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Reports of the Committee on Freedom of Association

362nd 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 November 2011, under the chairmanship of Professor Paul van der Heijden.
2. The members of American, Argentinian, Colombian and French nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2788, 2798 and 2817), Colombia (Cases Nos 2710, 2793, 2796 and 2804), France (Cases Nos 2750 and 2841) and the United States (Case No. 2741), respectively.

* * *

3. Currently, there are 169 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 43 cases on the merits, reaching definitive conclusions in 24 cases and interim conclusions in 19 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2318 (Cambodia), 2516 (Ethiopia) and 2723 (Fiji) because of the extreme seriousness and urgency of the matters dealt with therein.

Urgent appeals

5. As regards Cases Nos 2528 (Philippines), 2655 (Cambodia), 2714 (Democratic Republic of Congo), 2807 (Islamic Republic of Iran), 2822 (Colombia) and 2859 (Guatemala), 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: Cases Nos 2869 (Guatemala), 2870 (Argentina), 2871 (El Salvador), 2872 (Guatemala), 2873 (Argentina), 2877 (Colombia), 2878 (Colombia), 2879 (El Salvador), 2880 (Colombia), 2881 (Argentina), 2882 (Bahrain), 2883 (Peru), 2884 (Chile), 2885 (Chile), 2886 (Canada), 2887 (Mauritius), 2889 (Pakistan), 2891 (Peru), 2893 (El Salvador), 2894 (Canada), 2895 (Colombia), 2896 (El Salvador), 2897 (El Salvador), 2898 (Peru), 2899 (Honduras), 2900 (Peru), 2901 (Mauritius), 2902 (Pakistan), 2903 (El Salvador), 2904 (Chile), 2905 (Netherlands), 2906 (Argentina) and 2907 (Lithuania), 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: 2508 (Islamic Republic of Iran), 2712 (Democratic Republic of Congo), 2726 (Argentina), 2745 (Philippines), 2765 (Bangladesh), 2801 (Colombia), 2813 (Peru), 2847 (Argentina), 2848 (Canada), 2851 (El Salvador), 2853 (Colombia), 2855 (Pakistan), 2856 (Peru), 2860 (Sri Lanka), 2861 (Argentina), 2863 (Chile) and 2864 (Pakistan).

Partial information received from governments

8. In Cases Nos 2265 (Switzerland), 2445 (Guatemala), 2660 (Argentina), 2673 (Guatemala), 2694 (Mexico), 2704 (Canada), 2706 (Panama), 2740 (Iraq), 2749 (France), 2763 (Bolivarian Republic of Venezuela), 2778 (Costa Rica), 2792 (Brazil), 2806 (United Kingdom), 2811 (Guatemala), 2824 (Colombia), 2833 (Peru), 2840 (Guatemala), 2846 (Colombia), 2858 (Brazil), 2862 (Zimbabwe), 2866 (Peru), 2867 (Plurinational State of Bolivia) and 2874 (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 2177 (Japan), 2203 (Guatemala), 2254 (Bolivarian Republic of Venezuela), 2183 (Japan), 2602 (Republic of Korea), 2609 (Guatemala), 2660 (Argentina), 2684 (Ecuador), 2702 (Argentina), 2709 (Guatemala), 2727 (Bolivarian Republic of Venezuela), 2743 (Argentina), 2751 (Panama), 2752 (Montenegro), 2753 (Djibouti), 2758 (Russian Federation), 2761 (Colombia), 2768 (Guatemala), 2780 (Ireland), 2786 (Dominican Republic), 2789 (Turkey), 2809 (Argentina), 2819 (Dominican Republic), 2820 (Greece), 2821 (Canada), 2823 (Colombia), 2827 (Bolivarian Republic of Venezuela), 2828 (Mexico), 2829 (Republic of Korea), 2830 (Colombia), 2835 (Colombia), 2837 (Argentina), 2839 (Uruguay), 2844 (Japan), 2845 (Colombia), 2849 (Colombia), 2850 (Malaysia), 2852 (Colombia), 2854 (Peru), 2856 (Peru), 2865 (Argentina), 2868 (Panama), 2875 (Honduras), 2876 (Uruguay), 2888 (Poland), 2890 (Ukraine) and 2892 (Turkey), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Withdrawal of complaints

10. The Committee takes due note of the request of the complainant, Association des Juristes de l'État (AJE), to withdraw its complaint in Case No. 2857 (Canada), in light of an agreement in principle, concluded on 7 July 2011 with the Government of Quebec, with a view to the adoption of a collective agreement and relevant legislative amendments.

Article 26 complaint

11. The Committee is awaiting the observations of the Government of Belarus in respect of the recommendations relating to the measures taken in follow up to the Commission of Inquiry.

Transmission of cases to the Committee of Experts

12. The Committee draws the legislative aspect of the following case to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Ethiopia (Case No. 2516), Fiji (Case No. 2723), Pakistan (Case No. 2799) and Ukraine (Case No. 2843).

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

Case No. 2153 (Algeria)

13. The Committee last examined this case at its November 2010 meeting [see 358th Report, paras 13–14]. On that occasion, the Committee reiterated its recommendations and urged the Government to inform it without delay of the final judicial decisions handed down concerning the following trade union members and officials: Mr Hadj Djilani Mohamed, who had been dismissed, had suffered anti-union harassment, and had been sentenced to one month's imprisonment for slander; Mr Houari Kaddour, who had been dismissed from the health administration on 6 March 2006 for trade union activities, without referral to the disciplinary commission or any recourse to the remedies provided for by law; Mr Sadou Saddek, who had been suspended from his post without pay since June 2007 and faced prosecution for his trade union activities; and Mr Mourad Tchikou and Mr Rabah Mebarki, SNAPAP representatives, who had been subjected to anti-union harassment.
14. The Committee takes note of the Government's communications dated 22 February and 9 September 2011, which draw attention to the situation of the abovementioned trade union members and officials. Regarding Mr Hadj Djilani Mohamed, the Government indicates that the original sentence of two months' imprisonment for slander against a trade union was reduced on appeal to a fine. Mr Hadj continues to occupy the post of head nurse and has submitted no complaints to the administration. Regarding Mr Houari Kaddour, the Government states that he has made no statements since 2006 and the administration has not been notified of any appeal against the March 2006 decision to dismiss him. The Committee notes the information that, in order to ascertain the actual situation of Mr Hadj Djilani Mohamed and Mr Houari Kaddour, the Government has undertaken to carry out an inquiry in the Ministry of Health, Population and Hospital Reform on 10 February 2011, and the Committee will be notified of the results. Regarding Mr Sadou Saddek, the Government states that, in a ruling of 12 November 2009, the Council of State quashed the ruling of the Algiers Court of Appeal and upheld the decision of the provincial administration ordering Mr Saddek's transfer to the Kherrata sub-prefecture in Béjaïa province. The Government states that, since the Council of State gave its ruling, Mr Saddek has justified his refusal to take up his new posting by claiming sick leave, which he renews on a regular basis, and that he is currently on sick leave, approved by a sick leave certificate valid until 5 March 2011.
15. In its communication dated 9 September 2011, the Government further states that Mr Mourad Tchikou, a civil defence officer who was suspended as a precautionary measure following the legal action brought against him by his employer, appeared before

the court in Algiers in March 2011 but his case is still under investigation following an appeal lodged against the decision of the court. As concerns Mr Rabah Mebarki, a civil defence lieutenant, he appeared in May 2011 before the Joint Commission for Civil Defence Officers, which ruled in favour of his reinstatement with all its rights, including the payment of wages.

16. *Recalling that it has been requesting information over many years, the Committee appreciates the efforts made by the Government to gather the most up-to-date information on the SNAPAP union members and officials. Noting the different information elements provided, the Committee is awaiting information from the Government on the results of the inquiry carried out in the Ministry of Health, Population and Hospital Reform in February 2011 regarding the current situation of Mr Hadj Djilani Mohamed and Mr Houari Kaddour. It welcomes the information on the reinstatement's decision handed down in May 2011 regarding the case of civil defence officer and SNAPAP representative Mr Rabah Mebarki and as concerns Mr Mourad Tchikou, another representative of the SNAPAP, expects that the Government will provide information concerning the appeal lodged against the decision of the court. Lastly, the Committee urges the Government to provide information on the situation of Mr Sadou Saddek after the end of his sick leave in March 2011 and, in particular, to indicate whether he has taken up his new posting.*

Case No. 2651 (Argentina)

17. The Committee last examined this case regarding the alleged anti-union dismissals and changes to the conditions of employment by the National University of La Rioja in its November 2009 meeting, when it requested the Government to keep it informed of the result of all ongoing judicial proceedings related to the allegations submitted by the complainants against the university [see 355th report, paras 189–218].
18. In its communication of 2 February 2011, the Government submits a large number of documents sent by the University of La Rioja. The University of La Rioja submits copies of first and second instance rulings in connection with the judicial proceedings (constitutional protection proceedings and precautionary measures) initiated by the lecturers concerned by this case. These documents indicate that some of the rulings uphold the complainants' requests (particularly regarding the payment of wage arrears) while others reject them (particularly regarding appointments to teaching posts or changes to the hours of work).
19. *The Committee takes note of this information.*

Case No. 2742 (Plurinational State of Bolivia)

20. The Committee last examined this case concerning allegations that, following a strike declared illegal, criminal proceedings were started against eight trade union officials at its November 2010 meeting and on that occasion made the following recommendations [see 358th Report, para. 280]:

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

21. In a communication dated 30 May 2011, the Government states that the eight trade union officials in question have been acquitted by the judicial authority.

