting a large number of other union members who are employees. The Government therefore recommends that the unions take the necessary actions as soon as possible so that the members who are employees are guaranteed the right to engage in union activities, and that the owner-drivers, who are not employees, withdraw from the unions and establish an interest group of their own.

347. The Government refutes the complainant argument that owner-drivers are de facto employees and states that having comprehensively considered whether there was an employee–employer relationship, the courts have considered the question whether owner-drivers had the status of employees. According to the Government, in its 11 May 2006 ruling, the Supreme Court analysed an employee–employer relationship on the grounds of the following considerations: (1) whether the persons were under the supervision or direction of their alleged employer; (2) whether they received remuneration as a reward for their services; and (3) the nature and contents of the services provided, regardless of the types of contracts they might have had (which could be anything from employment contracts to outsourcing, entrustment or atypical contract). The Government further explains that in the case of ready-mixed concrete truck owner-drivers, the courts have consistently denied them the status of employees, and have not recognized their organization as a trade union established under the Trade Union and Labour Relations Adjustment Act (TULRAA). According to the Supreme Court decision of 13 October

2006, truck owner-drivers are not considered as employees who have an employee–employer relationship with the ready-mixed concrete manufacturing and selling companies. They provide services and live on wages paid for such services. The owner-drivers, under a transport contract with a concrete manufacturing and selling company, are required to comply with transport-related instructions from that company given the nature of their contract, and thus: their work cannot be considered to have been determined unilaterally by the company; they are free to decide when and whether to return to the company; they can hire a third party to provide transport services on behalf of them; they have ownership of their trucks and manage them on their own; they are not subject to the company’s employment rules, code of conduct and personnel regulations; receive no basic or fixed pay; and each of them is registered as an independent business, and pays business income tax and value added tax. In its decision of 6 October 2000, the Supreme Court also ruled that cargo truck and dump truck owner-drivers are not considered employees under the TULRAA as they had no employee–employer relationship with their company given that they had ownership of their trucks, worked without the specific direction or supervision of the company, and bore all the costs incurred during their work. According to this Supreme Court decision, if an owner-driver is registered as an independent business under his/her name, pays business income tax, has hired a driver to operate the vehicle, does not take specific instructions concerning product transport and receives transport charges from the company on the basis of the number of actual shipments, then he/she is not considered as an employee who is under the direction and supervision of the company or works for the purpose of earning wages under an employee–employer relationship with the company.

- 348.** With regard to the complainants’ statement that the Ministry of Employment and Labour did not recognize the KCWU and KTWU as trade unions despite the fact that both unions had received union establishment certificates from the Ministry when reporting their establishment, and were legitimately engaged in union activities, the Government explains that when it received the union establishment report from the KCWU and KTWU, it did not check whether the owner-drivers were members of the trade unions due to the short processing time (three days) and issued the union establishment certificates. Later the Government discovered that those who were not employees had joined the unions and were engaged in union activities and instructed both unions not to allow those people in as members.
- 349.** In respect of the above points, the Government forwards observations of the Korea Employers Federation, which, referring to Article 8(1) of ILO Convention No. 87, states that self-employed workers, i.e. people doing business under a contract with other businesses, such as owners of truck, concrete mixer trucks or dump trucks, cannot be considered as workers under Korean labour law. Even if Convention No. 87 did apply, an organization, the majority of members of which are self-employed workers, cannot be considered as a “trade union” under the national legislation. Therefore, the two orders made by the Government in respect of the KCWU and KTWU were made in accordance with the legislation in force.
- 350.** With regard to the complainants’ argument that the KCWU and KTWU have conducted collective bargaining with their employers several times over the past ten years and that, in some cases, they signed an agreement after negotiations mediated by public officials from local labour offices, the Government explains that because it is the mediation committee of the Labour Relations Commission that is responsible for mediating a labour dispute, the organization which the complainants say conducted mediation is probably the Regional Labour Relations Commission, not local labour offices. There are a few cases where the Regional Labour Relations Commissions conducted mediations at the request of the Korean Construction Transport Workers Union (KCTWU), the forerunner of the KCWU, but on 8 September 2006, the Supreme Court ruled that it did not recognize the KCTWU

as a trade union established under the TULRAA. The Government further indicates that the Korea Cargo Transport Workers Federation, affiliated with the KTWU and composed of cargo truck owner-drivers, has not signed a collective agreement. Moreover, although the construction machinery section of the KCWU, of which ready-mixed concrete truck and dump truck owner-drivers are members, has made a contract with their companies in the form of an agreement or arrangement, such contract cannot be viewed as a collective agreement under the TULRAA.

351. With regard to the complainants' argument that, on its own, the Ministry has no authority to issue correction orders or dissolve an established trade union, but that rather any such decision should be made after a deliberation by the Labour Relations Commission, the Government indicates that even a legitimately established trade union is subject to legal action under the TULRAA when a reason for disqualification arises after its establishment. The competent administrative authorities may recommend to the trade union to voluntarily eliminate the irregularities which would otherwise constitute grounds for withdrawal of trade union recognition, and if the trade union fails to comply, the authorities could notify the organization in question that it is no longer recognized as a trade union established under the TULRAA. The Government further refers to section 2(4) of the TULRAA, which stipulates that an organization shall not be regarded as a trade union if those who are not employees are allowed to join it. According to section 12(3) of the Act, in such cases, the administrative authorities shall return a "union establishment report". Pursuant to section 9(2) of the Enforcement Decree of the TULRAA, "where, after a trade union is delivered with a union establishment certificate, there arise reasons for returning the written report of establishment ..., the administrative authorities shall demand correction within the specified period of 30 days, and if the correction is not performed within this period, they shall notify the trade union in question that it shall not be regarded as a trade union as provided for under this Act". The Government stresses that the TULRAA does not require this process to be approved by the Labour Relations Commission, as the Act stipulates that the administrative authorities shall directly notify the trade union concerned that it is not considered as a trade union established under the TULRAA.
352. The Government further refers to the 2007 recommendations made by the National Human Rights Commission that those engaged in special types of work should be granted the right to organize, the right to collective bargaining and the right to collective action. In this respect, the Government points out that labour law experts have different opinions on the issue of whether those engaged in special types of work should be uniformly granted these rights. The Government considers, in particular, that due to the nature of the work performed in terms of the form and method of services provided, the degree of dependency from the company, status in the market, and the characteristics of the industries concerned, a different approach to protection of the rights of those who are engaged in these special types of work would help to expand their rights and protect their interests. When it is not determined that those engaged in special types of work are "employees" under the TULRAA, it is not desirable to grant them the right to organize, the right to collective bargaining and the right to collective action as recommended by the National Human Rights Commission.
353. The Government also indicates that the Bill proposed in June 2007 to protect those engaged in special types of work was not sufficiently discussed and was scrapped upon expiration of the term of the 17th National Assembly in May 2008. Furthermore, due to the conflicting interests, no agreement has been reached on the issue of protecting those engaged in special types of work by the labour law. Thus, at the present time, it would be desirable to implement protective measures under individual and economic laws to address the difficulties experienced by those engaged in the special types of work and to carefully consider whether and when to introduce a labour legislation and its contents after hearing opinions from the parties concerned and experts as to the outcomes and limitations of those

measures. As part of such individual protection measures, the Government established the Government-wide “Protection plans for those engaged in special types of work” in November 2006. Under these Plans, the Government has implemented the “Guidelines for the examination of abuses of position in making contracts with those engaged in special types of work” in relation to four occupational categories, including ready-mixed concrete truck owner-drivers and golf caddies. Other measures taken include provision of vocational training for self-employed small businesses engaged in six occupational categories, including ready-mixed concrete truck, dump truck or cargo truck owner-drivers.

- 354.** With regard to the Recommendations made in June 2008 and November 2009 by the Committee, the Government informs of the following developments. Regarding the dismissal of trade union members at the HMC Ulsan Plant in 2005, the Government indicates that the Supreme Court ruled on 22 July 2010 that the two workers of its in-company subcontractors were illegally dispatched to the HMC. Contrary to the High Court’s decision not acknowledging the subcontracted workers as dispatched workers and denying that HMC was their employer, the Supreme Court ruled that the subcontracting constituted illegal dispatch because the workers of the contracting and the subcontracted companies had worked in the same assembly lines and the contracting company had managed job assignments and working methods, and supervised the working attitude of the subcontracted workers. The Supreme Court sent the case back to the High Court for a retrial as a case involving an unfair dismissal of workers directly employed by HMC.
- 355.** This court decision caused the Government to conduct an intensive inspection from 6 September to 8 October 2010 to find out the current state of in-company subcontracting in 29 workplaces, including the HMC, in the automobile, electronics, steel, shipbuilding and IT industries which use many in-company subcontractors. The inspection will focus on whether in-company subcontracting takes the form of worker dispatch, the number of workers who are deemed to be employed or must be directly employed in the case of illegal dispatch, and whether there are any other violations of labour laws. If a violation is found as a result of the inspection, it will be dealt with in accordance with the legislation, and the employer concerned will be recommended and guided to directly employ the subcontracted workers in order to stabilize the employment of such workers.
- 356.** Regarding the unfair dismissal of three workers by the HMC Asan Plant, the Government informs that the Supreme Court handed down its decision on 25 June 2009. The Supreme Court considered that the workers’ industrial action was legitimate because it had followed the procedures under the TULRAA. The Court ruled that the act of dismissing these workers for their illegal strike constituted unfair dismissal, overturning the High Court’s decision and sending the case back to the High Court.
- 357.** Regarding compensation claims against workers by Kiryung Electronics, the Government indicates that none of the settlements resulted in members’ withdrawals from the union and provides the following details. By 9 May 2008, when the High Court recommended the parties concerned to settle their disputes through conciliation in the two compensation claims (one against 16 union members, including Kim So-yeon, and the other against 14 union members, including Kang Sun-yeol), Kiryung Electronics had already moved production lines to China. The company dropped its suits against subcontracted workers who had submitted their resignations and left the company, and gave them compensation according to its company rules. The company also paid compensation and early retirement allowances to its own workers and workers of its subcontractors when it shut down its domestic production lines. After the High Court recommended the compensation claims to be settled through conciliation, the cases were concluded with both parties agreeing to pay their respective legal costs and with the company promising not to claim compensation. Furthermore, the claim against Jeon Jae-hwan of the Federation of Korean Metal Industry

Trade Union (FKMITU) was, in effect, a case filed by Kiryung Electronics against the FKMITU and not related to whether each member of the KMWF had withdrawn from the union. The representative of the defendant Jeon Jae-hwan, the then president of the FKMITU, is now serving as head of the Incheon Regional Headquarters of the KCTU.

358. In a communication dated 8 February 2011, the Government informs that the Korean Metal Workers' Union (KMWF) and management of Kiryung Electronics agreed to settle their dispute and reached a job security agreement which was signed at the National Assembly on 1 November 2010. The company agreed to hire the ten remaining union members on strike and the union promised to end their sit in.

C. The Committee's conclusions

359. *The Committee recalls that the allegations pending in this case, lodged over three years ago, concern the situation of "illegal dispatch" workers in the metalworking sector, in particular in the HMC plants in Ulsan, Asan and Jeonju, at Hynix/Magnachip, Kiryung Electronics and at KM&I, who in practice have no legal protection under the terms of the TULRAA and, in particular, are left unprotected as regards: (1) recurrent acts of anti-union discrimination, including dismissals, which are intended to thwart their attempts to form a union; (2) the employer's refusal to negotiate, with the result that none of the representative unions has succeeded in negotiating a collective agreement; (3) cases of dismissal, imprisonment, and demands for compensation involving exorbitant sums for "obstruction of business" in strikes; and (4) physical assault, court injunctions and imprisonment of workers for "obstruction of business", all with the aim of preventing dismissed union officials from returning to company premises to organize meetings or carry on their representative functions.*
360. *The Committee recalls from the previous examination of the case that "illegal dispatch" (a term used by both the complainants and the Government) is a form of false subcontracting which functions to disguise what is in reality an employment relationship. In this respect, the Committee notes the 22 July 2010 decision of the Supreme Court concerning the dismissal of a worker from the HMC Ulsan factory for allegedly union-related activities while working for an in-house subcontractor. In its decision, the Court held that the worker concerned was not a subcontracted worker but an "illegal dispatch" worker who must be regarded as a directly employed worker the day after he worked more than two consecutive years at the plant. The Committee notes that the Supreme Court has sent the case back to the lower court for a retrial. The Committee requests the Government to provide it with a copy of the Supreme Court's ruling and to keep it informed of the outcome of the retrial of this case by the lower court. The Committee notes with interest the Government's indication that this decision prompted the Government to conduct an inspection to assess the current state of in-company subcontracting at 29 workplaces including HMC, in the automobile, electronics, steel, shipbuilding and IT industries. Recalling that it had also previously examined the difficulties faced by precarious workers in disguised employment relationships in the construction industry (see Case No. 1865), the Committee expects that the Government will take all necessary measures to ensure the necessary protection against such abuses and requests it to provide information on the outcome of the inspection and on any further impact this decision has on the situation of workers in a disguised employment relationship.*
361. *The Committee notes the Government's indication that on 25 June 2009, the Supreme Court handed down its decision in the case of dismissal of three workers by HMC Asan Plant, and, in particular, that the Court considered that the said workers' industrial action was legitimate because it had followed the procedures under TULRAA and that their dismissal was an unfair dismissal thereby overturning the High Court's decision, and*

remanding the case back to it. The Committee requests the Government to keep it informed of the High Court decision.

362. In the light of the information provided by the Government in respect of dismissal cases at HMC Ulsan factory and Asan Plant, the Committee once again urges the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination.
363. The Committee recalls that in its previous examination of the case, it took note of a communication dated 17 June 2009 from the KCTU, in which the KCTU referred to the Government's failure to take steps to implement the Committee's recommendations and submitted new allegations concerning instances of anti-union measures against a number of categories of heavy goods vehicle drivers who, according to the Government, cannot be regarded as employed workers covered by the terms of the TULRAA owing to their "self-employed" status. The KCTU alleged that, since the beginning of 2009, the Government had issued a number of notices calling on the unions voluntarily to exclude all these categories of worker or face deregistration, on the grounds that they were not entitled to form unions.
364. The Committee notes that the Government refers to section 2(4) of the TULRAA, according to which, an organization shall not be regarded as a trade union if those who are not employees are allowed to join it. The Government further refers to several Supreme Court decisions in which the latter consistently denied owner-drivers the status of employees, considering them to be self-employed. According to the Government, on this basis and pursuant to section 12(3) of the TULRAA and section 9(2) of the Enforcement Decree of the TULRAA, the administrative authorities have a right to cancel a trade union certificate. The Government adds that while self-employed persons can establish their own organizations representing their interests, through which they can address their demands with the Government and business organizations, such organizations cannot be considered as trade unions. The Committee notes that the Korean Employers' Federation concurs with the Government. At the same time, the Government indicates that when it is not determined that those engaged in special types of work are "employees" under the TULRAA, it is not desirable to grant them the right to organize, the right to collective bargaining and the right to collective action as recommended by the National Human Rights Commission in 2007. It further indicates that the idea of a labour legislation aimed at protecting those engaged in special types of work was not pursued as no agreement could be reached. The Government considers, in particular, that due to the nature of the work performed in terms of the form and method of services provided, the degree of dependency from the company, status in the market, and the characteristics of the industries concerned, a different approach to protection of the rights of those who are engaged in these special types of work would help to expand their rights and protect their interests, better achieved through individual and economic laws. In this regard, the Committee requests the Government to develop, in consultation with the social partners concerned, specific collective bargaining mechanisms relevant to the particularities of self-employed workers.
365. The Committee recalls that by virtue of the principles of freedom of association, all workers, with the sole exception of members of the armed forces and the police should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent in the case of self-employed workers [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 254]. The Committee requests the Government to

*take the necessary measures to ensure that all workers, including “self-employed” workers, such as heavy goods vehicle drivers, can fully enjoy freedom of association rights with the organizations of their own choosing for the furtherance and defence of their interest and that such organizations have the right to join federations and confederations of their own choosing, subject to the rules of the organizations concerned and without any previous authorization. The Committee recalls that it is for the federations and confederations themselves to decide whether or not to accept the affiliation of a trade union, in accordance with their own constitutions and rules [see **Digest** op. cit., para. 722]. It requests the Government to keep it informed of the measures taken or envisaged in this respect.*

- 366.** *With regard to the power granted to administrative authorities by virtue of section 12(3) of the TULRAA and section 9(2) of its Enforcement Decree to cancel trade union organization’s registration, the Committee requests the Government to indicate whether national legislation provides for the right of appeal in the case of dissolution of a trade union by the administrative authority. The Committee recalls in this respect that such a measure should only be possible through judicial channels and that any legislation which accords the administrative authorities a right to cancel the registration of a trade union, without any right of appeal to the courts, is contrary to the principles of freedom of association [see **Digest**, op. cit., paras 687 and 689]. An appeal should lie to the courts against any administration decision concerning the registration of a trade union. Such a right of appeal constitutes a necessary safeguard against unlawful or ill-founded decisions by the authorities responsible for registration. A decision to prohibit the registration of a trade union which has received legal recognition should not become effective until the statutory period of lodging an appeal against this decision has expired without an appeal having been lodged, or until it has been confirmed by the courts following an appeal [see **Digest**, op. cit., paras 300–301]. If such a procedure is not provided for, the Committee requests the Government to take the necessary measures, in consultations with the social partners, to amend the provisions of the TULRAA and its Enforcement Decree, taking into account the principles above and to ensure that an administrative decision does not take effect until a final decision is handed down. It requests the Government to keep it informed in this respect.*
- 367.** *The Committee notes that the Government confirms that the KCWU and KTWU will be de-registered if they do not comply with the recommendation to exclude owner-drivers from their membership. In the light of the above, and particularly in view of the fact that under the existing legislation, self-employed workers do not enjoy trade union and collective bargaining rights, the Committee requests the Government to hold consultations with the parties involved with the aim of finding a mutually acceptable solution so as to ensure that, on the one hand, workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining and, on the other hand, that no measures which would deprive trade union members from being represented by their respective unions are taken against the KCWU and KTWU. The Committee requests the Government to keep it informed of the outcome of such consultations.*
- 368.** *Deeply concerned by the absence of any action taken by the Government to implement its previous recommendations, and the situation of trade union and collective bargaining rights in the country, the Committee emphasizes 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 principles of freedom of association and that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [see **Digest**, op. cit., paras 15 and 17]. It once again urges the Government to develop, in consultation with the social partners concerned, specific mechanisms, aimed at strengthening the protection of subcontracted*

(“dispatch”) workers’ rights to freedom of association and collective bargaining guaranteed to all workers by the TULRAA and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights.. Such mechanisms should include an agreed process for dialogue determined in advance. The Committee reiterates its previous specific recommendations and expects that they will be implemented without further delay. It urges the Government to keep it informed of all measures taken in this respect. The Committee once again reminds the Government that it may avail itself of the technical assistance of the Office.

- 369.** *The Committee notes the information provided by the Government with regard to Kiryung Electronics and in particular the fact that the KMWU and the manager signed an agreement on 1 November 2010 where the company agreed to hire the ten remaining striking unionists thus bringing an end to the long-standing disputes. Therefore, the Committee will not pursue its examinations of this particular aspect of this case.*

The Committee’s recommendations

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

- (a) The Committee expects that the Government will take all necessary measures to ensure protection of workers’ organizational rights against abuses in relation to disguised employment relationships and requests it to provide a copy of the Supreme Court ruling of 22 July 2010 in the case of a worker dismissed from the HMC Ulsan factory in February 2005 and to provide information on the outcome of the retrial of this case by the lower court. It also requests the Government to keep it informed of the outcome of the inspection it conducted following the 22 July 2010 decision of the Supreme Court to assess the state of in-company subcontracting at 29 workplaces, and of any further impact this decision has on the situation of workers in a disguised employment relationship.*
- (b) The Committee requests the Government to take the necessary measures to ensure that all workers, including “self-employed” workers, such as heavy goods vehicle drivers, can fully enjoy freedom of association rights with the organizations of their own choosing for the furtherance and defence of their interest, including the right to join federations and confederations of their own choosing subject to the rules of the organization concerned and without any previous authorization.*
- (c) The Committee requests the Government to indicate whether national legislation provides for the right of appeal in the case of dissolution of a trade union by the administrative authority. If such a procedure is not provided for, it requests the Government to take the necessary measures, in consultations with the social partners, to amend the provisions of the TULRAA and its Enforcement Decree, so as to ensure that workers’ organizations are not liable to be dissolved by administrative authority and that an administrative decision does not take effect until a final decision is handed down. It requests the Government to keep it informed in this respect.*

- (d) *The Committee requests the Government to hold consultations with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that, on the one hand, workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining and, on the other hand, that no measures which would deprive trade union members from being represented by their respective unions are taken against the KCWU and the KTWU. The Committee requests the Government to keep it informed of the outcome of such consultations.*
- (e) *The Committee once again requests the Government to develop, in consultation with the social partners concerned:*
- (i) *appropriate mechanisms aimed at strengthening the protection of subcontracted (“dispatch”) workers’ rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. Such mechanisms should include an agreed process for dialogue determined in advance; and*
 - (ii) *specific collective bargaining mechanisms relevant to the particularities of self-employed workers.*
- (f) *The Committee once again urges the Government to carry out without delay independent investigations into:*
- (i) *the dismissals of the subcontracted workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed solely on the grounds that they staged industrial action against a “third party”, i.e. the principal employer (subcontracting company), to ensure that they are reinstated in their posts without loss of pay as a primary remedy. If the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination; and*
 - (ii) *the alleged acts of violence perpetrated by private security guards against trade unionists during rallies at HMC Asan and Ulsan and at Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered.*
- (g) *As regards the allegations of acts of anti-union discrimination and interference at Hynix/Magnachip and at HMC (Ulsan factory and Asan Plant), the Committee once again urges the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate*

compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee also requests the Government to keep it informed of the High Court decision in the case of workers dismissed from Asan Plant.

- (h) Regretting that the Government has not replied to its previous requests, the Committee once again urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers in the metal sector, in particular in HMC, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that subcontracted workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.*
- (i) Regretting that the Government has not replied to its previous requests, the Committee once again urges the Government to take all necessary measures without delay so as to bring section 314 of the Penal Code (“obstruction of business”) into line with freedom of association principles, and to keep it informed in this regard.*
- (j) The Committee expects that the Government and the judicial authorities will put in place adequate safeguards so as to avert in future the possible risks of abuse of judicial procedure on grounds of “obstruction of business” with the aim of intimidating workers and trade unionists, and that the courts in their rulings will take due account of the need to build a constructive industrial relations climate in the context of individual industrial relations.*
- (k) The Committee expects that the above recommendations will be implemented without further delay and urges the Government to keep it informed in this respect. It once again reminds the Government that it may avail itself of the technical assistance of the Office.*

CASE NO. 2450

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

Complaint against the Government of Djibouti presented by

- **the Djibouti Union of Workers (UDT)**
- **the General Union of Djibouti Workers (UGTD) and**
- **the International Trade Union Confederation (ITUC)**

Allegations: Refusal to reinstate workers dismissed following a strike in 1995 despite an agreement reached in 2002; anti-union dismissal of a postal service union leader; need to amend certain provisions of the Labour Code; objection to nominations for the Workers' delegation of Djibouti to the International Labour Conference

371. The Committee last examined this case at its March 2010 meeting [see 356th Report, paras 667–685].

372. The Government sent its observations in a communication dated 23 November 2010.

373. 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

374. During its previous examination of the case in March 2010, the Committee made the following recommendations [see 356th Report, para. 685]:

- (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.

B. The Government's reply

375. In a communication dated 23 November 2010, the Government provides a partial reply to a number of points raised by the Committee.

376. As regards the issue of the workers dismissed in 1995 following a strike who have not yet been reinstated despite an agreement reached on 8 July 2002 (recommendations (a) and (b)), the Government lists nine workers who were reinstated in 2002 and 2005, two workers whose reinstatement is under negotiation (Mariam Hassan Alin and Habib Ahmed Doualeh), a list of workers who do not wish to be reinstated (Adan Mohamed Abdou and Kamil Diraneh Hared), and also a list of workers about whose situation it has no information (Abdoufathah Hassam Ibrahim, Houssien Dirieh Gouled, Moussa Waiss Ibrahim, Abdillahi Aden Ali, Bouha Daoud Ahmed, Souleiman Mohamed Ahmed and Mohamed Doubad Waiss). The Government also refers to the recommendations made by the direct contacts mission in indicating that it agrees to the request concerning the reinstatement of the following persons present on the national territory to their original department or in another government department, as well as agreeing to pay contributions to the National Social Security Fund to enable them to qualify for or receive a standard retirement pension (Adan Mohamed Abdou, Kamil Diraneh Hared, Habib Ahmed Doualeh and Ahmed Djama Egueh). The Government also points out that Ahmed Djama Egueh and Kamil Diraneh Hared have reached retirement age. However, as regards the mission's recommendation concerning the payment of salary in arrears as from 1995, the Government states that it definitively rejects this request.

377. As regards the case of Mr Hassan Cher Hared (recommendation (c)), the Government firstly points to the problems faced by the postal service in Djibouti over recent years, the efforts made by the State to modernize the postal sector and the positive results of such a policy, which has seen the institution announce a positive annual balance during the last year. As regards the situation of Mr Cher Hared, the Government declares that the allegations, forwarded by the International Trade Union Confederation (ITUC), are far removed from the reality of the local situation and are aimed at supporting his status as asylum-seeker in Switzerland.

378. Finally, as regards the question of participation in the International Labour Conference (recommendation (d)), the Government indicates that it invites recognized organizations to freely appoint their representatives and that such a choice is therefore a matter for the social partners. For the employers, the Business Union of Djibouti (UED) is concerned. For the workers, the Government states that there are two confederations. The first of these is the General Union of Djibouti Workers (UGTD), led by Mr Abdou Sikieh Dirieh, which held its congress in August 2010 in the presence of numerous international observers (Arab Labour Organization (ALO), International Confederation of Arab Trade Unions (ICATU),

Community of Sahelo-Saharan States (CEN-SAD), Organization of African Trade Union Unity (OATUU) and the World Federation of Trade Unions (WFTU)), with the exception of the ITUC and the International Labour Organization (ILO). The Government indicates that the second organization, the Djibouti Union of Workers (UDT), is going through a serious leadership crisis involving its president, Mr Mohamed Youssouf Mohamed, and its General Secretary, Mr Adan Mohamed Abdou, which is paralysing it. The Government indicates that if the UDT does not hold free, transparent and open elections in the immediate future, it may be excluded from all tripartite bodies and will no longer be able to take part in national and international meetings.

- 379.** As regards the requested amendments to the Labour Code (recommendation (e)), the Government indicates that, at its meeting of 19 October 2010, the Council of Ministers adopted amendments to three sections of the Labour Code, namely sections 41, 214 and 215. The Government adds that the amendments have been approved by the National Council for Labour, Employment and Vocational Training (CNTEFP) and demonstrate the Government's willingness to bring the Labour Code into line with the provisions of international Conventions relating to freedom of association.
- 380.** As regards the establishment of the CNTEFP (recommendation (f)), the Government points out that the President of the Republic enacted Decree No. 2008-0023/PR/MESN establishing the CNTEFP, which is chaired by the Minister of Employment and the secretarial function of which is provided by the Directorate of Labour and Social Partner Relations. The Government also refers to a new development in the form of parliamentary representation within the CNTEFP.

C. The Committee's conclusions

- 381.** *The Committee recalls that the issues pending in the present case, which it has been examining since 2005, are as follows: refusal to reinstate workers dismissed following a strike in 1995 despite an agreement reached in 2002; the situation of a trade union leader of the Djibouti postal service who was allegedly dismissed on anti-union grounds; the need to amend certain provisions of the Labour Code; nominations for the Workers' delegation of Djibouti at the International Labour Conference; and the establishment of the CNTEFP.*
- 382.** *As regards the issue of the workers dismissed in 1995 following a strike who have not yet been reinstated despite an agreement reached on 8 July 2002, the Committee recalls that the Government made a commitment vis-à-vis the direct contacts mission of January 2008 to carry out the necessary checks into the situation of the workers on the basis of the list provided by the mission containing the names of workers sent by the complainant organizations. The Committee notes the Government's indication in its communication that it has no information concerning any of the workers whose names were supplied by the mission (Abdoufathah Hassam Ibrahim, Houssien Dirieh Gouled, Moussa Waiss Ibrahim, Abdillahi Aden Ali, Bouha Daoud Ahmed, Souleiman Mohamed Ahmed Mohamed Doubad Waiss, Abdourachid), except for two workers whose reinstatement it indicates is under negotiation (Ms Mariam Hassan Alin and Mr Habib Ahmed Doualeh). The Committee requests the Government to supply information on the situation of Ms Mariam Hassan Alin and Mr Habib Ahmed Doualeh. As regards the workers whose names have been supplied by the complainant organizations and concerning whose situation it states it has no information, the Committee expects the Government to take all necessary steps to resolve their situation without delay, at least for those who reside within the national territory or have indicated their wish to be reinstated.*
- 383.** *The Committee also notes the Government's assertion that Mr Adan Mohamed Abdou, UDT General Secretary, and Mr Kamil Dirane Hared, UGTD General Secretary, have declined to be reinstated. The Committee recalls that it previously noted that the*

complainant organizations disputed the Government's statement to the effect that the latter had declined to be reinstated. The complainant organizations asked the Government to furnish proof of its statement and asserted that the authorities had never had any intention of reinstating these two persons. The Committee further notes the Government's indication in its communication that it is willing to accept the recommendation made by the direct contacts mission by reinstating the following persons in their original department or in another government department: Messrs Adan Mohamed Abdou, Kamil Diraneh Hared, Habib Ahmed Doualeh and Ahmed Djama Egueh. The Government adds that it agrees to pay social security contributions to enable the latter to qualify for or receive a standard retirement pension. Finally, it points out that Mr Ahmed Djama Egueh and Mr Kamil Diraneh Hared have reached retirement age. The Committee notes contradictions in the Government's communication and requests it to supply detailed information without delay on the situation of Mr Adan Mohamed Abdou and Mr Kamil Diraneh Hared, concerning, on the one hand, that it agrees to their reinstatement to their original department or another government department together with payment of their social security contributions and, on the other hand, that these two men have declined to be reinstated. If the Government maintains that they have declined to be reinstated, the Committee expects it to provide details accordingly.

- 384.** *The Committee recalls the Government's statement to the direct contacts mission that it was not opposed to the principle of the payment of compensation to the workers since they had agreed to be reinstated to the postal service and accordingly the Ministry of Employment and National Solidarity had been instructed to conduct individual negotiations. The Committee notes with deep regret the Government's statement that it definitively rejects the recommendation of the direct contacts mission concerning the payment of salary in arrears since 1995. The Committee recalls that, in cases of dismissal of trade unionists on account of their trade union membership or activity, the Committee invariably calls for their reinstatement in their posts without loss of earnings in addition to the appropriate legal penalties to prevent such a situation from recurring in future. Moreover, should reinstatement prove impossible, steps should be taken to ensure that they receive adequate compensation for the damage suffered that would represent a sufficiently dissuasive sanction. The Committee expects that the Government reconsider its position.*
- 385.** *The Committee recalls that it considered the dismissal of UDT international relations secretary Mr Hassan Cher Hared, which occurred in September 2006, to be a serious case and urged the Government to launch an inquiry without delay into this dismissal. If the dismissal proved to be based on his union activities, the Committee called for his reinstatement and for the payment of any salary in arrears. The Committee notes once again with deep regret that the Government has not launched the requested inquiry into his dismissal and again merely denies the allegations, stating that the allegations, as forwarded by the ITUC, are far removed from the reality of the local situation. The Committee repeats once again its request to the Government to launch an inquiry without delay into the circumstances of the September 2006 dismissal of Mr Hassan Cher Hared and to inform it of the results and of any follow-up action taken.*
- 386.** *The Committee recalls that one of the pending issues relates to interference by the Government in the affairs of the UDT, particularly the nomination of representatives taking the place of the legitimate union officers in the Djiboutian delegation to the International Labour Conference. During its previous examination of the case, the Committee noted with concern that the Workers' delegation to the 98th Session (June 2009) of the International Labour Conference had been the subject of a new objection to the Credentials Committee and that, in its conclusions, the Credentials Committee regretted the blatant lack of progress on the matter since 1997 and noted that it had no new information at its disposal that might answer the questions raised the previous year. The Credentials Committee again expressed serious doubts as to whether the nomination*

of the UDT representative to the Conference had been truly independent and concluded that the nomination of the UDT representative to future sessions of the Conference should be carried out in consultation with the UDT as currently led by Mr Mohamed Abdou in the capacity of General Secretary. The Committee also previously noted that the nomination of the UGTD representative to the same session of the Conference was also questioned by the Credentials Committee, which concluded that the Government had not fulfilled its obligations under article 3 of the Constitution because it had not nominated Workers' delegates representing the workers of Djibouti in agreement with the most representative workers' organizations.

387. The Committee notes with concern that the Workers' delegation of Djibouti to the 99th Session (June 2010) of the International Labour Conference has been the subject of a new objection to the Credentials Committee. The Committee notes that the Credentials Committee indicates, in its conclusions, that the information supplied by the Government shows that the latter has insisted for years on applying the same procedure for the nomination of worker representatives, despite repeated recommendations made by the Credentials Committee and other ILO supervisory bodies. The Credentials Committee observes with regret that it has no new information at its disposal that might answer the questions which it has raised in recent years. The Credentials Committee therefore again expresses grave doubts as to whether the nomination of UDT and UGTD representatives is truly independent and, consequently, whether the Workers' delegation to the present session of the Conference is truly representative [see **Provisional Record** No. 5C, para. 33]. Furthermore, the Committee notes that the Credentials Committee asked the Government of Djibouti to submit to the ILO Director-General by the end of 2010 a detailed report on the progress made in Djibouti concerning the establishment of criteria for the independent representation of workers in the country and the specific steps taken towards a definitive resolution of the problem [see para. 10].
388. The Committee notes that the Government merely indicates once again in its communication that it invites recognized organizations to freely choose their representatives. For the employers, the UED is concerned. For the workers, the Committee notes the Government's statement that there are two confederations. The first of these is the UGTD, led by Mr Abdou Sikie Dirieh, which held its congress in August 2010 in the presence of numerous international observers (ALO, ICATU, CEN-SAD, OATUU and WFTU), with the exception of the ITUC and the ILO. The Committee notes the Government's indication that the UDT is going through a serious leadership crisis involving its President, Mr Mohamed Youssouf Mohamed, and its General Secretary, Mr Adan Mohamed Abdou, which is paralysing it. The Committee notes the Government's indication that if the UDT does not hold free, transparent and open elections in the immediate future, it may be excluded from all tripartite bodies and will no longer be able to take part in national and international meetings.
389. Moreover, the Committee expresses its concern at the latest allegations of interference and harassment by the Government towards the UDT which it is examining in a new case [see Case No. 2753, paras 395–413].
390. The Committee firmly expects the Government to guarantee the right to hold free and transparent elections to all trade unions in the country, particularly the UDT and its affiliated organizations. Such elections will enable the workers to choose their representatives in full freedom, without interference by the authorities, whether it is deciding the terms of eligibility for union officers or holding the actual elections. Thus, in a framework which fully respects the capacity of workers' organizations to act in total independence, the Government will be in a position to determine, together with these organizations, objective and transparent criteria for nominating worker representatives to national tripartite bodies and to the International Labour Conference.

- 391.** *As regards the allegations concerning the adoption of a new “anti-social” Labour Code, the Committee asked the Government in its previous recommendations to amend sections 41, 42, 214 and 215 of the Labour Code. The Committee notes with interest the indication that the Council of Ministers, at its session of 19 October 2010, adopted amendments to three sections of the Labour Code, namely sections 41, 214 and 215, so as to bring them into line with international Conventions. The Committee also notes the indication that the amendments were approved by the CNTEFP. The Committee urges the Government to inform it when the legislative text amending sections 41, 214 and 215 of the Labour Code enters into force and to send a copy of the said text.*
- 392.** *The Committee recalls that its previous recommendations also referred to the CNTEFP. The Committee previously urged the Government to supply information on the establishment and composition of this body. The Committee notes that the Government reiterates that the CNTEFP was established pursuant to Presidential Decree No. 2008-0023/PR/MESN, that it is chaired by the Minister of Employment and that its secretarial function is provided by the Directorate of Labour and Social Partner Relations. The Government refers to a new development in the form of parliamentary representation within the CNTEFP. The Committee urges the Government to supply detailed information on the composition of the CNTEFP and how it functions, in particular the manner in which it is consulted on legislative issues and those affecting the interests of the representative organizations of employers and workers.*
- 393.** *In general, the Committee notes the efforts made by the Government to respond to certain questions which have been under examination in the present case for many years. It notes visible progress in the form of the legislative amendments requested by the ILO supervisory bodies. The Committee nevertheless notes with great concern that questions remain regarding a number of serious issues. The Committee firmly expects the Government to show real willingness to improve the situation in this case by making specific and definitive responses to its recommendations. The Committee therefore firmly urges the Government once again to take specific steps towards this end without delay and thus facilitate transparent and sustainable social dialogue in Djibouti. Taking into account the history of this case and the questions still pending, the Committee requests the Government to accept a tripartite mission.*

The Committee’s recommendations

- 394.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee notes the efforts made by the Government to respond to certain questions which have been under examination in the present case for many years. The Committee notes visible progress in the form of the legislative amendments that have been requested by the ILO supervisory bodies, and urges the Government to inform it when the legislative text amending sections 41, 214 and 215 of the Labour Code enters into force and to send a copy of the said text.*
 - (b) The Committee notes with great concern, however, that questions remain regarding a number of serious issues. The Committee firmly expects the Government to show real willingness to improve the situation in this case by making specific and definitive responses to its recommendations. The Committee therefore firmly urges the Government once again to take*

specific steps towards this end without delay and thus facilitate transparent and sustainable social dialogue in Djibouti.

- (c) As regards the issue of the workers dismissed in 1995 following a strike who have not yet been reinstated, the Committee requests the Government to supply information on the situation of Ms Mariam Hassan Alin and Mr Habib Ahmed Doualeh, whose reinstatement it claims to be under negotiation. As regards the workers whose names have been supplied by the complainant organizations and concerning whose situation it claims to have no information, the Committee expects the Government to take all necessary steps to resolve their situation without delay, at least for those who reside within the national territory or have indicated their wish to be reinstated. As regards the question of payment of wage arrears, the Committee requests the Government to reconsider its position.*
- (d) The Committee requests the Government to supply detailed information without delay on the situation of Mr Adan Mohamed Abdou and Mr Kamil Diraneh Hared, concerning whom it indicates, on the one hand, that it agrees to their reinstatement in their original department or another government department together with payment of their social security contributions and, on the other hand, that these two men have declined to be reinstated. If the Government maintains that they have declined to be reinstated, the Committee expects it to provide details accordingly.*
- (e) The Committee repeats once again its request to the Government to launch an inquiry without delay into the circumstances of the September 2006 dismissal of Mr Hassan Cher Hared and to inform it of the results and of any follow-up action taken.*
- (f) The Committee firmly expects the Government to guarantee the right to hold free and transparent elections to all trade unions in the country, particularly the UDT and its affiliated organizations. Such elections will enable the workers to choose their representatives in full freedom, without interference by the public authorities, whether it be deciding the terms of eligibility for union officers or holding the actual elections. Thus, in a framework which fully respects the capacity of workers' organizations to act in total independence, the Government will be in a position to determine, together with these organizations, objective and transparent criteria for nominating worker representatives to national tripartite bodies and to the International Labour Conference.*
- (g) Taking into account the history of this case and the questions still pending, the Committee requests the Government to accept a tripartite mission.*

**Complaint against the Government of Djibouti
presented by
the Djibouti Labour Union (UDT)**

Allegations: The complainant denounces the closure of its premises and the confiscation of the key to its letter box by order of the authorities, the intervention of the police at a trade union meeting, the arrest and questioning of trade union officers, and the general ban on trade unions from holding any meetings

395. The complaint is contained in a communication dated 29 December 2009 presented by the Djibouti Labour Union (UDT).
396. Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case twice. At its November 2010 meeting [see 358th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body (1972), it could present a report on the substance of the case at the next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.
397. 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. The complainant's allegations

398. In a communication dated 29 December 2009, the UDT denounces interference by the authorities and acts of intimidation against the trade union movement, prevention of access to its premises and violation of its correspondence.
399. The complainant alleges that, early in the morning of 13 October 2009, a trade union training session which it was holding at the Palais du Peuple was interrupted by the police, who then prevented the activity from continuing. At this time, two union members – Mr Anouar Mohamed Ali, general secretary of the Djibouti Electricity Workers' Union (STED), and Mr Abdourachid Mohamed Arreh, member of the Primary School Teachers' Union (SEP) – were arrested and interrogated by the police. The complainant adds that it was informed on the same day, by the management of the hotel where its congress was due to take place, that its reservation had been cancelled by order of the authorities and that it was now necessary to obtain authorization from the Ministry of the Interior to organize such an activity. According to the UDT, the services of the Ministry of the Interior confirmed that the prohibition measures were directed at the two trade union organizations.
400. The complainant also states that, on the following day (14 October 2009), Mr Adan Mohamed Abdou, general secretary of the UDT, was prevented from entering the organization's headquarters, where two police officers were on guard and controlling access. The keys to the UDT's letter box were also confiscated.

401. Furthermore, the UDT denounces the fact that, at the 98th Session (June 2009) of the International Labour Conference, a UDT official caught an employee from the diplomatic representation of Djibouti in Geneva, who was also a member of the Djiboutian delegation, in the act of appropriating mail addressed to the UDT.
402. According to the UDT, such measures of harassment and discrimination constitute anti-union activity as defined by the new Labour Code, section 215 of which clearly states that the legal existence of a trade union is subject to registration formalities and verification of its legality.

B. The Committee's conclusions

403. *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainant's allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.*
404. *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present a report on the substance of the case without being able to take account of the information which it had hoped to receive from the Government.*
405. *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments, on their side, will recognize the importance of presenting, for objective examination, detailed replies concerning allegations made against them [see First Report, para. 31].*
406. *The Committee notes that the present case is concerned with alleged interference by the authorities in trade union activities and acts of intimidation against the trade union movement, the ban on the UDT with regard to its premises and its correspondence and the violation of its mail during an international conference.*
407. *The Committee observes that the complainant's allegations may be summarized as follows: early in the morning of 13 October 2009, a pre-congress training session held by the UDT at the Palais du Peuple was interrupted by the police, who then prevented the continuation of the activity. At this occasion, two union members – Mr Anouar Mohamed Ali, general secretary of the STED, and Mr Abdourachid Mohamed Arreh, member of the SEP – were arrested and interrogated by the police. The UDT was then informed by the management of the hotel where its congress was due to take place that its reservation had been cancelled by order of the authorities and that it was now necessary to obtain authorization from the Ministry of the Interior to organize such an activity. According to the UDT, the services of the Ministry of the Interior confirmed that the prohibition measures were directed at the two trade union organizations.*
408. *The Committee is deeply concerned by the complainant's allegations, which describe acts of interference by the authorities against the UDT and the trade union movement in general, to which the Government has made no reply to date. The Committee urges the Government to send its observations without delay concerning the intervention by the police and the need to obtain authorization from the Ministry of the Interior for organizing trade union meetings such as the union congress. The Committee recalls that, in view of the fact that in every democratic trade union movement the congress of members is the*

supreme trade union authority which determines the regulations governing the administration and activities of trade unions and which establishes their programme, the prohibition of such congresses would seem to constitute an infringement of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 456].

409. As regards the allegations concerning the arrest of the trade union members, the Committee urges the Government to explain the reasons for the arrest and interrogation of Mr Anouar Mohamed Ali, general secretary of the STED, and Mr Abdourachid Mohamed Arreh, member of the SEP. The Committee recalls that measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights [see **Digest**, op. cit., para. 63].
410. The Committee further notes the complainant's allegations that, on 14 October 2009 Mr Adan Mohamed Abdou, UDT general secretary, was prevented from entering the organization's headquarters, where two police officers were on guard and controlling access, and that the keys to the UDT's letter box were confiscated. Finally, the Committee notes that the UDT denounces the fact that, at the 98th Session (June 2009) of the International Labour Conference, a UDT official caught an employee from the diplomatic representation of Djibouti in Geneva, who was also a member of the Djiboutian delegation, in the act of appropriating mail addressed to the UDT. The Committee is bound to express its deep concern by these allegations of serious interference by the authorities in trade union activities and urges the Government to provide explanations in reply to the UDT allegations. The Committee recalls that the inviolability of trade union premises and property, including its mail, is a civil liberty which is essential to the exercise of trade union rights. The Committee also recalls that the access of trade union members to their union premises should not be restricted by the state authorities [see **Digest**, op. cit., para. 192].
411. Finally, the Committee notes that, according to the complainant, the interference and harassment carried out by the authorities constitute anti-union activity as defined by the new Labour Code, section 215, which clearly states that the legal existence of a trade union is subject to registration formalities and verification of its legality. The Committee recalls that, in the examination of a previous, still active case concerning Djibouti, it concluded that it was necessary for the Government, in consultation with the social partners, to modify section 215 of the Labour Code so as to guarantee the right to establish workers' and employers' organizations without previous authorization, remove the provisions which de facto give discretionary powers to the authorities, and ensure that the registration procedure is just a formality [Case No. 2450, 348th Report, para. 557]. The Committee expects that any adopted measures to address this matter will rapidly enter into force.
412. In conclusion, and from a general point of view, the Committee recalls that it has been urging the Government for many years to give priority to promoting and defending freedom of association and to give effect as a matter of urgency to the specific commitments which it has made vis-à-vis the international authorities to settle pending issues and enable transparent and sustainable social dialogue in Djibouti. The Committee is bound to note with deep concern the blatant lack of progress and the apparent unwillingness on the part of the Government to settle the pending issues, particularly to stop the harassment suffered by the UDT. The Committee expresses, in the strongest terms, its expectation that the Government will take concrete measures without delay to improve the situation.

The Committee's recommendations

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

- (a) The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainant's allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.*
- (b) The Committee urges the Government to send its observations without delay concerning the intervention by the police and the need to obtain authorization from the Ministry of the Interior for organizing trade union meetings such as the union congress.*
- (c) The Committee urges the Government to explain the reasons for the arrest and interrogation of Mr Anouar Mohamed Ali, general secretary of the STED, and Mr Abdourachid Mohamed Arreh, member of the SEP, following the intervention by the police on 13 October 2009.*
- (d) The Committee urges the Government to reply to the allegations by the UDT concerning the intervention by the police to prevent the UDT general secretary from entering the union premises, the confiscation of the key to the union's letter box and the appropriation by a member of the Djiboutian delegation of mail addressed to the UDT during the International Labour Conference.*
- (e) The Committee is bound to note with deep concern the blatant lack of progress and the apparent unwillingness on the part of the Government to settle the pending issues, particularly to stop the harassment suffered by the UDT. The Committee expresses, in the strongest terms, its expectation that the Government will take concrete measures without delay to improve the situation.*

**Complaint against the Government of the Dominican Republic
presented by
the National Trade Union Confederation (CNUS)**

Allegations: Anti-union acts and dismissals in the enterprises “Frito Lay Dominicana”, “Universal Aloe” and “MERCASID”, as well as the refusal to register various trade unions, namely: (i) the National Trade Union of Workers of the Call Center Branch (enterprises Rococo Investment Inc., Stream International, Language Line and Git Prepaid); (ii) the National Trade Union of Operators of Topographical Instruments (SINAMITO); (iii) the Trade Union of Workers of the Enterprise Barrick Gold (Minera Pueblo Viejo Barrick Gold enterprise); (iv) the United Trade Union of Workers of Minera Cerros de Maimón (SUTRAMICEMA) (Minera Cerros de Maimón enterprise); (v) the Trade Union of Electricity Generator and Convertor Building and Repair Workers and Related of Haina; (vi) the Single Federation of Workers of the Mining, Metalwork, Chemicals, Energy and Various Industries and Related (FUTRAMETAL)

414. The complaint is contained in a communication of the National Trade Union Confederation (CNUS) dated 26 May 2010. The CNUS sent additional information in a communication dated 8 July 2010.

415. The Government sent its observations in a communication dated 25 August 2010.

416. The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant organization’s allegations

417. In its communication dated 26 May 2010, the CNUS states that it is lodging a formal complaint against the Government of the Dominican Republic for refusal to register various trade unions.

418. Refusal to register the National Trade Union of Workers of the Call Center Branch. The complaint organization states that, on 2 September 2008, 26 workers employed at so-called “Call Centre” enterprises (Rococo Investment Inc., Stream International, Language Line and Git Prepaid) decided to form the National Trade Union of Workers of the Call Center

Branch. The complainant organization adds that, when holding the constituent assembly, the founding members of the trade union fulfilled all the requirements as to substance and form set out under the Labour Code regarding the establishment of a trade union: (1) more than 20 workers (in this case 26) from the Call Center enterprises gave their consent, participating voluntarily in the constituent assembly of the trade union and approving the statutes, which were recorded in the minutes that were, in turn, signed, along with the statutes, the list of founding members and the notification of the assembly, by all the founding members present and certified by the president and secretary of the assembly; and (2) this documentation was deposited with the Ministry of State for Labour on 18 September 2008, in order that the trade union might be registered.

- 419.** The complainant organization also states that, on 13 October 2008, the founder members of the trade union were informed by the enterprise that the Ministry of State for Labour had refused their application for trade union registration. The complainant organization highlights the fact that, in accordance with the provisions of section 375 of the Labour Code, procedure dictates that the documentation should be returned to the trade union in order to allow the latter to make good any omission in terms of the content of the application for registration and to resubmit the dossier. The complainant organization states that the decision by the General Labour Director to reject the application for registration made by the National Trade Union of Workers of the Call Center Branch was based on the following facts: (1) the trade union being formed did not have 20 workers, based on the communications deposited by the enterprise and alleged written by Andy Tejada, Boris F. Gil, Eliezer Ferreira, José A. Mordán Frías, Antonio Estévez Castro, William O. Egunjob and Aída Ho Sánchez, in which those individuals state that they do not wish to be associated with the founding of the trade union, despite having participated in the constituent assembly and having signed the corresponding documents; (2) Luis Chapman and Loverly R. Montes de Oca ceased to work for the Rococó Investment enterprise as of 28 May and 27 June 2008 respectively, but the fact that they were working for the enterprise at the moment when the trade union was founded was not taken into account.
- 420.** The complainant organization states that on 24 October it lodged a hierarchical appeal with the Ministry of State for Labour against the ruling issued by the General Labour Director in which the trade union requested the Ministry of State for Labour to revoke said ruling and to order that the trade union be registered. However, through a ruling dated 7 January 2009, the Ministry of State for Labour decided to uphold the decision not to register the trade union.
- 421.** In its communication dated 8 July 2010, the complainant organization adds that the workers of the Call Center branch who dared to exercise their trade union rights were faced with a wave of repression which led to several workers being dismissed, and which involved threats, blackmail, bribes and the recruitment of external agents in order to pressure the workers into giving up their attempt to have the trade union registered.
- 422. *Refusal to register the National Trade Union of Operators of Topographical Instruments (SINAMITO).*** The complainant organization states that SINAMITO has existed as an organization since 1962, but that, owing to the supposed deterioration of the records held at the Ministry of State for Labour, it was impossible to locate the document attesting to the trade union's registration. Furthermore, against the background of this lapse on the part of the State, the General Labour Director suggested that the workers should found a new trade union, something which the workers proceeded to do. On 20 January 2010, Jorge de Frank and Juan Francisco Rodríguez y Compartes deposited the documentation required under the Labour Code for registration of the trade union they had founded with the Ministry of State for Labour. On 29 January 2010, the General Labour Director returned the documentation deposited because the enterprises for which the founding members of

the trade union provided their services were not registered with the Ministry of State for Labour.

423. The complainant organization states that, on 17 February 2010, it requested the General Labour Director to register the trade union, given that the workers cannot be prevented from exercising a fundamental right such as the right to organize based on the fact that the enterprises for which they work are not registered with the Ministry of State for Labour, in particular given that no more than half of the small enterprises in the Dominican Republic are registered with this Ministry. Despite the communication transmitted by the CNUS, the General Labour Director continued to refuse to proceed with registration.
424. In its communication dated 8 July 2010, the complainant organization adds that the General Labour Directorate requested the workers to provide the payrolls of the enterprises for which they worked. The Directorate proceeded to check the names of staff members and, on allegedly finding that not all of the workers were listed on the payroll, refused to register the trade union, ignoring the fact that the workers could not be penalized for what was a failure on the part of the enterprise with regard to its obligations.
425. ***Refusal to register the Trade Union of Workers of the Enterprise Barrick Gold.*** The complainant organization states that on 24 April, Julio Antonio Rojas, Oscar Nina Arias, Derby E. Rodríguez Viña, Efraín Febriel Figuereo, Sandy Ureña Bautista, Roberto Sierra, Domingo A. Hernández, Reyito Aquino Mariñez, Adalberto Cruz, Luis R. Almonte González, Rosendo Martínez Candelario, Jerónimo Santiago, Juan Francisco Pineda, Ismael Mena Abreu, Joel Alexander Cruz Gómez, Luis Ramón Sánchez Disla, Marcelino Sánchez, Juan Reyes Martínez, Andy Rafael Sánchez Disla, Heuiy Mejía Jiménez and Juan B. Paredes founded the Trade Union of Workers of the Enterprise Barrick Gold and deposited the documentation required for trade union registration. The trade union was refused registration because, in the view of the General Labour Director (and following an investigation allegedly carried out by the latter into the payroll of the Minera Pueblo Viejo (Barrick Gold) enterprise), a number of the founding members of the trade union were not workers of the enterprise. The workers had work cards in which it was recorded that they were working for a subcontractor which was providing services for the Barrick Gold enterprise; therefore they worked in and for the enterprise, Barrick Gold.
426. The complainant organization adds that the workers providing services for the Barrick Gold enterprise, Julio Antonio Rojas and Oscar Nina Arias y Compartes, founded the Trade Union of Workers of the Mining Sector of Sánchez Ramírez Province and deposited the documentation required for its registration. The new trade union was not granted registration because, in the General Labour Director's opinion, the founders of the union had been recruited by enterprises which belonged to sectors other than the mining sector, including construction and metalwork. The complainant organization highlights that the founders of the trade union had been recruited by other enterprises to provide services for the Barrick Gold enterprise through subcontracting, a method used by a great many enterprises in order to avoid obligations and compliance with labour rights.
427. In its communication of 8 July 2010, the complainant organization adds that the enterprise contracted around 30 companies and that, in one of its verbal instructions, it urged those subcontractors not to allow trade union activities, stating that to do so would lead to immediate suspension of their contracts. The enterprise also filed a petition with the Ministry alleging that the workers were not included on its payroll and that therefore the name of the Barrick Gold enterprise could not be connected to the trade union's constituent assembly. Owing to the fact that the documents of the Ministry of Labour are in the public domain, an application was made for a certified copy of the petition. However, the General Labour Directorate never provided said document. The complainant organization states that Julio Rojas (Secretary-General of the trade union) was dismissed.

- 428. *Refusal to register the United Trade Union of Workers of Minera Cerros de Maimón (SUTRAMICEMA).*** The complainant organization states that, on 7 July 2009, Virginio Encarnación, José Antonio Pérez y Pérez and Epifanio Castro y Compartes founded SUTRAMICEMA and deposited the documentation required for trade union registration, which was returned to them through a communication of the General Labour Director, dated 7 August 2009, based on the fact that: (1) those workers were listed on the permanent payroll of the Sococo de Costa Rica Dominicana, SA enterprise, a subcontractor which selects staff for the mining enterprise, without the fact that those workers provide their services under the instructions of Minera Cerro de Maimón and their respective work cards bore the names of both enterprises being taken into account; (2) the legal name of Minera Cerro de Maimón was “Corporación Minera Domicincana, SA”, despite the fact that the jurisprudence of the Supreme Court of Justice of the Dominican Republic establishes that workers cannot be prevented from exercising their rights simply because they do not know the legal name of the enterprise for which they work.
- 429.** In its communication of 8 July 2010, the complainant organization adds that José Antonio Pérez y Pérez, Secretary-General of the trade union, was falsely accused of having set fire to a company vehicle and that he is constantly harassed as trade union leader. Finally, the complainant organization states that another member of the trade union, Juan Bautista (the appeals and disputes secretary), was dismissed.
- 430. *Refusal to register the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina.*** The complainant organization states that the application for registration of the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina was deposited on 26 October 2009 with the Ministry of State for Labour. The application contained all the necessary documentation listing the enterprises in which the founders of the trade union provided services, proving their status as employees and therefore, the Labour Code should be applied both with regard to their individual and collective rights.
- 431.** However, the complainant organization states that, through a ruling dated 5 November 2009, the General Labour Director rejected the trade union’s application for registration, claiming that the union was being established by independent workers who were not governed by the Labour Code. An appeal was lodged with the Ministry of State for Labour against the ruling. Through a ruling dated 24 March 2010, the Ministry upheld the decision of the General Labour Director, stating that the members of the union being formed did not qualify as workers and that it was therefore impossible to grant their application for registration.
- 432.** In its communication dated 8 July 2010, the complainant organization adds that the refusal to register the abovementioned trade unions has led to a situation whereby not only are these organizations being prevented from obtaining legal personality but also those workers who decided to exercise the right to organize are left without protection. Furthermore, once the enterprise learnt that the authorities had refused to register the trade union and that no trade union immunity had been granted, it broke the employment contracts and dismissed the founders of the trade unions without the Ministry of Labour even issuing a contravention notice concerning the freedom of association.
- 433. *Refusal to register the Single Federation of Workers of the Mining, Metalwork, Chemicals, Energy and Various Industries and Related (FUTRAMETAL).*** The complainant organization states that on 2 March 2010, the General Labour Director was requested to register FUTRAMETAL, founded on 5 December 2009. The documentation deposited contained details of the delegates representing the trade unions that made up the federation, their names, identity card numbers and respective signatures, as well as information on each trade union (their numbers and registration numbers), and proof of the

legal existence of eight trade unions (four more than the number required under the Labour Code). The complainant organization highlights that, with regard to the creation of federations, the only additional requirement established by the Labour Code is that their founding instruments must contain the names and addresses of the member trade unions and that the statutes of the federations must describe the form in which the trade unions are represented at the general assemblies of the federations.

434. The complainant organization states that, more than two months after the application, the General Labour Directorate of the Ministry of Labour has still not registered the federation, alleging that each and every one of the founding trade unions must provide it with the minutes of their respective assemblies, in which the majority of their members have approved the participation of the trade union in the formation of this new federation. The complainant organization adds that these excessive requirements for registration of a trade union organization are not normal and entail restrictions because they subject trade union organizations to special administrative supervisory measures which limit the right to organize. In the light of the General Director of Labour's position, the complainant organization states that, in order that trade union organizations legitimately established by the workers might be registered, it expressed its concern to the Ministry of State for Labour, but received no reply from the Dominican authorities.
435. In its communication dated 8 July 2010, the complainant organization states that, as well as acting incorrectly regarding the registration of trade union organizations, the Government has also failed to monitor compliance with labour rights, as can be seen from the following cases.
436. ***Frito Lay Dominicana enterprise.*** The complainant organization states that the trade union is under a constant state of siege within this enterprise, in the person of the secretary general, Ramón Mosquea, who was subjected to intimidation through the use of false accusations made with a view to his dismissal. During 2009 and the first quarter of 2010, more than 15 members of the trade union were dismissed for having carried out trade union activities. When the complainant organization presented formal complaints concerning the flagrant violations of the freedom of association in this enterprise, the Labour Inspectorate failed to carry out the investigations requested and consequently did not note the infringements. On other occasions, the actions of the investigators appointed to look into violations committed by the enterprise gave rise to serious suspicions that they were biased in favour of the employer sector. As a result of the ineffectiveness of the labour authorities with regard to the investigation and identification of violations of freedom of association, the judicial proceedings initiated for these violations conclude without the tribunals being able to sanction the enterprise, owing to a lack of evidence regarding the infringements committed.
437. ***Universal Aloe enterprise.*** The complainant organization states that pregnant women have been dismissed from this enterprise, direct threats have been made against the trade union leaders and the interventions of the Ministry of Labour have not been sufficiently effective owing to the fact that a high level of complicity exists. Recently the enterprise has come to believe that it can destroy the organization founded by the workers owing to the fact that none of the measures taken have led to the enterprise being sanctioned for its anti-union behaviour.
438. ***MERCASID enterprise.*** The complainant organization states that workers have been dismissed from this enterprise for having joined a trade union that had already been established. Furthermore, a campaign of slander was launched against Pablo de la Rosa with the aim of damaging his image and forcing him to abandon his demand that the collective agreement in force be respected and that the legally-constituted trade union be allowed the independence to run itself.

B. The Government's reply

439. In its communication of 25 August 2010, the Government states that many initiatives and measures have been taken to promote trade union rights in the country, in accordance with the international Conventions. The Government also provides the following information regarding the trade unions referred to in the complaint presented by the complainant organization.
440. ***The National Trade Union of Workers of the Call Center Branch.*** The Government states that, on 18 September 2008, workers from various Call Center enterprises requested trade union registration from the Labour Administration. This request was not granted because: (1) Andy Marcel Tejeda, Boris F. Gil, Eliezer Ferreras, José A. Mordán Frías, Antonio Estévez, William O. Egunjobi and Sra Aída Ho Sánchez, who were listed in the documentation presented to the Ministry of Labour as members of the management committee of the trade union, clearly informed both the Ministry of Labour and the committee managing the registry that they had not consented to their names being included on the list of participants for the constitution of the trade union in question. These workers took this step acting within their individual and constitutional rights as free individuals subject to law; (2) Luis Chapman and Loverly R. Montes de Oca, who were referred to in the request, were not workers at any of the Call Center enterprises at the time when the application for registration was made.
441. The Government adds that, in the light of the workers' statements to the effect that they have no interest in belonging to the National Trade Union of Workers of the Call Center Branch, and given that some of the individuals referred to in the request were not workers of the enterprise and that the fundamental requirement of gathering at least 20 workers from enterprises belonging to the corresponding sector was not fulfilled, the General Labour Director issued a ruling rejecting the application for registration. The applicants lodged a hierarchical appeal with the Ministry of Labour, who upheld the decision taken by the General Labour Director.
442. ***The National Trade Union of Operators of Topographical Instruments (SINAMITO).*** The Government states that, according to the complaint presented by the CNUS, this trade union has existed since 1962, and that it does not appear on the register owing to the deterioration of the Ministry of Labour's records. However, the Government states that, in 1994, work began to systematize the archives of the Trade Union Registry, with the support of the Spanish Cooperation. As a result of this process, a manual on procedures was drawn up, the paper archive of the Department of Trade Union Registry was reorganized and all the processes were systematized, in order to make it possible to offer a reliable, quality service to users. The Government highlights that on 5 March 2008, the Ministry of Labour received an application for the registration of SINAMITO, which was refused through a ruling dated 18 March 2008, owing to the fact that the trade union did not fulfil the basic requirement of representing dependent employees governed by the Labour Code.
443. The Government highlights that the root of the disagreements between trade union bodies lies in a meeting held in November 2008 at the Pension Fund for the Construction Sector. The National Single Federation of Trade Unions of Construction Workers (FENUSTRACON) requested a review of the registrations of the trade unions making up the Technical Council of the abovementioned Fund in order to check their legal status. The Technical Council of the Pension and Retirement Fund for Construction Sector Workers is made up of those trade union organizations of the construction sector with legal personality and is presided over by the Ministry of Labour. The corresponding review was carried out but no evidence was found in the archives of the Ministry of Labour of the registration of SINAMITO. It was found that this trade union, which had requested registration seven

months beforehand, had been operating for a long time using the registration which corresponded to the Autonomous Trade Union of Knitting Manufacturers, a trade union organization that is completely separate from SINAMITO.

444. The Government states that on looking closely at the situation it becomes apparent that a dispute exists between two trade union organizations, FENUSTRACON and SINAMITO, with regard to influence over the management of the Pension Fund for the Construction Sector. It was FENUSTRACON that objected to the participation of SINAMITO in the Pension Fund for the Construction Sector.
445. The Government also states that, on 20 January 2009 and 19 March 2010, the leaders of this trade union organization made new applications for registration, which were returned (and not rejected) so that missing details could be added to the dossier, in particular, information regarding representation of dependent employees (an indispensable requirement). The Government highlights that the return of applications for registration with observations does not imply rejection, rather, the aim is to inform applicants, in accordance with the procedure set out under the Labour Code, so that documentation is completed in due and proper form.
446. As to the Ministry of Labour's intervention in this case, the Government states that there is no trace of the registration or the founding documents (such as statutes, constituent assembly and list of members) of the said trade union in the trade union file archives. That is the reason why the Ministry of Labour is not in a position to certify that the trade union actually exists. The Government also states that the Labour Code only applies to dependent employees, that is to say, those with a mandate from an employer, and therefore the provisions of the Code do not apply to self-employed persons, as is the case with the topographical instrument operators, who are neither dependent upon nor subordinate to an enterprise or employer.
447. ***The Trade Union of Workers of the Enterprise Barrick Gold.*** The Government states that the legal name of the Barrick Gold enterprise is Pueblo Viejo Dominicano corporation (PVDC) and that: (1) it is a recently established mining enterprise which is currently constructing its installations, and to this aim, it has contracted various national and international construction firms; (2) one of the subcontractors is ISS Serviacerro and in response to an application made by Franciso Rafael Abreu Polanco, dated 11 November 2009, the United Trade Union of Workers of the Enterprise ISS Serviacerro was registered through a ruling dated 2 December 2009; (3) on 22 April 2010, the Ministry of Labour received an application for trade union registration from the workers of the Hermanos Yarull T enterprise, an enterprise which carries out work under contract within the PVDC mining complex. The Labour Administration responded to this application by granting trade union registration through a ruling dated 10 May 2010; (4) on 24 May 2010, the Ministry of Labour received an application for registration from the United Trade Union of Workers of the Construction Sector and Related Activities, whose construction enterprises were contracted by PVDC, with the Ministry granting registration through a ruling dated 15 June 2010; and (5) on 14 June, workers of the PVDC enterprise applied for the registration of the United Trade Union of Workers of the Enterprise Minera Pueblo Viejo Cotuí (Barrick Gold), with the Ministry of Labour granting registration through a ruling dated 25 June 2010.
448. The Government concludes by stating that the Labour Administration has granted a total of four trade union registrations to workers of PVDC and its related enterprises, and that therefore the claim that the Ministry of Labour is hindering trade union activity in this enterprise is untrue.

- 449. *The United Trade Union of Workers of Minera Cerros de Maimón (SUTRAMICEMA).*** The Government states that: (1) on 26 June 2008, the Labour Administration received an application for the registration of the Trade Union of the Enterprise Corporación Minera Cerro de Maimón, and granted that registration on 4 July 2008; (2) on 10 and 31 July 2009 new applications for the registration of the Trade Union of Workers of Minera Cerros de Maimón were received, which were returned in light of the fact that they contained errors of substance and form which prevented registration under the provisions of the Labour Code; and (3) prior to these applications (5 March 2009), an application for registration had already been received for the Autonomous Trade Union of Workers of the Enterprise Sococo de Costa Rica, Dominicana, SA, (SINTRASO), which was registered through a ruling dated 17 March 2009.
- 450. *The Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina.*** The Government states that, on 26 October 2009, the Ministry of Labour received an application for registration of the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina, which was not registered owing to the fact that the applicants are self-employed and are not governed by the Labour Code (dependent employee status is one of the fundamental requirements enshrined in the Labour Code regarding the granting of trade union registration).
- 451. *The Single Federation of Workers of the Mining, Metalwork, Chemicals, Energy and Various Industries and Related (FUTRAMETAL).*** The Government states that on 9 April 2010, it received an application for the registration of FUTRAMETAL. The Government highlights that the application was rejected based on the fact that: (1) the application in question did not fulfil the requirements set out in the Labour Code, given that the founding instrument, the notification of the assembly and the statutes had not been signed by the number of members required under labour legislation; and (2) one of the trade unions behind the application is not registered with the Ministry of Labour, and the registration of another was cancelled by the judiciary when it was noted that there were many errors that were not observed by the Ministry of Labour at the time that it was registered. In the light of these lapses, the constituent documentation was returned to this federation in order that it might take into account the points made in that regard by the General Labour Director.

C. The Committee's conclusions

- 452. *The Committee notes that in the present case the complainant organization alleges difficulties and delays in the registration of trade union organizations. These allegations refer to five trade union organizations and one federation.***
- ***The National Trade Union of Workers of the Call Center Branch.*** The Committee notes that, according to the complaint organization, the founding members of the trade union fulfilled all the requirements as to substance and form set out under the Labour Code regarding the establishment of a trade union. It also notes that, according to the Government, trade union registration was not granted because: (1) various workers, who were listed in the documentation presented to the Ministry of Labour as members of the management committee of the trade union, clearly informed both the Ministry of Labour and the committee managing the registry that they had not consented to their names being included on the list of participants for the constitution of the trade union in question; and (2) other individuals referred to in the application were not workers at any of the Call Center enterprises at the time when the application for registration was made and consequently the requirements set out under law were not fulfilled, namely, the need to gather 20 workers in order to found a trade union. Finally, the Committee notes that the applicants lodged a hierarchical appeal with the Ministry of Labour, who upheld the decision of the General Labour Director.

- **The National Trade Union of Operators of Topographical Instruments (SINAMITO).** The Committee notes that, according to the complainant organization, the General Labour Director returned the documentation deposited because the enterprises in which the founder members of the trade union provided services were not registered with the Ministry of State for Labour. The Committee also notes that, according to the Government: (1) the trade union does not fulfil the fundamental requirement of representing dependent employees governed by the Labour Code; (2) it was found that this trade union, which had applied for registration seven months beforehand, had been operating for a long time using the registration which corresponded to the Autonomous Trade Union of Knitting Manufacturers, a trade union organization that is completely separate from SINAMITO; and (3) the leaders of this trade union organization made new applications for registration, which were returned (and not rejected) so that missing details could be added to the dossier, in particular, information regarding representation of dependent employees (an indispensable requirement).
- **The Trade Union of Workers of the Enterprise Barrick Gold.** The Committee notes that, according to the complainant organization, the trade union was refused registration because, in the view of the General Labour Director, a number of the founding members of the trade union were not workers of the enterprise, despite the fact that all of those workers had work cards in which it was recorded that they were working for a subcontractor which was providing services for the Barrick Gold enterprise, that is to say, they were working in and for the Barrick Gold enterprise. The Committee also notes that the Barrick Gold enterprise (Pueblo Viejo Dominicano Corporation (PVDC)) is a recently established mining enterprise which is currently constructing its installations and to this aim it has contracted various national and international construction firms and that the Labour Administration has granted a total of four trade union registrations to workers of PVDC and its related enterprises.
- **The United Trade Union of Workers of Minera Cerros de Maimón (SUTRAMICEMA).** The Committee notes that, according to the Government, new applications for the registration of the Trade Union of Workers of Minera Cerros de Maimón were received on 10 and 31 July 2009, which were returned in light of the fact that they contained errors of substance and form which prevented registration under the provisions of the Labour Code.
- **The Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina.** The Committee notes that, according to the parties, the application for registration of the trade union was rejected because it was alleged that it was being formed by self-employed workers, not governed by the Labour Code. An appeal was lodged against this ruling with the Ministry of State for Labour, which, through a ruling dated 24 March 2010, upheld the decision of the General Labour Director.
- **The Single Federation of Workers of the Mining, Metalwork, Chemicals, Energy and Various Industries and Related (FUTRAMETAL).** The Committee notes that, according to the complainant organization, more than two months after the application, the General Labour Directorate of the Ministry of Labour has still not registered the federation, alleging that each and every one of the founding trade unions must provide it with the minutes of their respective assemblies, in which the majority of their members have approved the participation of the trade union in the formation of this new federation. The Committee also notes that the Government states that the founding documents of this federation were returned so that the points made in that regard by the General Labour Director might be taken into account.

453. In general, the Committee wishes to highlight that Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), establishes that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. The Convention guarantees this right for all workers, with the sole possible exception of the armed forces and the police. Therefore this right also applies to self-employed workers and subcontracted workers. The Committee notes that the Government states that dependent employee status is one of the fundamental requirements enshrined in the Labour Code regarding the granting of trade union registration. It can thus be concluded that the law only allows for the founding and registration of trade unions of dependent employees. The Committee recalls that by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 254]. The Committee requests the Government to take measures to amend, in consultation with the most representative workers' and employers' organizations, the legislation in order to allow trade unions of self-employed workers or trade unions which bring together contract workers to be founded and registered.
454. The Committee recalls that the Government freely ratified Convention No. 87, and that it is obliged to guarantee that the provisions of the Convention are respected. In light of the conclusions set out in the paragraphs above and if all procedural requirements have been met, the Committee requests the Government to register SINAMITO (whose membership consists of self-employed workers), the Trade Union of Workers of the Enterprise Barrick Gold and the Trade Union of Electricity Generator and Convertor Building and Repair Workers and Related of Haina (whose members are contract workers).
455. As to the National Trade Union of Workers of the Call Center Branch, the Committee notes that, according to the Government: (1) various workers who were listed in the documentation presented to the Ministry of Labour as members of the management committee of the trade union clearly informed both the Ministry of Labour and the committee managing the registry that they had not consented to their names being included on the list of participants for the constitution of the trade union in question; and (2) other individuals referred to in the application were not workers at any of the Call Center enterprises at the time when the application for registration was made. The Committee requests the complainant organization to communicate its observations concerning the Government's reply and expects that the Government and the trade union in question will together examine how the problems referred to by the Government might be resolved. The Committee also requests the Government to investigate claims of pressure being brought to bear on workers to get them to leave the trade union and if these allegations prove to be true, to take the necessary measures to prevent such acts from occurring in the future.
456. As to the United Trade Union of Workers of SUTRAMICEMA. The Committee regrets that the Government has not provided more details on the errors of substance and form to which it made a general reference. As to FUTRAMETAL, the Committee notes that, according to the Government, the founding documentation of this federation was returned so that the errors which prevented the trade union from being registered by the General Labour Director might be corrected. The Committee expects that the Government and the trade union and the federation in question will examine how the problems referred to by

the Government might be solved. The Committee requests the Government to keep it informed in this regard.

457. Finally, the Committee notes that the Government has not sent its observations regarding the allegations contained in the communication dated 8 July 2010 concerning anti-union dismissals, threats and practices in certain enterprises, such as the Frito Lay Dominicana enterprise, the Universal Aloe enterprise and the MERCASID enterprise and requests the Government to send its observations without delay, together with the views of these enterprises obtained through the most representative employers' organization.

The Committee's recommendations

458. *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, in consultation with the most representative workers' and employers' organizations, to take measures to amend the legislation in order to allow trade unions of self-employed workers or trade unions of contract workers to be founded and registered.*
- (b) *Recalling that the Government freely ratified Convention No. 87 and that it is obliged to guarantee that the provisions of the Convention are respected, and assuming that all procedural requirements have been met, the Committee requests the Government to register SINAMITO (whose membership consists of self-employed workers), the Trade Union of Workers of the Enterprise Barrick Gold and the Trade Union of Electricity Generator and Converter Building and Repair Workers and Related of Haina (whose members are contract workers).*
- (c) *As to the National Trade Union of Workers of the Call Center Branch, the Committee requests the complainant organization to communicate its observations concerning the Government's reply and expects that the Government and the trade union in question will together examine how the problems referred to by the Government might be resolved. The Committee also requests the Government to investigate claims of pressure being brought to bear on workers to get them to leave the trade union and if these allegations are proven to be true, to take the necessary measures to prevent any such acts from occurring in the future.*
- (d) *As to SUTRAMICEMA and FUTRAMETAL, the Committee expects the Government and the trade union and the federation in question, to examine how the problems referred to by the Government might be solved. The Committee requests the Government to keep it informed in this regard.*
- (e) *The Committee notes that the Government has not sent its observations regarding the allegations contained in the communication dated 8 July 2010 concerning anti-union dismissals, threats and practices in certain enterprises, such as the Frito Lay Dominicana enterprise, the Universal Aloe enterprise and the MERCASID enterprise and requests the Government to send its observations without delay, together with the views of these enterprises obtained through the most representative employers' organization.*

CASE NO. 2769

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

**Complaint against the Government of El Salvador
presented by
the Union of Family Physicians of the Salvadoran Institute
for Teachers' Welfare (SIMEFISBM)**

***Allegations: The complainant organization
alleges the anti-union dismissal of two of its
leaders from the Salvadoran Institute for
Teachers' Welfare***

459. The complaint is contained in a communication of the Union of Family Physicians of the Salvadoran Institute for Teachers' Welfare (SIMEFISBM) dated 18 March 2010.
460. The Government sent its observations in a communication of 26 July 2010.
461. El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

462. In its communication of 18 March 2010, the Union of Family Physicians of the Salvadoran Institute for Teachers' Welfare (SIMEFISBM) states that, in accordance with the notarial certificate granted in San Salvador, on 29 June 2009, it was constituted as an occupation-based union, in the presence of 36 founder members, including Dr José Alberto Calidonio Burgos, who works for the Salvadoran Institute for Teachers' Welfare (ISBM).
463. The complainant organization adds that, in accordance with the procedure established under national law, on 3 September 2009, the labour inspector appointed to deal with the case of the trade union being formed visited the premises of the ISBM and met with the Head of the Contracts and Procurement Department of the Institute. The inspector explained the reason for his visit to the Head of the department, who, in turn, stated that the 36 workers in question "are not employees of the Salvadoran Institute for Teachers' Welfare, given that they are contracted to provide professional services and participate in a public tender process in order to obtain contracts, in accordance with the Public Administration Procurement and Recruitment Act (LACAP)". The trade union being formed was made aware of this act so that it might present the necessary documentation to the Ministry of Labour and Social Welfare of El Salvador, in order to prove the employment relationship.
464. Through a document presented to the Ministry of Labour and Social Welfare, on 5 September 2009, Dr José Alberto Calidonio Burgos, acting in his capacity as president of the provisional executive committee of the trade union being formed, made the following statements: (1) that the workers providing services for and on the orders of ISBM are in a legal situation known in law as "fraudulent contract or simulated contract", quoting the corresponding jurisprudence on which his argument is based; (2) based on the "Principle of the primacy of reality", it is clear that an employment relationship exists between the founder members of the trade union and the ISBM, given that "what must prevail or

determine the regulations to be applied is the actual situation on the ground; such as the clear employment relationship between the contracted worker and the employer institution, where all the elements of an employment relationship are combined in an undeniable fashion: the performance of certain duties, in conditions of subordination and in exchange for a salary...thus we find ourselves before a true individual labour contract”, and (3) the contracts concluded with the ISBM are individual labour contracts (according to section 17 of the Labour Code of El Salvador) and not administrative contracts governed by the LACAP, given that the contracts of the founding members contain the requirements established by national law and jurisprudence to be considered as such, and therefore a clear employment relationship exists given that the workers provide their services subject to an established schedule, subordinate to the institution and in exchange for remuneration.