22. *The Committee notes this information with satisfaction.*

Cameroon (Case No. 2382)

23. At its last examination of the case, during its June 2010 meeting [see 357th Report, paras 17–29], the Committee, noting with concern the Government’s statement that it was not responsible for conducting an inquiry, notwithstanding the previous information concerning an inquiry conducted by the Secretary of State for Defence into the conditions surrounding the detention of Mr Ze in April 2004, had recalled once again the need for the Government to take the necessary steps to conduct an inquiry without delay, especially in the light of what it referred to as the existing record of a preliminary inquiry on the detention. The Committee also urged the Government to provide its observations on the allegations concerning the interrogation of Mr Ze by the police in March 2007 and March 2008 and his detention from 17 to 24 March 2008. As regards the allegations concerning the suspension of Mr Ze’s salary on the grounds of his periodic absences from work, the Committee had requested the Government and the complainant organization to indicate whether Mr Ze had returned to his post and followed the established procedure for requesting release from work and, if so, whether the suspension of salary payments had been ended and the release from normal duties had been granted. The Committee had again invited the Government and the complainant to keep it informed of any proceedings before the competent judicial authorities that would clarify the situation with regard to the legitimate representation of the Single National Union of Teachers and Professors in the Teachers Training Faculty (SNUIPEN), of any definitive ruling handed down in that respect, and of any other mechanisms invoked by the parties to settle the dispute.
24. In its communication dated 29 October 2010, the complainant organization denounces the Government’s continued disregard for the Committee’s recommendations and the fact that it merely reiterates its previous observations. As regards the allegations concerning the need to conduct an inquiry, the complainant organization adds that, in arguing that it is not responsible for conducting an inquiry into the multiple interrogations and detentions to which Mr Ze was subjected, the Government is violating its own legal and regulatory provisions, specifically sections 25 and 26 of Decree No. 94/199 of 7 October 1994 establishing general public service regulations, as amended and supplemented by Decree No. 2000/287 of 12 October 2000, which provides for the right of public servants (the status held by Mr Ze) to protection against threats, contempt, acts of violence, assault, insults or defamation while discharging their functions. It also provides that the State, after having assessed the damage resulting from these acts, is obliged to remedy the harm caused to the public servant. As regards his release from work and the threat of sanctions, the complainant organization states that Mr Ze is currently discharging his functions, as confirmed following an on-site mission by the new Minister for Basic Education. On that occasion, Mr Ze signed an undertaking on regular attendance, irrespective of his national trade union duties.
25. In its communication dated 19 November 2010, the complainant organization states that the Government has once again violated its union rights. Following a sit in organized by the Confederation of Public Sector Unions of Cameroon (CSP), which took place on 11 November and in which the SNUIPEN participated, Mr Ze was once again arrested along with other union members, detained in extreme conditions, and accused of demonstrating illegally and disturbing public order. This case is still before the courts pending a hearing. The complainant organization states further that the Government has again interfered in the SNUIPEN’s internal affairs and that, during a meeting in November 2010, the Minister for Basic Education, like her predecessor, presented Mr Ateba as the only leader of the SNUIPEN recognized by her ministerial department, whereas a ruling handed down by the Yaoundé-Ekounou Court of First Instance (No. 320/CIV of

26 November 2009), a copy of which is enclosed by the complainant organization, recognizes Mr Ze as Secretary-General of the SNUIPEN.

26. In its communications of 30 July 2010 and 11 January 2011, the Government maintains that the case involving Mr Ze is a matter of general law and that it is not competent to conduct an inquiry. As regards Mr Ze's release from work, the Government expresses surprise at the fact that he has not followed its instructions in order to regularize his situation. The Government has not replied to the new information sent by the complainant organization in its communication of 19 November 2010. The Government concludes by emphasizing that the complainant has shown bad faith and that, since it has no new information on further developments, it requests the Committee to take a final decision concerning this case.
27. *The Committee notes the information provided by the complainant organization and the Government's reply on certain points. The Committee recalls that the present case, which it has been examining since 2005, concerns the arrest, detention and interrogation of the Secretary General of the SNUIPEN, Mr Joseph Ze, and interference by the authorities in an internal union dispute.*
28. *As regards the recommendations which it has been making for six years regarding an inquiry by the Secretary of State for Defence into the events surrounding the interrogation and detention of Mr Ze from 16 April 2004, the Committee deeply regrets the absence of information from the Government in this regard and the fact that, since then, the Government has only referred to limitations on its competence to conduct such an inquiry, given that the allegations are matters of general law, stating that if there has in fact been abuse of authority and torture, the victim is able to seek redress before the courts, and that, with legislation as it now stands, there should be a record of a preliminary inquiry, which the complainant appears to be intentionally disregarding. The Committee wishes to recall once again that, in a previous examination of the case, it had observed that Mr Ze was questioned by the police, kept in custody and brutally and summarily interrogated, without a court having had the opportunity to hand down a ruling as to the accusations brought against him. Furthermore, the Government had acknowledged that what it referred to as a "procedure to recover" these funds had entailed the complainant being taken into custody illegally. The Committee had also noted that one of the officers involved in the detention (Captain Mengnfo Fai) had been suspended pending the conclusions of an investigation by the Secretary of State for Defence into the conditions of detention of Mr Ze. Lastly, the Committee, noting that certain police officers effectively took the side of the dissident faction of SNUIPEN and following pressure during the interrogations and the detentions had forced Mr Ze to release funds belonging to the union in order to give them to the dissidents, had indicated that such action was tantamount to seizure and confiscation of union funds, without any court ruling, to profit a third party [see 338th Report, paras 528, 530 and 531].*
29. *The Committee recalls that it has since that time been requesting information on the outcome of the inquiry by the Secretary of State for Defence because, in the light of the serious allegations concerning acts of torture and extortion of which Mr Ze is said to have been the victim, such an inquiry would make it possible to ascertain the facts and responsibilities, punish those responsible, and above all prevent any future recurrence of such acts. The Committee deeply regrets that the Government has not provided any information in this regard, given that the Government itself had acknowledged that abuse had occurred. The Committee reiterates yet again its request for information on the outcome of any inquiry by the Secretary of State for Defence into the conditions surrounding the detention of Mr Ze in April 2004 and also urges the Government to conduct an inquiry into the allegations concerning the arrest of Mr Ze in March 2007 and March 2008 and his detention from 17 to 24 March 2008.*

30. *As regards the allegations concerning the suspension of Mr Ze's salary on the grounds of his periodic absences from work, the Committee recalls that it had requested the Government to examine without delay, in the light of the underlying facts, the possibility of releasing Mr Ze from work for the purpose of carrying out his trade union duties, if necessary explaining to Mr Ze the procedures for obtaining such a discharge. The Committee notes that the complainant organization states that Mr Ze is currently discharging his functions, as confirmed following an on-site mission by the new Minister for Basic Education. On that occasion, Mr Ze signed an undertaking on regular attendance, irrespective of his national trade union duties. The Committee trusts that arrangements have been made to ensure Mr Ze's release from work, if necessary, for the purpose of carrying out his trade union duties, and requests the Government to keep it informed in this regard.*
31. *When it last examined this case, the Committee had taken note of the Government's statement to the effect it had always refrained from interfering in trade union activities and considered that the allegations made against it reflected the bad faith of union officials who lacked legitimacy from their own union. Recalling the background to this case, in which it noted that certain police officers had taken up the cause of one faction in the SNUIPEN, and the allegations that the Government had clearly favoured one faction of the SNUIPEN in the media, the Committee had trusted that the Government would maintain a position of strict neutrality with regard to internal union disputes, and in particular within the SNUIPEN. The Committee notes the complainant organization's allegation that the Government has once again interfered in its internal affairs and that, during a meeting in November 2010, the Minister for Basic Education, like her predecessor, presented Mr Ateba as the only leader of the SNUIPEN recognized by her ministerial department. The Committee also takes note of the ruling handed down by the Yaoundé-Ekounou Court of First Instance (No. 320/CIV of 26 November 2009), a copy of which is enclosed by the complainant organization, which appears to recognize Mr Ze as the Secretary-General of the SNUIPEN in the context of a decision in a case involving the recovery of a Ministry of Basic Education subsidy for the trade union. While the Committee notes that this ruling has, in one specific case, determined the legitimate representation of the SNUIPEN, it nevertheless notes with regret the allegation that, as recently as November 2010, the Minister of Basic Education presented Mr Ateba as the only leader of the SNUIPEN recognized by her ministerial department. In these circumstances, the Committee requests the Government to indicate the extent to which the question of the legitimate representation of the SNUIPEN has been clarified and, should this be the case, invites the Government to inform it of any definitive ruling handed down in this respect and of any other mechanisms undertaken by the parties to resolve the dispute.*
32. *Lastly, the Committee notes the new allegations concerning the arrest of Mr Ze following a sit in organized by the CSP, which took place on 11 November 2010. As a similar complaint concerning this event has been presented to the Committee by another organization, the Committee will continue to examine these allegations under Case No. 2812 [see 362nd Report, para. 394].*

Case No. 2257 (Canada (Quebec))

33. *The Committee examined the substance of this case at its November 2010 meeting [see 358th Report, paras 31–36]. It concerns the exclusion of managerial staff from Quebec's Labour Code, which prevents them from forming unions and from enjoying all the associated rights and prerogatives, in particular: a real right to collective bargaining; the right to a dispute settlement procedure in the absence of the right to strike; and the right to legal protection against acts of interference by employers. During its last examination of the case in November 2010, the Committee noted with regret that no progress had been made to amend the Labour Code in order to resolve all these problems, even though more*

than six years had passed since it made its recommendations. In these circumstances, the Committee strongly urged the Government: (i) to maintain a continuous dialogue with the representative organizations concerned with regard to following up its recommendations; (ii) to report on meaningful progress in the adoption of measures to amend the Labour Code of the Province of Quebec in order to resolve the problems of compliance with the principles of freedom of association that have been raised for many years; (iii) to indicate the status of the guide on good governance, which, according to the Association of Managerial Staff of the *Société des Casinos du Québec* (ACSCQ), cannot be applied to the managerial staff that it represents; and (iv) to provide its observations on the latest allegations by the ACSCQ, the CNCQ and the CCC.

34. In a communication dated 21 April 2011, the Government of Quebec sent its observations in reply to the Committee's recommendations. As regards point (i), the Government recalls that the ACSCQ filed an application for certification with the Labour Relations Board (CRT) against the *Société des Casinos* and that, as part of this application, the ACSCQ also challenges the constitutionality of subparagraph 1 of paragraph 1 of section 1 of the Labour Code. Accordingly, the Attorney-General of Quebec, acting for and on behalf of the Government of Quebec, is also a party to these legal proceedings, which are still pending. The Government adds that the parties are thus maintaining a certain form of dialogue, which does not rule out the possibility of negotiations, consultations or exchanges of information between the representatives of the parties.
35. As regards point (ii), the Government states that it can only refer to its observations submitted to the Committee in April 2004 in reply to the complaint, in which it stated that, notwithstanding the exclusion from the application of the Labour Code of persons deemed by the CRT to be employed as manager, superintendent, foreman or representative of the employer in his relations with employees (subparagraph 1 of paragraph 1 of section 1 of the Labour Code), such persons enjoy all the rights and protections under ILO Conventions Nos 87 and 98 and that those Conventions would be observed.
36. As regards point (iii), the Government states that the *Société des casinos du Québec* is a subsidiary of the *Société des loteries du Québec*, a public corporation also known as "*Loto-Québec*". It adds that the guide on good governance cannot be imposed on public corporations, as the Government has no direct authority to that effect. However, the existence of such a tool provides an opportunity for the Government to exert a positive influence on public corporations in terms of governance, and there is nothing to prevent that tool from serving as a model and ultimately being adopted by those corporations if the employers and workers so agree.
37. Lastly, as regards point (iv), the Government states that the president of the CNCQ requested a meeting with the Minister of Labour on 17 February 2010 to discuss the introduction of a labour relations regime for managerial staff. The Minister replied on 31 March 2010 that he would be unable to meet him in view of the ACSCQ's challenge against the validity of certain sections of the Labour Code. The president reiterated his request on 12 May 2010, dissociating his organization from the ACSCQ's action with regard to the application for certification. The director of the Office of the Minister replied on 29 June 2010 that he could communicate with the Deputy Minister to discuss the labour relations regime for managerial staff. The Deputy Minister has not received any request for a meeting from the CNCQ to date.
38. *The Committee takes note of the information provided. It notes with regret that, despite the time that has elapsed, no progress has been achieved in the present case since it made its recommendations on the substance of the case concerning the need to amend the Labour Code of the Province of Quebec. In these circumstances, the Committee once again strongly urges the Government to maintain genuine continuous dialogue with the*

representative organizations concerned with regard to following up its recommendations and to communicate any report issued in that regard. Noting that no ruling appears to have been handed down by the Labour Relations Board of Quebec regarding the application for certification filed on 10 November 2009 by the ACSCQ, either on the application itself or on the constitutionality of subparagraph 1 of paragraph 1 of section 1 of the Labour Code, the Committee requests the Government to keep it informed without delay of any new development or ruling handed down with respect to the application.

Case No. 2430 (Canada)

39. The Committee last examined this case, which concerns provisions of a statute (Colleges Collective Bargaining Act (CCBA), RSO 1990, c. 15) that denied all public colleges' part-time employees the right to join a union and engage in collective bargaining, at its November 2010 meeting [358th Report, approved by the Governing Body at its 309th Session, paras 37–42]. On that occasion, the Committee noted that representation votes had been held, as provided under the CCBA (as amended in 2008), to allow the Ontario Public Service Employees' Union (OPSEU) to represent part-time academic staff and part-time support staff units and that ballot boxes had been sealed pending a decision by the Ontario Labour Relations Board (OLRB). The Committee regretted, however, that the Government provided no observations on the complainant's allegations regarding the abusive use of procedural mechanisms under the amended Act by employers to delay the certification process and substantially impede or altogether prevent workers to unionize and engage in collective bargaining. The Committee noted that the Government had considered it inappropriate to comment on the case while the matter was pending before the OLRB and requested the Government to initiate consultations with the union concerned with a view to address the concerns raised by the complainant organization. The Committee also requested the Government to keep it informed of the outcome of such discussions as well as any decision taken by the OLRB on the matters currently pending before it.
40. In a communication dated 13 April 2011 submitted by the Government of Canada, the Government of Ontario states that disputes under the CCBA are heard by the OLRB, which is an independent, quasi-judicial tribunal with expertise in labour relations. The Government wishes to emphasize that it would be inappropriate for it to interfere or influence those proceedings or to be perceived to be interfering or influencing those proceedings. The Government recalls that the key issue in the present case is the disagreement of the College Employer Council (CEC) with the union's estimate, in its certification applications, of the number of individuals in the two bargaining units. According to the Government, under the CCBA, the OLRB need only determine that 35 per cent or more of the individuals in the bargaining unit appear to be members of the union at the time the certification application was filed.
41. The Government further informs the Committee that the OLRB has recently issued two interim decisions regarding the issues under current examination. On 27 September 2010, regarding part-time support staff, the OLRB ruled that: "Persons not at work on the date of application (23 July 2009) but who had an employment contract and worked at some point in the preceding year are to be counted for the purposes of the 35 per cent threshold assessment. Persons without an employment contract as of the date of application ought not to be included in the count. Persons who worked full-time hours in the 13 weeks that preceded the date of application ought not be included in the count." In its decision of 11 January 2011 regarding part-time academic staff and the clarification issued on 11 March 2011, the OLRB "noted that the parties have agreed – and the OLRB endorses this agreement – that an employee need not have been at work on the date the application was filed in order to be included in the count. The parties disagreed on the time period that the OLRB should consider. The union had argued that an employee needed to have been

employed immediately before and after the application date. The OLRB ruled, however, that for the purposes of determining whether the 35 per cent threshold was met, it will include those who had an employment relationship with a college on the application date and who performed work at any point in the fall 2008 academic semester.”

42. In a communication of 27 October 2011, the Government indicates that two further interim decisions have been issued by the OLRB on 25 May and 11 July 2011 regarding the determination of the status of certain categories of individuals concerning the membership in the bargaining unit. Consultations at the OLRB are expected to continue and the Government states that it will apprise the Committee of any further OLRB developments. In response to the latest communication of the complainants, the Government states that the authority granted to the Minister of Training, Colleges and Universities to issue binding policy directions or to intervene in the affairs of the colleges under sections 4 and 5 of the Ontario Colleges of Applied Arts and Technology Act (OCAATA) does not extend to intervention in the affairs of the CEC, which is a corporate entity with separate legal status from the colleges with exclusive responsibility for negotiating with employee organizations.
43. In a communication dated 4 October 2011, the complainants indicate that the litigation process at the OLRB is still continuing and that since the Committee’s last report, the LR has issued seven separate decisions – five with respect to the application for academic staff and two with respect to the support staff application. The complainants consider that the process is hopelessly mired down in legal arguments with no prospect of an end in sight and observe that the ballots cast by the workers remain uncounted. The complainants state that they agree with the Government’s response that it would be inappropriate for it to intervene and direct the OLRB to issue any particular decision. They point out, however, that the Government has the express statutory power to direct the employer, the Colleges Compensation and Appointments Council – a Government agency – as to how it should act and as to the positions it should take before the LR under sections 4 and 5 of the OCAATA. According to the complainants, the above mentioned provisions enable the Government to direct the employer to withdraw the objections filed before the OLRB, thus effectively ending the litigation before the OLRB, permitting the ballots cast both applications to be counted and allowing the workers to decide for themselves whether or not they wish to be unionized.
44. *The Committee recalls that, in its previous examination of the case, it had noted that the amended CCBA requires that 35 per cent of affected workers must sign union cards in order for the OLRB to order a vote but also allows colleges to challenge the number of cards union members have signed, a privilege that, according to the complainants, employers have abused in order to fight the certification vote. The complainants had alleged that, after “flooding” their own lists of affected workers with employees who clearly would not be part of the union bargaining unit and manipulating the timing of workers’ contracts so as to limit the number of signed union cards, the employers had undertaken long, costly and protracted mediation and litigation proceedings at the OLRB to challenge the certification process which would likely take months or even years before a final decision. The Committee expects that the ongoing dispute will be resolved by the OLRB without delay, in consultation with the parties, in order to effectively guarantee that part-time academic and support staff employed in Ontario’s public colleges fully enjoys the right to organize. The Committee requests the Government to keep it informed of any further developments in relation to this matter.*

Case No. 2630 (El Salvador)

45. In its previous examination of the case in November 2010, the Committee requested the Government to send it a copy of the decision on the appeal against the administrative resolution imposing sanctions on the Confitería Americana SA de CV enterprise for bringing pressure to bear on its workers to cancel their union membership. The Committee also observed that the Government had not sent any information on its recommendation regarding the accreditation of the Trade Union Association of Workers of the Confitería Americana SA de CV Enterprise (ASTECASACV) for the collective agreement. The Committee hoped that the action brought by the Trade Union of Workers of the Confitería Americana SA de CV Enterprise (STECASACV) challenging the decision to grant accreditation, currently before the Administrative Disputes Chamber of the Supreme Court of Justice, would be resolved without delay and that the court would have access to all elements of the case in reaching its decision. The Committee requested the Government to keep it informed in that regard [see 358th Report, paras 55–57].
46. In a communication of 13 May 2011, the Government states that, as a consequence of the pressure brought to bear on workers to cancel their union membership by the Confitería Americana SA de CV enterprise, a sanction was imposed on the enterprise; as may be seen from inspection report No. 439-06 (UD-06-07-06) of 28 July 2006, the labour inspector noted a violation of section 205, read in conjunction with section 30(11), of the Labour Code, having found that the enterprise had committed acts aimed at the workers' withdrawal from the trade union of which they were members, in violation of the right to freedom of association, which is recognized in article 47 of the Constitution. Accordingly, the case was referred to the Ministry of Labour under the procedure for the imposition of sanctions, and the Confitería Americana SA de CV enterprise was granted the right to a hearing on 22 August 2006; in the exercise of this right, the enterprise, through its authorized representative for labour issues, attended a hearing in the Department of Inspection of Industry and Commerce of the Ministry of Labour, at which it requested an appointment for the examination of witnesses. In response to that request, the Department of Inspection set the date for the examination of witnesses for the employer side on 4 September 2006. After examination of the documentary and testimonial evidence, a ruling against the employer was handed down on 6 September 2006, and the enterprise was notified on 24 April 2008 of the fine of US\$57,141 imposed on it, which it paid in May 2008.
47. As regards accreditation of the ASTECASACV for the collective agreement, the Government states that on 12 March 2009, Ms Iris Corina Selaya Sigüenza, as General Secretary of the STECASACV, filed a written application with the Administrative Disputes Chamber of the Supreme Court of Justice to withdraw the challenge suspending the administrative procedure substituting the union's accreditation. On 18 March 2009, the Chamber instructed Ms Selaya Sigüenza to substantiate her legal status in due form, as her term of office as General Secretary of the STECASACV had expired, and to clarify the correct spelling of her first surname, as it differed from the name on the application and the identity document presented. This notification was sent to Ms Selaya Sigüenza on 23 July 2009. Ms Selaya Sigüenza did not comply with the instruction; the court therefore again instructed her on 18 February 2010 to clarify the correct spelling of her first surname, and again she did not do so. Faced with this situation, the Administrative Disputes Chamber asked the National Department for Social Organizations of the Directorate-General for Labour of the Ministry for the address of the STECASACV in order to request it to confirm the withdrawal requested by Ms Iris Corina Selaya Sigüenza. The case is now pending a decision by the Administrative Disputes Chamber of the Supreme Court of Justice, of which the Committee on Freedom of Association will be informed in due time, as the Ministry has not been informed of any decision in the case to date.