- 465.** The complainant organization states that it was decided, through ruling No. 46/2009 of the Ministry of Labour and Social Welfare, in San Salvador, of 18 September 2009, to: “(a) approve the text of the 82 articles making up the statutes of the trade union being formed known as the Union of Family Physicians of the Salvadoran Institute for Teachers’ Welfare (SIMEFISBM), at the same time granting it the legal personality requested; (b) let the said statutes be published in the *Official Journal*, along with the present ruling; and (c) let said trade union be recorded in the corresponding register ...”.
- 466.** The complainant organization states that, on 9 November 2009, document No. 685/2009 of the Ministry of Labour and Social Welfare was issued ordering that the membership of the general executive committee of SIMEFISBM (which was elected on 10 October 2009) for the period beginning on 29 October 2009 and ending on 29 June 2010 be registered. One name on the list of members of the general executive committee was that of Dr José Alberto Calidonio Burgos, secretary general of SIMEFISBM. SIMEFISBM states that, even though the Ministry of Labour issued an official ruling recognizing the existence of fraudulent contracts or simulated contracts in the case of the doctors who provide services for and on the orders of ISBM, the institute continues to claim that said contracts are administrative in nature and governed by the LACAP, with those workers providing their services to said institute being obliged to participate in public calls for tender (as they have been doing for years) in order to be recruited to provide medical services for another year. The complainant organization adds that, in the light of the refusal by the institute to recognize the true legal status of the doctors and the verbal warning issued by the president of the ISBM to Doctors Carlos Mauricio Rivera and José Alberto Calidonio Burgos that their respective contracts would no longer be renewed, the two doctors, in their capacity as SIMEFISBM representatives, submitted a request on 12 November 2009 with the Minister of Labour and Social Welfare, based on section 18 of the Constitution of El Salvador, for a meeting with the Minister of Labour as soon as possible, to set up a forum for dialogue with the aim of resolving the labour issues existing between the doctors and the said institute. Following this request, the respective governmental authorities failed to do enough to reconcile the parties or to mediate effectively in the dispute.
- 467.** The complainant organization states that, on 2 December 2009, at the request of SIMEFISBM, negotiations began on the premises of the ISBM involving the trade union and the executive council of the ISBM, in order to prevent the definitive and arbitrary dismissal of doctors Carlos Mauricio Rivera and José Alberto Calidonio Burgos, an anti-union measure which poses a threat to all the rights to organise freely enjoyed by the doctors of the trade union. The aim was to convince the executive council that proceeding with the dismissal of the doctors (members of the general executive committee of the trade union) would constitute a serious violation of the Constitution, the international agreements on trade union rights and the national labour law in force, given that the Constitution and labour legislation guarantee employment stability for those doctors members of the general executive committee of SIMEFISBM (including Dr José Alberto Calidonio Burgos, secretary general) for the period during which they occupy official trade

union positions (they also enjoy protection for up to a year after they have left their trade union posts). During said negotiations, the Office of the Attorney for the Defence of Human Rights of El Salvador was asked to attend as a mediator, together with a legal expert from the Institute of Human Rights of the Central American “José Simeón Cañas” University as an observer. The negotiations did not produce any solutions to the dispute between the parties and the only undertaking obtained from the executive council of the ISBM was that talks would continue to be held in order to resolve the dispute. However, at the time that this complaint to the ILO was drafted this undertaking had not been fulfilled, neither had the Office of the Attorney for the Defence of Human Rights of El Salvador played any role in conciliating the parties and thus resolving the dispute. This failure by the Office of the Attorney to act means that the dispute between the parties has become more serious, with the legal security of the doctors who provide their services to the ISBM being undermined.

- 468.** The complainant organization states that, on 18 December 2009, a special, unscheduled inspection of the premises of the ISBM was carried out by the Ministry of Labour and Social Welfare, which revealed that the contracts of the unionized doctors (including that of Dr José Alberto Calidonio Burgos, secretary general of the trade union, as well as those of all the other doctor who provide services at the institute) meet the requirements for individual labour contract status. Furthermore, the same inspection uncovered the fact that Dr José Alberto Calidonio Burgos was subjected to labour discrimination in his capacity as trade union leader when it was arbitrarily decided not to renew his contract for a further year. It was also discovered that the clause in the ISBM contract, which establishes the duration of that same contract as being a year, violates the Constitution of the Republic, more specifically, section 52 which establishes that the rights of the workers are inalienable. In conclusion, according to the complainant organization, the Ministry of Labour and Social Welfare determined that the contracts of the doctors providing services at the ISBM fulfil the requirements set out for individual labour contracts. Therefore, Dr José Alberto Calidonio Burgos cannot be dismissed owing to his position as a trade union leader, given that the special procedure set out for such cases in section 248 of the Labour Code was not followed. The ISBM was given two days to rectify its mistakes, but once the deadline passed the institute had still not complied with the Ministry of Labour’s recommendation.
- 469.** The complainant organization adds that, on 4 January 2010, the Ministry of Labour and Social Welfare carried out a further inspection of the premises of the ISBM to check whether said institute had rectified the violations identified during the unscheduled inspections carried out on 12, 17, 20 and 26 of November 2009. The results of the new inspection were also negative, with the institute continuing to carry out anti-union and discriminatory acts against Dr José Alberto Calidonio Burgos, secretary general of SIMEFISBM. The institute arbitrarily refused to renew Dr José Alberto Calidonio Burgos’ employment contract, leaving him unemployed as of 31 December 2009. The complainant organization states that, on not being reinstated in his post, Dr José Alberto Calidonio Burgos, secretary general of SIMEFISBM, requested a conciliatory hearing before the Ministry of Labour (file No. 11/2010), on 4 January 2010. The doctor requested the hearing with the sole aim of being reinstated in his post. The hearing was scheduled for 11 and 12 of January 2010, but the institute yet again refused to reinstate Dr José Alberto Calidonio Burgos, maintaining its anti-union and discriminatory behaviour.
- 470.** The complainant organization states that, on 13 January 2010, Dr José Alberto Calidonio Burgos, in his capacity as secretary general of SIMEFISBM (his term of office was due to end on 29 October 2010), received an official notification from the president of the ISBM stating that, as of 31 December 2009, he was no longer employed by the institute, owing to the fact that he had failed to participate in the respective call for tender set out under the LACAP. This decision violates the unionized doctors’ employment stability and other

trade union rights, which are recognized by the Constitution of the Republic, as well as international legislation and agreements. On 14 January 2010, Dr José Alberto Calidonio Burgos denounced the ISBM to the Office of the Superintendent of Pensions for failing to provide social benefits to the doctors providing services at said institute, such as Pension Funds Administrator payments or invalidity/old age/survivor pension contributions. To date, the Office of the Superintendent of Pensions has delayed the processing of the denunciation and finally, the Office made a verbal announcement that it would not act upon the denunciation given that the ruling issued by the Minister of Labour and Social Welfare recognizing the existence of individual employment contracts was not sufficient to initiate proceedings. On 22 January 2010, Dr José Alberto Calidonio Burgos went to the premises of the Office of the Attorney General of the Republic in order to file labour proceedings against the IBSM for unfair dismissals. This procedure is ongoing.

- 471.** On 28 January 2010, another unscheduled inspection was carried out at the premises of the IBSM, at which time it was established that: (a) an employment relationship exists between the doctors and the institute, and therefore, the LACAP does not apply; (b) based on the labour legislation, the doctors at the institute, and in particular Dr Calidonio and Dr Rivera, cannot be forced to tender for their posts, given that those posts are permanent in nature and individual employment contracts are open ended; and (c) Dr José Alberto Calidonio Burgos, in his capacity as a trade union leader, may not be dismissed, or subject to a worsening in his conditions of work, etc, during his term of office, and until after one year from having ceased his functions other than for just cause as previously determined by the competent authority, unless the special proceedings set out under section 248 of the Labour Code are brought against him before the Ministry of Labour. Therefore, it was again found that the institute had committed a violation in the form of the dismissal of Dr José Alberto Calidonio Burgos, a member of the general executive committee of the trade union, and it was recommended that the institute should reinstate the doctor in his post within three working days. Despite said violation and recommendation, the institute refused to reinstate the dismissed trade union leaders, again reiterating its anti-union, discriminatory stance.
- 472.** On 12 February 2010, a special inspection was carried out at the premises of the ISBM, as a result of which it was determined that said institute had committed another violation in the form of non-payment of salary arrears for the month of January 2010 to Dr José Alberto Calidonio Burgos due to causes attributable to the employer. The institute again denied the accusation that it had committed a violation, ignoring it and reiterating its anti-union stance (a stance which contravenes the laws of the Republic). On 8 March 2010, an inspector of the Department of Membership and Inspection of the Salvadorian Social Security Institute (ISSS) told Dr José Alberto Calidonio Burgos that the ISBM was being fined for failing to pay the workers' (the doctors) contributions, given that, in the opinion of the ISSS, the legal basis put forward by the Ministry of Labour in its respective inspection actions was sufficient. The complainants are waiting for the ISS to notify the parties officially of this ruling in writing. According to the complainant organization, the Constitution of El Salvador, Conventions Nos 87, 98 and 135 and the Labour Code have all been violated.

B. The Government's reply

- 473.** In its communication of 26 July 2010, the Government states that the Ministry of Labour and Social Welfare granted legal personality to SIMEFISBM through ruling No. 46/2009, dated 18 September 2009. In the light of the request for registration of the executive committee of the trade union, submitted by the interested parties on 9 November 2009, and the documentation contained in an annex to said request, in which it is stated that as a result of the process of election of the executive committee Doctors José Alberto Calidonio Burgos and Carlos Mauricio Rivera took office as secretary general and organization and

statistics secretary respectively, it was ruled that the executive committee of the trade union in question should be registered.

- 474.** The Government states that in the ruling through which the secretary of State granted legal personality to SIMEFISBM, it was established that an employment relationship existed between the doctors who participated in the founding of the trade union and the ISBM, with this fact being confirmed during the respective labour inspections which determined that services were being provided in conditions of subordination, a key characteristic of employment relationships. This situation suggests that an individual employment contract exists in accordance with section 20 of the Labour Code, contradicting the statements made by the employer to the effect that the institute is linked to the founders of the trade union by administrative, rather than employment, contracts. Consequently, it having been demonstrated that the founders of the trade union are employees of the institute, they enjoy the right of association for trade union purposes recognized by section 47 of the Constitution of the Republic, Article 2 of ILO Convention No. 87 and section 204 of the Labour Code, with the inclusion of said trade union in the register kept by the Ministry being admissible.
- 475.** The ruling issued by this Ministry of State granting legal personality to SIMEFISBM is irrefutable proof, as stated by the complainants, that in its role as the regulatory body which implements labour standards, the Government recognizes and protects the right to freedom of association, ensuring that the necessary conditions exist to allow the doctors to exercise fully their right to organise freely, in compliance with the mandate set out in article 8(b) of the Labour and Social Welfare Sector Organization and Functions Act, which states that: The specific functions of the Ministry of Labour and Social Welfare are: (b) to facilitate the constitution of trade union organizations, complying fully with Articles 2,3, 7 and 8 of ILO Convention No. 87.
- 476.** As to the dismissals of Dr José Alberto Calidonio Burgos, secretary general of SIMEFISBM, and Carlos Mauricio Rivera, organization and statistics secretary of the trade union, the interventions of the Ministry of Labour and Social Welfare were designed to protect the right to organise of the abovementioned trade union leaders, in accordance with Article 1 of ILO Convention No. 98. The following administrative actions were carried out in the same spirit:
- (a) On 9 November 2009, Doctors Calidonio Burgos and Rivera, SIMEFISBM trade union leaders for the period 29 October 2009 – 29 June 2010, lodged the corresponding request for special labour inspection, in which they claimed that they were being discriminated against owing to their status as trade union members and that, owing to the fact that they were unionized, the employer had taken the decision not to renew their respective contracts for the January-December 2010 period. This decision was made because the doctors were founder members of the trade union. The ISBM also pointed to the fact that the contract with the doctors was administrative rather than one of employment and that they must participate in a public tender process in order to compete for another contract with the institute. In response to the doctors' request, the General Labour Inspection Directorate carried out the corresponding inspection procedure, noting in the respective inspection records contained in file No. 631-UD-11-09, dated 18 December 2009, that the ISBM had infringed: section 30(5) of the Labour Code, which states that "Employers are forbidden to: directly or indirectly discriminate against workers owing to their unionized status or take reprisals against them for the same reason"; Article 1(b) of ILO Convention No. 111; and section 248 of the Labour Code which states that "Members of executive committees of trade unions with legal personality or in the process of obtaining such legal personality may not be dismissed transferred or subject to a worsening in their conditions of work nor suspended for disciplinary

reasons during the period of their election and term of office and until after one year from having ceased their functions other than for just cause as previously determined by the competent authority.” Consequently, the ISBM was warned to rectify the abovementioned violations by immediately reinstating the trade union leaders in their posts in the light of the trade union immunity which gives them job security and protects them from dismissal for anti-union motives.

- (b) On 4 January 2010, the General Labour Inspection Directorate carried out a further inspection to check whether the employer had complied with the warning issued by the labour inspectors regarding the reinstatement of the dismissed trade union leaders. On that occasion it was noted in the corresponding inspection record that the ISBM had not rectified the violation noted during the special inspection of 18 December 2009. Consequently, sanctions proceedings were initiated, in accordance with articles 53 and 59 of the Labour and Social Welfare Sector Organization and Functions Act and section 627 and the following sections of the Labour Code.
- (c) In addition to the inspection procedures carried out by the Ministry of State, the General Labour Directorate was requested by the illegally dismissed trade union leaders to intervene in a conciliatory capacity in an attempt to restore their trade union rights. The General Labour Directorate summoned the parties in dispute with the aim of bringing about a conciliation that would lead to the reinstatement of the abovementioned trade union representatives in their respective posts. A conciliatory hearing was held on 11 January 2010, but no solution to the labour dispute was found, despite the fact that the ministerial delegates were determined to resolve said labour dispute through dialogue and negotiation.
- (d) In the light of the refusal by the employer to reinstate the trade union representatives in their posts, on 22 January 2010, Dr. Carlos Mauricio Rivera requested the legal assistance and support of the Office of the Attorney General of the Republic, in order to bring the corresponding legal action against ISBM for his unfair dismissal. These proceedings are currently ongoing before the labour courts.

477. As can be seen from the facts referred to in this report, the Ministry of Labour and Social Welfare, in its capacity as Ministry of State responsible at the administrative level for safeguarding labour rights, duly carried out all the institutional actions within its remit in order to bring about the reinstatement of the illegally dismissed trade union leaders. The administrative authority duly noted the violations and initiated sanctions proceedings against the employer. Conciliatory interventions were also carried out to resolve the dispute, but no satisfactory outcome has to date been achieved owing to the position adopted by the ISBM.

478. In accordance with its mandate to safeguard the labour rights of the workers of the country, the Ministry of Labour shall continue to carry out any necessary institutional actions, in order to achieve the reinstatement of the dismissed doctors in the shortest possible time and to ensure that they are granted the guarantees and facilitates necessary for the full exercise of the trade union rights recognized by law in the case of both workers and employers. The legal proceedings initiated by Dr Rivera will be monitored and their outcome reported on.

479. The Government states that it will continue to work to ensure that this case is resolved and the rights of the trade unionists of the country are not violated and that it is aware of its obligation to promote and guarantee respect for the rights of the workers, as an indispensable element in achieving peace and social justice. Furthermore, the Government renews its undertaking to make the necessary effort to guarantee the practical observance of trade union freedoms in the country.

C. The Committee's conclusions

480. The Committee notes that, in the present case, the Union of Family Physicians of the Salvadoran Institute for Teachers' Welfare (SIMEFISBM) alleges the anti-union dismissal of the trade union leaders Doctors José Alberto Calidonio Burgos, secretary general, and Carlos Mauricio Rivera, organization and statistics secretary, of SIMEFISBM.
481. The Committee notes that the Government confirms that the dismissals in question took place and states that: (1) on 18 December 2009, the General Labour Inspection Directorate informed the Salvadoran Institute for Teachers' Welfare (ISBM) that, in the light of the trade union immunity which guarantees the doctors protection from dismissal and from dismissal for anti-union motives, the dismissed trade unionists should be reinstated in their posts; (2) on 4 January, the General Labour Inspection Directorate noted that the ISBM had not rectified the violation (the dismissal of the trade union leaders) and initiated sanctions proceedings; (3) the Minister of State attempted to restore the trade union rights of the dismissed trade union leaders through the General Labour Directorate and summoned the parties to a conciliatory hearing on 11 January with the aim of reconciling them and bringing about the reinstatement of the trade union leaders, but no agreement was reached; (4) in the light of the refusal by the ISBM to reinstate the trade union leaders, Dr Carlos Mauricio Rivera brought a legal action for unfair dismissal which is currently ongoing; and (5) the Ministry of Labour and Social Welfare carried out and shall continue to carry out all the necessary institutional actions to achieve the reinstatement of the dismissed trade union leaders.
482. In this regard, 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. It also recalls that in a case in which a trade union leader was dismissed and then reinstated a few days later, the Committee pointed out that the dismissal of trade union leaders by reason of union membership or activities is contrary to Article 1 of Convention No. 98, and could amount to intimidation aimed at preventing the free exercise of their trade union functions [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 771 and 810]. The Committee profoundly regrets the dismissals of the trade union leaders in question and, while recognizing the efforts made by the Government to obtain their reinstatement, requests the Government to continue to take all the measures at its disposals to ensure that Carlos Mauricio Rivera and José Alberto Calidonio Burgos are reinstated in their posts at the ISBM, and that they are paid the lost wages and other legal benefits and, if reinstatement is not possible for objective and compelling reasons, to ensure that they are paid adequate compensation which would constitute a sufficiently dissuasive sanction. The Committee requests the Government to keep it informed in this regard. Furthermore, the Committee requests the Government to keep it informed of the result of the sanctions proceedings initiated by the General Labour Inspection Directorate and of the fine imposed. The Committee expects that said fine will be sufficiently dissuasive in nature to ensure that such anti-union acts do not occur in future at the concerned enterprise.
483. Finally, the Committee requests the Government to keep it informed of the result of the legal procedure for unfair dismissal initiated by Carlos Mauricio Rivera, and to keep it informed regarding any legal proceedings initiated by José Alberto Calidonio Burgos.

The Committee's recommendations

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

- (a) The Committee requests the Government to take all measures at its disposal to obtain the reinstatement of José Alberto Calidonio Burgos and Carlos Mauricio Rivera in their posts at the ISBM, as well as the payment of the lost wages and other legal benefits and to keep them informed in that regard. If reinstatement is not possible for objective and compelling reasons the Committee requests the Government to ensure that they are paid adequate compensation which would constitute a sufficiently dissuasive sanction. Furthermore, the Committee requests the Government to keep it informed of the result of the sanctions proceedings initiated by the General Labour Inspection Directorate and of the fine imposed. The Committee expects that said fine will be sufficiently dissuasive in nature to ensure that such anti-union acts do not occur in future at the enterprise concerned.**
- (b) The Committee requests the Government to keep it informed of the result of the legal procedure for unfair dismissal initiated by Carlos Mauricio Rivera, and to keep it informed regarding any legal proceedings initiated by José Alberto Calidonio Burgos.**

CASE NO. 2782

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

Complaint against the Government of El Salvador presented by the Trade Union Association of Nursing Professionals, Technicians and Aides (SIGPTEES)

***Allegations: Limits to the right to draw up the
trade union's statutes***

485. The Trade Union Association of Nursing Professionals, Technicians and Aides (SIGPTEES) lodged its complaint in a communication dated 20 May 2010.

486. The Government sent its observations in a communication dated 5 October 2010.

487. 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. Allegations of the complainant organization

488. In its communication dated 20 May 2010, the SIGPTEES indicates that it lodges a formal complaint against the Government of El Salvador owing to the limits placed on its right to draw up its statutes.

489. The complainant organization indicates that, as announced in the *Official Journal*, it was granted legal personality on 25 April 2008 as a trade union. It adds that it held an extraordinary general assembly on 27 March 2010 with a view to amending its statutes and that the quorum voted unanimously to amend article 2 as follows: “Membership of the Trade Union Association of Nursing Professionals, Technicians and Aides of El Salvador is open to persons with diplomas in nursing, nursing technologists, professional nurses, nursing technicians and nurses’ aides who are duly registered with the Nursing Profession Board of Supervisors of the Higher Health Council and who provide services in any part of the territory of the Republic of El Salvador, whether in public, private or official autonomous institutions”.
490. The complainant organization indicates that, in a written communication to the Ministry of Labour and Social Insurance dated 5 March 2010, it requested that the abovementioned article be amended in the statutes to allow it to affiliate both public and private sector workers.
491. On 25 March 2010, the representatives of the complainant organization, together with its secretary for disputes and a lawyer from the Human Rights Institute of José Simeón Cañas Central American University, acting as an observer, met with the director of the collective labour rights section of the Ministry of Labour. The complainant organization indicates that the director informed it on that occasion that the statutes could not be amended as proposed because the same trade union could not affiliate members from both the private and the public sectors.
492. On 8 April 2010, the same representatives and the persons accompanying them met with the legal adviser of the Ministry of Labour and Social Insurance. On that occasion, the complainant organization received confirmation that the statutes could not be amended as requested because section 76 of the Civil Service Law stipulates that: “for the purposes of the law, ‘trade union’ shall refer to any permanent association of public servants working for the same public administration institution”, meaning that it was not possible to mix public sector and private sector workers in the trade union association.
493. The complainant organization concludes by indicating that, to date, the matter of the denial or approval of the amendment to article 2 of the statutes has not been formally resolved, as it has received no written communication on the subject. The Ministry legal adviser promised to provide a denial within 15 days, but the only indication received is that the matter continues to be investigated with a view to providing the right response.

B. The Government’s response

494. In its communication dated 5 October 2010, the Government confirms that, in resolution No. 08/2008 of 28 March 2008, the Ministry of Labour and Social Insurance granted legal personality to the SIGPTEES, which was established as a trade union under the provisions of section 204 of the Labour Code.
495. The Government indicates that the request presented on 3 March 2010 to the Ministry of Labour and Social Insurance to amend article 2 of the statutes is inadmissible because trade unions cannot affiliate workers from both the private and the public sectors, given that section 76 of the Civil Service Law stipulates that: “for the purposes of the law, ‘trade union’ shall refer to any permanent association of at least 35 public servants working for the same public administration institution, for the study, improvement and protection of their respective common economic and social interests”.

- 496.** The Government emphasizes that there is a clear legal impediment to the constitution of mixed trade unions, or trade unions made up of public and private sector workers, given that section 76 mentioned above clearly stipulates that trade unions of public servants must be composed of employees working “for the same public administration institution”. The Government adds that, in El Salvador, the exercise of labour rights is the remit of various institutions: in the case of private sector workers, the Ministry of Labour and Social Insurance; in that of public sector employees, the Civil Service Tribunal. This is because there are substantial differences between public and private sector trade unions, for example with regard to: (i) the competent authority in the event of a collective labour dispute, which is the Civil Service Tribunal for the public sector, by virtue of sections 120–123 of the Civil Service Law, and the Ministry of Labour and Social Insurance for the private sector, by virtue of sections 467–470 of the Labour Code; (ii) article 221, paragraph 1, of the Constitution, which prohibits the right to strike in the public sector (“Strikes by public and municipal workers are prohibited, as is collective abandonment of duty ...”); and (iii) collective work agreements, which in the public sector are limited in ways that do not apply to the private sector: unlike private sector agreements, public sector collective agreements involve the Finance Ministry. In addition, article 246 of the Constitution establishes that “the public interest shall take precedence over private interests”, which is why there are limits to the exercise of freedom of association in the public sector.
- 497.** After referring to the principles of the supervisory bodies in respect of the application of Convention No. 87 to both public and private sector workers, the Government indicates that: (1) it is firmly committed to upholding the principles of Convention No. 87 and has made efforts to that end, even though the existing legal order does not allow it to comply with certain of the Convention’s provisions, owing to the impossibility to constitute trade unions of civil servants working in different public institutions; and (2) work is moving forward on an amendment to the Civil Service Law for submission to the legislative body. In addition, since article 47 of the Constitution was amended in 2009, it has been recognized that civil servants, public employees and municipal employees have the right to associate freely in the defence of their respective interests, forming professional associations or trade unions, it being nevertheless prohibited for such trade unions to affiliate private sector workers for the purposes of making up mixed trade unions.
- 498.** The Government asserts that, without breaking with the country’s institutional system, the approach adopted by the Ministry of Labour and Social Insurance is in compliance with that prescribed by Convention No. 87. Likewise, it can be concluded that as concerns the SIGPTEES, no action has been taken that infringes on the freedom of association of the public and private sectors, nor has the right to form professional associations enshrined in Article 11 of Convention No. 87 has been violated.
- 499.** The Government nonetheless goes on to say that, while it is true that article 47, paragraph 1, of the Constitution recognizes the right of “private employers and workers, without distinction of nationality, sex, race, creed or political beliefs and no matter what their activity or the nature of their work, to associate freely for the defence of their respective interests by establishing professional associations and trade unions”, and stipulates that the “same right shall be enjoyed by workers employed by autonomous official institutions, public servants and employees and municipal employees”, that right must be exercised within the legal provisions governing it, namely section 76 of the Public Service Law, and that it is not legally possible to apply two legal texts simultaneously to one professional association (the Civil Service Law and the Labour Code).

C. The Committee's conclusions

500. *The Committee observes that the complainant organization in the present case alleges limits to the right to draw up its statutes and to affiliate nursing staff from both the private and the public sectors.*
501. *The Committee takes note that, according to the complainant organization: (i) on 27 March 2010, an extraordinary general assembly convened to amend the statutes and that the quorum voted unanimously to amend article 2; (ii) in a written communication to the Ministry of Labour and Social Insurance dated 5 March 2010, the trade union requested that the abovementioned article be amended in the statutes to allow it to affiliate workers from both the public and the private sectors; (iii) on two occasions, the Ministry of Labour informed the trade union that the amendments to the statutes could not be given effect because one trade union could not affiliate both public and private workers; and (iv) to date, the matter of the denial or approval of the amendment to article 2 of the statutes has not been formally resolved, as there has been no written communication on the subject.*
502. *The Committee takes note of the Government's statements, according to which: (i) the request presented on 3 March 2010 to the Ministry of Labour and Social Insurance to amend article 2 of the statutes is inadmissible because, under the provisions of section 76 of the Civil Service Law, trade unions cannot affiliate workers from both the private and the public sectors; (ii) there is a clear legal impediment to the establishment of mixed trade unions; (iii) this is because there are substantial differences between trade unions from the private sector and trade unions from the public sector; (iv) work is being done on a proposed reform of the Civil Service Law for submission to the legislative body; (v) since article 47 of the Constitution was amended in 2009, it has been recognized that civil servants, public employees and municipal employees have the right to associate freely in the defence of their respective interests, forming professional associations or trade unions, it being nevertheless prohibited for such trade unions to affiliate private sector workers for the purposes of making up mixed trade unions; (vi) while it is true that article 47, paragraph 1 of the Constitution recognizes the right of private employers and workers to associate freely in the defence of their respective interests, forming professional associations or trade unions, there exists a clear legal impediment to the establishment of mixed trade unions, meaning trade unions made up of public and private sector workers, so long as section 76 of the Civil Service Law clearly stipulates that trade unions of public servants must be made up of employees working "for the same public administration institution"; and (vii) without breaking with the country's institutional system, the approach of the Ministry of Labour and Social Insurance is in compliance with that prescribed in Convention No. 87.*
503. *The Committee concludes that the legislation as it currently stands does not allow a trade union to affiliate both public sector and private sector workers. Likewise, it can be deduced from the Government's response that there are technical problems, given that the exercise of labour rights (constitution of trade unions, system for collective disputes and collective work agreements, right to strike, which is prohibited in the public sector, etc.) is regulated by different laws (the Labour Code and the Civil Service Law) and by different institutions: in the case of private workers, the Ministry of Labour and Social Insurance, and in the case of public employees, the Civil Service Court. In the Committee's view, the demand of the SIGPTEES to be permitted to affiliate nursing professionals, technicians and aides from both the private and the public sectors is perfectly legitimate, and it recalls that, with regard to restrictions limiting all public servants to membership of unions confined to that category of workers, it is acceptable for first-level organizations of public servants to be limited to that category of workers on condition that their organizations are not also restricted to employees of any particular ministry, department or service, and that*

the first-level organizations may freely join the federations and confederations of their own choosing [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, para. 337].

- 504.** *The Committee notes with interest that the Government states that it firmly intends to comply with the principles of Convention No. 87 in view of the legal impossibility to constitute mixed trade unions of private and public sector workers, and that it is working on a draft reform of the Civil Service Law for submission to the legislative body. The Committee asks the Government, in consultation with the most representative workers' and employers' organizations, to accelerate the procedure for amending the legislation, ensuring that it fully guarantees the respect of the freedom of association principles for civil servants, and expresses the firm hope that in the very near future the SIGPTEES will be able to modify its statutes in order to represent nursing professionals, technicians and aides from not just the private but also the public sector. The Committee asks the Government to keep it informed of the status of that reform and, in the meantime, to allow the trade union in practice to represent nursing professionals, technicians and aides from the private and the public sectors.*

The Committee's recommendation

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

The Committee notes with interest that the Government states that it firmly intends to comply with the principles of Convention No. 87, in view of the legal impossibility to constitute mixed trade unions of private and public sector workers, and that it is working on a draft reform of the Civil Service Law for submission to the legislative body. The Committee asks the Government, in consultation with the most representative workers' and employers' organizations, to accelerate the procedure for amending the legislation, ensuring that it fully guarantees the respect of the freedom of association principles for civil servants and expresses the firm hope that in the very near future the SIGPTEES will be able to modify its statutes in order to represent nursing professionals, technicians and aides from not just the private but also the public sector. The Committee asks the Government to keep it informed of the status of that reform and, in the meantime, to allow the trade union in practice to represent nursing professionals, technicians and aides from the private and the public sectors.

CASE NO. 2203

INTERIM REPORT

Complaints against the Government of Guatemala

presented by

- **the Guatemalan Workers' Trade Union (UNSITRAGUA) and**
- **the Guatemalan Trade Union, Indigenous and Campesino Movement (MSICG)**

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

- 506.** The Committee examined the substance of this case on five occasions [see 330th, 336th, 342nd, 348th and 351st Reports], the last of which was at its November 2008 meeting when it submitted an interim report to the Governing Body [see 351st Report, paras 849–860, approved by the Governing Body at its 303rd Session].
- 507.** The Guatemalan Trade Union, Indigenous and Campesino Movement (MSICG) sent information regarding the issues arising in the present case in a communication dated 14 June 2010.
- 508.** The Government sent its observations in communications dated 25 May, 14 June, 6 and 20 September and 29 December 2010.
- 509.** 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

- 510.** At its November 2008 meeting, the Committee made the following interim recommendations relating to the allegations presented by the complainant organizations [see 351st Report, para. 860]:
- (a) The Committee once again urges the Government to take the necessary steps to send without delay full and detailed information regarding all the pending recommendations and to implement the objective to which the Government has referred of setting up a tripartite commission to undertake the independent investigations suggested.
 - (b) With regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations, and strongly requests the Government to refer these cases as a matter of

urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid, in 2002, on the headquarters of the trade union at the company ACRILASA and burning of documents.

- (c) With regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the Labour Inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard.
- (d) With regard to the allegations concerning the dismissal of trade unionists at the company ACRILASA and the violation of the collective agreement, the Committee once again urges the Government to send without delay any judicial decisions that are handed down on the dismissal of trade unionists, including the members of the executive committee, and on the violation of the collective agreement, as well as its observations on the allegations of pressure on union leaders and members to resign from their jobs or from the union.
- (e) With regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority, the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, and the request for measures to be taken to ensure that all wages owed to union leader Mr Gramajo are paid without delay, the Committee requests the Government to send information without delay on the proceedings still pending and to take the necessary measures to ensure that all wages owed to Mr Gramajo are paid without delay.
- (f) With regard to the allegation concerning the dismissal of union leader Mr Fletcher Alburez by the Ministry of Health in April 2001, the Committee urges the complainant organization to indicate whether Mr Alburez actually initiated ordinary reinstatement proceedings.
- (g) With regard to the alleged unilateral imposition by the Supreme Electoral Tribunal of an organization manual (dealing with matters related to employees' duties, posts and salary levels) and acts of anti-union discrimination in the application of the said manual, the Committee requests the Government to keep it informed without delay of the results of the Conciliation Tribunal which has been recently set up to deal with these issues. As for the alleged refusal of the Tribunal to meet the union leaders in order to negotiate a collective agreement, the Committee once again requests the Government as a matter of urgency to meet the parties in order to find a solution to the problems that have arisen and to send its observations on the matter.

B. Additional information from the complainant organizations

511. As to the alleged refusal of the Tribunal to meet the union leaders in order to negotiate a collective agreement, the MSICG states in its communication dated 14 June 2010 that, on 3 July 2001, the Trade Union of the Supreme Electoral Tribunal (STTSE) requested the General Labour Inspectorate to transfer the draft collective agreement on working conditions to the Higher Electoral Court so that it could be negotiated directly, in accordance with the procedure established under Guatemalan law. In the light of the refusal by the Higher Electoral Court to negotiate directly, the trade union approached the Labour Inspectorate on 22 August 2002.

512. On 30 October 2002, the trade union lodged a complaint regarding the refusal of the Higher Electoral Court to negotiate the draft collective agreement on working conditions presented by the trade union. The MSICG states that during the processing of the

complaint, the State of Guatemala lodged two special procedural conditions as a point of law and brought legal proceedings to have documents declared null and void with the sole aim of delaying the process. All of these proceedings were declared groundless and an appeal was lodged with the constitutional courts through an *amparo* (enforcement of constitutional rights) appeal, involving two more instances in each of these delaying actions initiated by the State.

513. Finally, the Conciliation Tribunal issued recommendations dated 13 April 2009 which were accepted by the trade union and rejected by the Higher Electoral Court. On 20 April 2009, the trade union requested the Conciliation Tribunal to rule on the legality of the strike, with the Conciliation Tribunal having to carry out the respective count in order to do so. On 17 June 2009, the Conciliation Tribunal ordered that the count be carried out, commissioning the General Labour Inspectorate in the capital city and sending communiqués to the judges in the various offices of the Supreme Electoral Tribunal.
514. The MSICG states that to date, the count has not been carried out owing to the inefficiency of the various tribunals commissioned to complete the task. As a result the ruling on the legality of the strike has been delayed for over a year now since the count was carried out and almost eight years since the State of Guatemala, through the Supreme Electoral Tribunal, avoided a collective bargaining process with the trade union.
515. The MSICG highlights that the practical effect of the actions of the tribunals and officials has been to deny the worker members of STTSE their right to collective bargaining and to strike, following lengthy legal procedures in this regard lasting years.

C. The Government's reply

516. As to the dismissal of union leader Mr Fletcher Alburez by the Ministry of Health in April 2001 (recommendation (f)), the Government states in its communication dated 25 May 2010, that it requested information from the Third Labour and Social Welfare Court of the Department of Guatemala and that said court transmitted a copy of Ruling No. 294/2002 reinstating Mr Fletcher Alburez in his post with payment in damages of the unpaid wages.
517. As for the alleged refusal of the Tribunal to meet the union leaders in order to negotiate a collective agreement (recommendation (g)), the Government enumerates in its communication dated 29 December 2010, the reasons for the delay in the recount of the number of workers in favour of the strike: (a) the procedure started on 5 November 2002; (b) a resolution was promulgated on 16 June 2009 ordering the count of the number of workers at the national level; (c) notifications have been delivered on time to the departments concerned and noting that notifications had not been processed, the court decided to grant a period of ten days for the applicants to indicate the exact addresses where notifications could be sent to workers of the Supreme Electoral Tribunal; (d) on 26 August, the court decided, as a result of the return of several notifications due to the vacations period, that for a better administration of justice, judges should be commissioned; and (e) on 3 September, the Supreme Electoral Tribunal was also ordered to provide addresses corresponding to the Procedure No. 2768-2002 to ensure that all notifications had been delivered and, to date, none have been returned and the requested information is still awaited. Furthermore, in a communication dated 20 September 2010, the Government recognizes the delay in the recount that has been requested.

518. In addition, the Government provided a copy of the declaration of the partial unconstitutionality of the organization manual unilaterally imposed by the Supreme Electoral Tribunal (Rules of the Labour Relations of the Supreme Electoral Tribunal).
519. With regard to the allegations concerning the dismissal of trade unionists at the company Industrias Acrílicas de Centroamérica SA (ACRILASA) and the violation of the collective agreement (recommendation (d)), the Government states in its communication dated 6 September 2010 that the Trade Union of Workers of the Enterprise Industrias Acrílicas de Centroamérica brought a collective socio-economic dispute which was examined in the first instance by the Sixth Labour and Social Security Court which ruled on 5 September 2000 that: (i) the collective dispute had been brought; (ii) both parties were prohibited from taking reprisals against each other; and (iii) it was prohibited to terminate labour contracts without the permission of the labour judge who would ultimately hear the case regarding the dispute.
520. The Government adds that, in the interests of the above, the Higher Court of Justice referred the case to the Fourth Labour and Social Prevention Court to be heard. On examining the facts in the main proceedings, the judge noted that there existed a collective agreement on working conditions which was in force and which had the force of law for both parties to the dispute, and he held that the action filed by the Trade Union of Workers of the Enterprise Industrias Acrílicas de Centroamérica did not involve a collective socio-economic dispute, but rather violations of labour standards contained in the collective agreement in force. For this reason and based on the power granted to him by the law, the judge amended the proceedings (ruling dated 11 September 2000), revoking the ruling of the Court of the First Instance.
521. The Government states that it was for that reason that the reinstatements requested by the workers who had been dismissed became inadmissible, with the Higher Court of Justice consequently granting the *amparos* requested by the Enterprise Industrias Acrílicas de Centroamérica (*amparos* Nos 532/2001, 533/2001 and 534/2001) given that the workers enjoy the right to reinstatement only when the employer has been summoned regarding a collective socio-economic dispute.

D. The Committee's conclusions

522. *The Committee once again regrets that the Government's reply was incomplete despite the fact that the allegations refer to events which took place several years ago and include acts of violence against trade unionists, as well as acts of anti-union discrimination and interference. The Committee regrets the lack of cooperation on the part of the Government and the fact that it disregarded the Committee's previous recommendation, and is therefore urging the Government to implement the objective to which it has referred of setting up a tripartite commission to undertake the independent investigations suggested by the Committee on Freedom of Association.*
523. *As to the dismissal of the trade union leader Mr Fletcher Alburez by the Ministry of Health in April 2001, the Committee notes with interest that the Third Labour and Social Welfare Court of the Department of Guatemala issued Ruling No. 294/2002 reinstating Mr Fletcher Alburez in his post with payment in damages of the unpaid wages. The Committee asks the Government to confirm that the trade union leader concerned has been reinstated in application of the above ruling.*

524. As to the alleged refusal of the Supreme Electoral Tribunal to meet the union leaders in order to negotiate a collective agreement, the Committee notes that in its new allegations the MSICG recalls that this refusal took place in 2001 and was followed by delaying tactics, such as the rejection by the employer in 2009 of the recommendations of the Conciliation Tribunal. Furthermore, the MSICG states that when it attempted to declare a strike (2009) it was impossible to carry out a count of strikers because of the inefficiency of the authorities who were supposed to complete that task. Furthermore, the Committee notes the reasons given by the Government to recount the number of workers in favour of the strike and that it recognises a delay in this regard. The Committee notes that for several years now the parties have failed to conclude a collective agreement and that when the trade union attempted to declare a strike within the framework of the law, on various occasions the authorities failed to carry out a count of the workers in favour of strike action. The Committee highlights that “The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations”, and that “The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition (revised), paras 547–548]. The Committee regrets the time that has passed and the obstacles and delays to the collective bargaining process and requests the Government to promote collective bargaining between the Supreme Electoral Tribunal and the Guatemalan Workers’ Trade Union (UNSITRAGUA).
525. With regard to the alleged unilateral imposition by the Supreme Electoral Tribunal of an organization manual (dealing with matters related to employees’ duties, posts and salary levels) and acts of anti-union discrimination in the application of the said manual, the Committee takes note of the partial declaration of unconstitutionality of the organization manual and highlights that the matters of common interest to the employer and the workers should be the subject of in-depth consultation with the trade union concerned. The Committee invites the complainants to provide information as to whether all issues relating to the allegations have been resolved.
526. With regard to the allegations concerning the dismissal of trade unionists at the company ACRILASA, the Committee notes that the Government states that: (i) the members of the Trade Union of Workers of the Enterprise Industrias Acrílicas de Centroamérica brought a collective socio-economic dispute which was examined in the first instance by the Sixth Labour and Social Security Court; (ii) the Higher Court of Justice referred the case to the Fourth Labour and Social Prevention Court; (iii) on examining the facts in the main proceedings, the judge noted that there existed a collective agreement on working conditions which was in force and which had the force of law for both parties to the dispute, and he held that the action filed by the Trade Union of Workers of the Enterprise Industrias Acrílicas de Centroamérica did not involve a collective socio-economic dispute; (iv) the judge amended the proceedings, revoking the ruling of the Court of the First Instance (provisionally); (v) it was for that reason that the reinstatements requested by the workers who had been dismissed became inadmissible, with the Higher Court of Justice consequently granting the amparos requested by the company. The Committee notes furthermore that the Government failed to provide information on the alleged pressure exerted by the company on union leaders and members to resign from their jobs or from the union and draws the Government’s attention to the fact that these practices constitute a grave violation of Convention No. 98.

527. *As to the remaining allegations, in the absence of the Government's observations, the Committee yet again reiterates its previous recommendations which are reproduced below and urges the Government to send the information or take the actions requested:*

- *as regards the allegations concerning acts of violence and intimidation against trade unionists, as well as attacks on union headquarters (UNSITRAGUA alleged destruction of the headquarters of the union operating in the General Property Registry; death threats against Mr Baudilio Reyes, officer of the union operating at Agrícola Industrial Santa Cecilia SA; death threats against the general secretary of the union operating in the El Tumbador Municipality; death threats against the general secretary and the head of finance of the union operating at ACRILASA, as well as against union officers and union members; acts of intimidation against the general secretary; assaults on two members of the executive board and on union members; raiding with force of the union's headquarters and sacking or burning of property and/or documents; death threats against officers of the union operating at Finca La Torre; intimidation of union member Ms Nora Luz Echeverría Nowel at the El Tumbador Municipality; intimidatory surveillance of UNSITRAGUA headquarters and pursuit of union leader Mr Carlos Enrique Cos), the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations, and strongly requests the Government to refer these cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee once again invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid, in 2002, on the headquarters of the trade union at the company and burning of documents;*
- *with regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the Labour Inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard;*
- *with regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority, the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, and the request for measures to ensure that all wages owed to union leader Mr Gramajo are paid without delay, the Committee requests the Government to send information without delay on the proceedings still pending and to take the necessary measures to ensure that all wages owed to Mr Gramajo are paid without delay.*

The Committee's recommendations

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

- (a)** *The Committee regrets the significant obstacles and delays to the collective bargaining process between the Supreme Electoral Tribunal and UNSITRAGUA, as well as the obstacles to the exercise of the right to strike by the trade union and requests the Government to promote collective bargaining and to keep it informed in that regard.*

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- (b) *The Committee asks the Government to confirm that the trade union leader Mr Fletcher Alburez has been reinstated as ruled by the court.*
- (c) *The Committee invites the complainants to provide information as to whether all issues relating to the allegations concerning the organization manual have now been resolved.*
- (d) *As to the remaining allegations, in the absence of the Government's observations, the Committee yet again reiterates its previous recommendations which are reproduced below and urges the Government to send the information or take the actions requested:*
- *with regard to the allegations concerning assaults, death threats and acts of intimidation against trade unionists, as well as attacks on union headquarters, the Committee deeply regrets that, despite the seriousness of the matter, the Government has not sent full observations and strongly requests the Government to refer these cases as a matter of urgency to the Special Prosecutor for Offences against Trade Unionists and to keep it informed in this regard. The Committee again invites the Government to enter into contact with UNSITRAGUA with a view to providing a detailed reply regarding the case relating to the alleged raid, in 2002, on the headquarters of the trade union at the company ACRILASA and burning of documents;*
 - *with regard to the allegations concerning employer interference in union elections at the General Property Registry, which was confirmed by the Labour Inspectorate, the Committee once again requests the Government to take the necessary measures without delay to sanction the entity responsible, to provide for adequate compensation for the damages suffered and to ensure that similar acts do not occur in future. The Committee requests the Government to keep it informed in this regard;*
 - *with regard to the allegations relating to the Municipality of El Tumbador concerning the reinstatement proceedings ordered by the judicial authority, the dismissal of union officials César Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and César Adolfo Castillo Barrios, and the request for measures to ensure that all wages owed to union leader Mr Gramajo are paid without delay, the Committee requests the Government to send information without delay on the proceedings still pending and to take the necessary measures to ensure that all wages owed to Mr Gramajo are paid without delay.*

CASE NO. 2241

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

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

- **the Trade Union of Workers of Guatemala (UNSITRAGUA)**
- **the Guatemalan Union of Workers (UGT)**

supported by

- **the World Confederation of Labour (WCL)**
- **the Latin American Central of Workers (CLAT)**
- **the Movement of Trade Unions, Indigenous Peoples and
Agricultural Workers of Guatemala (MSICG) and**
- **the International Trade Union Confederation (ITUC)**

***Allegations: The complainant organizations
allege a number of anti-union acts in the Higher
Electoral Tribunal, at the La Esperanza Centre
and at Rafael Landívar University, as well as
physical and verbal abuse of trade unionists***

- 529.** The Committee last examined this case at its November 2009 meeting [see 355th Report, paras 751–765, approved by the Governing Body at its 306th Session].
- 530.** The Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) associated itself with the case in its communication of 25 January 2010. Likewise, the International Trade Union Confederation (ITUC) expressed support for the complainant organizations' allegations in its communication of 17 February 2010.
- 531.** The Government sent its observations in communications dated 2 February, 5 and 27 May, and 2 and 21 July 2010.
- 532.** 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

- 533.** At its November 2009 meeting, the Committee made the following interim recommendations with regard to the allegations presented by the complainant organization [see 355th Report, para. 765]:

- (a) With regard to the allegations concerning the Higher Electoral Court, the Committee urges the Government to send without delay the following: (1) the text of the ruling of the Labour and Social Insurance Appeal Court concerning the dismissal of trade unionist Victor Manuel Caño Granados; (2) the rulings concerning the dismissal of trade unionist Ulalio Jiménez Esteban and the suspension of 15 days' wages of trade unionist Pedro Rudolp Menéndez Rodas.
- (b) As regards the dismissals of Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, according to the allegations, after they had applied to join a union representing workers at the Higher Electoral Court, the Committee requests the Government to ensure

that the labour inspectorate conducts an investigation into these dismissals without delay and, if it is shown that they were carried out for anti-union reasons, to take steps to ensure that the workers in question are reinstated immediately in their places of work.

- (c) As regards the allegations of threats of dismissal and threats to the safety of trade union members in the context of the dispute in the teaching sector between the union and the Fundación Movimiento Fe y Alegría Fathers' and Mothers' Associations at the La Esperanza Centre, the Committee, taking into consideration the Government's statements to the effect that the competent authorities in criminal matters have not received any complaints, invites the complainant organizations to lodge a formal complaint concerning the allegations with the competent authorities and to provide as much information as possible. The Committee also reiterates its recommendation that the Government should ensure that the workers in these institutions are able to join the union freely and without any form of intimidation, that the report of the labour inspectorate on violations of trade union rights is made available to the union, and that labour relations are conducted in a climate free from intimidation and violence.

B. The Government's reply

- 534. In its communication of 2 February 2010, the Government indicates, as regards the allegations of threats of dismissal and threats to the safety of trade union members in the context of the dispute in the teaching sector between the union and the Fathers' and Mothers' Associations (*Movimiento Fe y Alegría*) at the La Esperanza Centre, that the foundation has been dissolved and that its obligations under the Labour Code have been duly met, each worker having received his outstanding pay and other emoluments. The Government further indicates that the association is being wound up.
- 535. As regards the allegations relating to the Higher Electoral Court, the Government indicates in its communication of 2 February 2010 that the case of Mr Pedro Rudolp Menéndez Rodas was heard by the Third Chamber of the Labour and Social Insurance Court, which confirmed the ruling, dismissing the charge of retaliatory action (suspension of 15 days' wages) brought by the trade unionist, and that the case is therefore closed. Disciplinary action was taken against Mr Menéndez Rodas for misconduct considered to be serious, as he was employed as a security guard and was discovered by the court inspector and other persons under the influence of alcohol.
- 536. In addition, in its communications of 2 and 21 July 2010, the Government adds that the ruling of 16 March 2009 authorizing the termination of the individual employment contract of Mr Ulalio Jiménez Esteban (an employee of the Higher Electoral Court) indicates that the grounds for dismissal were serious misconduct, failing to show up for work on numerous and repeated occasions without written justification, dereliction of duty, failure to obtain prior permission and absences not accepted by his immediate supervisor; the ruling authorizes the Higher Electoral Court to put an end to the working relationship with Mr Ulalio Jiménez Esteban once the judgement becomes enforceable. The Government indicates that on 21 July 2009, the Third Chamber of the Labour and Social Insurance Appeal Court handed down its decision confirming the ruling of 16 March 2009.
- 537. The Government concludes that Messrs Ulalio Jiménez Esteban and Pedro Rudolp Menéndez Rodas in any case submitted resignations from their jobs with the court (documents Nos 004-2007 and 01-2008), which were accepted, and that the corresponding emoluments were subsequently cancelled.
- 538. As regards the allegations concerning the Higher Electoral Court and the dismissal of trade unionist Víctor Manuel Caño Granados, the Government indicates in its communication of 5 May 2010 that the Third Chamber of the Labour Appeal Court ruled on 3 August 2005 that there were no grounds for reinstating Mr Caño Granados given that it had not been shown that the dismissal had been ordered as a retaliatory measure and in view of his past

misconduct and the disciplinary action taken against him (a copy of the decision is appended).

539. As regards the dismissal of Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar (recommendation (b)), the Government indicates in its communication of 27 May 2010 that it is taking action through the labour inspectorate to ascertain whether the dismissals were carried out for anti-trade union reasons.

C. The Committee's conclusions

540. *As regards the allegations of threats of dismissal and threats to the safety of trade union members in the context of the dispute in the teaching sector between the union and the Fathers' and Mothers' Associations (Movimiento Fe y Alegría) at the La Esperanza Centre, the Committee notes that the foundation has been dissolved and that its obligations under the Labour Code have been duly met, each worker having received his outstanding pay and other emoluments. Moreover, the complainant organizations have submitted no additional information in that regard.*
541. *As regards the allegations relating to the Higher Electoral Court and the rulings relating to the dismissal of trade unionist Ulalio Jiménez Esteban and the 15 days' suspension of wages of trade unionist Pedro Rudolp Menéndez Rodas, the Committee notes the following: (1) the case was heard by the Third Chamber of Labour and Social Insurance, which on 11 July 2007 confirmed the ruling dismissing the charge of retaliatory action brought by Mr Pedro Rudolp Menéndez Rodas, and the case is therefore closed; in the case of Mr Menéndez Rodas, disciplinary action for serious misconduct was taken against him; (2) the ruling authorizing the termination of the individual employment contract of Mr Ulalio Jiménez Esteban was handed down on 16 March 2009 and confirmed on appeal, and it indicates that the worker was dismissed for reasons unrelated to his trade union activities; and (3) in any case, Messrs Ulalio Jiménez Esteban and Pedro Rudolp Menéndez Rodas sent their employer letters of resignation which were accepted and the corresponding emoluments were subsequently cancelled. In these circumstances, in the absence of any additional information from the complainants, the Committee will not proceed with the examination of these allegations.*
542. *As regards the allegations relating to the Higher Electoral Court and the dismissal of trade unionist Víctor Manuel Caño Granados, the Committee observes that on 3 August 2005, the Third Chamber of the Labour Appeal Court rejected the reinstatement of trade unionist Victor Manuel Caño Granados in view of his past misconduct and the disciplinary action taken against him, having determined that it had not been shown that the dismissal had been ordered as a retaliatory measure. In these circumstances, in the absence of any additional information from the complainants, the Committee will not proceed with the examination of these allegations.*
543. *As regards the dismissal of Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, the Committee takes note of the Government's information that measures are being taken through the labour inspectorate to ascertain whether the dismissals were carried out for anti-trade union reasons, appending copies of the measures. The Committee requests the Government to keep it informed of any developments and of the labour inspectorate's conclusions with regard to the reasons for the dismissals.*

The Committee's recommendation

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

As regards the dismissal of Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, the Committee takes note of the Government's information that measures are being taken through the labour inspectorate to ascertain whether the dismissals were carried out for anti-trade union reasons. The Committee requests the Government to keep it informed of any developments and of the labour inspectorate's conclusions with regard to the reasons for the dismissals.

CASE NO. 2341

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

Complaint against the Government of Guatemala presented by

- **the Workers' Trade Union of Guatemala (UNSITRAGUA) and**
- **the International Trade Union Confederation (ITUC)**

Allegations: Interference in the internal affairs of the Trade Union of Portuaria Quetzal; dismissals in the Municipality of Comitancillo (department of San Marcos) in violation of a court reinstatement order; dismissal of a member of the Trade Union of the Supreme Electoral Tribunal; harassment and issuing of a warrant for the arrest of an official of the Education Workers' Trade Union of Guatemala; failure by the Crédito Hipotecario Nacional Bank to recognize the results of trade union elections; use of threats and intimidation against the executive committee of the trade union

545. The Committee last examined this case at its November 2009 meeting [see 355th Report of the Committee, paras 766–774, approved by the Governing Body at its 306th Session].

546. The Union Movement of Guatemalan Indigenous and Agricultural Workers (MSICG) asserted itself as a complainant in this case in a communication dated 25 January 2010. The International Trade Union Confederation (ITUC), in its communication dated 17 February 2010, also indicated that it supported the complaints of UNISTRAGUA and the ICFTU.

547. The Government sent its observations in communications dated 2 February, 5 and 13 May, and 15 and 25 June 2010.

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

A. Previous examination of the case

549. In its November 2009 meeting, the Committee made the following interim recommendations concerning the allegations presented by the complainant organization [see 355th Report, para. 774]:

- (a) With respect to the dismissal of 18 employees from the municipality of Comitancillo (San Marcos), the Committee deplores the long delay that has occurred owing to the various procedures and appeals, and recalls that justice delayed is justice denied, and asks the Government to send the ruling handed down in this matter by the Fourth Court of Labour and Social Welfare;
- (b) As to the remaining allegations, the Committee deeply deplores finding itself obliged for a second time, in view of the lack of response from the Government or the complainant organizations, to reiterate its earlier recommendations, reproduced below:
 - With regard to the alleged interference by the enterprise Portuaria Quetzal in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, the Committee requests the Government to send its observations without delay on any administrative or judicial decision taken, particularly with regard to the fact that the decisions of the trade union assembly were challenged by 113 of the 600 members.
 - The Committee requests the complainant organizations to send additional information on the alleged warrant for the arrest of Mr Jovial Acevedo, Secretary General of the STEG (file number, court, etc.), to enable the Government to communicate its response;
 - With respect to the allegations by UNSITRAGUA dated 17 May 2007, the Committee regrets that the Government has not replied and urges it to send its observations without delay on the allegations relating to: (1) the non-recognition by Crédito Hipotecario Nacional Bank of the union officials chosen by the union's general assembly on 15 December 2006, despite an administrative decision establishing that the employer was not legally entitled to challenge the trade union elections; (2) the provisional decision handed down by the Supreme Court of Justice in connection with a remedy of amparo (appeal for protection of constitutional rights) lodged by the bank to suspend the abovementioned administrative decision on a provisional basis; and (3) the refusal to grant trade union leave to the union official Héctor Alfredo Orellana Aroche, on the basis of the abovementioned provisional decision handed down by the Supreme Court of Justice. The Committee also requests the Government to send the text of the ruling handed down by this Court; and
- (c) On a more general note, the Committee urges the Government to be more cooperative with the procedure in future, particularly given that this case was presented a number of years ago.

B. The Government's replies

550. In its communications dated 2 February and 5 May 2010, the Government provides information on: (i) the allegations regarding the practices of the Ministry of Education in promoting subcontracting in the *Movimiento Fe y Alegría* association through parents' associations, with the objective of weakening the trade union, by making renewal of contracts conditional on not belonging to the union; and (ii) the allegations relating to the dismissal of the trade union member Víctor Manuel Cano Granados (this information is not

recorded here, since this and the complainants' allegations are examined in this report in the context of a previous case (No. 2241)).

551. With regard to the alleged arrest warrant against Jovial Acevedo, the STEG's Secretary-General (second paragraph of recommendation (b)), the Government in its communication dated 13 May 2010 reiterates its earlier information, namely: (1) the Special Attorney for Crimes against Journalists and Trade Unionists has not received any complaint regarding such an incident, but has received one regarding the break in and theft carried out on the union headquarters; and (2) the Sixth Criminal Court of First Instance indicated that it was asked to examine criminal case No. 13456-2006, in which Mr Jovial Acevedo had filed a complaint in his capacity as Secretary-General of the STEG and coordinator of the General Assembly of the Teaching Profession, alleging that he had been coerced and threatened, but this case was set aside and archived, at the litigant's own request, by an order dated 6 September 2007, there being no complaint relating to the warrant for arrest in connection with his participation in the protest demonstrations against the adoption of the Free Trade Agreement. The Government adds that to date the information requested by the Committee from the complainant organization has not been received, which shows the complainant's lack of interest in establishing the facts and makes it clear that there is not, and never was, any truth in the complaint.
552. With regard to the refusal to grant trade union leave to the union official Héctor Alfredo Orellana Aroche, on the basis of the provisional decision handed down by the Supreme Court of Justice (referred to in the third paragraph of recommendation (b), point (3)), the Government indicates in its communication of 15 June 2010 that, in an official letter dated 11 February 2010, it requested information from the General Labour Inspectorate as to whether any complaint had been received from Mr Héctor Alfredo Orellana Aroche concerning his employer's refusal to grant trade union leave. The Government adds that on 27 April 2010, the General Labour Inspectorate reported that in the adjudication of case file No. R1-960-2010 of the Crédito Hipotecario Nacional Bank of Guatemala, Mr Orellana Aroche and other members of the union stated that between 2007 and 2008, approximately, there were indeed problems with the exercise of trade union leave. This is no longer the case; the problem has been resolved, and trade union leave is now granted in accordance with the law and the collective agreement. To date, the issues with the employer have been resolved with the intervention of the Ministry of Labour and Social Welfare as a goodwill mediator, which persuaded the authorities of the Crédito Hipotecario Nacional Bank of Guatemala to comply with the requirement to grant trade union leave.
553. With regard to the Crédito Hipotecario Nacional Bank's refusal to recognize the union officials elected by the union's general assembly on 15 December 2006, despite an administrative decision which established that the employer was not legally entitled to contest the trade union elections, and with the provisional decision handed down by the Supreme Court of Justice in connection with a remedy of *amparo* (constitutional protection) lodged by the bank to suspend the abovementioned resolution on a provisional basis (recommendation (b), third paragraph, points (1) and (2)), the Government indicates in its communication dated 25 June 2010 that on 18 December 2006, the Secretary-General of the executive committee of the Workers' Trade Union of the Crédito Hipotecario Nacional Bank of Guatemala notified the head of the human resources department that the union's general assembly had been held and informed her of the composition of the executive committee and advisory council. The Government adds that in response to the abovementioned official letter, the head of human resources of the Crédito Hipotecario Nacional Bank of Guatemala sent the union an official letter stating that the employer did not recognize the members of the executive committee or the advisory council.
554. The Government states that the General Manager of the Crédito Hipotecario Nacional Bank of Guatemala made his disagreement clear to the Director-General of Labour with

regard to the registration of the members of the executive committee and advisory council of the Workers' Trade Union of the Crédito Hipotecario Nacional Bank, requesting that the elected union officials in question not be recognized, a demand that was addressed in ruling No. 943-2006 by which it was decided that "... The claimant's disagreement must be dealt with through the appropriate channels and the party provided under the law and statutes for that purpose, since it is established that the union elections were carried out in the exercise of the trade union autonomy enjoyed by organizations of this type and in accordance with the right to freedom of association on a collective basis." The Government indicates that the Crédito Hipotecario Nacional Bank disagreed with the outcome and appealed against the ruling handed down by the Directorate General of Labour which, in its ruling No. 4/20G7, rejected the appeal.

555. The Government also indicates that: (1) given the rejection of this appeal, the general manager of the Crédito Hipotecario Nacional Bank of Guatemala appealed for constitutional protection (*amparo*) against the Ministry of Labour and Social Welfare, claiming that this authority had failed to respect the law by issuing a decision which protected the illegality of the elections held by the union, which was granted provisional constitutional protection; (2) it was concluded that the manager had requested constitutional protection without first exhausting the corresponding judicial procedure, and on that basis the protection requested by the Crédito Hipotecario Nacional Bank of Guatemala was refused and, as a consequence, the provisional constitutional protection was withdrawn; (3) the General Manager lodged an appeal stating that he had requested constitutional protection, not a court review of the decision, since, based on decision 4/2007 of the Ministry of Labour, the constitutional provisions had clearly been violated and the union elections had been illegal; and (4) it was determined that it is for the general assembly of the union's members, not the employer, to contest union election results, and the Constitutional Court therefore upheld the contested ruling. The Government explains that despite the various means which the management has used in order to avoid recognizing the trade union officials, the latter retained their positions as officials and, in accordance with Guatemalan legislation, the rights of the union's members were fully respected; there was thus no non-compliance with the Conventions on freedom of association and collective bargaining ratified by Guatemala.

C. The Committee's conclusions

556. *As regards the alleged warrant for the arrest of Mr Jovial Acevedo, the Secretary-General of the STEG, the Committee notes that the Government reiterates the information previously provided, namely: (1) the Special Attorney for Crimes against Journalists and Trade Unionists has not received any complaint regarding such an incident, but has received one concerning the break in and theft carried out on the union headquarters; and (2) the Sixth Criminal Court of First Instance indicated that it was examining criminal case No. 13456-2006, in which Mr Jovial Acevedo had filed a complaint alleging, in his capacity of Secretary-General of the STEG and coordinator of the General Assembly of the Teaching Profession, that he had been coerced and threatened, but the case in question was set aside and archived, at the litigant's own request, by an order dated 6 September 2007, there being no complaint regarding the abovementioned arrest warrant for his participation in the protests against the adoption of the Free Trade Agreement. Given that the Committee has been unsuccessfully requesting that the complainant organizations send additional information on the alleged warrant for Mr Jovial Acevedo's arrest, and bearing in mind the Government's observations, the Committee will not pursue its examination of this allegation.*
557. *With regard to the refusal to grant trade union leave to the union official Héctor Alfredo Orellana Aroche, the Committee notes with interest that to date the issues with the employer concerned by the complaint have been resolved through the intervention of the*

Ministry of Labour and Social Welfare as a goodwill mediator, which persuaded the authorities of the Crédito Hipotecario Nacional Bank of Guatemala to comply with the requirement to grant trade union leave.

558. *With regard to the Crédito Hipotecario Nacional Bank's refusal to recognize the trade union officials elected by the union's general assembly on 15 December 2006, the Committee notes the rulings handed down by the courts following the repeated appeals lodged by the employer. These rulings confirmed the legality of the contested elections of trade union officials.*

559. *With regard to the remaining allegations, the Committee deeply deplores finding itself obliged, in view of the lack of response from the Government, to reiterate its previous recommendations on certain allegations and urges the Government to reply without delay:*

- *With respect to the dismissal of 18 employees from the municipality of Comitancillo (San Marcos), the Committee deplores the long delay that has occurred owing to the various procedures and appeals, and recalls that justice delayed is justice denied. It asks the Government to send the ruling handed down in this matter by the Fourth Court of Labour and Social Welfare, and to inform it whether the abovementioned workers have been reinstated following the decision of the Constitutional Court dated 14 November 2006.*
- *With regard to the alleged interference by the enterprise Portuaria Quetzal in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, the Committee requests the Government to keep it informed of any administrative or judicial decision taken on this issue, particularly with regard to the fact that the decisions of the trade union assembly were challenged by 113 of the 600 members.*

The Committee's recommendation

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

The Committee deeply deplores finding itself obliged, in view of the lack of response from the Government, to reiterate its previous recommendations on certain allegations and urges the Government to reply without delay:

- *With respect to the dismissal of 18 employees from the municipality of Comitancillo (San Marcos), the Committee deplores the long delay that has occurred owing to the various procedures and appeals, and recalls that justice delayed is justice denied. It asks the Government to send the ruling handed down in this matter by the Fourth Court of Labour and Social Welfare, and to inform it whether the abovementioned workers have been reinstated following the decision of the Constitutional Court dated 14 November 2006.*
- *With regard to the alleged interference by the enterprise Portuaria Quetzal in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, the Committee requests the Government to keep it informed of any administrative or judicial decision taken on this issue, particularly with regard to the fact that the decisions of the trade union assembly were challenged by 113 of the 600 members.*

Complaint against the Government of Guatemala presented by

- **the World Confederation of Labour (WCL) (in 2005) 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

- 561.** The Committee last examined this case at its March 2010 meeting and presented an interim report to the Governing Body [see 356th Report, paras 772–778, approved by the Governing Body at its 307th Session (March 2010)].
- 562.** The Government sent its observations in communications dated 24 May, 22 June, 2 July and 13 September 2010.
- 563.** 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

- 564.** At its March 2010 meeting the Committee made the following recommendations concerning the allegations presented by the complainant organization [see 356th Report, para. 778]:
- (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 Raquéc 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 Raquéc, 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.

B. The Government's reply

565. As regards the alleged violations of the union rights of the Trade Union Association of Itinerant Vendors of Antigua in the Department of Sacatepéquez (recommendation (e)), the Government indicates in its communication of 24 May 2010 that the Ministry of Labour

and Social Welfare requested information from the magistrate's court of the municipality of Antigua in the Department of Sacatepéquez concerning whether the members of the aforementioned union had filed a complaint with regard to the acts committed against them. The magistrate's court replied that on 5 May 2005 the complaint presented by Higinia Concepción López, Moisés González Buc, Sofía Buc Selvin and Miguel Ángel Buc Cotzal against officers of the Sacatepéquez municipal police (complaint No. 206-2005) was received. The Government adds that the complaint is the responsibility of the Third Court, which was unable to initiate proceedings owing to the lack of information from the trade union needed to issue a summons in accordance with the law.

- 566.** As regards the allegations of violations in relation to collective bargaining in the municipality of Río Bravo, Suchitepéquez (recommendation (g)), the Government states in its communication of 22 June 2010 that the Constitutional Protection Chamber of the Supreme Court issued the final judgment rejecting the appeal for *amparo* (protection of constitutional rights) filed by the Standing Committee of Workers of the Municipality of Río Bravo on 31 May 2007. The Government indicates that the Standing Committee of Workers of the Municipality of Río Bravo filed an appeal with the Constitutional Court, which issued a ruling on 7 February 2008 upholding the refusal to grant *amparo*.
- 567.** As regards the allegations concerning the attempted murder of trade unionist Marcos Álvarez Tzoc (recommendation (c)), the Government indicates in its communication dated 2 July 2010 that Mr Julio Enrique de Jesús Salazar Pivaral (who committed the acts referred to previously), following the decision issued by the Court of Criminal Judgment, filed a special appeal in form and substance which was rejected and consequently came before the Constitutional Court. The Government adds that on 21 March 2007 the Constitutional Court issued ruling No. 2213-2006 upholding the operative part of the ruling which was appealed against. The Government concludes that since the rulings are pending and not immediately enforceable, it will keep the Committee informed of the progress of the criminal proceedings in question.
- 568.** As regards the murder of Mr Julio Rolando Raquec (recommendation (c)), the Government states in its communication dated 13 September 2010 that on 26 July 2010 it requested updated information on the progress of the investigations. On 10 August 2010 it was informed that "on the date of removal of the corpse of the victim, the partner of the deceased was interviewed by agents of the Criminal Investigation Service of the National Civil Police and indicated that the persons who had shot her partner were gang members operating in that sector".
- 569.** According to a detailed report dated 24 February 2009 from Bureau 03 of the Public Prosecutor's Office for the Investigation of Violent Crime, a department of the Attorney-General's Office, it has been impossible to establish the exact whereabouts of the deceased person's partner, Ms Lidia Merida Coy. Since she was an eyewitness to the events that occurred, it is impossible to initiate criminal proceedings as her statement has not been verified and there is insufficient corroboration to take action. With a view to shedding light on the death of Mr Julio Rolando Raquec, every effort has been made to try to locate Ms Lidia Merida Coy so that she can make a statement as an eyewitness, since she holds certain persons responsible for the death of her partner, namely Víctor Alfonso Cruz Zacarías, Pedro Luis Gómez Herrera, Mario Alexander Galicia Gómez, Luis Roberto García Guzmán, Carlos Rivera García and Manuel Francisco Caal Gutiérrez. The search to contact Ms Lidia Merida Coy continues so that, if appropriate, the relevant arrest warrants may then be issued. The Government indicates that, according to the Public Prosecutor's Office, the only means of contacting the witness has been through Mr Victoriano Zacarías, though this has not produced any results since there has been a lack of cooperation from Mr Zacarías. The Public Prosecutor's Office states that instructions were given to the investigators concerned to undertake field work which had not been completed

satisfactorily with respect to other witnesses to the crime (who related the sequence of events leading to the victim's death but refused to reveal their identities for fear of reprisals) and with respect to the whereabouts of the witness in order also to refer her to the Psychology Clinic of the National Institute of Forensic Science of Guatemala and determine the degree of victimization which she has suffered as a result of witnessing the criminal act.

570. The Public Prosecutor's Office also stated that it was awaiting information from the Centre for the Compilation, Analysis and Dissemination of Criminal Information (CRADIC), from the National Civil Police Automated Fingerprint Identification System (AFIS), from the Directorate-General for the Control of Arms and Munitions (DIGECAM), and from the records of the computerized case management system at the Attorney-General's Office (SICOMP).

C. The Committee's conclusions

571. *The Committee profoundly deplores the fact that, despite the time that has elapsed since the last examination of the case, the Government has only sent observations concerning some of the allegations. In view of the gravity of certain allegations, including serious acts of violence against trade union officials and members, the Committee urges the Government to send its observations without delay concerning all the pending allegations. The Committee emphasizes that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, coercion 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.*
572. *As regards the allegation concerning death threats against members of the Trade Union Association of Itinerant Vendors of Antigua, including its general secretary, the Committee notes that on 5 May 2005 the magistrate's court received the complaint presented by Higinia Concepción López, Moisés González Buc, Sofía Buc Selvin and Miguel Ángel Buc Cotzal against officers of the Sacatepéquez municipal police and that the competent court was unable to initiate proceedings owing to the lack of information from the trade union needed to issue a summons in accordance with the law. The Committee is bound to observe with regret that this situation results in impunity for those who issued the death threats. The Committee urges the Government to take steps to ensure that an independent investigation into these allegations is launched without delay and to keep it informed of its results.*
573. *As regards the allegations concerning the attempted murder of trade unionist Marcos Álvarez Tzoc, the Committee observes that following the decision issued by the Court of Criminal Judgment, Mr Julio Enrique de Jesús Salazar Pivaral, who had been accused of the attempted murder, filed an appeal which was rejected, and that the Constitutional Court issued ruling No. 2213-2006 upholding the operative part of the ruling which was appealed against. Noting the Government's indication that this latest ruling is not yet enforceable, the Committee requests the Government to keep it informed with respect to the enforcement of the penalty imposed under this ruling. The Committee deplores that the Government has once again not supplied the information requested in relation to the attempted murder of trade union official Ms Imelda López de Sandoval and urges the Government once again to inform it as a matter of urgency of all developments in the ongoing investigations and proceedings related to this matter.*
574. *As regards the murder of Mr Julio Rolando Raquec, the Committee notes that according to the Government's reply: (i) on the date of removal of the corpse of the victim, the partner of the deceased was interviewed by agents of the Criminal Investigation Service of the National Civil Police and indicated that those who had shot her partner were mareros*

(gang members) operating in that sector, and mentioned the names of six persons; (ii) according to a report from Bureau 03 of the Public Prosecutor's Office for the Investigation of Violent Crime, a department of the Attorney-General's Office, it has been impossible to establish the exact whereabouts of the deceased person's partner; (iii) since she was an eyewitness to the events that occurred, it is impossible to initiate criminal proceedings as her statement has not been verified and there is insufficient corroboration to take action; (iv) the only means of contacting the witness has been through Mr Victoriano Zacarías, though this has not produced any results since there has been a lack of cooperation from Mr Zacarías; (v) instructions were given to the investigators concerned to undertake field work which had not been completed satisfactorily with respect to other eyewitnesses to the crime and with respect to the whereabouts of the witness; and (vi) information was being awaited from the Centre for the Compilation, Analysis and Dissemination of Criminal Information (CRADIC), from the National Civil Police Automated Fingerprint Identification System (AFIS), from the Directorate-General for the Control of Arms and Munitions (DIGECAM), and from the records of the computerized case management system at the Attorney-General's Office (SICOMP). The Committee recalls that it previously requested the Government to take the necessary steps to ensure that heavy penalties are imposed on the perpetrators. The Committee therefore notes with deep concern that the eyewitness has not been found, regrets that the investigations have not enabled the perpetrators to be identified and urges the Government to continue to take steps towards this end and to keep it informed of any developments in the investigation in question.

575. As regards the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist, Mr Julio Rolando Raquec, the Committee observes that according to the report from Bureau 03 of the Public Prosecutor's Office for the Investigation of Violent Crime, a department of the Attorney-General's Office, Ms Lidia Merida Coy (the partner of Mr Julio Rolando Raquec) requested protection as a witness and asked to be sent to the State of Virginia in the United States of America with funds of US\$3,000; assistance was requested from the Department of Logistical Support, which stated that the Attorney-General had only authorized 1,500 Guatemalan quetzals (CTQ) (approximately US\$188); Ms Lidia Merida Coy rejected the amount offered and did not appear when summoned on subsequent occasions. The Committee recalls that it previously asked the Government to take immediate measures to safeguard the lives of Ms Lidia Merida Coy and her children and, while noting that the Government offered her a meagre amount of money, it expresses its concern at the fact that the whereabouts of this chief eyewitness have been unknown since then. The Committee requests the Government to make all efforts to discover the whereabouts of Ms Lidia Merida Coy, the chief eyewitness to the murder of her partner Julio Rolando Raquec. The Committee urges the Government once again to take steps to ensure her safety and that of her children.
576. As regards the alleged dismissal of trade unionists in the municipality of Río Bravo (Clermont Estate), the Committee notes the rulings issued by the Constitutional Protection Chamber of the Supreme Court and by the Constitutional Court refusing the amparo (constitutional protection) requested by the Standing Committee of Workers of the Municipality of Río Bravo. With regard to such dismissals, the Committee observes that the Government has not supplied any information concerning the proceedings relating to the authorization to dismiss the trade unionists at the Los Ángeles Estate (municipality of Puerto Barrios) requested from the judicial authority by the employer. The Committee therefore reiterates that justice delayed is justice denied, and once again urges the Government to inform it of the outcome of these proceedings, with the strong expectation that they will be concluded without further delay.
577. The Committee notes that the Government has accepted technical assistance from the ILO and trusts that this will be implemented in the near future. The Committee firmly expects

that the objective of this assistance will be to ensure promptly that trade union rights are exercised in a climate that is free from violence, coercion or threats, to eliminate impunity and to establish an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently deterrent penalties and prompt means of redress, beginning with the implementation without delay of the judicial reinstatement orders.

578. As regards the remaining allegations, in view of the lack of observations from the Government, the Committee repeats its previous recommendations once again and urges the Government to send the requested information or take the requested action.

The Committee's recommendations

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

- (a) *As regards the allegation concerning death threats against members of the Trade Union Association of Itinerant Vendors of Antigua, including its general secretary, the Committee notes that the competent court was unable to initiate proceedings owing to the lack of information from the trade union. The Committee is bound to observe with regret that this situation results in impunity for those who issued the death threats and urges the Government to take steps to ensure that an independent investigation into these allegations is launched without delay and to keep it informed of its results.*
- (b) *As regards the allegations concerning the attempted murder of trade unionist Marcos Álvarez Tzoc, noting the Government's indication that the ruling issued by the Constitutional Court against Mr Julio Enrique de Jesús Salazar Pivaral is not yet enforceable, the Committee requests the Government to keep it informed with respect to the enforcement of the penalty imposed by the ruling of the Court of Criminal Judgment. The Committee deplores that the Government has not supplied the information requested in relation to the attempted murder of trade union official Ms Imelda López de Sandoval and urges the Government once again to inform it as a matter of urgency of all developments in the ongoing investigations and proceedings related to this matter.*
- (c) *As regards the murder of Mr Julio Rolando Raquec, the Committee regrets that the investigations have not enabled the perpetrators to be identified and urges the Government to continue to take steps towards this end and to keep it informed of any developments in the investigation in question.*
- (d) *As regards the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist, Mr Julio Rolando Raquec, the Committee requests the Government to make all efforts to discover the whereabouts of Ms Lidia Merida Coy, the chief eyewitness to the murder of her partner Mr Julio Rolando Raquec. The Committee once again urges the Government to take steps to ensure her safety and that of her children.*
- (e) *As regards the alleged dismissal of trade unionists in the municipality of Río Bravo (Clermont Estate), the Committee reiterates that justice delayed is*

justice denied, and urges the Government once again to inform it of the outcome of these proceedings, with the strong expectation that they will be concluded without further delay.