48. *The Committee takes note of this information. The Committee requests the Government to keep it informed of the ruling handed down by the Administrative Disputes Chamber of the Supreme Court of Justice in regard to accreditation of the ASTECASACV for the collective agreement.*

Case No. 2227 (United States)

49. The Committee last examined this case – which concerns the inadequacy of the remedial measures in cases of illegal dismissals of undocumented workers – at its March 2010 meeting [see 356th Report, paras 61–66]. On that occasion, the Committee requested the Government to continue to keep it informed of innovative steps taken to ensure that undocumented workers are sufficiently protected against acts of anti-union discrimination and to provide information on the steps taken to consult the social partners concerned on further possible solutions aimed at ensuring effective protection for undocumented workers.
50. In a communication dated 16 March 2011, the Government indicates that a review of recent case law continues to indicate a narrow application of Hoffman. In *Majestic Restaurant and Buffet* (2009), an NRLB Administrative Law Judge found that Hoffman does not apply where an employee without work authorization did not violate the Immigration Reform and Control Act (IRCA) and where the employer did violate the IRCA in a case where the employees did not submit fraudulent immigration documents to the employer and the employer knowingly employed or continued to employ the employees despite their immigration status.
51. The Government further indicates that the Department of Labor has in place an Alliance Program whereby the department partners with unions, consulates, trade or professional organizations, businesses, faith and community-based organizations and educational institutions to enhance protection for workers, including by providing education, guidance and assistance on labor issues and promoting awareness of labor rights and responsibilities of workers and employers.
52. *The Committee takes due note of the above information provided by the Government but observes once again that, as a result of the Hoffman decision, the remedies available in cases of anti-union dismissals of undocumented workers still do not enable the sanctioning of such acts, nor the possibility of adequate compensation taking into account both the damage incurred and the need to prevent the repetition of such situations in the future. The Committee expects that the Government will take all necessary steps so that undocumented workers are sufficiently protected against acts of anti-union discrimination.*

Case No. 2292 (United States)

53. The Committee last examined this case – which concerns executive orders denying airport screeners their collective bargaining rights by exempting them from the Federal Service Labor-Management Relations Statute (FSLMRS) – at its November 2008 meeting [see 351st Report, paras 42–66]. On that occasion, the Committee urged once again the Government to carefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of Transport Security Officers (TSOs) which are not directly related to national security issues so as to engage in collective bargaining on these matters with the screeners' freely chosen representative.

54. In a communication dated 16 March 2011, the Government indicates that under the Aviation and Transportation Security Act – the legislation that created the Transport Security Administration (TSA) – the US Congress gave TSA’s Administrator broad authority to set the terms and conditions of employment of TSOs notwithstanding any other provision of law. The former TSA Administrator used this authority in 2003 to issue a Determination that, while TSOs are free to join unions and select union representatives as their personal representatives, collective bargaining as such was inconsistent with security requirements at that time. The Government however informs the Committee that the Obama Administration has now provided TSOs with a framework for engaging in collective bargaining over certain issues. On 1 July 2010, John S. Pistole was sworn as the new Administrator of the TSA and indicated his commitment to a review of labor relations including the issue of collective bargaining by TSOs and its potential impact on security and safety. This review included discussions with the leadership of the two unions seeking to represent the TSOs.
55. On 12 November 2010, the Federal Labor Relations Authority (FLRA) issued a decision directing a nationwide election among TSOs for exclusive representation for matters not including collective bargaining.
56. On 4 February 2011, Administrator Pistole issued a Determination entitled “Transportation Security Officers and Collective Bargaining”, which modified the 2003 Determination, by “providing for an election concerning representation and, if a union is elected, for carefully defined limited exclusive union representation under conditions and within a framework unique to TSA that does not adversely impact the resources and agility necessary to protect the security of the traveling public”. The Government indicates that the election on union representation for the TSOs was to take place between 9 March and 19 April 2011.
57. *The Committee notes with interest the above information provided by the Government and welcomes the recognition of the right to organize and bargain collectively for TSOs. The Committee understands that the elections have taken place and TSOs are now represented by a union. The Committee expects that, within this new framework, TSOs will have the right to bargain collectively on all terms and conditions of employment not directly related to national security issues and requests the Government to keep it informed of the outcome of the subsequent negotiations.*

Case No. 2460 (United States)

58. The Committee last examined this case – which concerns the prohibition imposed by the legislation of North Carolina to make any collective agreement between cities, towns, municipalities or the State and any labour or trade union in the public sector – at its March 2010 meeting [see 356th Report, paras 67–69]. On that occasion, the Committee expected that the new legislation would be adopted in the very near future, so as to remove the collective bargaining ban imposed on state and local public employees. It further requested the Government to continue promoting the establishment of a collective bargaining framework in the public sector in North Carolina, as well as the effective recognition of the right of collective bargaining.
59. In a communication dated 16 March 2011, the Government states that none of the four bills introduced in the 2009–10 session of the North Carolina legislature to repeal or modify the provision contained in the North Carolina General Statute (NCGS) sections 95–98 prohibiting agreements between governing bodies of the state’s political subdivisions and public-sector labor organizations were enacted into law during the legislative session. The Government further states that similar legislation has not yet been introduced in the legislative session that began in January 2011.

60. The Government further indicates that the United States is committed to the promotion of the principle of freedom of association and has made efforts to do so in public sector workplaces. On 9 December 2009, President Obama issued Executive Order 13522, which aims to establish a cooperative and productive form of labor–management relations throughout the executive branch. Similarly, steps are being taken to protect, assess and encourage progress at the state and local levels. There have also been efforts at the federal level to enact legislation giving collective bargaining rights to public safety employees at the state and local levels of government with the introduction in the House of Representatives and the Senate of the Public Safety Employer-Employee Cooperation Act of 2009 and the conduct of public hearings on 10 March 2010. The bills – which would give state and local safety officers the right to form unions or collective bargaining units, mandate recognition of their representatives as well as the right to bargain for wages, hours and others terms and conditions of employment and make available a mediation process to resolve impasses in negotiations – are no longer under consideration as the legislative session has ended and similar legislation has not yet been introduced.
61. *The Committee notes the above information provided by the Government and regrets that none of the bills introduced in North Carolina to remove the collective bargaining ban imposed on state and local public employees were enacted into law. The Committee expresses the firm hope that similar legislation will be introduced and adopted in the very near future. Taking note of the efforts made by the Government, the Committee urges it to continue to promote freedom of association and collective bargaining rights in the public sector, including by promoting the establishment of a collective bargaining framework in the public sector in North Carolina and to keep it informed of developments in that respect.*

Case No. 2547 (United States)

62. The Committee last examined this case – which concerns a decision of the National Labor Relations Board (NLRB) denying graduate teaching and research assistants at private universities the right, under the National Labor Relations Act (NLRA), to engage in organizing or collective bargaining – at its March 2010 meeting [see 356th Report, paras 73–75]. On that occasion, the Committee requested the Government to keep it informed of progress made in ensuring that graduate teaching and research assistants are not excluded from the protection of freedom of association and collective bargaining in their capacity as workers following the introduction of bills in the United States Congress to overrule the NLRB’s decision by adding language to the definition of “employee” under the NLRA to include “a student enrolled at an institution of higher education ... who is performing work for remuneration at the direction of the institution, whether or not the work relates to the student’s course of study”.
63. In a communication dated 16 March 2011, the Government states that the bills were not enacted into law during the legislative session and similar legislation has not yet been introduced. However, the Government indicated that the issue central to the case, Brown University (342 NLRB 483 (2004)), may be revisited in the near future as, on 25 October 2010, the NLRB reversed a Regional Director’s dismissal of a petition filed by a local of the United Auto Workers seeking a representation election for 1,800 graduate teaching and research assistants at New York University (New York University and GSOC/UAW, 356 NLRB No. 7(2010)). The dismissal was based on the NLRB’s decision in Brown, where the graduate student assistants at another school were not employees within the meaning of the Act. In reversing New York University, the Board stated that there were “compelling reasons for reconsideration of the decision in Brown” and remanded the case to the Regional Director for a hearing and development of a “full evidentiary record”. The New York University case record was expected to close by the end of February, with a decision to issue subsequently.

64. *The Committee notes the above information with interest and requests the Government to keep it informed of progress made with regard to any further developments at the NLRB in relation to the freedom of association and collective bargaining rights of graduate teaching and research assistants, as well as any additional steps taken in the US Congress as concerns this matter.*

Case No. 2678 (Georgia)

65. The Committee examined this case, which concerns interference in trade union activities of the Educators and Scientists Free Trade Union of Georgia (ESFTUG) and dismissals of trade unionists, at its June 2010 session [see 357th Report, paras 629–660]. On that occasion, the Committee made the following recommendations:

- (a) The Committee requests the Government to ensure that the check-off facilities at the Senaki nursery, Nakolakevi public school and Tbilisi Public Schools Nos 115, 127 and 160 are re-established, without delay, if they have not yet been, and to ensure that any remaining arrears are paid to the ESFTUG. The Committee requests the Government to keep it informed in this respect.
- (b) The Committee requests the Government to conduct an independent inquiry into the allegation of dismissal of 11 workers from Public School No. 1 of Dedoplistskaro district and, if it is found that these teachers were dismissed on account of their ESFTUG affiliation, to take the necessary measures to reinstate them without loss of pay. If reinstatement is not possible, for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the trade union leader and members concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-union dismissal. It requests the Government to keep it informed in this respect.
- (c) The Committee requests the Government to take the necessary measures, without delay, in full consultation with the social partners concerned, to amend the Labour Code so as to ensure specific protection against anti-union discrimination, including anti-union dismissals, and to provide for sufficiently dissuasive sanctions against such acts. It requests the Government to keep it informed of the measures taken in this respect, as well as in relation to any progress made in the discussions to be placed on the agenda in the National Social Dialogue Commission.
- (d) The Committee requests the Government to indicate the measures taken or envisaged to promote collective bargaining in the education sector and to inform it as to whether any collective agreement has since been signed in the education sector and whether the ESFTUG was a party to such an agreement or participated in the negotiation.
- (e) The Committee requests the Government to provide further information on the status of the PES so as to allow it to make an assessment of its situation.

66. In a communication dated 16 June 2010, Education International (EI) indicates that the Ministry of Education, through its regional offices and education resource centres ordered the interruption of the check-off system for the ESFTUG despite the agreement signed with the Ministry of Education in 1998. This order had been already implemented in a number of regions and cities. The complainant organization states that the interruption of the check-off system will lead to serious financial difficulties and will impede the functioning of the union. The complainant organization also indicates that the Government has failed to initiate any dialogue with the ESFTUG.

67. By a communication dated 26 April 2011, the Government of Georgia submits information concerning this case, as provided by the Ministry of Education and Science of Georgia (MES). The MES indicates that it is currently implementing successive and effective reforms in the education system of Georgia, with a clear vision to ensure protection of the legal rights and interests of teachers as well as other stakeholders involved in the education

process. Transparency and social dialogue are essential parts of this process as they contribute to the effectiveness of the reforms. To this effect, the MES has developed several initiatives in order to establish relevant coordination mechanisms between the representatives of the civil society and the MES. In particular, following intensive consultations and meetings with the representatives of parliamentary and non-parliamentary opposition, the ESFTUG, the Union of Professional Education and Training Qualified Workforce, the Independent Professional Union of Students, the Education Employers' Union, the Education Professional Syndicate and the League of Education Leaders, on 19 February 2010, a public board was established within the MES. The board meets on a monthly basis to discuss any urgent issues and the ways of dealing with them. At the same time, an advisory board of the MES was established in March 2010. It consists of experts in different fields, representatives of NGOs and famous personalities. These board members meet monthly to discuss all ongoing issues in the education system. In the framework of social dialogue, the MES has conducted a number of meetings with the participation of the representatives of parliamentary and non-parliamentary opposition, as well as the ESFTUG, the Education Employers' Union and the Education Professional Syndicate. All innovations, implemented by the MES in 2010–11 (such as amendments to be made at schools, teachers' certification for professional-level advancement, improvement of the national curriculum and school textbooks, creating safe school environments, relations between educational institutions and trade unions) have been discussed at these meetings.

- 68.** Furthermore, in order to execute the decision of the Panel of Civil Cases of Tbilisi City Court (decision of 20 February 2007) that obliged the MES to conduct collective negotiations with the ESFTUG in order to sign a sectoral agreement, as well as to involve trade unions in the education reform, a working group in consultation with the ESFTUG was set up by Minister's Decree No. 125 dated 18 February 2010. In August 2010, the Ministry held a working meeting with Mr Irakli Petriashvili, Head of the Georgian Trade Union Confederation (GTUC); it was decided that a special committee composed of the MES and the GTUC's representatives will be set up to regulate the legal relations between the educational institutions under the MES and trade unions. Currently, consultations are ongoing on setting up a working group in order to put relations with trade unions in compliance with the legislative requirements.
- 69.** With respect to the ESFTUG's allegations that the MES interferes in its activities, the MES considers that this claim is ill founded and indicates that it has never intervened in the ESFTUG's activities. With regard to the payment of trade union dues at the general educational institutions, the MES refers to section 25(3) of the Law on Trade Unions, according to which "employer, administration of enterprise, company, organization, shall transfer membership fees from the employee's monthly salary to the account of trade unions on the basis of personal written application of a member of a trade union, in accordance with the terms and conditions defined in the collective agreement". Paragraph 4.13 of the sectoral agreement dated 22 April 1998 obliges administrations of educational institutions (and not the MES) to transfer trade union dues deducted from salaries of trade union members to the respective bank account. In this regard, the MES emphasizes that in 1998, when the then Ministry of Education and the Republic Council of Georgian Trade Unions (legal successor of which is now the ESFTUG) signed the sectoral agreement, the general educational institutions were functioning under the Ministry of Education. In accordance with Decree No. 448 dated 15 September 2005, educational institutions changed legal status and are now formed as legal entities of public law, i.e. autonomous and independent legal entities. In accordance with the Law on General Education, school principals, elected by school boards, independently regulate labour relations with teachers. The MES has no authority to interfere in school affairs.

70. The MES further indicates that according to the Law on Trade Unions, a collective agreement is an agreement between an employer, enterprise, company, establishment, organization and trade unions regulating labour, social and professional relations between the parties. Furthermore, according to subparagraph (f) of section 43(1) of the Law of Georgia on General Education, a public school principal is responsible to sign and execute the labour agreement with teachers and all other school personnel. Thus, school principals and not the MES, are the employers of public school teachers. According to section 12(3) of the same law, in case of any disagreements between the principal of a public school and teachers, any interested party has the right to appeal to the court to regulate the labour relations. The MES indicates that the teachers who are members of the ESFTUG have not appealed to the national court and thus, did not use the legal remedies the national legal system provides. The MES also indicates that public schools cannot transfer trade union dues without the written consent of teachers who are trade union members, and in the absence of a collective agreement.
71. The MES concludes by stating that it makes all efforts to protect the legal rights and interests of teachers, that it respects and acknowledges the right of expressing teachers' free will. Moreover, the MES regularly holds meetings with teachers and school principals in order to understand and consider their opinions and approaches.
72. *The Committee notes the information submitted by the Government and its stated commitment to social dialogue.*
73. *The Committee notes that EI submits new allegations of withdrawal of check-off facilities previously enjoyed by the ESFTUG. The Committee recalls that it had previously examined similar allegations and, on that occasion, it emphasized that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 475]. The Committee notes the Government's explanation, as expressed by the MES, that pursuant to the national legislation for trade union dues to be deducted and transferred, two requirements shall be met: a union member shall produce a written consent to that effect and a collective agreement shall be concluded at the school. The Committee recalls from the previous examination of this case that the complainant argued that written consents were produced by the ESFTUG members. On the issue of collective agreements, the Committee notes that the MES refers to the sectoral agreement dated 22 April 1998 obliging administrations of educational institutions to provide for check-off facilities on the one hand and, on the other, explains that schools are autonomous legal bodies which independently regulate labour relations with teachers and that the MES has no authority to interfere in their affairs. Furthermore, the MES indicates that according to the existing legislation, a public school principal is responsible for signing and executing a collective agreement; it is the public school principal and not the MES who is considered to be the employer of teachers working at a particular public school. In case of a disagreement between the principal and teachers of a public school, any party has the right to appeal to the court. The MES indicates that in this particular case, the ESFTUG did not appeal to the national court and thus did not use the legal remedies the national legal system provides. In this respect, the Committee, without prejudging the judicial system in Georgia and noting that the decision of 20 February 2007 by the Tbilisi Court Panel on Civil Cases ordering the MES to conduct collective bargaining with a view to signing a new sectoral collective agreement has still not been fully implemented, understands the union's reluctance to address their grievances in court. Noting that the decision taken by some school principals to withdraw check-off facilities was also in violation of the 1998 agreement, the Committee wishes to recall that the ultimate responsibility for ensuring respect for the principles of freedom of association, including the principle that agreements should be binding on the parties, lies with the*

Government. The Committee urges the Government to take the necessary measures to ensure that the check-off facilities previously enjoyed by the ESFTUG are re-established, without delay, if they have not yet been, and to ensure that any remaining arrears are paid to the ESFTUG.