- (f) The Committee notes that the Government has accepted technical assistance from the ILO and trusts that this will be implemented in the near future. The Committee firmly expects that the objective of this assistance will be to ensure promptly that trade union rights are exercised in a climate that is free from violence, coercion or threats, to eliminate impunity and to establish an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently deterrent penalties and prompt means of redress, beginning with the implementation without delay of the judicial reinstatement orders.*
- (g) As regards the remaining allegations, in view of the lack of observations from the Government, the Committee repeats its previous recommendations once again and urges the Government to send the requested information or take the requested action.*
- (h) The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2609

INTERIM REPORT

**Complaint against the Government of Guatemala
presented by
the Movement of Trade Unions, Indigenous Peoples
and Agricultural Workers of Guatemala (MSICG)
supported by
the International Trade Union Confederation (ITUC)**

Allegations: The complainant organization alleges numerous murders and acts of violence against trade unionists and acts of anti-union discrimination, as well as obstacles to the exercise of trade union rights and social dialogue, denial of legal status to several unions and system failures leading to impunity with regard to criminal and labour matters

580. This case was last examined by the Committee at its November 2009 meeting [see 355th Report, paras 775–866, approved by the Governing Body at its 306th Session].

581. The Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) sent new information in a communication dated 14 January 2010. The International Trade Union Confederation (ITUC) notified the Committee that it supported the complaint in a communication dated 17 February 2010.

582. The Government sent its observations in communications dated 22 January, 2 February, 25 May, 1 June, 30 July, 12 and 25 August, 1, 7 and 28 September and 29 December 2010.

583. 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

584. At its meeting in November 2009, the Committee made the following interim recommendations concerning the allegations presented by the complainant organization [see 355th Report, para. 866]:

- (a) The Committee deeply regrets that the Government has only sent its observations on a limited number of the allegations in this case despite having been invited to do so on several occasions and despite an urgent appeal in that respect, in particular given the extreme gravity of the allegations. The Committee firmly expects that the Government will be more cooperative in the future.
- (b) Noting the extremely high number of allegations concerning anti-union acts, a significant percentage of which relate to acts of extreme violence against union leaders and members (16 murders, death threats, a disappearance, acts of physical violence) and sometimes against their families, the Committee deplores these extremely serious allegations of violence against trade unionists and other anti-union acts that are incompatible with Conventions Nos 87 and 98 and urges the Government to send its observations in full, without delay, and for this purpose to order that investigations be carried out into each of the cases mentioned by the complainant organization. The Committee urges the Government to send the outcome of these investigations and any decisions or rulings by the authorities.
- (c) The Committee urges the Government to ensure the physical safety of trade unionists who are threatened or harassed and of witness Roberto Dolores and to confirm the whereabouts of the allegedly missing Francisco del Rosario López and the minor María Antonia Dolores López.
- (d) Bearing in mind the high number of anti-union dismissals, the delays in proceedings and the failure to comply with judicial orders to reinstate trade unionists, the Committee once again reminds the Government that the ILO's technical assistance is at its disposal and that the Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, emphasizing reinstatement as an effective means of redress. The Committee extends this invitation to issues relating to criminal matters.
- (e) The Committee draws the Governing Body's attention to the serious and urgent nature of this case.

B. Further information provided by the complainant

585. In a communication dated 14 January 2010, the complainant provides new information that is summarized below.

Murders

586. *Traders' Guild of Oriente*. On 5 December 2009, Ms Olga Marina Ramírez Sanes, a member of the Traders' Guild of Oriente, was murdered. Ms Ramírez Sanes had earlier received death threats in connection with her union activities. She was murdered at 10.30 a.m. at her place of work in the central market of Chiquimula. Armed individuals

shot her four times with a weapon fitted with a silencer, so that there was no general alarm. The incident has not yet been elucidated.

- 587.** *Union of Employees of the Criminal Investigation Directorate of the Office of the Public Prosecutor (SITRADICMP).* On 7 May 2009, Mr Víctor Alejandro Suyos Surte, a member of the Advisory Board of SITRADICMP, was murdered. The murder occurred just when the union was engaged in a labour conflict with the Office of the Public Prosecutor (the employer). At the time of his murder, one of the victim's tasks was to document the Office's anti-union policy.
- 588.** *Union of Commercial Workers of Coatepeque.* On 17 March 2009, a number of paid gunmen followed a member of the union, Mr Luis Arnaldo Ávila, and shot him several times in the head with an AK47 as he was leaving his place of work. Mr Ávila had received death threats in connection with a union dispute over the transfer of traders of the Coatepeque market which he had opposed. On 12 January 2009 Mr Amado Monzón, who was also against moving the traders out of Coatepeque market, was shot three times in the head. On 6 October 2009, during an eviction process, the Guatemala state security force (army, municipal police and national civilian police) shot Mr Miguel Chacaj Jax eight times: he died on 13 October 2009 from the injuries sustained.
- 589.** *Union of Traders of the Public Square of Jocotán.* At 5.30 a.m. on 16 July 2009, union member Julián Capriel Marroquín was on his way to work in the municipality of Jocotán, in the department of Chiquimula, when he was accosted by armed gunmen who shot him half a dozen times. The assault was directed specifically against him and not against his companion, who was neither shot nor threatened. He was deputy secretary general of the Union of Traders of the Public Square of Jocotán. The incident has not yet been elucidated.
- 590.** *Union of Municipal Workers of Malacatan.* At around 8 a.m. on 29 January 2010, Mr Pedro Antonio García left his workplace in the municipality of Malacatan on his way home when minutes later, at 8.15 a.m., he was accosted and killed by heavily armed individuals. The murder took place at the Barranca Honda estate in Malacatan, San Marcos, where 23 shells from a firearm were later found.

Attempted murder, assaults and death threats

- 591.** *Altiplano Agricultural Workers' Committee (CCDA) and the MSICG.* Since 26 February 2009, Mr Leocadio Juracán has increasingly been the victim of death threats by telephone and messages to his cellphone. The threats focus on his activities at the head of the CCDA and of the MSICG's political council. Though court proceedings have been initiated, the Office of the Public Prosecutor has not yet investigated the incident.
- 592.** On 25 March 2009, Ms Lesvia Morales, a member of the Coordinating Board of the CCDA, started receiving death threats on her cellphone. Although she has lodged complaints with the Office of the Public Prosecutor, it is still not known whether the investigation has made any progress. In the course of 2009, five members of the MSICG's Policy Board were the victims of anti-union aggression, including kidnapping, intimidation, attempted murder, libel, etc.
- 593.** *Union of Small Traders and Assimilated Workers.* On 25 August 2009, the state security forces, notably members of the national civilian police and of the municipal traffic police, attempted to evict members of the union from their stands in the historical centre of Guatemala City, as a result of which union members Camilia Tecum, Antonia Aceituno, María Pu, María Lucinda Ajpí, María Eugenia Tubac, Manuela López, Luciano Díaz Pérez, Marcelo López Xoc and Elvira Mórán were wounded. Although complaints have

been lodged with the Office of the Public Prosecutor and despite the involvement of the state security forces, the incident has not been investigated.

594. *Union of Banana Workers of Izabal (SITRABI)*. On 16 July 2009, members of the union received a telephone call informing them that a large sum of money had been offered to kill all the members of the union and their families. They were told that, if they wanted to protect themselves and their families, they should give up their union activities. The union members who received these death threats were Noé Ramírez, César Guerra, Jesús Martínez, Selfa Sandoval and José Cartagena. They continue to receive these threats and, although complaints have been lodged with the Office of the Public Prosecutor, the incidents have not been investigated.
595. *Union of Workers of the Palo Gordo Sugar Refinery*. This is currently the only active trade union in the sugar and ethanol industry, other attempts to organize the workers – such as those at the Magdalena refinery’s El Cóbano sugar plantation – stopped before they could consolidate into a trade union. Although article 28(k) and (l) of the collective agreement on working conditions signed by the employer and the union stipulates that 24 and 25 December are annual days off, the employer nevertheless expected the workers to work on these paid holidays. Consequently, on the morning of 24 December 2009 the workers belonging to the union held a meeting near the refinery to demand that the employer respect the collective agreement. One of the members present was Héctor Eli Arauz Pérez, who at the time was secretary general of the union. During the meeting the administrative head of the César Álvarez refinery arrived by car, started threatening the workers and tried to intimidate them with a weapon that he was carrying. Although the incident was reported to the national police of the municipality of San Antonio Suchitepéquez, the incident has not yet been elucidated.
596. *Union of Commercial Workers of Coatepeque*. On 6 April 2009, in the middle of a violent and illegal eviction, the state security forces attempted unlawfully to evict union members José Luis Chití Pu, Martín Satic, Daniel Escobar, Víctor Velásquez, Miguel Maldonado, Marín Sajbín, Héctor Hernández, Ramón Gómez, Orlando Miranda, Carlili Miranda and Oswaldino Gómez. On 8 April 2009 Mr Mario Méndez, one of the union’s officials, received death threats by telephone advising him to leave Coatepeque. Since then he has continued to receive threats.
597. *National Health Union*. In May, July and August 2009, union members Manuel Batz, Olga Santos, Yensy Hernández and Jeovanny Hernández all received death threats warning them that the aggressors were holding their families.

Kidnappings

598. *Union of Workers of the Winner SA Company*. At 6.05 a.m. on 6 January 2010, while she was waiting for the Winners SA company bus to take her to work, Ms Vásquez was kidnapped by two men armed with weapons similar to those used by the state security forces. She was taken to an isolated ravine where she was questioned about her job and her family, especially her children. During her interrogation, Ms Vásquez denied her identity and begged her captors to let her go, claiming that she worked for another assembly plant and was not the person they were looking for. While they held her, her captors made a number of telephone calls, but she could not identify the persons they were calling. After about an hour another two men joined the kidnappers and also questioned her. Her aggressors said they had orders to kill her and started beating and raping her. Fortunately she survived the ordeal, albeit with serious injuries. Proceedings have been initiated with the Office of the Public Prosecutor.

599. *MSICG.* On 6 November 2009, as part of the MSICG's ongoing campaign in favour of decent working conditions, union leaders Dora Bajan, Blanca Villatoro, Cristina Ardón, Ingrid Ruano, Deysi Gonzales, Hortensia Gómez, María Ruano, María Barrios and Etelvina Tojín went to the Ministry of Labour and Social Welfare to present a complaint concerning the violation of the labour rights of women working on banana plantations for the multinational companies Chiquita Brand and Del Monte Frehs. The complaint asked that a group of labour inspectors be sent to see for themselves how women's rights (to a crèche and to the deduction of social security contributions, for example) under the country's legislation were systematically flouted and how they were being denied the right to go to the Guatemala Social Security Institute. The media had been invited to witness the occasion and to inform the public at large. When the women arrived at the Ministry, security guards and members of the staff proceeded to close the entrances to the building and to keep them inside the railings that surround it, thereby preventing the representatives of the media from entering and the women from leaving the premises. During the roughly two hours that the women were thus held against their will, they were photographed, videoed and insulted by Ministry staff in order to intimidate them and prevent them from presenting their complaint officially. The Ministry staff repeatedly told them the photos and videos were being taken on orders from "higher up", in other words the Minister of Labour and Social Welfare. Under pressure from the media and from workers who had arrived at the scene to denounce the constant violation of their labour rights, the women were eventually freed.

Blacklisting

600. For years now, the MSICG has been informing the Committee of its concern regarding the preparation and circulation in the country of lists of union leaders and details of union activities, as well as the inclusion in these lists of details about workers who have taken their employer to court anywhere in the country. The lists are used by employers to avoid recruiting anyone with a trade union background. Given the anti-union sentiment in the country this is a matter of great concern, as people are often dismissed for trying to set up a trade union and are thus immediately denied any chance of finding work anywhere and run the risk of being unable to fend for themselves and for their families. There are two companies in Guatemala that employers or anyone else can pay for this kind of information: these are Trans Union and InforNet. Selling this information affects above all workers who have exercised or are exercising their trade union rights, despite the fact that articles 31 and 44 of the Constitution, section 274 of the Labour Code and section 64 of the Public Information Access Act prohibit the buying and selling of such information, which is punishable by five to eight years of prison.

Harassment and intimidation

601. *SITRADICMP.* At 3.50 p.m. on 21 April 2009, by order of the Prosecutor General, Amílcar Velásquez Zarate, and the director of criminal investigations of the Office of the Public Prosecutor, Mynor Alberto Melgar, the members of SITRADICMP were obliged to leave their offices and to leave the doors open. Employees who were not present at the time were told not to enter the work area. While the union members were absent, a number of computer experts (staff members benefiting from the trust of the employer) entered their offices to remove and upload documents and programs on their computers.

602. On 22 April 2010, when the members of SITRADICMP reported for work as usual and entered their offices, they discovered that their computers were encrypted and the data was all over the place. Realizing how serious the situation was and knowing their employer's anti-union background, a members of SITRADICMP's advisory board, Mr Víctor Alejandro Soyos Suret, called in a notary to make an official record of what had happened,

and especially of the fact that the members of SITRADICMP were not responsible for the loss or uploading of any physical or electronic evidence involving the use of their computers.

603. On 28 April 2009, the director of criminal investigations of the Office of the Public Prosecutor, Mr Mynor Melgar Valenzuela, lodged criminal charges in writing with the official on permanent duty in which he recognized that the Office was conducting an investigation into the unit where the members of SITRADICMP were employed and that the computer supervisor had accessed their computers for that purpose. According to the employer, the investigators found child pornography, pornography and other files on the computers and the Office of the Public Prosecutor was therefore instituting criminal charges against the whole department, and specifically against the members of SITRADICMP.
604. As noted in the notary's report requested by Mr Soyos, the so-called investigation undertaken by the employer took place on 21 April 2009, whereas the complaint lodged by the employer says that it took place on 22 April. Moreover, the computer department's report on which the criminal charges against the members of SITRADICMP were based states that the investigation took place on 27 April and the charges were lodged on 28 April. In light of this, on 5 May 2010, several members of SITRADICMP went to the administrative building of the Office of the Public Prosecutor to inquire what kind of investigation was being conducted against them by their employer. When they saw the charges, they realized that their employer, the Office of the Public Prosecutor, had not made an official record of the investigation that took place on 21 April, as is required by law, yet it was on the basis of that investigation that criminal charges were being brought against members of the union, notably the members of its executive board. The members of SITRADICMP accordingly requested the presence of a notary, who made a copy of the file.
605. Subsequently, the Public Prosecutor presented as evidence a file from another case. The introduction of evidence against the members of SITRADICMP in order to break up the union went so far as to accuse the union's organization and information secretary, José Alejandro Reyes Canales, of having uploaded pornography onto his computer.
606. On 28 July 2009, the Public Prosecutor announced the removal from office and dismissal of 20 employees of the DICRI and the initiation of criminal proceedings against them, ten of whom are members of the union. This anti-union policy was implemented for the sole purpose of eliminating the trade union, which can only be done by getting rid of all its leaders. It should be mentioned that the Office of the Public Prosecutor is currently facing two court subpoenas, which means that it cannot dismiss anyone without first initiating court proceedings – though it has so far dismissed 15 members of SITRADICMP without seeking a court order and has announced publicly the dismissal of the other members cited above.
607. *Union of Workers of the Municipality of Zacapa.* In October 2008, members of the Union of Workers of the Municipality of Zacapa held a peaceful demonstration in the vicinity of their place of work, outside working hours, to demand the negotiation of a collective agreement on working conditions. Some days later the mayor of the municipality of Zacapa initiated criminal proceedings against Axel Alberto Ramírez Soto, Gabriel Enrique Ciramagua Ruíz, Nehelia Aracely Morales Díaz, Arturo Enrique Mejía, Heydee Azucena Hernández and Enrique Mayorga Córdón, all of whom are members of the union's executive committee, on charges of illegal detention, coercion, insurrection, incitement and attempted assassination – most of which are crimes against the security of the State. This is tantamount to criminalizing the exercise of union activities, a tactic frequently used by employers and by the State. Although the MSICG is the principal victim of crimes against

trade unionists, it is being denied access to information on the progress of the investigation into the incidents.

- 608.** *Union of Workers of the Petén Distribution Company (SITRAPETEN).* For 19 months members of the union had been engaged in the constitutionally legitimate exercise of their right of peaceful resistance in front of the National Palace, when on 10 December 2009 the state security forces, using excessive force, illegally evicted them and robbed them of their possessions. For this they employed 250 national civilian police, anti-riot police and traffic police, whereas only 25 union members were demonstrating at the time. In the course of the eviction the state security forces used excessive force, beating members of the political council of the MSICG who were showing their solidarity with SITRAPETEN and members of the executive board. They also sprayed irritants on the faces and bodies of the union members, which blinded them and whose effects they still suffered from 24 hours later. The union members who were assaulted in this way were Edwin Álvarez, Oto Quevedo, Oscar Véliz, Edwin Rodolfo López, Francisco Talé, Mario Roberto Mejía, Velbis Román and Javier Mendoza, all members of SITRAPETEN, and Efrén Emigdio Sandoval Sanabria and María Ruano, members of the MSICG's political council. After the assault some 200 national civilian police and anti-riot police stayed behind and systematically intimidated the union members. Fearing for the physical integrity and the lives of their comrades, the MSICG immediately petitioned the court of first instance of Guatemala City for a writ of habeas corpus, which should have been issued that very night. In response to the request and given the seriousness of the complaint against the state security forces who had assaulted the union members, the court judge went personally to the scene of the incident to make sure that they were not subjected to further harassment and violations of their human rights. Although the writ of habeas corpus was issued as quickly as possible, it was unfortunately too late to prevent the union members being beaten up and evicted again and at around 11.30–12.00 p.m. the state security forces assaulted them again, spraying their eyes, face and body with toxic substances and hitting them again and again. This new violent incident was not mentioned in the report because the writ of habeas corpus was issued the day after the 3 p.m. assault and criminal charges had already been lodged. In other words, the writ was issued only after the union members had been assaulted a second time and therefore did not have the desired effect. Moreover, the appointed judge did not order any investigation into the complaint lodged by the union members.
- 609.** *CCDA and MSICG.* On 9 February 2010, a search was carried out at the “Café Justicia” coffee processing plant located at Cerro de Oro, Santiago Atitlán. Here the aggressors left clear messages aimed at intimidating the MSICG and each of its member organizations. In the opinion of security experts, the messages refer to the elimination of the MSICG and of every one of its organizations. The aggression occurred a few days after the MSICG presented a report entitled *Guatemala, el costo de la libertad sindical* (“Guatemala: The cost of freedom of association”), in which it denounced the violence and assaults aimed at the struggle of indigenous peoples, agricultural workers and trade unionists led by the MSICG, and a few days before the Trade Union Confederation of the Americas (TUCA) issued a statement condemning the climate of violence against the MSICG, the impunity surrounding the violence and the attempts to penetrate and weaken the autonomous trade union, agricultural workers’ and indigenous peoples’ sector. It also coincided with the preparation by the MSICG and the ITUC of the Latin American Forum on the Rights of Indigenous Peoples.
- 610.** Once the complaint had been presented at the international level the acts of violence against the CCDA and against Leocadio Juracán intensified. On 13 February 2010 the aggressors went to the CCDA's headquarters and to the coffee processing plant, where they left written notes threatening Leocadio Juracán, the CCDA's coordinator, and members of the MSICG's political council. On 14 February 2010, following the same

pattern of harassment and intimidation, aggressors slid death threats under the door of the house of a relative of the trade unionist that were aimed not only at Leocadio Juracán but at his family too. On 15 February an MSICG delegation on a visit to the CCDA headquarters and to the coffee processing plant were followed by unknown persons in a deliberate attempt to intimidate them. These aggressions intensified when the CCDA, as a member of the MSICG, had just joined in lodging a complaint in defence of indigenous peoples, agricultural workers and trade unionists. Although complaints were duly lodged with the competent authorities on each occasion, none of the incidents has been elucidated. The most recent incident occurred during the night of 9 February, when the police went to the scene of the crime to look for evidence, but it was all to no avail because they did so without the presence of a representative of the Office of the Public Prosecutor. The latest complaint proved impossible to lodge because the Public Prosecutor repeatedly refused to register it or said that he could not do so because it did not meet all the requirements of the law. Although a request was made for security measures, they were not provided quickly enough and, even when authorized, they were in practice virtually useless. On 20 February 2010, Leocadio Juracán and his family went into exile because of the increasing threats and harassment against them and the MSICG and because of the inability of the State to provide them with adequate security.

C. The Government's reply

Murders

611. In its communication dated 7 September concerning the alleged general climate of violence that is preventing the exercise of trade union rights and the murder of Marco Julio Ramírez Pórtela, Jaime Nery González, Lucila Martínez Zúñiga, Edmundo Noé Herrera Chávez, José Israel Romero Ixtacuy, Freddy Morales Villagrán, Marvin Leonel Arévalo Aguilar, Sergio Miguel García, Carlos Enrique Cruz Hernández, Mario Caal, Miguel Ángel Ramírez Enríquez and Israel Romero Ixtacuy, the Government makes the following observations:

- *Marco Julio Ramírez Pórtela.* The incident is registered as Case No. MP001-20.09-116447. The unit of the Office of the Public Prosecutor that deals with crimes against journalists and trade unionists states that the investigation is still under way and that “at the current stage of the investigation, it can be concluded that the incident was not a direct consequence of the union activities of the murder victim”.
- *Jaime Nery González.* The technical coordination secretary notes that “in this case the name needs to be clarified as several persons with the name Nery Gonzáles are listed as having been the victims of homicide, and it is therefore not clear which is the person referred to here”.
- *Lucila Martínez Zúñiga.* Ms Martínez Zúñiga was director of the Zone 18 prison for women. Her death occurred in the course of a failed attempt to escape from the El Boquerón maximum security prison by two gangsters, 20-year-old Oscar Gabriel Morales Ortiz and 23-year-old Rolando Elíseo Gonzáles Rodas. According to the investigation, the perpetrator of the murder was Roberto Pérez Rosales, a member of the Mara 18 gang. A warrant was issued for his arrest and he was apprehended by investigators of the national civilian police on 19 November 2009. He was charged with aggravated murder with intent to steal by the eighth judge of the narcotics and environment criminal court of first instance on 12 May 2009.
- *Edmundo Noé Herrera Chávez.* The case is being handled by the municipal prosecutor's office in Amatitlán. The motive for the murder was theft. At about 3.30 a.m., when the victim was driving to work at Rafael Landívar university along

Carretera de la Colonia Altos de la Cruz in the municipality of Amatitlán, two individuals attempted to rob him of his belongings. Possibly because of being hard of hearing he did not hear them and the perpetrators concluded that he was putting up resistance. They shot Edmundo Noé Herrera Chávez in the left side of the head and killed him. The incident is still under investigation.

- *Freddy Morales Villagrán*. The case is being handled by the office for crimes against people life and physical integrity of the Office of the Public Prosecutor. The preliminary hypothesis derived from the investigation is that the armed assault was not aimed directly at Mr Morales Villagrán. On the day of the incident, several people were drinking alcohol in the Lupita bar when two armed men came in and started shooting at everyone inside. Three people were killed and three injured, including Mr Morales Villagrán who later died in hospital. The three who died were not friends and were not all at the same table, and according to the investigation all those present agree that the shots were not aimed at anyone in particular. Since the assault was not aimed at him, it is assumed that the incident was not connected with trade union activities. The case is still under investigation.
- *Marvin Leonel Arévalo Aguilar*. The case is being handled by the district prosecutor's office of Izabal. It is thought that Mr Arévalo Aguilar was the victim of a traffic offence. At the time of the incident he was taking part in a transport strike demonstration on Carretera de la Ruta al Atlántico, when Carlos Humberto Coc Ramos, ignoring all precautions, started overtaking the line of traffic that was being held up, heading towards the demonstrators. The demonstrator tried to get out of the way, but Marvin Leonel Arévalo Aguijar did not manage to do so. The vehicle hit him in the shoulder and he later died from injuries sustained. In the course of the investigation, Carlos Humberto Coc Ramos was charged with culpable homicide and he is currently waiting for the court to set a date for a public hearing.
- *Sergio Miguel García*. The case is being handled by the district prosecutor's office of Puerto Barrios. The victim died of 13 May 2008 after being shot by a firearm. On 15 May 2008, the victim's wife went to the prosecutor's office where she was handed his belongings. She had previously stated expressly that nobody had witnessed the incident and she had no idea why her husband had been killed. On 22 May 2008 the departmental police station was asked to investigate the matter and, in its report dated 28 May 2008, it indicated that the perpetrators were unknown persons who had not been identified. The report added that so far the preliminary investigation did not point to the victim having been killed for his trade union activities. The case is still under investigation.
- *Carlos Enrique Cruz Hernández*. The case is being handled by the district prosecutor's office of Izabal, which has declared that Carlos Enrique Cruz Hernández was killed for personal reasons connected with a debt that he had contracted as guarantor for a work colleague on the plantation where they were employed. Mr Noé Antonio Ramírez Pórtela, secretary general of SITRABI, said that the victim had accepted to act as guarantor for a debt incurred by Edwín Adolfo Morataya Méndez and that, when the latter failed pay up, the debt reverted to Cruz Hernández (and another guarantor). Cruz Hernández found a legal way to free himself of the debt by transferring it to the wife of Edwin Adolfo Morataya, Ms Reina Saguil Lemus, though Mr Morataya was not happy with the arrangement and apparently threatened to kill him. Members of his family and others also said that he was killed on account of the debt. It is therefore discounted that Cruz Hernández was killed for his trade union activities. However, the investigators have not excluded other explanations for the crime, and the investigation is still open in the hope of finding further evidence that could confirm or rule out the statements that have been received.

- *Mario Caal.* The technical coordination secretary notes that, in this case, the name needs to be clarified as several persons with the name Mario Caal are listed as murder victims and it is therefore not clear which is the person referred to here.
- *Miguel Ángel Ramírez Enríquez.* The case is being handled by the district prosecutor's office of Escuintla. It is suspected that on 2 March 2008 Efraín López and Víctor Manuel Gómez Mendoza conspired to kill Miguel Ángel Ramírez Enríquez because he had previously lodged a complaint with the Office of the Public Prosecutor stating that Víctor Manuel Gómez Mendoza and others had told him that they were members of a political party but had illegally used all the information about the party to set up a trade union. The outcome was that they threatened to kill him and eventually did so, shooting him and causing him multiple injuries. The prosecutor says that so far the investigation shows that it is unlikely that the victim was killed on account of his trade union activities. The incident is still under investigation.
- *José Israel Romero Ixtacuy.* The unit responsible for crimes against journalists and trade unionists of the Human Rights Section of the Office of the Public Prosecutor reported on 5 May 2010 that this homicide was still under investigation.

Attempted murder, assault and death threats

- 612.** With regard to the alleged assaults on members of the Union of Commercial Workers of Coatepeque, the Government states in its communication dated 30 July 2010 that it was the workers' refusal to move to a new market that provoked the use of excessive force by the security forces and municipal employees, resulting in a number of people being injured and one death. As a result of the incident the Ministry of Labour and Social Welfare sought information from the Office of the Public Prosecutor, which reported that it had so far ascertained only that one person had died and that the investigation was still under way. As to the other people involved, it was reported that no complaint had been lodged on their behalf.
- 613.** With regard to the attempted murder of trade unionist Julián Capriel Marroquín, the Government states that the Ministry of Labour and Social Welfare has taken all proper steps to establish the truth. Asked whether a complaint had been lodged, the Office of the Public Prosecutor said that a complaint had been lodged on 16 April 2009 (Case No. MP297/2009/2455) and that it was currently under investigation. The Government mentions that there are discrepancies in the information supplied by the complainant and records of the Office of the Public Prosecutor regarding the date of the occurrence and that the complainant has been requested to provide clear and precise details.
- 614.** Regarding the alleged illegal eviction of street traders in the historical centre of the capital, the Government states in its communication of 12 August 2010 that the Ministry of Labour and Social Welfare has initiated inquiries to determine the truth of the allegations. The Office of the Prosecutor General has indicated that a complaint has been filed (Case No. M0012-2009-98696) and is currently being investigated.
- 615.** Regarding the alleged death threats against members of the National Health Union, the Government states that, when asked for information, the Office of the Public Prosecutor and the Human Rights Prosecutor reported that no such complaint had been registered and that there was therefore no legal foundation for proceeding with the criminal investigation.

Kidnapping

- 616.** In its communication dated 30 July 2010, the Government states regarding the kidnapping and rape of trade unionist María Alejandra Vásquez that the Ministry has taken the necessary steps to determine whether a complaint has been lodged on behalf of the victim with the Office of the Public Prosecutor, which replied that in order to be certain it needed the full name of the victim, since its records showed several complaints under the same name. It considered it irresponsible to denounce an incident that cannot be tied in with the victim and requests the full name of the person concerned so that it can conduct an objective and impartial investigation.
- 617.** Regarding the alleged holding of a group of leaders of the MSICG on the premises of the Ministry of labour and Social Welfare against their will, the Government states in its communication dated 29 December 2010 that the MSICG lodged a complaint with the Public Prosecutor about the incident. Following an investigation it was established that no crime of any kind had been committed and the investigating magistrate therefore rejected the complaint.

Blacklisting

- 618.** Regarding the alleged drawing up and circulation of blacklists to prevent unionized workers being recruited, the Government states in its communication dated 30 July 2010 that the Guatemala does not provide information on people who are or have been engaged in trade union activities or on people who have instituted legal proceedings in the courts for purposes of blacklisting. It firmly rejects any such assertions which it says are based on hearsay and are quite untrue. Moreover, the Office of the Public Prosecutor reports that the persons concerned have never lodged a complaint or provided any evidence of state institutions taking any such extreme action, which the complainant organizations claim is aimed at the country's workers.

Harassment and intimidation

- 619.** Regarding the allegations that the mayor of the municipality of Zacapa brought penal charges against the leaders of the executive board of the Union of Workers of the municipality, the Government states in its communication dated 12 August 2010 that upon the conclusion of the investigation the Office of the Public Prosecutor requested the judicial body handling the case to suspend the investigation provisionally, and that is where proceedings stand at present.

Obstacles to the exercise of trade union rights and to social dialogue

- 620.** Regarding the alleged violation of trade union rights at the Las Américas SA and Crown Plaza Guatemala hotels, the Government states in its communication dated 25 May 2010 that the Ministry of Labour and Social Welfare has taken the necessary steps to establish the truth of the matter. The General Labour Inspectorate has stated that complaints were lodged against it by some of its employees but they differ from the allegations. The Government adds that the Ministry will do everything possible to clarify the matter and will submit its findings in due course.
- 621.** Regarding the alleged violation of freedom of association and collective bargaining in the Quetzal Port Enterprise, the Government states in its communication dated 1 September 2010 that Quetzal Port was inaugurated and the Quetzal Port Enterprise created to manage it in 1985, in accordance with Legislative Decree 100-85, as a decentralized, autonomous

state institution with its own legal status and with the authority to acquire rights and contract obligations. In order to further its objectives, the enterprise's board of directors issued Agreement No. 8-20-2007 which, in accordance with article 9(b) of the Act establishing the Quetzal Port Enterprise, laid down the operational rules and regulations governing services rendered in Quetzal Port. The relationship between the Quetzal Port Enterprise, the providers of services and the clients involved in all the port's activities is governed by the International Code for the Security of Ships and of Port Facilities. Companies under contract to Quetzal Port Enterprise are deemed to be contractors in so far as they carry out their activities with their own equipment and capital and are constituted as merchant companies; moreover, the Quetzal Port Enterprise is not jointly responsible for the work carried out by their employees and the latter are not entitled to the benefits accruing to employees of the Quetzal Port Enterprise, who join and establish their own occupational associations with which the collective agreement on working conditions is concluded in strict compliance with the Constitution, the labour legislation and the rules and regulations made under it. The Quetzal Port Enterprise is an autonomous decentralized state institution whose principle purpose is to meet the demand for the loading and offloading of cargo and the boarding and disembarking of passengers. In due course, the workers of the merchant enterprises set up their own union and, guided by their trade union federations, initiated a collective labour dispute in order to negotiate a list of demands through the labour court of the department of Escuintla. Initially, direct talks were held with the Quetzal Port Enterprise in an attempt to have it take part in the negotiations. In the light of the legal arguments put forward by the Quetzal Port Enterprise, it was determined that the enterprise had no labour relationship with the workers concerned nor any responsibility for such labour relationships or for the collective labour dispute that had been instigated. In terms of jurisdiction, it must be emphasized that Quetzal Port Enterprise was at no time taken to court. The various groups of workers pursued their claims against their employers, with whom they subsequently entered into direct negotiations and reached arrangements that brought the dispute to an end. Attention must also be drawn to the fact that the complaint brought before the Committee on behalf of the Union of Dockers and Workers involved in Related Activities in Quetzal Port (SITEGREACOPQ) alleges that a series of violations were committed by the Quetzal Port Enterprise which, as indicated above, is quite separate from the private enterprises that provided services at the port, whose labour relations depend on their own policies and internal rules and regulations. It follows directly from the above that the omission of evidence to back up the claims made in the complaint suggests that the complainant is not acting in good faith, as required by Guatemalan law – and specifically section 17 of the Judiciary Act which reads as follows: “Rights must be exercised in conformity with the requirements of good faith.” The complainant group must, moreover, be requested to provide some kind of evidence that it has indeed brought the matter before some administrative or judicial labour institution capable of elucidating the matter, such as the Ministry of Labour and Social Welfare through the General Labour Inspectorate or the labour courts, since it is somewhat odd that the object of the complaint, the Quetzal Port Enterprise, should be held responsible for dismissals carried out by companies that are completely outside its administrative and management purview. The Quetzal Port Enterprise denies the allegations because, in addition to the fact that they offer no evidence, the workers who provided their services through private companies have initiated proceedings with the labour and social welfare court of the department of Escuintla; in some cases the workers have reached a direct arrangement with their employer, while other cases are still awaiting a decision.

Denial of legal status and anti-union dismissals

622. *SITRAPETEN*. In its communication dated 22 January 2010, the Government states that in 2007 the union applied on four occasions for recognition of its legal status, which it was denied. On 29 March 2008, workers of the Petén distribution company met in general assembly and established SITRAPETEN. On 2 April 2008, the Ministry of Labour

received a request for recognition of the union's legal status and approval of its by-laws, which it dealt with accordingly. On 10 April 2008, a ruling was handed down which recognized SITRAPETEN's legal status, approved its by-laws and ordered its registration in the public record of trade unions. On 21 May, a request was received to issue the credentials of the union's officers and for the General Labour Inspectorate to decree their trade union immunity. These credentials were issued on 4 June 2008 and on 1 July the up-to-date list of members was forwarded to the General Labour Inspectorate and recorded in the corresponding register.

623. On 11 June 2008, the Ministry received a request to register amendments to the union's by-laws, inasmuch as an extraordinary general assembly of the union held on 4 June 2008 had agreed to amend articles 1, 2 and 9, subparagraph A, as follows: "To be accepted as a member of the union the applicant must ... be an active employee of the company known as "Petén Distribution Company and allied companies with which it constitutes a single economic unit." Since it was dealing with a company union, the Ministry asked on 18 July 2008 the General Commercial Register of Guatemala whether in its registration archives it had any reference to a private company known as "Petén Distribution Company and allied companies with which it constitutes a single economic unit". The same day, the General Commercial Register informed the Ministry that its records listed a company under the name "Petén Distribution Company, in process of liquidation", as well as four other companies with the same name owned by the company concerned. On 29 September 2008, a ruling was handed down refusing registration and on 1 October 2008 an appeal against the ruling was lodged by members of SITRAPETEN's executive committee. On 17 October 2008, the appeal was denied with due reason by resolution No. 246-2008. The interested party was notified of the resolution on 27 October 2008, and upon expiry of the legal delay for making further submissions the resolution became final and the file was sent to the General Labour Directorate for archiving.

624. In its communication dated 2 February 2010 regarding the alleged denial of the right to organize and restrictions on registration in compliance with the labour legislation in respect of the Union of Workers of the Prison System, Union of Workers and Independent Agricultural Workers (Liga Campesina) of Cerro Colorado village of the Municipality of La Gomera Escuintla, Union of Workers of the Municipality of Río Bravo Suchitepéquez, Confederation of Trade Union Unity of Guatemala (CUSG), Union of Workers of the municipality of Colomba Costa Cuca, Union of Workers of the Municipality of San Marcos and of the San Marcos Municipal Electricity Company, Union of Independent Fishers of the Village of Tacaton of the Municipality of Amatitlán, Union of Workers of the Municipality of El Tumbador, Union of Workers of the Municipality of Atescaíempa Jutiapa, Union of Workers of the Municipality of San Cristóbal Totonicapán, Union of Workers of the Ministry of the Environment and of Natural Resources (SITRAMARN), Taxi Workers' Guild of Izabal, Union of Banana Workers of the South, and others, the Government makes the following observations:

- *Union of Workers of the Prison System.* In 2007 the union applied to the General Labour Inspectorate for recognition of its legal status, the approval of its by-laws and the union's registration. The requests were declared irreceivable under the terms of Decree No. 71-86 (Act respecting unionization of state workers and regularization of their right to strike) and Government Agreement No. 607-88. The Inspectorate's decision is thus in conformity with the law and there is therefore no cause for alleging any refusal or restriction, since the workers concerned did not comply with the law.
- *Union of Workers and Independent Agricultural Workers (Liga Campesina) of Cerro Colorado village of the Municipality of La Gomera Escuintla.* The workers who set up this organization unanimously decided to dissolve it. The General Labour Directorate was duly informed and asked to make the official announcements

required by law for dissolving an organization. In conclusion, the union referred to has been dissolved by decision of its members.

- *Union of Workers of the Municipality of Río Bravo Suchitepéquez.* In 2005, the union presented a formal request for its establishment, and on 30 March 2005, having fulfilled all the legal requirements, the union was registered and an announcement to that effect was published on 8 April 2005.
- *CUSG.* In 2006, the CUSG initiated proceedings with the General Labour Directorate for its recognition. A complaint was subsequently lodged against the request, declaring that it was not entitled to registration. Later, the request was taken up again, subject to the correction of a number of errors in the submission. Finally, the petitioner complained at the delay in the formalities, without doing anything to speed them up, since the decisions taken on this matter were based on section 218(d) of the Labour Code, the last paragraph of which stipulates: “If the errors or defects can be corrected, the interested parties shall be informed accordingly so that they can make the corrections and, if appropriate, ask for the request to be resubmitted.”
- *Union of Workers of the Municipality of Colomba Costa Cuca.* This organization exists, inasmuch as it has complied with all legal requirements.
- *Union of Workers of the Municipality of San Marcos and of the San Marcos Municipal Electricity Company.* On 29 May 2009, the union was registered as required by law.
- *Union of Independent Fishers of the Village of Tacaton of the Municipality of Amatitlán.* This organization was registered on 9 September 1993. It is currently inactive because its registration provided for a two-year mandate for its officers and these have not been renewed.
- *Union of Workers of the Municipality of El Tumbador.* This union is also registered, but its officers’ mandate ended on 19 January 2006 and the union is therefore inactive.
- *Union of Workers of the Municipality of Atescaíempa Jutiapa.* The union was registered on 17 May 2007 and is still functioning.
- *Union of Workers of the Municipality of San Cristóbal Totonicapán.* The union was registered on 4 March 2008.
- *SITRAMARN.* The union was legally registered on 20 November 2008.
- *Taxi Workers’ Guild of Izabal.* The union was legally constituted on 5 June 2007.
- *Union of Banana Workers of the South.* On 15 October 2007 the union’s legal status was recognized and its by-laws were approved and registered. An appeal against this ruling was sustained on the grounds that the workers were not employed by the company. The ruling of 15 October was therefore revoked.
- *Union of Workers of the Deaf and Blind Committee of Guatemala.* The legal proceedings that were initiated with a view to collective bargaining have been taken up by the Chamber of Habeas Corpus and Preliminary Hearings of the Supreme Court of Justice, which has handed down its ruling on the matter. The Ministry has reverted to the Chamber with a request that it inform it whether any of the parties concerned have appealed against the ruling. It is awaiting the Chamber’s reply.

- *Unions of Workers of the Los Angeles and La Argentina Plantations.* According to the General Labour Directorate's records with respect to these organizations, the Ministry of Labour and Social Welfare requested their dissolution on 22 April 2009 under the applicable procedure. The request is still before the courts.
- *Union of Workers of the Municipality of Zaragoza.* According to the General Labour Directorate's records, the union has not been dissolved as indicated by the complainant. The organization is legally constituted and has legal status. Regarding the legal proceedings the complainant organizations have initiated, they should be informed that when presenting a complaint against Guatemala they should identify the legal proceedings concerned with the appropriate case number, so that their current status can be established and delays avoided. In the case in point, the labour, social welfare and family court of first instance of Chimaltenango states that proceedings have indeed been initiated against the municipality. The Ministry is currently seeking information on the matter and establishing whether the proceedings relate to requests for reinstatement.
- *Union of Workers of the Municipality of Chimaltenango.* The General Labour Directorate has investigated the incidents referred to and established that the court that investigated the collective dispute instigated by the trade union has taken the appropriate action required by law. The requests for reinstatement are still under discussion in the relevant judicial bodies.
- *Union of Workers of the Municipality of San Antonio Huista in the department of Huehuetenango.* Regarding the complaints against the municipality, the mayor, Carlos Alfredo Morales López, has informed the Ministry of Labour that on 7 February 2008 a group of neighbours took over the municipality and demanded that the municipal employees who worked for the previous administration resign. In his capacity as mayor he informed the demonstrators publicly that they were committing a crime, and the matter was subsequently placed in the hands of the national civilian police and the district office of the Public Prosecutor, located in Democracia Huehuetenango municipality. The employees of the previous administration presented their resignation voluntarily and then initiated legal proceedings that were brought before the labour and social welfare court of first instance of Huehuetenango, which validated the resignations and thus put an end to the deadlock in which the municipality found itself. In a humanitarian gesture the municipality compensated the employees concerned and paid them their employment benefits.

625. In its communication dated 1 June 2010 the Government states that, in the course of the follow-up of the allegations concerning the request for court protection No. II 24-2006, the Ministry of Labour and Social Welfare recognized the legal status of SITRAMARN and approved and registered its by-laws. The court ruled that the Ministry of Labour and Social Welfare's decision was legally justified and disallowed the request for court protection. The Government adds that an appeal was lodged and the ruling was sustained.

626. In its communication dated 12 August 2010 concerning the refusal to recognize the legal status of several unions, the Government states that the technical and legal advice counsel issues rulings so that the Ministry can sign resolutions recognizing the legal status of trade unions, approving their by-laws and order their registration in accordance with the Labour Code. Consequently, if the documents submitted contain errors or fail to meet legal requirements, the workers concerned are given the opportunity to bring them into conformity with the law so that their union can be granted legal status. This is not designed to prejudice, deny or delay recognition.

D. The Committee's conclusions

627. *The Committee observes that in the case under examination the complainant organization alleges numerous murders and acts of violence against trade unionists and acts of anti-union discrimination, as well as obstacles to the exercise of trade union rights and social dialogue, denial of legal status to several unions and system failures leading to impunity with regard to criminal and labour matters.*
628. *The Committee draws attention to the serious and urgent nature of this case, given the numerous allegations of murder, attempted murder, assault and death threats, kidnappings, harassment and intimidation and blacklisting. In general, the Committee deplores the numerous allegations of criminal acts of which trade unionists have been victims in a general context of violence and expresses its concern that according to the allegations a large number of union leaders and members have been affected. It draws the attention of the Government to the fact that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 44].*

Murders

629. *With regard to the numerous murders referred to, the Committee notes that the complainant organizations indicate that the following trade unionists have been murdered since the Committee last examined the case in November 2009, without the facts having been elucidated: Ms Olga Marina Ramírez Sansé, Mr Víctor Alejandro Soyos Suret, Mr Luis Arnaldo Ávila and Mr Pedro Antonio García. The Committee observes that, for its part, the Government provides information on the murder of the following trade unionists: Mr Marco Julio Ramírez Portela, Mr Jaime Nery González, Ms Lucila Martínez Zúñiga, Mr Edmundo Noé Herrera Chávez, Mr Freddy Morales Villagrán, Mr Marvin Leonel Arévalo Aguilar, Mr Sergio Miguel García, Mr Carlos Enrique Cruz Hernández, Mr Mario Caal, Mr Miguel Ángel Ramírez Enríquez and Mr José Israel Romero Ixtacuy (11 of the 14 murders listed in the previous examination of the case).*
630. *The Committee recalls that the right to life is a fundamental prerequisite for the exercise of the rights contained in Convention No. 87. 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**, op. ci.t, paras 42–43]. The Committee observes that according to the Government's reply all the murders listed above are under investigation and that so far the inquiries carried out would appear to indicate in most cases that the murders were not related to the trade union activities of the persons concerned. Given the seriousness of the allegations, the Committee urges the Government to take steps to ensure that the investigations are concluded without delay so that the guilty parties can be duly punished and requests the Government to keep it informed in detail of the outcome of the investigations and of the criminal charges brought against the perpetrators. The Committee further notes that in the case of Mr Jaime Nery González and Mr Mario Caal, the Government states that more precise information is needed as it has not been possible to ascertain whether a complaint has been lodged in their case, as several complaints concerning similar incidents have been lodged in connection with persons with the same name. The Committee requests the complainant organization to clarify the matter so that the Government can provide clear information as to how far the investigations into the murder of Mr Jaime Nery González and Mr Mario Caal have progressed. The Committee also urges the Government to provide information*

on the investigations into the murder of the other trade unionists, namely: Israel Romero Istacuy, Diego Gustavo Chite Pu and Sergio Alejandro Ramírez Huezo.

631. Regarding the murder of trade unionists Ms Olga Marina Ramírez Sansé, Mr Víctor Alejandro Soyos Suret, Mr Luis Arnaldo Ávila and Mr Pedro Antonio García, the Committee notes that the Government has not provided any information on the subject. The Committee 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]. The Committee therefore urges the Government to order independent investigations without delay and to keep it informed of their outcome and of the criminal charges brought as a result.

Attempted murder, assault and death threats

632. With regard to the Union of Small Traders and Assimilated Workers, the Committee notes that the complainant organization indicates that the state security forces attempted to evict union members from their workplace in the historical centre of the capital and that several workers were injured in the process. The Committee observes that the Government, through the Ministry of Labour and Social Welfare, has taken action to determine the facts of the matter and that the Office of the Prosecutor General has indicated that a complaint has been lodged that is currently under investigation. The Committee requests the Government to keep it informed in detail of the outcome of the investigation under way and of the criminal charges brought in the matter.
633. With regard to the Union of Commercial Workers of Coatepeque, the Committee notes that the complainant organization indicates that state security forces attempted the extrajudicial killing of union members and that a union official, Mr Mario Méndez, has received death threats by telephone ever since. The Committee notes the Government's reply to the effect that it was the workers' refusal to move to a new market that resulted in the excessive use of force by the state security forces and employees of the local municipality, with the result that people were injured and one person was killed. The Committee observes that the death is currently under investigation, but that according to the Ministry of Labour and Social Welfare none of the other people concerned have lodged complaints. The Committee requests the Government to keep it informed in detail of the outcome of the investigation under way and of the criminal charges brought in the matter. The Committee also urges that independent investigations be undertaken into the allegations of attempted extrajudicial killings, death threats and injuries of which the union members have been the victim. The Committee urges the Government to keep it informed in detail about these investigations and about the criminal charges brought in the matter.
634. With regard to the National Health Union, the Committee notes that members of the union and their families have been the victims of death threats. The Committee observes the Government's statement that according to the records of the Public Prosecutor and of the Human Rights Prosecutor no complaint has been lodged and therefore no criminal charges can legally be brought. The Committee urges the Government to order an independent investigation into the aforementioned allegations and to keep it informed in detail of the outcome of the investigation and of any criminal charges that may be brought as a result.
635. With regard to the attempted murder of Mr Julián Capriel Marroquín, the Committee observes that due steps were taken to establish the facts and that a complaint was lodged

on 16 April 2009 and the matter is currently under investigation. The Committee notes specifically that, according to the Government, there are discrepancies between the information provided by the complainant and by the Office of the Public Prosecutor regarding the date the incident took place. The Committee requests the complainant organization to clarify the facts so that clear and precise information can be submitted on the incident.

636. Regarding the allegations concerning death threats against the Union of Banana Workers of Izabal (SITRABI) and the Union of Workers of the Palo Gordo Sugar Refinery, the Committee notes that the Government has not provided any information on the subject. It accordingly urges the Government to send its observations without delay.

Kidnappings

637. With regard to the kidnapping and rape of Ms María Alejandra Vásquez, the Committee observes that, according to the Government, the Ministry has taken the necessary steps to establish that a complaint lodged by a Ms Alejandra Vásquez does appear in the records of the Office of the Public Prosecutor but that the records contain a list of complaints in which people with the same name are cited. The Committee requests the complainant organization to provide it with additional information so that the Government can conduct an investigation into the matter.
638. With regard to the alleged holding by the security forces of members of the MSICG against their will at the headquarters of the Ministry of Labour and Social Welfare, the Committee observes the Government's statement that the MSICG lodged a complaint with the Office of the Public Prosecutor regarding the incident and that the investigation had shown that no crime of any kind had been committed and the investigating magistrate therefore rejected the complaint.

Blacklisting

639. With regard to the alleged blacklisting of trade unionists to prevent their being employed, the Committee observes the Government's statement that Guatemala does not provide information on people who are or have been engaged in trade union activities or on people who have instituted legal proceedings that can be used for purposes of blacklisting. The Government firmly rejects any such assertions as being based on hearsay and quite untrue. Moreover, the Office of the Public Prosecutor reports that the persons concerned have never lodged a complaint or provided any evidence of state institutions taking such extreme action, which the complainant organizations claim is aimed at the country's workers. The Committee notes that the complainant organization mentions private companies and recalls that it has expressed the opinion that all practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices [see **Digest**, op. cit., para. 803]. The Committee urges the Government to conduct a thorough investigation of the allegations and to keep it informed of the outcome.

Harassment and intimidation

640. With regard to the Union of Workers of the Municipality of Zacapa, the Committee notes that according to the complainant organization the mayor of the municipality of Zacapa initiated criminal proceedings against officers of the union's executive committee. The Committee observes the Government's statement that, upon the conclusion of the investigation, the Office of the Public Prosecutor requested the judicial body in charge of

the matter to suspend the investigation provisionally, and that that is where proceedings stand at present. The Committee urges the Government to keep it informed of developments and to take steps to investigate whether criminal charges were brought in connection with the trade union activities of the union officials referred to.

- 641.** *With regard to the detailed allegations of harassment and intimidation presented by SITRADICMP, CCDA, SITRAPETEN and the MSICG, the Committee observes that the Government has not provided any information on the subject. The Committee urges the Government to send its observations without delay.*

Obstacles to the exercise of trade union rights and to social dialogue

- 642.** *With regard to the alleged violations of freedom of association in the Las Américas SA and Crown Plaza Guatemala hotels, the Committee notes that the incidents are currently being investigated. It therefore requests the Government to keep it informed of the outcome of the investigation.*

- 643.** *With regard to the alleged violations of freedom of association and of the right to bargain collectively in the Quetzal Port Enterprise, the Committee observes the Government's statement that, in the light of the legal arguments put forward by the enterprise, it was determined that the enterprise had no labour relationship with the workers concerned nor any responsibility for such labour relationship or for the collective labour disputes instigated by the workers, and that the groups of workers referred to pursued their claims against their employers with whom they subsequently held direct negotiations and reached an arrangement that put an end to the dispute. Furthermore, with regard to the allegations presented by SITEGREACOPQ concerning anti-union dismissals, the Committee notes that the Government denies the allegations as having no basis in fact and that the workers who provided their services through private companies took the matter to the labour and social welfare court of the department of Escuintla, where some cases are still awaiting a decision. The Committee requests the Government to keep it informed of the outcome of the cases that are still awaiting a decision and to send it a copy of the rulings when they are handed down. Furthermore, the Committee will examine these matters relating to the company in the framework of Case No. 2341.*

Denial of legal status and anti-union dismissals

- 644.** *With regard to the alleged denial of the right to organize and of restrictions on official registration, as required by law, of the Union of Workers of the Prison System, Union of Workers and Independent Agricultural Workers (Liga Campesina) of Cerro Colorado Village of the Municipality of La Gomera Escuintla, Union of Workers of the Municipality of Río Bravo Suchitepéquez, CUSG, Union of Workers of the Municipality of Colomba Costa Cuca, Union of Workers of the Municipality of San Marcos and of the San Marcos Municipal Electricity Company, Union of Independent Fishers of the Village of Tacaton of the Municipality of Amatitlán, Union of Workers of the Municipality of El Tumbador, Union of Workers of the Municipality of Atescaíempa Jutiapa, Union of Workers of the Municipality of San Cristóbal Totonicapán, SITRAMARN, Taxi Workers' Guild of Izabal, Union of Banana Workers of the South, and others, the Committee notes the Government's statement the most of these trade unions have been granted legal status and that the others have been dissolved, are inactive, are awaiting the correction of errors in the documents submitted with the request for recognition or are awaiting a decision. The Committee requests the Government to keep it informed of any decisions taken on the subject and of the recognition of unions once the errors in their documentation have been corrected.*

645. *With regard to the collective dispute and dismissal of members of the Union of Workers of the Municipality of Chimaltenango, the Committee notes that the General Labour Directorate has looked into the incidents referred to and has established that the court that investigated the collective dispute instigated by the trade union took all the necessary steps required by law. As to the requests for reinstatement, these are still under discussion in the relevant judicial bodies. The Committee requests the Government to keep it informed of the decisions handed down by the courts. With regard to the Union of Workers of the Municipality of San Antonio Huista in the department of Huehuetenango, the Committee notes that, according to the Government, the workers took their case to the labour and social welfare court of first instance of Huehuetenango, which validated the resignations tendered by the employees of the previous administration and thereby put an end to the deadlock in which the municipality found itself. The Committee observes that the municipality compensated the employees and paid them their employment benefits.*

The Committee's recommendations

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

- (a) The Committee draws attention to the gravity of this case, given the numerous allegations of murder, attempted murder, assault and death threats, kidnappings, harassment and intimidation and blacklisting.*
- (b) With regard to the murder of trade union leaders and members, the Committee requests the complainant organization to clarify the facts as regards the cases of Mr Jaime Nery González and Mr Mario Caal so that the Government can provide information on how far the investigations have progressed. The Committee also urges the Government to provide information on the investigations into the murder of Mr Israel Romero Istacuy, Mr Diego Gustavo Chite Pu and Mr Sergio Alejandro Ramírez Huevo.*
- (c) With regard to the murder of trade unionists Ms Olga Marina Ramírez Sansé, Mr Víctor Alejandro Soyos Suret, Mr Luis Arnaldo Ávila and Mr Pedro Antonio García, the Committee urges the Government to order independent investigations without delay and to keep it informed of their outcome and of the criminal charges brought as a result.*
- (d) With regard to the injured workers of the Union of Small Traders and Assimilated Workers, the Committee requests the Government to keep it informed in detail of the outcome of the investigation under way and of the criminal charges brought in the matter.*
- (e) With regard to the death of a trade unionist following the use of excessive force, the Committee urges the Government to keep it informed in detail of the outcome of the investigation under way and of the criminal charges brought in the matter. The Committee also urges that independent investigations be undertaken into the allegations of attempted extrajudicial killings, death threats and injuries to union members. The Committee requests the Government to keep it informed in detail about these investigations and about the criminal charges brought as a result.*

- (f) With regard to the members of the National Health Union, the Committee urges the Government to order an independent investigation in the death threats received and to keep it informed in detail of the outcome of the investigation and of the criminal charges brought as a result.*
- (g) With regard to the attempted murder of Mr Julián Capriel Marroquín, the Committee requests the complainant organization to clarify the facts so that clear and precise information can be submitted on the incident.*
- (h) With regard to the alleged death threats against SITRABI and the Union of Workers of the Palo Gordo Sugar Refinery, the Committee urges the Government to send its observations on the matter without delay.*
- (i) With regard to the kidnapping and rape of Ms María Alejandra Vásquez, the Committee requests the complainant organization to provide it with additional information so that the Government can conduct an investigation into the matter.*
- (j) With regard to the alleged blacklisting of union members to prevent their being employed, the Committee urges the Government to conduct a thorough investigation of the allegations and to keep it informed of the outcome.*
- (k) With regard to the officers of the Union of Workers of the Municipality of Zacapa, the Committee urges the Government to keep it informed of the criminal proceedings and to order an investigation into whether the criminal charges were brought in connection with the trade union activities of the union officials referred to.*
- (l) With regard to the detailed allegations of harassment and intimidation cited by SITRADICMP, CICD, SITRAPETEN and the MSICG, the Committee urges the Government to send its observations on the subject without delay.*
- (m) With regard to the alleged violation of freedom of association in the Las Américas SA and Crown Plaza Guatemala hotels, the Committee requests the Government to keep it informed of the outcome of the investigation under way.*
- (n) With regard to the alleged violation of freedom of expression and of the right to bargain collectively in the Quetzal Port Enterprise, the Committee requests the Government to keep it informed of the outcome of the cases that are still awaiting a decision and to send it a copy of the rulings when they are handed down. Furthermore, the Committee will examine the matters relating to the company in the framework of Case No. 2341.*
- (o) With regard to the alleged denial of the right to organize and restrictions on the registration of trade unions as required by the national labour legislation, the Committee requests the Government to keep it informed of any decisions taken on the subject and of the recognition of unions once the errors in their documentation have been corrected.*

- (p) *With regard to the orders for workers to be reinstated in the context of the collective dispute and the dismissal of members of the Union of Workers of the Municipality of Chimaltenango, the Committee requests the Government to keep it informed of the outcome of the decisions handed down by the judicial courts.*
- (q) *The Committee draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.*

CASE NO. 2754

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

**Complaint against the Government of Indonesia
presented by
the Federation of Indonesian Metalworkers' Union (FIMWU)**

Allegations: The complainant organization alleges anti-union dismissals from the PT. Dok Dan Perkapalan Surabaya resulting in difficulties of the SEKAR–DPS trade union to operate

647. The complaint is contained in a communication dated 13 December 2009 from the Federation of Indonesian Metal Workers' Union (FIMWU).
648. The Government sent its observations in a communication dated 6 September 2010.
649. Indonesia has ratified the Freedom of Association and Protection of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

650. In a communication dated 13 December 2009, the FIMWU, acting on behalf of an affiliated organization, namely the SEKAR–DPS trade union, alleges that the Government of Indonesia fails to protect trade unions from anti union practices by the management of a state-owned enterprise, the PT. Dok Dan Perkapalan Surabaya (PT. DPS).
651. The complainant indicates that PT. DPS had been trying to interfere in the election of the President of the SEKAR–DPS trade union. However, having failed to do so, the enterprise dismissed the newly elected President of the union, Mr Muchlish, and harassed 60 members of the union executive. Such anti-union practices from the management led to a situation where the union had serious difficulty to operate normally. The complainant adds that all attempts of SEKAR–DPS to discuss with the management had been in vain. Furthermore, the enterprise's management refused mediation proposed by the local police of the Ministry of Manpower. The complainant provides the following chronological details of the case.

- 652.** On 13 August 2009, the trade union president election committee of the SEKAR–DPS sent to the management of PT. DPS the election schedule informing of the date of the election (14 October 2009). On 9 October 2009, Mr Muchlish, the President of SEKAR–DPS and one of the candidates for the coming election, was notified without any prior consultation or notice of his transfer to the Jakarta office effective from the date of notification. The union sent two objection letters to the management requesting a proper dialogue. While Mr Muchlish won the trade union election on 14 October with 90 per cent of all cast votes for a second term, he received from the management a third grade warning letter for his failure to go to the Jakarta office.
- 653.** The complainant indicates that, following his letter to the management on the schedule of the trade union, on 16 October 2009 Mr Muchlish was barred from entering the trade union office by security guards instructed by the management. On the same day, the trade union sent to the management a dialogue request letter together with a strike notice. The management decided to dismiss Mr Muchlish and to notify Mr Arie Wibowo, the general secretary of the union, of his suspension effective 19 October 2009. Furthermore, three days later three members of the trade union were restricted from entering the company property, which resulted in putting the normal operation of the SEKAR–DPS to a halt.
- 654.** The complainant indicates that the strike which took place from 28 to 30 October 2009 as scheduled complied to all legal requirements and was held in a very orderly manner. However the management of PT. DPS refused to negotiate. The trade union decided on 2 November 2009 to organize demonstrations in several locations including PT. DPS, the office of the East Java Governor and the House of People’s Representatives. The complainant denounced the fact that from 3 November 2009 the management of PT. DPS suspended 17 members of the SEKAR–DPS and gave warning for suspension to the entire trade union committee (60 members). A letter dated 30 November 2009 to the management requesting immediate dialogue relating to the sanctions remained unanswered.
- 655.** The FIMWU requests the Committee to instruct the Government to ensure the free exercise of trade union activities without management interference.

B. The Government’s reply

- 656.** In its communication of 6 September 2010, the Government indicates that it had organized several meetings to solicit information from the management of the PT. DPS. The Government provided the following chronological details of the case.
- 657.** On 13 August 2009, the chairperson of the election commission of the union notified the management of the schedule of the election for chairpersonship of SEKAR–DPS and that the candidate was the incumbent chairperson itself, Mr Muchlish. On 3 October 2009, Mr Muchlish was called by the President Director to get a briefing on a job transfer plan made by the company wherein 18 people, including himself, would be transferred to new posts. The letter of decision of the Board of Directors on the job transfer and promotion of the 18 people was issued on 7 October to be effective as of 9 October 2009. On 12 October, Mr Muchlish was called by the Senior Human Resources Manager to receive the letter of decision on the job transfer and to get instructions and explanation on the transfer, but he asked a friend from the to take it instead. On the same day, SEKAR–DPS sent a letter of objection to the job transfer.
- 658.** On 14 October 2009, Mr Muchlish won the election as chairperson of SEKAR–DPS. On the same day, the Board of Directors of the company notified SEKAR–DPS to the effect that the job transfer of Mr Muchlish was final and that he was asked to carry out the new assignment not later than 16 October 2009. On 15 October 2009, Mr Muchlish received a

third warning letter for having ignored the company's instruction which, according to the company, contravened the collective agreement. On the same day, SEKAR-DPS sent a letter to the Manpower Office of Surabaya City requesting inquiries into the job transfer of Mr Muchlish qualified as a suspected crime against the Manpower Law. On 16 October 2009, the Board of Directors of the company issued a letter of decision on the discharge of Mr Muchlish from employment for his refusal to obey the job transfer order. The letter also prohibited Mr Muchlish from entering the company. The letter sparked a series of actions from other employees causing several people to be suspended. In response, SEKAR-DPS issued a strike notice, which was to take place on 28 October 2009.

- 659.** On 22 October 2009, Mr Arie Wibowo, general secretary of SEKAR-DPS, made a report on the violation of article 28 of Act No. 21 of 2000, on Trade union/Labour union. The union went on strike as scheduled from 28 to 30 October 2009. The union demanded reconsideration of the decision to transfer Mr Muchlish, the termination of the company's outsourcing programme, the realization of the incentive on income tax under article 21 of the Regulation of the Minister of Finance, the settlement of division of the proceeds from the company's waste processing, and the entrusting of the company's waste processing to the employees' cooperative society. The management of the company made an objection to the strike by a letter dated 28 October 2009, sent to the East Java region police and to the Manpower Office of Surabaya on the grounds that the normative demand of the trade union would be granted, that the strike was detrimental to the company, that the strike was unlawful by forcing other workers to stop working, that the strike involved workers who were under suspension or whose employment had been terminated, and that the FIMWU, the complainant in the present case, had held a meeting without the permission of the company and had made provocation.
- 660.** On 3 November 2009, a supervisory officer of the Manpower Office of Surabaya City sought clarification from the chairperson and the general secretary of SEKAR-DPS. Neither were willing to give any written statement for fear of double jeopardy. They feared that the intervention of the Manpower Office would put a halt to the inquiries which were being conducted by the Surabaya municipal police in relation to alleged violation of Act No. 21 on Trade union/Labour union, as requested by the union. On 4 November, the supervisory officer of the Manpower Office of Surabaya City sought clarification from the President Director and the Senior Human Resources Manager of PT. DPS. A written interrogation report was drawn up on the statements given. After a second letter of complaint by SEKAR-DPS, the supervisory officer of Surabaya City conducted an inspection at the company on 23 November 2009. A report on the outcome of the inspection was sent to the company and the trade union on 28 November 2009. On 30 November 2009, the Surabaya municipal police heard the Senior Human Resources Manager of PT. DPS as a witness in the case of violation of article 28 of Act No. 21 on Trade union/Labour union.
- 661.** On 5 January 2010, SEKAR-DPS addressed to the Manpower Office of Surabaya City and East Java province a response to the outcome of the inspection at the company and requested a re-inspection. As a follow-up to the letter, summonses were served upon SEKAR-DPS on 2 February 2010, and upon the Director of the company on 3 February 2010. The outcome of the clarification summons was incorporated in a letter dated 12 February 2010 and sent to both parties.
- 662.** The Government indicates that from 14 January to 3 February 2010, the Director of the company issued letters of discharge from employment to eight workers for their involvement in the workers' action of 16 October 2009 and the strike, and for not changing their attitude after their suspension. These workers are Mr Abd. Sukur, Mr Abadi Harianto, Mr Subiyanto, Mr Aris Purwanto, Mr Katjung Budi Susianto, Mr Dhoni Laksono, Mr A. Rifai and Mr Arie Wibowo, the general secretary of the union. On 29 January 2010,

the trade union issued a letter objecting to the decision to dismiss the eight workers. However, the Government underlined that no mediation process had been requested to the Manpower Office of Surabaya City for the settlement of the dispute.

- 663.** On 11 February, a mediator of the Manpower Office of Surabaya City issued recommendations on the conflict between the company and the union, essentially recommending that Mr Muchlish accept the job transfer and that the decision to suspend Mr Wibowo and friends be revoked and they resume work, with payment of back wages. On 12 February 2010, a supervisor of the Manpower Office of Surabaya City reported on the outcome of the clarification summons on the case of PT. DPS, essentially to the effect that the employment relationship between the company and the workers had not yet ended so long as a decision of the industrial relations dispute settlement institution had not been made, thereby the two parties still had to comply with their obligations.
- 664.** On 27 April 2010, the SEKAR–DPS issued a request for an official memorandum on instruction of payment of wages. This was followed up by an inspection at the company conducted by a local manpower supervisor on 5 May 2010. As a result, the Manpower Office of Surabaya City issued a letter on memorandum of inspection dated 11 May 2010, addressed to the company to the effect that the wages of Mr Muchlish since November 2009 were to be paid and the matter of termination of employment of eight workers was to be immediately registered with the Manpower Office and the company was to pay their wages.
- 665.** The Government underscores the efforts made by the authorities, among them the occasions where the manpower supervisory officer sought clarification from the parties, the inspections conducted at the company, and the letters issued by the Manpower Office of Surabaya City to the company on actions to be taken following the outcome of examination of the disputes.
- 666.** The Government also highlights the examination by the Surabaya municipal police with the hearing of a witness in the case of alleged violation of article 28 of Act. No. 21 on Trade union/Labour union and a community policing acceleration activity conducted in November 2009 at the company for the development of understanding of the employees and the company in order that, in responding to any issue, there would not be any provocative act.
- 667.** The Government adds that procedures under Act No. 2 of 2004 on Industrial Dispute Settlement had been taken concerning the job transfer decision resulting in the termination of employment of Mr Muchlish and that a settlement had now been achieved through the mediation of the Manpower Office of Surabaya City. The mediator made the following recommendations:
- Mr Muchlish was to take the job transfer from Surabaya to Jakarta as determined by the company;
 - the company was to revoke the suspension of Mr Arie Wibowo and friends (17 people) in order that they could resume work;
 - the company remained obliged to pay the wages of the workers during the non-job period;
 - the company was to comply with the income tax procedure under the regulation in force;

- waste processing formed the right and authority of the company to regulate on condition that 80 per cent was for the interest of the company and 20 per cent for the workers;
 - assignment of a job to a third party did not conform to the laws and regulations; the employment status of workers had to be transformed to employment relationship with the company.
- 668.** The Government adds information provided by the PT. DPS to the effect that the job transfer of Mr Muchlish and 17 other workers formed a routine activity of the company carried out every year, and more specifically the transfer was intended to promote Mr Muchlish in his career. The company emphasized that the job transfer was conducted through a transparent mechanism which included prior consultation of the 18 workers before the notification of job transfer. However Mr Muchlish refused to take the letter of decision on the job transfer and asked a friend to take it. According to the company, Mr Muchlish received a third warning letter for being regarded as having breached the collective employment agreement; Mr Muchlish had also performed acts in breach of letter (b)–(d), paragraph 3, article 20, of the Collective Employment Agreement, so that he was given a sanction and discharged from employment. With respect to the recommendation of the mediator to the effect that Mr Muchlish was to take the job transfer assigned by the company, PT. DPS denied the recommendation for the reason that the post of Jakarta Representative Office Manager was now filled by another person. However, the company added that Mr Muchlish had indeed then agreed to accept the job transfer.
- 669.** The Government declares that the company never hindered the implementation of freedom of association; on the contrary the company provided operational support to the management of its employees' trade union. The job transfer of Mr Muchlish and other workers had been discussed by the management since May 2009, while the election of the chairperson of SEKAR–DPS was scheduled to take place in October 2009, demonstrating that the job transfer had nothing to do with the election. The case of employment of Mr Muchlish and the denial by the management of PT. DPS of the recommendation of the Manpower Office of Surabaya City had been filed with the Industrial Relations Tribunal at the District Court of Surabaya. The tribunal issued a decision on 19 July 2010 whereby it declared that the Mr Muchlish had performed an act contrary to Act No. 13 of 2003 on manpower and had breached the Collective Employment Agreement, that the letter of decision on the job transfer dated 16 October 2009 from the Board of Directors was lawful and valid, that the employment relationship between the company and Mr Muchlish was severed as of 19 October 2009, and the tribunal ordered the company to pay the rights of Mr Muchlish on account of the termination of employment amounting to 66,672,547 rupiahs (IDR) (the Government provided copy of the judgment in original language).
- 670.** Finally, the Government indicates that the demonstration staged by SEKAR–DPS without notice and which shut down the company had caused great losses to the company, and consequently the management terminated the employment of eight workers who were proven to be the initiators of the demonstration. However, the Government asserts that a negotiation is being held in the company on the issue of their reinstatement.

C. The Committee's conclusions

- 671.** *The Committee notes that this case concerns allegations of anti-union dismissals by the PT. DPS resulting in difficulties for the company trade union, the SEKAR–DPS, to operate.*
- 672.** *The Committee notes the allegations from the FIMWU that the Government of Indonesia fails to protect trade unions from anti union practices by the management of its state-*

owned enterprise, the PT. DPS (“the company”). The Committee notes that, according to the complainant, the company had been trying to interfere in the election of the President of the SEKAR–DPS. However, having failed to do so, the enterprise had dismissed the elected President of the union, Mr Muchlish, and harassed 60 members of the trade union executive board. According to the complainant, these practices – despite attempts by the trade union to discuss with the management – had led to a situation where the union had serious difficulty operating normally.

673. The Committee notes from the information provided both by the complainant and by the Government that the dispute arose after the trade union notified the management of the company of the chairpersonship election schedule (14 October 2009). The Committee notes that, according to the complainant, Mr Muchlish, the incumbent President of SEKAR–DPS – and candidate for election – was notified on 16 October 2009, without any prior consultation or notice of his transfer to the Jakarta office effective from the date of notification. The Committee also notes the company’s indication that, on the contrary, the job transfer of Mr Muchlish and 17 other workers formed a routine activity of the company carried out every year. The job transfer had been discussed by the management since May 2009 and had nothing to do with the election. The company added that the job transfer was conducted through a transparent mechanism, which included prior consultation of the 18 workers concerned before the notification of their job transfer. Moreover, the transfer was intended to promote Mr Muchlish in his career as the Jakarta Representative Office Manager. The Committee notes from the details provided by the Government that, on 3 October 2009, Mr Muchlish was called by the President Director to get a briefing on a job transfer plan made by the company wherein 18 people, including himself, would be transferred to new posts. The letter of decision of the Board of Directors on the job transfer and promotion of the 18 people was issued on 7 October to be effective as of 9 October 2009. On 12 October, Mr Muchlish was called by the senior human resources manager to receive the letter of decision on the job transfer and to get instructions on the transfer, but he asked a friend from the Human Resources Development Department to take it instead. According to the complainant, several letters from the union to discuss this question remained unanswered.
674. The Committee notes that Mr Muchlish won the trade union election on 14 October with 90 per cent of all cast votes for a second term. On the same day, the trade union received a letter from the Board of Directors of the company indicating that the job transfer of Mr Muchlish was final and asking him to carry out the new assignment on 16 October. The following day, Mr Muchlish received from the management a third grade warning letter for his failure to comply with the transfer decision and for allegedly contravening the collective agreement signed between the company and the trade union. The Committee notes that, finally, on 16 October 2009, the Board of Directors issued a letter of decision on the discharge of Mr Muchlish from employment for his refusal to obey the job transfer order.
675. The Committee notes that, according to the information provided by the complainant and the Government, the letter of dismissal also prohibited Mr Muchlish from entering the company. Moreover, the complainant indicated that Mr Muchlish was barred from entering the trade union office by security guards instructed by the management. In this regard, the Committee wishes to recall that the access of trade union members to their union premises should not be restricted. Furthermore, the Committee has emphasized that workers’ representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representative function. Moreover, the Committee recalls that trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned [see **Digest of decisions and principles of the**

Committee on Freedom of Association, fifth edition, 2006, paras 1104–1105]. Therefore, the Committee observes that, while the employment of Mr Muchlish had been terminated (a point it will come back to below), he remained the elected chairperson of the company trade union. The Committee is of the view that the decision of the Board of Directors to prohibit Mr Muchlish from entering the company constituted a serious interference with the effective exercise of his representative function. The Committee draws attention to the need to ensure full compliance with the abovementioned principles concerning access to the workplace.

- 676.** *The Committee further notes that, following the discharge of Mr Muchlish, the general secretary of the SEKAR–DPS made a report to the police on the violation of article 28 of Act No. 21 of 2000 on Trade union/Labour union. The trade union also went on strike from 28 to 30 October 2009. The union demanded reconsideration of the decision to transfer Mr Muchlish, as well as the termination of the company’s outsourcing programme, the realization of the incentive on income tax under article 21 of the Regulation of the Minister of Finance, the settlement of the division of the proceeds from the company’s waste processing, and the entrusting of the company’s waste processing to the employees’ cooperative society. The Committee notes that the company made an objection to the strike by a letter dated 28 October 2009, sent to the East Java Region Police and to the Manpower Office of Surabaya City on the grounds that the normative demand of the trade union would be granted, that the strike was detrimental to the company, that the strike was unlawful by forcing other workers to stop working, that the strike involved workers who were under suspension or whose employment had been terminated, and that the FIMWU, the complainant in the present case, had held a meeting without the permission of the company and had made provocation.*
- 677.** *The Committee notes the Government’s indication that, in November 2009, a supervisory officer of the Manpower Office of Surabaya City sought clarification from the chairperson and the general secretary of SEKAR–DPS as well as from the President Director and the Senior Human Resources Manager of the company. An inspection at the company was also conducted on 23 November 2009. The Committee observes that a settlement of the matters has been achieved through the mediation of the Manpower Office of Surabaya City under Act No. 2 of 2004 on industrial dispute settlement. The Committee notes in particular that the mediator made a recommendation to the effect that Mr Muchlish was to take the job transfer from Surabaya to Jakarta as determined by the company. Although the company acknowledged that Mr Muchlish had then agreed to accept the job transfer, it denied the recommendation for the reason that the post had been filled by another person. Finally, the Committee notes that the case of employment of Mr Muchlish and the denial by the management of PT. DPS of the recommendation of the Manpower Office of Surabaya City was filed with the Industrial Relations Tribunal at the District Court of Surabaya. The tribunal issued a decision on 19 July 2010 whereby it declared that Mr Muchlish had performed an act contrary to Act No. 13 of 2003 on manpower and had breached the Collective Employment Agreement, that the letter of decision on the job transfer dated 16 October 2009 from the Board of Directors was lawful and valid, that the employment relationship between the company and Mr Muchlish was severed as of 19 October 2009. The tribunal ordered the company to pay the rights of Mr Muchlish on account of the termination of employment amounting to IDR66,672,547 (=US\$7,364) consisting of severance pay, service gratuity and compensation for rights.*
- 678.** *The Committee notes the divergent views expressed by the complainant and the Government on the motivation and circumstances of the decision to transfer Mr Muchlish, the chairperson of SEKAR–DPS. The Committee gives due note to the recommendations of the mediator and the findings of the Industrial Relations Tribunal. The Committee also wishes to recall that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in*

respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom. The Committee has expressed the view that a deliberate policy of frequent transfers of persons holding trade union office may seriously harm the efficiency of trade union activities [see **Digest**, op. cit., paras 799 and 802]. While it expects that all measures will be taken to ensure full compliance with the abovementioned principles, the Committee requests the Government to provide information on the present employment status of Mr Muchlish, indicating whether he is still exercising his functions as chairperson of the SEKAR-DPS and, if so whether he is granted access to PT. DPS to enable him to carry out his representative function. More generally, the Committee expresses its concern at the fact that the question of the transfer of Mr Muchlish was not resolved through dialogue with the union as the complainant indicates it had requested and in light of the context of the elections to take place at the same moment. Noting the divergent views of the complainant and the enterprise set out in the Government's reply concerning the motivation for the transfer of Mr Muchlish, the Committee requests that the Government encourage dialogue between the union and the enterprise on the employment status of Mr Muchlish including, but not limited to, the possibility of rehiring him in another post, should he so desire and should this be practicable.

679. Furthermore, the Committee notes that, according to the Government, the decision of the Board of Directors to prohibit the President of the trade union from entering the union premises had sparked a series of action from other employees causing several people to be suspended. From 3 to 6 November 2009, the management of the company suspended 17 members of the trade union committee. The Government also indicated that the demonstration staged by SEKAR-DPS without notice, shutting down the company, had caused great losses to the company, and consequently the management terminated the employment of eight workers who were proven to be the initiators of the demonstration. The Government specified that from 14 January to 3 February 2010, the Director of the company issued letters of discharge to eight workers for their involvement in the workers' action of 16 October 2009 and the strike, and for not changing their attitude after their suspension. These workers are Mr Abd. Sukur, Mr Abadi Harianto, Mr Subiyanto, Mr Aris Purwanto, Mr Katjung Budi Susianto, Mr Dhoni Laksosno, Mr A. Rifai and Mr Arie Wibowo, the general secretary of the union. The Committee notes the information from the complainant that Mr Arie Wibowo, the general secretary of the union, was notified of his suspension effective as of 19 October 2009. Three days later three members of the trade union were also restricted from entering the company property, which resulted in bringing the normal operation of the SEKAR-DPS to a halt.
680. First, the Committee recalls that no one should be penalized for carrying out or attempting to carry out a legitimate strike. Moreover, the dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No. 98 [see **Digest**, op. cit., paras 660–661]. The Committee observes that, in the present case, the Government indicated that, under the procedures of Act No. 2 of 2004 on industrial dispute settlement, a mediator of the Manpower Office of Surabaya City issued, among others, the recommendation that the decision of suspension of Mr Wibowo and 16 members of the union committee be revoked and they resume work and that they be paid back wages. The Committee also notes the indication that a negotiation is ongoing in the company on the reinstatement of the eight workers – of the 17 suspended workers – who were dismissed for their involvement in a

demonstration which allegedly caused great losses to the company and for not having changed their attitude during their suspension period. The Committee requests the Government to keep it informed on any follow-up to the recommendation of the mediator of the Manpower Office of Surabaya City to the effect that the company revoke the suspension of Mr Arie Wibowo, general secretary of the SEKAR–DPS, and 16 other members of the union committee and pay back wages. As regards the indication from the Government that a negotiation is ongoing in the company concerning the reinstatement of the eight dismissed workers, the Committee requests the Government to make efforts to bring about a negotiated solution to this matter, particularly given the fact that, according to the Government, they were fired for having undertaken demonstrations in reaction to the firing of their chairperson and for not changing their attitude, and in a context where, according to the complainant but not refuted in the Government's reply, attempts to discuss the matter in dispute went unanswered by the management. The Committee requests the Government to keep it informed of any progress made in this regard.

- 681.** The Committee acknowledges the efforts from the local authorities, in particular the Manpower Office of Surabaya City and the Surabaya municipal police, to resolve the dispute through inquiries and mediation. Since the case concerns alleged anti-union dismissals resulting in difficulties of a trade union to operate, the Committee requests the Government and the complainant to indicate whether the SEKAR–DPS is still organizing activities at the PT. DPS.
- 682.** The Committee is bound to recall that on a number of occasions it examined complaints of anti-union discrimination in Indonesia and has considered that the prohibition against anti-union discrimination in Act No. 21/2000 is insufficient. While the Act contains a general prohibition in article 28 accompanied by dissuasive sanctions in article 43, it does not provide any procedure by which workers can seek redress [see Case No. 2236, 335th Report, para. 968]. The Committee recalls that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can, in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [see *Digest*, op. cit., para. 707]. The Committee notes the importance of mediation in finding commonly acceptable solutions to labour disputes. The Committee also recalls that no one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished [see *Digest*, op. cit., para. 772]. Where a government has undertaken to ensure that the right to associate shall be guaranteed by appropriate measures, that guarantee, in order to be effective, should, when necessary, be accompanied by measures which include the protection of workers against anti-union discrimination in their employment [see *Digest*, op. cit., para. 814]. The basic regulations that exist in national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see *Digest*, op. cit., para. 818]. Consequently, the Committee urges the Government to take steps, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination in the future, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. It expects that allegations of anti-union discrimination would be examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned [see *Digest*, op. cit., para. 738], as required by Convention No. 98. The Committee requests the Government to keep it informed in this regard.

The Committee's recommendations

683. *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 provide information on the present employment status of Mr Muchlish, indicating whether he is still exercising his functions as chairperson of the SEKAR–DPS and, if so whether he is granted access to the PT. DPS to enable him to carry out his representative function.*
- (b) Noting the divergent views of the complainant and the enterprise set out in the Government's reply concerning the motivation for the transfer of Mr Muchlish, the Committee requests that the Government encourage dialogue between the union and the enterprise on the employment status of Mr Muchlish including, but not limited to, the possibility of rehiring him in another post, should he so desire and should this be practicable.*
- (c) The Committee requests the Government to keep it informed on any follow-up to the recommendation of the mediator of the Manpower Office of Surabaya City to the effect that the company revoke the suspension of Mr Arie Wibowo, general secretary of the SEKAR–DPS, and 16 other members of the union committee and pay back wages.*
- (d) As regards the indication from the Government that a negotiation is ongoing in the company concerning the reinstatement of the eight dismissed workers, the Committee requests the Government to make efforts to bring about a negotiated solution to this matter, particularly given the fact that, according to the Government, they were fired for having undertaken demonstrations in reaction to the firing of their chairperson and for not changing their attitude, and in a context where, according to the complainant but not refuted in the Government's reply, attempts to discuss the matter in dispute went unanswered by the management. The Committee requests the Government to keep it informed of any progress made in this regard.*
- (e) The Committee requests the Government and the complainant to indicate whether the SEKAR–DPS is still organizing activities at the PT. DPS.*
- (f) The Committee urges the Government to take steps, in full consultation with the social partners concerned, to amend its legislation to ensure comprehensive protection against anti-union discrimination in the future, providing for swift recourse to mechanisms that may impose sufficiently dissuasive sanctions against such acts. The Committee requests the Government to keep it informed in this regard.*

CASE NO. 2807

INTERIM REPORT

**Complaint against the Government of the Islamic Republic of Iran
presented by
the International Trade Union Confederation (ITUC)**

Allegations: The complainant alleges that the accreditation of the Coordinating Center of Workers Representatives as the workers' delegation of the Islamic Republic of Iran to the International Labour Conference is inconsistent with the requirements of the ILO Constitution, as the organization is unknown to the complainant and to independent workers' groups within the country

- 684.** At its 99th Session (June 2010), the International Labour Conference approved the proposal of the Credentials Committee – made in accordance with article 26bis, paragraph 6, of the Conference Standing Orders ¹ – to refer the issues raised by the International Trade Union Confederation (ITUC) in its objection concerning the nomination of the Workers' delegation of the Islamic Republic of Iran to the Committee on Freedom of Association.
- 685.** The issues raised by the ITUC are contained in a communication dated 3 June 2010.
- 686.** The Government forwarded information on the matters raised by the ITUC in communications dated 26 May and 9 June 2010 and provided further observations in a communication dated 8 November 2010.
- 687.** The Islamic Republic of Iran has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations and examination
of the case by the Credentials Committee**

- 688.** In its communication dated 3 June 2010, the ITUC raised an objection concerning the nomination of the Workers' delegation of the Islamic Republic of Iran. This objection, together with the information provided by the Government in communications dated 26 May and 9 June 2010, was examined by the Credentials Committee, as set out below:

...

55. The Committee received an objection from the International Trade Union Confederation (ITUC) concerning the nomination of the Workers' delegation of the Islamic Republic of

¹ Article 26bis, paragraph 6, of the Conference Standing Orders: If the Credentials Committee considers unanimously that the issues raised by an objection relate to a violation of the principles of freedom of association which has not already been examined by the Governing Body's Committee on Freedom of Association, it may propose referral of the question to that Committee. The Conference shall decide, without discussion, on such proposals for referral.

Iran. The ITUC expressed surprise to see representatives from the Coordinating Centre of Workers' Representatives in the delegation because, before the 98th Session (2009) of the Conference, it had never heard of this organization. After that session it heard nothing more of them until representatives were accredited to the 99th Session of the Conference. Furthermore, none of the independent workers' groups, with whom the ITUC had contact, had heard of it. The ITUC contended that the law did not mention these sorts of centres; the Labour Code stipulated that either an Islamic labour council or a guild society could be established at a workplace and that the law strongly favoured labour councils. The national coordinating and leading centre of the Islamic labour councils was the Workers' House, the "official" workers' organization set up and backed by the authorities. In the view of the ITUC, where a council had been established no other form of representation was allowed. Workers' House authorities claimed that over 1,000 labour councils had been established in the country; the ITUC alleged that the councils were often formed by threats and pressure, promises, or forced or rigged elections. In addition, it alleged that the labour councils were formed as tools for controlling workers protests and demands and as the Government's alternative and barrier to the workers' efforts to organize. The ITUC contended that workers who try to organize independently were subjected to different forms of harassment, including violence, arrest, detention and prison sentences. It was surprising, therefore, that there was a new so-called workers' organization which no one had heard of, particularly given the great dissatisfaction among workers against the already existing government-organized union. In view of the repression exacted against new independent workers' organizations, the existing legal framework supporting the Islamic labour councils, and since none of the independent organizations in the Islamic Republic of Iran knew of the Coordinating Centre of Workers' Representatives, the ITUC did not believe that it was a genuine workers' organization. It added that, to its knowledge, all delegation members to the Conference had always been appointed by the Government and not the workers themselves. In view of these facts the ITUC considered that the nomination had not been made in accordance with article 3, paragraphs 1 and 5, of the ILO Constitution and it challenged the credentials of the Coordinating Centre of Workers' Representatives.

56. The Committee had also before it a written communication from the Government dated 26 May 2010, in which it was informed of the procedure followed for the nomination of the Iranian Workers' delegation to the Conference. Representatives of the two major workers' organizations in the Islamic Republic of Iran, the High Assembly of the Workers' Representatives (HAWR) and the High Center for Islamic Labour Councils (HCILC) had been asked by a letter dated 30 March 2010 to provide the names of their representatives to the Ministry of Labour. The Head of the Workers' House was invited to attend a meeting in the International Affairs Department of the Ministry of Labour and Social Affairs which was held on 12 April to discuss the manner in which the Workers' delegation to the Conference would be designated. Although Mr Alirez Mahjoub, Head of the Workers' Fraction of the Islamic Consultative Assembly was invited to accompany the delegation, he declined the invitation. The HAWR and the HCILC convened a meeting on 5 May 2010 and agreed to a rotation for the delegate and substitute delegate to the Conference; as the Workers' delegate at the 98th Session (2009) was from the HCILC, it would be from the HAWR at this session. They also agreed to cooperate with each other and adopt joint approaches.
57. In a written communication addressed to the Committee at its request, Mr Tavakol Habibzadeh, the Deputy Minister for International Relations and Overseas Employment, informed the Committee that the workers' organizations may choose their representative using free will and discretion and upon consultation among themselves and that this had been the case between the two most representative workers' organizations: the Islamic Labour Council (ILC) and the Coordinating Center of Workers' Representatives (CCR). The Government undertook to make sure that the Workers' delegation to the Conference and other relevant assemblies were inclusive of the representatives of workers from different trade industries as well as trade unions from the most represented workers' organizations around the country. It submitted that the CCR was provided for in article 131, Chapter 6, note 4 of the Iranian Labour Law and was necessary given the existence of a fairly large informal sector and number of workplaces accommodating less than ten workers. The CCR was first established by a directive of the Government issued on 4 March 1993; at the moment it covered some 3,406 workplaces making it the

single largest workers' organization. Among its tasks was ensuring proper implementation of the provisions of the Labour Law and establishing the assembly of the CCR in order, inter alia, to elect the Iranian workers' representatives attending ILO meetings. National law prohibited the formation of more than one organization of workers' representatives per province. The CCR in each province was authorized to conclude collective bargaining agreements in compliance with the Labour Law. The formation of the High Council of the CCR had greatly helped the fulfilment of tripartism and social dialogue in the Islamic Republic of Iran, particularly among the informal sectors and rural areas. According to reliable statistics, the CCR along with the ILC are among the most representative workers' organizations in the Islamic Republic of Iran. They agreed to a rotation as to the delegate and substitute delegate. The Government had proposed amendments to Chapter 6 of the Labour Law on workers' and employers' organizations to create an enabling environment for the promotion of trade union activities and the proliferation of trade unions. The Government reaffirmed its commitment to the implementation of Convention No. 87 and to that end welcomed any technical cooperation which could be provided by the Office.

58. *The [Credentials] Committee regrets that it received the Government's written communication 45 hours after the time-limit set by the Committee, thereby making it difficult for the Committee to fully examine the objection before it.*
59. *In general, the Committee finds that the objection raises questions that go beyond those concerning exclusively the nomination of the Workers' delegation to the Conference and may be better examined by the Committee of Freedom of Association. For example, it appears from the Government's response that the law prohibits the formation of more than one organization of workers' representatives in each province. The Committee also has doubts about the nature of the CCR as a genuine workers' organization. It notes that according to the Government's communication the CCR has among its tasks to ensure proper implementation of the provisions of the Labour Law and the communication mentions that the CCR has inspectors in each province, which seems to indicate that the CCR exercises public administration functions.*
60. *The Committee recalls that article 3, paragraph 5, of the Constitution, requires consultation and agreement with the most representative workers' organizations. This condition can only be satisfied if the organizations consulted are genuine organizations of workers, which are free and independent from the Government. In light of the above information, the Committee expresses doubts as to whether this condition is fulfilled in this case.*
61. *The Committee unanimously considers that the objection before it raises issues which relate to violations of the principles of freedom of association which have not already been examined by the Committee on Freedom of Association of the Governing Body. It proposes that the Conference refer the question to that Committee, in accordance with article 26bis, paragraph 6, of the Conference Standing Orders.*
- ...
147. The Credentials Committee adopts this report unanimously. It submits it to the Conference in order that the Conference may take note of it and adopt the proposals contained in paragraphs 10, 61, and 75.

Geneva, 15 June 2010²

- 689.** The report and proposals of the Credentials Committee were approved by the International Labour Conference unanimously.³

² International Labour Conference, *Provisional Record* No. 5C, 99th Session, Geneva, 2010, Reports on credentials, Second report of the Credentials Committee, Objection concerning the nomination of the Workers' delegation of the Islamic Republic of Iran.

³ International Labour Conference, *Provisional Record* No. 19, 99th Session, Geneva, 2010, Tenth sitting, 19/5.

B. The Government's additional observations

- 690.** In its communication dated 5 November 2010, the Government provides its response to the issues raised by the Credentials Committee. The Government indicates that article 131, note 4, of the Labour Law of 1990 emphasizes the principle of pluralism and provides that pursuant to their own interests and preferences, workers can be represented by any of the three following bodies: an Islamic Labour Council, a trade union or workers' delegates.⁴ It further indicates that in accordance with the Labour Law, workers can establish their own trade union institutions at their own discretion and that workers' representatives are democratically elected by direct election. The Government refers to article 136 of the Labour Law and indicates that all workers' delegates to the ILO, courts of first instance, dispute settlement boards and other bodies are elected freely by the most representative workers' organizations or workers' representatives. The Government states that contrary to the ITUC's contention, workers' delegates to the 2010 Conference had been elected in accordance with the national rules and regulations and ILO standards, taking into account the observations of the Credentials Committee as to the need for the participation of the most representative workers' organizations. The Government further indicates that the same procedure was followed to elect representatives to the 2009 Conference, without any objection being raised as to their credentials.
- 691.** The Government explains that the nomination of workers' delegates was the outcome of a long-established, but less resorted to, customary legal process. Each of the six workers' delegates have gone through the following four stages of election, registered by legal bodies: (1) workplace election in the presence and with the participation of the majority of workers of the relevant unit; (2) election at the provincial level in the presence and with the participation of the majority of workers' representatives of various workplaces in the relevant province; (3) election of members of the Confederation of Trade Unions [sic] in the presence and with the participation of the majority of the trade unions in the provinces throughout the country; and (4) election to select representatives out of the members of the boards of directors of the Confederations of the Workers' Trade Union [sic] in the presence and with the participation of the majority of members of the Boards of Directors of those organizations. The Government stresses that workers' delegates whose credentials have been contested by the ITUC have been democratically elected by members of the High Assembly of the Workers' Representatives (HAWR) and have been given credential letters. The workers' delegates to the Conference have met with various ITUC and ILO officials. The Government also indicates that it recognizes them as their social partners.
- 692.** The Government indicates that the HAWR was established and registered on 16 August 2008, pursuant to article 131 of the Labour Law, following independent and free election by the founding board and members of the Board of Directors of the Assembly of Worker Representatives [sic] of different provinces of the country. Eleven members of the Board of Directors (six from the industrial sector and five from the professional sector) and their five substitutes (three from the industrial sector and two from the professional sector), as well as two inspectors and two substitutes were elected. The officers of the organizations are elected for four years. The HAWR has its own constitution consisting of four chapters, 41 articles and 53 notes and represents 3,600 professions and industry workplace units. They participate in such bodies as the Supreme Council of Labour, Supreme Council of Employment, Supreme Council of Social Security, Supreme Council of Technical Protection, various welfare committees, etc. Out of 30 provinces in the country, 22 provinces have registered boards of directors of worker representatives and more than 80 provincial elections have been held.

⁴ Section 131, note 4, of the Labour Law refers to "a guild society" and "workers' representative", instead of "trade union" and "workers' delegates", as used by the Government in its communication transmitted in English.

693. Following the establishment of the HAWR, the Islamic workers' councils [sic] have been disposed of and the Workers' House no longer represents workers and has no trade union identity. The Government explains that the Workers' House exercised both political and trade union activities and that the ILO had previously recommended to the Government to separate trade union activities from political and party activities and reinforce trade union pluralism. The Government further states that it has always supported workers' and employers' free and independent trade union structures and that at present, workers' and employers' leaders and representatives have also reached theoretical and intellectual maturity and their associations are pursuing a reforming trend. Workers have thus decided to disband the Workers' House and established, instead, provincial and national general assemblies [sic].
694. The Government is proud that, in collaboration with the social partners, it has been able to pave the way for the emergence of workers' activities. Within one year, 1,000 workers' councils have been established and registered. Moreover, from 2005 to 2009, the number of workers' associations increased from 2,958 to 4,990 (69 per cent growth). The Government expresses its respect for the principle of pluralism of workers' associations by profession and industry. Moreover, by calling on workers' representatives to be involved in the labour law revision, the Government is trying to expand social dialogue and increase the number of collective agreements.
695. The Government points out that all of the existing workers' and employers' associations are independent, having been formed based on free and independent election. It considers, however, that it has the right to establish the system of registration of such associations. The Ministry of Labour and Social Affairs is the body responsible for the registration of workers' and employers' institutions. The obligation of registration does not negate the independence of trade union associations.
696. The Government reiterates that the heads of boards of directors of the most representative national workers' trade union associations had been asked by a letter dated 30 March 2010 to elect their representatives and to provide their names to the Ministry of Labour so that the latter could communicate them to the ILO. Based on joint minutes of the Head of the High Center for Islamic Labour Councils (HCILC) and the Head of the HAWR, names of six delegates were received on 5 May 2010. These names were submitted to the Credentials Committee. No delegate from the Workers' House had been elected due to the non-trade union nature of such organizations. However, despite this free and independent decision of workers, Mr Mohammad Hamzei, Director of International Affairs Unit of the Workers' House attended the session of the Conference Committee on the Application of Standards.
697. The Government indicates that it is ready to have full technical and professional collaboration with the ILO.

C. The Committee's conclusions

698. *The Committee notes that the present case was referred to it by the International Labour Conference upon a proposal of the Credentials Committee – made in accordance with article 26bis, paragraph 6, of the Conference Standing Orders – to refer the issues raised by the ITUC in its objection concerning the nomination of the Workers' delegation of the Islamic Republic of Iran to the Committee on Freedom of Association. The Committee notes that the Credentials Committee considered that the objection raised questions that went beyond those concerning exclusively the nomination of the Workers' delegation to the Conference. In particular, the Credentials Committee observed that it did not appear possible, under the national legislation, to form more than one organization of workers' representatives in each province and further raised queries as to whether the Coordinating*

Center of Workers' Representatives (CCR) could be considered as a genuine workers' organization.

- 699.** While recalling that questions of representation at the International Labour Conference fall within the competence of the Conference Credentials Committee [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 6 and 14], the Committee will proceed with its examination of this case on the basis of article 26bis, paragraph 6, of the Standing Orders of the International Labour Conference and its mandate to review the freedom of association aspects raised by the Credentials Committee.
- 700.** With regard to the question of trade union pluralism referred to it, the Committee notes the observations provided by the Government, referring, in particular, to article 131 of the Labour Law. The Committee recalls in this respect that article 131, note 4, provides that “Workers of a unit may [be represented] only by one of the three: an Islamic Labour Council, a guild society or a workers’ representative”. While taking note of the Government’s statement that it respects trade union pluralism, the Committee recalls that it has considered the issue of organizational monopoly, as enshrined in article 131 of the Labour Law, on several occasions and concluded that the organizational monopoly required by the law appeared to be at the root of the freedom of association problems in the country [see Cases Nos 2508 and 2567]. The Committee recalls that in Case No. 2508, while the Government confirmed that the existing legal framework did not permit the existence of both an Islamic Labour Council and a union at the same enterprise, it expressed its intention to amend the Labour Law to address this issue [see para. 1190, 346th Report, Case No. 2508]. While in its subsequent report, the Committee noted with interest the proposed amendments to the Labour Law [see paras 912 and 946, 354th Report, Cases Nos 2508 and 2567, respectively], it appears that the abovementioned provision has not yet been amended.
- 701.** The Committee notes with concern that the new issues raised in this case relate to the genuine representation of workers by the CCR and High Assembly of Workers’ Representatives (HAWR). The Committee notes in this respect that the Credentials Committee had expressed doubts about the nature of the CCR as a genuine workers’ organization and had further noted that the CCR seemed to exercise public administration functions. The Committee recalls that the principle of trade union pluralism, which the Iranian Government has been called to ensure in law and in practice on many occasions, is grounded in the right of workers to come together and form organizations of their own choosing, independently and with structures which permit their members to elect their own officers, draw up and adopt their by-laws, organize their administration and activities and formulate their programmes without interference from the public authorities and in the defence of workers’ interests. Given the continuing legally binding force of article 131 of the Labour Law, it would appear that such a right has once again been usurped by another structure – namely the CCR and the HAWR.
- 702.** Moreover, the Committee wishes to recall the concerns it has expressed over the legal framework within which the Government supervises organization elections. It recalls, in particular, that it had previously noted with regret the Government’s indication that, until amendments were passed by Parliament, it was obliged to implement the laws providing for governmental supervision of organization elections – namely article 131 of the Labour Law and article 19 of the Council of Ministers’ Rules and Procedures on the Organization, Functions, Scope and Liabilities of Trade Unions [see para. 943, 354th Report, Case No. 2567].

703. *The Committee is deeply concerned at the apparent absence of workers' organizations' delegates, appointed in the full spirit of freedom of association, among the official delegation to the International Labour Conference. It further observes that the draft amendments provided within the framework of Case No. 2567 examined in the introduction of the Committee's report would still appear to maintain a restrictive choice between being either represented by a workers' guild or by a workers' delegate; thus it would seem that the workplaces now being represented by workers' representatives would not be able to form trade unions of their own choosing, either now or following the adoption of the proposed amendment. It therefore considers that it is a matter of urgency that the Government deploy all efforts for the rapid amendment of the labour legislation in a manner so as to bring it into full conformity with the principles of freedom of association, by ensuring that workers may freely come together – regardless of the existence of elected workers' representatives or Islamic Labour Councils – without government interference, to form organizations of their own choosing. It requests the Government to provide information on the recent steps taken in this regard.*

704. *The Committee notes the Government's indication that it is ready to have full technical and professional collaboration with the ILO and expects that the Government will avail itself of the technical assistance of the Office with respect to all the freedom of association matters pending before it.*

The Committee's recommendations

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

- (a) The Committee urges the Government to deploy all efforts for the rapid amendment of the labour legislation so as to bring it into full conformity with the principles of freedom of association by ensuring that workers may freely come together, without government interference, to form organizations of their own choosing. It requests the Government to provide information on the recent steps taken in this regard.*
- (b) The Committee expects that the Government will avail itself of the technical assistance of the Office with respect to all the freedom of association matters pending before it.*

CASE NO. 2756

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

**Complaint against the Government of Mali
presented by
the Trade Union Confederation of Workers of Mali (CSTM)**

***Allegations: Refusal by the authorities to
nominate representatives of the Trade Union
Confederation of Workers of Mali to national
consultation bodies despite rulings issued by the
Supreme Court annulling several instruments of
appointment of members of the Economic,
Social and Cultural Council***

- 706.** The complaint is contained in a communication dated 29 December 2009 of the Trade Union Confederation of Workers of Mali (CSTM).
- 707.** The Government sent partial information in a communication dated 9 March 2010.
- 708.** Mali has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant organization's allegations

- 709.** In a communication dated 29 December 2009, the CSTM states that, since December 1997, the national trade union landscape has been made up of two trade union confederations, the National Union of Workers of Mali (UNTM) and the CSTM. The CSTM adds that, even though section 265 of the Labour Code (Act No. 92-020, of 23 September 1992) states that the Government must organize professional elections to determine the percentage of representativity of each trade union confederation, the State has not yet done so. The Economic, Social and Cultural Council was established under Title XIII of the national Constitution. Under Act No. 92-031, of 19 October 1992, concerning the organization and modalities of functioning of the body, the trade union component of the Council is made up of representatives of the most representative public and private sector workers' trade union organizations.
- 710.** The complainant organization states that it requested to participate in the Economic, Social and Cultural Council at the time of its second term in 1999, in accordance with the Act governing its functioning and taking into account the lack of professional elections to designate the most representative organizations. However, the Government refused to nominate representatives of the CSTM to the Economic, Social and Cultural Council, either in 1999 for the second term (Decree No. 99-272 concerning the composition of the Council), or in 2004 for the third term of the Council (Decree No. 415/P-RM, of 23 September 2004).
- 711.** The complainant organization states that it lodged an appeal with the Supreme Court against the two government decisions of 1999 and 2004 and that, in both cases, the Instrument of Appointment in question was annulled. Thus, through Rulings No. 30 of

28 September 2000, and No. 76 of 15 August 2002, the Supreme Court annulled the Instrument of Appointment No. 99-272. Despite this development, in 2004, the Presidency of the Republic (together with the Government) drew up a list of the members of the Economic, Social and Cultural Council, yet again excluding the CSTM. The complainant organization again had recourse to the Supreme Court, and the latter yet again annulled the Instrument of Appointment (this time for 2004) through Ruling No. 135 of 16 August 2007.

- 712.** The complainant organization denounces the fact that, despite successive Supreme Court rulings, the Presidency of the Republic issued an Instrument of Appointment on 12 November 2009 for the fourth term of the Economic, Social and Cultural Council, again excluding the CSTM from its composition (Decree No. 09-608/P-RM). The CSTM adds that, despite the clarity of the laws and regulations governing tripartite institutions in Mali, the trade union is excluded from all of these bodies, in particular from the governing bodies of the National Social Welfare Institute, the National Employment Agency and the Vocational Training Support Fund, as well as the Higher Labour Council, the Higher Public Service Council and their joint committees.

B. The Government's reply

- 713.** The Government submitted partial information in a communication dated 9 March 2010. It recognizes that the Supreme Court annulled instruments of appointment Nos 99-272 and 04-415 for ultra vires action and that, in Ruling No. 135 of 16 August 2007, the Supreme Court considered in particular that the equivocation regarding trade union pluralism and the denial of the right of each organization to have its say constitute ultra vires actions.
- 714.** However, in the Government's view, the Supreme Court overestimated the representativity of the CSTM, which still has to be proved under the Labour Code. The Government adds that Act No. 92-031 of 19 October 1992, concerning the composition and operational modalities of the Economic, Social and Cultural Council, cannot be enforceable against it unless the representativity of the trade union organizations has previously been recognized in accordance with law.
- 715.** Furthermore, the Government recognizes that it did not make use of its prerogatives to designate the most representative organizations. However, it refers to major obstacles to the organization of professional elections which could help in sharing out seats on national consultation bodies such as the Economic, Social and Cultural Council. The first obstacle cited by the Government is the lack of an agreement between it and the social partners regarding funding of professional elections. The second obstacle concerns a disagreement between the trade union confederations as to the method of voting; the UNTM prefers a majority system, whereas the CSTM is in favour of the introduction of a representativity threshold. By way of a conclusion, the Government states its wish to promote dialogue in order to overcome any differences. It points to a workshop on trade union representativity, organized in December 2008 with the support of the ILO, and to the efforts of the Ministry of Labour, the Public Service and the Reform of the State to convince the social partners to participate in the elections under government-approved conditions.

C. The Committee's conclusions

- 716.** *The Committee notes that the present case concerns the repeated refusal by the Government to nominate the CSTM to the Economic, Social and Cultural Council, as well as to national tripartite consultation bodies in general.*

- 717.** *The Committee highlights the statement according to which, since 1997, the trade union landscape of Mali has consisted of two trade union confederations, the UNTM and the CSTM. The Committee further notes that the Labour Code states that the Government must organize professional elections in order to determine the percentage of representativity of each trade union confederation. However, to date, no such elections have been organized for reasons linked, according to the Government, to disagreements over funding of the electoral process and the voting method to be employed.*
- 718.** *The Committee notes that the CSTM states that it has been requesting to be represented on the Economic, Social and Cultural Council since 1999, the trade union component of which must, according to Act No. 92-031 of 19 October 1992, concerning its organization and operational modalities, be composed of the representatives of the most representative organizations of public and private sector workers. According to the CSTM, its request is legitimate given the lack of professional elections to designate the most representative organizations. The Committee notes that the Government refused to nominate representatives of the CSTM to the Economic, Social and Cultural Council, either in 1999 for the second term (Decree No. 99-272 concerning the composition of the Council), or in 2004 for the third term of the Council (Decree No. 415/P-RM of 23 September 2004).*
- 719.** *The Committee notes that, according to the information provided by the complainant organization and confirmed by the Government, the CSTM lodged an appeal with the Supreme Court against the two government decisions of 1999 and 2004 and that, in both cases, the trade union obtained the annulment of the Instrument of Appointment in question on the grounds of ultra vires action on the part of the authorities. Thus, through rulings No. 30 of 28 September 2000, and No. 76 of 15 August 2002, the Supreme Court annulled Instrument of Appointment No. 99-272. Furthermore, the Supreme Court annulled Decree No. 415/P-RM through Ruling No. 135 of 16 August 2007, which stated that the equivocation regarding trade union pluralism and the denial of the right of each organization to have its say constituted an ultra vires action.*
- 720.** *The Committee notes that: the complainant organization denounces the fact that, despite successive Supreme Court rulings, the Presidency of the Republic issued an Instrument of Appointment on 12 November 2009 for the fourth term of the Economic, Social and Cultural Council, again excluding the CSTM from its composition; in order to justify the Instrument of Appointment, the Government points to the fact that, when issuing its rulings, the Supreme Court presumed the representativity of the CSTM, which still has to be proved under the Labour Code; the Government furthermore recognizes that it has not made use of its prerogatives to designate the most representative organizations because it faces major obstacles concerning the organization of professional elections. According to the Government, there is no agreement between the Government and the social partners regarding the funding of professional elections. There is also disagreement between the trade union confederations as to the method of voting, with the UNTM preferring a majority system, while the CSTM is in favour of the introduction of a representativity threshold.*
- 721.** *The Committee first of all wishes to recall that it was not called upon to express an opinion as to the right of a particular organization to be invited to take part in joint or consultative bodies unless its exclusion constituted a clear case of discrimination affecting the principle of freedom of association. This is a matter to be determined by the Committee in the light of the facts of each given case. The fact that a trade union organization is debarred from membership of joint committees does not necessarily imply infringement of the trade union rights of that organization. However, for there to be no infringement, two conditions must be met: first, that the reason for which a union is debarred from participation in a joint committee must lie in its non-representative character, determined by objective criteria; second, that in spite of such non-participation, the other rights which it enjoys and the*

activities it can undertake in other fields must enable it effectively to further and defend the interests of its members within the meaning of Article 10 of Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1089 and 1091]. In the case in point, the Committee is particularly concerned by the Government's statement concerning the need to prove the representativity of the CSTM (which would explain the trade union's exclusion from the list of employee representatives on the Economic, Social and Cultural Council), while the Government also recognizes that there are difficulties in organizing professional elections in order to determine the level of representativity of the two national trade union confederations. In this regard, the Government's attitude is somewhat less than restrained in that it has clearly, and without regard for any objective criteria, presumed the representativity of one trade union confederation to the detriment of another in order to decide unilaterally on the trade union representation within national consultation bodies. The Committee urges the Government to adopt a completely neutral position in the future in the absence of representativity determined according to objective criteria.

722. The Committee reminds the Government that, in Ruling No. 135 of 16 August 2007, the Supreme Court clearly stated that any decision made by the authorities that did not take into account the prevailing situation of trade union pluralism in the country and the right of each trade union confederation to have its say was tainted by abuse of power. Accordingly, the Committee draws the Government's attention to the fact that, in the interests of promoting open and constructive social dialogue, it might be desirable, rather than necessarily identifying one single organization with a view to granting it exclusive trade union representation, to ensure a place for a range of voices on the basis of objective and predefined criteria. The Committee recalls in this regard that it had to highlight the importance, for the preservation of a country's social harmony, of regular consultations with employers' and workers' representatives; such consultations should involve the whole trade union movement, irrespective of the philosophical or political beliefs of its leaders [see **Digest**, op. cit., para. 1065].
723. Consequently, in the interest of harmonious professional relations and in order to promote a plurality of views among representative organizations, the Committee requests the Government to amend Decree No. 09-608/P-RM of 12 November 2009, in order to include the CSTM on the list of representatives of public and private sector employees on the Economic, Social and Cultural Council, in accordance with the rulings of the Supreme Court.
724. Furthermore, the Committee notes that the CSTM also denounces the fact that it has been excluded from all tripartite consultation bodies (despite the laws and regulations which govern them), in particular the governing bodies of the National Social Welfare Institute, the National Employment Agency, the Vocational Training Support Fund, as well as the Higher Labour Council and the Higher Public Service Council. Noting the lack of a reply from the Government in that regard, the Committee recalls that any decisions concerning the participation of workers organizations in a tripartite body should be taken in full consultation with all the trade unions whose representativity has been determined by objective criteria [see **Digest**, op. cit., para. 1090]. In the same spirit of dialogue mentioned above, the Committee requests the Government to take the necessary measures to allow the CSTM to participate in those tripartite consultation bodies with which it has an expressed interest.

725. *The Committee further notes the Government's statement that it wishes to promote dialogue in order to resolve the disagreements regarding professional elections. The Government points to a workshop on trade union representativity organized in December 2008 with the support of the ILO and to the efforts of the Ministry of Labour, the Public Service and the Reform of the State to convince the social partners to participate in the elections under government-approved conditions. The Committee expects that the Government will organize as soon as possible the professional elections provided for in the Labour Code, taking into account the principles of freedom of association, and requests the Government to keep the Committee informed of the objective criteria employed, in consultation with the trade union organizations, to determine the representativity of trade unions. The Committee reminds the Government of the possibility to avail itself of further ILO technical assistance, if it so wishes.*

The Committee's recommendations

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

- (a) The Committee requests the Government to amend Decree No. 09-608/P-RM of 12 November 2009, in order to include the CSTM on the list of representatives of public and private sector employees on the Economic, Social and Cultural Council, in accordance with the rulings of the Supreme Court.*
- (b) In a spirit of open and constructive social dialogue, the Committee requests the Government to take the necessary measures to allow the CSTM to participate in those tripartite consultation bodies with which it has an expressed interest.*
- (c) The Committee expects that the Government will organize as soon as possible the professional elections provided for in the Labour Code, taking into account the principles of freedom of association, and requests the Government to keep the Committee informed of the objective criteria employed, in consultation with the trade union organizations, to determine the representativity of trade unions.*
- (d) The Committee reminds the Government of the possibility to avail itself of further ILO technical assistance, if it so wishes.*

CASE NO. 2694

INTERIM REPORT

**Complaint against the Government of Mexico
presented by
the International Metalworkers' Federation (IMF)
supported by
the International Trade Union Confederation (ITUC)
and other organizations**

Allegations: General questioning of the industrial relations system as a consequence of the extremely widespread use of employer protection collective agreements

727. The complaint in this case was presented against the Government of Mexico and is contained in a communication of the International Metalworkers' Federation (IMF) dated 5 February 2009. The Government presented its observations in a communication dated 1 March 2010, contesting the admissibility of the complaint, and also providing observations on the substance of the complaint.
728. At its meeting of March 2010, the Committee decided to transfer the Government's reply to the complainant organization so that it could present its comments on the Government's arguments against the admissibility of the complaint.
729. In a communication dated 26 April 2010, the complainant organization sent the requested comments. In a communication dated 12 April 2010, the International Trade Union Confederation (ITUC) supported the complaint of the complainant organization. It was also supported by the following Mexican organizations: the Independent Union of Workers of the Metropolitan Autonomous University (SITUAM), the National Steel and Allied Workers Union (STIMAHCA) and the Mexican National Union of Miners, Metal and Allied Workers (SNTMMRSM).
730. At its June 2010 meeting, the Committee considered that the complaint was admissible. In order for it to examine the case in full knowledge of the facts, the Committee requested the complainant organizations to provide concrete and detailed information and, with respect to the legislative aspects referred to, to specify the provisions which violate freedom of association and the manner in which they do so. Subsequently, the IMF sent communications dated 19 May and 7 September 2010.
731. Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but not the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Allegations of the complainant organization

732. In its communication dated 5 February 2009, the IMF alleges that, even though the Federal Labour Act establishes apparently straightforward registration requirements (a copy of the minutes of the constituent assembly, a list of workers and employers, a copy of the trade union's constitution and a copy of the minutes of the meeting held to elect the executive committee) and the reasons for refusal are clearly defined (not having the purpose provided for by law, comprising fewer than 20 members or failing to provide the documents

indicated), it is common in Mexico for the law to be interpreted and twisted in such a way as to avoid the registration of trade unions which operate outside the “subordination model”. The obstacles identified include the following:

- (a) having to prove the existence of an employment relationship (the authorities apply different interpretations concerning the suitable forms of proof, creating plenty of room for manoeuvre, and some authorities request that the list of members be signed by the employee);
- (b) having to certify the employee’s federal or local authority by means of legal documents which are difficult for workers to access;
- (c) making observations concerning the documents submitted, if the authority considers that these documents are contradictory or unclear, to the effect that the workers have to hold new meetings which gives the employer or trade union leader concerned time, in the face of possible claims of bargaining rights or the conclusion of a collective labour agreement, to pressurize or dismiss the workers to put an end to their attempt. The observations may relate to the trade union’s constitution, the list of members, meeting minutes or various documents attached;
- (d) having to expressly show the desire of the workers to belong to the trade union requesting registration by means of inspection, documents or even the physical presence of the workers themselves. This should suffice to imagine the pressure on workers if labour inspectors arrive to interrogate them in front of the employer or trade union leaders with questions concerning bargaining rights under an employer protection collective agreement (CCPP);
- (e) requiring that the applicants prove the nature of their activities, claiming that some of them occupy positions of trust and cannot therefore form part of the trade union.

733. These requirements inhibit the interest of workers and create considerable fear, in particular because the authorities drag out the process and force applicants to exhaust lengthy proceedings before federal high courts. In practice, very few workers can endure this long and winding path.

734. The *toma de nota* (taking note) is the authorization given to trade unions to legalize their existence but the procedure for obtaining that authorization is discretionary and depends on the characteristics of the organization, its level of influence (federal or state), the labour authority responsible for its registration, the employer, the dominant trade union confederation or the trade union confederation administering the CCPP for the workplace in which the workers applying for registration are employed, etc.

735. With regard to collective bargaining, the complainant organization alleges that in Mexico the agreements signed are predominantly CCPPs (90 per cent according to a well-known trade union leader), which are based more on practice than on legal standards, or rather on a particular way of interpreting the labour legislation. These collective agreements are concluded in the vast majority of cases behind the backs of workers between a trade union and an employer, and in general their clauses merely reproduce the minimum requirements of the Federal Labour Act without any additional benefits. This is possible because under Mexican legislation, employers whose workers are members of a trade union are required to conclude a collective agreement on the request of the trade union, but are not required to indicate the workers represented or their consent. Once signed, the collective agreement is filed with the conciliation and arbitration board (JCA), a formality which requires only the signature of the union’s general secretary and the formal representation of the employer, that is, proof of its legal personality. The complainant organization emphasizes that once this stage is complete it is not possible to conclude another agreement with another union.

736. Under Mexican legislation employers with workers who are members of a trade union are required to conclude a collective labour agreement with that union on the request of the union. Under section 387 of the Federal Labour Act, if an employer refuses to sign an agreement the workers may exercise their right to strike. There are three ways of obtaining the conclusion of a collective labour agreement and the bargaining rights under that agreement:

- (a) *Compulsory.* By means of a strike aimed at achieving the signing of a collective labour agreement. It should be pointed out that no action is taken in response to the request if a collective labour agreement has already been filed and that requirements are imposed which block this route.
- (b) *Voluntary.* Concluded by agreement without a strike. The only requirement is that the agreement must be signed by the parties' representatives without prior approval by the workers concerned and their consent is not necessary.
- (c) In theory, there is a third possibility by means of full legal proceedings, but there have been no cases to date, since the length of such proceedings means that this is not a viable option.

737. The CCPPs correspond to the voluntary route since the employer selects the trade union of its choice and the authorities do not impose any requirements particularly apart from having to prove the legal personality of both. With regard to the route involving calling a strike, in addition to the fact that the request is automatically rejected if a collective agreement has already previously been filed, the JCAs impose a series of requirements which are difficult to meet and contrary to law, such as providing the names of the workers and their signatures, supplying documents proving the employment relationship and submitting the membership records for the new union. In addition, some boards require proof that the workers have been officially registered as members of the union, the proof being issued by the JCA. At first sight these conditions appear logical to ensure that the request is legitimate. However, in practice, as soon as this information has been supplied, pressure is immediately exerted on the workers trying to conclude a collective agreement through this route by the employer and by the trade union which signed a collective agreement before the strike notice was issued in order to prevent another agreement being concluded and filed. The requirement to supply proof of the workers' official registration as members of the union is particularly serious because the very body which issues that proof is in fact a JCA. These boards are tripartite bodies composed of representatives of the employer and the dominant union in the area both of whom obviously oppose the issue of such proof or delay the procedure for the necessary time to thwart the attempt at organization. In this regard the dual role played by JCAs as both judge and party is clear and it is for that reason that in practice, they turn into an obstacle to groups of workers who do not belong to the dominant unions wishing to obtain the conclusion of a collective agreement by means of a strike. In the event that no collective agreement has previously been filed, the time taken to deal with the workers' request can be used to conclude and file another collective agreement with a union which has the same interests as the employer.

738. Sections 387, 388 and 389 of the Federal Labour Act establish the principle of exclusivity and section 389 stipulates that the loss of the majority shall result in the loss of bargaining rights under the collective labour agreement. The procedure for obtaining bargaining rights is subject to sections 892–899 of the Act and should in theory conclude in a ballot which has its own difficulties. If a trade union is claiming bargaining rights under a collective agreement and an agreement has already been filed, the only way for workers to have a union which has the support of the majority is to initiate this procedure. In most states of the Republic, no response is even given on the basis that it would cause a disruption of

social peace. To give a semblance of legality to this practice, the labour authorities have themselves encouraged the dominant trade union confederations to conclude agreements in which they agree not to question bargaining rights under collective agreements among themselves. This practice has become so widespread that these agreements have been referred to publicly by the Ministry of Labour and Social Welfare as successes of the “new labour culture”. These so-called “Agreements on Respect and Collaboration” are signed by the general secretaries of various unions and the Minister of Labour and Social Welfare as witnesses. One of the clauses of these agreements provides that “the parties undertake to respect their respective collective agreements”, which involves ignoring the will of the workers and respecting the status conferred on them by employers when they chose them as bargaining agents under the CCPPs.

- 739.** Requests for bargaining rights are hindered by the same obstacles as those created to prevent the signing of collective agreements by means of a strike. The applicants are required to supply names and signatures, provide the minutes of the meeting recording the desire of workers to submit the request and submit proof of the employment relationship. Some JCAs also request proof that workers have been officially registered as members of the union claiming bargaining rights, which is even issued by the labour board itself. This requirement obviously hinders the attempt of workers who wish to change union, for the reasons already outlined. Once their names and signatures have been supplied, the workers tend to be the victim of repressive measures implemented by the employer who regards it as an insult that its workers wish to withdraw from the union that it selected for them.
- 740.** The trade union organization originally imposed by the employer may implement repressive measures against dissident workers, including the exclusion clause. Under section 395 of the Federal Labour Act it is possible to provide in the collective agreement that the employer shall dismiss workers who are expelled from the contracting union. This is the well-known exclusion through dismissal clause. Under the same section, workers may also be excluded through non-admission in that employers may admit as workers only those who are members of the contracting union. This clause has been declared unconstitutional by the Supreme Court of Justice in various rulings although there is no legal precedent and the clause remains in the text of the Act. This clause is yet another way of putting pressure on workers who wish to change union.
- 741.** At a meeting held on 3 December 1997, the Central Committee on the New Labour Culture, established in 1995 and comprising the federal Government and the main trade union and employer leaders, formulated a number of conclusions in which it recognized the seriousness of the issue of bargaining rights, albeit with a biased perspective. Nonetheless, the text is a useful tool for gauging the view of the corporate organizations which make use of the protection agreement model:

There are currently a high number of requests for bargaining rights. Many of these requests lack the support of the workers and do not meet the procedural requirements established by law. More than 80 per cent of these requests for bargaining rights are withdrawn, which indicates that, in most cases, they are motivated by individual interests that are detrimental to the stability of collective agreements, industrial peace and a harmonious balance between productive factors. This is shown by the fact that, during proceedings relating to bargaining rights under collective agreements, there has been violence against individuals, particularly during hearings and ballots and, while this violence is sporadic, it infringes the fundamental rights of the defendants, their lawyers and judges. Such violence occurs at both the local and federal levels.

- 742.** The Central Committee recommends “the application of stricter criteria, in accordance with the law, concerning the procedural requirements for accepting requests”. As noted, based on this model of completely restricting collective rights which is applied in Mexico, the trend is to maintain and even strengthen the control mechanisms, given that increasing

the requirements imposed on workers who wish to change union, strengthens the employer's decision to maintain the union of its choice with whom it originally signed the collective agreement. It should be made clear that no procedural requirements whatsoever are imposed by law and that all requirements imposed are contrary to the law. Nonetheless, the authorities and sector leaders reached agreement through this so-called dialogue on the new labour culture to tighten controls. This practice has strengthened the validity of CCPPs, which is clear from the little transparency that is present in the information.

- 743.** Very few requests for bargaining rights result in a ballot and those groups which succeed in organizing a ballot are practically torn apart as a result of pressure. Many workers are forced to abandon the attempt for financial reasons, while others are dismissed. In addition, difficulties are encountered with regard to the ballot itself as these events tend to be surrounded by considerable violence, as acknowledged by the labour authorities themselves. The Chairperson of the Federal Conciliation and Arbitration Board (JFCA) drew the following conclusions in 2000 with regard to proceedings relating to bargaining rights:

This practice and its likely purpose is contrasted with the fact that the large majority of proceedings initiated for this reason ended with the complainant union simply withdrawing from the proceedings before the ballot had even been held or with the total abandonment of the proceedings and withdrawal at the ballot, and the fact that proceedings which did reach a conclusion in the form of a decision mostly resulted in the union's claims not being upheld.

- 744.** The list of factors which create a violent atmosphere at ballots is endless but includes pressure groups designed to prevent workers from accessing the ballot site, usually the company's own premises, with the clear intention of achieving a majority, that is, 51 per cent of the total members of the union to be able to change trade union, in accordance with the definition established in previous cases by the Supreme Court of Justice. Consequently, any worker who does not attend is mathematically regarded as being in favour of the union currently holding the bargaining rights, which is usually the union chosen by the employer. The factors creating a violent atmosphere also include pressure inside the factory, threats of dismissal and physical attacks on those waiting in voting lines which are organized by the company itself and by the union holding the bargaining rights under the collective labour agreement. In these conditions it is almost impossible to replace the union imposed by the employer. Violence at ballots has been documented by civil society organizations and democratic unions.
- 745.** Under section 401 of the Federal Labour Act, a collective agreement may be terminated for three reasons: by mutual agreement, on completion of the work or as a result of the closure of the enterprise. Taken in isolation this provision would appear logical, but in the context of CCPPs, the possibility of terminating an agreement voluntarily means that this article is used to reduce working conditions by terminating a collective agreement and immediately concluding another agreement with the same or another union, as the company sees fit, with lower wages and benefits and increasingly involving the use of subcontractors.
- 746.** In cases of termination of collective agreements the authorities tend not to impose any requirements particularly and do not require proof of the agreement of workers or additional documentation. Clearly they apply different criteria when it comes to strikes called for the purpose of achieving the conclusion of a collective agreement which are hindered by strict obstacles. This is because a pattern of total complicity is developing and employers have asserted their power through their lawyers who maintain that the freedom to terminate collective agreements voluntarily cannot be restricted.
- 747.** With regard to the right to strike, the complainant organization points out that the term "strike" is defined by section 440 of the Federal Labour Act as the temporary suspension of work by a coalition of workers, while the reasons for calling a strike are regulated by

section 450. It is important when interpreting the Mexican labour situation to constantly compare the text of the Act with the practice, given that there is an enormous difference between one and the other. For example, in the case of state employees, the Constitution recognizes their right to strike in article 123(B)(X) and its regulatory act defines the conditions of exercise of that right. However, in the entire history of this bureaucratic labour regime, there has never been a lawful strike and as a result, the concept is practically dead. That is not to say that there is no strike action in this sector. On the contrary, it could be said that it is the most mobilized sector. The problem is that strike action in this sector is unlawful because the legislation is so restrictive that nobody has faith in it. The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) is aware of the limitations on the exercise of collective rights in this sector and has made very important recommendations on this matter in the past.

- 748.** As indicated, there are two fundamental routes in practice for achieving the conclusion of a collective agreement: by means of a strike and the supposedly voluntary route. Thus, there are two mechanisms for validating the CCPP model: firstly, in accordance with the principle established in section 923 of the Federal Labour Act, no action is taken in response to a written strike notice and accompanying claim that a collective agreement should be signed if an agreement has already been filed and, secondly, obstacles are created to hinder a strike called by a union that is regarded as unacceptable by the employer.
- 749.** Despite ratifying Convention No. 87, which entails an obligation to comply with the provisions of that Convention, Mexico has repeatedly refused to take due note of the observations of the CEACR and the recommendations of the Committee calling for legal reform.
- 750.** The right to organize is fundamentally violated with the protection agreements model by preventing trade union diversity and the registration of new organizations by imposing prior authorization and state discretion for its full exercise, as well as requirements that are almost impossible to meet, in a practice based on open state interventionism. With regard to trade union registration, the granting of legal personality to trade unions is dependent on the *toma de nota* being obtained. The complainant organization alleges the existence of practices such as the dismissal of workers when they are found to be organizing outside the union imposed on them, threats to workers to leave the union representing them, physical attacks at ballots and all the violence that surrounds trade union registration processes, the signing and termination of collective agreements, bargaining rights under such agreements and strikes, all of which is contrary to the principles of ILO Convention No. 87.
- 751.** It is the State that justifies the system of protection agreements on the basis that they maintain "industrial peace" by strengthening trade union confederations which consequently operate in the context of tripartite bodies. Moreover, those holding political power have openly expressed their support for these agreements and apply the law on a discretionary basis.
- 752.** The factors which render the freedom of association protected under Convention No. 87 ineffective include the lack of an impartial authority that can ensure the rapid, effective and inexpensive settlement of labour disputes. One of the pillars of the protection agreement model is the tripartite JCAs. Given that these boards are composed of parties involved in the cases referred to them for consideration, the role that they play as both judge and party is detrimental to any system of impartial justice. This practice of acting as both judge and party is present in the processes relating to trade union registration, the conclusion and termination of collective agreements and the granting of bargaining rights under collective agreements. In addition to the lack of impartiality, the deliberate delays in dealing with cases combined with the imposition of requirements not sanctioned by law implement the

principle of “justice delayed is justice denied”, thereby discouraging the claimants, thwarting their attempts and also limiting their freedom of association contained in Convention No. 87. Furthermore, the right of workers to join the organization of their choice is violated by forcing them to join the dominant trade unions and confederations and applying the exclusion clause to them in the event that they change to a union not chosen by the employer, which also constitutes trade union discrimination.

753. The national labour legislation includes provisions protecting workers which are outside its reach due to the established web of complicity between the labour courts, employers and trade unions, which are the key components of the employer protection agreement model. The trade union involved in this web is chosen by the employer from a number of options taking into account the size of the workplace, the branch of production and the region in which the workplace will be located. The choice is made with the help of legal advice which may be given by a large transnational office or by a single lawyer who refers people to JCAs. The decision is given more legitimacy through the involvement of public authority representatives, such as the governor of the state in which the workplace is to be located or members of the JCA. The advantages offered by the “protection unions” include the economical possibilities of the future employer and control over the workers.
754. It has been fully documented how the slow speed at which the labour courts work and the violence used to repress organization by workers (which is clear in the cases presented against Mexico in which dismissals, threats, criminal complaints and imprisonment of leaders are constant) undermine trade union organization. It would be difficult to imagine a situation of total violation of labour and human rights, without the complicity of the public labour administration system and the administrative function of JCAs which appear formally to represent the sectors in a tripartite context, whereas the concept of collective representation is tainted from the very beginning given that the JCAs are both judge and party and in general lack the impartiality characteristic of any judge.
755. Furthermore, the complainant organization alleges an attempt to strengthen protection agreements, and indicates that the resulting violations of the rights contained in Convention No. 87 become clear in the draft law submitted on 12 December 2002 to the Chamber of Deputies of the Congress of the Union referred to as the “Abascal reform”, after the then Minister of Labour and Social Welfare, Mr Carlos Abascal Carranza. The draft includes amendments to three sections of the Federal Labour Act: 387, 920 and 923, which together establish prerequisites for claiming the conclusion of a collective agreement through a strike, namely the provision of the names of the workers calling the strike, proof of the radius of activity of the union linked to the company’s activity and evidence of registration with the registry of associations (the JCA at the local level and the Ministry of Labour and Social Welfare at the federal level). If these requirements are not met, no action will be taken in response to any request for the conclusion of a collective agreement by means of a strike notice, which leaves only the option of so-called voluntary conclusion whereby the employer selects the union of its choice and future workers will be obliged to join that union if they wish to be employed in that workplace. Since this is not an option for workers, the only option that remains is to apply for the transfer of bargaining rights under the collective agreement.
756. The initiative also puts an end to this possibility, since the reform of sections 893-A and 893-C of the Federal Labour Act envisages similar “procedural” requirements including certification by the registering authority. However, as reiterated throughout the present complaint, local JCAs are tripartite bodies, and the employer and dominant union constitute the majority vote. Obviously, the employer and dominant union would not authorize or support a decision that would result in legal action being taken against themselves. It is clear here how these tribunals play the role of both judge and party. If these requirements – which constitute obstacles – are approved, workers will find it

difficult to risk their job and their own safety as well as that of their families by providing their signatures and documents to organizations which seek to call a strike or challenge bargaining rights on their behalf. Even more ridiculous, section 893-C provides that while the issue of the bargaining rights under a collective agreement has not been resolved no other claim on the same grounds will be admitted. This gives a further advantage to the employer, who has prior knowledge that workers wish to change union or leave the union originally imposed by the employer. As a result of this new article, employers merely need to submit a claim against themselves by an illegitimate union to prevent action by the genuine union indefinitely. Anyone with minimal experience in labour matters knows that any trade union action requires a minimum of prior organization, as a result of which the employer or the union holding the bargaining rights requires only minimum information – which is easy to obtain due to the requirement to provide signatures, attach documents and prove certification of the union’s membership to the same representatives of the employer and dominant union – to have enough time to block the possibility of the genuine union submitting a claim indefinitely, given that the termination of the proceedings is dependent on the employer, the union controlled by it and any union recruited for the purposes of submitting a fake claim.

757. The “Abascal Reform” is reproduced in the draft drawn up recently by the Ministry of Labour and Social Welfare, referred to as the “Lozano reform”, as a result of which the risk of protection agreements achieving a semblance of legality is increased. If approved, workers would be obliged to opt only for the illegal route to assert their rights, since with these reforms it would be impossible to have a genuine collective agreement and the safety valve of changing union by challenging bargaining rights would be removed.
758. The reform violates other basic rights and infringes the principles forming the basis of the present complaint. For example, a new section 388 has been added, the last paragraph of which removes the possibility of occupational trade unions obtaining bargaining rights under a collective agreement for their own occupation when the agreement was originally signed by a branch trade union. This section is clearly aimed at the democratic unions in the education and aeronautic sector which occupy a privileged position in alternative trade unionism in Mexico. The effect is clear given that, if the employer selects the union of its choice when signing the original collective agreement and that union is legally registered as a branch trade union, an occupational trade union can never again claim representation of the workers in its occupation. This section was included in the Lozano reform at the request of employers in the aeronautic sector who were afraid that democratic unions would be able to claim bargaining rights in new enterprises in the sector which had signed CCPPs. The intended legal reform would consolidate once and for all the union chosen by the employer and would deny democratic unions traditionally organized by occupation the possibility of including workers governed by CCPPs in their membership (the IMF provides numerous appendices).
759. In its communication dated 19 May 2010, IMF states that the Mexican Government’s reply contains three central arguments. Firstly, it flatly denies the existence of protection agreements, on the basis that the Mexican legal system does not provide for their existence and Mexican legislation recognizes the right to organize. Secondly, it reiterates that the violations on which the complaint is based are not applicable, since the law provides otherwise. In conclusion, the logic of the first two arguments is that it is not possible to show illegal conduct if the law contemplates otherwise. According to that reasoning, it would not be possible to lodge any complaint.
760. The third argument seeks to emphasize the lack of precision in the specific cases, as if the complaint was confined to those cases, when in fact the complaint concerns an industrial model which in its entirety precludes respect for Convention No. 87 with regard to freedom of association. It should be pointed out that the Mexican Government fails to

counter the specific charges made in the complaint, preferring vagueness and obscurity in order to try and prevent the proceedings in the case being expedited and decided by the CFA. This extreme vagueness combined with constant legal references is a feature throughout the entire reply, sometimes even going to the extreme of denying any violation of labour rights as if it were easy to draw the wool over the Committee's eyes, as if there were no other complaints which shed further light on a scenario of comprehensive infringement of trade union rights and as if there were no well-earned notoriety for the old trick of avoiding complying with recommendations, both in practice and in law.

761. With regard to the first argument, the crux of which concerns trade union registration, signature of the collective agreement and bargaining rights, the Government refers to the regulatory framework in law and the procedure for each. On this point, it should be emphasized that by reproducing the law, it seeks to show that it is in compliance with Convention No. 87. Furthermore, the Government indicates that the fact that there are legal mechanisms which may be invoked by workers when they consider that their rights have been infringed is sufficient to consider that the Mexican Government is not in breach of the Federal Labour Act or Convention No. 87.
762. As indicated in the complaint, the substance of the problem is the practical mechanisms which have the effect of preventing the exercise of these rights and which are exemplified in the cases presented in the complaint.
763. With regard to trade union registration (UNTYPP case), it was described how despite its having complied with the legal requirements, further requirements were imposed, thereby unleashing one of the principal mechanisms for limiting the right of freedom of association, manipulating time to wear down and dismiss leaders and members of the organization applying all kinds of pressure and aggression. The extra requirements bordered on the absurd, asking them to prove the existence of their employer, the largest state-owned enterprise, Petróleos Mexicanos. In clear interference in their autonomy, changes to the constitution, classification of the trade union, purging of members were demanded, while members of the executive committee were dismissed with excessive violence and union members resigned when they were refused emergency medical services for their families and themselves. Nine months later, trade union registration was refused.
764. The manipulation of the *toma de nota* is a mechanism which limits the exercise of the right to organize of Mexican workers and is fully documented in the recommendations issued by the CEACR and the CFA itself in the cases submitted to them. This shows that it is not an isolated case or one limited to a given period of time, but a pattern of conduct of the Mexican Government. This assertion is reinforced by the analyses, presented as evidence in the IMF complaint, which examined the phenomenon and presented case studies of the mechanisms and legal authorities involved. Some of the authors of these studies are consultants with international organizations such as the ILO itself and ECLAC. Furthermore, contradicting itself, the Mexican Government states that a trade union may be freely formed and is not subject to prior authorization, but a trade union which is not registered in accordance with the law (prior authorization) does not have legal existence, and thus, while it there is no *toma de nota*, it cannot exercise or enjoy the right to organize. Thus there is a flagrant violation of Articles 2, 3(2), 5, 7, 8 and 10 of Convention No. 87.
765. The second question addressed by the Mexican Government in its reply is the signature of the collective agreement. It maintains that trade unions have the right to declare a strike against an employer to request him to sign a collective agreement, thus these agreements are the result of conciliation between the trade union and the employer. In fact the employer, even before starting operations, signs a collective agreement with the most influential trade union federation in the industry or region. That agreement contains the legal minimum requirements and may possibly remain the same ad infinitum. The selected

trade union undertakes to control the workers to prevent them demanding higher wages and benefits and anyone who escapes the net or tries to organize another trade union is immediately discovered and may be dismissed. Furthermore, it is impossible to seek to conclude a collective agreement without trade union registration. The evidence provided in the complaint clearly reflects how state governments encourage the signature of agreements with trade union federations before companies are even established (the newspaper *El Milenio* 06/07/2007, “*caso la célula*”), in obvious violation of Article 3 of Convention No. 87.

- 766.** Bargaining rights under the collective agreement are closely linked to its signature. When workers do not have the possibility of choosing the trade union which represents them, nor changing their conditions of work, obtaining better wages and benefits, they organize to achieve changes in this respect. This in itself shows the limitations on Mexican workers who wish to organize freely and obtain trade union registration and later request signature of an agreement. This system blocks any possibility of exercising the right to organize, a pattern of behaviour which must be viewed in the round and not in isolation, as the Mexican Government claims in its reply, and which, it is emphasized, is clear from the cases presented to the CFA and the observations of the CEACR.
- 767.** Concerning bargaining rights, the Mexican Government indicates that there is no conflict of interest. The labour authorities responsible for processing registration applications are impartial. It exalts the benefits of tripartism, dressing up its argument on the basis of the case law concerning the form in which a *recuento* (ballot) must be held. As indicated in the complaint, the JCAs were the subject of observations concerning their lack of impartiality and lack of autonomy by the CEACR, the CFA, the United Nations High Commission for Human Rights and the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. Merely referring to sections of the Federal Labour Act does not in itself show the impartiality of the JCA, as the Mexican Government claims. It should be clarified that this criticism is not addressed to all tripartite models. In the field of dialogue, it is undoubtedly a valuable institution, as the existence of the ILO itself shows. It is another matter in the case of a purportedly judicial body in which the decision is taken by the Executive Power, whether at federal level through the Secretary of Labour or at local level by the governor, because, in taking that decision, the latter automatically has the support of the representative favoured by its decision. It could not be otherwise, because its financing, appointment and removal depends on the Executive Power, i.e. it lacks the autonomy and impartiality essential in any judicial body.
- 768.** On the subject of bargaining rights, the ballot is only one of the drawbacks. First, it is necessary to surmount the “requirements of receivability”, then ensure that the parties are notified and, when the meeting finally takes place, wait longer because other trade unions are invited by the employer to claim bargaining rights in order to delay the proceedings. They must also resist threats by thugs who come to the meetings and ensure that the workers resist threats and prevent them being dismissed. In this scenario, the ballot is only one of the stages. The cases described in the complaint describe a pattern of behaviour which limits the exercise of the right to organize by nullifying the possibility of workers joining and being represented by a trade union of their choice, thereby violating Articles 2, 3, 5, 7 and 8 of Convention No. 87. It should be emphasized that they must not be analysed in isolation but in the context of the cases presented and indicated to the CFA itself and the recommendations issued by the CEACR. In particular, it is important to consider the evidence produced in this regard, especially document 4, relating to the agreements concluded between trade union federations, employers and Government representatives concerning bargaining rights, where the guiding principle is not to represent workers’ interests through collective bargaining, but to avoid disputes and ensure industrial peace, which is the responsibility of the Secretariat of Labour and Social Security. In this way, the Mexican Government, represented by the secretariat of state, and

the employers' organizations define a trade union policy which has nothing to do with the workers. The fact is that it is the very trade union federations and employers' organizations which reply to the IMF complaint.

- 769.** As indicated in the complaint, it is important to emphasize the close link between collective bargaining and the right to organize in Mexico. In general, workers join a trade union not because they have freely chosen to join that union, but because they have started work in a company where there is already an active trade union. Whence the enormous importance of the rules which define access to collective bargaining. With regard to signature, it has been pointed out that there are two routes: the first is where the employer chooses its trade union, which accounts for the vast majority of cases; the second is where signature of the collective agreement is secured by means of a strike. Given that workers are members of the trade union chosen by the employer, only by joining that union do workers have access to collective bargaining rights. This process is essential in understanding the model, which is not contested by the Government's reply, for the simple reason that it is a truth that everyone knows, but which is accepted as a necessary evil. That is because employers are very frightened of real freedom of association and the guarantees set out in Convention No. 87, to such an extent that in the replies provided by the employers' side, curiously included by the Mexican Government in its reply, the latter in part admits to this process, although it claims that it is justified. It was sought to address these concerns in law through the recent initiative presented on 23 March 2010 to the Chamber of Deputies by the parliamentary party of the National Action Party (*Partido Acción Nacional*), to which the national Executive belongs, prepared by the Secretariat of Labour and Social Security. Although it is an event which occurred subsequent to the complaint, its content is crucial because it demonstrates how it is sought to enshrine in law the violations which occur in practice but which are denied here. It is sufficient with regard to bargaining rights to look at section 899(A) and (C). Part IV of the former states as a "requirement of receivability", i.e. as a precondition for considering the intention to change trade union "certification by the competent registering authority that the abovementioned persons are on the trade union list and the date of entry". To show the vast scope of this provision, it should be recalled that the reference to the registering authority means the Secretariat of Labour and Social Security, at federal level, and the local JCAs at local level, both of which are responsible for issuing that certification or authorization. If we take into account that the JCAs consist mainly of the employers' representative body and the dominant trade union in the area, jointly the defendant in these proceedings, it is necessary to obtain consent from the person who may be prejudiced by the result of the decision. This already happens in practice and for this reason obstacles are placed in the way of proceedings on bargaining rights. This also explains the slow speed and the acknowledgement by the authorities themselves that over 95 per cent of proceedings do not lead to a decision. Obtaining certification involves an administrative procedure in which the employment relationship, signature, etc. must be proved, and, if they are not accepted by the "registering authority", these details must be supplied by the employer. In other words, a vicious circle, which is the central theme of the complaint.
- 770.** Section 899(C) is self-explanatory, especially the first paragraph which prevents proceedings to change trade union being instigated if there is another action in progress, in which case it is required to wait one year. In practice, this will mean that when any group of workers organizes to leave the trade union imposed by the employer, the latter engages any trade union to file a claim bargaining rights with the company, which will delay the start of proceedings to change trade union for a long time.
- 771.** As regards the signature of the collective agreement under threat of strike action, section 920(IV)(3) contains similar provisions which block the other possibility of access to bargaining rights. In conclusion, it is sought to close the circle of CCPPs, the existence of which is denied here in the most cynical manner, especially as it affects the vast

majority of the industrial system, in the fond belief that a problem of this dimensions can be swept under the carpet.

772. The IMF indicates that the Government denies the existence of CCPPs, stating that they do not exist in the Federal Labour Act. This is true in formal terms, but the complaint is clearly centred on an abusive practice, a system which twists the content of the law to achieve an objective in which the employers' sector decides and maintains collective agreements to suit itself. Obviously we are not referring to public departments nor mature parastatal unions, but in particular to workplaces where there is no proper trade union, but only a fake mechanism created to prevent the workers organizing freely. This phenomenon is allowed by the Government, to the point where it is seeking to convert it into law, because it considers that this is the best way of attracting investment and supposedly creating jobs. This pattern of complicity is evident in the reply to the complaint viewed as a whole.

773. The existence of these agreements is very well documented, as shown in the analyses produced. In particular, in document 4, paragraph (a), pages 133–134, and paragraph (c), page 213, the representative of the Mexican Government makes express reference to them. The Secretary of State for Labour and Social Security, Mr Javier Lozano, expressly refers to protection agreements in interviews and official documents which are reproduced on the website of that government department. The following are some examples:

- The labour reform initiative of 18 March 2010 presented in the Chamber of Deputies on 23 March 2010 by the National Action Party, in its presentation of the reasons, makes specific reference to protection agreements. At the end of paragraph 33 of that presentation, it states in so many words: “Equally, and with the objective of avoiding the conclusion of so-called ‘protection agreements’ in collective industrial relations, it is proposed in section 390 that the aforementioned requirements must be satisfied when collective agreements are filed with JCAs.” This initiative is sponsored by the Mexican Government through the Secretariat of Labour and Social Security (STPS).
- On the STPS’s own website, an interview was published on 29 March 2010 with the Secretary of Labour in which he claimed the credit for the bill presented to the Chamber of Deputies by the parliamentary group of the National Action Party (mentioned in the previous paragraph).
- In the press section of the STPS website, various official events are reported attended by the Secretary of Labour who, in his speeches, makes express reference to protection agreements, of which the following are a few examples:
 - 23 January 2008, address by the Secretary in closing the commemorative assembly on Mexican Pilots Emancipation Day, celebrated by the Airline Pilots Association (ASPA). “I share in very large measure the views, comments and ideas just expressed by your general secretary, Mr Dennis Lazarus, and that is why it is so important that if we are all concerned about subcontracting, outsourcing, simulation, puppet unions, protection agreements, if we are so concerned about these things, we must tackle them together, and that is something we can and must do every day. I also congratulate ASPA because it has really found a way of dealing with competition on the sector. The competition is fierce: first the crisis generated by the twin towers in 2001 and then in recent years the opening of low-cost airlines, and, as Dennis said, not always with fair working conditions, because now we are seeing that protection agreements, puppet unions, sometimes simulation, is typical. In this country we cannot allow ourselves the luxury of achieving low costs by trampling on workers’ rights, even if they simulate legal instruments as if they were really in application of a law ...”.

- 25 March 2010, transcription of the interview with Secretary of State for Labour and Social Security, Mr Javier Lozano Alarcón by the interviewer Carlos Puig of W Radio, who replied as follows to the journalist's questions "... specifically regarding protection agreements, I am against both puppet trade unions and protection agreements. The antidote is transparency, allowing workers themselves to access collective agreements on the Internet ...".
 - 4 August 2009, the Secretary of Labour's words presiding over the general assembly of the airline pilots' union. "... Furthermore, I reject the practices whereby some companies try to impose so-called 'protection' agreements, which in many cases contain serious infringements of the Federal Labour Act ...".
 - 1 April 2010, in the transcription of the press conference given by the Secretary of Labour, at Infonacot's premises, he said with respect to protection agreements "... another thing that is very important: the publication on the Internet of all collective agreements and all trade union registrations. What often happens, and that is why they are protection agreements and puppet unions ...".
- The Secretary of Labour also makes reference to protection agreements in official events documented in the websites of various communication media, such as:
- In an interview with the Secretary of Labour published in the journal *Fortuna*, he suggests "... Regulation of outsourcing, promotion of split shifts, tolerance of protection agreements and abolition of social security guarantees in the labour agenda of the Felipe Calderón Government. With an EAP of almost 30 million, the government proposal is to reform the Federal Labour Act to create a 'productive and competitive environment' ..." says Javier Lozano Alarcón, head of the STPS.
 - 30 May 2007, in a meeting of the national executive council of CANACINTRA, the Secretary of Labour said "... the Secretariat of Labour and Social Security (STPS) spoke out against puppet unions, protection agreements and said that the exclusion clause in article 128 of the collective agreement should disappear ...", according to its head, Javier Lozano Alarcón.
 - 5 May 2008, in an interview published in *El Universal* on the subject of labour reform, referring to the Secretary of Labour, "... furthermore, the head of the STPS considered that the best antidote to protection agreements is transparency and information ...".
- The Secretariat of Labour and Social Security itself, in its National Labour Policy Programme 2001–06, expressly admitted to the existence of CCPPs as a key plank in its policy. Page 2 of the section headed National Labour Policy Programme 2001–06, quoted verbatim, states: "Consistent with these principles, the programme satisfies the statements made during the campaign by Vicente Fox Quezada to various trade union organizations, experts in labour law and other bodies on subjects related to decent work, freedom of association and the right to organize, legitimate collective bargaining and labour justice. These subjects include, among others, inviting the parties involved to engage in dialogue about employer protection agreements."
- 774.** It is important to emphasize that the complaint is based on concrete evidence, the details of which are not contested, except by meaningless generalities. That is why, to avoid this vagueness, detailed analysis is needed, leading to make recommendations designed to ensure that the labour system in Mexico is compatible with the commitments assumed by the Mexican Government.

775. Finally, the IMF sent a communication dated 7 September 2010 in which it stated that employer protection agreements are not regulated by labour law under that name. The name has been attributed on the basis of what has become common practice in Mexico.
776. It was indicated that the signature of a collective agreement becomes a unilateral act which is decided by the employer which can choose its preferred trade union even before the source of employment exists. It is alleged that it is a legal act in that, under section 387, there is no precondition at all for the signature of a collective agreement between the employer's representative and the fake trade union, nor is prior consultation of the workers necessary, nor even a minimum number of workers. It is sufficient that two workers from a population of one thousand so request for the formal requirement to be satisfied and the collective agreement signed, and, in accordance with section 396, for its provisions to extend to all persons working in the company or establishment, even if they are not members of the trade union which concluded the agreement.
777. Only two signatures are required to conclude a collective agreement, that of the employer's representative and that of the general secretary of the trade union, followed by filing with the competent JCA.
778. Once the agreement has been filed with the board, a process of protection commences which prevents other workers from demanding signature of a collective agreement by means of a strike, as set out in section 450(II) of the Federal Labour Act. As observed in article 923, no notice of a strike which demands the signature of a collective agreement may be processed if one has already been filed, because in that case the position would be occupied, thus preventing an authentic trade union from seeking the signature of a collective agreement and, in the event of a refusal, calling a strike to demand its signature.
779. Once the agreement has been signed with the trade union selected by the employer and filed with the Board, the only option left open to the workers is to seek a change of bargaining rights under the collective agreement, as the possibility of signature has been blocked. To obtain these bargaining rights, they have two options: register the trade union in accordance with the requirements of section 365 of the Federal Labour Act or claim bargaining rights by a proceeding which is usually very complicated which requires the majority of the workers.
780. It should be emphasized that although signing a collective agreement does not require proving any number or majority, if the employer refuses to sign and it is necessary to call a strike, in the latter case it is necessary to have the majority set out in article 451(II). In other words, the signature of the collective agreement is in the hands of the employer and this has resulted in leaders of fake trade unions seeking to be chosen or invited by the companies to sign them. Suffice it to look at the website of the Federal District Arbitration and Conciliation Board to confirm the filing of collective agreements with the minimum legal requirements concluded simultaneously in a whole chain of workplaces.
781. In the statements concerning the increase and outlook for protection agreement recorded and transcribed by the Friedrich Ebert Foundation in "Auge y Perspectivas de los Contratos de Protección", the existence of these agreements is expressly recognized. Even employers' representatives themselves assert that they are necessary to protect companies from strikes by extortionate trade unions, meaning unions which demand payment of an amount of money in exchange for not calling strikes. The replies of Jorge A. del Regil, from the firm Baker & McKenzie, member of the current CFA, and Tomás Natividad, representative of the Mexican Employers' Confederation (COPARMEX), are striking. Jorge A. del Regil admits that in his 40 years' experience he has signed protection agreements with all the trade union federations to protect the companies he represents, and acknowledges that they do not take account of the workers' wishes "but serve to protect

the source of work against strikes by the signature of another union ...” and later he also acknowledges that it is necessary to pay the leader for that protection and employer protection agreements are an “ideal industrial relations model, in that, even if there is an economic cost, they ensure the subservience of the workforce to the companies and armours them against uncontrolled actions by trade union organizations”.

782. This interview is particularly interesting because it is linked to a statement by Ramón Gámez Martínez, who through a vast network of trade unions, which includes “Justo Sierra” (and other organizations to which the epithet progressive is applied), holds several thousand collective agreements through his relations with the firm of Baker & McKenzie; and the workplaces controlled by “Justo Sierra”, include fast-food restaurant chains such as McDonald’s and Valle de México University campuses. In that interview, Ramón Gámez acknowledges that 95 per cent of collective agreements in Mexico are signed in this way and in one of the remarks in the interview he says it all: “... all of we trade union federations are doing it. Because it is the mechanism forced on us by law. And, pardon me for saying so, an employer would be daft to do anything else ...”. Tomás Natividad, who appears in the Government’s reply to this complaint to the ILO Committee on Freedom of Association, also admits their existence, saying that “... protection agreements are a necessary evil, they are justified, they are needed to ensure the survival of sources of work ...”.
783. There are many examples of the widespread existence of CCPPs as a general practice, as well as the statements of the Secretary of Labour himself, well documented in the first document of complaint No. 2694 presented to the CFA. However, the first reply that we received from the Mexican Government denied the existence of protection agreements, on the pretext that they cannot exist because they would not be legal if they did.
784. The IMF also states that the phenomenon of signing CCPPs without considering the wishes and participation of the workers, but as a unilateral act of the employer, is clearly acknowledged and proved in the cases of several trade unions, presented in the IMF complaint and updated at the end of this document. The extension of this fake collective bargaining to all workers means that trade union membership is not a voluntary act separate from collective bargaining, but that workers who are employed by the company or who are recruited in the future, must join the fake trade union which signed the collective agreement. In other words, the workers who belong to the union are forced to do so by virtue of the exclusion clause contemplated in section 395 of the Federal Labour Act.
785. In Mexico, there is no possibility whatsoever of a worker individually to choose one trade union or another. In the case of public employees, the deduction of their trade union dues appears on their payslip and, in consequence, they are considered formally part of the trade union, despite the fact the applicable labour legislation prohibits the exclusion clause (closed-shop). It is simply a common and frequent practice and, therefore, in larger workplaces such as the Secretariat of Public Education, the unionization rate is shown as 100 per cent. Under the general system (identified by article 123(A) of the Constitution), workers become a member of the trade union with bargaining rights under the collective agreement when they take up their employment. No doubt there are exceptions under one system or another, but they are not representative.
786. In particular, sections 2, 3(1) and (2), 4, 7, 8(2), and Article 11, as the key Article of Convention No. 87, are repeatedly violated by the Mexican Government and its representatives in their everyday practice. Mexican workers have no option or chance of influence the initial collective bargaining, thus their membership is determined by the employer, who, by defining the collective bargaining, automatically decides the fake trade union to which the worker must belong.