74. *The Committee notes the establishment of various bodies to address urgent and outstanding issues in the education sector. It requests the Government to take the necessary measures to ensure that the outstanding recommendations in this case, namely those relating to the allegations of anti-union dismissals and withdrawal of check-off facilities and promotion of collective bargaining, are brought to the attention of these bodies without delay. It requests the Government to keep it informed in this respect and expects that the Government will provide detailed information on the measures taken to implement all of the abovementioned outstanding recommendations.*

Case No. 2228 (India)

75. The Committee last examined this case at its June 2009 meeting [see 354th Report, paras 108–119]. This case concerns acts of anti-union discrimination including dismissals, the suppression of a strike by the police and refusal to negotiate in the Worldwide Diamond Manufacturers Ltd, which is situated in the EPZ of Visakhapatnam in the state of Andhra Pradesh. At its June 2009 meeting, the Committee made the following recommendations:

- (a) As regards the alleged cases of anti-union discrimination resulting in imposition of fines, dismissals and suspensions of trade unionists, the Committee underlined the excessive delay in the judicial resolution of the cases given that the complaint was filed in 2002 and requested the Government to send the judicial resolutions in the 20 cases it states have been disposed of, and to keep it informed of any further developments in the 18 pending cases.
- (b) The Committee requested the Government to institute an independent investigation in respect of allegations concerning the brutal suppression of a strike by workers at Worldwide Diamonds Manufacturing Ltd in January and February of 2002, the detention of hundreds of striking workers and a trade union officer by the police, the prohibition of meetings in the complainant's local office, excessive police violence (caning and chaining of workers), and the visit of police officers to workers' homes in order to threaten them so that they return to work and to keep it informed of the results.
- (c) As regards the question of restrictions on the right to collective bargaining of workers in the VEPZ and on the right of the Visakhapatnam Export Processing Workers' Union to take part in negotiations with the management of the Worldwide Diamonds Manufacturers Ltd, the Committee repeated its request that the Government provide a copy of the minutes of the joint meeting held on 3 September 2004 that led to the lifting of the employer's lockout, which the Government indicates it has forwarded to the Committee but which have still not been received. The Committee also requested the Government to provide information on the evolution of collective bargaining and to send any agreement reached by the parties.
- (d) As regards the request that the Government takes necessary steps to ensure that in the EPZ of Visakhapatnam the functions of Grievance Redressal Officer (GRO) are not performed by the Deputy Development Commissioner (DDC) but by another independent person or body having the confidence of all parties concerned, the Committee expected the Government to make quick progress on steps taken to ensure that the roles of GRO and DDC are carried out by different persons or bodies, and thereby to promote the settlement of disputes and grievances through inexpensive, expeditious and impartial conciliation procedures. The Committee requested the Government to provide further information in this regard as soon as possible, as well as its observations on the allegations in respect of the state government of Uttar Pradesh which introduced the same unjust practice of vesting administrative/operational heads in

non-EPZ/Special Economic Zone (SEZ) areas with the power and responsibility of a GRO [see 354th Report, para. 109].

- (e) The Committee repeated its request that the Government take all necessary measures, including amending the Industrial Disputes Act of 1947, so as to ensure that suspended workers as well as trade unions could approach the court directly, without being referred by the state Government.
- (f) The Committee requested the Government to institute expeditiously an inquiry in order to thoroughly and promptly consider the alleged dismissals and suspensions at the Synergies Dooray Automotive Ltd and to keep it informed of the outcome in this regard.

76. In a communication dated 7 April 2011, the Government of India forwards the following observations of the Development Commissioner of Visakhapatnam EPZ:

- As regards point (a), (c) and (e) above, no information was provided.
- As regards point (b), the Development Commissioner indicates that the Principal Secretary, Labour Employment Training and Factories Department of the Government of Andhra Pradesh stated again that all the accused were acquitted in CC No. 421/02 on 29 November 2006 and no independent inquiry is required since a judicial Court has already adjudicated the matter.
- As regards point (d), the Development Commissioner responded that one post on deputation basis from the State Labour Department in the cadre of Assistant Commissioner of Labour was created in the EPZ to look after the grievances of the workers.
- As regards point (f), the Development Commissioner indicated that the company had set up their unit initially in the EPZ under EPZ scheme but after conversion of the EPZ into a non-EPZ/SEZ in 2003, the unit was converted as an EOU and continued its operations outside the special economic zone. When the unit was under EPZ scheme, no independent inquiry was conducted on the alleged dismissal and suspension of workers. Presently, the unit does not come under the jurisdiction of the special economic zone on labour matters. The Development Commissioner further indicates that the company is no longer in business and that a separate company, Synergies Castings Ltd, has been operating in the said unit since 1 May 2005.

77. *The Committee deeply regrets that nine years have passed since the complainant first filed allegations with the Committee in the present case which remains largely unresolved. The Committee takes note of the information provided by the Government and requests it once again to provide the outstanding information, given the importance that the Committee attaches to such proceedings being concluded expeditiously, as justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 104 and 105]. The Committee requests once again the Government to provide the information requested. with respect to recommendations (a), (c) and (e).*

78. *In respect of allegations concerning the brutal suppression of a strike by workers at Worldwide Diamonds Manufacturing Ltd in January and February of 2002, the detention of hundreds of striking workers and a trade union officer by the police, the prohibition of meetings in the complainant's local office, excessive police violence (caning and chaining of workers), and the visit of police officers to workers' homes in order to threaten them so that they return to work, the Committee observes with concern, while duly noting the Government's response that all the accused were acquitted in CC No. 421/02 on 29 November 2006 and that no independent inquiry is required since a judicial court has already adjudicated the matter, that no independent investigation was undertaken*

regarding the specific allegations made by the complainants with respect to the behaviour of the police forces and the alleged use of excessive force. Given the time that has elapsed, the Committee would request the Government to send the judicial decision of 29 November 2006 in CC No. 421/02.

- 79.** *As regards the request that the Government take necessary steps to ensure that in the EPZ of Visakhapatnam the functions of GRO are not performed by the Deputy Development Commissioner (DDC) but by another independent person or body having the confidence of all parties concerned, the Committee notes that one post on deputation basis from the State Labour Department in the cadre of Assistant Commissioner of Labour was created to look after the grievances of the workers.*
- 80.** *As regards the alleged dismissals and suspensions at the Synergies Dooray Automotive Ltd, the Committee notes with regret that no independent inquiry was conducted and that the company is no longer in business. 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 and the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [see **Digest**, op. cit., paras 769 and 17]. The Committee further recalls that, where the enterprise no longer exists, measures should be taken to ensure that workers dismissed for trade union activities are fully compensated [see **Digest**, op. cit., para. 848] and that a corporate restructuring should not directly or indirectly threaten unionized workers and their organizations [see **Digest**, op. cit., para. 797]. The Committee requests the Government to indicate whether the workers dismissed and suspended had initiated court proceedings.*

Case No. 2567 (Islamic Republic of Iran)

- 81.** 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 March 2011 meeting [see 359th Report, paras 90–95]. On that occasion, the Committee made the following recommendations:

As to the employers' general elections, [...] 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.

82. In a communication dated 29 May 2011, the Government provided additional information in relation to issues pending in this case. With respect to the amendment of the labour code, the Government indicates that, since March 2011, the proposal of the Government was approved by the Islamic Consultative Assembly (Parliament) and the process of redevelopment of national labour market, rules and regulations of labour relations has been implemented within the framework of the decent work national document and in accordance to articles 25 and 73 of the Fifth Economic, Social and Cultural Development Plan. Under article 73, the Government is bound to adopt necessary legal measures to amend the Labour Code, social security law and labour relations by the end of the first year of the plan. The Government states that, in line with this objective, the new process of revising and amending the Labour Code and its executive code of procedures are under further consideration by the special working group in the Ministry of Labour and Social Affairs in collaboration with the social partners and professionals of Labour Code and economics. Additionally, the Government informs the Committee that it has amended and approved the new code of procedures for the establishment and scope of their duties and method of performance of the trade unions, which was sent to all respective bodies and social partners through Letter No. 112179, dated 16 February 2011. With respect to an ILO mission to the country, the Government indicates that the admission of the ILO mission will be possible within the framework of technical cooperation.
83. With respect to the announcement of the ICEA election results and the ability of ICEA to carry out its activities without interference, the Government states that the election was held in a healthy atmosphere on November 2010 and that the related results were announced to the General Office of Workers' and Employers' Organizations of the Ministry of Labour and Social Affairs through Letter No. 12040-310, dated 16 February 2011. The Government further states that the confirmation of the election was announced to the General Office Public Relations, Ministry of Labour and Social Affairs to be published in the *Gazette* through Letter No. 117675, dated 4 March 2011. The Government indicates that it merely had an intermediary role and was a neutral observer at all stages. The Government indicated that it confirmed the legal activities of the ICEA, announced the authenticity of the election of the ICEA and presented the names of titular and substitute members of Board of Directors of the ICEA in the *Gazette*, hence preparing in practice all legal stages for the continuation of the legal activities of this organization. The Government finally states that it considers that all issues have been resolved and requests the Committee to close the case.
84. In a communication dated 9 May 2011, the International Organisation of Employers (IOE) indicates that the Government has adopted a position of non-interference and neutrality in the exercise of freedom of association in relation to membership of the ICEA and taken the necessary measures in reregistering and re-recognizing the ICEA as the national most representative employers' organization of the country. The IOE further indicates that the Ministry of Labour and Social Affairs issued Circular No. 122212, dated 14 March 2011 providing information on the results of the election which took place in the extraordinary setting of the ICEA General Assembly on 9 February 2011.
85. *The Committee welcomes the confirmation from the Government and from the IOE that the Government has adopted a position of non-interference and neutrality in relation to membership of the ICEA and that the Government has taken the necessary measures in reregistering and rerecognizing the ICEA as the national most representative employers' organization of the country.*
86. *With respect to the ongoing legislative revision process, the Committee notes that, since March 2011, a new process of revision and amendment of the Labour Code and its executive code of procedures are under further consideration by the special working group in the Ministry of Labour and Social Affairs in collaboration with the social partners and*

professionals of Labour Code and economics. The Committee trusts that the Government will take the necessary measures to ensure that the Labour Law and new code of procedures 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 will pursue its examination of this matter in the other cases pending against the Government of the Islamic Republic of Iran.