- 787.** All this forms part of a model which, to ascertain the scale of the restriction of the right to organize, must be seen as a whole, namely: (1) control of trade union registration; and (2) control of the *toma de nota* of trade union executives.
- 788.** In practice, trade union executives must periodically obtain authorization from the so-called registering authority which is simply a control body (whether at federal level through the Secretariat of Labour and Social Security, or locally, through the tripartite JCA) and in which, absurdly, the authorization to exist legally (registration) or continue (*toma de nota* of the executive) or change trade union must be decided by the employers' representation and the trade union leader who has the most collective agreements in the industrial sector, when the employer has already signed the collective agreement
- 789.** For all these reasons, the studies conducted in the National Autonomous University of Mexico by Doctor Alfonso Bouzas Ortíz confirm that over 90 per cent of collective agreements registered in Mexico City are dead or moribund. In other words, they are not revised, not bargained and are maintained at the legal minimum, i.e. they are mere semblances of collective agreements. Obviously, in this environment, all the workers supposedly covered by these collective agreements which they do not know and do not bargain are the victims of a violation of their fundamental right to establish and to join organizations of their own choosing.
- 790.** A frequent argument used by the employers' side is that the practice of employers' protection agreements is designed to "protect the company from cases of trade union extortion". There is some truth in this assertion. There are cases of trade unions which simulate legal acts to obtain economic benefits and do so successfully because of the employer's fear that holding a ballot or challenging a false strike would force them to disclose the protection agreement which, in many cases, is concealed, i.e. formally filed in the court, but unknown or only partly known to the workers. In this regard, the complaint exposes collective bargaining in the various forms designed to confine freedom of association and collective bargaining into a single package. Both aspects are inseparable, since it would be pointless to have trade union registration without access to bargaining rights. For this reason, too, several democratic sectors have demanded that the Mexican Government should ratify ILO Convention No. 98, which it has resisted, claiming that to do so would infringe national legislation, particularly with reference to the exclusion clause. Although this is a legal provision which is quite rigorously applied in practice, it has been declared unconstitutional on two occasions by the Mexican Supreme Court of Justice.
- 791.** The Mexican model must be analysed taking into account the practical and daily difficulties which prevent workers from exercising the rights associated with freedom of association and collective bargaining. There is no impartial system of arbitration nor mechanisms for certifying the wishes of the workers at the signature stage. The agreement of the majority of the workers is only required in the case of a strike or change of trade union and, ultimately, the delays, setbacks and dragging out of the legal processes act as a fundamental dissuasive and repressive factor. For example, if a trade union is refused registration or *toma de nota*, the workers' organization must undertake a very lengthy legal procedure which begins with an application for indirect protection (*amparo*) before a district judge which allows many possibilities of delay and ends with a review before a federal high court. In a good many of the known cases and thus in the cases described in this complaint, when a favourable judgment is granted, it is up to the registering authority to correct its decision and it can again issue a refusal.
- 792.** In the case of the UNTYPP reported here, for over a year the registering authority kept making new requirements, thereby seeking to frustrate the will of the workers through the dismissal of those workers one by one. The *amparo* proceeding lasted almost a year

(15 January 2009–30 November 2009) and, when protection was finally granted, the end result was the dismissal of those workers who had supported the proceeding, who were forced to sign a document sent to the authority renouncing the trade union, all with the same wording and, adding insult to injury, appointing a company lawyer as their legal representative to request the cancellation of the trade union registration. There is delay throughout the process. Obviously this frustrates the real effectiveness of the right to organize, because without registration and without the *toma de nota* of the committee, the delay on the procedure for acquiring bargaining rights, and a parallel system of repression, it is practically impossible to complete the legal procedures. A recent example of this can be found in an article published in the newspaper *El Universal* (26 July 2010 “Los Caminos del SME”), in which the Secretary of Labour, referring to the Mexican Electricians’ Union (SME) dispute which, together with the dispute of the mineworkers’ union (SNTMMSRM affiliated to the IMF) had a huge impact in recent times, states that neither of the executive committees had the *toma de nota*. Nevertheless, the Secretary of Labour said that he had two months to respond to any request for a *toma de nota*, i.e. he could leave a trade union without legal representation for that period. Obviously, that assertion carries no legal weight, because it extends the length of time which the law allows for the registration of the trade union, not the *toma de nota* of the regular elections. In one sentence, he said it all “... without the *toma de nota*, there would be a permanent conflict within trade unions and their legal representation in civil life would be precarious, if not practically non-existent”.

793. The Mexican Government commonly seeks to conceal national reality and has devoted considerable resources to building a seemingly democratic image abroad. To some extent, it has succeeded, since the employers’ representation composed of people who are well aware of the reality but conceal it, take advantage of the democratic façade created by the supposedly tripartite composition of the control body. Unfortunately, however, as can be seen in many cases, in reality there is evident complicity between the Government, employers’ and workers’ representatives, in closely guarding their shared interests. This framework has been one of the major obstacles to changing the justice system, replacing the existing JCAs with a proper control body which is impartial and genuinely tripartite, and which truly represents the three sectors. The current configuration of the JCAs also influenced the rejection of initiatives such as the Public Register of Trade Unions and Collective Agreements, which was proposed in the sphere of labour reform, in order to have an impartial arbiter which is essential.
794. It is absurd that where there is a practice of signing collective agreements without reference to the workers, leaving as the only way of substantiating a claim for contractual bargaining rights a procedure which must be heard by a tribunal in which decision is taken by the defendants themselves, the ones who caused the anomalous situation, the employers’ side, acting in concert with the government representatives as well as the workers’ representation, often the same trade union federation as the one that the workers are seeking to change. The very reply of the Mexican Government to our complaint is clear evidence of this complicity, as two dominant union federations and the employers’ representative body, COPARMEX, are all contributors to this reply, with the intention of presenting a united front.
795. We provide below, for information, a description of the proceedings and updated details of three of the specific cases of violations of the right to organize illustrated in our complaint.
796. The IMF updates the facts in three of the cases mentioned in their initial complaint of February 2009.

797. With regard to the National Union of Petroleum Technicians and Professionals (UNTYPP), trade union registration, the IMF indicates the following:

- 18 March 2008, the UNTYPP was formed in a meeting in which its constitution is approved and the executive committee were elected.
- 29 April 2008, the UNTYPP requested registration with the Directorate for Registration of Associations in the Secretariat of Labour and Social Affairs (STPS): in order to comply with the Federal Labour Act, it produced the convocation and minutes of the constituent meeting of the trade union which recorded the will of the workers present to join the trade union and request its registration; membership list showing 260 members, duly authorized constitution, 260 membership forms and documentation showing them to be PEMEX workers.
- 6 June 2008, the STPS required the UNTYPP, among other things, to amend its constitution and produce the minutes of the meeting approving the amendments, prove the existence of PEMEX and that the members were employed by that company.
- 11 June 2008, Oscar del Cueto Charles, Public Relations Secretary of the UNTYPP, was dismissed for trade union activism.
- 21 August 2008, for the second time, the STPS required the UNTYPP, among other things, to amend the constitution and produce the minutes of the meeting when the amendments were made, delete from the membership list those workers who did not produce original documents showing them to be PEMEX employees.
- 21 August 2008, Didier Marquina Cárdenas, General Secretary of the UNTYPP was summoned by Mr Marco Antonio Murillo Soberanis, PEMEX deputy human resources director, to the company offices in Mexico City, and pressured to withdraw the request for trade union registration, under threats that he should think of his future and that of his children.
- 16 October 2008, for the third time, the STPS required the UNTYPP to prove the wish of each member to belong to the trade union, to amend the constitution and produce the minutes of the meeting when the amendments were made, and to remove more members.
- 14 November 2008, PEMEX dismissed 14 members of the executive committee, and over 40 UNTYPP officials and members were violently ejected from their workplace by security personnel of that company and their personal belongings were confiscated.
- 18 November 2008, the UNTYPP requested the STPS to grant trade union registration as it had fulfilled all the requirements set out in the Federal Labour Act and over 60 days had elapsed without a decision being made in that regard.
- 19 November 2008, the STPS replied to the UNTYPP's request of 18 November 2008 indicating that the requested registration was not receivable because it had replied making various observations and that the registration was under consideration.
- 19 November 2008, the father of Felipe Jaime Valencia Galindo, UNTYPP executive committee member, died because he was refused urgent medical treatment in the PEMEX HOSPITAL, because his son was a member of the UNTYPP.

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- 20 November 2008, PEMEX summoned several dismissed workers and offered them reinstatement on condition that they renounced the UNTYPP, and several of them, who urgently needed medical treatment, signed a letter of renunciation of the UNTYPP.
 - 25 November 2008, the UNTYPP requested the STPS to grant trade union registration as it had fulfilled all the requirements set out in the Federal Labour Act and over 60 days had elapsed without a decision being made in that regard and three days had passed since the request in question without any decision in that regard, in accordance with article 366 of the Federal Labour Act.
 - 27 November 2008, the STPS requested the UNTYPP to clarify whether it was a company or sectoral trade union.
 - 27 and 28 November 2008, PEMEX embarked on a campaign of threats in the workplaces to force active UNTYPP members to renounce the trade union, failing which they would be sacked.
 - 27 November 2008, the STPS informed the UNTYPP that it had requested PEMEX to inform it of the functions of the UNTYPP members and to confirm the details provided by them in the membership list.
 - 1 December 2008, the UNTYPP responded to the observation of the STPS of 27 November 2008 and requested registration in accordance with the provisions of article 366 of the Federal Labour Act.
 - PEMEX stepped up the violence against UNTYPP members, increased the veiled or direct threats against them personally and against their families, medical services for members were cancelled, blackmailing them by providing medical care only if they renounced the trade union, and enforced retirement.
 - 23 December 2009, the STPS refused registration of the UNTYPP on the grounds that it did not comply with the requirements of the Federal Labour Act, including that the number of members was less than 20.
 - In reply to the refusal to register, several members confirmed to the STPS that they belonged to the UNTYPP, showing that there were more than 20.
 - 12 January 2009, a claim for unfair dismissal of union members and members of the executive committee, on the grounds of their organizing as a trade union, was lodged.
 - 15 January 2009, the UNTYPP applied for *amparo* against the refusal to register by the Directorate for Registration of Associations.
 - 2 July 2009, in reply to the application for *amparo* filed by the UNTYPP, the district primary judge for labour matters found that the registration was allowable, as the requirements of the Federal Labour Act had been fulfilled and ordered the STPS to register the UNTYPP.
 - 16 July 2009, the STPS appealed the decision that ordered the registration of the UNTYPP.
 - 30 November 2009, the 14th Labour Appeal Court found in favour and upheld the judgment that the UNTYPP should be granted registration.

- 21 December 2009, the STPS granted trade union registration to the UNTYPP and took note (*toma de nota*) of the national executive committee for the period 18 March 2008 to 17 March 2012.
- 23 December 2009, UNTYPP members and trade union representatives began to receive telephone calls threatening them with dismissal and physical violence if they did not renounce the trade union.
- 30 December 2009, the UNTYPP asked PEMEX for a meeting to start formal relations.
- January 2010, the UNTYPP launched a membership drive, visiting workplaces throughout the country.
- In reply to the UNTYPP's membership drive, the company, through its security personnel and management, threatened workers who attended UNTYPP meetings with dismissal. Trade union representatives were threatened with physical violence and threats were made against their families, they were spied on and followed by strangers in cars.
- January 2010, managers at each workplace summoned UNTYPP members individually to their offices, they were detained by security personnel for a long time, while they were threatened with dismissal if they did not renounce the trade union, they were forced to sign letters which were supposedly personal but all had the same format and appointed the same lawyer to undertake the procedures mentioned in them. The first letter was a renunciation of the trade union and the second, a request to the Secretariat of Labour and Social Security to dissolve the UNTYPP. The JFCA received these documents and opened cases Nos 1/2010 to 55/2010 in Special Board Twelve of the JFCA.
- 18 January 2010, approximately 200 workers belonging to the UNTYPP were threatened with dismissal by PEMEX human resources management staff, supported by security personnel, to force them to sign the renunciation of the trade union and request for dissolution of the trade union. Three trade union members and officials were dismissed.
- 28 January 2010, Erasto Luis de la Cruz, labour secretary of the executive committee and five members of the sectional executive committee in the Antonio Dovalí Jaime Refinery were threatened with dismissal by the human resources manager and deputy manager of the refinery because they refused to sign letters renouncing the trade union.
- 15 February 2010, due to their refusal to sign letters of renunciation of the trade union, Erasto Luis de la Cruz, labour secretary of the executive committee and five members of the sectional executive committee in the Antonio Dovalí Jaime Refinery were dismissed.
- March and April 2010, a fierce onslaught was unleashed against our members and advisers, in particular against the general secretary with repeated calls to his mobile phone with threats of violence against himself and his family.
- April 2010, trade unions launched a campaign of support for their fellow trade unionists with letters to the Mexican Government to cease the threats and attacks against them and demanding their reinstatement.

- May 2010, PEMEX called the members of the executive committee to supposed negotiations, asked them to stop the campaign of letters and offered to reinstate some members.
- End of May 2010, the executive committee agreed to stop the campaign in defence of the trade union on condition that the Government and PEMEX ended the repression of members and workers.
- June 2010, the repression of members and workers ended. The talks between PEMEX and the trade union continued.
- 16 July 2010, Didier Marquina Cárdenas and Francisco Ríos Piñeyro, general secretary and secretary of the organization, respectively, were reinstated, but their jobs were frozen.

798. As regards the case of the Commercial, Office, Retail, Similar and Allied Workers' Union (STRACC), bargaining rights, the IMF indicates the following facts:

- 9 January 2003, the STRACC presented a claim for bargaining rights and requested the Federal District Conciliation and Arbitration Board (JCADF) to keep the details of workers belonging to the STRACC confidential, the said information to be supplied in a sealed envelope.
- February 2003, leaders of the movement in the workplace were dismissed, having been identified because the envelope containing their personal data had been broken into.
- No hearings are being held, as the JCADF did not notify the defendant trade union and company or they are held at irregular intervals, and other claims for bargaining rights were held, and a ballot was finally called on 20 August 2003.
- 20 August 2003, two hours before the ballot, the JCADF suspended it, awaiting a petition lodged by one of the trade unions (the confederation CTC) which also claimed bargaining rights. Thanks to this ruse, the workers belonging to the STRACC were identified.
- Having identified the STRACC members, the company dismissed three more officials and intensified threats and violence against the workers.
- 10 November 2003, another trade union appeared, also claiming bargaining rights in a hearing to request a ballot date to be set. Groups of thugs turned up and harassed STRACC members to make them drop their claim. The JCADF did not set a date for the ballot and despite the fact that it was witness to the assaults and had the legal means to prevent them, it did nothing.
- 8 December 2003, the JCADF allowed the claim for bargaining rights by the trade union which appeared at the hearing on 10 November 2003.
- Various hearings were called, and more trade unions presented claims for bargaining rights which were invariably allowed by the JCADF, thus a ballot could be held until the cumulative hearings for each claim had been completed.
- The JCA continued to set dates for hearings which were not held due to failure to notify all the claiming unions or deliberate errors in the JCADF agreements.

- 18 November 2005 was set by the JCADF for the ballot at the company's sites, but it could not be held because thugs surrounded the sites and barred the entry of the JCADF official and the STRACC representatives, there were constant threats and aggression and a group of workers was abducted by the company to prevent them voting.
- Despite having the legal mechanisms to notify the defendant trade union and the repeated request by the STRACC representatives to use them, the JCA did not do so. The trade unions which also claimed bargaining rights are the CTM, CROM and CTC which have representatives in the JCADF.
- 15 January 2009, a hearing was held to hear the STRACC claim and a date was set for the ballot on 22 January 2009.
- 22 January 2009, the ballot was held and the JCADF used as the electoral list the one provided by the company without checking it, as required by law, and which contained persons who did not work for the refinery. The ballot takes place amid assaults by thugs without the JCADF taking any action to prevent it. Despite everything, the STRACC won the ballot.
- At the end of 2009, the JCA issued a final decision which recognized the STRACC as having bargaining rights under the collective agreement.
- In 2010, the parent company refused to reinstate the dismissed workers.

799. As regards the case of Johnson Controls, Puebla, the IMF mentions the following facts:

- In the second half of 2005 and throughout most of 2006, working time was unilaterally increased in the dressmaking area to 12 hours per shift, the Christmas bonus and profit-related pay were reduced and replaced by a bonus of lower value.
- In the face of the systematic abuse and violation of their rights, the workers organized into a coalition which confronted the protection trade union claiming better conditions of work, participation on collective and wage bargaining and participation in the election of their representatives.
- In May 2007, under the Federal Labour Act, the revision of the collective agreement signed by the Commercial, Office, Retail, Similar and Allied Workers' Union and the employees was due.
- On 4 June 2007, the workers' coalition requested the company trade union to allow them to participate in the wage review, although not the collective agreement, and requested a copy of the collective agreement for information; the trade union replied that they should come to its offices for that purpose.
- In June 2007, due to the growing disagreement expressed by the workers' coalition, the trade union initiated a campaign of harassment against any worker who expressed disagreement, hounding them and keeping production lines and villages under surveillance.
- In June 2007, seven members of the workers' coalition were dismissed in application of the exclusion clause. The workers lodged a complaint of unfair dismissal in the JFCA.

- On 26 and 27 October 2007, 150 workers were dismissed without any defence or recourse for a legal settlement for the workers concerned by the protection trade union.
- In August 2008, after a process of surveillance of the workers' coalition by the trade union and the company, 15 leaders were dismissed.
- In June 2008, 50 workers were dismissed. The company says that the reason was that they had enrolled in education.
- There was systematic direct physical aggression and threats against the workers, leaders and organizers.
- The company and the trade union refused to give a copy of the collective agreement to the workers, and those who requested it were dismissed and any attempt to organize detected was eliminated with the dismissal of the leaders.
- Johnson Controls contracted workers through various outsourcing firms, each of which had its respective trade union and CCPP.
- Due to the slowness and risks involved in requesting trade union registration, the workers' coalition decided to file a claim for bargaining rights, presentation of which is pending.
- In 2010, workers and leaders of Johnson Controls and the coalition were attacked and threatened by men linked to the company trade union.
- On 29 May 2010, the coalition and workers of the Johnson Controls (Resurrección Area) Puebla, claimed the right to form their own trade union section and affiliate with a national democratic trade union, and went on strike for three days before negotiating an agreement with the company and the regional authorities.

800. Lastly, the IMF sends a table of the applicable legal provisions.

B. The Government's reply

801. In its communication dated 1 March 2010, the Government states that it took the liberty of consulting with the actors involved to clarify the statements made by the IMF. To that end, provided below are the comments and observations of the federal Government, together with those of the Mexican Workers' Confederation (CTM), the Revolutionary Confederation of Workers and Peasants (CROC), the Confederation of Chambers of Industry of the United Mexican States (CONCAMIN) and the Employers' Confederation of the Mexican Republic (COPARMEX).

802. In its initial complaint, the IMF indicates that it has followed with concern the current state of industrial and trade union relations in Mexico, due to the constant claims of workers, trade unions in course of formation, constituted trade unions, non-governmental and human rights organizations alleging difficulties that arise in forming trade unions and formally registering them with the labour authorities, including the system of "taking note", the practical rules applicable in accessing collective bargaining at its various stages, from inception, signature or conclusion, going on to periodic review and termination, as well as the establishment of mechanisms which hinder the satisfactory implementation of the rights contained in Convention No. 87.

803. In addition, they make allegations, mostly based on imprecise academic studies, of: (i) widespread use of a system of protection agreements which infringes the right to organize; (ii) express recognition of that model by the Mexican State; (iii) corporate control of workers as a fundamental element of the political system; and (iv) use and strengthening of this corporatism, which in practice includes the power of the State to intervene and influence the organization of workers, while the employers' side uses and is strengthening the protection model to prevent workers organizing and claiming signature of a CCT or improvements in their conditions.

804. The IMF bases its complaint on the following points:

- (i) The CCPPs are a practice which nullifies the enjoyment and exercise of labour rights.
- (ii) The critical points of violation of the right to organize allege a pattern of conduct identifiable in the complaints presented to the ILO Committee on Freedom of Association and cases presented at national and international levels in various bodies, related to the principal institutions of collective law: trade union registration; request to conclude a CCT; holding of a CCT; termination of the CCT; and strike.
- (iii) The constant growth of the phenomenon of CCPP is shown to the extent that there is more information on the content of CCTs and that the vast majority of them do not benefit the workers because the legal minimums are maintained and are only signed and deposited to impose trade unions and CCPP by decision of the employers' side.
- (iv) Cases which explain and clarify the restrictions based on the trade union classification, the registration system, rules on signature, agreement holder and termination of CCT, strike, and the trend to increasing control by seeking to give them legal form through reforms of labour legislation.
- (v) Collective protection agreements and their mechanisms are essentially founded in practice and not law. It would be hard to conceive an all-embracing model of violation of human labour rights without the complicity of the public labour administration and the administrative function of the JCAs.
- (vi) A comprehensive model which demands explanation by the Mexican Government side in the ILO, as well as the contempt reflected in the failure of the Mexican Government to implement the recommendations of the CFA to comply with Convention No. 87.
- (vii) The legal limitations on the right to organize begin with the restrictive classification of trade unions set out in section 360 of the LFT which contains a limited list of types of trade union: guilds, company, industrial sector, national industrial sector and various offices; in support of this characterization and linked to the interpretation of powers set out in section 527 of that Act, there are a set of restrictions on the so-called "radius of action" of trade unions in order to limit their scope of representation to branches of activity, entrenched in registration procedures and the so-called "taking note".

The registration requirements are apparently very simple to fulfil under the various articles of section 365 of the LFT. Despite being duly regulated, it is common to distort the interpretation of the law to avoid registering trade unions which act outside the model of subordination characteristic of the system of protection agreements. Among the obstacles identifiable are having to show the existence of the employment relationship, proving the federal or local status of the employer by means of legal documents which are difficult for workers to obtain, difficulties relating to the documentation presented, expressly showing the will of the workers to belong to the

trade union which is seeking registration by means of inspections, documents or even the physical presence of the workers themselves, and proving the nature of the activities, alleging that in some cases these are a matter of trust and, in consequence, they cannot belong to the trade union. These requirements discourage workers' interest and generate considerable fear.

- (viii) The formation of trade unions which could demand signature of a CCT is avoided.
- (ix) Once the CCT has been signed, it is deposited with the relevant JCA. This process only requires the signature of the general secretary of the union and the formal representation of the employer. Once this stage has been completed, no other agreement can be signed with another trade union, because of the principle of exclusivity of the agreement holder.
- (x) The majority of CCT have the legal minimum conditions, which allows the inference that almost all are CCPP, since it makes no sense to conclude and deposit a CCT with these characteristics when its purpose is to improve conditions of work.
- (xi) The various states of the federation do not have this information available, thus a serious lack of transparency prevails. This becomes an important factor in preventing workers from knowing of the existence of a CCT concluded to govern industrial relations in their workplace. The JCAs impose a set of requirements which are difficult to satisfy, and which are not a legal requirement, such as the names of the workers, their signatures, production of documents which justify the employment relationship and membership lists of the applicant trade union. Particularly serious is the requirement to produce certification of the entries in the union membership roll. This shows the role of judge and party played by the JCAs and the reason why in practice they are an obstacle to groups of workers who do not belong to the hegemonic trade unions seeking to obtain signature of a CCT by notice of a strike.
- (xii) If a trade union claims the right to conclude a CCT and one has already been deposited, the only way for the workers to have a trade union which reflects the will of the majority is to adopt this procedure. In some states of the Republic, the procedure does not even take place, on the grounds that it causes a breach of social peace. Claims for the bargaining rights are subject to the same obstacles as those which apply to notice of a strike for signature of a CCT. Applicants are required to show names, signatures, minutes of the assembly showing the will of the workers to file the claim and evidence in support of the employment relationship.

The trade union originally imposed by the employer may take repressive actions against the dissenting workers, one of them being the exclusion clause. This is just one more of the means of pressure used against workers who seek to change their trade union.

Almost all the CCTs deposited nowadays do not contain any improvement beyond the legal minimums, showing clearly that it is a sham which seeks essentially to protect the employer from the entry of another trade union. That is an infringement of the freedom of association contemplated not only in our constitutional framework but also in ILO Convention No. 87. Attempts are being made to ensure that these obstacles acquire the status of law under a bill put forward by the STPS, known as the "Lozano Reform".

A very small percentage of claims for ownership end in a *recuento*. Those groups which do succeed in participating in the proceeding, in practice disintegrate under the pressure, many of them obliged to give up for economic reasons, others dismissed. Added to this are the difficulties inherent in the *recuento* itself, which is often

surrounded by serious violence, as acknowledged by the labour authorities themselves.

- (xiii) In the context of the collective protection agreement model, its voluntary character is used, in practice, to worsen conditions of work. This is done by terminating one CCT and immediately concluding another with the same or another trade union as the company sees fit with lower wages and benefits and increasingly with subcontractors.

In cases of termination of CCTs, the authorities do not normally impose additional requirements, such as evidence of the workers' will or additional documentation. Obviously, therefore, they apply a different criterion from the rigidity which impedes the notice of a strike for signature of a CCT. That is because it reinforces a model of total complicity which strengthens the employers' side, in particular through its lawyers who maintain that this freedom to contract can only be limited in the case of voluntary termination.

- (xiv) In the case of workers in the service of the State, the Constitution recognizes their right to strike in article 123(B)(X), while its regulating act fixes the terms of that right but, throughout the history of this bureaucratic labour regime, there has never been a legal strike, thus these are practically extinct institutions.

- (xv) As indicated above, in practice there are two basic ways of achieving signature of a CCT, notice of a strike and the supposedly voluntary route. Thus, there are two mechanisms for applying the CCPP model. On the one hand, there is the principle established in section 923 of the LFT that the notice of a strike in support of a claim to conclude a CCT is not allowed if one has already been deposited. On the other, the creation of obstacles to the convening of a strike by a trade union that is not considered "acceptable to the employer".

The employer collective protection agreement model, therefore, functions on the basis of practices to constrict the workers' organization from the moment when it is detected, spying on groups and organizations which participate in the process, ranging from veiled threats, direct threats, physical assaults which threaten the life and safety of workers and their families, as well plain dismissal. Against this background, the exercise of the right to organize becomes impossible.

- 805.** The central point of the complaint presented by the IMF concerns the so-called "CCPPs", defined by the complainant as follows:

These are instruments agreed between the general secretary of a trade union without genuine life but registered with the authority and the employer in order to allow the latter to evade bilateral bargaining in the determination of conditions of work.

- 806.** In general terms, our legal system does not provide for so-called "CCPPs". In this regard, the Mexican Government does not recognize in any way whatsoever the existence of such agreements, since trade unions are free to form themselves, draw up their constitutions, designate their representatives or leaders and regulate their own structure and internal procedure.

- 807.** The Mexican labour authorities are solely concerned to take note of the formation of trade unions, the election of their executive bodies and leaders, the constitutions which govern their activities and internal organization, but at no time do they intervene in those processes, thus the provisions contained in ILO Convention No. 87 on freedom of association are observed.

- 808.** The requirements for registration of a trade union by the labour authority are reviewed by the administrative authority in accordance with the provisions of section 365 of the LFT, which lays down the requirements to be satisfied in order for trade unions to apply for registration.
- 809.** Sections 368 and 374 of the LFT provide that registration of trade unions by the labour authorities has the effect of granting them legal personality in relation to all authorities.
- 810.** This situation does not cause any harm whatsoever to the trade unions, as registration of the trade union does not preclude the right of workers to form a trade union, elect their executive and draw up their constitution, as that right is protected both by article 123(XVI) of the Political Constitution of the United Mexican States, and section 357 of the LFT. Thus from the very moment of their formation, trade unions have the respective rights, a question which has also been recognized by the Supreme Court in the separate opinion which is reproduced below:

Ninth session.

Body: Plenary.

Source: *Judicial Weekly of the Federation and Gazette IX*, June 1999, page 1.5.

Opinion: P.LII/99. Separate opinion. Subject(s): labour.

Trade unions. Their registration does not have constituent effects: Trade unions are legal persons which have capacity to defend their rights and exercise the corresponding actions before all authorities, from the moment when they satisfy the requirements for their formation set out in the relevant law and not until they file their registration with the competent authority, because this is not a precondition for their formation, but that, through registration, the corresponding authority certifies that the constituent act satisfies all the requirements of substance required by law, but does not grant the trade union existence or legal personality.

Appeal (*amparo*) 1339/98. Francisco Pacheco García and co-applicants. 11 May 1999; Unanimity of ten votes. Absent: José Vicente Aguinaco Alemán; Speaker: Juan Díaz Romero. Secretary: Armando Cortés Galván.

- 811.** The following are certain arguments that are considered pertinent in justifying and explaining how trade unions are organized and function in Mexico.
- 812.** In Mexico, “trade union” has the meaning set out in section 356 of the LFT, which defines it as follows:
- Article 356. A trade union is an association of workers or employers formed for the study, improvement and defence of their respective interests.
- 813.** The formation of a trade union requires the agreement of at least 20 workers in active employment according to section 359 of the LFT. However, they may be formed without the need for prior authorization or permission from the authority. Thus the relationship between trade unions and the authorities is simply a matter of registration, i.e. the authorities do not intervene in the formation, operation or internal functioning of trade unions, but solely maintain a register of such organizations.
- 814.** In order to define the competent body for registration, we must distinguish between trade unions with federal jurisdiction and those with local jurisdiction: the former must register with the STPS while the latter must be registered with the JCA of each state of the Republic.
- 815.** The relationship maintained by trade unions with the authorities, after their formation and registration, is like that of any legal person, in accordance with the provisions of

sections 368 and 374 of the LFT. As associations to defend their members, they have the function of representing the workers who make up their membership. This legal representation will be exercised by the general secretary or the person designated by its executive body, except as otherwise provided in their constitution, in application of the provisions of sections 375 and 376 of the LFT.

816. The IMF complaint appears to contain the following irregularities:

- The IMF annexes to its communication various copies of studies, book chapters, press articles and reviews in an attempt to substantiate its unfounded arguments. In this respect, the CFA is requested not to take these texts into account as evidence of the assertions of the complainant, as they are merely opinions in the form of assertions on some occasions, and academic on others, which must be evaluated as what they are, i.e. the freely expressed opinions of their authors, which, for all that they are based on analysis of facts which may be true, only reflect their personal views, which should not be used in support of the IMF's complaint, especially because they do not mention facts of specific violations of freedom of association of specific organizations or a given number of workers. They deal with subjective questions on aspects which, although they might relate to specific subjects of study and analysis, cannot serve as a reflection of the entire national reality. Therefore, such texts should not be taken into account as evidence of general facts.
- Furthermore, the IMF indicates "the limitations on the right to organize were reflected, among other things, in 46 complaints to the Committee on Freedom of Association (CFA) against the Mexican Government (up to December 2008), in 39 cases between 1990 and 2006, 66 legislative observations of which one was only partially allowed and 26 practical observations".

From this assertion, it appears that the IMF accepts and recognizes that the trade unions in Mexico have a variety of means of legal recourse which they can use if they consider that their rights of freedom of association have been infringed, including, when they have exhausted the relevant recourses in international bodies, complaints in the ILO Committee on Freedom of Association, a body which resolved them by issuing observations to the Mexican Government, which acts in accordance with the law and endeavours to implement such observations to the extent allowed by Mexican legislation. We must, after all, recall that the authorities can only do what the law allows without exceeding their powers or jurisdiction.

- In another point of its complaint, the IMF indicates that "the way in which the slowness of labour justice and the violence used to suppress actions to organize the workers operate against trade unions is well documented (as is evident from the cases presented against Mexico in which dismissals, threats, criminal charges and imprisonment of leaders are a constant feature)".

In this respect, it should be pointed out that both workers and trade unions representing them have at their disposal the legal remedies and means provided by our legal system for the purpose of taking the appropriate legal action to put their case and defend their rights.

- In cases of unfair dismissal, workers may apply individually or as a group to claim reinstatement or payment of such compensation as may be applicable under the provisions of the Political Constitution of the United Mexican States and the applicable labour laws before the competent administrative authorities or courts. It should be emphasized that the federal Government has established prosecutor's offices for workers with the primary task of defending labour rights and to:

- Guide and advise workers, their unions or beneficiaries on the rights and obligations under labour, pensions and social security laws, as well as the processes, procedures and competent bodies to which they may apply to enforce those rights.
- Receive from workers, their unions or beneficiaries, complaints of non-compliance with, and violation of, labour, pensions and social security laws and, if applicable, summon employers or trade unions to appear to testify in accordance with their rights, advising them that, if they fail to appear, they will be fined an amount of up to 100 times the general minimum daily wage applicable in the place and at the time of the non-compliance.
- Draw up the relevant complaints before the competent authorities for violation of labour, pensions and social security laws and report to the Attorney-General's office matters which are presumed to constitute criminal offences.
- Propose amicable solutions to the interested parties to settle their disputes, by concluding out-of-court agreements and having them confirmed in authorized acts.
- Represent workers, their trade unions and beneficiaries when they so request before the courts, administrative authorities and any other public or private institution, in order to take such actions and recourse as may be appropriate under ordinary and special proceedings, including protection (*amparo*) until they are totally terminated.

As can be seen from the foregoing, the Mexican Government has established administrative bodies which provide guidance and legal advice, not only to workers as individuals, but also to trade unions, assert their labour rights, including before the courts, by delivering the respective judgments which must be enforced while at the same time fostering the settlement of disputes. Thus, in no way can it be argued that the Mexican Government violates the labour laws which the Government itself promotes and supports.

- The IMF asserts in its complaint that: “the strengthening of corporatism encouraged the development of the employer protection model, which finds its maximum expression in the collective employer protection agreements ...”. In asserting this, the trade union seeks to persuade the employers to intervene and exercise control of trade unions, presuming that it is they who form them without “real” representation of the workers, in order to sign collective agreements with their representatives which only benefit the employers.

This argument is completely mistaken because, as indicated above, current labour legislation sets out the requirements that must be satisfied by any trade union to obtain registration as an association, but its formation is free and not subject to prior authorization by the authorities.

Trade unions have the right to convene a strike and notify the employers, with a view to signing a CCT which proposes additional benefits for the workers in return for provision of their services. In this case, the agreements are the result of the conciliation between the workers and employers, but always to the benefit of the general conditions in which the work is performed, from which it can be inferred, once again, that the “employer protection agreements” alleged by the complainant organization do not exist.

- The IMF indicates in its complaint that: "... the administrative function of the JCAs, which formally represent the sectors in a tripartite system, without taking into account the forms of representation in collective bargaining, are inherently flawed because the JCAs are judge and party and thus lack the impartiality required by any judge".

In this regard, the complainant organization is quite wrong and unjustified in expressing itself in this way, since the JCAs are bodies created to settle disputes between industry, represented by the employers, and labour, represented by the workers. They have a tripartite composition, with involvement of a representative of the Government who is impartial, whereby it is sought to achieve a strict balance in worker–employer relations.

- 817.** The establishment of the tripartite JFCA is set out in sections 605, 606, 607, 608 and 609 of the LFT, thus its decisions are based in law, fair and seek a balance between the factors of production, without the decision favouring one side in particular, as its decisions are adopted collectively.
- 818.** The Mexican Supreme Court of Justice has established in several opinions that the JCA must order recourse to the *recuento* or secret ballot of the workers in a dispute over loss of bargaining rights and administration of a CCT.
- 819.** Section 931 of the LFT does not specify the method of voting in the recourse to the *recuento* procedure. However, based on a systematic analysis of the precept in numerous other articles of the same Act, and taking into account that it is the point in the procedure when the absolute and unrestricted will of the workers in relation to the trade union which must administer the collective agreement can be tested, it is concluded that the confidentiality of the will of the person who expresses his preference must be protected. This is in order to prevent external influences changing his decision and to ensure security in exercising his vote within the democratic system contemplated in the Political Constitution of the United Mexican States, which transcends all orders of social life, including trade unions.
- 820.** Transcribed below is case law opinion No. 150/2008 of the Second Chamber of the Supreme Court of Justice on resolving the contradicting opinions of collegiate courts concerning the procedure of *recuento* in cases of disputes over rights to the collective agreement (*Judicial Weekly of the Federation and its Gazette*; opinion No. 150/2008, page 451):

Recuento (ballot) to determine the holder of the collective labour agreement set out in article 931 of the Federal Labour Act. Conciliation and Arbitration Boards must order and guarantee that, in deciding, the workers must cast a personal, free, direct and secret vote. In accordance with the fundamental principles set out in the Political Constitution of the United Mexican States, international treaties and secondary laws which, under article 133 of the Constitution, are the supreme law of all the Union, and also the general principles of law and social justice, applicable in the terms of article 17 of the Federal Labour Act, workers have the right to express their opinion and preference to choose freely the organization which represents them, protected against any act of discrimination. Now, in order to fulfil such principles, the labour authority, as director of the proceedings concerning determination of the holder of the collective labour agreement, must order that the test of *recuento* to which article 931 of the said Act refers, must be conducted according to a procedure which guarantees, in the framework of a democratic system of freedom of association, the personal, free, direct and secret vote of the workers, as it is the point in the proceedings when the absolute and unrestricted will of each of them concerning the trade union which they consider must be the holder and administrator of the collective labour agreement can be tested. Thus it is the duty of the boards, both local and federal, to ensure that the examination satisfies the obligation to ensure the total freedom of those who exercise that right. To that end, it must protect the confidentiality, authenticity and freedom of their will, avoiding external influences

which might cause them to change their decision and endanger their security when they cast their vote in a system of democratic life and freedom of association, which is a social guarantee intricately linked with freedom of expression and association, which presumes that each person may decide without any pressure, interference or impersonation in his decision. Consequently, the Conciliation and Arbitration Board responsible for ordering the above examination must, as it sees fit in the light of the characteristics of the specific case: (1) compile a reliable, complete and up to date list of all the workers eligible to vote, considering the provisions of paragraphs II, III and IV of article 931; (2) ensure that the place or places where the *recuento* is held offer the minimum physical and security conditions for its conduct in a rapid, orderly and peaceful manner; (3) verify that on the day of the *recuento*, all the documentation and materials necessary and appropriate for the holding of a safe, free and secret ballot are available; (4) ensure that mechanisms to fully identify workers entitled to vote in the ballot are in place as necessary; (5) check that the final count of the votes is conducted in a transparent and public manner by the labour authority conducting the examination, in the presence of duly accredited trade union and employers' representatives; and (6) if objections are presented, pursuant to paragraph V of article 931, hold, before the *recuento* and without any delay, the hearing to which that paragraph refers.

- 821.** Thus, the case law cited above establishes the obligation of the JFCA in processing claims for rights to conclude CCTs that all *recuentos* should be conducted by secret ballot, thereby guaranteeing the free will of the workers and protecting confidentiality in the casting of the vote concerning the trade union which must administer the collective agreement.
- 822.** The JFCA is a tribunal of the executive power, and its tripartism is inherent in its historical roots and reflects a reality which consists of the gravitation of social forces. The tripartite composition of the JFCA is based on article 123(A)(XX) of the Political Constitution of the United Mexican States and section 605 of the LFT. The tripartite organization of the bodies which deliver labour justice has been considered the ideal format for resolving disputes.
- 823.** The legitimacy and strength of the JFCA is largely dependent on tripartism, which has allowed it to consolidate a framework of certainty in labour matters. It has been able to place reason and the law above the pressures inherent in bargaining.
- 824.** As regards CCTs, these are regulated by section 386 of the LFT, which provides as follows:
- Section 386. A collective labour agreement is an agreement concluded between one or more trade unions and one or more employers, with the object of establishing conditions under which they must perform their work in one or more companies or establishments.
- 825.** Based on the principle of freedom of association and the right to organize, there may exist a plurality of trade unions in one company contracting with certain establishments or type of category.
- 826.** It should be pointed out that, under section 387 of the LFT, an employer who employs workers who belong to a trade union is obliged to conclude with that union, at its request, a CCT. If he refuses, the workers may exercise the right to strike. In this context, it is clear that, under the LFT, the responsibility to request the conclusion of a CCT belongs to the workers through their trade unions and not the employers.
- 827.** The JFCA functioning in special panels has the duty to receive the deposit of collective agreements and internal work regulations under section 616 of the LFT.

- 828.** The JFCA maintains a register and control of CCTs, acts as a depository for them, carries out analysis and supervision to ensure that they comply with the requirements of the LFT, after which it issues the relevant certificate of registration.
- 829.** In 2003, in the framework of the Federal Act on Transparency and Access to Public Government Information, the JFCA began a digitalization programme. The programme involves digitalizing CCTs, agreements on administration of sectoral agreements and internal labour regulations.
- 830.** By December 2008, 16,062 CCTs, agreements on administration of sectoral agreements and internal labour regulations had been digitalized, contained in 20,482 documents containing 1,558,982 images, which are available to those interested on the Internet on the STPS website: http://contratoscolectivos.stps.gob.mx/RegAso/legal_contratos.asp.
- 831.** Collective labour agreements for an indefinite term cover 1,995,000 workers and agreements for the execution and implementation of sectoral agreements cover some 97,000 workers, which contribute significantly to economic stability and help to maintain social peace in Mexico.
- 832.** With the publication of CCTs, any worker has the possibility of knowing and obtaining a copy of it, as well as his duties, the trade union to which he belongs and the name of the general secretary. This has led to a new awareness among workers which will have a favourable impact on the development of individual and collective labour relations and freedom of association.
- 833.** The requirements for giving notice of a strike for the signature of a CCT are set out in sections 920 and 923 of the LFT:

Article 920. The strike procedure shall be initiated by the presentation of a set of claims, which must satisfy the following requirements:

- I. the employer shall be notified in writing; the notice shall contain the claims, notify the intention to strike if they are not satisfied, shall correctly state the purpose of the strike and shall indicate the day and time when work will be suspended or the end of the pre-strike period;
- II. a duplicate of the notice shall be sent to the Conciliation and Arbitration Board. If the company or establishment are located in a place other than the seat of the Board, the notice may be submitted to the nearest labour authority or the highest level political authority in the place where the company or establishment is located. The authority that issues the summons shall send the notice, within twenty-four hours, to the Conciliation and Arbitration Board and shall inform the president of the Board by cable or telephone;
- III. the notice of suspension of labour must be given at least six days in advance of the date indicated for suspension of labour and ten days in advance in the case of public services, subject to the legal provisions of this Act. The period shall start to run from the day and time when the employer is notified.

Article 923. The notice of convening of a strike shall not be processed when it is not drawn up in accordance with the provisions of article 920 or it is presented by a trade union which is not the holder of the collective labour agreement, or when it is sought to demand the signature of a collective agreement but there is already one deposited with the competent Conciliation and Arbitration Board. The president of the Board, before initiating the processing of any strike notice, must satisfy himself as to the foregoing, order the corresponding certificate and notify the promoter of the decision in writing.

- 834.** The specific cases of agreement holder indicated in the section “Holder of CCT Case” and “Johnson Controls Case” were not processed by the JFCA, but that did not mean failure to comply with the principle of freedom of association.

- 835.** In relation to documentary evidence, paragraph 4(a), in which allusion is made to the JFCA, describes general situations and comments, articles of the LFT and case law opinions which in no way constitute non-compliance with the principle of freedom of association and the right to organize enshrined in ILO Convention No. 87.
- 836.** Similarly, in the section on evidence, alleged examples of CCPPs in the air transport sector are indicated. In this regard, the content of section 387 of the LFT is reiterated.
- 837.** The CTM has indicated that the right of association in labour matters in Mexico is regulated by articles 9(1) and (4) and 123(1)(XVI) of the Constitution, ILO Convention No. 87 signed by Mexico and the LFT, Title Seven on collective labour relations. It is thus pointless to demand legislation concerning the matter under discussion, as there is already an ample legal framework.
- 838.** As regards the complaint presented by the IMF, at no time does it indicate specific violations of the right to organize, but only mentions institutions of collective law such as trade union registration, request to sign the CCT, termination of the CCT and strike, thus there is no basis for dispute.
- 839.** The federal State, acting in the exercise of its powers, could not nor can differentiate between the CCTs concluded before it, except in accordance with the provisions of the LFT. The types of agreements for employment relations with employers contained in the law are: (1) CCT; (2) sectoral agreement; and (3) individual contract.
- 840.** The CCT is the agreement concluded between one or more trade unions and one or more employers with the object of establishing the conditions under which they must perform their work in one or more companies or establishments.
- 841.** The sectoral agreement is the agreement concluded between one or more trade unions and one or more employers with the object of establishing the conditions under which they must perform their work in a given branch of industry, which is declared mandatory in one or more federal entities, one or more economic zones which cover one or more of these entities or the entire national territory.
- 842.** The individual contract is defined by the LFT as the act whereby a person undertakes to provide personal labour to another in a subordinate capacity, for payment of a wage, subject to previously established worker–employer relations.
- 843.** Thus, for the Mexican authorities, it is impossible to differentiate or classify CCPPs as collective agreements, sectoral agreements and individual contracts and their respective legal nature are the same.
- 844.** As regards the assertion that “the vast majority of them do not benefit the workers because the legal minimums are maintained and are only signed and deposited to impose trade unions”, the authority analyses the legality and formality of the CCTs concluded before them, which must comply with certain formal requirements.
- 845.** The mechanisms for concluding a CCT are fully identified and established in chapter three of the LFT, on the CCT, which is covered in sections 386–403. Any practice outside the law is ruled out, as is recognized by students of Mexican and international labour law. In this regard, it is worth recalling the basic and fundamental tripartism that pertains in the provisions of labour law, taking account of the employers, workers and the Government. Thus, as this is a basic principle of labour justice, it is unacceptable for the IMF to assert that the JCAs, whether local or federal, are judge and party, as they act as arbitrators and/or conciliators to resolve industrial disputes.

- 846.** The Mexican authorities have never failed to follow the recommendations of the Committee on Freedom of Association of the Governing Body of the International Labour Organization. As its name implies, they are recommendations that the Mexican Government has taken into consideration and implemented, thus fully complying with the provisions of Convention No. 87. In other words, the Mexican Government has never infringed the right of association of any Mexican worker.
- 847.** In Mexico, there is no limitation on the right to organize. It is important to point out that, in Mexico, there is no violation of the right to freedom of association or to meet peacefully for any lawful purpose including the right to organize.
- 848.** Thanks to the freedom granted under the Political Constitution of the United Mexican States, articles 5 and 123, and Mexico's obligations assumed when it signed ILO Convention No. 87, the Mexican Government is obliged to uphold those rights. Consequently, it has regulated these associative activities, and is thus able to give trade unions a life in law, a fact which is clearly established in section 25(IV) of the Mexican Federal Civil Code, endowing them with legal personality, with all the rights and obligations inherent therein, a fact which shows the Government's interest in upholding freedom of association.
- 849.** Section 360 of the LFT, far from being restrictive as the IMF indicates, is a legal framework which can provide a group of workers who are associated for the purpose of achieving better conditions of work with a specific status and legal personality for their movement.
- 850.** In order to be able to classify the trade union, it is necessary to know whether it is formed by workers with the same occupation, office or specialism; workers employed in the same company; workers employed in two or more companies in the same industrial sector; workers employed in one or more companies in the same industrial sector located in two or more federal entities; workers employed in various occupations. These trade unions may only be formed when, in the municipality concerned, the number of workers in the same occupation is less than 20. The LFT clearly sets out the requirements that must be satisfied for the formation of a trade union but, as they all have their own specific characteristics, it is necessary to group them and establish their nature. That is why the LFT groups them as guild, company, sectoral, national sectoral, various offices.
- 851.** The requirements set out in the LFT are necessary to assist the labour authorities in deciding on the substance of the matter, as well as accrediting the legal status of the party to a claim to bargaining rights in order to exercise those rights.
- 852.** The Revolutionary Confederation of Workers and Peasants (CROC) has expressed its disagreement with the complaint presented by the IMF in the ILO. At the meeting of the regional conference of Central America, Mexico and the Dominican Republic of this Confederation held on 15 and 16 April 2009 in Buenos Aires, Argentina, the Mexican organizations affiliated to the IMF expressed their disagreement, and distanced themselves from the mechanism used in drawing up the complaint which was communicated to the affiliates after it had been drawn up, deposited and published in the Mexican press.
- 853.** They requested the immediate withdrawal of the complaint presented by the IMF Executive Committee, signed by Messrs Jurgen Peters and Marcello Malentacchi, to the International Labour Organization on 5 February 2009 relating to ILO Convention No. 87, against the Government of Mexico, as the affiliated Mexican trade unions had not been consulted on its preparation.

- 854.** The substance of the complaint fundamentally prejudices and damages the collective legal precepts of defence of collective bargaining which are ownership of the collective agreement, the right to strike and trade union safeguard clauses which in no way conflict with ILO Convention No. 87.
- 855.** The Confederation of Chambers of Industry of the United Mexican States (CONCAMIN) has indicated that the justification of the complaint refers to a series of questions of fact and opinions of various persons relating to the existence of CCTs signed between an employer and a trade union, which are identified as “CCPPs” and that these agreements violate Convention No. 87.
- 856.** In essence, what the complainants are targeting is the existence of a legitimate and lawful legal act, which occurs in Mexican labour practice, which, according to the complainants, consists of the signature of a CCT without the involvement of the workers in a given company.
- 857.** The part of the text of the LFT relating to collective agreements perfectly echoes the content of ILO Convention No. 87, as it fully respects Article 2 of Convention No. 87, that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. There is nothing in the rest of the articles to suggest the practice of a specific method of concluding collective agreements.
- 858.** It should be recalled that Mexico has not ratified Convention No. 98 concerning the right to organize and collective bargaining. However, it should not be considered that the way in which a CCT is signed has anything to do with freedom of association or the right of collective bargaining, as Mexican law and the abovementioned Conventions talk of the right of persons to form such trade unions as they see fit and the right of trade unions to bargain collectively. Thus, it must be considered that the signature of an agreement between a trade union regarded by law as a legal entity and an employer are not only legitimate acts allowed by legislation and international conventions, but they represent in themselves the exercise of a right enshrined in the law, namely the right to bargain collectively.
- 859.** It should also be pointed out that the supposed incapacity or impossibility of workers being involved in collective bargaining are not given as a principle of freedom of association, since the mere existence of a CCT between two entities, the trade union and the employer, confirms that the principle of freedom of association already applied precisely when the trade union which bargains collectively was formed.
- 860.** In essence, CONCAMIN considers that the complaint contains a series of opinions attributed to various persons, exhibits a series of press and academic articles which bear no relation to freedom of association and which, moreover, cannot be held to be valid, as they do not reflect an indisputable fact, that Mexican experience of press and academic publications is that, in the vast majority of cases, they modify, misrepresent or distort what is said by the putative sources of the statements. In the case of the annexed publication, it is clear that these are publications by a particular section of academia, with strong political tendencies which do not necessarily coincide with those of the majority of the public or that of the governments democratically elected by the country’s inhabitants and therefore they, too, cannot be considered indisputable.
- 861.** For the foregoing reasons, CONCAMIN rejects the receivability of the allegations, since they have nothing to do with the text of Convention No. 87.

- 862.** As regards the specific cases mentioned in the complaint concerning the agreement holder for the administration of collective agreements in petrol stations, this cannot be accepted, because it does not specifically define which employers are concerned. The cases of the Nivel Superior de Servicios SA de CV and Superservicios Coapa, SA de CV companies should be disregarded, since they have nothing to do with the complaint that refers to the existence of certain so-called “employer protection” collective agreements, but appear to be cases of decisions or collective disputes where two trade unions are fighting for the right to conclude agreements and represent workers in a workplace, which again contradicts the alleged violation of Convention No. 87, since it expressly states that there are two trade unions fighting each other, and that one claims to have won the right to administer collective bargaining in a ballot.
- 863.** In the case of Johnson Controls, we are talking of a typical case of outsourcing or subcontracting, and thus it has absolutely no bearing on the complaint.
- 864.** In the Black & Decker case, likewise, it is a matter of dismissals and another dispute over bargaining rights, where it is again clear that there was already a fight between two trade unions, and thus it also has no relation to Convention No. 87, since, by definition, for a trade union to exist, it must be formed by workers. If, in this particular case, there are two trade unions in dispute, it is obvious that freedom of association is satisfied and that it is up to the trade union which holds the majority to administer the collective bargaining.
- 865.** Furthermore, by referring to the various proposed reforms, the complainants are accepting, in essence, that there is a legal vacuum at the present time, which, on the one hand, allows exercise of the right to strike to obtain signature of a CCT, without demonstrating that the workers in the company in question are represented, which can obviously give rise to a legal fiction. This is because it is sufficient to claim to represent workers in a company to be able, in principle, to initiate strike action, even though not representing the workers in that company. In practice, this Confederation is obliged to express its great concern at the existence of this legal vacuum, which has given rise to endless abuses and which has become an instrument of extortion and blackmail.
- 866.** The fact of the matter is that, in the proposed legal reforms, the principle has been upheld that, to seek signature of a CCT, it is necessary to have certainty of representing workers in a given company. If that principle is not upheld, the principle of freedom of association is violated and workers of a company would be forced to accept, against their will, the presence of the trade union which demands the signature of a collective agreement. That is why the draft labour reforms contemplate this fundamental safeguard – democracy. For the persons cited in the complaint, it is clear to this Confederation that the researchers and academics mentioned have shown that they reject this form of democratic trade unionism, as they defend the idea of the supremacy of the trade union over the individual.
- 867.** In conclusion, CONCAMIN considers that the so-called complaint against the Mexican Government does not base its allegations on the subject of freedom of association, but on the form of worker–employer relations in the country which are perfectly legal and in consequence legitimate. It therefore considers that the ILO should reject the unfounded allegations contained in the document signed by the representatives of the IMF.

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- 868.** The justification of the claim contains many assertions and facts which are untrue, which must therefore be challenged. For example, it is stated that the proposed reforms of Mexican labour legislation put forward by the Government are the opposite of what is

indicated in the complaint, as there is no government proposal to reform labour legislation. The proposals have been put forward by deputies and senators in the two houses.

- 869.** Cases have been given of trade unions which demand signature of a CCT, without representing the workers in the company in question, as those workers have not joined the trade union. In some areas, states or regions of the country where a company is to be set up or the opening of a new business is announced, still without hiring any workers, and on occasions without even being close to the start-up date, the future employer is notified of a strike for the signature of a collective agreement by these organizations, and the notice of strike is maintained until the employer starts operations.
- 870.** The need for trade unions which seek to sign a CCT with a company to prove to the authorities in advance that it does indeed represent the workers in the said workplace, or some of them, is one of the subjects which the manufacturing sectors have discussed with the federal labour authorities in the current negotiations on labour reform in the country.
- 871.** Nowadays, the large and medium-sized companies which operate in the country are subject to international codes of ethics which are applied and enforced in Mexico, from which derive rules which do not allow cases such as the protection agreement, which are secret and unknown to the workers, who should be the true beneficiaries of collective bargaining.
- 872.** It is true that the laws mentioned have been, and are the subject of, extensive discussion and review by the country's manufacturing sectors which, coordinated by the federal Government, have negotiated multiple reforms of current legislation which it was not possible to finalize due to problems of a political nature.
- 873.** In the light of the foregoing, it is not true that our current legislation is prejudicial to the right to organize and that it always the employers who choose the agreement of their own preference. Nor is it true that our legislation includes provisions to protect workers which are not accessible to them and that there is a web of complicity established between the labour courts, employers and trade unions, and that therefore there exists what they call employer protection agreements.
- 874.** With regard to the matters stated in the complaint, the following should be noted:
- It is untrue that in Mexico workers do not choose the trade union which represents their labour interests, and that it is the employer that chooses the union that accords with his interests and signs a CCT without reference to its beneficiaries.
 - The annexed cases which are intended as examples of violations of freedom of association and the right to organize do not support this in any way.
 - The regulation allowed under the current legislation in Mexico does not restrict the radius of action of trade unions, as the country chose the various forms of trade unionism precisely in respect of freedom of association in order to allow trade unions: guilds, company, sectoral, national sectoral and other offices (article 360 of the LFT).
 - The conclusion of agreements of respect and collaboration between the general secretaries of various trade unions and the Secretary of Labour and Social Security does not violate but protects freedom of association and the collective bargaining that derives from it.
 - It is not true that the test of *recuento* is set in a context of violence and pressure to prevent workers obtaining access to the place where the ballot takes place. The Supreme Court of Justice has already determined in specific case law that there is a requirement for secret ballot in disputes over rights to conclude CCTs.

- Articles 2, 3, 5, 7 and 10 of Convention No. 87 are not violated in any way, as our current legislation clearly establishes those rights, which are fully respected in the terms set out in the Convention, which are in conformity with the Constitution, article 123(XVI) and articles 132(X), (XI), (XXI), and (XXII), 354, 356, 357, 368, 369, 374 and 381 of the LFT.
- It is not correct to state without proving it that there are no authorities which can resolve industrial disputes impartially. In Mexico, there are specialized labour courts and appeal (*amparo*) tribunals which resolve industrial disputes and which have been constituted in accordance with the law and which apply the current legislation in the country impartially and subject to law, rapidly, efficiently and free of charge.
- It is not true that there are violations of the rights contained in Convention No. 87 in any proposed reform of the LFT, as none of those which have been presented to the Chamber of Deputies and the Senate of the Congress of the Union – over 300 reform initiatives – affect workers’ rights, much less the freedom of association to which Convention No. 87 refers.

875. In its complaint, the IMF indicates various decisions and principles adopted by the Committee on Freedom of Association of the Governing Body of the ILO, which were supposedly ignored by the Government of Mexico and which are the subject of the complaint, among which we highlight the following:

- Paragraph 8 of the complaint infers that “The practice in the Mexican model which hinders the right of association renders collective bargaining ineffective when the workers cannot participate and influence the setting of their conditions of work”.

In this regard, as has been shown in the present document, the Government of Mexico has guaranteed, through its Constitution and the LFT, the right of workers to decide their freedom of association with the object of protecting and influencing improvements in their conditions of work, while not omitting to point out that the complainant does not indicate any particular situation or fact in support of its assertion.

- In paragraphs 10, 11 and 12, it mentions that the CCPP limit the enjoyment and exercise of the rights of association, collective bargaining and trade union plurality by workers, because it imposes restrictions on the creation of new trade unions and gives preference to those that already exist. It cites paragraphs 296, 297, 309, 310, 339, 340, 341, 343 and 344 of the *Digest of decisions and principles of the Freedom of Association Committee* of the ILO Governing Body, 2006 (the *Digest*, 2006).
- In this respect, as stated and shown above, it should be noted that the Government of Mexico does not violate, or limit at any time, either the fact or right of freedom or association or collective bargaining of workers, recalling that its sole function is to maintain a register of existing associations. This is only required to satisfy certain elements of a formal character, which in practice are not insuperable for those who associate freely, the “taking note” is merely a matter of registration and not validation or recognition, as associations in Mexico do not require the latter formalities for their existence, let alone the authorization of the employers.
- In paragraphs 13 and 15, the IMF states that one of the pillars of the protection agreement model is the JCAs and that the Mexican State has failed to establish protection measures for those workers who promote freedom of association and cites paragraphs 33, 338, 770, 771, 772, 773, 775, 776, 780, 785 and 1261 of the *Digest*, 2006, because it is judge and party in the process of “taking note” of the trade union’s

registration, signature, agreement holder and termination of CCTs and strike, and does not guarantee the protection of workers.

- Nevertheless, in previous paragraphs, the characteristics of the tripartite composition of the delivery of justice in Mexico are explained. It is transparent, impartial and, moreover, if workers so request, they receive free advice on protection of their labour and trade union rights through the Office of the Federal Prosecutor for Protection of Labour. In addition, specific criteria have been laid down by the Supreme Court of Justice to guarantee the right of Mexican workers to choose. Furthermore, as has been mentioned throughout the document, the IMF does not present specific evidence of its allegations.
- In paragraph 14, the IMF complains of the exclusion clause contained in some CCTs, indicating that it is an infringement of the workers' right to join the organization of their choice and cites paragraphs 334, 335, 363 and 368 of the *Digest*, 2006.

In this respect, as has been mentioned previously in its articles 5 and 9, the Political Constitution of the United Mexican States enshrines, through its most important and representative institutions, the right to work and freedom of association.

- It emerges from paragraph 16 that the complainant considers that collective protection agreements violate the right of freedom of association because workers lack trade unions which reflect their interests, and mentions violation of paragraphs 597, 966, 967 and 984 of the *Digest*, 2006.

As mentioned throughout this document, and it has been the shared view of the workers', employers' and government sides, the collective protection agreement model is not a legal model recognized in Mexico. Moreover, the IMF does not provide convincing evidence, examples or facts of the existence of such agreements in Mexican labour practice.

- In paragraph 17, the IMF mentions the interference of the State through protection agreements by applying discretionary criteria to the requirements that must be fulfilled by trade unions for the purpose of registration, and bases their right on paragraphs 296, 297, 299, 303, 375, 377, 381, 388, 389, 967 and 986 of the *Digest*, 2006.

In this respect, and in order to avoid repetition, the Mexican State maintains a profound respect for the social institutions created to defend workers' interests and the right to freedom of association, enshrined in the Political Constitution of the United Mexican States. It recalls that the registration requirements are merely formal, thus there is no interference by the Mexican Government, either in practice or in law in the life of trade unions, let alone their organization. It further recalls that the assertions of the IMF in this respect are obscure and general and do not provide sufficient items of evidence.

- Paragraph 18 mentions that the right to strike in the context of CCPPs becomes void, and bases this statement on paragraphs 520, 521, 522, 523, 524 and 525 of the *Digest*, 2006.
- As mentioned above, CCPPs do not exist in Mexican legislation, thus they cannot be considered, as the IMF seeks to do, as a means of limiting the workers' right to strike set out in the LFT.
- Paragraphs 19 and 20 refer to proposals to reform the LFT which, according to the IMF, would present serious violations of the rights contained in Convention No. 87

and it provides an analysis of the content of the reforms. It should be pointed out that these reforms are not the law at present and that the possibility to which the IMF refers concerns future events which may not happen, as the proposed reforms presented by the Federal Executive, before being approved, must be discussed in the Congress of the Union in accordance with article 72 of the Political Constitution of the United Mexican States. Furthermore, it should be noted that it can be observed in the IMF's own study that it makes an incorrect evaluation of the possible impacts of the reforms, which, as indicated above, cannot be the subject of evidence as they are not law as presently constituted in Mexico.

- 876.** The Mexican legal system does not contemplate the concept of so-called “CCPPs”. The Mexican Government therefore does not recognize in any way whatsoever the existence of such agreements, since trade unions are free to form themselves, draw up their constitutions, designate their representatives and leaders, and regulate their own structure and internal affairs.
- 877.** The document supposedly referred to as a complaint is the result of an obscure and general conceptual exercise, as it does not indicate specific infringements of freedom of association since, from the matters described in the communication, it cannot be inferred that the labour rights of the members of the complainant Federation have been violated, nor can it be inferred in any way that the right of workers to join a trade union has been infringed.
- 878.** The Mexican Government has established administrative bodies to provide guidance and legal advice, not only to workers individually, but also to trade unions, in seeking respect for labour rights, including before the competent authorities by delivering decisions which are implemented while at the same time fostering settlement of disputes. In no way, therefore, can it be argued that the Mexican Government violates the labour laws which the Government itself promotes and supports.
- 879.** Trade unions have the right to give notice of a strike to the employers, in order to sign a CCT which contains additional benefits for the workers in return for their services. In that case, the agreements are the result of the conciliation achieved between workers and employers, but always to the benefit of the general conditions in which the work is performed, from which it can be seen, once again, that the “employer protection agreements” alleged by the complainant organization do not exist.
- 880.** The tripartite composition of the JFCAs is envisaged in sections 605, 606, 607, 608 and 609 of the LFT, thus its decisions are founded in law, fair and seek to strike a balance between the factors of production, without the decision favouring one side in particular, as its decisions are adopted collectively.
- 881.** In the case law, opinion No. 150/2008 of the Supreme Court of Justice establishes the obligations of the JFCA to process claims for rights to CCTs in all *recuentos* by secret ballot of workers, thereby guaranteeing the free will of the workers and protecting confidentiality in the exercise of the vote on the trade union which is to administer the collective agreement.
- 882.** In 2003, in the framework of the Federal Act on Transparency and Access to Public Government Information, the JFCA began a digitalization programme.

With the publication of CCTs, any worker has the possibility of knowing and obtaining a copy of it, as well as his duties, the trade union to which he belongs and the name of the general secretary. This has led to a new awareness among workers which will have a

favourable impact on the development of individual and collective labour relations and freedom of association.

- 883.** Trade unions in Mexico have a variety of means of legal recourse which they can use if they consider that their rights of freedom of association have been infringed, including, when they have exhausted the relevant recourses, in international bodies, such as the complaints against the Mexican Government in the ILO Committee on Freedom of Association.

Between 1954 and 2010, that Committee has examined 48 cases concerning Mexico, of which 43 have been concluded by the ILO body and five are still under examination. The concluded cases are an indication that the Mexican Government has implemented the recommendations of the CFA, in accordance with the law.

- 884.** The reforms of the legal provisions on labour matters in Mexico have been carried out with the collaboration of the International Labour Office and in the light of its recommendations.
- 885.** In the opinion of the CTM, the mechanisms for concluding a CCT are fully identified and established in the LFT and any practice not laid down in law is barred.
- 886.** The Mexican authorities have never failed to follow the recommendations issued by the Committee on Freedom of Association of the Governing Body of the International Labour Organization as they are recommendations which the Government has taken into consideration and acted accordingly, thus fully complying with the provisions of Convention No. 87. This means that the Mexican Government has never infringed the rights of association of any Mexican worker.
- 887.** In Mexico, there is no limitation whatsoever on the right of freedom of association. In Mexico, there is no violation of the right to freedom of association or to meet peacefully for any lawful purpose including the right to organize.
- 888.** The CROC, a Mexican organization affiliated to the IMF, distanced itself from the mechanism used in the preparation of the complaint and requested the immediate withdrawal of the complaint presented by the Executive Committee of the IMF.
- 889.** The CONCAMIN considers that the complaint contains a series of opinions attributed to various persons, exhibits a series of press and academic articles which bear no relation to freedom of association and rejects the receivability of these allegations as they bear no relationship to the text of Convention No. 87.
- 890.** As regards the cases of the Nivel Superior de Servicios SA de CV and Superservicios Coapa SA de CV companies, these should be disregarded, since they have nothing to do with the complaint but appear to be cases of proceedings or collective disputes where two trade unions are fighting for bargaining rights and the right to represent workers in a workplace. In the case of Johnson Controls, we are talking of a typical case of outsourcing or subcontracting, and thus it has absolutely no relevance to the complaint.
- 891.** The legal existence of trade unions, for the sake of order and legal clarity, depends on registration granted by the competent labour authorities, the STPS for federal trade unions, local JCAs in the various states of the Republic and the federal district for local jurisdiction, through which bodies trade union life is regulated and whence the legal existence of trade unions originates.

892. It is not true that our current legislation is prejudicial to the right to organize and that it is always the employers who choose the agreement of their own preference. Nor is it true that our legislation includes provisions to protect workers which are not accessible to them and that there is a web of complicity between the labour courts, employer and trade unions, and that therefore there exists what they call CCPPs.
893. Articles 2, 3, 5, 7 and 10 of Convention No. 87 are not violated in any way, as our current legislation clearly establishes those rights, which are fully respected in the terms set out in the Convention, which are in conformity with the Constitution, section 123(XVI) and articles 132(X), (XI), (XXI) and (XXII), 354, 356, 357, 368, 369, 374 and 381 of the LFT.
894. In the light of the foregoing, the CFA is requested to refuse the complaint submitted.

C. The Committee's conclusions

895. *The Committee observes that in this complaint, the complainant organization questions the overall functioning of the industrial relations system in Mexico with regard to the recognition of trade unions and their executive boards (toma de nota), which it describes as discretionary; the possibility of the employer signing a generally applicable collective agreement with the trade union of its choice before the company starts operating or without the need to prove the trade union's representativeness or the participation of the workers, containing practically the minimum protection required under labour legislation (in the opinion of the complainant organization, the vast majority of collective agreements are of that kind); the obstacles in practice to showing through a ballot the greater representativeness of another trade union; the lack of independence, impartiality and excessive slowness of the authorities (JCAs) responsible for complaints of violation of trade union rights; the obstacles to the exercise of the right to strike, and draft laws designed to further hinder the exercise of trade union rights. The complainant organization denounces a web of corruption between the trade union organizations and employers with the complicity of the authorities which impacts on the JCAs. Furthermore, according to the complainant organization, when the workers try to exercise their trade union rights against this background, they are confronted with acts of violence, threats and acts of discrimination. ITUC indicates in its communication dated 12 April 2010 that the complaint is based on the violation of the right to organize, on the premise that it is the workers who should freely choose the trade union which represents their occupational interests; when it is the employer which chooses the trade union in accordance with its own interests and signs a collective agreement (CCT) without the involvement of its beneficiaries, the fundamental workers' rights contained in ILO Convention No. 87 are violated.*
896. *The Committee notes that in its supplementary information, the complainant organization states that: (1) employer protection agreements are not regulated by labour law; the name has been attributed on the basis of what has become common practice in Mexico; (2) it was indicated that the signature of a collective agreement becomes a unilateral act which is decided by the employer which can choose its preferred trade union even before the source of employment exists; (3) it is alleged that it is a legal act in that, under section 387, there is no precondition at all for the signature of a collective agreement between the employer's representative and the fake trade union, nor is prior consultation of the workers necessary, nor even a minimum number of workers; it is sufficient that two workers from a population of one thousand so request for the formal requirement to be satisfied and the collective agreement signed, and, in accordance with section 396, for its provisions to extend to all persons working in the company or establishment, even if they are not members of the trade union which concluded the agreement. Only two signatures are required to conclude a collective agreement, that of the employer's representative and that of the general secretary of the trade union, followed by filing with the competent JCA;*

(4) once the agreement has been filed with the board, a process of protection commences which prevents other workers from demanding signature of a collective agreement by means of a strike, as set out in section 450(II) of the Federal Labour Act. As observed in section 923, no notice of a strike which demands the signature of a collective agreement may be processed if one has already been filed, because in that case the position would be occupied, thus preventing an authentic trade union from seeking the signature of a collective agreement and, in the event of a refusal, calling a strike to demand its signature; (5) once the agreement has been signed with the trade union selected by the employer and filed with the Board, the only option left open to the workers is to seek a change of bargaining rights under the collective agreement, as the possibility of signature has been blocked. To obtain these bargaining rights, they have two options: register the trade union in accordance with the requirements of section 365 of the Federal Labour Act or claim bargaining rights by a proceeding which is usually very complicated and which requires the majority of the workers; (6) it should be emphasized that although signing a collective agreement does not require proving any number or majority, if the employer refuses to sign and it is necessary to call a strike, in the latter case it is necessary to have the majority set out in section 451(II); in other words, the signature of the collective agreement is in the hands of the employer and this has resulted in leaders of fake trade unions seeking to be chosen or invited by the companies to sign them; according to the IMF, it is sufficient to look at the website of the Federal District Arbitration and Conciliation Board to confirm the filing of collective agreements with the minimum legal requirements concluded simultaneously in a whole chain of workplaces; the IMF emphasizes the existence of protection agreements as a widespread practice which has been confirmed by major companies and persons now holding posts in the Ministry of Labour; and (7) according to the IMF, what happens is a simulation of collective bargaining. Studies conducted in the National Autonomous University of Mexico by a researcher (Doctor Alfonso Bouzas Ortíz) confirm that over 90 per cent of collective agreements registered in Mexico City are dead or moribund. In other words, they are not revised, not bargained and are maintained at the legal minimum, i.e. they are mere semblances of collective agreements. The Committee notes that, according to the IMF, several democratic sectors have demanded that the Mexican Government should ratify ILO Convention No. 98, which it has resisted, claiming that to do so would infringe national legislation, particularly with reference to the exclusion clause (a trade union protection clause), a legal provision which is quite rigorously applied in practice, but has been declared unconstitutional on two occasions by the Mexican Supreme Court of Justice

897. *The Committee notes the Government's explanations concerning the content of the legal provisions and available procedures, and also its conclusions on this case which perfectly summarize its position:*

- (a) *The Mexican legal system does not provide for so-called "employer protection collective agreements (CCPP)". In this regard, the Mexican Government does not recognize in any way whatsoever the existence of such agreements, since trade unions are free to form themselves, draw up their constitutions, designate their representatives or leaders and regulate their own structure and internal procedure.*
- (b) *The document supposedly referred to as a complaint is the result of an obscure and general conceptual exercise, as it does not indicate specific infringements of freedom of association since, from the matters described in the communication, it cannot be inferred that the labour rights of the members of the complainant Federation have been violated, nor can it be inferred in any way that the right of workers to join a trade union has been infringed.*
- (c) *The Mexican Government has established administrative bodies which provide guidance and legal advice, not only to workers as individuals, but also to trade unions, to assert their labour rights, including before the courts, by delivering the*

respective judgments which must be enforced while at the same time fostering the settlement of disputes. Thus, in no way can it be argued that the Mexican Government violates the labour laws which the Government itself promotes and supports.

- (d) Trade unions have the right to give notice of a strike to the employers, in order to sign a CCT which contains additional benefits for the workers in return for their services. In that case, the agreements are the result of the conciliation achieved between workers and employers, but always to the benefit of the general conditions in which the work is performed, from which it can be seen, once again, that the “employer protection agreements” alleged by the complainant organization do not exist.
- (e) The tripartite composition of the JFCAs is envisaged in sections 605, 606, 607, 608 and 609 of the LFT, thus its decisions are founded in law, fair and seek to strike a balance between the factors of production, without the decision favouring one side in particular, as its decisions are adopted collectively.
- (f) In the case law, opinion No. 150/2008 of the Supreme Court of Justice establishes the obligations of the JCA to process claims for rights to CCTs in all recuentos by secret ballot of workers, thereby guaranteeing the free will of the workers and protecting confidentiality in the exercise of the vote on the trade union which is to administer the collective agreement.
- (g) In 2003, in the framework of the Federal Act on Transparency and Access to Public Government Information, the JFCA began a digitalization programme. With the publication of CCTs, any worker has the possibility of knowing and obtaining a copy of it, as well as his duties, the trade union to which he belongs and the name of the general secretary. This has led to a new awareness among workers which will have a favourable impact on the development of individual and collective labour relations and freedom of association.
- (h) Trade unions in Mexico have a variety of means of legal recourse which they can use if they consider that their rights of freedom of association have been infringed, including, when they have exhausted the relevant recourses, in international bodies, such as the complaints against the Mexican Government in the ILO Committee on Freedom of Association. Between 1954 and 2010, that Committee has examined 48 cases concerning Mexico, of which 43 have been concluded by the ILO body and five are still under examination. The concluded cases are an indication that the Mexican Government has implemented the recommendations of the CFA, in accordance with the law.
- (i) The reforms of the legal provisions on labour matters in Mexico have been carried out with the collaboration of the International Labour Office and in the light of its recommendations.
- (j) In the opinion of the Mexican Workers’ Confederation (CTM), the mechanisms for concluding a CCT are fully identified and established in the LFT and any practice not laid down in law is barred.
- (k) The Mexican authorities have never failed to follow the recommendations issued by the Committee on Freedom of Association of the Governing Body of the International Labour Organization as they are recommendations which the Government has taken into consideration and acted accordingly, thus fully complying with the provisions of Convention No. 87. This means that the Mexican Government has never infringed the rights of association of any Mexican worker.

- (l) *In Mexico, there is no limitation whatsoever on the right of freedom of association. In Mexico, there is no violation of the right to freedom of association or to meet peacefully for any lawful purpose including the right to organize.*
- (m) *The CTM questions the assertions in the IMF complaint and the Revolutionary Confederation of Workers and Peasants (CROC), a Mexican organization affiliated to the IMF, distanced itself from the mechanism used in the preparation of the complaint and requested the immediate withdrawal of the complaint presented by the Executive Committee of the IMF.*
- (n) *The CONCAMIN considers that the complaint contains a series of opinions attributed to various persons, exhibits a series of press and academic articles which bear no relation to freedom of association and rejects the receivability of these allegations as they bear no relationship to the text of Convention No. 87.*
- (o) *As regards the cases of the Nivel Superior de Servicios SA de CV and Superservicios Coapa SA de CV companies, these should be disregarded, since they have nothing to do with the complaint but appear to be cases of proceedings or collective disputes where two trade unions are fighting for bargaining rights and the right to represent workers in a workplace. In the case of Johnson Controls, we are talking of a typical case of outsourcing or subcontracting, and thus it has absolutely no relevance to the complaint.*
- (p) *The legal existence of trade unions, for the sake of order and legal clarity, depends on registration granted by the competent labour authorities, the STPS for federal trade unions, local JCAs in the various states of the Republic and the federal district for local jurisdiction, through which trade union life is regulated and whence their legal existence originates.*
- (q) *It is not true that the current legislation is prejudicial to the right to organize and that it is always the employers who choose the agreement of their own preference. Nor is it true that the legislation includes provisions to protect workers which are not accessible to them and that there is a web of complicity between the labour courts, employer and trade unions, and that therefore there exists what they call CCPPs.*
- (r) *Articles 2, 3, 5, 7 and 10 of Convention No. 87 are not violated in any way, as the current legislation clearly establishes those rights, which are fully respected in the terms set out in the Convention, which are in conformity with the Constitution, article 123(XVI) and articles 132(X), (XI), (XXI) and (XXII), 354, 356, 357, 368, 369, 374 and 381 of the LFT.*

898. *The Committee concludes that the statements of the complainant organization and the Government are largely contradictory. The Committee observes that the Government focuses more on the legal aspect and denies the existence of CCPPs, while the complainant organization emphasizes that it concerns mechanisms that exist in practice because the legislation does not require a trade union to prove a certain degree of representativeness to register a collective agreement, even before the company starts operations. The Committee observes that the Government also questions the validity of the examples of companies provided by the complainant organization in support of its allegations.*

899. *The Committee wishes to point out that on previous occasions it has requested certain legislative reforms to strengthen trade union rights, and has found that there has been excessive delay by the administrative or judicial authorities in relation to the registration of certain trade unions or the recognition of certain trade union executive boards; in addition, the Committee has been made aware of cases of violence between trade union factions which claimed to be more representative. Furthermore, the IMF emphasizes that a*

considerable proportion of the problems it raises refer to the fact that, even though, on two occasions, the Supreme Court of Justice has declared trade union protection clauses, so-called “exclusion clauses”, unconstitutional, these clauses operate quite rigorously in practice.