Case No. 2637 (Malaysia)

87. The Committee last examined this case, which concerns the denial of freedom of association rights to migrant workers, including migrant domestic workers, in law and in practice, at its March 2010 meeting [see 356th Report, paras 82–85]. On that occasion, the Committee noted with regret that, in respect of its previous recommendations in the present case, the Government merely repeated its previous observations. The Committee once again expressed the expectation that the Government would take the necessary measures, including legislative if necessary, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. Additionally the Committee once again requested the Government to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requests the Government to keep it informed of the progress made in this regard.
88. In a communication dated 9 March 2011, the Government indicates that the Ministry is very reluctant to allow the formation of associations of migrant domestic workers and that the Committee's recommendation to allow for the formation of such associations should not be considered on security grounds. While acknowledging that migrant workers have contributed to the development of Malaysia, the Government points out that, by allowing the registration of associations of domestic workers, Malaysia will be seen as opening the doors for conflicts as continuous demands by migrant domestic workers through any form of organization may provoke nationalist and racist tendencies among the local population which will be prejudicial to public order and jeopardize national security in the long run. The Government indicates that, under article 10 of the Federal Constitution, the Parliament may impose laws to ensure national security and public order. Taking into account the specific context prevailing in Malaysia, namely the priorities of nation-building in a sensitive multi-cultural, multi-religious, multi-ethnic and multi-racial environment, the Government further states that they have to respond wisely, carefully and thoroughly on this issue and suggests that new additional forums should be provided to allow migrant domestic workers to channel their grievances either through existing bilateral and multilateral arrangements, like ASEAN or the subregional grouping. The Government indicates that it does not condone abuses by the employers on migrant domestic workers as the existing laws do protect their welfare which is also reflected in many court rulings. The Government further indicates that Malaysia has made progress in enhancing the welfare of migrant domestic workers under the Workmen's Compensation Act 1952 (Amended), Social Security Act, 1969, and other related rules and regulations.
89. *The Committee takes due note of the above information provided by the Government. The Committee notes with regret that no progress has been made since the last examination of this case to ensure that migrant domestic workers may all effectively enjoy the right to establish and join organizations of their own choosing. Regarding the concerns of the*

*Government in relation to the consequences, in the long run, of allowing migrant domestic workers to establish and join trade unions on national security and public order, the Committee recalls that the development of free and independent organizations and negotiation with all those involved in social dialogue is indispensable to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation. [See **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 26.] The Committee further recalls that it always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries [**Digest**, op. cit., para. 10].*

90. *The Committee recalls that on numerous occasions it has interpreted the right of freedom of association to include migrant workers, and has further stated that domestic workers are not excluded from the application of Convention No. 87 and should therefore be governed by the guarantees it affords and have the right to establish and join occupational organizations [**Digest**, op. cit., para. 267]. The Committee urges the Government to take the necessary measures, including legislative if necessary, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. The Committee invites the Government to avail itself of the technical assistance of the Office in this respect. Additionally the Committee urges the Government to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requests the Government to keep it informed of the progress made in this regard.*
91. *The Committee recalls the provisions of the Convention concerning decent work for domestic workers, in particular Article 3 with respect to freedom of association and the effective recognition of the right to collective bargaining of domestic workers.*

Case No. 2685 (Mauritius)

92. The Committee last examined this case, which concerns alleged acts of anti-union discrimination and refusal to recognize the Syndicat des Travailleurs des Etablissements Privés (STEP) by the Phil Alain Didier Co. Ltd (PAD), at its November 2010 meeting [see 358th Report, paras 68–74]. On that occasion, the Committee requested the Government to provide further information as to the existence of any representative organization in the PAD, as well as to whether the STEP, taking into account the provisions of the ERA, may negotiate with the company, in the absence of an exclusive bargaining agent, at least on behalf of its own members. It further requested that the necessary steps be taken without delay to ensure that Mr Martinet is reinstated in his former position with compensation for lost wages and benefits. As regards the dismissal of Mr Lagailarde and the pending criminal proceedings, the Committee expected that a ruling would be handed down expeditiously, and that, should Mr Lagailarde be acquitted of the charges, steps would be taken without delay to reinstate him in his post without loss of wages or benefits.
93. In communications dated 27 April and 12 October 2011, the Government indicates that no representative workers' organization presently exists in the company, as the employees of the company are neither members of STEP nor of any other trade union. The Government further indicates that any workplace issue is discussed directly between the workers and management.
94. With regard to the dismissal of Mr Martinet, the Government indicates that the case of unjustified termination of employment against the company which had been fixed for trial at the Industrial Court on 27 September 2011 has been postponed to 26 March 2012.

95. With regard to the dismissal of Mr Lagaillarde, the Government indicates that, upon advice of the Director of Public Prosecution, Mr Lagaillarde was being prosecuted for “interfering with motor vehicle” and that he was convicted to pay a fine on 19 September 2011. The case of unjustified termination of employment lodged against the company by Mr Lagaillarde which had been set for trial on 15 June 2011 has been postponed to 8 February 2012.
96. *The Committee takes due note of the above information provided by the Government, in particular that there exists presently no representative workers’ organization in the PAD. The Committee requests the Government, as well as the complainants, to provide further information on the status of the STEP in the PAD, including the decision of the Employment Relations Tribunal and the results of the secret ballot organized on 13 June 2009 as well as the recommendations of the Industrial Relations Commission of 2 July 2008 supporting the recognition of the STEP by the PAD in respect of its manual employees for collective bargaining purposes.*
97. *With respect to the dismissals of Mr Martinet and Mr Lagaillarde, the Committee notes that judicial proceedings are still ongoing 4 and 2.5 years respectively after their dismissals. The Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 826]. The Committee expects that rulings in all remaining cases will be handed down without delay and that steps will be taken without delay to reinstate both trade union members in their posts without loss of wages or benefits, subject to Mr Lagaillarde being acquitted of criminal charges. The Committee requests the Government to keep it informed of developments and to provide it with copies of all judgments relevant to this case.*

Case No. 2799 (Pakistan)

98. The Committee last examined this case at its March 2011 session [see 359th Report, paras 970–991]. This case concerns the allegation 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 the national trade unions from engaging in collective bargaining at the level of industries of national scope and importance. At its March meeting, the Committee made 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.

99. In a communication dated 24 March 2011, the Pakistan Workers Federation (PWF) provides a copy of the judgment pronounced in the Islamabad High Court in writ petition No. 4917/2010 on 10 February 2011, which challenged the decision of Lahore High Court Rawalpindi Bench in case No. 3(063)/2009. The Islamabad High Court ruled that the Industrial Relations Act (2008) stands automatically repealed on 20 April 2010 and orders issued by the National Industrial Relations Commission of Pakistan (NIRC) after this date were illegal, as well as further proceedings conducted on the basis of such NIRC orders. The Islamabad High Court based its decision on the judgment of the Sindh High Court, Karachi of 2010 (2010 P.L.C.359). The PWF indicates that this judicial decision confirmed that the NIRC was left with no jurisdiction to function after the expiry of the Industrial Relations Act (2008).

100. In a communication dated 25 May 2011, the Government indicates that a new law to cater for the needs of the national level trade unions and federations in Pakistan is under process and the NIRC is proposed to be retained under the proposed law. In a communication dated 2 November 2011, the Government indicates that the President of Pakistan promulgated, on 18 July 2011, a new Industrial Relations Ordinance. The Government explains that the Ordinance regulates industrial relations and registration of trade unions and federations of trade unions in the Islamabad Capital Territory and in the establishments which cover more than one province. The Government indicates that the Ordinance was finalized during the tripartite consultations meeting on 13 May 2011, on the basis of the proposals received from all stakeholders and social partners. On 12 October 2011, the Ordinance was introduced to the National Assembly for discussion, following which it will be made into an Act of Parliament. The Government transmits a copy of the new Ordinance.

101. *The Committee takes due note of the information provided by the Government. It requests the Government to keep the Committee of Experts on the Application of Conventions and Recommendations, to which it refers this case, informed of the adoption of the Industrial Relations Ordinance by the Parliament, as well as with respect to any other legislation adopted at the provincial level.*

Case No. 2576 (Panama)

102. In its previous examination of the case at its November 2010 meeting, the Committee made the following recommendations [see 358th Report, paras 701 and 723]:

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

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

103. In its communication dated 18 May 2010, the Government states the following:

- with regard to (a), concerning the alleged anti-union dismissal of union leaders Mr Cubilla, Mr Adamson and Mr Aguilar, these persons were not dismissed; instead, each trade union official signed an agreement with the company to terminate the employment relationship by mutual consent (in which they agreed on respective severance pay, and agreed to formally drop any claims, complaints, or legal proceedings against the company, with the company agreeing to do the same vis-à-vis the workers);
- with regard to (b), concerning the alleged dismissal by the company Union International Network G4SW of trade unionists who were said to have been involved in the October 2006 protest march, these workers cannot claim unfair dismissal, given that the Higher Labour Court of the First Judicial District of Panama has ruled that the strike held by the National Union of Security Agency Employees (Unión Nacional de Trabajadores de Agencias de Seguridad – UNTAS) was illegal;

- with regard to (c), concerning the alleged failure of Union International Network G4SW to pass on union dues to the union, the company indicates that all union dues have been paid and that no money owed to the trade union has been withheld; Union International Network G4SW (which later changed its name to GS4 SA) also signed a collective agreement with UNTAS on 8 October 2009, valid for four years from that date;
- with regard to (d), concerning the alleged violent attack and theft of the belongings of trade unionists exercising their right to protest against Union International Network G4SW (which later changed its name to GS4 SA) – as mentioned above, mutual agreements were signed with the trade union members, stipulating that they would drop any claims, complaints or legal proceedings which had been lodged previously;
- with regard to (e), concerning alleged financial support provided by Union International Network G4SW to set up a new trade union, the Community Organizations Directorate is not aware of any parallel trade union existing within the company, with UNTAS being the only affiliated trade union entity;
- with regard to (f), concerning other allegations of threatened civil or criminal sanctions against trade unionists who took part in the demonstrations, certification (recognition) of trade union elections involving a very small group of dissidents from the union and the union's request for collective negotiations (the list of demands that had been settled by an agreement concluded in September 2006 was resubmitted in October 2006), the Government indicates that the Higher Labour Court ruled in favour of the company in its ruling that the UNTAS strike was illegal; the company has also signed agreements with UNTAS trade union officials, in which the parties agree to end the employment relationship by mutual consent, and has issued the respective severance payments and formally dropped any claims, complaints or legal action vis-à-vis the workers; moreover, having attempted to negotiate a collective agreement with Union International Network G4SW in 2006, UNTAS finally signed a collective agreement with the company – now known as GS4 SA – on 8 October 2009, and valid for four years from that date.