- 900.** *The Committee also observes that both the complainant organization and the Government had reported that there are bills for reform of labour and trade union legislation before the National Congress.*
- 901.** *In these circumstances, taking into account the contradictions between the allegations and the Government’s reply and that the employers’ organizations, the CTM and the CROC, question the complaint, the Committee invites the Government to take measures to initiate a constructive dialogue with the workers’ organizations (including the five complainants) and employers’ organizations, on the application of the labour and trade union legislation. This dialogue should include: (1) the questions relating to the trade union protection clauses, “exclusion clauses”, declared unconstitutional by the Supreme Court which may give rise to certain situations contemplated in the complaint; (2) questions relating to the minimum representativeness of trade unions in order to bargain collectively; and (3) the allegations of the lack of impartiality of the JCAs and the allegedly excessive length of their proceedings. The Committee requests the Government to inform it of the meetings held and of the outcome of this dialogue.*
- 902.** *The Committee also requests the Government to reply specifically to the allegations and examples from the complainants concerning: (1) the public personalities, including public authorities, which made statements concerning the reality of employer protection collective agreements and the high number of these agreements; and (2) the specific cases of enterprises mentioned in paragraphs 796–799, including the allegations of deficient or partial functioning of the JCAs in relation to the exercise of the distinct trade union rights of the STRACC.*

The Committee’s recommendations

- 903.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee invites the Government to take measures to initiate a constructive dialogue with the workers’ organizations (including the five complainants) and employers’ organizations, on the application of the labour and trade union legislation. This dialogue should include: (1) the questions relating to the trade union protection clauses, “exclusion clauses”, declared unconstitutional by the Supreme Court which may give rise to certain situations contemplated in the complaint; (2) questions relating to the minimum representativeness of trade unions in order to bargain collectively; and (3) the allegations of the lack of impartiality of the conciliation and arbitration boards (JCAs) and the allegedly excessive length of its proceedings. The Committee requests the Government to inform it of the meetings held and the outcome of this dialogue.*
 - (b) The Committee also requests the Government to reply specifically to the allegations and examples from the complainants concerning: (1) the public personalities including public authorities, which made statements concerning the reality of employer protection collective agreements and high number of these agreements; and (2) the specific cases of enterprises*

mentioned in paragraphs 796–799, including the allegations of deficient or partial functioning of the JCAs in relation to the exercise of the distinct trade union rights of the STRACC.

CASE NO. 2752

INTERIM REPORT

**Complaint against the Government of Montenegro
presented by
the New Trade Union of the Radio and Television of Montenegro (RTCG)**

Allegations: The complainant organization alleges the refusal of the management of the Radio and Television of Montenegro to recognize the union as the representative organization of workers, as well as the dismissal of its officers and harassment of its members

- 904.** The complaint is contained in communications dated 11 June 2009 and 1 February 2010, from the New Trade Union of the Radio and Television of Montenegro (RTCG).
- 905.** The Committee has been obliged to postpone its examination of the case on two occasions [see 356th and 357th Reports, paras 6 and 7, respectively]. At its meeting in November 2010 [see 358th Report, para. 5], the Committee issued an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested had not been received in due time. To date the Government has sent no observations.
- 906.** Montenegro has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

- 907.** In its communications dated 11 June 2009 and 1 February 2010, the New Trade Union of the RTCG explains that it was registered by the Ministry of Labour on 15 March 2007 and counts 107 members out of 650 employees of the enterprise. The complainant organization further explains that its struggles are related not only to its trade union activities, but also to the discovery it had made on the illegal and corrupt activities of the management of the RTCG and the Government with regard to the satellite transmission of public radio and TV programmes.
- 908.** The complainant alleges that in February 2008, the director-general of the enterprise dismissed three trade union leaders of the New Trade Union of the RTCG – Mr Dragan Janjic, President, Ms Mirjana Popovic, member of the Executive Committee, and Mr Miodrag Boskovic, member of the Supervising Committee. The union alleges that, while officially they were dismissed for absenteeism, in reality, they were dismissed on

account of their trade union activities. On the date of the complaint, a court case concerning Mr Janjic was still pending.

- 909.** The union also alleges that, under threats and pressure of the management, workers cannot freely exercise their trade union rights. It further alleges that local authorities do not react to the appeals of the union.
- 910.** The complainant further alleges that the management of the undertaking refuses to recognize it, withdrew the check-off facility previously enjoyed by the union; had not provided the union with such facilities as an office, personal computer, Internet or telephone/fax; had never consulted the union with regard to the changes in conditions of employment; does not provide any kind of information to the union and ignores all demands and communications addressed to it by the union; prohibits the union to display its information without prior approval by the director of the undertaking; deprived its members of bonuses given to other workers; and threatens its members with dismissal unless they resign from the union
- 911.** With regard to the refusal to grant certain facilities to the union and the withdrawal of the check-off facility, the union addressed a complaint to the labour inspectorate. The complainant explains that the other, pro-government, trade union enjoys the facilities pursuant to a collective agreement amended in agreement with that union. According to the New Trade Union of the RTCG, while an officer of the Ministry of Labour confirmed that trade unions have a right to facilities, the labour inspector replied that these rights are provided only for the most representative trade union organizations. While the complainant requested the Ministry of Labour and the labour inspectorate to clarify which of the interpretations of the legislation was a correct one, none provided a reply.
- 912.** The complainant indicates that it lodged a complaint against the enterprise before the court of first instance in Podgorica. At the preliminary hearing, the judge requested all unions operating at the enterprise to submit admission forms filed by the members of the union so as to determine the most representative organization. Only the New Trade Union of the RTCG presented 107 legally valid forms. Nevertheless, the judge refused to recognize the union as the most representative and on 16 June 2009, suspended the proceedings so as to allow the complainant to appeal the verdict. This appeal is still pending. The complainant points out that the President of the pro-government trade union, affiliated to the Confederation of Trade Unions of Montenegro (CTUM), declared that his union has 642 members out of 722 employees, and that this information was provided to the court through a legal representative of the management of the enterprise.

B. The Committee's conclusions

- 913.** *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainant's allegations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urgently requests the Government to be more cooperative in the future.*
- 914.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*
- 915.** *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The*

Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating for objective examination detailed replies concerning allegations made against them [see the First Report of the Committee, para. 31].

916. The Committee notes, in this case, the complainant organization, the New Trade Union of the RTCG alleges the refusal of the management of the RTCG to recognize the union as the representative organization of workers, as well as the dismissal of its officers and harassment of its members.
917. The Committee notes the complainant's indication that the problems it faces with the enterprise management and the Government also relate to the discovery it had made of what it believes to be illegal and corrupt activities of the enterprise management and the Government with regard to the satellite transmission of public radio and TV programmes. The Committee wishes to point out in this respect that its mandate consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 6]. It will therefore not pursue the examination of this aspect of the allegations.
918. With regard to the dismissal of three of the complainant's trade union leaders (Mr Dragan Janjic, Ms Mirjana Popovic and Mr Miodrag Boskovic), the Committee notes the complainant's allegation that, contrary to the officially stated reason of absenteeism, trade union leaders were dismissed on account of their trade union activities. The Committee recalls that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions. No person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment. Since inadequate safeguards against acts of anti-union discrimination, in particular against dismissals, may lead to the actual disappearance of trade unions composed only of workers in an undertaking, additional measures should be taken to ensure fuller protection for leaders of all organizations, and delegates and members of trade unions, against any discriminatory acts [see **Digest**, op. cit., paras 769, 771 and 773]. Noting the limited information provided by the complainant organization and the lack of the Government's reply, the Committee requests the New Trade Union of the RTCG to provide more details in respect of the alleged anti-union dismissals and requests the Government to institute an independent investigation into the allegations and provide it with full details as to the outcome. Noting that the complainant indicates that Mr Janjic's case is still pending, the Committee requests the Government and the complainant to provide information on the final decision rendered by the courts.
919. With regard to the allegations of denial of bonuses to and threats against the members of the complainant organization, pressure to withdraw their union membership, as well as interference with the union's capacity to exercise its activities in the defence of the workers, the Committee considers that this is a very serious allegation which, if true, would be likely to have a grave effect on the membership of an organization and its representativity. The Committee recalls that acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize. Furthermore, granting bonuses to non-union member staff – even if it is not to all non-union workers – and excluding all workers who are union members from such bonuses during a period of collective conflict constitutes an act of anti-union discrimination contrary to Convention No. 98 [see **Digest**, op. cit., paras 786–787]. The

Committee expects that an independent investigation will be carried out by the Government into the allegations made without delay and requests the Government and the complainant to provide detailed information on its outcome.

920. *The Committee notes that the issue of recognition of the complainant organization as representative is currently pending before the court and requests the Government and the complainant to provide information on the outcome.*

921. *With regard to the facilities of which the complainant organization is allegedly deprived, the Committee recalls that Convention No. 135, ratified by Montenegro, calls on ratifying member States to supply such facilities in the undertaking as may be appropriate in order to enable workers' representatives to carry out their functions promptly and efficiently, and in such a manner as not to impair the efficient operation of the undertaking concerned [see **Digest**, op. cit., para. 1098]. The Committee further recalls that, according to Article 4 of that Convention, national laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention. Thus, with regard to the alleged refusal by the management of an enterprise to establish communications with the representatives of the trade union, the Committee points out that Paragraph 13 of the Workers' Representatives Recommendation, 1971 (No. 143), provides that workers' representatives should be granted without undue delay access to the management of the undertaking and to management representatives empowered to take decisions, as may be necessary for the proper exercise of their functions. The Committee therefore requests the Government to bring the parties – the management of the enterprise and the New Trade Union of the RTCG – together in order to facilitate their reaching an agreement in relation to the facilities to be provided to the representatives of the complainant, bearing in mind the principles above. It requests the Government to keep it informed in this respect.*

The Committee's recommendations

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

- (a) The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainant's allegations. The Committee strongly urges the Government to be more cooperative in the future.*
- (b) The Committee requests the complainant to provide further details in respect of the alleged anti-union dismissals and urges the Government to institute an independent investigation into these allegations and provide it with full details as to the outcome. Noting that the complainant indicates that Mr Janjic's case is still pending, the Committee requests the Government and the complainant to provide information on the final decision rendered by the courts.*
- (c) The Committee expects that an independent investigation will be carried out by the Government without delay into the allegations of threats against and pressure on trade union members to withdraw from their union and requests the Government and the complainant to provide detailed information on its outcome.*

- (d) *The Committee notes that the issue of the recognition of the complainant organization as representative is currently pending before the court and requests the Government and the complainant to provide information on the outcome.*
- (e) *The Committee requests the Government to bring the parties – the management of the enterprise and the New Trade Union of the RGTC – together in order to facilitate their reaching an agreement in relation to the facilities to be provided to the representatives of the complainant, bearing in mind the principles above. It requests the Government to keep it informed in this respect.*

CASE NO. 2613

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

**Complaint against the Government of Nicaragua
presented by
the Central Workers' Confederation of Nicaragua (CTN)**

***Allegations: The complainant organization
alleges numerous dismissals and transfers of
trade union officials and members***

923. The Committee last examined this case at its meeting in November 2009 [see the Committee's 355th Report, paras 910–937, approved by the Governing Body at its 306th Session]. The Central Workers' Confederation of Nicaragua (CTN) submitted new allegations and additional information in communications dated 15 and 17 December 2009.
924. The Government sent its observations in communications dated 24 February, 12 March, 10 June and 9 December 2010.
925. Nicaragua 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

926. At its meeting in November 2009, the Committee made the following recommendations [see 355th Report, para. 937]:
- (a) As regards the allegation concerning the dismissal of union officials and members of the Workers' and Employees' Union of the INSS, the Committee expects that the current legal actions initiated by some of these officials and members will be concluded in the near future, and requests the Government to keep it informed of the final outcome of these legal actions;
 - (b) The Committee urges the Government to make every effort to bring about talks between the parties with a view to the reinstatement, ordered by the judicial authority, of Mr Fidel Castillo Lagos, Minutes Secretary of the Genaro Lazo Union of the Nicaraguan Aqueduct and Sewer Company of Estelí (ENACAL–Estelí) and that the indemnity

already paid to Mr Lagos be taken into account in this regard. The Committee also requests the complainant organization to send the names of the other 15 members allegedly dismissed, as requested by the Government in its previous reply, so that the Government can send its observations;

- (c) As regards the allegations concerning the dismissals of eight officials of the Eastern Services Territorial Unit Workers' Union (UTSO), nine officials of the ENACAL Granada Workers' Departmental Union, and five officials of the ENACAL Carazo Workers' Departmental Democratic Union, the Committee urges the Government: (1) to take measures, including legislative measures if necessary, to ensure that, in future, responsibility for declaring a strike illegal lies with an independent body that has the confidence of the parties involved; (2) to inform it more precisely of the requirements which the organizations are said not to have met, thus leading to the declaration that the strike was illegal which subsequently gave rise to the dismissal of the trade union officials, in order that it may express its view on this matter in full possession of the facts; and (3) to inform it of the outcome of the judicial proceedings initiated by a number of workers at ENACAL–Granada and ENACAL–Carazo. The Committee requests the Government in this regard to inform it whether the trade union officials mentioned by name by the complainant organization have initiated legal action in connection with their dismissals; and
- (d) The Committee expects that the judicial authority that examines the legal action for reinstatement initiated by the trade union official Ms Maura de Jesús Vivas Ramos, who was dismissed from the Directorate-General of Revenues, will give its ruling in the near future, and requests the Government to keep it informed of the final outcome of these proceedings.

B. The complainant's new allegations and additional information

927. In its comments of 15 and 17 December 2009, the Central Workers' Confederation of Nicaragua (CTN-autónoma) states that the Directorate-General of Revenues (DGI) refuses to comply with the ruling handed down on 1 July 2009, by which the judicial authority ordered the reinstatement and/or payment of double compensation to Ms Maura de Jesús Vivas Ramos, Membership Secretary of the Public Employees' Union in the Directorate-General of Granada (SEPGRADGI). The CTN-autónoma adds that, without even having implemented the judicial ruling in favour of Ms Vivas Ramos, on 24 November 2008 the authorities of the Directorate-General of Revenues (DGI) ordered the dismissal of Mr Ricardo Francisco Arista Bolaños, who had been employed as an auditor A by the Directorate-General of Revenues of Granada since 1 September 2000, and was elected on 8 September 2007 as a spokesperson of the executive committee of the CTN-autónoma.

928. The complainant organization adds that Mr Arista Bolaños, availing himself of his trade union immunity, lodged a formal complaint to the authorities of the Ministry of Labour which, in the first instance, tried to dismiss the complaint by incorrectly invoking article 277 of the Labour Code, against which an appeal was promptly and duly lodged, resulting in an administrative decision nine months later that the dismissal of Mr Arista Bolaños was illegal. An order for his reinstatement was issued, but this was clearly disregarded by the DGI, and the complaint has been pending with the judicial authorities since September 2009.

929. CTN-autónoma states that the Civil and Labour Affairs Chamber of the Eastern District Appeals Court ruled that the appeal lodged by the general legal representative of the Nicaraguan Aqueduct and Sewer Company (ENACAL) was unfounded, thereby confirming as final the decision handed down on 24 October 2008 by the Local Civil and Labour Affairs Court under the jurisdiction of Jinotepe which upheld the complaint filed by the ENACAL Carazo unionized workers affiliated to the CTN. These workers were illegally dismissed on 13 May 2007, and have to date neither been reinstated nor received payment of the amount due to them in law.

C. The Government's reply

- 930.** In its communication of 12 March 2010, the Government states that Mr Ricardo Francisco Arista Bolaños initiated a legal action for reinstatement with the Managua District First District Labour Affairs Court against the DGI. This case is currently pending and awaits a decision by the judicial authority of first instance. The DGI is nevertheless prepared to comply with the requirements of the judicial authorities once all existing remedies have been exhausted. With respect to the case of Ms Maura de Jesús Vivas Ramos, a final ruling was given in her favour. This ruling was handed down by the district labour affairs judge through the jurisdiction of the City of Granada, and stipulates that the DGI must reinstate Ms Vivas Ramos in her post and on the same terms as before. The institution was unable to comply with the decision since the post that Ms Vivas Ramos used to occupy no longer exists. In this context, it was referred to the judicial authority, in accordance with the provisions of article 46, paragraph 2, of the Labour Code, with respect to the termination of her employment and the calculation of all benefits due to her in relation to such termination, and in accordance with the special law that regulates the actions of the State of the Republic of Nicaragua. It is clear that no violations of labour law have taken place and the parties have availed themselves of their rights under the law at every stage of the labour proceedings initiated in the courts where they have lodged their respective complaints.
- 931.** In its communications of 24 February, 10 June and 9 December 2010, the Government states in relation to the recommendations made in the Committee's 355th Report, paragraph 937, and on the outcome of current judicial proceedings in connection with the dismissals of the workers of the Nicaraguan Social Security Institute (INSS), that this institution reported that the respective settlements had been paid, including the social benefits to which Mr Sergio Juan Ramón Quiroz, Ms Magda del Carmen Reyes López, Mr Fabricio José Sevilla, Mr Allan Antonio González Torrez, Ms Vilma Isabel Munguia Guillen, Ms Fátima del Rosario Pérez Canales and Mr Josman Octavio Solis Nuñez were entitled. On the other hand, Ercilia Aguilera Centeno and Gianly Castillo Tercero and Margarita del Carmen Sánchez Méndez withdrew their legal action for reinstatement. The cases of Alvin Alaniz González, Jazmín del Sagrario Carballo Soto and Rolando Delegado Miranda are still awaiting a ruling of first instance.
- 932.** With regard to Mr Fidel Castillo Lagos, it was reported that compensation payments in lieu of reinstatement were made on 19 May 2008, as prescribed in article 46 of the Labour Code, and, with no other settlement payment outstanding, on 26 March 2010 a letter was sent to the Local Civil and Labour Affairs Court clearly outlining all payments made by the company and received by Mr Fidel Castillo Lagos.
- 933.** As regards the workers of the Nicaraguan Aqueduct and Sewer Company – ENACAL of Granada, the company said that it had paid settlements to the workers and complied with the ruling handed down by the Civil and Labour Affairs Chamber of the Southern District Appeals Court, and no payment was outstanding. It also reported that a ruling was due on a judicial complaint filed by 58 workers.
- 934.** As for the case of the workers of the Nicaraguan Aqueduct and Sewer Company – ENACAL of Carazo, the company reported that it had complied with the order of the local civil and labour affairs judge under the jurisdiction of Jinotepe-Carazo and had reached an agreement with workers and their trade union representative on a four-installment payment, and they had already received their first instalment.
- 935.** Regarding the cases of Mr Ricardo Francisco Arista Bolaños and Ms Maura de Jesús Vivas Ramos, the DGI stated the following: (1) Mr Arista Bolaños, availing himself of his rights under the labour laws of the Republic of Nicaragua, initiated a legal action for

reinstatement with the Managua District First District Labour Affairs Court against the DGI; and (2) as regards Ms Maura de Jesús Vivas Ramos, a final ruling was given in her favour. That ruling was handed down by the District Labour Affairs Court of the City of Granada and stipulates that the DGI must reinstate Ms Vivas Ramos in the same post and on the same terms as before. Given the impossibility of complying with this decision, since the post formerly occupied by Ms Vivas Ramos no longer exists, it was referred to the judicial authority, in accordance with article 46, paragraph 2, of the Labour Code of the Republic of Nicaragua, which reads as follows: “When there is a ruling in favour of reinstatement and the employer fails to comply with the judicial decision, the employer shall pay the worker, in addition to compensation for years of service, a sum equivalent to one hundred per cent of the same.”

D. The Committee’s conclusions

936. *The Committee recalls that the complainant organization in the present case had alleged numerous dismissals of trade union officials and members. At its meeting in November 2009, the Committee made a number of interim recommendations.*

Recommendation (a)

937. *At its meeting in November 2009, the Committee requested the Government to inform it of the outcome of the legal proceedings in connection with the dismissal of trade union officials and members of the Workers’ and Employees’ Union of the Nicaraguan Social Security Institute. In this regard, the Committee notes the Government’s information that an appropriate settlement, including social benefits, was paid to seven workers, three workers withdrew the reinstatement proceedings which they had initiated, and a ruling of first instance is due on the cases of Alvin Alaniz González, Jazmín del Sagrario Carballo Soto and Rolando Delgado Miranda. In these circumstances, the Committee requests the Government to keep it informed of the outcome of current legal proceedings.*

Recommendation (b)

938. *The Committee urged the Government to make every effort to bring about talks between the parties with a view to the reinstatement, ordered by the judicial authority, of the trade union official, Mr Fidel Castillo Lagos, Minutes Secretary of the Genaro Lazo Union of the Nicaraguan Aqueduct and Sewer Company of Estelí (ENACAL-Estelí), and that the compensation already paid to Mr Lagos be taken into account. The Committee notes the Government’s information that the company paid the trade union official in question compensation for non-reinstatement as provided for in article 46 of the Labour Code in May 2008, and that it informed the Local Civil and Labour Affairs Court of this payment on 26 March 2010.*

939. *The Committee also recalls that, at its 2009 meeting, it requested the complainant organization, as had the Government, to send the names of the other 15 members allegedly dismissed, so that the Government could send its observations. In this regard, given that the complainant organization has failed to provide the information requested, the Committee will not pursue its examination of these allegations.*

Recommendation (c)

940. *The Committee requested the Government to provide information on the outcome of the judicial complaints filed by trade union officials and workers of the ENACAL Granada and ENACAL Carazo companies (in connection with this company, the complainant organization alleges that in December 2009 the workers remained illegally dismissed and had not been reinstated or paid appropriate compensation) as a result of their dismissals.*

The Committee notes the Government's information that: (1) the ENACAL Granada company had complied with the ruling handed down by the Civil and Labour Affairs Chamber of the Southern District Appeals Court, paid the settlement to the workers, and a judicial complaint initiated by 58 dismissed workers is still in process; and (2) the ENACAL Carazo company stated that it had complied with the local civil and labour affairs judge's order and reached a pay agreement with the workers and their trade union representative.

- 941.** *Under these circumstances, the Committee requests the Government to keep it informed of the outcome of the current legal proceedings initiated by the dismissed workers of the ENACAL Granada company.*

Recommendation (d)

- 942.** *The Committee requested the Government to keep it informed of the final outcome of the judicial proceedings for reinstatement initiated by the trade union official Ms Maura de Jesús Vivas Ramos, who had been dismissed by the Directorate-General of Revenues (DGI). In this regard, the Committee notes the Government's information that: (1) a final ruling was given in favour of the trade union official and provides that the Directorate-General of Revenues must reinstate her in the same post and on the same terms as before; (2) it is impossible to comply with this ruling, since the post which she used to occupy no longer exists; and (3) the ruling was referred to the judicial authorities, in accordance with article 46, paragraph 2, which stipulates that when there is a ruling in favour of reinstatement and the employer fails to comply with the judicial decision, the employer must pay the worker, in addition to compensation for years of service, a sum equivalent to one hundred per cent of the same.*
- 943.** *The Committee also notes that the complainant organization alleges the dismissal of the trade union official Mr Ricardo Francisco Arista Bolaños from the DGI, on 24 November 2008. In this regard, the Committee notes the Government's information that the trade union official in question initiated legal action for reinstatement with the Managua District First District Labour Affairs Court against the DGI. The Committee requests the Government to keep it informed of the final outcome of these proceedings.*
- 944.** *More generally, the Committee observes that, in its reply, the Government does not deny that the alleged dismissals referred to in the complaint constituted anti-union discrimination, and that in several of the alleged cases the judicial authorities ordered the reinstatement of trade union officials or members and that there was a failure to comply with those rulings as a result of the payment of compensation prescribed by law. The Committee expresses its concern at the fact that it would appear, even in the cases where it was clear that there had been an anti-union dismissal, that the employer can choose between reinstatement or payment of compensation equivalent to the amount due for the worker's years of service. In this regard, the Committee recalls that no one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 772]. In addition, on a number of occasions the Committee has emphasized that in the event of the dismissal of trade union officials or members on account of their trade union membership or activities, the best solution is the reinstatement of the workers in their posts and that, in cases where an independent competent body determines, for compelling and objective reasons, that reinstatement in that specific post is no longer possible, steps must be taken to ensure that the complainants receive full and adequate compensation and that there are sufficiently dissuasive sanctions in place to deter anti-union dismissals. The Committee requests the Government to ensure that these principles are upheld in the future.*

945. *Finally, the Committee urges the Government to take measures, including legislative measures if necessary, to ensure that, in future, responsibility for declaring a strike illegal lies with an independent body that has the confidence of the parties involved.*

The Committee's recommendations

946. *In view 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 pertaining to the dismissal of Alvin Alaniz González, Jazmín del Sagrario Carballo Soto and Rolando Delgado Miranda, of the Nicaraguan Social Security Institute (INSS).*
 - (b) *The Committee requests the Government to keep it informed of the outcome of the current judicial proceedings initiated by the dismissed workers of the Nicaraguan Aqueduct and Sewer Company of ENACAL Granada.*
 - (c) *The Committee requests the Government to keep it informed of the final outcome of the judicial action for reinstatement of the trade union official Mr Ricardo Francisco Arista Bolaños against the DGI, which is currently in process before the Managua District First District Labour Affairs Court.*
 - (d) *The Committee urges the Government to take measures, including legislative measures if necessary, to ensure that, in future, responsibility for declaring a strike illegal lies with an independent body that has the confidence of the parties involved.*

CASE NO. 2762

DEFINITIVE REPORT

Complaint against the Government of Nicaragua presented by the Autonomous Workers' Federation of Nicaragua (CTN-A)

***Allegations: The complainant organization
alleges obstacles to the exercise of collective
bargaining in the public education sector***

947. The Autonomous Workers' Federation of Nicaragua (CTN-A) presented a complaint in a communication dated 18 February 2010.
948. The Government sent its observations in a communication dated 26 October 2010.
949. Nicaragua 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

- 950.** In its communication dated 18 February 2010, the CTN–A states that on 11 December 2009 the representatives of the Municipal Union of Technical and General Education Workers of Granada, the Union of Schoolteachers and General Service Workers of NERPE “Mercedes Mondragón” of Granada, the Democratic Union of Education Workers of Diriomo (Granada) and the Union of Education Centre Security Workers of Granada (SITRAVICE–Granada), affiliated to the Departmental Federation of Technical and General Education Workers of Granada, affiliated with the CTN–A, submitted to the Departmental Labour Inspectorate of Managua, Branch I, a formal list of demands for the sole purpose of signing a collective labour agreement in order to improve the general social, economic, labour and trade union conditions of Ministry of Education (MINED) employees, owing to the expiry of the current collective agreement. The complainant organization adds that a notification of 15 December 2009 from the Departmental Labour Inspectorate, Ministry of Labour, Branch I, Managua, stated that, the legal requirements had been met according to section 373 of the Labour Code, the list of demands were admitted, further action would be taken, as required by law, by the bargaining committee, and the matter would be referred to the Directorate of Conciliation.
- 951.** The complainant adds that, on 22 December 2009, in accordance with section 377 of the Labour Code, the Head of the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour issued a notice to the effect that, in accordance with section 377 of the Labour Code, Ms Yasmina Auxiliadora Jiménez Latino was hereby appointed as conciliation lawyer and the parties were summoned to appear at the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour on Tuesday, 12 January 2010, at 9 a.m., to attend a preliminary negotiation hearing. If the employer was unable to appear in person, he could appoint a legally authorized representative or establish a duly accredited bargaining committee having official power to take decisions.
- 952.** The CTN–A indicates that, by means of a communication dated 7 January 2010, the Head of the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour informed the Minister of Education, the Labour Affairs Secretary of the Municipal Union of Technical and General Education Workers of Granada, the Labour Affairs Secretary of the Union of Schoolteachers and General Service Workers of NERPE “Mercedes Mondragón” of Granada, the General Secretary of the Democratic Education Workers’ Union of Diriomo (Granada) and the Finance Secretary of the SITRAVICE–Granada that, in order to ensure the greatest possible representation of teachers and workers of the MINED in the bargaining process for the new collective agreement, the convocation for the preliminary negotiation hearing scheduled for 12 January 2010 had to be suspended until such time as the authority resolved matters arising from the new demands submitted by other trade union organizations at the MINED.
- 953.** On 21 January 2010, the Head of the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour notified the complainant that the Director-General of Human Resources at the MINED had stated that bargaining had been in progress with the trade union organizations in the education sector since 16 December 2009, in accordance with sections 240 and 372 of the Labour Code. The Directorate also stated that the parties had agreed and signed the collective agreement for 2010–12 on 5 January 2010 and had sent three copies of the collective agreement duly signed by the parties for verification and registration, in accordance with section 372 of the Labour Code. The Directorate of Collective Bargaining at the MINED indicated that, in view of the fact that it had received demands sent by the Departmental Inspectorates, Branches I and II, after the start of direct negotiations for the MINED collective agreement between the MINED senior management and a group of trade unions separate from the one which had submitted demands to the Ministry of Labour, it arranged for the registration of the MINED collective agreement.

- 954.** The complainant indicates that, in view of the breaches committed by the Head of the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour in relation to the provisions of the Constitution (articles 27, 46, 49, 52, 88 and 183), of ILO Convention No. 98 and of national law, the Municipal Union of Technical and General Education Workers of Granada, the Union of Schoolteachers and General Service Workers of NERPE “Mercedes Mondragón” of Granada, the Democratic Education Workers’ Union of Diriomo and the SITRAVICE–Granada, being in total disagreement with this decision issued by the Director of Collective Bargaining and Conciliation which violates its rights and guarantees, filed a formal appeal against it. On 2 February 2010, the Head of the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour stated that the appeal was admitted, informing the appellants that they had 24 hours in which to bring their grievances concerning the decision before the Directorate-General of Collective Rights and Labour Consultancy at the Ministry of Labour.
- 955.** On 3 February 2010, the trade union organizations in question brought their grievances in written form before the Directorate-General of Collective Rights and Labour Consultancy at the Ministry of Labour, describing in detail the violations committed by the Head of the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour and their grievances on the basis of these violations, specifically citing to the legislation that had been violated, causing the following grievances: (1) they had annulled the rights and guarantees established in articles 27, 49, 52 and 88 of the Constitution, being the object of discrimination and being divested of the inalienable right to conclude, in defence of individual and union interests, a collective agreement with their employer (the MINED), in accordance with the law; (2) they had annulled the rights and guarantees established in section 373 of the Labour Code with regard to submitting a list of demands to the Departmental Labour Inspectorate and concluding a collective agreement with their employer (the MINED), in compliance with the Constitution and the Labour Code; (3) they had annulled the rights and guarantees established in Article 4 of ILO Convention No. 98; (4) they had annulled the rights and guarantees established in Article 23 of the Universal Declaration of Human Rights, divesting the workers of the right to form trade unions for the protection of their interests. The complainant claims, as in the case of the decision against which they are appealing, to have been penalized by negligence on the part of the Departmental Inspectorates of the Ministry of Labour in the form of late transmission of the list of demands.

B. The Government’s reply

- 956.** In its communication of 26 October 2010 the Government states that, on Friday, 11 December 2009, at the Departmental Labour Inspectorate of Managua, Branch I (Oral Proceedings for Labour Administrative Matters), Ministry of Labour, a list of demands was received, signed on the same date by the Labour Affairs Secretary of the Municipal Union of Technical and General Education Workers of Granada, the Labour Affairs Secretary of the Union of Schoolteachers and General Service Workers of NERPE “Mercedes Mondragón” of Granada, the General Secretary of the Democratic Education Workers’ Union of Diriomo and the Finance Secretary of the SITRAVICE–Granada. The aforementioned list of demands was made versus the MINED.
- 957.** On 15 December 2009, the Departmental Labour Inspectorate of Managua, Branch I (Oral Proceedings for Labour Administrative Matters), issued an order relating to the admission and referral of the list of demands to the Directorate of Collective Bargaining and Conciliation, notifying the parties concerned (the MINED and the trade union organizations) as required by law. On 21 December 2009, the aforementioned list of demands was received at the Directorate of Collective Bargaining and Conciliation and, in accordance with section 377 of the Labour Code, a conciliator was appointed to hold a preliminary hearing, the date for which was set as 12 January 2010. The Directorate of

Collective Bargaining and Conciliation was informed that lists of demands were still being received at the Departmental Inspectorate from certain trade unions, and these demands were being verified for compliance with the requirements of section 373 of the Labour Code. Accordingly, on Wednesday, 6 January 2010, a communication was addressed to the parties that had been summoned to a preliminary hearing due on Tuesday, 12 January 2010, informing them that the hearing had been suspended in order to ensure greater representation of the teachers.

958. The Government states that on Thursday, 7 January 2010, the Directorate of Collective Bargaining and Conciliation received a communication signed by the Director-General of the MINED, indicating that negotiations had been in progress with the trade unions in the education sector since Wednesday, 16 December 2009, in accordance with sections 240 and 372 of the Labour Code. On 5 January 2010, the parties agreed and signed the collective agreement for 2010–12. The agreement was negotiated directly between the parties, namely: the General Confederation of Education Workers of Nicaragua (CGTEN–ANDEN), the Nicaraguan Confederation of Education and Culture Workers (CONFENITEC), the Trade Union Confederation of Education Workers (CSTE), the MECD “29 June” Workers’ and Teachers’ Federation, the “Lolita Soriano de Guerrero” Schoolteachers’ Federation of the Department of Managua, the “Profesor Emmanuel Mongalo y Rubio” Education Workers’ Federation, the Trade Union Confederation of Teachers of Nicaragua, the MECD Headquarters Workers’ Union, the “Miguel Ramírez Goyena” Workers’ Union, the “Miguel Bonilla Obando” Autonomous Education Workers’ Union and the “Educational Independence” Workers’ Union, on the one hand, and the MINED, on the other.
959. The Government indicates that the director of collective bargaining and conciliation complied with the terms of section 372 of the Labour Code, which states that collective agreements may be concluded by direct settlement and shall then be submitted to the Ministry of Labour for verification of their compliance with the law and for registration. The director was careful to ensure that the aforementioned agreement would in no way restrict the rights conferred on the MINED workers by the Constitution, the Labour Code or any other labour legislation. Subsequently, by means of an order of Thursday, 21 January 2010, the director issued an instruction at the request of the parties to register the 2010–12 MINED collective agreement and shelved the procedures launched in relation to the negotiations concerning the lists of demands before the Directorate of Collective Bargaining and Conciliation. The parties were notified accordingly on Thursday, 28 January 2010.
960. On Monday, 1 February 2010, a formal appeal was filed against the order of Thursday, 21 January 2010 by the Labour Affairs Secretary of the Municipal Union of Technical and General Education Workers of Granada, the Labour Affairs Secretary of the Union of Schoolteachers and General Service Workers of NERPE “Mercedes Mondragón” of Granada, the General Secretary of the Democratic Education Workers’ Union of Diriomo and the Finance Secretary of the SITRAVICE–Granada.
961. On Monday, 1 February 2010, the Director of Collective Bargaining and Conciliation issued an order admitting the appeals and instructed the appellants to bring their grievances within 24 hours before the Directorate-General of Collective Rights and Labour Consultancy. On Wednesday, 3 February 2010 a communication was submitted by the Labour Affairs Secretary of the Municipal Union of Technical and General Education Workers of Granada setting forth the grievances relating to the order of Thursday, 21 January 2010 issued by the Director of Collective Bargaining and Conciliation, as referred to above.

962. The Directorate-General of Collective Rights and Labour Consultancy, by means of Decision No. 003-2010 of 2 March 2010, decided on Monday, 1 February 2010 to dismiss the appeal and uphold the order of Thursday, 21 January 2010 issued by the Director of Collective Bargaining and Conciliation.
963. As regards the grievances caused and the violations of the constitutional and legal fundamentals alleged by the complainant, the Government states that the workers' constitutional rights established in article 88(2) of the Constitution and in the Labour Code have been preserved inasmuch as the inalienable right of trade union organizations and employers to conclude collective agreements was respected, by means of dialogue and negotiation aimed at direct settlement between the parties, as in the case of the MINED collective agreement for 2010–12, which was negotiated by various trade union organizations and the employer. Under the provisions of labour law, the terms of a collective agreement shall apply to all persons in the categories covered by the agreement who work at the enterprise, business or workplace concerned, even if they are not union members, as laid down by section 237 of the Labour Code. This provision gives legal certainty to both parties to the labour relationship. On the one hand, the workers have the certainty of the collective agreement which applies to them and, on the other hand, the employer knows which collective agreement applies, since it would be impossible to apply, five, six or ten different collective agreements. The Ministry of Labour, through the Departmental Labour Inspectorate of Managua, Branch I (Oral Proceedings for Labour Administrative Matters), the Directorate of Collective Bargaining and Conciliation, and the Directorate-General of Collective Rights and Labour Consultancy acted in accordance with the law.
964. Section 373 of the Labour Code empowers the Departmental Labour Inspectorate of Managua, Branch I (Oral Proceedings for Labour Administrative Matters) to verify compliance with the requirements laid down in the said section, in relation to lists of demands. In the present case, the inspectorate admitted in due time and form the complainants' list of demands, which was referred in turn to the Directorate of Collective Bargaining and Conciliation. Finally, the Government declares that the complainant trade union organizations enjoy full exercise of the union rights conferred on them by the Constitution, the Labour Code and all other labour legislation.

C. The Committee's conclusions

965. *The Committee observes that in the present case the Autonomous Workers' Federation of Nicaragua (CTN-A) alleges that several of its affiliated organizations in the Department of Granada submitted a list of demands on 11 December 2009 to the Departmental Labour Inspectorate in Managua with the aim of signing a collective agreement with the MINED in view of the expiry of the current agreement, but although the list of demands was admitted and a mediator was appointed, the Directorate of Collective Bargaining at the Ministry of Labour stated that the list of demands was received after the start of direct negotiations between the MINED and other trade union organizations and ordered the registration of a collective agreement concluded by the latter for the 2010–12 period. According to the CTN-A, its affiliated organizations have been harmed by the negligence (or the negligence alleged by the complainant) of the departmental inspectorates as a result of the late transmission of its list of demands to the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour.*
966. *The Committee notes that: (1) the Government confirms the statements by the CTN-A regarding the submission of a list of demands by a group of affiliated organizations on 11 December 2009 and the receipt by the Directorate of Collective Bargaining at the Ministry of Labour of a communication from the MINED on 7 January 2010, indicating that as from 16 December 2009 it had initiated negotiations with other trade union*

organizations (four national confederations, three federations and three trade unions), with which it signed a collective agreement for the 2010–12 period; (2) the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour ordered registration of the collective agreement and shelved the procedures launched in relation to the negotiations concerning the list of demands submitted by the organizations affiliated to the CTN-A; (3) the latter organizations appealed against the decision to register the collective agreement for 2010–12 concluded by the other organizations, and, in March 2010, the Directorate-General of Collective Rights and Labour Consultancy at the Ministry of Labour dismissed the appeal; (4) the workers' rights established in both the Constitution and the Labour Code have been preserved inasmuch as the inalienable right of trade union organizations and employers to conclude collective agreements was respected and, under the provisions of labour law, the terms of a collective agreement shall apply to all persons in the categories covered by the agreement who work at the enterprise, business or workplace concerned, even if they are not union members; (5) this provision gives legal certainty to the parties to the labour relationship, since the workers have the certainty of the collective agreement that applies to them and the employer knows which collective agreement applies, since the law does not permit the application of several different collective agreements; and (6) the various levels of the labour administrative authority acted in accordance with the law.

967. *In this regard, the Committee considers that it cannot determine with certainty whether in the present case there was negligence or bad faith on the part of the labour inspectorates in the procedure involving the late communication to the Directorate of Collective Bargaining and Conciliation at the Ministry of Labour of the list of demands submitted by the organizations affiliated to the complainant. However, as regards the alleged delay in transmission of the list of demands, the Committee notes that the organizations affiliated to the complainant (primary trade unions and a federation in the education sector in the Department of Granada) opted for presentation of the list of demands to the administrative authority instead of contacting the MINED directly. On the contrary, the Committee observes that the organizations which signed the collective agreement (including four national confederations in the education sector) with the MINED opted for direct negotiation with that Ministry.*

968. *Furthermore, the Committee observes that it was not informed that the complainant or its affiliated organizations had filed a complaint with the judicial authority for damages suffered as a result of the Ministry of Labour's dismissal of the appeal against the decision to register the collective agreement in question. In addition, the complainant has not furnished any proof of the greater representativeness of its affiliated organizations in the education sector; on the other hand, the Government emphasizes that the signatories to the collective agreement include four national confederations in the education sector. Taking all the above information into account, the Committee will not pursue examination of this case.*

The Committee's recommendation

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

CASE NO. 2799

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

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

- the Muttahida Labour Federation (MLF) and
- the Pakistan Workers Federation (PWF)

supported by

the International Trade Union Confederation (ITUC)

Allegations: The complainant organizations allege that the Government has allowed the Industrial Relations Act to expire, has failed to promulgate and implement a new labour legislation, and has enacted the 18th Amendment to the Constitution, which transferred responsibility for labour issues from the federal to the provincial governments, thereby effectively preventing national trade unions from engaging in collective bargaining at the level of industries of national scope and importance

970. The complaint is set out in communications by the Muttahida Labour Federation (MLF) and the Pakistan Workers Federation (PWF) dated 20 May, 30 June and 31 July 2010. The PWF sent additional observations in communications dated 4 October 2010 and 7 February 2011. In a communication dated 12 November 2010, the International Trade Union Confederation (ITUC) associated itself with the complaint.

971. The Government forwarded its observations in a communication dated 27 August 2010.

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

A. The complainants' allegations

973. In their communications dated 20 May, 30 June, 31 July and 4 October 2010, the complainant organizations, the MLF and the PWF, inform that the Industrial Relations Act (IRA) 2008, which was an interim law, expired on 30 April 2010. The complainant organizations indicate that despite the commitment expressed at the 98th Session of the ILO International Labour Conference in 2009 to amend the said law, the Government has neither amended nor extended it. According to the complainants, the expiry of the IRA 2008 and the absence of a new legislative act has caused the worst legal crisis in the country's labour history: workers have no institution to turn to for relief against their victimization and unfair labour practices by employers; labour courts and the registrar of trade unions at provincial and district levels ceased to function as from 1 May 2010; thousands of cases filed by workers in the labour courts are held in abeyance; no new unions can be formed or legally registered; and the process of collective bargaining with

employers has stopped. Against this background, the status of national industrial trade unions and federations became paradoxical with regard to their capacity to maintain legal identity and to bargain with the respective employers in enterprises operating at the national level (such as railways, oil and gas; Pakistan Water and Power Development Authority; postal, telecommunication, Pak PWD, etc.). Moreover, many employers at the national undertakings are reluctant to enter into dialogue and negotiate with the elected collective bargaining agents determined earlier under section 30 of IRA 2008.

974. The MLF and the PWF explain that meanwhile, the Parliament of Pakistan enacted the 18th Constitutional Amendment, which transferred the responsibility for labour issues to the provincial governments. Consequently, provincial governments began legislating on the matter. For instance, the government of Punjab, the largest province in the country, has promulgated the Industrial Relations Ordinance (IRO) 2010. According to the complainants, this legislation specifically excludes the jurisdiction of the National Industrial Relations Commission (NIRC) to register and determine collective bargaining agents in national institutions and adjudicate industrial disputes. The complainants refer, in particular, to sections 82 and 83 of the Punjab IRO, 2010 which stipulate the following:

82. Repeal and savings – (1) Notwithstanding the repeal of the Industrial Relations Act, 2008 (IV of 2008), hereinafter referred to as the repealed Act.

(a) every trade union registered under the repealed Act shall be deemed to be registered under this Ordinance.

83. Transfer of cases from National Industrial Relations Commission –

(1) All the cases pending before the National Industrial Relations Commission, constituted under the Industrial Relations Act, 2008 (IV of 2008) shall stand transferred to the Tribunal, Labour Court and Registrar having jurisdiction in the matter.

(2) The National Industrial Relations Commission shall transfer the record of all the cases and trade unions to the Tribunal, Labour Court or Registrar.

975. The complainant organizations further refer to the 18 June 2010 judgement of the Sindh High Court (Karachi) in which the court decided that the IRA 2008 stood repealed on 30 April 2010 by force of its section 87(3) and declared that the Industrial Relations Ordinance (IRO), 1969 was now once again in force until altered, repealed or amended by the competent authority. The complainants further refer to paragraphs 2 and 3 of Notification No. PAS/Legis-B-16/2010, dated 5 July 2010, on the Industrial Relations (Revival & Amendment) Act, 2010, Sindh Act No. XV of 2010, which provide the following:

2. **Revival of Act No. IV of 2008.** The Industrial Relations Act, 2008 (Act No. IV of 2008) is hereby revived with effect from 1st May, 2010 as if it had never been repealed.

3. **Amendment of section 87 of Act No. IV of 2008.** In the Industrial Relations Act, 2008, on revival, in section 87, sub-section (3) shall be omitted.

976. The complainants explain that the NIRC was the regulatory authority for registration of nationwide industrial trade unions, federations and confederations and determination of collective bargaining agent of nationwide trade unions. As the IRA 2008 is not applicable in the provinces of Sindh and Punjab on account of promulgation of the provincial laws, the NIRC has no authority in these provinces.

977. The PWF indicates that it has filed a writ petition before the APEX Court of Pakistan (Supreme Court of Pakistan) under article 184(3) of the Constitution of Pakistan against infringement of fundamental freedom of association rights guaranteed under article 17 of the Constitution.

- 978.** It further indicates that while the Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs has issued a “clarification in respect of cases of industrial disputes which do not belong to a single province and are in the nature of industry-wise character”, wherein it considered that in such cases, the NIRC “may proceed in the matters ..., subject to existence of relevant laws”, this interpretation is not being followed by some provincial high courts on the ground that the IRA 2008 has expired.
- 979.** In view of the above, the complaint organizations request that a law on industrial relations be promulgated so as to allow national industrial trade unions and federations to maintain their legal identity and bargain collectively with employers of national undertakings, and so as to ensure that protection against unfair labour practices also extends to their trade union members and office bearers. They further request the NIRC to be revived. The complainants indicate that a new legislation can be adopted by incorporating an amendment in the 18th Constitutional Amendment restoring Item No. 27 in the Concurrent Federal List contained in the 4th Schedule of the Constitution pertaining to “Trade Unions, Industrial and Labour Disputes” which could enable the federal Government to restore the law on the above subject in order to comply with the principles of freedom of association and collective bargaining.
- 980.** In its communication dated 7 February 2011, the PWF adds that the newly adopted Punjab legislation runs counter to a number of Convention No. 87 and 98 principles, including an excessively high minimum membership requirement, administrative dissolution of trade unions and provisions which would have an impact on collective bargaining rights.

B. The Government’s reply

- 981.** In its communication dated 27 August 2010, the Government indicates that the IRA 2008 remained in force until the matter was challenged in a court of law. The Sindh High Court, Karachi, in a judgment dated 18 June 2010 decided that the IRA 2008 stood repealed on 30 April 2010 by virtue of its section 87(3) and that Industrial Labour Ordinance (IRO) 1969 was once again in force and would stay in force unless altered, repealed or amended by the competent authority, as IRO 1969 was one of the pieces of legislation protected under article 268(1) of the Constitution. Therefore, according to the Government, at present, there is no legal vacuum and trade union issues at the national level are being dealt with by the National Industrial Relations Commission (NIRC) and inter-provisional commissions. The Government further indicates that the clarification regarding the functioning of the NIRC issued by the Law and Justice Division has further facilitated the working of trade unions and their federations at the national level.

C. The Committee’s conclusions

- 982.** *The Committee notes that this complaint arises from the expiry, on 30 April 2010, of the Industrial Relations Act (IRA) of 2008. The IRA 2008 was adopted as an interim law, due to expire, by virtue of its section 87(3), on 30 April 2010. According to the complainants, the lapsing of the national industrial relations legislation and the devolution of the matters relating to industrial relations and trade unions to the provinces by virtue of the 18th Amendment to the Constitution has given rise to an untenable situation for national trade union organizations and an absence of relevant machinery for the protection of freedom of association.*
- 983.** *The Committee notes that the complainants allege that the expiry of the IRA 2008 and the absence of a new Act have caused a legal crisis and a vacuum with regard to the regulation of labour relations in the country. In particular, according to the complainants, workers have no institution to turn to for relief against their victimization and unfair*

labour practices by employers; labour courts and the registrar of trade unions at provincial and district levels ceased to function as from 1 May 2010; cases filed by workers in the labour courts are held in abeyance; no new unions can be formed or legally registered and the process of collective bargaining with employers has stopped; the status of national industrial trade unions and federations became paradoxical with regard to their capacity to maintain legal identity and to bargain with the respective employers in enterprises operating at the national level; and many employers at the national undertakings are reluctant to enter into dialogue and negotiate with the elected collective bargaining agents determined earlier under section 30 of IRA 2008.

984. The Committee further notes the 18 June 2010 judgment of the Sindh High Court (Karachi) in which the court decided that the IRA 2008 stood repealed on 30 April 2010 by virtue of its section 87(3) and declared that Industrial Relations Ordinance (IRO), 1969 was now once again in force until altered, repealed or amended by the competent authority. The Committee further notes that at least two provincial governments have legislated on the matter: the government of Punjab has promulgated the Industrial Relations Ordinance (IRO) 2010, and on 5 July 2010, the government of Sindh adopted the Industrial Relations (Revival & Amendment) Act, 2010. The complainant raises specific concerns with respect to the conformity with Conventions Nos 87 and 98 of the minimum membership requirements, union dissolution and collective bargaining provisions in the Punjab IRO.
985. The Committee notes that the complainants also raise concerns with regard to the status of the NIRC. In this respect, the Committee notes that the Ministry of Law, Justice and Parliamentary Affairs has issued a “clarification” in respect of cases of industrial disputes which involve more than one province and nationwide industries, wherein it considered that in such cases, the NIRC “may proceed in the matters ..., subject to existence of relevant laws”. In this respect, the Committee notes that while the Government indicates that the NIRC continues to function, the complainants allege that the above interpretation is not being followed by some provincial high courts on the ground that the IRA 2008 has expired and that following promulgation of the provincial laws, the NIRC has no authority in the provinces of Punjab and Sindh.
986. The Committee further notes that while the Government indicates that pursuant to the decision of the High Court of Sindh, the IRO 1969 was now in force and therefore, there is no legal vacuum with regard to the regulation of labour relations in the country, the Committee understands that the competence of the High Court of Sindh is limited to the territory of Sindh. It further notes that while some provincial governments have moved to pass their own labour legislation based on the expired IRA 2008, others have not. It therefore expresses its concern over evident obstacles in the current situation for national industry-wide trade unions to exercise their rights and observes that the lack of clarity in relation to the national legislative framework for industrial relations and trade union rights could restrict the freedom of association rights of the national workers’ organization. The Committee therefore expects that new legislation fully ensuring the trade union rights of workers, including at the national level, will be adopted in the country in the very near future with the full consultation of the social partners concerned. In this respect, the Committee emphasizes the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 1072–1074].
987. The Committee notes that the Committee of Experts on the Application of Conventions and Recommendations had previously commented upon a number of significant restrictions on the right to organize under the IRO 1969; the IRO 2002, which replaced the IRO 1969; as well as the IRA 2008, which replaced the IRO 2002. It also recalls Case No. 2229, still

pending before the Committee, in which it considered that numerous provisions of both the IRO 2002 and IRA 2008 were not in conformity with Conventions Nos 87 and 98, ratified by Pakistan. The Committee therefore expects that any adopted legislation, including that adopted at provincial level, will be in full conformity with the Convention and requests the Government to keep it informed in this respect.

- 988.** *Noting the complainants' allegations with regard to the NIRC and taking into account the Government's reply thereon, the Committee expects that pending adoption of the relevant legislation, this body can exercise its functions in adjudicating industrial disputes and dealing with issues relating to the registration and determination of collective bargaining agents in national institutions and industries of national scope and importance. Similarly, provisions should be made to ensure that national trade unions and employers' organizations are able to exercise their activities at the national level in a legal and effective manner. The Committee requests the Government to keep it informed as to the manner in which the NIRC has continued to function in the current context, and to provide any relevant statistics on the cases reviewed by it.*
- 989.** *It reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes.*
- 990.** *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

The Committee's recommendations

- 991.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee expects that new legislation ensuring the trade union rights of workers, including at the national level, will be adopted in the country in the very near future with the full consultation of the social partners concerned and that any adopted legislation, including the recently adopted provincial acts, will be brought into full conformity with Conventions Nos 87 and 98. It requests the Government to keep it informed in this respect.*
 - (b) The Committee expects that pending adoption of the relevant legislation, the NIRC can exercise its functions in adjudicating industrial disputes and dealing with issues relating to the registration and determination of collective bargaining agents in national institutions and industries of national scope and importance and that provisions are made to ensure that national trade unions and employers' organizations are able to exercise their activities in a legal and effective manner. It requests the Government to keep it informed as to the manner in which the NIRC has continued to function in the current context and to provide any relevant statistics on the cases reviewed by it.*
 - (c) The Committee reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes.*
 - (d) 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. 2751

INTERIM REPORT

Complaint against the Government of Panama presented by

- **the National Federation of Public Employees and Public Service Enterprise Workers (FENASEP) and**
- **the National Council of Organized Workers (CONATO)**

Allegations: Recent legal reforms and rulings contrary to the right of trade unions to free speech, to strike and to collective bargaining; freezing of recognition of 30 trade union organizations that had requested registration; interference in the functioning of trade union organizations; refusal to allocate education insurance funds to FENASEP and dismissal of a trade union leader; threats by the authorities to institute criminal proceedings against trade union leaders

- 992.** The complaints are contained in communications of the National Federation of Public Employees and Public Service Enterprise Workers (FENASEP) and the National Council of Organized Workers (CONATO) respectively dated 24 November 2009 and 30 June 2010.
- 993.** The Government sent its observations in communications dated 11 May, 11 November and 2 December 2010.
- 994.** Panama has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 995.** In its communication dated 24 November 2009, FENASEP alleges that, on 30 July 2009, the Government enacted Act No. 43, reforming Act No. 9, of 1994, and Act No. 8, of 1998, respectively, structuring administrative and legislative careers. Act No. 43 eliminates tripartism, given that the previous act was based on the fundamental principle that the representatives of public servants on the Technical Committee and the Appeal and Conciliation Committee would be nominated by FENASEP. Act No. 43 eliminates this possibility.
- 996.** Despite the fact that the ILO supervisory bodies have urged that the minimum number of trade union members required by Panamanian legislation should be lowered, Act No. 43 raised the number to 50 in the public sector.
- 997.** Furthermore, FENASEP alleges that, on 9 October 2009, the current Minister of Labour dismissed the General Secretary of the Association of Employees of the Ministry of Labour and Social Welfare (ASEMITRABS) Mr Víctor C. Castillo Díaz (a labour inspector enjoying protection under the Conventions on labour inspection ratified by

Panama), who is protected by section 17 of Act No. 43, which states that “the following public servants (even if they are not in the administrative service) can only be dismissed for the reasons established in this act: 1. The General Secretary of any association or federation of public servants, from the time of his selection until three months after the conclusion of the term of office for which he was elected ...”.

- 998.** Moreover, given that brother Castillo is a labour inspector, as stated in Staff Decree No. 102, the Minister of Labour, Dr Cortés, has also violated another Convention ratified by Panama in 1958, the Labour Inspection Convention, 1947 (No. 81), in particular Article 6 of that Convention which states that: “The inspection staff shall be composed of public servants whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences.” The rights (enshrined in ILO Convention No. 81) of brother Castillo and other inspectors who have been dismissed by the current government, as well as those of others who will surely be dismissed, are being violated.
- 999.** Finally, FENASEP alleges that the Minister of Labour is attempting to disregard FENASEP as a trade union organization and is currently refusing to grant it education insurance funds, leaving thousands of public servants without the necessary protection (all the private sector trade union organizations are receiving the corresponding budget appropriation).
- 1000.** In its communication of 30 June 2010, CONATO alleges that Act No. 43 of 2009, and Act No. 4 of 2010, have removed the right of public officials dismissed unfairly and then reinstated through a ruling to receive the lost wages running from the moment of separation until that of reinstatement.
- 1001.** CONATO also alleges refusal to allocate 5 per cent of the education insurance to FENASEP. Section 4 of the cabinet decree of 27 July 1971, establishing the education insurance, states that it is the Trade Union Education Commission that is responsible for determining the use of education insurance funds for education or trade union training. Indeed, for many years, the abovementioned Commission approved the allocation of said funds to FENASEP, taking into account the fact that FENASEP is a unique and special trade union organization which operates within the public administration and which has been a part of CONATO for approximately 15 years. Moreover, on various occasions, a FENASEP representative has spoken before the International Labour Conference (ILC) on behalf of the entire Panamanian trade union movement. Furthermore, the education insurance is financed by deductions (1.25 per cent) from the salaries of all public workers. CONATO states that the Trade Union Education Commission is made up of three CONATO representatives, the Rector of the University of Panama, two technical experts on trade union education and the Minister of Labour (who presides over the Commission), with decisions being adopted by a majority. Furthermore, within this body, the Minister of Labour does not have the power to determine unilaterally how education insurance funds are allocated. The move to hold back these funds undoubtedly reflects the current Government’s anti-union policy.
- 1002.** Furthermore, the authorities orchestrated a libellous propaganda campaign to demonize and discredit the trade union leaders in the eyes of the public. In particular, they threatened to denounce various trade union leaders to the public ministry for alleged inconsistencies regarding the management of the 5 per cent of the education insurance. This anti-union campaign was undertaken despite the fact that section 224 of the Labour Code states that “The establishment of trade unions is in the public interest, being an effective means to contribute to the economic and social maintenance and development of the country, Panamanian popular culture and democracy”.

- 1003.** The CONATO also alleges that, through Ruling No. DM 280/09 of 15 December 2009, the Ministry of Labour and Labour Development (MITRADEL) implemented a manual of procedures for the Department of Social Organizations, with the aim of imposing these new rules on trade unions, federations, confederations and central workers' organizations when they present documents concerning the functioning of trade unions. These rules consist of supervising and vouching for the electoral process of trade union organizations and associations; intervening ex officio or at the request of the parties to the disputes between trade union organizations or associations or within them and resolving them in accordance with the law. Furthermore, in cases in which trade unions are carrying out changes to their executive, prior to its establishment, any new executive must be approved by MITRADEL. This ruling attempts to overturn or repeal provisions of the ILO Conventions, the Political Constitution and the Labour Code which concern the right to elect trade union representatives freely and which limit the competence of the Ministry of Labour to the registration of the electoral process. The abovementioned ruling endangers the exercise of trade union rights.
- 1004.** The CONATO adds that the authorities of the Ministry of Labour have frozen 30 requests for the trade union registration over the last ten months, that is to say, they are trying to avoid applying the Labour Code.
- 1005.** Furthermore, section 7 of Act No. 29 of 8 June 2010 allows enterprises to operate for the first six years without undertaking bargaining processes concerning collective labour agreements. Moreover, section 8 of this Act fails to take into consideration the representation of social organizations of workers and employers, that is to say, the National Private Enterprise Council (CONEP) and CONATO, with regards the composition of the Administration Committee of the Special Economic Area of Barú.
- 1006.** Finally, CONATO alleges that Act No. 30 of 2010 frees employers from the duty of deducting trade union dues and transferring them to the trade union, this change having a major economic impact on trade unions. Moreover, the abovementioned act amends the Labour Code, restricting the workers' right to strike and to have disputes resolved through arbitration.
- 1007.** Act No. 30 of 2010 also establishes that workers' confederations, centrals and trade union federations not affiliated to any confederation or central shall be grouped together under the Workers' Council of Panama (COTRAPA), with CONATO (the highest Panamanian workers' body) being abolished. Formerly, it was CONATO which submitted short lists to the executive body for the nomination of the workers' representatives to the ILC and the official Panamanian bodies. Now, these short lists will be submitted by COTRAPA, the workers' confederations and centrals and the trade union federations so that the Government can manipulate the appointment of the workers' representatives. Act No. 30 makes the situation worse by establishing that COTRAPA will be made up of a representative of CONATO, a representative of the Independent National Confederation of Labour Union Unity (CONUSI), a representative of each trade union confederation, a representative of each workers' central and a representative of each workers' federation.
- 1008.** Finally, CONATO refers to other violations of the labour rights of the workers not related to the ILO Conventions on freedom of association.

B. The Government's reply

- 1009.** In its communication of 11 May 2010, the Government states that the allegations made by FENASEP in its complaint refer to a series of situations that this organization perceives as being violations of trade union rights, as well as to FENASEP and ASEMITRABS, the latter body being completely unknown to the majority of the public servants working at the

Ministry of Labour. Consequently, there is a need to exhaustively examine the internal legislation, given that the public administration is built on a basis for management and rules which are distinct from those governing private enterprises. The latter are fundamentally covered by the provisions of the Labour Code, which defines the concept of trade union and how such bodies are granted legal personality, the situation regarding the public administration being very different.

- 1010.** As to the amendment of Act No. 9 of 1994, and Act No. 8 of 1998, structuring administrative and legislative careers respectively, the Government states that it considered it appropriate to reformulate the provisions of said Act, given that Act No. 24 of 2 June 2007 distorts the spirit of entry into the administrative service, which should be one of merit and competition. The Act of 2007 clearly deviates from the main objective of the administrative service career path by stating that acting public servants will only be evaluated if they can prove that they meet the minimum requirements for entry into the service and will not be required to take part in administrative service open competitions.
- 1011.** As to the legal minimum number of members of a trade union organization stated by FENASEP and established under Act No. 9 of 1994 (Administrative Careers Act), the Government states that, originally, the number was 50. In 2007, without any prior study being carried out, the minimum number of members required to form an organization of public servants was amended to 40. The only effect the new amendment of 2009 has is to re-establish 50 as the minimum number of members required to form an organization of public servants. It is important to highlight this fact given that the Administrative Careers Act neither refers to nor governs trade union organizations, as pointed out by FENASEP in its complaint.
- 1012.** Furthermore, FENASEP affirms that Act No. 43 of 30 July 2009 eliminates the tripartism, advocated by the ILO, by preventing FENASEP from participating in the Executive Committee and the Appeal and Conciliation Committee of the Administrative Service. It should be pointed out, in this regard, that the participation of public servants, as well as of the Government and the users, in said bodies is enshrined in the provisions of said act.
- 1013.** The Government refers to the allegation that Mr Víctor C. Castillo Díaz is protected by section 17 of Act No. 43 of 2009, given that he holds the post of Secretary General of ASEMITRABS. In this regard, the Government states that the abovementioned employees' association is not currently operating within MITRADEL. The officials know nothing about ASEMITRABS or the activities of any such organization of public servants. In reality, said association does not operate within the institution. Furthermore, Mr Díaz has lodged an administrative appeal of full jurisdiction with the Third Administrative Disputes Chamber of the Supreme Court of Justice. Consequently, the Panamanian State must not issue an opinion in this regard because the case is currently being examined by the internal judicial authority which will decide on the legal merit of the claim.
- 1014.** FENASEP calls itself a trade union organization and states that it is being denied education insurance funds, with thousands of public servants being left without the necessary protection, given that all the trade unions in the private sector have received the corresponding budget appropriation. In this regard, the Government states that, under Panamanian positive law, the legislation is clear with regards the difference between a trade union and an association of public servants. The following is an example which demonstrates that point. There was an attempt to establish a trade union at the University of Panama, referred to as an enterprise workers' trade union. This registration of a trade union, made up of public servants working at the University of Panama, was presented as that of an enterprise trade union. However, the law does not permit the establishment of this type of organization for several reasons: (1) it is not composed of "workers" as defined according to the provisions of section 82 of the Labour Code; (2) the persons applying to

register an enterprise trade union are employed at the University of Panama, an entity which, in accordance with article 103 of the Political Constitution, is an Official University of the State with autonomous status. Hence, all persons employed there are public servants, as defined by article 299 of the Constitution: “Public servants are persons who are temporarily or permanently appointed to posts in the executive, legislature or judiciary, municipalities, or autonomous or semi-autonomous entities; and in general persons who are remunerated by the State”; (3) this trade union calls itself an enterprise trade union and it is therefore necessary to clarify this term in accordance with section 97 of the Labour Code which states “For the purpose of labour standards, enterprise means the structure encompassing activities and means which constitute an economic unit for the extraction, production or distribution of goods or services for profit or otherwise”. Clearly, in view of the provisions of the Constitution, the University of Panama does not meet this definition. It is important, therefore, to point out that registration of a trade union composed of public servants of the University of Panama is not feasible, since this violates clear, specific standards of the Labour Code.

- 1015.** The Government highlights that section 1 of the Labour Code governs the relationship between capital and labour, i.e. it refers to the employment relationship between a private investor and an employee. Such a private investor, as opposed to a public or official investor, has the legal title of “employer” and is defined as “the natural or legal person for whom the worker provides services or performs work” (section 87 of the Labour Code). An employee, as opposed to a public servant, is given the title of “worker” and is defined by law as the natural person who has the obligation “by means of a verbal or written employment contract, explicit or presumed, individually or as part of a group, to provide a service or perform a task while subordinate to or dependent on a person” (section 82). The Labour Code does not govern employment relationships between public servants and state/public institutions, as provided for in section 2: “Public employees shall be governed by the administrative career regulations, except where specific provision is made for the application of any rules of the present Code”. Article 3 of the Constitution states that public servants are persons appointed within, inter alia, autonomous or semi-autonomous entities, and in general those who receive remuneration from the State; therefore, it is not the provisions of the Labour Code but the administrative career regulations which are applicable, as laid down by section 2 of the Code, and therefore it is not possible to claim treatment and benefits, such as the education insurance appropriation, equal to those enjoyed by trade unions if associations of public servants are not covered by those benefits.
- 1016.** In its communication of 2 December 2010, the Government transmits a ruling of the Supreme Court of Justice, of 17 February 2006, recognizing the right of public servants to receive the lost wages and other benefits for the period between the date of their unfair dismissal and their reinstatement. Regarding this last point, in its communication of 11 November 2010, the Government states that the complainants state that in the world of work (both private and public), as a general rule, any worker who has been unfairly dismissed and then reinstated through a ruling, has the right to receive the lost wages for the period between the moment of separation and reinstatement. Furthermore, according to the complainants, as a result of Act No. 43 of 30 July 2009, public servants have had this right taken away from them. The Government states that this claim is groundless, given that Act No. 43 of 2009 does not contain any provision for the removal of such a right. This is demonstrated by the cases of the officials of MITRADEL, who were dismissed and consequently brought successful legal actions which resulted in the State having to pay the employment benefits resulting from the actions.
- 1017.** As to the alleged disregard for FENASEP as a trade union organization, the Government states that in the complaint it is claimed that the authorities disregard Articles 10 and 15 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). However, Article 10 determines the meaning of the term “organization”, and

therefore the authorities cannot be held to have disregarded anything because the article merely refers to the meaning of a term. Article 15 determines the obligation of those Members of the International Labour Organization (ILO) whose ratifications have been registered with the Director-General.

- 1018.** With regards this last point, the Government highlights that it responded to the appeal made by the Committee of Experts on the Application of Conventions and Recommendations and the Standards Committee of the ILC of the ILO, setting out the recommendations of the Committee on Freedom of Association concerning Case No. 1931, and the proposals that the Office wishes to implement. Among other things, a formal request was made to the ILO for technical assistance from the Office in addressing issues concerning freedom of association, in order to seek formulas of compromise making it possible to harmonize national legislation and practice with the provisions of Conventions Nos 87 and 98.
- 1019.** It should be reiterated that under Panamanian law there exists a clear and defined difference between a trade union organization and an association of public servants. The Labour Code does not govern employment relations between public servants and government or public institutions, in accordance with the final paragraph of section 2, which states that: “Public employees shall be governed by the administrative career regulations, except where specific provision is made for the application of any rules of the present Code”.
- 1020.** The Political Constitution of the Republic determines that “Public servants are persons who are temporarily or permanently appointed to posts in the executive, legislature or judiciary, municipalities, or autonomous or semi-autonomous entities; and in general persons who are remunerated by the State”.
- 1021.** Furthermore, for FENASEP to be considered as a trade union organization, the Political Constitution would have to be amended, which would be no easy task according to article 313, Title XIII of the Constitution on “Reform of the Constitution”, which states that:

The National Assembly, Cabinet Council and the Supreme Court of Justice all have the power to propose constitutional reforms. Said reforms must be approved through one of the following procedures:

- (1) Through a constitutional act, approved in three debates by an absolute majority of the members of the National Assembly, which must be published in the *Official Journal* and transmitted by the executive body to said Assembly within the first five days of the ordinary sessions following the installation of the National Assembly elected at the last general elections, so that in its first term of office the reform may be debated and approved without amendment, in one single debate, by the majority of the members making up the Assembly.
 - (2) Through a constitutional act approved in three debates by an absolute majority of the members of the National Assembly, in one term of office, and also approved, in three debates, by an absolute majority of the members of the abovementioned Assembly, during the following term of office. At that time the text approved during the previous term of office may be amended. The constitutional act approved in this way must be published in the *Official Journal* and submitted to direct popular consultation through a referendum to be held on the date set by the National Assembly, within a period of no less than three months and no more than six months from the time of the approval of the constitutional act during the second term of office.
- 1022.** As to the allegation regarding the refusal to grant 5 per cent of the education insurance to FENASEP, the Government states that FENASEP is a representative association of the public sector workers of Panama, with legal personality granted by the executive body

through Ruling No. 345 of 20 September 1984, and is therefore governed by Title VIII, chapter I, section 174, and the following articles of Act No. 9 of 20 June 1994 “establishing and regulating administrative careers”.

- 1023.** Section 175 of the same Act states that “Associations of public servants shall be recognized by the executive body through the Ministry of Government and Justice, with the opinion of the General Directorate of Administrative Careers through a reasoned ruling and subject to compliance with the requirements established by law”. Section 175 goes on to state “Associations shall be granted legal personality once they have been registered in the Associations of Public Workers Section of the public registry, and shall enjoy the same rights and be governed by the same limitations as any other not-for-profit association”.
- 1024.** The above information is fundamental in determining whether FENASEP has the right to receive education insurance funds for trade union education under Act No. 13, section 2(2), of 28 July 1987.
- 1025.** This act states that the 5 per cent appropriation shall be used for “trade union education”, that is to say, by trade union organizations recognized by the executive body and whose legal personality shall be determined by registration with MITRADEL. FENASEP does not fall into this category, because, although it was granted recognition and consequent legal personality by the executive body, this was done through the Ministry of Government on the understanding that FENASEP was a not-for-profit association, and in no way a trade union, as if it were, its legal personality would be registered with MITRADEL.
- 1026.** The Government opines that the way in which FENASEP was granted its legal identity and the purposes for which it was established cannot be disregarded. While the purposes of FENASEP seem to coincide with those of a trade union organization and with participation in CONATO, the federation does not fall into this category. Therefore, the idea that FENASEP should receive financial support is questionable, given that only trade unions are entitled to such funding.
- 1027.** FENASEP cannot claim to have been established under Act No. 9 of 28 June 1994 and then use other provisions of Panamanian positive law to claim benefits to which, in the view of the Government, it is not legally entitled. Had financial support been granted, then this would mean that MITRADEL had committed an act of corruption and diversion of public funds, which would obviously be illegal.
- 1028.** As to the allegation that the Government has dismissed trade union leaders within the Ministry of Labour, disregarding the grounds mentioned in Act No. 43 of 2009, the Government states that no employees’ associations operate within MITRADEL, and therefore, no trade union leaders have been dismissed.
- 1029.** As to the alleged campaign aimed at discrediting the trade union leaders, the Government states that it is clear that the complainants have made a series of fictitious statements. The complainants refer to a report issued by the Office of the Comptroller General of the Republic, dated 11 May 2010, examining the way in which trade unions spend public money (such as the education insurance), the use of which must be supervised by the State owing to its provenance. This report identified serious administrative irregularities and the diversion of funds by some trade unions, as a result of which the State was clearly obliged to send the findings of the report to the Public Ministry, so that the latter could, subject to compliance with the law, identify those responsible, should they exist. In a State governed by the rule of law, these principles apply to all citizens residing in the Republic of Panama, with no exception being made for members of a trade union, and therefore no articles of Convention No. 87 have been violated, nor has the freedom of association been infringed in any way.

1030. As to the allegations regarding the manual of procedures for the Department of Social Organizations, established under ministerial Ruling No. DM 280/09 of 15 December 2009, the Government states that this instrument is used by the Department of Social Organizations of MITRADEL. The manual covers the mechanism and requirements that must be respected with regards applications or procedures within said department. It in no way limits the freedom of association, on the contrary, it reiterates, for the benefit of trade union organizations, the formalities with which they sometimes fail to comply (thus impeding the effective and timely management of procedures). The manual also gives details of and expands on the legal framework, in keeping with the Constitution and the Labour Code, allowing officials to be proactive and to manage trade union structures in due form (assemblies, vote counting, leave to attend seminars, reform of statutes, etc.). The Department of Social Organizations does not, however, interfere with regards changes to executive committees, nor issues involving trade union immunity. Rather, those changes are transmitted to the department so that the database can be updated and the information certified should such an assurance be sought by interested parties. The Government attaches a copy of the manual of procedures, published in the *Official Journal* No. 26459 of 29 January 2010.

1031. As to the alleged freezing of 30 requests for trade union registration over the last ten months, thus avoiding implementation of the Labour Code and infringing provisions of Conventions Nos 87 and 98, the Government states that, once the appropriate inquiries were carried out before the Department of Social Organizations, nine legal personalities were granted under the current administration, far exceeding the number granted under any previous administration. The Government highlights that section 356 of the Labour Code establishes that:

Once the 15 calendar days referred to under articles 352 and 353 have expired, should the request for registration not have been rejected or objected to, the trade union, federation, confederation or workers' central organization shall be considered to be registered for all legal purposes and, consequently, the Ministry is obliged to issue the respective documents and certifications and to add the corresponding entry to the registry of social organizations.

1032. The Government goes on to state that, under the above provision, once the period established has expired, should the request for registration not have been rejected or objected to, the trade union, federation, confederation or workers' central organization shall be considered to be registered. Thus, it would be impossible to freeze 30 requests for trade union registration, given that under the law, they would have to have been registered and the corresponding certifications issued. The Government clarifies, however, that it would be impossible to grant legal personalities outside the framework of the law, that is to say, to bodies which fail to comply with the requirements established under the Act through actions such as: the presentation of a provisional list of members, failure to provide personal identity cards, errors of form (and sometimes of substance) concerning statutes, as well as the founding instrument or its clauses, among other causes or omissions leading to refusal of registration.

1033. As to Act No. 29 of 8 June 2010, establishing a special regime for the area of Barú, the Government states that for several decades now Puerto Armuelles and the district of Barú, in particular, have suffered from social, cultural, economic and health problems, owing to the failure of previous administrations to implement sustainable policies, an issue that the Government is addressing in a responsible manner. Assessments were carried out across the region, in order to identify possible opportunities for development. It was concluded that there was a need to establish an appropriate mechanism for attracting economic investment to the district in the form of a special economic area. The project took the form of a suitable integral development plan, based on the establishment of a special integral regime for the establishment and operation of enterprises, manufacturing industries and any economic activity that will contribute to the national and global economy through the

export of goods and services, promoting investment and encouraging scientific, technological, economic, cultural, educational, health and social development in the country.

- 1034.** The labour legislation was drawn up with employment promotion in mind, guaranteeing a 24/7 business environment through changes in terms of varying shifts and rest days (not necessarily Sundays). MITRADEL set up the Administration Committee of the Special Economic Area of Barú, which carried out large-scale consultations, dialogues and presentations aimed at the workers of the area, who, in turn, expressed their support for the project.
- 1035.** As to the allegations relating to Act No. 30 of 2010, the Government states that it concluded the National Tripartite Dialogue Forum with sectors of civil society, which met for over three months of intense debate over Act No. 30. Tripartite agreements were signed under which it was agreed that Act No. 30 would be split into six bills, to be approved at a future date by the legislative body.
- 1036.** Act No. 30 was repealed in October 2010 in the framework of a national tripartite dialogue which led to the approval of various acts by the National Assembly, including an act containing labour reforms (all of which were duly agreed on at the Tripartite Dialogue Forum). The arguments of the complainants were rendered groundless by the repeal of Act No. 30.
- 1037.** Finally, the Government reiterates that it respects the Conventions on the freedom of association and collective bargaining that it has ratified. It is for this reason that it has been making every effort to ensure their implementation within a framework of dialogue with the social actors. Therefore, the current labour administration, taking into account the reality of the current situation and in order to comply with Conventions Nos 87 and 98 on freedom of association and to promote the social dialogue, has been examining the possibility of establishing a higher labour council as the consultative tripartite body of the executive body, attached to MITRADEL, with the aim of regulating dialogue and promoting economic and social cooperation between the public authorities and the employers' and workers' organizations of the country with regards labour issues, with the technical support of the ILO.

C. The Committee's conclusions

- 1038.** *The Committee notes that, in the present case, the complainant organizations allege recent legal reforms and rulings restricting fundamental trade union rights, refusal to recognize the public servants' organization FENASEP in practice, the exclusion of FENASEP from tripartite bodies, refusal to grant FENASEP educational insurance funds for trade union training, the freezing of the recognition of 30 trade union organizations and the dismissal of a trade union leader.*
- 1039.** *As to the allegations regarding restrictions on trade union rights contained in Act No. 30 of 2010, concerning the right to strike, the deduction of union fees through a check-off facility, the possibility of recourse to arbitration and the establishment, in the light of this Act (or law), of COTRAPA in order to suppress CONATO, the Committee takes due note of the Government's statements concerning the repeal of Act No. 30 in October of 2010, within the framework of a national tripartite dialogue which led to the approval by the National Assembly of various acts containing reforms which had been duly agreed on.*
- 1040.** *As to the allegations regarding Act No. 29 of 8 June 2010, establishing a special regime for the area of Barú, which includes a provision allowing enterprises to operate for the first six years without undertaking bargaining processes concerning collective labour*

agreements (section 7 of the Act) and that the employers' central CONEP and the workers' central CONATO are not represented on the Administration Committee of the Special Economic Area of Barú, the Committee notes that the Government states that the aim of the Act is to address important social, economic and cultural issues while attracting economic investment and promoting employment. According to the Government, the Ministry of Labour and Labour Development established the Administration Committee of the Special Economic Area of Barú, which has carried out consultations, dialogues and presentations aimed at the workers of the area, who, in turn, have expressed their support for the project.

- 1041.** *The Committee wishes to point out that the right to collective bargaining is a fundamental right of the workers and their organizations and that Convention No. 98 only allows exceptions to the right to collective bargaining with regards officials engaged in the administration of the State, the armed forces or the police. Consequently, the Committee considers that section 7 of Act No. 29 constitutes a direct violation of Convention No. 98 and therefore urges the Government to take the necessary measures to repeal said provision without delay. Furthermore, noting that the Government has not responded to the complainants' allegation that the representatives of the country's workers' and employers' centrals are not represented on the Administration Committee of the Special Economic Area of Barú, the Committee, recalling the importance of consultation with the most representative employers' and workers' organizations with regards labour issues, requests the Government to consider, together with those organizations, the possibility of the latter being represented on the Administration Committee, in order that they might be consulted on issues affecting their members, and to keep it informed in this regard.*
- 1042.** *As to the allegations regarding a manual of procedures for the Department of Social Organizations (ministerial ruling of 15 December 2009), which according to the complainants restricts the exercise of trade union rights, the Committee takes note of the Government's statement that said Manual does not limit freedom of association and that it is in keeping with the Constitution and the Labour Code. The Committee observes that the complainant organizations highlight in particular the fact that the Manual requires that the rules governing executives must be "approved" by the Ministry of Labour and allows this Ministry to intervene ex officio in disputes between trade union organizations, as well as to supervise trade union electoral processes. The Committee observes that the text of the Manual (copy provided by the Government) does not seem to have been subject to consultations with the most representative trade union organizations. Rather, it is claimed that the Manual consists of a series of flexible procedures aimed at speeding up the administrative process and the Government is ready to consider any recommendations that might arise from its application. The Committee considers that certain terms employed in the Manual, such as the "approval" of executive committees, may give rise to problems of interpretation and requests the Government to examine said Manual with the most representative workers' organizations in order to clear up any misunderstandings and produce a text which enjoys as much support as possible.*
- 1043.** *As to the alleged increase of the minimum number of public servants required to establish a trade union association in the public sector (50 servants), in the light of Act No. 43, the Committee takes note of the Government's statement that: (1) the number of public servants required stood at 50 in 2007 (Act No. 9); (2) without any prior study being carried out, the minimum number of members required to form an organization of public servants was amended to 40; and (3) the new amendment of 2009 (Act No. 43) re-established 50 as the minimum number of members required to form an organization of public servants. In this regard the Committee wishes to highlight the principle that "The requirements 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 the authorities in registering a trade union constitutes*

an infringement of Article 2 of Convention No. 87.” Furthermore, the Committee refers to the article concerning the principle it established regarding enterprise trade unions, which states that “The establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes the minimum number of members of a trade union at obviously too high a figure, as is the case, for example, where legislation requires that a union must have at least 50 founder members.” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 279 and 284].

1044. The Committee also recalls that the Committee of Experts had considered the requirement of 50 public servants for the establishment of a trade union association in Panama to be excessive and had requested the Government to reduce that figure. In these circumstances, the Committee requests the Government to take measures to amend Act No. 43 in order to reduce the minimum number of public servants necessary to establish a trade union association, given that an excessively high minimum number could restrict trade union rights, in particular in certain public institutions and small municipalities.
1045. As to the allegation that, in the light of Act No. 43 of 2009, public servants dismissed unfairly and then reinstated through a ruling do not have the right to receive the lost wages for the period between the moment of separation and that of reinstatement, the Committee notes the Government’s statement that this allegation is groundless and notes that the Government backs up this claim by referring to two Supreme Court rulings obliging the State to pay the wages and other benefits. The Committee notes that the Government only sent one of the rulings, dated 17 February 2006, when, in fact, Act No. 43 was adopted in 2009. The Committee would therefore be grateful if the Government would send other rulings supporting its statement.
1046. As to the allegations regarding the organization of public servants FENASEP i.e. refusal by the authorities to recognize FENASEP in practice, despite the fact that FENASEP representatives have participated in the ILC as delegates on several occasions, exclusion of representatives of this organization from the Technical Committee and the Appeal and Conciliation Committee in the light of Act No. 43 of 30 July 2009, denial of education insurance funds (trade union training) previously enjoyed by FENASEP – affecting, in particular, all those public servants from whose salaries 1.25 per cent is deducted for the education insurance (thus discriminating between trade union associations of public servants and private sector trade unions), the Committee notes the Government’s statements that: (1) FENASEP is an association of public servants who are remunerated by the State, with legal personality granted by the Ministry of Government, governed by the Administrative Careers Act as a not-for-profit association, and not a trade union governed by the Labour Code and registered with the Ministry of Labour; (2) therefore it is not possible to claim treatment and benefits, such as the education insurance appropriation, equal to those enjoyed by trade unions if associations of public servants are not covered by those benefits; and (3) Act No. 43 of 30 July 2009 ensures the participation of public servants and the Government in the Expert Committee and the Appeal and Conciliation Committee of the Administrative Career Service. According to the Government, the Constitution would have to be amended for FENASEP to be considered as a trade union organization. The Government recognizes, however, that FENASEP participates in CONATO and was established for purposes which seem to coincide with those of a trade union organization. The Committee also recalls that, under the law, FENASEP enjoys the right to conclude collective agreements.
1047. The Committee wishes to highlight that associations of public servants, whether they call themselves trade unions or not, must enjoy all the rights and guarantees contained in Convention No. 87, which only allows the armed forces and the police to be excluded from enjoying such rights and guarantees. The Committee wishes to emphasize that the public

servants' organization FENASEP (whose representatives have participated in the ILC on several occasions and which is considered by the Government to be a representative association) recently had its right to enjoy education insurance funds for trade union training withdrawn despite the fact that public servants contribute 1.25 per cent of their salaries to said fund. Moreover, FENASEP has been excluded from the Expert Committee and the Appeals and Conciliation Committee of the Administrative Career. The Committee believes that the arguments for these exclusions advanced by the Government do not justify such treatment and requests the Government to initiate a constructive dialogue with FENASEP in order to find a solution to the problems which will avoid any risk of discrimination against the organization while allowing it to be recognized for all purposes in connection with its representativeness.

- 1048.** *As to the allegation that the Ministry of Labour has frozen 30 requests for trade union registration over the past ten months, the Committee notes that the Government states that the current administration has granted nine new legal personalities to trade union organizations (far exceeding the number granted under any previous administration), recalling that in cases of administrative silence trade union organizations having applied for registration should be considered to be registered. The Committee also notes that the Government states that legal personality cannot be granted unless the legal requirements have been fulfilled (submission of the list of members, presentation of identity cards, failure to provide founding act or the clauses of the statutes). The Committee requests the Government to indicate those trade unions which have not been registered despite the fact that they have submitted applications for registration and to communicate the reasoned administrative rulings behind the non-registration of trade union organizations.*
- 1049.** *As to the dismissal of Mr Víctor C. Castillo Díaz (according to the allegations, the General Secretary of the Association of Employees of ASEMTRABS) in violation of Act No. 43 on the protection of trade union leaders (trade union immunity), the Committee notes the Government's statements to the effect that: (1) this association is completely unknown to the majority of public servants working within the Ministry of Labour and no employees' associations currently operate within the Ministry; (2) Mr Víctor C. Castillo Díaz lodged a judicial complaint before the Third Administrative Disputes Chamber of the Supreme Court of Justice, which will rule on the legal merit of the claim. The Committee requests the Government to communicate the result of the appeal lodged against the dismissal of Mr Víctor C. Castillo Díaz and, given that the Government disputes his appointment as General Secretary and even the existence of his association of public employees (despite the fact that the complainant organizations have sent a public instrument drawn up by a solicitor which vouches for ASEMTRABS' establishment and executive committee), to indicate whether said association has applied for registration and legal personality and, should that be the case, to indicate the reasons why that application was unsuccessful.*
- 1050.** *As to the alleged campaign to discredit the trade union leaders in the eyes of the public, in particular involving threats to denounce various trade union leaders to the Public Ministry for alleged inconsistencies in the management of the 5 per cent of the education insurance, the Committee notes the Government's statements to the effect that: (1) the allegations are a series of fictitious statements; (2) the Comptroller General of the Republic issued a report on 11 May 2010 examining the way in which trade unions spend public funds (such as the education insurance). This report identified serious administrative irregularities and the diversion of funds by some trade unions, as a result of which the State was clearly obliged to send the findings of the report to the Public Ministry, so that the latter could, subject to compliance with the law, identify those responsible, should they exist. The Committee requests the Government to send it copies of any rulings or charges brought by the Public Ministry against trade union leaders for illicit diversion of public funds.*

- 1051.** Finally, the Committee notes that the Government has been examining the possibility of establishing a higher labour council as a consultative body in order to promote social dialogue concerning labour issues with the technical support of the ILO, and that it has formally requested ILO technical assistance in harmonizing national legislation and practice with the provisions of Conventions Nos 87 and 98 (the Government highlights that request in the part of this document regarding the allegations affecting FENASEP). The Committee expresses the firm hope that said technical assistance will be established in the very near future.

The Committee's recommendations

- 1052.** *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 Act No. 29 of 8 June 2010, establishing a special regime for the area of Barú, which includes a provision allowing enterprises to operate for the first six years without undertaking bargaining processes concerning collective labour agreements (section 7 of the Act), the Committee urges the Government to take the necessary measures to repeal the abovementioned section 7 without delay. Furthermore, noting that the Government has not responded to the allegation made by the complainants with regards to said Act, according to which, the representatives of the workers' central CONATO and the employers' central CONEP are not represented on the Administration Committee of the Special Economic Area of Barú, the Committee recalls the importance of consultation with the most representative employers' and workers' organizations with regards labour issues, requests the Government to consider, together with those organizations, the possibility of the latter being represented on the Administration Committee, in order that they might be consulted on issues affecting their members, and to keep it informed in this regard.*
- (b)** *As to the allegations regarding a Manual of Procedures for the Department of Social Organizations (ministerial ruling of 15 December 2009), which according to the complainants restricts the exercise of trade union rights, the Committee notes that the text of the Manual (copy provided by the Government) does not seem to have been subject to consultations with the most representative trade union organizations. Rather, it is claimed that the Manual consists of a series of flexible procedures aimed at speeding up the administrative process and the Government is ready to consider any recommendations that might arise from its application. The Committee finds that certain terms employed in the Manual, such as the "approval" of executive committees, may give rise to problems of interpretation and requests the Government to examine said Manual with the most representative workers' organizations in order to clear up any misunderstandings and produce a text which enjoys as much support as possible.*
- (c)** *As to the alleged increase of the minimum number of public servants needed to establish a trade union association in the public sector (50 servants) in the light of Act No. 43, the Committee requests the Government to take measures to amend Act No. 43 in order to reduce the minimum number of public servants necessary to establish a trade union association, given that*

an excessively high minimum number could restrict trade union rights, in particular in certain public institutions and small municipalities. As to the allegation that, in the light of Act No. 43 of 2009, public servants dismissed unfairly and then reinstated through a ruling do not have the right to receive the lost wages for the period between the moment of separation and that of reinstatement, the Committee notes the Government's statement that this allegation is groundless and notes that the Government backs up this claim by referring to two Supreme Court rulings obliging the State to pay the wages and other benefits. The Committee notes that the Government only sent one of the rulings, dated 17 February 2006, when, in fact, Act No. 43 was adopted in 2009. The Committee would therefore be grateful if the Government would send other rulings supporting its statement.

- (d) As to the allegations regarding the public servants' organization FENASEP i.e. refusal by the authorities to recognize FENASEP in practice, despite the fact that FENASEP representatives have participated in the ILC as delegates on several occasions, exclusion of representatives of this organization from the Technical Committee and the Appeal and Conciliation Committee in the light of Act No. 43 of 30 July 2009, denial of education insurance funds (trade union training) previously enjoyed by FENASEP – (despite the fact that all public servants have 1.25 per cent deducted from their salaries for the education insurance, thus discriminating between trade union associations of public servants and private sector trade unions), the Committee requests the Government to initiate a constructive dialogue with FENASEP in order to find a solution to the problems which will avoid any risk of discrimination against the organization while allowing it to be recognized for all purposes in connection with its representativeness.*
- (e) As to the allegation that the Ministry of Labour has frozen 30 requests for trade union registration over the past ten months, the Committee requests the Government to indicate those trade unions which have not been registered despite the fact that they have submitted applications for registration and to communicate the reasoned administrative rulings behind the non-registration of trade union organizations.*
- (f) As to the dismissal of Mr Víctor C. Castillo Díaz (according to the allegations, the General Secretary of the Association of Employees of ASEMISTRABS) in violation of Act No. 43 on the protection of trade union leaders (trade union immunity), the Committee request the Government to communicate the result of the appeal lodged against the dismissal of Mr Víctor C. Castillo Díaz and, given that the Government disputes his appointment as Secretary General and even the existence of his association of public employees (despite the fact that the complainant organizations have sent a public instrument drawn up by a solicitor which vouches for ASEMISTRABS' establishment and executive committee), to indicate whether said association has applied for registration and legal personality and, should that be the case, to indicate the reasons why that application was unsuccessful.*

- (g) *The Committee requests the Government to send it copies of any rulings or charges brought by the Public Ministry against trade union leaders for illicit diversion of public education insurance funds earmarked for trade union training.*
- (h) *Finally, the Committee notes that the Government has been examining the possibility of establishing a higher labour council as a consultative body in order to promote social dialogue concerning labour issues with the technical support of the ILO, and that it has formally requested ILO technical assistance in harmonizing national legislation and practice with the provisions of Conventions Nos 87 and 98 (the Government highlights that request in the part of this document regarding the allegations affecting FENASEP). The Committee expresses the firm hope that said technical assistance will be established in the very near future.*

CASE No. 2639

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

**Complaint against the Government of Peru
presented by
the Federation of Peruvian Light and Power Workers (FTLFP)**

***Allegations: Interference by the budgetary
authorities in the collective bargaining process
of state enterprises***

- 1053.** The Committee examined this case at its November 2009 meeting and presented an interim report to the Governing Body [see 355th Report, paras 977–1015, approved by the Governing Body at its 306th Session (November 2009)].
- 1054.** The Federation of Peruvian Light and Power Workers (FTLFP) sent new allegations in a communication dated 2 December 2009. The Government sent its observations in communications dated 12 November 2009 and 7 February 2011.
- 1055.** 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

- 1056.** In its previous examination of the case in November 2009, the Committee made the following recommendation with regard to the pending issues [see 355th Report, para. 1015]:

The Committee awaits the Government's specific observations on the allegations contained in the latest communication [of 3 November 2008] from the complainant organization, concerning attempts to make the trade unions relinquish the entitlement enjoyed in several public enterprises to take union leave at any time and particularly anticipates the information expected by the FONAFE and the labour inspection on these issues.

- 1057.** The complainant's allegations of 3 November 2009 referred to in the Committee's recommendation [see 355th Report, paras 982–987] are reproduced below.
- 1058.** In its communication of 3 November 2008, the complainant refers to the case of the Electro Sur Medio SAA – the enterprise – in which two of its affiliated first-level trade unions, the Single Trade Union of Workers and Employees of Electro Sur Medio SAA ICA–NASCA and its subsidiaries and Allied Workers and the Single Trade Union of Workers of Electricidad Regional Sur Medio SAA Pisco–Chincha, operate and, at the time of the complaint, were negotiating the lists of demands for 2007–08 and 2008–09. The complainant states that on 22 September 2008 the aforementioned unions contacted the enterprise and the Ica Regional Labour Authority about the decision by members to launch an unlimited nationwide strike, which had received majority approval because of the refusal by the enterprise to settle the list of demands for 2007–08.
- 1059.** The decision to go on strike was taken on 9 and 11 September at assemblies convened and organized by the respective executive committees, in accordance with the trade unions' own rules and the provisions of the Collective Labour Relations Act.
- 1060.** Nevertheless, in a letter of 23 September 2008, in response to the notice of strike action and in blatant disregard of the right to collective freedom of association, the enterprise stated: "We have taken note of your undated communication giving notice of your decision, as recorded in the minutes of your assemblies of 9 and 11 September, to launch an unlimited general strike from midnight on 7 October 2008. During those assemblies, it would seem that your members made their decision without knowing that, on 18 September, you were called to our head office in order to be informed that we have accepted your latest comprehensive pay proposal, with the sole proviso being agreement to the union leave limits established by law, which is reasonable in the light of this enterprise's needs in an extremely difficult economic situation".
- 1061.** The employer thus accuses the two unions of having held the general assemblies of workers and of having agreed on strike action without informing union members of the employer's proposal to increase pay on condition that union officials involved in collective bargaining relinquished their ability to take union leave at any time, as is provided for in the collective agreements concluded with the enterprise. This is a clear example of blatant interference in union activities – protection against which is provided under Article 2 of ILO Convention No. 98 – and is especially serious considering that, as is explained below, the enterprise is seeking to make the relinquishment of union officials' right to take union leave at any time a condition for settling the collective bargaining demands for 2007–08, which is also a violation of freedom of association.
- 1062.** The complainant organization notes that, in another paragraph of the letter, the legal representative of the enterprise stated that: "Apparently, taking into account that the agreements were reached at the assemblies of 9 and 11 September 2008, the workers were unaware that your latest demand for a pay rise was accepted by the enterprise on 18 September. We therefore find it particularly remarkable that the workers want to launch an unlimited strike simply for a trade union benefit that will in no way affect free trade union activity, which we have always respected".
- 1063.** It should be noted in this regard that, pursuant to section 32 of the Collective Labour Relations Act No. 25593, which is now part of the single consolidated text approved by Supreme Decree No. 010-2003-TR, union leave over and above the legal minimum of 30 calendar days, as provided for by the Act, must be respected, unless, in this specific case, the parties agree to amend the collective agreement which gave rise to the trade union leave entitlements at the enterprise. In this regard, the refusal of the abovementioned unions to negotiate and surrender the right to take union leave at any time, which is

recognized under the collective agreements reached with the enterprise, cannot be used as a condition for and an obstacle to settling the demands for 2007–08. In particular, the enterprise proposes, as a condition for increasing pay and settling the dispute, that recognized entitlements to take union leave at any time should be limited to the number of leave days set by law (30 days per year), as referred to in section 32 of the Collective Labour Relations Act.

B. The complainant's new allegations

1064. In its communication of 2 December 2009, received at the ILO on 14 December 2009, the FTLFP alleges the following violations of collective bargaining in state electricity enterprises:

- At Electro Oriente SA, violation of the collective agreements of 2008 and 2009: the increase in basic wages is not being paid to some of the workers, despite this being stipulated by the collective agreements.
- At Electro Sur SA, violation of the collective agreements of 2007, 2008 and 2009: the increase in basic wages is not being paid to some of the workers, despite this being stipulated by the collective agreements.
- At Sociedad Eléctrica del Sur Oeste – SEAL, the increase in basic wages has not been paid to some of the workers for several years, despite this being stipulated by the collective agreements.
- At Electropuno SA, the increase in basic wages is not being paid to some of the workers, despite this being stipulated by the collective agreement of 2009.

C. The Government's reply

1065. In its communication dated 12 November 2009 the Government declares that, as regards the supposed attempts (alleged by the complainant) to make the trade unions surrender the right that they enjoy in various state enterprises to take union leave at any time, a request has been made, by means of official letter No. 958-2009-MTPE/9.110, to the National Fund for Financing State Enterprise Activity (FONAFE) to express its institutional opinion on these aspects, and the reply will be forwarded to the ILO in due course. In addition, by means of official letter No. 957-2009-MTPE/9.1110, a request has been made to the National Directorate of Labour Inspection to supply information on inspections it has ordered in state enterprises in connection with observance of union leave entitlements.

1066. In its communication dated 7 February 2011, the Government indicates it has requested information from relevant entities about the allegations concerning the application of union leave in the public companies mentioned. The Government indicates that the FONAFE declares that the legal system has established certain rules or mechanisms to ensure compliance with the recognition of collective rights. These mechanisms include union leave on the basis of which article 32 of Decree No. 010.2003.TR, unique text of the Act on Industrial Relations (TUO of the LRCT) establishes that an employer is required to give each union official union leave up to a maximum of 30 days per calendar year. Regarding the attribution of the union leave, FONAFE adds that it is necessary that a relationship exists between the parties. However, in this case, FONAFE is not the employer of any member of the union. Therefore, it is the responsibility of every company which employs unionized workers to define access to union leave. Moreover, FONAFE has never tried to suspend the union leave to the union leaders mentioned, nor does it have the legitimacy to do so. The Government adds that the Ministry of Labour and Employment Promotion has requested FONAFE to supply additional information regarding the application of union

leave in companies and entities within its framework. Once this information is received, it will be brought to the attention of the Committee.

D. The Committee's conclusions

- 1067.** *The Committee recalls that, according to the allegations, Electro Sur Medio SAA has sought to make the relinquishment of union officials' right to take union leave at any time a condition for settling the collective bargaining demands for 2007–08, stating that such leave should be limited to the number of leave days established by law (30 days per year), as referred to in section 32 of the Collective Labour Relations Act. The complainant also claims, however, that under section 32 of the Act, union leave over and above the legal minimum of 30 calendar days must be respected unless the parties agree to amend the collective agreement.*
- 1068.** *The Committee observes that the Government, in its reply to the Committee's recommendation in its last examination of the case, transmits the opinion of FONAFE concerning the alleged attempts to make the electricity sector trade unions relinquish their entitlement to take union leave at any time and that FONAFE indicates that the questions regarding union leave must be addressed to the enterprises concerned. The Government adds that it has requested the National Directorate of Labour Inspection to supply information on trade union leave and that it has also requested the enterprise to forward this information.*
- 1069.** *The Committee awaits the information announced by the Government concerning the allegations relating to trade union leave, including information from the enterprise concerned and other information on inspections made at the enterprise. The Committee expects that this information will be sent without delay.*
- 1070.** *As regards the new allegations contained in the complainant's communication dated 2 December 2009, the Committee observes that they concern the failure to pay the increase in basic wages to some of the workers despite such payment being stipulated by the collective agreements applicable at the enterprises Electro Oriente SA, Electro Sur SA, SEAL and Electropuno SA. In view of the lack of reply from the Government to these allegations, the Committee reiterates the importance of compliance with the terms of collective agreements, which should be binding on the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 939] and requests the Government to conduct an investigation and, if the failure to pay the increase in basic wages at the enterprises concerned is proven, to take steps to ensure that the workers receive the pay increase in question. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

- 1071.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee awaits the information announced by the Government concerning the allegations relating to trade union leave at the Electro Sur Medio SAA enterprise, including information from the enterprise concerned and other information on inspections made at the enterprise. The Committee expects that this information will be sent without delay.*
 - (b) Furthermore, with regard to the alleged non-compliance with certain collective agreements, the Committee reiterates the importance of*

compliance with the terms of collective agreements, which should be binding on the parties, and requests the Government to conduct an investigation and, if the failure to pay the increase in basic wages provided for in the collective agreements at the enterprises Electro Oriente SA, Electro Sur SA, Sociedad Eléctrica del Sur Oeste – SEAL and Electropuno SA is proven, to take steps to ensure that the workers receive the pay increase in question. The Committee requests the Government to keep it informed in this respect.

CASE NO. 2771

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

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

Allegations: The complainant organization alleges the detention of two trade union leaders; that their right to defence was not respected, and that they are detained in a prison institution far from their homes in overcrowded conditions endangering their physical safety

- 1072.** The complaint was presented in a communication dated 5 February 2010 by the General Confederation of Workers of Peru (CGTP).
- 1073.** The Government sent its observations in a communication dated 20 October 2010.
- 1074.** 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

- 1075.** In its communication of 5 February 2010, the CGTP states that in recent years Peru has experienced an unprecedented increase in social conflict. According to the figures provided by the Office of the Ombudsman, in December 2009, the number of national disputes had more than tripled compared to January 2006. The CGTP states that the Government's response to the growing number of disputes has been to combat social protest and those involved in it, in other words, civil society organizations and their leaders, instead of addressing the fundamental causes of conflict. This policy of criminalizing social protest is reflected in the increase in sentences handed down for behaviour associated with social protest, the prosecution and imprisonment of leaders for these or other offences, the use of the media to discredit the activities of social organizations, the toughening of police intervention, arbitrary detentions and torture, the use of administrative mechanisms to restrict the activities of trade unions and other social organizations, the intervention of the army to deal with disputes, and sanctions against the journalists and media reporting these situations.

- 1076.** The CGTP states that, in this context, the mining sector stands out as the main source of social and labour disputes in Peru. According to the Ministry of Labour, the mining sector employs less than 1 per cent of the national labour force but is involved in 68 per cent of labour disputes.
- 1077.** The CGTP indicates that the Casapalca Mine Workers' Union is a trade union affiliated to the CGTP and that Mr Pedro Condori Laurente is the union's General Secretary.
- 1078.** The CGTP states that on 9 September 2009 Mr Pedro Condori, along with other representatives of his organization, participated in a meeting at the Ministry of Labour with the objective of improving their poor conditions of work and employment and that he was arrested by the police on quitting this meeting. There had been no prior indication of the existence of an arrest warrant against him. The CGTP adds that, a few days later, Mr Claudio Boza, the trade union's Health and Safety Secretary, visited Mr Condori at the prison where he is being held to take him some food and deal with trade union matters. On his journey home, Mr Boza was also arrested, despite not having been previously informed of the existence of an arrest warrant against him. Although there are various prison institutions much closer to their homes, Mr Boza and Mr Condori continue to be held at the Aucallama prison in Huaral, making any coordination with their lawyers, trade union and family extremely difficult.
- 1079.** The CGTP reports that the arrests of the two trade union leaders are linked to the investigation that is being carried out into the killing of police officer Giuliano Villareal Lobatón, who died when hit by a stone during a protest organized by Casapalca workers in November 2008. The judicial authorities are trying to hold the trade union leaders responsible for the police officer's death, despite the lack of any evidence or legal arguments to warrant their prosecution. In particular: (1) there is no evidence whatsoever that they were present at the location in question when the alleged events took place. Furthermore, they claim that they were on their way to Lima, where they participated in a meeting at the Ministry of Labour on that day. In addition, neither of the trade unionists appear in the video footage taken at the time and place of the events referred to in the corresponding case file; (2) even if it were possible to prove that the trade union leaders were present at the scene of the crime, this would, given the large number of protest participants, constitute insufficient grounds to conclude that they threw the stone which caused the police officer's death; (3) there is no legal provision for holding leaders accountable for unintentional offences committed by third parties participating in a demonstration; and (4) many non-unionized workers participated in the abovementioned demonstration, and the stone could therefore have been thrown by a person unconnected with the trade union.
- 1080.** The decisions of the Public Prosecutor's Office and the judicial authority which ordered the arrests of the two trade unionists breach their right to defence, since they do not specify the conduct of which they are accused, giving only a generic description, with no basis in evidence, of the events that led to the police officer's death. Both decisions also violate the trade unionists' right to defence inasmuch as they do not specify the exact nature of the charges brought against them: both court orders are unclear as to whether they are accused (a) of having thrown the stone that caused the police officer's death, despite the lack of evidence for this, which would mean they are regarded as materially responsible for an act of culpable homicide, which would violate their right to the presumption of innocence, or (b) of being responsible, as trade union leaders, for the actions of participants in the abovementioned demonstration (indirect responsibility for homicide, for which, as explained above, there is no provision in law), which would violate the principle of legality, since that includes the right not to be prosecuted for an offence that does not exist in law.

- 1081.** Furthermore, according to the CGTP, the legal criteria for the detention of accused persons are not met, as both Mr Condori and Mr Boza are public figures, with a known place of residence, who participate frequently in meetings with government representatives; there is therefore no risk of their absconding that could justify their detention. Furthermore, the measure of detention is totally disproportionate, considering that the penalty for culpable homicide is only two years' imprisonment. If they had been given the maximum sentence, they would be released after only three more months in prison, taking into account time already served.
- 1082.** The CGTP adds that notice of confirmation of the detention order against Mr Condori was given on 22 January 2010, nearly five months after the corresponding appeal was filed. The decision issued by the Second Chamber for Criminal Proceedings of the High Court of Justice of Lima merely repeats, practically word for word, the contents of the appealed decision, without examining any of the arguments submitted by the defence. According to the Chamber, the risk that Mr Condori might abscond is based on the discrepancy between the address given in his national identity document and the address given in his statement to the police. This not only breaches the right to justification of judicial decisions, but also the right to be tried without undue delay. To date, the appeal against the warrant for Mr Boza's arrest, which was lodged on 15 January 2009, is still pending. Mr Condori has now been deprived of his liberty for five months. His health, which was already weakened by his mining work, is deteriorating day by day owing to the poor sanitary conditions in the prison where he is detained. His wife and three under-age children have to resort to community aid in order to support themselves. The same applies to Mr Boza, who has two young children.
- 1083.** The CGTP states that, due to the general problem of overcrowding in Peruvian prisons, both the defendants are obliged to pay a monthly "rent" of 150 nuevos soles in order to have access to a dormitory bed, without which they would have to sleep on the floor in the corridors. Furthermore, owing to the lack of adequate food given to prisoners, family members and trade union colleagues have to bring them food in prison. All this just further exacerbates their families' poverty. Lastly, Mr Condori has started receiving threats and verbal and physical abuse from two inmates in his block. Although there is no conclusive evidence, these inmates have revealed that their hostility is based on Mr Condori's trade union role, and the possibility that this abuse is orchestrated from outside the prison cannot be ruled out.
- 1084.** Lastly, the CGTP considers that the violations of the abovementioned civil rights are in reprisal for the trade union activities of Mr Condori and Mr Boza, who are furthermore being used as a public example to dissuade others from taking up positions of leadership within trade unions and social organizations. The CGTP therefore requests that the Committee adopt appropriate measures to ensure the immediate release of Mr Boza and Mr Condori, and to ensure that their rights are respected.

B. The Government's reply

- 1085.** In its communication of 20 November 2010, the Government indicates that the Secretary-General of the National Prosecutor's Office sent copies of the criminal proceedings brought against Mr Pedro Condori Laurente and Mr Claudio Boza, formally set out in File No. 40855-2009. This documentation states that, on 24 November 2008, the Huarochiri Provincial Prosecutor drew up the order for the removal of the corpse of Peruvian National Police (PNP) Captain Giuliano Villareal Lobatón, who was killed during the unrest associated with the strike organized by the Casapalca Mine Workers' Union. In a resolution without reference number, dated 26 November 2008, the Huarochiri Prosecutor's Office decided to initiate a police investigation before the Homicide Division

of the Criminal Investigation Department (DIRINCRI), for a 20-day period, to identify those responsible for this crime.

- 1086.** On 1 September 2009, the Huarochiri Provincial Prosecutor submitted report No. 426-2008FP-H-MP-FN, formalizing the criminal charge against Mr Pedro Condori Laurente, Mr Claudio Boza, and others, for the culpable homicide of PNP Captain Giuliano Carlo Villareal Lobatón. The indictment order was issued under Resolution No. 1, dated 8 September 2009, in which the judge of the Civil and Criminal Court of Matucana of the High Court of Lima ordered a summary investigation against the trade union leaders and other persons, and issued the arrest warrant.
- 1087.** In ruling No. 72-2010, dated 2 March 2010, the Deputy Provincial Prosecutor of the 46th Criminal Prosecutor's Office decided not to issue an indictment against defendants Pedro Condori Laurente and Claudio Boza, requested dismissal of the proceedings, and requested that certified copies be sent to the registry office of the Criminal Prosecutor's Office in session in Lima, to enable it to continue the investigation with a view to identifying the person responsible for throwing the stone which caused the victim's death. In a resolution with no reference number, dated 10 March 2010, the 46th Criminal Court of the High Court of Justice of Lima received the abovementioned ruling and ordered that the court decisions be placed at the disposal of the parties for a period of ten days, in order to allow them to prepare their case in writing or orally.
- 1088.** In an order dated 25 March 2010, the Criminal Judge of the 46th Criminal Court of the High Court of Justice of Lima ordered the immediate release of the trade union leaders and, on 11 June 2010, ordered that the case be definitively dismissed and filed. The Government adds that the appeal brought by the civil party before the Second Chamber for Criminal Proceedings of the High Court of Justice against the dismissal order granted by the 46th Criminal Court of Lima remains pending.

C. The Committee's conclusions

- 1089.** *The Committee observes that, in the present case, the CGTP alleges the arrest in September 2009 of the trade union leaders Mr Pedro Condori Laurente, General Secretary, and Mr Claudio Boza, Health and Safety Secretary, of the Casapalca Mine Workers' Union within the framework of an investigation into the death of a policeman, a fact which the Committee can only deplore. The CGTP also alleges that the right to defence of the trade union leaders was not respected, that they are held in a prison establishment far from their homes in overcrowded conditions, and that Mr Condori Laurente has started receiving threats and verbal and physical abuse.*
- 1090.** *The Committee notes that the Government reports that: (1) the Criminal Judge of the 46th Criminal Court of the High Court of Justice in Lima on 25 March 2010 ordered the immediate release of the trade union leaders and the definitive dismissal and filing of the case; and (2) the civil party in the case filed an appeal against the dismissal order.*
- 1091.** *The Committee recalls 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 of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 70]. Under these circumstances, while profoundly regretting the detention and the conditions of detention suffered by these trade union leaders, the Committee requests: (1) to be kept informed of the result of the appeal brought by the civil party against the dismissal order issued by the 46th Criminal Court of Lima; and (2) asks the Government take the necessary measures to fully compensate the trade union leaders Pedro Condori Laurente, General Secretary, and Claudio Boza,*

Health and Safety Secretary, of the Casapalca Mine Workers' Union, for their seven months of detention.

The Committee's recommendations

1092. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests to be kept informed of the result of the appeal brought by the civil party against the dismissal order issued by the 46th Criminal Court of Lima in the investigation into the death of a policeman.*
- (b) The Committee asks the Government to take the necessary measures to fully compensate the trade union leaders Mr Pedro Condori Laurente, General Secretary, and Mr Claudio Boza, Health and Safety Secretary, of the Casapalca Mine Workers' Union, for their seven months of detention.*

CASE NO. 2528

INTERIM REPORT

Complaint against the Government of the Philippines presented by 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

- 1093.** The Committee last examined this case at its March 2010 meeting, when it presented an interim report to the Governing Body [356th Report, paras 1117–1193, approved by the Governing Body at its 307th Session (March 2010)].
- 1094.** The Union of Filipino Employees (UFE–DFA–KMU) sent new allegations in communications dated 16 August and 3 September 2010.
- 1095.** The Government forwarded additional observations in a communication dated 15 November 2010.
- 1096.** 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

1097. At its March 2010 session, in the light of the Committee's interim conclusions, the Governing Body approved 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 judgments;
 - (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.
- (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 Labour 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 judgments 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.

B. The complainant's new allegations

1098. By its communications dated 16 August and 3 September 2010, the UFE–DFA–KMU alleges continuing violation of trade union rights at the Nestlé-Philippines Cabuyao factory. According to the union, the Government, together with the enterprise's management created the Nestlé Cabuyao Workers Union (NCWU) to eliminate the UFE–DFA–KMU as the sole and exclusive bargaining agent for the Cabuyao workers, to undermine the final and executory decision of the Supreme Court and to annihilate the retirement benefits as part of the negotiable issue in the collective agreement. It further indicates that in January 2010, the Court of Appeals of the Philippines affirmed the earlier decision of the National Labor Relations Commission (NLRC), that the termination by the enterprise of more than 600 workers was legal and justified due to workers' defiance of the DOLE Secretary's Assumption of Jurisdiction Order. In April 2010, the Supreme Court dismissed the union's petition for review regarding the illegal dismissal case due to the lack of merit.

1099. The union further alleges that on 2 June 2010, at around 5.20 p.m., unidentified men gunned down a trade union leader in a crowded street in Barangay Caingin, Santa Rosa City, Laguna. Edward Panganiban, aged 27, died on the spot after sustaining 12 gunshot wounds. Mr Panganiban worked in Japanese-owned Takata Philippines Incorporated in Laguna Technopark Incorporated (LTI) and was elected secretary of the Independent Union Samahang Laks ng Manggagawa as Takata Philippines (SALAMAT–Independent).

1100. The UFE–DFA–KMU further question the composition of the Executive Committee of the Tripartite Industrial Peace Council (TIPC) and states that labour sector representatives on the TIPC are not real leaders of the working class.

C. The Government's reply

1101. In its communication dated 15 November 2010, the Government indicates that the TIPC Monitoring Body was established pursuant to Resolution No. 1 of 20 January 2010 as the monitoring body on the application of the international standards, in particular the ILO Conventions on freedom of association and protection of the right to organize. The Government stresses its commitment to the promotion of inclusive tripartism and social dialogue through the reconstitution of the TIPCs at the national and regional levels and

indicates that the complainant in this case, the KMU, has already conveyed interest to participate in the national TIPC and in the TIPC Monitoring Body.

- 1102.** The Government further indicates that through its Resolution No. 2, adopted on 25 June 2010, the TIPC Monitoring Body recommended the following actions for the 39 cases of extrajudicial killings: (a) eight cases for closure; (b) six on-trial cases were requested to be prioritized by the courts and the Department of Justice (DOJ) for prosecution and resolution; (c) 11 cases for expeditious investigation by the DOJ; and (d) 14 cases for the Commission on Human Rights (CHR) to conduct an in-depth investigation on the circumstances or a “final pass” on those that had already been investigated by either the CHR, the Philippines National Police (PNP) Task Force, or DOJ Task Force 211, with a view to accord justice to the victims and their families at the soonest possible time. A copy of this resolution was provided by the Government.
- 1103.** The Government indicates that this resolution has been forwarded to the relevant agencies for the appropriate action and the DOLE Secretary had sought audience with the heads of the agencies for the commitment to expedite the investigation, prosecution and resolution of the cases. The DOJ has responded that it will form a panel of prosecutors to look into the cases. Furthermore, on the TIPC’s request to the Supreme Court for prioritization of the six cases pending before various lower courts, the meeting between the DOLE Secretary and representatives of the Supreme Court is being arranged. With regard to the 14 cases endorsed to the CHR, ten were recommended for closure. Most of these cases were either archived due to the non-availability of witnesses/lack of evidence or were closed without prejudice to reopening once there are developments on the case. The Government indicates that the recommendations of the TIPC Monitoring Body, together with the alleged harassment and abduction cases raised in Case No. 2528, will be discussed at its November 2010 meeting.
- 1104.** The Government further indicates that: (a) letters of intervention were sent in relation to the case of workers of Karnation Industries and Export Incorporated and the case of Felicidad Caparal; (b) follow-up letters were sent to the management of the relevant companies; and (c) “backdoor” negotiation to facilitate the settlement of the labour dispute involving AMADO–KADENA–NAFLU–KMU is currently being undertaken by the DOLE Secretary.
- 1105.** The Government further reiterates its commitment to capacity-building and awareness-raising activities and the initiated legislative reforms to further strengthen trade unionism and remove obstacles to the effective exercise of labour rights.

D. The Committee’s conclusions

- 1106.** *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. The Committee recalls that in its previous examination of this case, it had noted the efforts and steps taken or envisaged by the Government in recognition of the gravity of the allegations. The Committee notes with interest the efforts pursued and the further steps indicated by the Government to address the issues raised in this case as well as the detailed information provided by the Government to the Committee of Experts on the Application of Conventions and Recommendations (CEACR).*
- 1107.** *The Committee notes, in particular, from the information supplied to the CEACR, the information on the measures taken by the Government to strengthen the operational capacity of the PNP and armed forces of the Philippines (AFP) aimed at fostering an*

enabling environment for the enjoyment of constitutionally guaranteed civil liberties and trade union rights through (1) inclusion into the PNP operational procedures (POP) manual and the manual on rules on labour disputes, rallies and demonstration of human rights protection to be provided to victims and criminals; (2) supplementing the POP manual with a guidebook on human rights-based policing to provide police personnel with a basic reference on rights-based policing and to offer practical suggestions on how to mainstream international standards on human rights for law enforcement in police stations; (3) reinforcement of human rights desks in the police stations; and (4) the campaign to dismantle all private armies. It further notes the Government's indication that the revised joint guidelines on the conduct of the PNP personnel and private security guards during strikes and lockouts are to be signed before the end of 2010 after the final consultation.

- 1108.** The Committee also notes information on the activities conducted under the EU–Philippines Justice Support Program (EPJUST) (police and other investigative bodies, prosecutors and judiciary) aimed, among others, at: (1) enhancing the capacity and effectiveness of the Philippine justice system in the effective and timely investigations, prosecution and bringing to justice perpetrators, ensuring a fair, speedy and impartial trial of those charged with the crimes; (2) enhancing the capacity and effectiveness of the Commission of Human Rights; and (3) strengthening the ability of the uniformed services to train their personnel in relevant international human rights standards.
- 1109.** Moreover, the Committee notes that two regional seminars were conducted in April 2010 on civil rights, freedom of association, collective bargaining, and labour law implementation and enforcement in the Philippine economic zones; and that a capacity-building seminar for labour justice administrators, supreme court justices and their legal staff were conducted at the end of 2010.
- 1110.** The Committee notes, in particular, that the TIPC Monitoring Body was established in January 2010 as a monitoring body on the application of the international standards, in particular Convention No. 87. While the Committee notes the concern raised by the UFE–DFA–KMU as to the workers' representation at this body, it notes, from the information provided by the Government and Resolution No. 2, concerning this case, adopted by the TIPC Monitoring Body on 25 June 2010, efforts made by the Government to involve the KMU, the complainant organization in this case. The Committee expects that the Government will continue to engage with the KMU in dealing with cases involving its members and leaders and requests to be kept informed in this respect.
- 1111.** Welcoming the measures taken so far by the Government, the Committee requests it to continue to keep it informed of the steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines, and encourages the Government to develop a fully-fledged technical cooperation programme in this respect.

Extrajudicial killings

- 1112.** The Committee notes that the abovementioned resolution contains detailed information on the status of the 39 cases of alleged killings. The Committee notes that out of 39 cases, eight cases have been recommended for closure by the PNP Task Force and/or DOJ Task Force 211. The Committee further notes that out of the latter eight cases, in three cases, the main suspects were dead; in one case, the suspect was tried and acquitted, and in the remaining four cases, the injured parties have “voluntarily executed an affidavit against the filing of any civil, criminal or administrative cases against the suspects”. With regard to these four cases, the Committee considers that the killing, disappearance or serious injury of trade union leaders and trade unionists require the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the

circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 48]. In the Committee's opinion such crimes, due to their seriousness should be investigated and prosecuted *ex officio*, i.e. even in the absence of a formal criminal complaint being lodged by a victim or an injured party. The Committee stresses that the absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest**, *op. cit.*, para. 52]. 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.

1113. The Committee further notes from Resolution No. 2 that out of the 39 cases referred to above, the TIPC requested to prioritize prosecution and/or resolution of six cases already pending before the prosecutors' office and/or courts; to expedite the investigation in 11 cases and/or immediately effect the arrest of suspects (if applicable); and refer 14 cases to the CHR. With regard to the latter, the Committee notes the Government's indication that ten cases were recommended by the CHR for closure and that most of these cases were either archived due to non-availability of witnesses/lack of evidence or were closed without prejudice to reopening once there are developments.
1114. While noting the information above, the Committee deplores that the Government once again omitted to provide the relevant data concerning the investigation, prosecution and judicial proceedings in the Hacienda Luisita incident, 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. Recalling 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 urges the Government to provide specific information without further delay as to the institution of judicial proceedings for this incident which dates back to 2004.
1115. The Committee further deeply regrets that no information has been supplied by the Government on the allegations of murder, and attempted murders, brought forward by the KMU in communications dated 30 September and 10 December 2009. The Committee urges the Government to institute an independent investigation into these allegations without delay. The Committee understands from the information provided by the Government that these cases were scheduled to be discussed by the TIPC at its November 2010. The Committee therefore urges the Government to indicate the progress made by the TIPC in reviewing the following cases:
 1. Carlito B. Dacudao, organizer of the National Federation of Sugar Workers (NFSW)–KMU in Negros, 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), 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 Myrianne Chapter, municipality of Manapla, Negros Occidental, 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), 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, killed on 12 December 2006.*
 6. *Jesus Buth Servida, Union President of the SM–EMI–Ind, 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, 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.*
- 1116.** *The Committee expresses serious concern at the complainant’s indication of a new murder on 2 June 2010 of Edward Panganiban, trade union leader in Barangay Caingin, Santa Rosa City, Laguna. The Committee urges the Government to institute an independent investigation and to respond without delay to this new allegation of murder. It expects that this case will also be reviewed by the TIPC and urges the Government to indicate without delay the progress made in this regard.*

Abductions and enforced disappearances

- 1117.** *The Committee notes the Government’s indication that the issue of abductions and enforced disappearances was scheduled for the discussion by the TIPC Monitoring Body at its November 2010 meeting. The Committee therefore expects that the Government will communicate detailed information as to the progress made in investigating and prosecuting all alleged cases of abductions and enforced disappearances and provide any relevant court judgments.*
- 1118.** *The Committee recalls that it had previously noted that a Bill “defining and penalizing the crime of enforced or involuntary disappearance and for other purposes” was before the Congress. The Committee considered that the adoption of this Bill could represent an important step in acknowledging the existence of enforced disappearances and ensuring significant and dissuasive sanctions. Regretting the absence of any new information in this regard, the Committee requests the Government to keep it informed of the progress made in its adoption, or of any other relevant legislative measures.*

Witness protection

- 1119.** *The Committee recalls that it had previously noted that the Supreme Court considered that the witness protection programme (WPP) was shown to be insufficient in some aspects and that together with the CHR, it was reviewing the WPP on the Writ of Amparo adopted in 2007. The Committee notes with interest the adoption, on 11 December 2009, of Act*

No. 9851 on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, providing, in section 13, for measures which could be taken by the court or prosecutor for the protection of victims and witnesses. It further notes with interest Act No. 9745 (Anti-Torture Act), approved on 10 November 2009, which penalizes torture and other cruel, inhuman and degrading treatment or punishment and reinforces the earlier issuances of the Supreme Court on the Writ of Habeas Data and Writ of Amparo.

Lengthy procedures

- 1120.** *The Committee notes the Government's indication that Resolution No. 2 had been forwarded to the relevant agencies for their action and that the DOLE Secretary had sought audience with the heads of the agencies for the commitment to expedite the investigation, prosecution and resolution of the cases. The Committee further notes the Government's indication that the DOJ has responded that it would form a panel of prosecutors to look into the cases. Furthermore, on the TIPC's request to the Supreme Court for prioritization of the six cases pending before various lower courts, the meeting between the DOLE Secretary and representatives of the Supreme Court is being arranged. The Committee requests the Government to keep it informed of the developments in this respect.*
- 1121.** *The Committee recalls that it had previously observed 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 had also observed that, as a result, the then 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 judgment 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 once again requests the Government to supply information on the working of the 99 regional trial courts designated by the Supreme Court, including on the length of procedures in practice, and to provide detailed information on steps taken to create a special team of competent and well-trained prosecutors.*
- 1122.** *Furthermore, the Committee once again requests the Government to provide information regarding the adoption and implementation of the "Omnibus Rules" elaborated by the CHR, which would require cases to be treated within a maximum of one year.*

Chain of command

- 1123.** *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. The Committee notes that abovementioned Acts Nos 9851 and 9745 contain provisions providing for criminal responsibility of superiors and penalizing commanding officers involved in the prohibited acts and requests the Government to provide information on their implementation in practice.*

Harassment and intimidation: Militarization of workplaces

- 1124.** *The Committee recalls that it had previously requested the Government to communicate its observations on the following allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU: (i) listing in the military's order of battle (Romualdo Basilio – KMU–SMR Chairperson; Omar Bantayan – KMU–SMR Secretary-General; and Joel Maglungsod – 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.*
- 1125.** *The Committee further notes that by its communications dated 16 August and 3 September 2010, the UFE–DFA–KMU alleges continuing trade union rights violations at the Nestlé–Philippines Cabuyao factory. According to the union, the Government, together with the enterprise's management created the NCWU to eliminate the UFE–DFA–KMU as the sole and exclusive bargaining agent for the Cabuyao workers, to undermine the final and executory decision of the Supreme Court and to annihilate the retirement benefits as part of the negotiable issue in the collective agreement. It further indicates that in January 2010, the Court of Appeals of the Philippines affirmed the earlier decision of the NLRC that the termination by the enterprise of more than 600 workers was legal and justified due to workers' defiance of the DOLE Secretary's Assumption of Jurisdiction Order. In April 2010, the Supreme Court dismissed the union's petition for review regarding the illegal dismissal case due to the lack of merit.*
- 1126.** *The Committee notes the Government's indication that follow-up letters were sent to the management of the relevant companies and that “backdoor” negotiations to facilitate the settlement of the labour dispute involving AMADO–KADENA–NAFLU–KMU is currently being undertaken by the DOLE Secretary. The Government further indicates that the cases of harassment raised in this case were scheduled to be discussed by the TIPC at its November 2010 meeting.*
- 1127.** *The Committee urges the Government to respond to the allegation submitted by the UFE–DFA–KMU without delay. It further requests the Government to keep it informed on the outcome of the discussion of the abovementioned harassment cases by the TIPC Monitoring Body or of any other measures taken to facilitate the settlement of labour disputes and to indicate the progress made in ensuring the full and swift investigation of the alleged acts of harassment and intimidation. The Committee recalls that such measures*

should be undertaken following consultations with the most representative workers' and employers' organizations.

- 1128.** *The Committee had previously requested to be kept informed of any measures taken to suppress the “order of battle” which leads to the commission of acts of violence against trade unionists on the basis of their purported ideology. The Committee notes with interest that pursuant to section 6 of Act No. 9745, “an ‘order of battle’ shall not and can never be invoked as a justification for torture and other cruel, inhuman and degrading treatment or punishment”.*
- 1129.** *The Committee reiterates its previous request to provide observations on the allegations concerning: (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.*
- 1130.** *The Committee also once again requests the Government to keep it informed regarding the 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.*

Arrest and detention

- 1131.** *The Committee deeply regrets that, except for stating that letters of intervention were sent in relation to the case of workers of Karnation Industries, no new information has been provided by the Government on the 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 PAMANTIK–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. The Committee urges the Government to submit further and precise information in relation to these arrests and the legal or judicial proceedings upon which they are based.*
- 1132.** *The Committee recalls that it had previously noted 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 judgment, 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 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 was scheduled to hear the motion on 11 January 2010.*
- 1133.** *The Committee urges the Government to communicate its observations in respect of the allegations regarding these 20 workers 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. Regarding, in particular, the workers of Karnation Industries, the Committee once again urges the Government to take the necessary measures to ensure that any of those workers still imprisoned are immediately released. 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 judgments handed down in the above cases, together with the grounds adduced therefor.*

The Committee's recommendations

1134. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *Welcoming the measures taken so far by the Government, the Committee requests it to continue keeping it informed of the steps taken and envisaged to ensure a climate of justice and security for trade unionists in the Philippines, and encourages the Government to develop a fully-fledged technical cooperation programme in this respect. The Committee expects that the Government will continue to engage with the KMU in dealing with cases involving its members and leaders and requests to be kept informed in this respect.*
- (b) *As regards the alleged extrajudicial killings, abductions and enforced disappearances, the Committee:*
 - (i) *urges the Government to take all necessary measures in order to ensure that the investigation and judicial examination of all acts of extrajudicial killings, attempted murders, abductions and enforced disappearances advance successfully and without delay. It asks the Government to indicate without delay the progress made in this regard and provide any relevant court judgments;*
 - (ii) *with respect to the Hacienda Luisita incident, recalling 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, urges the Government to provide specific information without further delay as to the institution of judicial proceedings for this incident which dates back to 2004; and*
 - (iii) *requests the Government to inform it of the progress made in the adoption of the Bill concerning enforced disappearances.*
- (c) *As to the issue of lengthy procedures, the Committee:*
 - (i) *requests the Government to take the necessary measures to ensure the expeditious conclusion of proceedings in allegations of labour-related violence;*
 - (ii) *requests the Government to supply information on the working of the 99 regional trial courts designated by the Supreme Court, including on the length of procedures in practice, and to provide detailed information on the steps taken to create a special team of competent and well-trained prosecutors; and*
 - (iii) *asks to be kept informed on any further developments regarding the adoption and implementation of the "Omnibus Rules" being elaborated by the CHR.*
- (d) *The Committee requests the Government to provide information on the implementation of Acts Nos 9851 and 9745.*

- (e) *With regard to the alleged harassment and intimidation of trade union leaders and members affiliated to the KMU, the Committee urges the Government to respond to the allegation submitted by the UFE–DFA–KMU without delay and to keep it informed on the outcome of the discussion of the allegations of harassment and intimidation of trade union leaders and members affiliated to the KMU by the TIPC Monitoring Body or of any other measures taken to facilitate the settlement of labour disputes and to indicate the progress made in ensuring the full and swift investigation of the alleged acts of harassment and intimidation.*
- (f) *With regard to the militarization of workplaces, the Committee:*

 - (i) *urges the Government to communicate its observations on the outstanding allegations;*
 - (ii) *requests 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 labour disputes, and of any progress made in updating them; and*
 - (iii) *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.*
- (g) *With regard to the cases of arrest and detention, the Committee requests the Government:*

 - (i) *to communicate its observations in respect of the outstanding allegations of illegal arrest and detention;*
 - (ii) *to submit further and precise information 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 judgments handed down in the above cases, together with the grounds adduced therefor; and*

- (v) *as regards the prolonged detention of 20 workers from Karnation Industries, 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, the Committee urges the Government to ensure that any of the workers that are still imprisoned are immediately released and to take the necessary measures to ensure that all remaining charges are dropped.*
- (h) *The Committee draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.*

CASE NO. 2760

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

**Complaint against the Government of Thailand
presented by
the Textile, Garment and Leather Workers Federation
of Thailand (TWFT)**

Allegations: The complainant alleges that the Chairperson and members of its affiliate, the Triumph International (Thailand) Labour Union, have been kept under surveillance by the military and that the Chairperson has been physically assaulted by unidentified persons. The complainant further alleges that the union Chairperson has been dismissed by the employer (Body Fashion) for having expressed support for a political opposition leader, that the employer subsequently dismissed half of its workforce (1,959 workers) – including 13 of the 17 members of the union’s executive board – and that a strike staged by the union, as a result of these dismissals, has been violently dispersed

- 1135.** The Garment and Leather Workers Federation of Thailand (TWFT) presented a complaint against the Government of Thailand alleging violations of trade union rights in a communication dated 24 November 2009.
- 1136.** The Government sent partial observations in a communication dated 17 March 2010. It presented additional information in a communication dated 20 September 2010.
- 1137.** Thailand has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1138.** The complainant indicates that the Triumph International (Thailand) Labour Union is a member of the TWFT and that TWFT is a member of the International Federation for Textile, Garment and Leather Workers (ITGLWF). The company involved in this case is Body Fashion (Thailand) Ltd (a subsidiary of Triumph International), which is a manufacturer and distributor of women's garments, lingerie, swimwear and sportswear. The complainant alleges five main violations of trade union rights, namely: (i) the dismissal of Ms Kotchadej, Chairperson of the labour union; (ii) the dismissal of 1,959 workers, including 13 board members of the labour union; (iii) violent dispersion of a peaceful strike; (iv) arrests of three union members; and (v) interference with trade union activities.
- 1139.** *Dismissal of Ms Kotchadej, Chairperson of the union.* According to the complainant, after the military coup of 19 September 2006, military officials and officials from the Internal Security Command Operations (ISOC) approached the management of the company, asking them to take care of the labour union and, in particular, to see that Ms Jitra Kotchadej, who was on leave and was the Chairperson of Triumph International (Thailand) Labour Union, steered clear of politics. The military officials set up a checkpoint in front of the factory to keep a watch on any move by the union. According to the complainant, this happened since the union had joined many civic groups to oppose the coup and to campaign to urge people not to approve the 2007 Constitution during the referendum. Furthermore, the complainant states that Ms Kotchadej has been subjected to physical assaults and that none of the culprits have been identified. On 29 July 2008, Ms Kotchadej was informed by the Human Resources Manager that the Chief Executive Officer (CEO) wanted to meet with her at headquarters. Once there, she was informed that on 21 July 2008 the company had filed a case with the Central Labour Court in Samuthprakarn, asking the Court to approve the lay-off of Ms Kotchadej and that the Court had made the decision, in absentia, in favour of the company. The complainant specifies in this respect that since Ms Kotchadej is a member of the Employee Committee, any punitive action against her has to be approved by the Court.
- 1140.** The complainant further indicates that the company claimed that she had to be dismissed since she had caused damage to the company's reputation. In a letter from the General Manager dated 30 July 2008, circulated to all employees, the reason for her lay-off referred to the fact that on 24 April 2008, Ms Kotchadej had been invited to speak in a public television programme – *Krong Sathanakarr* – on the topic "Pregnancy and abortion" broadcast on the NBT channel where, according to the company, she intended by her behaviour to mislead the viewers that the company supported her cause. During the programme, as part of the campaign for the promotion of reproductive rights and the right to terminate pregnancy legally and with sanitation, Ms Kotchadej wore a T-shirt saying "Not standing is not a crime, thinking differently is not criminal". She was subsequently accused by the People's Alliance for Democracy of wearing a T-shirt in support of Mr Chotisak On-Soong, who had been charged with lese-majesty for failing to stand up during a royal anthem, and they shored up a hate campaign against her.
- 1141.** After the lay-off announcement, the union members organized a strike and a picket in front of the factory demanding the reinstatement of Ms Kotchadej. The strike went on for 46 days until the Court agreed to retry the case on 23 September 2008. Ms Kotchadej complained to the Court that prior to the decision of the Court, she had not been informed and that she had had no role whatsoever during the hearing process. Nevertheless, during the retrial procedure, the Court decided that Ms Kotchadej had breached the "Thai national spirit" and ordered the dismissal to be immediately effective. According to the complainant, although Ms Kotchadej asked to submit an appeal, the Court rejected it.

- 1142.** The complainant considers that the dismissal was an attempt to dismantle the leadership of the union, since Ms Kotchadej had been very active in mobilizing union members in various demonstrations and actions. She had been quite involved, in particular, in a campaign of the union in June 2007 which forced the company to accept workers' demands. As a result, on 12 September 2007, an agreement had been concluded between the company and the labour union reiterating that the company had to strictly abide by the code of conduct of Triumph International and ILO Conventions.
- 1143.** *Dismissal of 1,959 workers.* The complainant further indicates that on 29 June 2009, the company management decided to lay off 1,959 workers of the total 4,200 workers. Thirteen out of the 17 board members of the labour union were included among those dismissed. Only four board members were allowed to continue working in the factory. The General Manager from Switzerland informed the workers that this extensive restructuring was necessary for the company. All workers who were union members and worked in the swimwear line were dismissed, though a few workers in important positions were spared to keep the production going. All workers in this production line had been actively involved with the union's activities and joined the 46-day strike in 2008 to protest against the dismissal of Ms Kotchadej. It adds that the dismissal orders were not applicable to the workers in another factory, in Nokhonsawan, where, prior to this, the company had moved part of its production, since at the factory in Nokhonsawan, workers had not started to get organized as a union.
- 1144.** In addition, the complainant considers that the lay-off of 1,959 workers runs counter to the agreement made between the union and the company on 6 August 1999, which provides, in the first paragraph of article 6 regarding the dismissal of workers, that if the company needs to restructure its workforce and mechanize its production or increase the mechanization and if it is necessary for the company to lay off workers, the company agrees to act in compliance with the following: (a) the decision concerning the lay-off has to be collectively agreed between the company and the labour union to ensure fairness and equality; and (b) if the dismissals are based on the above reasons, the company agrees to provide a special compensation on top of the legal compensation, as per section 118 of the 1998 Labour Protection Act for those workers who have been working longer than six years successively. The additional compensation shall be the equivalent of the total pay for 20 days based on the last remuneration rate, but the total special compensation shall not exceed the pay of 360 days combined. The special compensation shall be made available to any dismissed worker, except to those dismissed for disciplinary reasons. According to the complainant, the dismissal of the 1,959 workers was done without prior collective decision and without consultation. Furthermore, after the announcement of the dismissals, state media and officials claimed that the company had given all compensation to the workers as required by law and the company cited it as a reason to refuse to meet and negotiate with the union.
- 1145.** *Violent dispersion of a peaceful strike.* On 27 August 2009, the Triumph International (Thailand) Labour Union mobilized to ask about any progress made by the Government since, on 6 August, they had submitted demands to the Government asking it to mediate with the company so that the company remits all the due compensation to the laid-off workers. More than 400 of them gathered peacefully and unarmed in front of the Government House and Parliament. According to the complainant, the demonstration simply constituted the exercise of a constitutional right to gather peacefully. The workers had attempted to coordinate with the officers inside the Government House, asking for permission to hold the demonstration there. The complainant provides that on the demonstration day, officials turned on a Long Range Acoustic Device (LRAD) to disrupt the demonstration and declared their success in experimenting with this device through media coverage in mainstream television. According to the complainant, the use of the loud noise emitting device has caused many workers to suffer from ear pain, nausea,

disrupted pace of heartbeat, headache, fatigue and middle-ear infection, as certified by medical examinations.

- 1146.** *Arrests of three union members.* According to the complainant, in the framework of the abovementioned strike, arrest warrants were issued against three union members, Ms Boonrod Saiwong, Executive Secretary of Triumph International (Thailand) Labour Union, Ms Jitra Kotchadej and Ms Sunthorn Boonyod, as per warrants Nos 2494/2009 and 2495/2009 dated 27 August 2009 citing the Criminal Law Codes 215–216 for organizing assemblies of ten persons or more, inciting unrest in the city, and refusing to end disruptive protest actions at the request of the police. The lawyers asked for a copy of the warrants, but the Court of Lower Instance refused to furnish them a copy claiming that “the issuance of the arrest warrant is part of the inquiry process and there is no reason to meet the lawyers’ request”. The lawyers have lodged an appeal before the Appeal Court against the Court’s order.
- 1147.** *Alleged interference with trade union activities.* Finally, the complainant alleges acts of interference by the authorities in their trade union activities. After the dismissals of the union leaders, the members of the union decided to convene a special session on a no-confidence motion against the union Chairperson, Ms Wanphen Wongsombat, and they elected Ms Suchitra Choikhunthod as the new Chairperson. The complainant indicates that in its letter Ror Ngor 0509/009712, dated 17 November 2009, addressed to the company, the Department of Labour Protection and Welfare insisted that the company should continue to contact the union through Ms Wanphen Wongsombat, despite the information provided by the union to both the company and the authorities regarding the newly elected union representatives.

B. The Government’s reply

- 1148.** In its communications dated 17 March and 20 September 2010, the Government indicates that the order given by the employer of Body Fashion (Thailand) Ltd to dismiss Ms Kotchadej had been taken in accordance with the decision of the Central Labour Court (Samuthprakarn Province) of 8 July 2008. It adds that on 27 November 2008, the Central Labour Court (Samuthprakarn Province) confirmed the previous decision, allowing the employer to dismiss Ms Kotchadej and that Ms Kotchadej has not yet introduced an appeal against this decision before the Supreme Court.
- 1149.** According to the Government, the labour law provides protection against unreasonable dismissals. In particular, the Labour Relations Act B.E.2518 (1975) contains provisions which protect the employees involved in bargaining processes or trade unions against acts of discrimination and unfair dismissal. It adds that employees who suffer from unfair treatment can file complaints with the Labour Relations Committee, which may give an ad hoc order to protect the complainant. As to the employees who are members of the Employee Committee, the employer cannot penalize or dismiss them without the authorization of a judicial body. Finally, the Government states that the complainant federation is not a party engaged in the case, and that it can therefore not understand every detail of all the matters addressed by the Court.
- 1150.** As to the allegations concerning the dismissal of 1,959 workers, the Government indicates that the employees, allegedly victims of violations of their rights, are entitled to file a complaint before the Department of Labour Protection and Welfare, but that the employees concerned in this case did not do so. As to the dismissal of the board members, the Government states that the Central Labour Court (Samuthprakarn Province) decided to allow the employer to dismiss them, but they appealed against the judgment and the case is now before the Supreme Court. Regarding the collective agreement concluded between the union and the company on 6 August 1999, the Government indicates that the

complainant's indications are not true and that there is no clause in the collective agreement stipulating that the dismissal of any employee shall be based on a mutual agreement. It adds that on 17 December 2009, the Labour Court handed down a decision stating that the employer was not responsible for the special severance pay, since the dismissal of the 250 employees, in this case, did not come within the purview of the clause of the collective agreement concerning severance pay. The Government adds that, in fact, the employees had already received the full amount of severance pay and that the Government could therefore not order the employer to reinstate them. It adds that the Department of Labour Protection and Welfare informed the employees that they have the right to file a complaint before the Labour Relations Committee, but that they did not do so. Therefore, the administrative authority could not investigate the case. Finally, according to the Government, the administrative authority has organized several meetings between the employer and the employees, and the employer agreed to provide financial support to the employees amounting to 55 million baht (approximately US\$1.7 million).

1151. As regards the intervention of governmental authorities during the strike, the Government considers that the complainant's indication, according to which the strike was peacefully conducted for the purpose of requesting governmental help, is not true. According to the Government, the strikes conducted by the employees were not peaceful, as the strikers interrupted public roads without permission, which constitutes an illegal action invading the rights of the people. The responsible governors requested the strikers to stop interrupting public transportation, but the strikers did not respond to the request. According to the Government, there was no other way than implementing the law to stop this illegal action.
1152. Finally, the Government states that the Ministry of Labour did not sue the strikers, but on the contrary, supported the employees by providing them with 250 sewing machines, upon their request. Finally, the Government indicates that Ms Kotchadej, the leader of the strikers and the Ministry of Labour concluded a Memorandum of Agreement on 19 February 2010 – which is attached to the communication – which led to the settlement of this case, and that all the strikers agreed to move out of the Ministry of Labour.
1153. As to the arrest warrants issued against three members of the TWFT, Ms Boonrod Saiwong, Ms Jitra Kotchadej and Ms Sunthorn Boonyod, the Government indicates that this case is pending prosecution. It adds, however, that before the Court issued the three arrest warrants, all the demonstrators had dispersed peacefully without any action by the police.
1154. Finally, as regards the allegations of interference in trade union activities, the Government indicates that the Department of Labour Protection and Welfare (DLPW) plays a main role in the advocacy in relation to trade union activities and that the establishment of a trade union requires permission and registration from administrative authorities. According to the Government, although the election of a union committee constitutes an internal affair, the union leader or representative, who will have to interact with third persons, should be the most appropriate person and the DLPW has to give non-legally binding opinions on whether the union leader has been correctly elected or not. The purpose of giving such opinion is maintaining good relationships between third persons and the union, which brings benefits to the union. It also states that this problem has been settled and that the DLPW has already informed the union of the results of the investigation.

C. The Committee's conclusions

1155. *The Committee notes that this case concerns five allegations of violations of the principles of freedom of association and trade union rights: (i) the individual dismissal of a leader of the Triumph International (Thailand) Labour Union in violation of the fundamental*

principle of freedom of expression, following a judicial procedure which took place in violation of the rights of the defence; (ii) the collective dismissal of 1,959 workers, including 13 union board members, in the framework of a restructuring process, allegedly in violation of a collective agreement in force; (iii) the use of dangerous sound devices by the police forces to disperse strikers who gathered in the aftermath of the collective dismissal; (iv) the arrest of three union leaders in the framework of a strike, on the basis of unsubstantiated criminal charges; and (v) the interference by authorities in the elections of the union.

- 1156.** *As regards the dismissal of Ms Kotchadej, Chairperson of the Triumph International (Thailand) Labour Union, the Committee notes that according to the complainant, on 29 July 2008, Ms Kotchadej was informed by the Chief Executive Officer (CEO) that the company had filed a case with the Central Labour Court in Samuthprakarn, asking the Court to approve her lay-off and that the Court had made the decision, in absentia, in favour of the company. The complainant specifies in this respect that since Ms Kotchadej is a member of the Employee Committee, any punitive action against her has to be approved by the Court. The complainant indicates that in a letter of the General Manager circulated to all employees, dated 30 July 2008, the reason for her lay-off referred to the fact that she had caused damage to the company's reputation, since on 24 April 2008 she participated in a public television programme where, the complainant states that according to the company, she intended by her behaviour to mislead the viewers that the company supported her cause. During the programme, Ms Kotchadej wore a T-shirt saying "Not standing is not a crime, thinking differently is not criminal", which was considered by the People's Alliance for Democracy to be in support of the political activist Mr Chotisak On-Soong, who had been charged with lese-majesty for failing to stand up during a royal anthem. According to the complainant, after the lay-off announcement, the union members organized a strike and a picket, which went on for 46 days until the Court agreed to retry the case on 23 September 2008. According to the complainant, Ms Kotchadej complained to the Court that prior to the decision of the Court, she had not been informed and that she had had no role whatsoever during the hearing process. Nevertheless, during the retrial procedure, the Court decided that Ms Kotchadej had breached the "Thai national spirit" and ordered the dismissal to be immediately effective. According to the complainant, although Ms Kotchadej asked to submit an appeal, the Court rejected it. Finally, the Committee notes that the complainant considers that the dismissal was an attempt to dismantle the leadership of the union, since Ms Kotchadej had been very active in mobilizing union members in various demonstrations and actions, especially in a campaign in June 2007 which led to the conclusion, on 12 September 2007, of an agreement between the company and the labour union reiterating that the company had to strictly abide by the code of conduct of Triumph International and ILO Conventions.*
- 1157.** *The Committee notes that the Government indicates in this respect that the order given by the employer of Body Fashion (Thailand) Ltd to dismiss Ms Kotchadej had been taken in accordance with the decision of the Central Labour Court (Samuthprakarn Province) of July 2008. It adds that on 27 November 2008, the Central Labour Court (Samuthprakarn Province) confirmed the previous decision, allowing the employer to dismiss Ms Kotchadej and that Ms Kotchadej has not yet introduced an appeal against this decision before the Supreme Court. Furthermore, according to the Government, the labour law provides protection against unreasonable dismissals. In particular, the Labour Relations Act B.E.2518 (1975) contains provisions which protect the employees involved in the bargaining processes or trade unions against acts of discrimination and unfair dismissal. It adds that employees who suffer from unfair treatment can file complaints with the Labour Relations Committee, which may give an ad hoc order to protect the complainant.*

1158. While noting the above indications as to the rights and remedies in law with respect to unreasonable dismissals, the Committee notes that, according to the complainant, the judicial procedure which led to the dismissal of Ms Kotchadej, was marked by various infringements of the rights of the defence. It notes in particular that the complainant indicates that Ms Kotchadej had not been informed in due time of the company's dismissal request to the Central Labour Court in Samuthprakarn, which would have allowed her to prepare her defence or receive legal assistance. According to the complainant, she was only informed of the Court decision, without having been heard during the hearing process. The Committee observes that these allegations are not denied by the Government. While the Government has indicated that Ms Kotchadej has not introduced an appeal against the decision on retrial, the Committee observes that the complainant has indicated that Ms Kotchadej asked to submit an appeal but that the Court rejected it.
1159. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures, and that this protection is particularly desirable in the case of trade union officials. One way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 799 and 804]. The Committee also wishes to emphasize the importance which it places on respect for the basic civil liberties of trade unionists and for employers' organizations, including freedom of expression, as essential prerequisites to the full exercise of freedom of association.
1160. In this respect, the Committee wishes to underline that the Government: (i) has not provided any information on the legal grounds and facts invoked on the basis of which the Court authorized the dismissal to take place, both during the first hearing and during the retrial procedure; (ii) has not denied the alleged infringements to the due process principles as detailed by the complainant; (iii) has not commented upon the anti-union character of the dismissal alleged by the complainant; and (iv) has not denied the complainant's assertion that the dismissal was invoked by the Court as being a breach of the "Thai national spirit". On the basis of the elements in its possession, the Committee cannot conclude that the dismissal of Ms Kotchadej was in no way influenced by her activities as chair of the union and that, while the statement on her T-shirt may have been considered as offensive by some, the Committee has difficulty in understanding the relationship between this event and her employment, and expresses its deep concern that it gave rise to the dismissal of a trade union leader, impacting also upon the defence of the workers' interests at the enterprise. In light of the above considerations, the Committee urges the Government to take all necessary measures to seek the immediate reinstatement of Ms Kotchadej with full pay for back wages and requests to be kept informed in this respect. If her reinstatement is found not to be possible for objective and compelling reasons, the Committee requests the Government to ensure that Ms Kotchadej is paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests to be kept informed without delay of the final outcome of the judicial proceedings and of all measures of redress taken.
1161. In addition, the Committee notes that the complainant alleges that Ms Kotchadej has been subjected to physical assaults and that none of the culprits have been identified. The Committee notes that the Government does not provide information in its communications in this respect. The Committee requests the complainant organization to provide detailed information on the date and circumstances of these assaults, and requests the Government to take the appropriate steps to investigate these allegations and to provide information on the outcome.

- 1162.** *The Committee notes that the complainant further alleges that on 29 June 2009, the company management decided to lay off 1,959 workers of a total of 4,200 workers on the ground that this extensive restructuring was necessary for the company. Thirteen out of the 17 board members of the labour union were included among those dismissed. Only four board members were allowed to continue working in the factory. All the workers who were union members and worked in the swimwear line were dismissed, though a few workers in important positions were spared to keep the production going. The Committee notes that the complainant indicates that all the workers in this production line had been actively involved with the union's activities and joined the 46-day strike in 2008 to protest against the dismissal of Ms Kotchadej. The Committee further notes that according to the complainant, the dismissal orders were not applicable to the workers in another factory in Nokhonsawan where, prior to this, the company had moved part of its production, since at the factory in Nokhonsawan, workers had not started to get organized as a union. Furthermore, according to the complainant, the lay-off of 1,959 workers ran counter to the agreement made between the union and the company on 6 August 1999, which provides in the first paragraph of its article 6 that, if the company needs to restructure its workforces and mechanize its production or increase the mechanization and, if it is necessary for the company to lay off workers, the company agrees to act in compliance with the following: (a) the decision concerning the lay-off has to be collectively agreed between the company and the labour union to ensure fairness and equality; and (b) if the dismissals are based on the above reasons, the company agrees to provide a special compensation on top of the legal compensation as per section 118 of the 1998 Labour Protection Act for those workers who have been working longer than six years successively. The additional compensation shall be the equivalent of the total pay for 20 days based on the last remuneration rate, but the total special compensation shall not exceed the pay of 360 days combined. The special compensation shall be made available to any dismissed worker, except to those dismissed for disciplinary reasons. According to the complainant, the dismissal of the 1,959 workers was done without prior collective decision and without consultation. Furthermore, after the announcement of the dismissals, state media and officials claimed that the company had given all compensation to the workers as required by law and the company cited it as a reason to refuse to meet and negotiate with the union.*
- 1163.** *As to the dismissal of the board members, the Committee notes that the Government states that the Central Labour Court (Samuthprakarn Province) decided to authorize these dismissals, but they appealed against the judgment and the case is now before the Supreme Court. Regarding the collective agreement concluded between the union and the company on 6 August 1999, the Committee notes that the Government states that the complainant's indications are not true and that there is no clause in the collective agreement stipulating that the dismissal of any employees shall be based on mutual agreement. It adds that on 17 December 2009, the Labour Court handed down a decision stating that the employer was not responsible for the special severance pay, since the dismissal of the 250 (sic) employees, in this case, did not come within the purview of the clause of the collective agreement concerning severance pay. The Committee notes that the Government adds that, in fact, the employees had already received the full amount of severance pay and that the Government could therefore not order the employer to reinstate them. It adds that the Department of Labour Protection and Welfare (DLPW) informed the employees that they have the right to file a complaint before the Labour Relations Committee, but that they did not do so. Therefore, the administrative authority could not investigate the case. Finally, the Committee notes that according to the Government, the administrative authority has organized several meetings between the employer and the employees, and the employer agreed to provide financial support to the employees amounting to 55 million baht (approximately US\$1.7 million).*
- 1164.** *While observing that the Government contests the existence of a clause in the 1999 collective agreement stipulating that, in the framework of a restructuring process, the*

decision concerning the lay-off has to be collectively agreed between the company and the labour union, the Committee further notes that the Government has not replied to the allegations concerning the application by the company of anti-union criteria when identifying the workers to be dismissed. Finally, the Committee notes that it has not received any information from the Government on whether consultations did indeed take place between the workers and the employer in this case.

- 1165.** *The Committee also recalls that the Government is responsible for preventing all acts of anti-union discrimination and that it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. If workers who are trade union members are not immune from the impact of general company restructuring programmes, the application of staff reduction programmes must not be used to carry out acts of anti-union discrimination and a corporate restructuring should not directly or indirectly threaten unionized workers and their organizations. It also recalls that in cases of staff reductions it has drawn attention to the principle contained in the Workers' Representatives Recommendation, 1971 (No. 143), which mentions among the measures to be taken to ensure effective protection to these workers that recognition of a priority should be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce (article 6.2(f)) [see **Digest**, op. cit., paras 796, 797, 817 and 832].*
- 1166.** *The Committee recalls that it can examine allegations concerning economic rationalization programmes and restructuring processes only in so far as they might have given rise to acts of discrimination or interference against trade unions. The Committee further recalls that in cases where new staff reduction programmes are undertaken, negotiations should take place between the enterprise concerned and the trade union organizations [see **Digest**, op. cit., paras 1079 and 1082]. Given the allegations in the present case, the Committee requests the Government to inquire into whether anti-union criteria were applied when identifying the employees to be dismissed. The Committee further requests the Government to provide a copy of the decision of the Supreme Court on the appeal introduced by the dismissed board members of the union as soon as it is handed down, as well as of any other relevant judicial decisions. The Committee also requests the complainant organization to provide a copy of the relevant provisions of the collective agreement, including article 6, which allegedly stipulates that if the company needs to restructure its workforces, the decision concerning a lay-off has to be collectively agreed.*
- 1167.** *The Committee notes that according to the complainant, on 27 August 2009, the Triumph International (Thailand) Labour Union mobilized to ask about any progress made by the Government on its request of 6 August that the Government mediate with the company so that it remits all the compensation due to the laid-off workers. More than 400 dismissed workers gathered peacefully and unarmed in front of the Government House and Parliament. According to the complainant, the demonstration simply constituted the exercise of a constitutional right to gather peacefully. The workers had attempted to coordinate with the officers inside the Government House, asking for permission to hold the demonstration there. The complainant indicates that on the day of the demonstration, officials turned on a Long Range Acoustic Device (LRAD) to disrupt the demonstration. The complainant states that the Government declared its success in experimenting with this device through media coverage in mainstream television. The use of the loud noise emitting device has caused many workers to suffer from ear pain, nausea, disrupted pace of heartbeat, headache, fatigue and middle-ear infection, as certified by medical examinations.*
- 1168.** *The Committee notes that the Government contests the allegation made by the complainant that the strike was peacefully conducted for the purpose of requesting governmental help.*

According to the Government, the strikes conducted by the employees were not peaceful, as the strikers interrupted public roads without permission, which constitutes an illegal action invading the rights of the people. The responsible governors requested the strikers to stop interrupting public transportation, but the strikers did not respond to the request. According to the Government, there was no other way than implementing the law to stop this illegal action. The Government adds that all the demonstrators dispersed peacefully without any action by the police.

- 1169.** *The Committee recalls that the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order and that the intervention of the police should be in proportion to the threat to public order. It further recalls that governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order [see **Digest**, op. cit., para. 647]. Noting that the complainant has provided images of the use of the LRAD during the protest and that the Government does not deny its use to disperse the strikers during the 27 August 2009 demonstration, the Committee urges the Government to undertake appropriate investigations into this matter, including the impact of the use of the LRAD on the striking workers and to take the necessary measures to ensure that police forces or other government authorities do not intervene in demonstrations with unjustified or excessive force and in a manner that is likely to cause injury to the striking workers. It further requests the Government to ensure the strict observance of due process guarantees in the context of any surveillance operations of workers' activities by the army, in order to guarantee 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 urges the Government to keep it informed in this respect.*
- 1170.** *The Committee notes that the Government indicates that Ms Kotchadej, the leader of the strikers, and the Ministry of Labour concluded a Memorandum of Agreement dated 19 February 2010 bringing an end to the dispute.*
- 1171.** *The Committee notes that the complainant indicates that in the framework of the abovementioned strike, arrest warrants were issued against three members of the Triumph International (Thailand) Labour Union, Ms Boonrod Saiwong (Executive Secretary), Ms Jitra Kotchadej and Ms Sunthorn Boonyod, as per warrants Nos 2494/2009 and 2495/2009 dated 27 August 2009 citing the Criminal Law Codes 215–216 for organizing assemblies of ten persons or more, inciting unrest in the city and refusing to end disruptive protest actions at the request of the police. Furthermore, the Committee notes the complainant's allegations that the Court of Lower Instance refused to supply the lawyers a copy of the warrants claiming that "the issuance of the arrest warrant is part of the inquiry process and there is no reason to meet the lawyers' request". The lawyers have lodged an appeal before the Appeal Court against the Court's order. The Committee notes that the Government indicates in this respect that the case is pending prosecution.*
- 1172.** *Recalling that the detention of trade unionists on the grounds of trade union activities constitutes a serious obstacle to the exercise of trade union rights and that authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike, since such measures entail serious risks of abuse and constitute a grave threat to freedom of association [see **Digest**, op. cit., paras 66 and 671], the Committee expresses its deep concern at the arrests of the three trade union leaders, particularly given that the sections of the Criminal Law Codes 215–216 referred to could also encompass legitimate trade union activities. The Committee urges the Government to provide without delay updated information on their present situation, including on the specific charges filed against them. Should these charges be related to their legitimate trade union activities and bearing in mind the Memorandum of Agreement concluding the*

dispute, it urges the Government to ensure that the charges are immediately dropped. The Committee also requests the Government to ensure that their lawyers will be allowed to have full access to the arrest warrants, as well as to any other relevant information for their proper defence. Finally, it requests the Government to provide a copy of any relevant judicial decision in this respect, in particular, a copy of the appeal decision on the request made by the lawyers to receive a copy of the arrest warrants.

- 1173.** *The Committee notes that the complainant alleges acts of interference by the authorities in their trade union activities. More particularly, according to the complainant, after the dismissals of the union leaders in the framework of the restructuring process, the members of the union decided to convene a special session on a no-confidence motion against the union Chairperson, Ms Wanphen Wongsombat, and they elected Ms Suchitra Choikhunthod as the new Chairperson. The complainant alleges that in its letter addressed to the company, dated 17 November 2009, the DLPW insisted that the company should continue to contact the union through Ms Wanphen Wongsombat, despite the information provided by the union to both the company and the authorities regarding the newly elected union representatives.*
- 1174.** *The Committee notes that the Government indicates in this respect that the DLPW plays a main role in the advocacy in relation to trade union activities and that the establishment of a trade union requires permission and registration from administrative authorities. According to the Government, although the election of a union committee constitutes an internal affair, the union leader or representative, who will have to interact with third persons, should be the most appropriate person and the DLPW has to give non-legal binding opinions on whether the union leader has been correctly elected or not. According to the Government, the purpose of giving such opinion is maintaining a good relationship between third persons and the union, which brings benefits to the union.*
- 1175.** *The Committee underlines that any consideration given by the authorities regarding the appropriateness or suitability of a candidate or an elected representative of a trade union, constitutes a direct violation of the principle of non interference in trade union activities enshrined in Article 3 of Convention No. 87. Accordingly, it notes that the interference of the DLPW in the elections of the Triumph International (Thailand) Labour Union Chairperson is in direct contradiction of the freedom of association principles. While observing the Government's statement that this problem has been settled and that the DLPW has already informed the union of the result of the investigation, the Committee urges the Government to take the necessary measures to ensure, should this not already be the case, that the newly elected Chairperson is recognized by the authorities and the employer so that the right of workers to elect their representatives freely is fully ensured. It further requests the Government to take steps so that, in the future, the authorities refrain from any interference in the exercise of the right of workers' organizations freely to elect their representatives, as guaranteed by Convention No. 87. It requests the Government to keep it informed in this respect. The Committee expects that the Government will make all efforts to provide the information requested including by seeking information from the employer through the relevant employers' organizations concerned.*

The Committee's recommendations

- 1176.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) As to the dismissal of Ms Kotchadej, Chairperson of the Triumph International (Thailand) Labour Union, the Committee:**

- (i) *concludes that the dismissal of Ms Kotchadej may indeed have been linked to the exercise of legitimate trade union activities;*
 - (ii) *requests the Government to take all necessary measures to seek her immediate reinstatement with full pay for back wages. If her reinstatement is found not to be possible for objective and compelling reasons, the Committee requests the Government to ensure that Ms Kotchadej is paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed without delay in this respect.*
- (b) *The Committee further requests the Government:*
 - (i) *to keep it informed of the final outcome of the judicial proceedings and of all measures of redress taken;*
 - (ii) *to supply a copy of the two judicial decisions authorizing the dismissal of Ms Kotchadej and to take the necessary measures to ensure that these decisions will be shortly revised in the framework of a procedure which will fully ensure her participation in the hearings, her right to a due process and the respect of her rights of defence;*
 - (iii) *requests the Government and the complainant to provide additional information on the appeal lodged by Ms Kotchadej against the decision of the Court dated 27 November 2008 confirming her dismissal (as alleged by the complainant but as contested by the Government).*
- (c) *As regards the dismissal of the 1,959 workers, the Committee:*
 - (i) *requests the Government to inquire into whether anti-union criteria were applied when identifying the employees to be dismissed;*
 - (ii) *requests the Government to provide a copy of the decision of the Supreme Court on the appeal introduced by the dismissed board members of the union, as soon as it is handed down, as well as of any other relevant judicial decisions;*
 - (iii) *requests the complainant organization to provide a copy of the relevant provisions of the collective agreement, including article 6, which allegedly stipulates that if the company needs to restructure its workforces, the decision concerning a lay-off has to be collectively agreed.*
- (d) *As to the dispersion of the demonstration, which took place on 27 August 2009, noting that the Government does not deny the use of LRAD to disperse the strikers, the Committee:*
 - (i) *urges the Government to undertake appropriate investigations into this matter, including the impact of the use of LRAD on the striking workers and to take the necessary measures to ensure that police forces or other government authorities do not intervene in demonstrations with*

excessive force and in a manner that is likely to cause injury to the striking workers;

- (ii) further requests the Government to ensure the strict observance of due process guarantees in the context of any surveillance operations of workers' activities by the army, in order to guarantee 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 urges the Government to keep it informed in this respect.*
- (e) The Committee expresses its concern at the arrests of the three trade union leaders, particularly given that the sections of the Criminal Law Codes 215–216 referred to could also encompass legitimate trade union activities. The Committee further:*
 - (i) urges the Government to provide updated information on their present situation, including on the specific charges filed against them. Should these charges be related to their legitimate trade union activities and bearing in mind the Memorandum of Agreement concluding the dispute, it urges the Government to ensure that the charges are immediately dropped;*
 - (ii) requests the Government to ensure that their lawyers will be allowed to have full access to the arrest warrants as well as to any other relevant information for their proper defence;*
 - (iii) requests the Government to provide a copy of any relevant judicial decision in this respect, in particular, a copy of the appeal decision on the request made by the lawyers to receive a copy of the arrest warrants.*
- (f) Noting that the interference of the Department of Labour Protection and Welfare in the elections of the Triumph International (Thailand) Labour Union Chairperson is in direct contradiction of the freedom of association principles, the Committee:*
 - (i) urges the Government to take the necessary measures to ensure, should this not already be the case, that the newly elected Chairperson is recognized by the authorities and the employer so that the right of workers to elect their representatives freely is fully ensured;*
 - (ii) requests the Government to take steps so that, in the future, the authorities refrain from any interference in the exercise of the right of workers' organizations freely to elect their representatives, as guaranteed by Convention No. 87;*
 - (iii) requests the Government to keep it informed in this respect.*
- (g) The Committee expects that the Government will make all efforts to provide the information requested including by seeking information from the employer through the relevant employers' organizations concerned.*

- (h) *Finally, as to the alleged assaults against Ms Kotchadej, the Committee requests the complainant organization to provide detailed information on the date and circumstances of these assaults and, once this information is provided, requests the Government to take the appropriate steps to investigate these allegations and to provide information on the outcome.*

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 Manufacturers' 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 and threatened employers; bomb attack on the FEDECAMARAS headquarters; acts of favouritism by the authorities with respect to non-independent employers' organizations

1177. The Committee last examined this case at its meeting of March 2010 and presented an interim report to the Governing Body [see 356th Report, paras 1392–1557, approved by the Governing Body at its 307th Session (March 2010)].
1178. Subsequently, the International Organisation of Employers (IOE) sent new allegations in a communication dated 12 October, two communications dated 3 November 2010 and additional information in a communication dated 10 February 2011. The Government sent new observations in communications dated 18 May and 9 and 12 November 2010 and 25 February 2011.

- 1179.** 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

- 1180.** At its March 2010 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 356th Report, paras 4 and 1557]:

- (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;
 - 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 Act establishing the Central Planning Commission and harassment of employers' leaders through speeches given by the President of the Republic; and
- (j) the Committee draws the Governing Body's attention to the extreme seriousness and urgent nature of this case.

B. New allegations of the IOE

1181. In its communication dated 12 October 2010, the International Organisation of Employers (IOE) again complains, in common with the Venezuelan business community, the constant harassment by the Government of the Bolivarian Republic of Venezuela of free enterprise in the country and complains of new attacks on the private sector and its representative organization, FEDECAMARAS. The IOE complains of failure by the Government to comply with the recommendations made by the Committee on Freedom of Association in the last five years, including those made in its meeting of March 2010.

1182. In its communication dated 3 November 2010, the IOE alleges that on the night of 27 October 2010, in Caracas, a group of five armed and hooded men machine-gunned, kidnapped and maltreated the President of FEDECAMARAS, Mr Noel Alvarez, its former President, Ms Albis Muñoz, the Executive Director, Mr Luis Villegas and its Treasurer, Mr Ernesto Villamil. The kidnappers fired three shots into the body of Ms Albis Muñoz, Employer member of the ILO Governing Body. After she had lost a lot of blood, the attackers dragged her from the vehicle in which she was travelling and dumped her near the Pérez Carreño Hospital, where she was taken some time later by a passing police patrol. The other three abducted persons were released two hours later, after the abductors had faked an abduction, expressed their intention to demand a ransom of 300 million bolivars, and stolen their belongings.

- 1183.** According to the IOE, the manner of the attack suggests that its purpose was to decapitate the business leadership of the Bolivarian Republic of Venezuela, although it was afterwards disguised as an abduction.
- 1184.** The IOE indicates that the Government of the Bolivarian Republic of Venezuela has an obligation to guarantee the life and safety of citizens and their institutions and recalls that FEDECAMARAS has been the target of violent attacks on its offices and leaders on many occasions, as has been reported in previous complaints to the Committee on Freedom of Association.
- 1185.** The IOE emphasizes that the climate of aggression and hostility towards the private sector, especially towards FEDECAMARAS and its leaders which is constantly expressed in the highest institutions of the State, especially the President of the Republic himself, Mr Hugo Chávez, together with the growing insecurity in the country means that the State is responsible for this new violence against Venezuelan business leaders. It should be recalled, for example, that in June 2010, President Chávez declared “economic war” on Venezuelan private entrepreneurs and their organizations.
- 1186.** The IOE requests the Committee on Freedom of Association to invite the Government of the Bolivarian Republic of Venezuela to carry out a thorough investigation of this attack, to arrest and convict the perpetrators and stop the physical violence, confiscation of property and verbal attacks to which it incessantly subjected the business community and private companies in the Bolivarian Republic of Venezuela.
- 1187.** The IOE indicates that so far none of the attacks on FEDECAMARAS have led to the arrest and punishment of those responsible, despite the fact that the names of the persons and institutions behind them are known.
- 1188.** In another communication dated 3 November 2010, the IOE states that the Committee on Freedom of Association examined Case No. 2254 at its meeting of 2010, and made recommendations which were approved by the Governing Body, drawing the attention of the Governing Body to the “extreme seriousness and urgent nature of this case”. The IOE complains that the Government has not complied with any of the recommendations made in the last five years.
- 1189.** The IOE alleges that as a consequence of their work to defend their members, representatives of employers’ organizations, and the private sector in general, are constantly harassed and threatened. On this occasion, the IOE complains of attacks against the property of the former Presidents of FEDECAMARAS, Messrs Vicente Brito, Rafael Marcial Garmendia and Carlos Sequera Yépez, as well as against Mr Manuel Cipriano Heredia, the current President of FEDENAGA (the leading agricultural sector body affiliated to FEDECAMARAS) and its former President, Mr Genaro Méndez, and also Mr Eduardo Gómez Sigala, former President of CONINDUSTRIA (the leading industrial sector body affiliated to FEDECAMARAS). The National Land Institute (INTI) together with the National Guard constantly invade productive farms under the so-called “Land Recovery Plan”. The INTI could only “recover” those lands which it owned, and that is not the case of the properties of the expropriated business leaders.
- 1190.** In the specific case of the farm of Mr Eduardo Gómez Sigala, former President of the Caracas Chamber of Commerce, the Venezuelan Chamber of Food and the CONINDUSTRIA Industrial Confederation, the IOE alleges that on 21 September 2009, a group of 20 persons who claimed to be officials of the Lara Regional Land Office, accompanied by 14 members of the national armed forces, carrying automatic weapons, arrived at the entrance to the La Bureche farm. They threatened the farm manager, Mr Castejón Martínez, and ordered him to open the main door immediately, without

showing any documentation. They entered the farm and took over the premises. From that point on, the entrance to the La Bureche farm remained under the strict control of the army, who set up several tents around Mr Eduardo Gómez Sigala's family home. During that evening, 21 September 2009, and during the following days, the La Bureche farm remained totally occupied by officials of the INTI, the Venezuelan Food Corporation and members of the national armed forces. Only vehicles belonging to these bodies were allowed to enter, together with tractors and heavy machinery which were used to destroy the 18 hectares of sugar cane growing there, which should have been harvested in two months' time.

- 1191.** On 24 September 2009, Mr Gómez Sigala tried to enter his family home, situated within the La Bureche farm. Army personnel seized Mr Gómez Sigala and forced him inside the farm, before putting him in a vehicle and taking him under arrest to the headquarters of the Thirteenth Infantry Division, located in the town of Barquisimeto in Lara State. There he was arbitrarily held prisoner until the evening of 25 September. In being released, he was taken to the Barquisimeto Supervisory Court (*Tribunal de Control*), where, to justify his detention, the Public Prosecutor's Office charged him with "resisting authority and minor personal injury", because he had torn a sergeant's shirt during the struggle when he was forced to leave the farm. On the following day, the business leader was released on conditional bail subject to the obligation to report to the court or the Public Prosecutor's Office whenever required or needed for the investigation. It should be emphasized that there is no time limit or specific date was attached to this measure, thus the accused must remain indefinitely at the disposal of the authorities.
- 1192.** The La Bureche farm is owned by the Agrícola Bureche 2007, CA, a company based in Caracas. The company's memorandum and articles of association show that Mr Eduardo Gómez Sigala owns 99 per cent of the shares in Agrícola Bureche 2007, CA, of which he is the sole director. On this estate, as well as sugar cane, grass and other crops, is his family home, which he uses frequently during his long stays in the town of Barquisimeto, which, in addition to Caracas, is the seat of his businesses and interests and is the place of residence of part of his family.
- 1193.** Recently, the authorities came to move horses and cattle. The farm has currently been taken over by the military, who use it for military training. As of today, Mr Gómez Sigala is not allowed to enter the farm (see Annex 5).
- 1194.** In addition, the IOE alleges that despite the Committee's numerous requests, it regrets to have to report that the Government has not followed the Committee's recommendation to quash the order for the arrest of the former President of FEDECAMARAS, Mr Carlos Fernández, so that he may return to the country without fear of reprisals.
- 1195.** The IOE also recalls that over three years ago, on 24 May 2007, the headquarters of FEDECAMARAS was attacked by representatives of the Ezequiel Zamora National Campesino Front, the Simón Bolívar National Communal Front, the Alexis Vive Collective and the Simón Bolívar Coordinator, committing acts of violence against the institution and its premises. Those leaders were interviewed in the media where they identified themselves. To date, these violent groups have not been charged with anything.
- 1196.** Another attack on FEDECAMARAS headquarters occurred in February 2008. On 24 February 2008, metropolitan police inspector Mr Héctor Amado Serrano Abreu was killed by an explosive device when he was placing it against the front of the FEDECAMARAS headquarters building. On 26 February 2008, the complaint concerning this incident was lodged with the Public Prosecutor's Office, requesting a thorough and exhaustive investigation of the facts and identification of those responsible. So far, there has been no visible result. In 2009 and 2010, the IOE continues, just before the

International Labour Conference, these matters appeared in the media. Thus, just before the 98th Session of the International Labour Conference (2009), the Government said that it was dealing with the case and mentioned the persons under investigation and the courts handling the case. However, on 26 June 2009, seven days after the end of the International Labour Conference, in letter No. 01-F-50—842-09, the Public Prosecutor's Office told FEDECAMARAS that it "was ordering the case to be filed", due to the impossibility of assembling sufficient evidence to allow the conviction of any person in the case. This letter was received at FEDECAMARAS' offices on 26 August 2009, two months after the date when it was written and the necessary instructions were immediately given to appeal that decision. Up to now, no reply has been received. Recently, and before the 99th International Labour Conference (2010), it appeared in the press, on 6 May 2010, that an active official of PoliCaracas, Mr Juan Crisóstomo Montoya, had been identified as a member of the group which placed the bomb at FEDECAMARAS headquarters and had been arrested. However, on returning from the Conference, FEDECAMARAS was informed that Mr Montoya had been released and that, for no reason, all the charges against him had been dropped. Consequently, there has still been no visible result in this regard.

- 1197.** The IOE considers that the Government's action can be summarized as a strategy to present a semblance of progress in the investigations into the attacks against FEDECAMARAS during the International Labour Conference. However, that cannot hide the fact that for over three years, since those criminal acts were committed, the Government has not shown any serious will to investigate and punish those responsible for the bomb attack on FEDECAMARAS, thereby fostering a climate of hostility against FEDECAMARAS and one of impunity for those who attack the private sector and its representative organization, FEDECAMARAS.
- 1198.** The IOE also points out that Mr Noel Álvarez, the current President of FEDECAMARAS, after being interviewed by RCTV International, was the subject of an investigation by Public Prosecutor's Office 10 in the Caracas Metropolitan Area, and charges were brought against him for alleged offences against national security, rebellion, incitement to insurrection and incitement to commit criminal offences. As of today, Mr Noel Álvarez has been denied the right to appoint his defence lawyers.
- 1199.** There have been numerous threats and verbal attacks against the private sector representative organization, FEDECAMARAS, by the President of the Republic. Recently, on 3 June, at the beginning of the International Labour Conference 2010, the President of the Republic stated that "FEDECAMARAS is an enemy of this people and we do not need it. More than that, let me make it crystal clear, I think this country can do without it". Also, on 15 June 2010, he said that FEDECAMARAS "is a great obstacle to the country's development", and, therefore, he declared, its members were "enemies of the State". On 13 October 2010, as the annual assembly of FEDECAMARAS was ending, the President of the Venezuelan Republic stated that "FEDECAMARAS" does not exist" and declared in that regard "Do these people still exist? I do not recognize them, I don't know who they are" (the relevant annexes are attached).
- 1200.** The IOE concludes that all the foregoing shows a clear and constant will by the Government of the Bolivarian Republic of Venezuela to attack and destroy FEDECAMARAS, even though it is the national representative organization of the employers' side. The increasing frequency and content of the verbal attacks by the Government of the Bolivarian Republic of Venezuela against FEDECAMARAS is a cause for much concern.
- 1201.** The IOE alleges that the Government of the Bolivarian Republic of Venezuela finances parallel organizations to FEDECAMARAS by means of subsidies. In this regard, it

attaches an extract from the financial report of the Economic and Social Development Bank (BANDES) of 30 June 2007. This report indicates that Entrepreneurs for Venezuela (EMPREEN) was granted an allocation of 2,267,846 bolivars and a further allocation of 438,378 bolivars. Furthermore, national financial institutions give priority to cases processed by EMPREEN (the organization backed by President Chávez) to the detriment of those which are not affiliated to it. The Foreign Exchange Commission (CADIVI) allocated dollars for imports in 91 per cent of the cases processed by EMPREEN (see annex).

1202. The Government's support to official companies was also expressed by the investment of 3 billion bolivars in the Bicentenary Fund which finances "social production companies" which participate in export and import substitution plans, but not to private enterprises represented by FEDECAMARAS.

1203. The result of the foregoing is discrimination against private companies and against FEDECAMARAS which do not have access to these public funds. Consequently, as has been emphasized on various occasions "the national industrial stock fell by 36 per cent between 1998 and 2007, according to the National Institute of Statistics (INE). Since 2007, no official figures on company closures have been published, but it is estimated that it is over 40 per cent. The intention to replace private companies with socialist enterprises is a fact. The former are being strangled by legal constraints and requirements, while the latter are promoted and obtain preferential credits, although without obvious results. They only contribute 10 per cent of the country's GDP". In the ten years since Mr Hugo Chávez came to power, the number of companies in the country fell from 11,000 to 7,000. Furthermore, a World Bank report early in 2010 warned that the collapse of private activity in the Bolivarian Republic of Venezuela would increase the prospect of negative economic growth and that "the lack of cooperation" between the private and public sector was a key factor in the collapse of economic performance in 2010.

Expropriations of private sector assets and property

1204. The IOE and FEDECAMARAS highlight that in the last few months, the Government has multiplied attacks against the private sector, issuing numerous expropriation orders against companies without the slightest legal justification and without any financial compensation. In this regard, on 2 June 2010, President Chávez declared "economic war" on the business sector and its representatives, especially FEDECAMARAS. He added "I declare myself in a state of economic war. Let's see who comes out on top, you bourgeois trash or those who love their country".

1205. It should be emphasized that recently, on 3 October 2010, the company Agroisleña SA, which is crucial to the agriculture and livestock industry of the Bolivarian Republic of Venezuela and the chief distributor of farming products with 82 sales outlets and eight silos across the country, was nationalized. The order for the expropriation of Agroisleña was widely rejected by producers and company workers. In Barinas, the state police used teargas to disperse a protest by 150 producers. After this action, one producer was arrested and injured.

1206. On 25 October 2010, an order was approved for the expropriation for the Venezuelan subsidiary of the United States company, Owen Illinois, the world leader in the manufacture of glass containers for drinks, food, medicines and cosmetics.

1207. On 30 October 2010, President Chávez ordered the expropriation of the Siderúrgica del Turbio (SIDETUR), a subsidiary of the private Venezuelan steel group SIVENSA, and six urban complexes were paralysed and a further eight were "temporarily occupied".

1208. The announcement concerning Owen Illinois brought the number of expropriated companies in 2010 to 200, most of them without any compensation. In 2009, 139 companies were expropriated, not including companies in the agricultural sector. As highlighted by the firm Eco-analítica and the Venezuelan American Chamber of Commerce and Industry (VenAmCham), nationalizations and state takeovers worth \$23,315 million have been ordered since 2007, but only \$8,600 million have been paid in compensation, representing one third of the expropriations. The pace of takeovers of private companies by the Government without compensation has been accelerating in recent months. In the last three years, the Venezuelan Government nationalized 371 companies in strategic sectors such as electricity, banking, cement, steel, oil and food. Of this total, half were taken over between January and August 2010. The exponential number and headlong rush of expropriations without compensation by the Government of the Bolivarian Republic of Venezuela is seriously endangering the viability, development and national output in key sectors of the economy, which as well as causing heavy economic losses also generates unemployment and poverty across large swathes of the population.

Deaths and abductions of producers and cattle breeders

- 1209.** As a result of the constant confiscations of companies and properties, there have been many acts of violence and abductions in the agricultural and livestock sector. A special case is that of the agricultural and livestock farmer, Mr Franklin Brito, who died aged 49 years on 30 August 2010, as a result of going on a succession of hunger strikes since 2 July 2009 in protest against the Government for the invasion and expropriation of his land and despite having produced to the Government the maps and documents proving his ownership of the property situated in Bolívar State. The farmer was demanding the return of his land and payment of compensation for damages. Sadly, this was not achieved even when, after his death, the highest authorities published documentation recognizing his rights in the media.
- 1210.** The policy of harassment of the private sector has now resulted in 25 agricultural and livestock farmers being abducted without the Government being concerned to bring about their release. Since 1999, the State has occupied 3 million hectares of land, rejecting titles of ownership.
- 1211.** The IOE and FEDECAMARAS once again deplore the lack of social dialogue and bipartite and tripartite consultations, although the Committee has incessantly emphasized “the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation”. Despite the Committee’s recommendation that “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”, it should be noted that the Government’s attitude has not changed and that it is adopting reforms and laws which affect the private sector without prior consultation or social dialogue with the social partners.
- 1212.** The IOE and FEDECAMARAS emphasize the Government’s rejection of the Committee’s recommendations on the matter and the absence of any “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”. On the contrary, the Government is now using the procedure of decrees with the force of law, which do not have a time limit, to legislate without dialogue or consultation, since with this type of instrument it is not necessary to discuss draft legislation in the National Assembly.

- 1213.** For example, there was no social dialogue or consultation by the Government in the following cases:

Fixing of the minimum wage. As reported many times to the various ILO supervisory bodies, the Government has been fixing the minimum wage unilaterally for ten years, without tripartite consultation or convening the National Tripartite Commission on the Minimum Wage, established by articles 167 and 168 of the Organic Labour Act, and despite the observations of the Committee and the Committee of Experts on the Application of Conventions and Recommendations on the application of ILO Convention No. 26.

The Public Procurement Act, approved on 5 August 2010, which gives greater powers to the public administration in the award of contracts for institutions which use public funds. The employers' side expressed its concern that the reform of the law applies the seizure or requisition of assets in the case of alleged failures or halting of the works, without any opportunity for considering the right to defence.

The General Banking Act, approved on 12 August 2010, whereby shareholders, directors, staff and managers of the communication media are disqualified from exercising a financial activity, thereby openly violating article 112 of the Constitution which provides that anyone may engage in the productive activity of their choosing.

Land and Agrarian Development Reform Act, approved on 14 August 2010, under which producers lose their protection against procedures for expropriation of their lands without compensation. Venezuelan businessmen reject the legal practice of "recovery of lands" which is applied arbitrarily by the law enforcement services and the INTI, taking over estates and destroying tools and crops.

The Labour Stability Bill which envisages that employers have the obligation to obtain prior authorization from the labour authority to terminate the employment relationship with any of their workers, which, due to the country's actual economic crisis, has led to the closure of thousands of companies.

The Social Property Bill. The Government may order compulsory acquisition if it is determined that a company's productive activity is not aimed at satisfying real needs or it is not in conformity with national interests and the socio-productive model.

The International Cooperation Bill which seeks to control the registration and financing of NGOs in the Bolivarian Republic of Venezuela.

- 1214.** The Organic Act establishing the Central Planning Commission was approved by the National Assembly on 15 April 2010. The objectives of this Act include accelerating central planning and drawing up a central map of the national public and private economic structure, which implies defining plans for both sectors. Subsequently, on 24 May 2010, the Act to Reform the Organic Act establishing the Central Planning Commission was approved, a measure which constituted an unprecedented threat against economic freedoms. The private sector, in common with its representative organization, FEDECAMARAS, was never consulted on these laws.

- 1215.** Article 2, which sets out the aims of the Commission, provides that it shall carry out its functions with a view, among other things, to: "driving the transition to an integrated central planning model ..." and "guide the establishment of a model capable of ensuring satisfaction of the spiritual and material needs of society, achieving the utmost social happiness, in other words, the socialist model". It is a clear abuse that individual decisions taken by economic agents in the exercise of their rights may be challenged by third parties, i.e. by members of the Central Planning Commission.

- 1216.** Article 4 sets out the Commission's powers, indicating that its responsibilities shall include "drawing up a central map of the national economic structure, state, public and private, which will serve as the basis for planning and controlling the construction of the Venezuelan socialist model". Consequently, the officials appointed by the President of the Republic as members of the Commission will determine the structure of the national economy. This administrative determination of the structure of markets and economic sectors is a threat to economic freedom and disregards the reality of many sectors, in particular the dynamic and endogenous nature of market structures. The scope of this power granted to the Commission is in clear conflict with the economic freedoms enshrined in the Constitution and the social model of the market.
- 1217.** Article 5, paragraph 4, reads as follows: "To link and coordinate mechanisms for the exchange and distribution of national production, based on the needs of the people and the actual costs of production by branch, sector and productive unit, to fix fair prices". The lack of any definition of those who will be responsible for this function is another clear infringement of the National Constitution and the economic framework and model indicated therein. Indeed, central planning of this kind not only makes free initiative impossible and reduces the positive effects of dynamism and innovation, but it also damages consumer freedom of choice.
- 1218.** For all the above reasons, it is clear that the Government of the Bolivarian Republic of Venezuela, by its destructive attitude to social dialogue and its campaign of constant and violent harassment of the private sector, wanted once again to destabilize the country's employers' representative institution, FEDECAMARAS, by means of constant serious harassment of its members, business leaders, and attacks on their persons and properties. On the other hand, once again demonstrating its constructive approach, FEDECAMARAS expressed its optimism for the results of the parliamentary elections of September 2010, hoping that the composition of the new National Assembly from January 2010 would send a message of confidence to national and foreign investors, so that they would return to the country. It also stated that the expropriation and control measures had seriously damaged businesses, and that the situation needed to be reversed. The IOE and FEDECAMARAS again request the Committee on Freedom of Association to reach a decision on this Case No. 2254, which is extremely serious and urgent, urging the Government of the Bolivarian Republic of Venezuela to accept the tripartite missions of direct contacts requested by the various ILO supervisory bodies, to cease its practices that violate freedom of association, to permanently cease attacking the employers' representative institutions and begin a dialogue with them, to take specific measures to show their will to comply with the international agreements to which they subscribed voluntarily, to accept and fulfil the recommendations of the ILO supervisory bodies; and to protect business leaders and their institutions from the violent attacks that they frequently suffer from armed gangs and that the latter should be tried and held responsible for their acts.
- 1219.** In its communication dated 10 February 2011, the IOE provided additional information concerning the cases of confiscation of property of employers' leaders, the alleged physical attacks against employers' leaders and the lack of consultation and social dialogue, as well as other questions.

C. The Government's new reply

- 1220.** In its communication dated 18 May 2010, the Government states in relation to the allegations concerning social dialogue with FEDECAMARAS that in January 2010, the Ministry of Popular Power for Labour and Social Security sent communications to the employers' organizations, including FEDECAMARAS, inviting their opinion on the fixing of the national minimum wage for 2010. The majority of those organizations replied, sending their observations on the national minimum wage to the Department of Labour and

Social Security. The National Executive, having heard the views of the employers' and workers' organizations and the relevant bodies, ordered the national minimum wage to be increased by 25 per cent in 2010.

1221. Meetings, consultations and discussions were also held with employers; and workers' organizations, including FEDECAMARAS, concerning the Food Act and its regulations, the regulations pursuant to the Organic Act on Occupational Safety and Health and the Workplace Environment, the new Organic Labour Act, measures on labour immobility and principles of the representativeness of the country's employers' and workers' organizations in 2003, 2004, 2006, 2008, 2009 and 2010.
1222. Consultations were also held on many other laws not related to social and labour matters. Large, medium-sized and small enterprises, the urban and rural sector, workers' representatives, communities, etc., took part in all of these, including representatives of FEDECAMARAS which, as one of the country's employers' organizations, like others, was invited to consultations, discussions and dialogue on various subjects.
1223. Furthermore, meetings were also held for the appointment of the tripartite delegation to attend the last International Labour Conference, in which the following employers' organizations took part: the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS); the Venezuelan Federation of Craft, Micro, Small and Medium-sized Business Associations (FEDEINDUSTRIA); Entrepreneurs for Venezuela (EMPREEN); the Bolivarian Council of Industrialists, Entrepreneurs and Micro-entrepreneurs (COBOIEM) and the National Confederation of Farmers and Stockbreeders of Venezuela (CONFAGAN). At these meetings, the representatives of these organizations also discussed subjects of economic, political and social interest in the country.
1224. On a separate matter, by Presidential Decree No. 7173 of 12 January 2010, published in the *Official Gazette* No. 39349 on 19 January 2010, the Constitutional President of the Bolivarian Republic of Venezuela created the Bicentenary Fund, through which the national Government is promoting strategies to stimulate selective import substitution and the country's export sector, through collaboration between workers and entrepreneurs in the productive sector of the economy, both under private and public ownership, in close coordination with governments, municipal and local authorities, with the firm commitment to satisfy the basic needs of the people by developing the national productive system.
1225. This new initiative by the national Government complements others which, for some years past, have been designed to support initiatives in the business sector which generate economic sovereignty and social wellbeing. Considerable financing for such initiatives has been channelled through the public bank on preferential terms.
1226. At national level, representatives of various productive areas in the private sector participated in the socialist productive forums initiated by the national Government on 28 January 2010. Many of those representatives were related to FEDECAMARAS, which confirms the participation of the latter and other employers' organizations in the inclusive, constructive and productive social dialogue promoted by the national Government to facilitate and strengthen the country's development based on the articulation of the public and private sectors of the economy.
1227. An initial review of the results, in January 2010, showed 3,356 import substitution business projects and 589 export business projects. In percentage terms, the projects presented included 21 per cent in the agricultural sector, 14 per cent in textiles, 7 per cent in food and 10 per cent in tourism and services, all of them private enterprises.

- 1228.** As regards the reform of the Organic Labour Act, last year and in the first months of 2010, intensive consultations were held on the reform of the Act and its most important aspects. The debate began in June, with meetings being held in almost all sectors of the national economy. Representatives of all the employers' organizations, trade union confederations, federations and individual trade unions took part in these consultations. In addition, meetings and workshops were held both in the national capital and the various states of the country. By this process, the Social Development Commission of the National Assembly received over 4,000 proposals from all the interested parties. During the first few months of this year, the process of public consultation continued with the participation of all the social sectors, employers' organizations, workers' organizations and other people's organizations.
- 1229.** The Social Development Committee of the National Assembly is examining the observations and proposals made by the public institutions and social partners. The Organic Labour Act Reform Bill is will soon have its second reading in the National Assembly in accordance with the legislative agenda.
- 1230.** In addition, the National Assembly website also contains a forum, available to all workers, employers and citizens, on the Organic Labour Act, which is a space opened by the Permanent Social Development Committee to debate and consult on this reform.
- 1231.** The Reform Bill has been widely discussed and debated, as part of the process of "street social parliamentarianism" being developed by the Venezuelan State through the National Assembly, to allow workers, employers and their organizations, as well as interested citizens and social institutions to make proposals and suggestions to enrich this legislative initiative which represents a great advance in the social, labour and restitution rights of the workers, and designed to achieve the maximum consensus possible.
- 1232.** As regards the proceedings at the La Bureche estate and the situation of Mr Ángel Eduardo Gómez Sigala, the Government states that it duly informed the Committee that the National Land Institute, an agency of the Ministry of Popular Power for Agriculture and Land, duly authorized in accordance with the law, initiated the procedure for recovery of the plot of land known as the La Bureche estate, in the parish of Cabudare, municipality of Palavecino, Lara State, with the basic objective of promoting the agricultural use of the Río Turbio valley by immediately working the said land because it was lying idle. This was fully in conformity with the provisions of the National Constitution, the Land and Agrarian Development Act and Decree No. 2743 of 10 December 2003, published in the *Official Gazette*, No. 331541 of 30 December 2003.
- 1233.** Furthermore, inspection of this estate showed that the farm was underutilized, since it grew crops that were not suitable for the type of soil, thus causing a process of degeneration, and there was also inadequate management which had an adverse environmental impact and 83 hectares out of the farm's total area of 97 hectares (6,260 m²) were left idle.
- 1234.** Thus the proceeding carried out in the Río Turbio Valley in Lara State was part of a process of recovery of lands and properties by the national Government and implemented by the National Land Institute, based on fallowness, lack of productivity or illegal use of land, as laid down in Venezuelan legislation.
- 1235.** As regards the situation of Mr Ángel Eduardo Gómez Sigala, the Public Prosecutor's Office charged him, having apprehended him in the act, with the offences of resisting authority and minor personal injury, as laid down in articles 216 and 418, respectively, of the Venezuelan Criminal Code. Mr Sigala was charged by Public Prosecutor's Office 5 in Lara State. On 26 September 2009, the Eighth Lara State District Court, on the application of the Public Prosecutor's Office, ordered the application of the ordinary proceedings and

release on conditional bail, as laid down in article 256, section 9 of the Criminal Procedures Code. The Public Prosecutor's Office requested the San Juan and Barquisimeto branches of the Scientific, Penal and Criminal Investigation Service to carry out physical tests on a sample of clothing, verification of three compact discs provided for the defence of the accused, photographic records, technical inspection and interviews of witnesses in person, in order to prepare a report of its conclusions. The subsequent judicial proceeding against Mr Sigala is subject to all the procedural guarantees and rights set out in national and international law, and is based on compliance with and total application of the provisions of national legislation. Lastly, it should be noted that Mr Gómez Sigala is at liberty during the proceedings and all his constitutional rights and guarantees have been respected.

- 1236.** As regards the allegations relating to labour solvency, the Government states that during the coup d'état, the employers' strike with mass closures of companies and sabotage of oil production in 2002 in the Bolivarian Republic of Venezuela, many private sector entrepreneurs belonging to FEDECAMARAS were responsible for the economic losses and involved in attacks on democracy, using dismissals and violation of rights to punish the working class. That is why, at the beginning of 2004, the workers' side, organized in the National Workers' Union in order to seek tools to guarantee their rights, presented the draft decree on labour solvency to the national Government. This initiative by the workers was widely discussed, and the decree was approved by the national Government to safeguard the social and labour rights of the country's workers and their families.
- 1237.** The labour solvency certificate is an administrative document issued by the Ministry of Popular Power for Labour and Social Security, which certifies that the employer effectively complies with the human, labour and social rights of its workers. It is an essential requirement for employers which wish to conclude contracts and agreements with the State in the financial, economic, technological, international trade and foreign exchange areas.
- 1238.** The labour solvency scheme has broad and sufficient guarantees of legality and impartiality for all those who apply for it. It also has simple, fast procedures. It is thus very far from restricting or threatening the free operation and development of companies and commercial activity in the country, or limiting the production and marketing of goods and services. Much less is it a mechanism of discrimination against employers. On the contrary, it is an effective means of guaranteeing and protecting the human, social and labour rights of workers which, for a long time, were at risk. The procedure is also subject to transparent mechanisms of social supervision.
- 1239.** Employers which comply with the law, contracts of employment, respect the workers and maintain satisfactory conditions of safety and health in the workplace have no reason to be concerned that they will not duly and efficiently obtain the labour solvency certificate.
- 1240.** With respect to the incidents which occurred in February 2008 at FEDECAMARAS headquarters, the Government states that it informed the Committee that, according to the information provided by the Public Prosecutor's Office, the police investigation related to the detonation of the explosive device at FEDECAMARAS headquarters and the case against Mr Juan Crisóstomo Montoya González and Ms Ivonne Gioconda Márquez Burgos, who were suspected of committing the offences, was conducted in May 2008. Their arrest was also ordered in 2008, and they thus became fugitives from justice.
- 1241.** The Prosecutor's Office also reports that, on 6 and 10 May 2010, law enforcement officers arrested the accused, Mr Juan Crisóstomo Montoya González and Ms Ivonne Gioconda Márquez Burgos, respectively, on suspicion of committing the acts which occurred at FEDECAMARAS headquarters. The Public Prosecutor's Office requested the application

of the ordinary procedure and remand in custody, which was granted by the court, and the said citizens were held in a remand centre in the metropolitan area of Caracas. The current stage in the proceedings is that submission of the final report is pending, according to official information provided by the Prosecutor's Office.

1242. Notwithstanding the foregoing, the Government categorically rejects the Committee's suggestions that the fact that until a few days ago the accused citizens were fugitives from Venezuelan justice constituted a situation of impunity, as that would be a denial of justice and a lack of will to punish offences. The Venezuelan State, through its competent authorities, carried out all relevant investigations and made every effort to find the accused as quickly as possible, to ensure the fulfilment of the provisions of the law and the application of the principles and values of the rule of law and justice. Thus, even though those citizens could not be arrested, the Committee is not entitled at this stage to find that the Bolivarian Republic of Venezuela is a State of impunity.
1243. As regards the alleged events in May and November 2007 at FEDECAMARAS headquarters, the Government states that the competent authority, in this case the Public Prosecutor's Office, informed the Department of Labour and Social Security, that no complaint or information had been received which would give rise to investigation into any incident at the headquarters of that employers' organization during 2007.
1244. As regards the request to quash the order for the arrest of Mr Carlos Fernández, the Government reiterates what it said on other occasions to the Committee concerning the constitutional principle of the separation of powers in the Venezuelan State. This separation of powers seeks to distribute and organize the functions of the State in which the powers of each are granted to a separate public body or organization. This, together with the fundamental rights enshrined in the Constitution, is one of the principles that characterize the rule of law and justice in the Bolivarian Republic of Venezuela.
1245. The Venezuelan Constitution of 1999 establishes rules of institutional control and balance, by setting limits on the exercise of power and the guarantee that the bodies which hold those powers keep within their legal framework. Thus, public bodies are constrained to carry out only those activities which are assigned to them by legislation. This is where the principle of separation of powers is considered essential to ensure and safeguard the freedom of citizens, and by attributing the exercise of those powers to separate bodies, the power in the hands of each is limited.
1246. In the same vein, given that this principle applies in the Venezuelan State, it is the Public Prosecutor's Office which is responsible for investigating and examining the evidence in these cases, as well as all the related trial proceedings.
1247. The Government states that it is paradoxical that the Committee should request it to take steps to investigate and apprehend those suspected of the incidents which occurred at FEDECAMARAS headquarters, as requested in the last recommendations in the Committee's reports, and at the same time request it in this case to quash an arrest warrant issued by the Public Prosecutor's Office for the arrest of Mr Carlos Fernández, who is accused of committing the particularly serious offences of civil rebellion and incitement to crime, established in the Venezuelan Criminal Code in articles 144, 284, 285 and 286. These are offences with which he was charged on the basis of evidence that he committed those offences during the employers' strike and oil stoppage during 2002 and 2003 which were an assault on the rule of law and caused serious social harm and significant economic losses in the country.
1248. We cannot understand how the Committee on Freedom of Association can request punishment for some and absolution for others, when in both cases offences were

committed which are specified and punishable under Venezuelan law and because they are punishable offences, warrant investigation to secure conviction in the case of guilt or acquittal if found innocent.

- 1249.** The fact is that, in both cases, the suspects were identified and charged and the legal process was paralysed due to the obstruction of justice by the flight or absence of the accused, a situation which persists in the case of Mr Carlos Fernández, who continues to be a fugitive from justice.
- 1250.** We request and urge the Committee to show respect, impartiality and fairness in its observations and statements about our country, since persons suspected of committing an offence, whoever they may be, must be tried and punished if appropriate. The mere fact that he is a member of an employers' organization does not, in the Bolivarian Republic of Venezuela, give Mr Carlos Fernández any form of immunity in the case of the commission of criminal acts which, in this case, were public and notorious, as well as being particularly grave.
- 1251.** The Committee should be reminded, when it requests the order for the arrest of Mr Carlos Fernández to be quashed, that his participation not only in the incidents on the occasion of the employers' strike and oil stoppage but also in relation to the breakdown of the constitutional order by a coup d'état in April 2002, is public and notorious, which is why we wish to make some observations in this regard. Mr Carlos Fernández was the Vice-President of FEDECAMARAS in 2002 and was one of the participants in the coup d'état suffered by the Bolivarian Republic of Venezuela against the Government of President Hugo Chávez on 11 April of that year.
- 1252.** In December 2002 and January–February 2003, Mr Carlos Fernández, now President of FEDECAMARAS, was one of the promoters of the illegal employers' strike and oil sabotage, which had serious economic and social consequences for the country and its people, acts which led to his being charged by the Public Prosecutor's Office with the abovementioned offences.
- 1253.** The illegal employers' strike and oil sabotage left the population without access to basic services and staple foods, a public industry with losses of over \$12 million, and forced hundreds of small and medium-sized enterprise in economic difficulty to close down permanently, leaving thousands of workers jobless, such that unemployment rose from 11 per cent in 2002 to 20 per cent in June 2003.
- 1254.** Despite the investigations and proceedings opened by the Public Prosecutor's Office against the suspected participants in the incidents that occurred during the coup d'état and the oil stoppage in December 2002 and January–February 2003, on 31 December 2007, the President of the Republic, in a magnanimous gesture, granted a presidential pardon to all those persons who, at that time, were within the law, had surrendered to the relevant criminal proceedings, and had been tried or convicted for offences during the coup d'état, illegal employers' strike and oil sabotage, extinguishing in full all criminal, judicial, military and police proceedings initiated by the organs of State. This law and the pardon in question do not apply to the perpetrators of offences considered as in crimes against humanity.
- 1255.** Mr Carlos Fernández could have benefited from this pardon and amnesty. However, he was and still is a fugitive from Venezuelan justice. Consequently, because he did not surrender to the competent authorities with respect to the commission of the offences with which he was charged, he was not covered by the presidential pardon or Amnesty Act.

- 1256.** Eight years have passed since 11 April 2002, when the coup d'état took place, and eight years have also passed since the illegal employers' strikes and oil sabotage. It is incredible, unfair and deplorable that international bodies, such as some of the ILO supervisory bodies, do not recognize these facts and repeatedly insist that they should fall under a cloak of impunity. The Government demands due respect and due impartial from the officials of the ILO supervisory bodies.
- 1257.** In its communication of 9 November 2010, the Government condemns and investigates any act of violence against persons living in the country. It therefore deplores and condemns what happened on 27 October 2010 to Ms Albis Muñoz and the FEDECAMARAS, leaders, Messrs Noel Álvarez, Luis Villegas and Ernesto Villamil, as was stated publicly at the time by the Minister of Popular Power for Internal Relations and Justice, Mr Tarek El Aisami.
- 1258.** The Government states that, as soon as the facts were known, the competent authorities of the Venezuelan State immediately launched an investigation in order to clarify what had happened, identify those responsible and bring them to trial, in accordance with national legislation. Once the results of this investigation are complete, they will be made public and the information will be duly published. Thus the "request for investigation" made by the Secretary-General of the IOE in the complaint of 3 November 2010 is both tardy and superfluous, as the competent national authorities acted immediately as is right and proper.
- 1259.** Given that the investigation into the incident is in progress, until the results are known, any speculative suggestion such as that expressed by the Secretary-General of the IOE is unjustified and not serious, when he indicates that "... purpose [of the attack] was to decapitate Venezuela's business leadership, although it was afterwards disguised as an abduction". In this regard, the prejudiced and reckless speculations should at least not claim to be the real explanation of the facts, but deliberate and opportunist manipulation of an act of violence which we all deplored and condemned. It should be noted that the victims of this act of violence, all of them representatives of FEDECAMARAS, did not make an official complaint in the Bolivarian Republic of Venezuela like the one filed by the official representing the IOE.
- 1260.** Furthermore, due to the fact that the Secretary-General of the IOE states that "... none of the attacks on FEDECAMARAS have led to the arrest and punishment of those responsible, despite the fact that the names of the persons and institutions behind them are known", we feel obliged to remind the Secretary-General of the IOE that the Committee on Freedom of Association was duly informed of the detonation in 2008 of an explosive device at the Federation's headquarters, the investigation of which resulted in the arrest and trial of Mr Juan Crisóstomo Montoya and Ms Ivonne Gioconda Márquez Burgos, who were suspected of the attack. With regard to other attacks against FEDECAMARAS headquarters in 2007 (not specified in the complaint in question), the Committee on Freedom of Association was also informed that, according to the Public Prosecutor's Office, there were no other current proceedings concerning an alleged attack or attacks on the headquarters of the said Federation. Thus, apart from the deplorable act of violence which occurred on 27 October 2010, which is still under investigation, there are no complaints filed by representatives of FEDECAMARAS which are not being dealt with by the competent national authorities.
- 1261.** Lastly, the Government categorically rejects the irresponsible, unfounded and false allegations with which, with impunity, they seek to link public institutions, even up to the highest representatives of the State, with acts of "... violence against Venezuelan business leaders", as expressed by the Secretary-General of the IOE in his complaint. The Bolivarian Republic of Venezuela is a deeply democratic state, based on the sovereignty of the people and a social state, governed by the rule of law and justice which was interrupted

only during the coup d'état which took place on 11 April 2002 against the constitutional President, Hugo Chávez, when the then president of the leading business organization, FEDECAMARAS, took the Government Palace by assault and dissolved by decree all the public powers.

- 1262.** The Government, once again, deplores the attempt to abuse the complaint mechanism, using it as a political stratagem to undermine the institutions of the Bolivarian Republic of Venezuela, generate a web of adverse opinion and to manipulate the ILO's supervisory bodies.
- 1263.** In its communication of 12 November 2010, the Government states that, on 10 November 2010, as a result of the investigations carried out by the competent authorities, two people, Mr Antonio José Silva Moyega and Mr Jaron Manjares, were arrested for their direct participation in the incident which occurred on 27 October (allegations of abduction and attacks on four FEDECAMARAS leaders). In addition a warrant was issued for the arrest of Mr Cristian Leonardo Castro Rojas, who is currently a fugitive from justice. The Minister of Popular Power for Internal Relations and Justice also reported that a further two persons are suspected of being involved, but they have not yet been identified with certainty and all of these people are members of a criminal gang engaged in robbery and abduction. The arrested persons are being tried in Caracas Metropolitan District Court 35. Finally, the Government provided additional observations in a communication dated 25 February 2011, in response to the communication sent by the IOE on 10 February 2011.

D. The Committee's conclusions

Allegations concerning acts of violence against employers' leaders and members of FEDECAMARAS or its headquarters

- 1264.** *The Committee notes with deep concern the allegations of the IOE according to which: (1) on the night of 27 October 2010, in Caracas, a group of five armed and hooded men machine-gunned, kidnapped and maltreated the President of FEDECAMARAS, Mr Noel Alvarez, its former President, Ms Albis Muñoz, the executive director, Mr Luis Villegas and its treasurer, Mr Ernesto Villamil. The kidnappers fired three shots into the body of Ms Albis Muñoz, employer member of the ILO Governing Body. After she had lost a lot of blood, the attackers dragged her from the vehicle in which she was travelling and dumped her near the Pérez Carreño Hospital, where she was taken some time later by a passing police patrol. The other three abducted persons were released two hours later, after the abductors had faked an abduction, expressed their intention to demand a ransom of 300 million bolivars, and stolen their belongings. According to the IOE, the manner of the attack suggests that its purpose was to decapitate the business leadership of the Bolivarian Republic of Venezuela, although it was afterwards disguised as an abduction.*
- 1265.** *The Committee notes the statements according to which: (1) the Government condemns and investigates any act of violence against persons living in the country. It therefore deplores and condemns what happened on 27 October 2010 to Ms Albis Muñoz and the FEDECAMARAS, leaders, Messrs Noel Álvarez, Luis Villegas and Ernesto Villamil; (2) as soon as the facts were known, the competent authorities of the Venezuelan State immediately launched an investigation in order to clarify what had happened, identify those responsible and bring them to trial, in accordance with national legislation; (3) given that the investigation into the incident is in progress, until the results are known, any speculative suggestion such as that expressed by the Secretary-General of the IOE, is unjustified and not serious, when he indicates that "... purpose of the attack was to decapitate Venezuela's business leadership, although it was afterwards disguised as an*

abduction.” In this regard, no representative of FEDECAMARAS made a similar official complaint in the Bolivarian Republic of Venezuela; the Government categorically rejects the irresponsible, unfounded and false allegations with which, with impunity, they seek to link public institutions, even up to the highest representatives of the State, with acts of violence against Venezuelan business leaders; (4) on 10 November 2010, as a result of the investigations carried out by the competent authorities, two people, Mr Antonio José Silva Moyega and Mr Jaron Manjares, were arrested for their direct participation in the incident which occurred on 27 October. In addition a warrant was issued for the arrest of Mr Cristian Leonardo Castro Rojas, who is currently a fugitive from justice; and (5) a further two persons are suspected of being involved, but they have not yet been identified with certainty and all of these people are members of a criminal gang engaged in robbery and abduction. The arrested persons are being tried in Caracas Metropolitan District Court 35.

- 1266.** *The Committee deplores the offences that were committed, emphasizes their seriousness and requests the Government to take all the steps within its power to arrest the other three persons involved in the abductions and wounding, and to keep it informed of developments in the investigations. The Committee expresses the hope that the persons guilty of these crimes will soon be convicted and sentenced in proportion to the seriousness of the offences in order that such incidents will not be repeated and requests the Government to keep it informed in this respect.*
- 1267.** *As regards the allegation relating to the attacks on FEDECAMARAS headquarters in 2007, the Committee notes that, according to the IOE, the attacks consisted of acts of violence against the institution, FEDECAMARAS, and its premises and were carried out by representatives of the Ezequiel Zamora National Campesino Front, the Simón Bolívar National Communal Front, the Alexis Vive Collective and the Simón Bolívar Coordinator. Those leaders were interviewed in the media where they identified themselves, but they have not been punished. The Committee deplores that the Government has ignored its recommendation to step up the investigations into these attacks on FEDECAMARAS headquarters in May and November 2007, whether or not there had been a complaint by representatives of FEDECAMARAS within the country. The Committee requests FEDECAMARAS to file an official complaint concerning the alleged facts of the attacks on its headquarters in 2007 with the Public Prosecutor’s Office and hopes that the authorities will collaborate with the organization’s representatives to clarify the facts, identify and convict the guilty persons.*
- 1268.** *As regards the allegation concerning the bomb attack on FEDECAMARAS headquarters on 24 February 2008, the Committee notes that the IOE recalls that in that attack, metropolitan police inspector Mr Héctor Amado Serrano Abreu was killed by an explosive device when he was placing it against the front of the FEDECAMARAS headquarters building. On 26 February 2008, the complaint concerning this incident was lodged with the Public Prosecutor’s Office, requesting a thorough and exhaustive investigation of the facts and identification of those responsible and, so far, there has been no visible result. The Committee notes, however, that the Government states that the investigation into the case of the detonation in 2008 of an explosive device at the FEDECAMARAS headquarters resulted in the arrest and trial of Mr Juan Crisóstomo Montoya and Ms Ivonne Gioconda Márquez Burgos, who were suspected of the attack. The Committee firmly hopes that the authors of the bomb attack at FEDECAMARAS headquarters will soon be convicted and sentenced in proportion to the seriousness of the offences. The Committee requests the Government to keep it informed of developments.*
- 1269.** *The Committee notes that, according to the IOE, as a result of the constant confiscations of companies and properties, there have been many acts of violence and abductions in the agricultural and livestock sector. A special case is that of the agricultural and livestock*

farmer, Mr Franklin Brito, who died aged 49 years on 30 August 2010, as a result of going on a succession of hunger strikes since 2 July 2009 in protest against the Government for the invasion and expropriation of his land and despite having produced to the Government the maps and documents proving his ownership of the property situated in Bolívar State. The farmer was demanding the return of his land and payment of compensation for damages. The IOE highlights that the policy of harassment of the private sector has now resulted in 25 agricultural and livestock farmers being abducted without the Government being concerned to bring about their release. Since 1999, the State has occupied 3 million hectares of land, rejecting titles of ownership.

- 1270.** *Deploing the lack of observations by the Government concerning these allegations, the Committee emphasizes their seriousness, requests the Government to reply without delay to these allegations, and that it should make every effort to secure the release of the 25 abducted agricultural and livestock farmers and should order investigations to be carried out to punish the guilty persons. The Committee requests the Government to keep it informed of developments.*
- 1271.** *In general, taking into account the series of allegations examined in this section, the Committee draws the attention of the Government to the principle that the rights of workers' and employers' organizations can only be exercised in a climate 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.*

Allegations of harassment and intimidation of employers' leaders

- 1272.** *The Committee notes that, according to the IOE, as a consequence of their work to defend their members, representatives of employers' organizations, and the private sector in general, are constantly harassed and threatened. The IOE complains of attacks against the property of the former Presidents of FEDECAMARAS, Messrs Vicente Brito, Rafael Marcial Garmendia and Carlos Sequera Yépez, as well as against Mr Manuel Cipriano Heredia, the current President of FEDENAGA (the leading agricultural sector body affiliated to FEDECAMARAS) and its former President, Mr Genaro Méndez, and also Mr Eduardo Gómez Sigala, former President of CONINDUSTRIA (the leading industrial sector body affiliated to FEDECAMARAS). Also, according to the IOE, the National Land Institute (INTI) together with the National Guard constantly invade productive farms under the so-called "Land Recovery Plan". The INTI could only "recover" those lands which it owned, and that is not the case of the properties of the expropriated business leaders. The Committee also notes that the IOE emphasizes that Mr Noel Álvarez, the current President of FEDECAMARAS, after being interviewed by RCTV International, was the subject of an investigation by Public Prosecutor's Office 10 in the Caracas Metropolitan Area, and charges were brought against him for alleged offences against national security, rebellion, incitement to insurrection and incitement to commit criminal offences. As of today, Mr Noel Álvarez has been denied the right to appoint his defence lawyers.*
- 1273.** *The Committee further notes that, according to the IOE, there have been numerous threats and verbal attacks against the private sector representative organization, FEDECAMARAS, by the President of the Republic. Recently, on 3 June, at the time of the International Labour Conference 2010, the President of the Republic stated in Venezuela that "FEDECAMARAS is an enemy of this people and we do not need it. More than that, let me make it crystal clear, I think this country can do without it". Also, on 15 June 2010, he said that FEDECAMARAS "is a great obstacle to the country's development", and, therefore, he declared, its members were "enemies of the State". On 13 October 2010, as*

the annual assembly of FEDECAMARAS was ending, the President of the Venezuelan Republic stated that “FEDECAMARAS” does not exist” and declared in that regard “Do these people still exist? I do not recognize them, I don’t know who they are”.

- 1274.** *The Committee observes that the IOE concludes that the foregoing shows a clear and constant will by the Government of the Bolivarian Republic of Venezuela to attack and destroy FEDECAMARAS, even though it is the national representative organization of the employers’ side; the increasing frequency and content of the verbal attacks by the Government of the Bolivarian Republic of Venezuela against FEDECAMARAS is cause for much concern.*
- 1275.** *Finally, the Committee notes that, according to the IOE, as part of the harassment of the private sector, the President of the Republic declared “economic war” on the business sector and its representatives, and, in the last three years, the Government had nationalized and expropriated 371 companies in strategic sectors and had paid only one third of the compensation.*
- 1276.** *The Committee expresses its concern with respect to these allegations of intimidation and harassment of FEDECAMARAS and its leaders, including the invasion and expropriation of farms or companies (in many cases without payment of due compensation) to the detriment of leaders or members of FEDECAMARAS, criminal prosecutions of employers’ leaders and verbal attacks by the authorities against FEDECAMARAS and its leaders. The Committee deplores that the Government has not replied to these allegations and requests it to send detailed observations without delay. The Committee reiterates the principle expressed previously on the exercise of the rights of organizations in a climate free of violence and intimidation and expresses the firm hope that in the future the authorities will refrain from adopting such an aggressive tone in their statements concerning FEDECAMARAS and its leaders and members, and that these allegations of unjust invasions and expropriations, prosecutions (see following paragraph) and measures involving periodic reporting to the judicial authority should be investigated.*
- 1277.** *As regards the allegations concerning the employers’ leader, Mr Eduardo Gómez Sigala (seizure of his lands by military personnel in the framework of recovery of lands falsely considered as unproductive or idle, detention and prosecution for “resisting authority and minor personal injury” because he had torn a sergeant’s shirt in the struggle when he was forced to leave the farm and the order for his release on conditional bail with the obligation to appear before the court whenever required) the Committee notes the Government’s statements, according to which: (1) the National Land Institute, an agency of the Ministry of Popular Power for Agriculture and Land, duly authorized in accordance with the law, initiated the procedure for recovery of the plot of land known as the La Bureche estate, in the parish of Cabudare, municipality of Palavecino, Lara State, with the basic objective of promoting the agricultural use of the Río Turbio valley by immediately working the said land because it was lying idle; (2) inspection of this estate showed that the farm was underutilized, since it grew crops that were not suitable for the type of soil, thus causing a process of degeneration, and there was also inadequate management which had an adverse environmental impact and 83 hectares out of the farm’s total area of 97 hectares (6,260 m²) were left idle; (3) the Public Prosecutor’s Office charged Mr Ángel Eduardo Gómez Sigala, having apprehended him in the act, with the offences of resisting authority and minor personal injury, as laid down in articles 216 and 418, respectively, of the Venezuelan Criminal Code; (4) On 26 September 2009, the Eighth Lara State District Court, on the application of the Public Prosecutor’s Office, ordered the application of the ordinary proceedings and release on conditional bail, as laid down in article 256, section 9, of the Criminal Procedures Code. The Public Prosecutor’s Office requested the San Juan and Barquisimeto branches of the Scientific, Penal and Criminal Investigation Service to carry out physical tests on a sample of clothing, verification of three compact*

discs provided for the defence of the accused, photographic records, technical inspection and interviews of witnesses in person, in order to prepare a report of its conclusions; and (5) all his legal procedural and constitutional guarantees have been respected.

- 1278.** *The Committee deplores that the Government has not explained in detail the circumstances of the specific facts which resulted in the criminal charge and trial of this employers' leader (in its previous examination of the case, the Committee requested a detailed account of the events, since the Government had stated that Mr Gómez Sigala had been arrested for assaulting a military officer who had suffered a dislocated arm) and requests it to do so since the IOE states that this leader had torn a sergeant's shirt in a struggle.*
- 1279.** *The Committee reiterates its previous conclusion and recommendation concerning the illegal and unlawful nature of the confiscation of this leader's property. The Committee requests the Government to keep it informed of developments in the proceeding and wishes to refer it to its conclusions in the last examination of the case on the alleged illegality of the confiscation (according to the Government, it was not about 25 hectares but 83):*

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 [see 356th Report, para. 1542].

- 1280.** *As it did in its recommendation in its last examination of the case, the Committee once again requests the Government to return the "La Bureche" farm to the employers' leader, Mr Eduardo Gómez Sigala and to compensate him fully for all the damages caused by the intervention of the authorities in the seizure of his farm.*
- 1281.** *The Committee notes that the IOE reiterates that the authorities have still failed to quash the order for the arrest of the former President of FEDECAMARAS, Mr Carlos Fernández, so that he may return to the country without fear of reprisals. The Committee notes the Government's observations in this respect. The Committee emphasizes that it had examined the Government's position on Mr Carlos Fernández on several occasions, and the Government's latest observations do not add anything new which might lead it to modify its previous recommendation. Consequently, the Committee once again requests the Government to quash the order for the arrest of the former President of FEDECAMARAS, Mr Carlos Fernández, so that he may return to the country without fear of reprisals.*

Allegations concerning deficiencies in social dialogue

- 1282.** *The Committee notes that the IOE and FEDECAMARAS once again deplore the lack of social dialogue and bipartite and tripartite consultations, although the Committee has incessantly emphasized “the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation”. Despite the Committee’s recommendation that “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”, it should be noted that the Government’s attitude has not changed and that it is adopting reforms and laws which affect the private sector without prior consultation or social dialogue with the social partners. The Committee notes that the IOE and FEDECAMARAS emphasize the Government’s rejection of the Committee’s recommendations on the matter and the absence of any “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”. On the contrary, according to the complainants, the Government is now using the procedure of decrees with the force of law, which do not have a time limit, to legislate without dialogue or consultation, since with the new “Enabling Act” it is not necessary to discuss draft legislation in the National Assembly. The Committee notes that the IOE mentions four important laws on which there was no consultation, which nevertheless clearly affect employers’ interests, as well as three bills which were also not a subject of consultations, and also unilateral decisions on fixing the minimum wage.*
- 1283.** *The Committee notes that the Government states that, in January 2010, the Ministry of Popular Power for Labour and Social Security sent communications to the employers’ organizations, including FEDECAMARAS, inviting their opinion on the fixing of the national minimum wage for 2010. The majority of those organizations replied, sending their observations on the national minimum wage to the Department of Labour and Social Security. The National Executive, having heard the views of the employers’ and workers’ organizations and the relevant bodies, ordered the national minimum wage to be increased by 25 per cent in 2010. The Committee notes that the Government reiterates that meetings, consultations and discussions were also held with employers’ and workers’ organizations, including FEDECAMARAS, concerning the Food Act and its regulations, the regulations pursuant to the Organic Act on Occupational Safety and Health and the Workplace Environment, the new Organic Labour Act, measures on labour immobility and principles of the representativeness of the country’s employers’ and workers’ organizations in 2003, 2004, 2006, 2008, 2009 and 2010. In addition, the Government indicates that consultations were also held on many other laws not related to social and labour matters. Large, medium-sized and small enterprises, the urban and rural sector, workers’ representatives, communities, etc., including representatives of FEDECAMARAS, took part in all of these. The Committee also notes that meetings were also held for the appointment of the tripartite delegation to attend the 99th International Labour Conference in which several employers’ organizations, including FEDECAMARAS, took part; at these meetings, the representatives of these organizations also discussed subjects of economic, political and social interest in the country. On a separate matter, by Presidential Decree No. 7173 of 12 January 2010, published in the Official Gazette No. 39349 on 19 January 2010, the Constitutional President of the Bolivarian Republic of Venezuela created the Bicentenary Fund, through which the national Government is promoting strategies to stimulate selective import substitution and the country’s export sector, through collaboration between workers and entrepreneurs in the productive sector of the economy, both under private and public ownership, in close coordination with governments, municipal and local authorities, with the firm commitment to satisfy the*

basic needs of the people by developing the national productive system. The Government adds that at national level, representatives of various productive areas in the private sector participated in the socialist productive forums initiated by the national Government on 28 January 2010, many of them related to FEDECAMARAS, which confirms the participation of the latter and other employers' organizations in the inclusive, constructive and productive social dialogue promoted by the Government. An initial review of the results, in January 2010, showed 3,356 import substitution business projects and 589 export business projects.

1284. *The Committee wishes to emphasize that the Government referred to consultations with FEDECAMARAS were also held on various laws and certain questions and many laws not related to social and labour matters, as well as consultations on the minimum wage and the composition of the tripartite delegation to the last International Labour Conference. The Committee emphasizes, however, that some of these measures refer to the period 2003–10 and in other cases the Government refers to consultations or activities with private sector representatives “related” to FEDECAMARAS, for example in relation to tripartite activities in the framework of the Bicentenary Fund and/or “socialist productive forums”.*

1285. *The Committee observes that the Government does not provide much detail about these consultations which, as indicated above, sometimes refer to previous years, not does it indicate with respect to these activities or consultations which it mentions how it took into account the views of the employers' confederation, FEDECAMARAS or whether there were agreements. The Committee also observes that the Government did not deny the alleged lack of consultations with it on various laws or bills on matters affecting them. The Committee further observes that the Government continues not to convene the national tripartite commission on the minimum wage provided in the legislation and that it has not implemented its recommendations. In particular, it has not established a high level joint commission assisted by the ILO to resolve problems pending before the Committee through direct dialogue, nor has it created a tripartite forum for social dialogue based on the representativeness of workers' and employers' organizations. In these circumstances, the Committee must deplore once again that the Government has ignored its previous recommendations, for which reason it reiterates them and reproduces them below:*

- *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;*

- 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;
- 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.

Allegations relating to acts of favouritism or discrimination

- 1286.** *As regards the Committee's recommendation in its previous examination of the case in which it requested 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, the Committee notes the Government's statements according to which: (1) the labour solvency certificate is an administrative document issued by the Ministry of Popular Power for Labour and Social Security, which certifies that the employer effectively complies with the human, labour and social rights of its workers. It is an essential requirement for employers which wish to conclude contracts and agreements with the State in the financial, economic, technological, international trade and foreign exchange areas; (2) the labour solvency scheme has broad and sufficient guarantees of legality and impartiality for all those who apply for it. It also has simple, fast procedures. It is thus very far from restricting or threatening the free operation and development of companies and commercial activity in the country, or limiting the production and marketing of goods and services. Much less is it a mechanism of discrimination against employers. On the contrary, it is an effective means of guaranteeing and protecting the human, social and labour rights of workers which, for a long time, were at risk. The procedure is also subject to transparent mechanisms of social supervision, and (3) employers which comply with the law, contracts of employment, respect the workers and maintain satisfactory conditions of safety and health in the workplace have no reason to be concerned that they will not duly and efficiently obtain the labour solvency certificate.*
- 1287.** *The Committee requests the Government to indicate the means of recourse available to employers who feel that they are victims of discrimination involving refusal to issue a labour solvency certificate or official foreign exchange authorizations, to initiate a dialogue with FEDECAMARAS on these questions and to inform the Committee of developments.*
- 1288.** *The Committee notes that the IOE alleges that the finances parallel organizations to FEDECAMARAS with official subsidies. It attaches, in this regard, an extract from the financial report of the Economic and Social Development Bank (BANDES) of 30 June 2007. This report indicates that Entrepreneurs for Venezuela (EMPREEN) was granted an allocation of 2,267,846 bolivars and a further allocation of 438,378 bolivars. Furthermore, national financial institutions give priority to cases processed by EMPREEN (the organization backed by President Chávez) to the detriment of those which are not affiliated to it. The Foreign Exchange Commission (CADIVI) allocated dollars for imports in 91 per cent of the cases processed by EMPREEN. The Government's support to official companies was also expressed by the investment of three billion bolivars in the Bicentenary Fund which finances "social production companies" which participate in export and import substitution plans, but not to private enterprises*

represented by FEDECAMARAS. According to the IOE, the intention to replace private companies, which are being strangled by legal constraints and requirements, with socialist enterprises which obtain preferential credits, is a fact. The consequence of this situation is that since the President of the Republic came to power, the number of companies in the country fell from 11,000 to 7,000.

- 1289.** *The Committee observes with regret that the Government has not replied to these allegations of discrimination against FEDECAMARAS and its members concerning parallel bodies and organizations close to the Government. The Committee requests the Government to send without delay its observations on these allegations and wishes to emphasize that by favouring or disadvantaging certain organizations compared with the rest, governments can influence the attitude of workers or employers when they choose which organization they wish to join, which is incompatible with the principle contained in Convention No. 87, whereby public authorities must refrain from any interference which would restrict the rights enshrined in the Convention.*
- 1290.** *With regard to the examination of the bill on international cooperation, the Committee hopes that it will provide for rapid recourse in the cases of discrimination and that it will avoid interference by the authorities in access to foreign funds by workers' and employers' organizations. Finally, the Committee notes the comments of the complainant organization concerning the Organic Act establishing the Central Planning Commission. In this respect, while the legislation establishes strong state intervention in the economy and national economic structure under the aegis of central planning in order to construct the Venezuelan socialist model, the Committee requests the complainant organizations to provide information as to the relationship between the allegations and the violation of Conventions Nos 87 and 98.*
- 1291.** *The Committee notes the additional information sent by the IOE on 10 February 2011 concerning the cases of confiscation of property of employers' leaders, the alleged physical attacks against employers' leaders, the lack of social dialogue, as well as other questions, and the Government's communication, dated 25 February 2011, received two days before the Committee's meeting. The Committee will review these communications when it will next examine this case.*

The Committee's recommendations

- 1292.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *With regard to the abduction and maltreatment of the FEDECAMARAS leaders, Messrs Noel Álvarez, Luis Villegas, Ernesto Villamil and Ms Albis Muñoz (Employer member of the Governing Body of the ILO), the latter being wounded by three bullets, the Committee deplores the offences that were committed, emphasizes their seriousness and requests the Government to take all the steps within its power to arrest the other three persons involved in the abductions and wounding, and to keep it informed of developments in the investigations. The Committee expresses the hope that the persons guilty of these crimes will soon be convicted and sentenced in proportion to the seriousness of the offences in order that such incidents will not be repeated and requests the Government to keep it informed in this respect.*

- (b) *As regards the allegations concerning the attacks on FEDECAMARAS headquarters in 2007, the Committee notes that the Government states that there is no complaint pending with the Public Prosecutor's office and the representatives of FEDECAMARAS have not filed any complaint. The Committee deplores, whether or not there had been a complaint by representatives of FEDECAMARAS within the country, that the Government has ignored its recommendation to step up the investigations into these attacks on FEDECAMARAS headquarters in May and November 2007. The Committee requests FEDECAMARAS to file an official complaint concerning the alleged facts of the attacks on its headquarters in 2007 with the Public Prosecutor's Office and hopes that the authorities will collaborate with the organization's representatives to clarify the facts, identify and convict the guilty persons.*
- (c) *As regards the allegation concerning the bomb attack on FEDECAMARAS headquarters on 24 February 2008, the Committee firmly hopes that the authors of the bomb attack at FEDECAMARAS headquarters will soon be convicted and sentenced in proportion to the seriousness of the offences. The Committee requests the Government to keep it informed of developments.*
- (d) *The Committee deplores the lack of observations on the alleged abduction of 25 agricultural and livestock farmers and the death of one farmer (Mr Franklin Brito) as a result of going on a succession of hunger strikes in protest against the Government for the unjust invasion and expropriation of his land. The Committee emphasizes the seriousness of these allegations, requests the Government to reply to them without delay, and to make every effort to secure the release of the 25 abducted agricultural and livestock farmers and should order investigations to be carried out to punish the guilty persons. The Committee requests the Government to keep it informed of developments.*
- (e) *In general, taking into account the series of allegations examined in this section, the Committee draws the attention of the Government to the principle that the rights of workers' and employers' organizations can only be exercised in a climate free of violence, intimidation and fear, as such situations of insecurity are incompatible with the requirements of Convention No. 87.*
- (f) *With respect to the allegations of intimidation and harassment of FEDECAMARAS and its leaders, including the invasion and expropriation of farms or companies (in many cases without payment of due compensation) to the detriment of leaders or members of FEDECAMARAS, criminal prosecutions of employers' leaders and verbal attacks by the authorities against FEDECAMARAS and its leaders, the Committee deplores that the Government has not replied to these allegations and requests it to send detailed observations without delay. The Committee reiterates the principle expressed in the previous paragraph and expresses the firm hope that in the future the authorities will refrain from adopting such an aggressive tone in their statements concerning FEDECAMARAS*

and its leaders and members, and that these allegations of unjust invasions, expropriations and prosecutions should be investigated.

- (g) *The Committee deplores that the Government has not explained in detail the circumstances of the specific events which resulted in the criminal charge and trial of employers' leader, Mr Eduardo Gómez Sigala, and requests it to do so and to keep it informed of developments in the trial. The Committee once again 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 seizing his farm.*
- (h) *The Committee once again requests the Government to quash the order for the arrest of the former President of FEDECAMARAS, Mr Carlos Fernández, so that he may return to the country without fear of reprisals, given the lack of significant progress.*
- (i) *The Committee reiterates its previous recommendations concerning social dialogue:*
- *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;*
 - *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;*
 - *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.*

- (j) *The Committee requests the Government to indicate the means of recourse available to employers who feel that they are victims of discrimination involving refusal to issue a labour solvency certificate or official foreign exchange authorizations, to initiate a dialogue with FEDECAMARAS on these questions and to inform the Committee of developments.*
- (k) *The Committee observes with regret that the Government has not replied to the allegations of discrimination against FEDECAMARAS and its members concerning parallel bodies and organizations close to the Government. The Committee requests the Government to send without delay its observations on these allegations and wishes to emphasize that by favouring or disadvantaging certain organizations compared with the rest, governments can influence the attitude of workers or employers when they choose which organization they wish to join, which is incompatible with the principle contained in Convention No. 87 whereby public authorities must refrain from any interference which would restrict the rights enshrined in the Convention. The Committee therefore requests the Government to ensure equal treatment for all employers' organizations in the matter of financing of activities and not to discriminate against members of FEDECAMARAS.*
- (l) *With regard to the examination of the international cooperation bill, the Committee hopes that it will provide for rapid recourse in the cases of discrimination and that it will avoid interference by the authorities in access to foreign funds by workers' and employers' organizations.*
- (m) *The Committee notes the comments of the complainant organization concerning the Organic Act establishing the Central Planning Commission. In this respect, while the legislation establishes strong state intervention in the economy and national economic structure under the aegis of central planning in order to construct the Venezuelan socialist model, the Committee requests the complainant organizations to provide information on the relationship between the allegations and the violation of Conventions Nos 87 and 98.*
- (n) *The Committee notes the additional information sent by the IOE on 10 February 2011 concerning the cases of confiscation of property of employers' leaders, the alleged physical attacks against employers' leaders, the lack of social dialogue, as well as other questions, and the Government's communication, dated 25 February 2011, received two days before the Committee's meeting. The Committee will review these communications when it will next examine this case.*
- (o) *The Committee draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.*

Geneva, 11 March 2011

(Signed) Professor Paul van der Heijden
Chairperson

Points for decision: Paragraph 226
Paragraph 263
Paragraph 290
Paragraph 302
Paragraph 316
Paragraph 341
Paragraph 370
Paragraph 394
Paragraph 413
Paragraph 458
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Paragraph 646
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Paragraph 1134
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