104. *The Committee takes note of this information, and particularly the fact that the parties to the conflict have signed a new collective agreement.*

Case No. 2086 (Paraguay)

- 105.** The Committee last examined this case, relating to the trial and sentencing in the first instance for “breach of trust” of the three presidents of the trade union confederations, the United Confederation of Workers (CUT), the Paraguayan Confederation of Workers (CPT) and the Trade Union Confederation of State Employees of Paraguay (CESITEP), Mr Alan Flores, Mr Jerónimo López and Mr Rinaldo Barreto Medina, at its March 2010 meeting [see 356th Report, paras 114–116]. On that occasion, it requested the Government to inform it of the status of judicial proceedings against the trade union officials in question, and to indicate whether any further appeals had been lodged in the case.
- 106.** In a communication dated 21 June 2011, the CESITEP, the CUT, the CPT and the General Confederation of Workers (CGT), state that in these proceedings, which have been going on for more than 15 years, without any reliable factual basis or foundation in criminal law, and which according to the Attorney-General's Office prescribed in 2005, the Supreme Court of Justice upheld the first instance sentences handed down in respect of the union officials in question without informing the complainants of the involvement of the Criminal Division. Due to the alleged violations of due process and human rights, the

complainant organizations request that an ILO direct contacts mission be sent to the country.

- 107.** *The Committee notes this information and regrets the lack of a response from the Government. The Committee deeply deplores the fact that these proceedings have gone on for more than ten years. The Committee recalls having noted at the time that an ILO mission had visited Paraguay in connection with this case, and having stated on that occasion among other things that “the court of first instance violated the principle of nullum crimen sine lege, which prohibits applying criminal law retroactively, and that the sentence was handed down on the basis of a rule of criminal law promulgated after the acts at issue took place”, and that “the accused have served a substantial part of the terms of imprisonment imposed by the court of first instance” [see 332nd Report, para. 122]. Under these circumstances, it is the Committee’s understanding that the officials in question are, at least for now, at liberty – as the Committee had requested at the time – although a court sentence still hangs over them. The Committee once again reiterates the importance of ensuring that these trade union officials are not subject to criminal sanctions including imprisonment.*

Case No. 2400 (Peru)

- 108.** In its previous examination of the case at its March 2011 meeting, the Committee requested the Government to keep it informed of the ongoing process concerning the dismissal or transfer of the trade unionists Mr William Alburquerque Zevallos and Mr Arnoldo Calle Flores (of Crediscotia Financiera SA) and to provide a copy of the decision once adopted. Furthermore, the Committee once again requested the Government to report on the results of the legal proceedings concerning the dismissal of the trade unionists Mr Miguel Moreno Ávila and Mr Felipe Fabián Fernández López, who worked at the enterprise Gloria SA, and to provide copies of the corresponding decisions [see 359th Report, para. 127].
- 109.** In its communication of 3 May 2011, the Government states that the judicial authority has ordered the reinstatement of the trade unionists Mr Miguel Moreno Ávila and Mr Felipe Fabián Fernández López and the payment of their wages.
- 110.** *The Committee notes the above information with satisfaction.*
- 111.** As to the trade unionist of the enterprise Crediscotia Financiera SA, Mr William Alburquerque Zevallos, the Government reports that he has appealed against the decision of the court of first instance.
- 112.** *The Committee requests the Government to inform it of any decision handed down regarding this appeal.*
- 113.** With regard to the trade unionist Mr Arnoldo Calle Flores, the Government reports that both the judicial authority of the first instance and that of appeal handed down decisions calling for the hostile acts related to the transfer of this trade unionist to be halted, and that the enterprise submitted a further appeal against these decisions.
- 114.** *The Committee requests the Government to inform it of any decision handed down regarding this appeal.*

Case No. 2527 (Peru)

115. The Committee last examined this case regarding alleged acts of anti-union discrimination by the San Martín Mining Company SA at its November 2010 meeting, when it requested the Government to: (1) keep it informed of the status of the ongoing judicial proceedings relating to the dismissal of union official Mr José Arenaza Lander; (2) keep it informed of progress in the *amparo* (protection of constitutional rights) proceedings in relation to the dismissal of union official Mr César Augusto Elías García; and (3) send its observations on the allegations of the CATP of 18 June 2009 regarding acts of violence against union official Mr César Augusto Elías García and the outcome of the criminal complaint presented by that official in connection with the alleged assaults [see 358th Report, paras 83–87].
116. In its communications dated 20 October 2010, 7 February and 23 September 2011, the Government states that proceedings to annul dismissal, initiated by Mr José Antonio Arenaza Lander (reference No. 434-2006-0-1801-JR-LA-19) against the San Martín Mining Company were introduced with the 19th Labour Court. In a decision dated 31 March 2010, the 19th Labour Court of Lima ruled that the application was unfounded; an appeal against that ruling was lodged by Mr Arenaza Lander on 17 May 2010. In a hearing decision dated 13 August 2010, the Provisional Labour Appeals Chamber of the High Court of Justice of Lima upheld the first instance judicial ruling declaring the application unfounded and ordered that the case be definitively set aside. On 14 October 2010, Mr José Antonio Arenaza Lander lodged an appeal on points of law which was overturned in a decision of 18 October 2010 on the grounds that the time allowed for it had elapsed and, on 24 January 2011, the case was referred again to the original court to be set aside. On 11 March 2011, Mr Arenaza Lander lodged an application for *amparo* (protection of constitutional rights) in relation to the Chamber of the High Court of Justice of Lima; the said constitutional action was declared inadmissible by the Sixth Constitutional Court of Lima. This ruling was appealed before the Seventh Civil Chamber of the High Court of Justice of Lima.
117. In its communications dated 27 July and 23 September 2011, the Government indicates that, on 15 July 2011, the Constitutional Court took a decision in the constitutional grievance appeal initiated by Mr César Augusto Elías García against the decision taken by the Fifth Civil Chamber of the High Court of Justice of Lima. The Constitutional Court declared the appeal well-grounded, repealed the cassation and confirmed the decision dated 24 December 2008 which declared the arbitrary dismissal invalid.
118. *The Committee takes note of this information. The Committee expects that, following the decision taken by the Constitutional Court regarding the dismissal of union official Mr César Augusto Elías García, this union official will be reinstated in his position without delay and with the payment of lost wages. The Committee also urges the Government once again to send its observations on the allegations of the CATP of 18 June 2009 regarding acts of violence against union official Mr César Augusto Elías García, and the outcome of the criminal complaint presented by that official in connection with the alleged assaults. Furthermore, the Committee requests the Government to keep it informed of the outcome of the appeal filed by the union official, Mr Arenaza Lander, with the Seventh Civil Chamber of the High Court of Justice of Lima relating to his dismissal.*

Case No. 2559 (Peru)

119. At its November 2010 meeting, the Committee requested the Government to comply in full with the 2007 court order calling for the reinstatement of union official Mr Roger Augusto Rivera Gamarra and the payment of the wages and benefits due to him and expressed the firm hope that the Government would as a matter of urgency take the necessary steps to

ensure the payment of his wages and other benefits. The Committee requested the Government to keep it informed of the action taken [see 358th Report, paras 88–90].

120. In its communication dated 7 February 2010, the Government states that it requested information from the Ministry of Agriculture regarding the steps taken regarding the payment of wages still owed and benefits due to Mr Roger Augusto Rivera Gamarra. The Ministry of Agriculture, in letter No. 289-2011-PP-AG, dated 21 January 2011, provided the following information: (a) in strict compliance with the court order, Mr Roger Augusto Rivera Gamarra was reinstated in his post at the Donoso-Huaral Experimental Facility of the National Institute for Agricultural Research; (b) regarding the outstanding wages owed to the reinstated worker, the payment of 99,330.53 nuevos soles (PEN) was ordered and the Ministry of Agriculture proceeded to pay that sum in instalments; (c) in addition, the claimant applied to the judicial authorities to pay compensation for time worked and legal interests foregone, an application which was dismissed by the Combined Tribunal of the Superior Court of Justice of Huara, which instructed the lower court to issue a new ruling. In accordance with the Tribunal's instruction, the Court of First Instance handed down another ruling ordering the Ministry of Agriculture to pay compensation, and an appeal has been lodged against that ruling. In the light of the facts set out in this report, it appears that the Ministry of Agriculture is paying the claimant's outstanding wages in regular instalments, and the ILO will be notified in due course of the final outcome of the appeal lodged by the Ministry of Agriculture.

121. *The Committee takes note of this information. The Committee expects that the judicial authority will hand down a definitive ruling in the near future on the claim of union official Mr Roger Augusto Rivera Gamarra regarding payment of compensation for time worked. The Committee requests the Government to keep it informed of these proceedings.*

Case No. 2594 (Peru)

122. At its November 2010 meeting, the Committee requested the Government to keep it informed of the outcome of the judicial proceedings in connection with the dismissal of workers by the company Panam Contenidos SA (previously known as Panamericana Televisión SA). In this regard, the Committee, requested the Government, if illegal dismissals were confirmed, to take the necessary steps to ensure that workers dismissed or redeployed for anti-union reasons were reinstated in their posts and paid the wages and other benefits owed to them, and that the fines for such violations were significantly increased so as to constitute sufficiently dissuasive sanctions [see 358th Report, paras 772–780].

123. In its communication of 7 May 2011, the Government states that, with regard to the proceedings filed by Ms Ana María Sihuay Parodi, in letter No. 09-2011-27-JLL-BCC of 20 January 2011, the 27th Labour Court of Lima reported that these proceedings are currently at the execution stage and that Panamericana Televisión SA has been ordered to pay Ms Sihuay the sum of 55,952.20 nuevos soles (PEN) to cover compensation for her arbitrary dismissal and social benefits owed to her. Regarding the proceedings initiated by Ms María Eliza Vilca Peralta, the Government states that, according to the court report obtained from the online court database, the case is currently pending a decision by the 5th Provisional Labour Court. Regarding the proceedings initiated by Ms Carmen Rosa Mora Silva, the Government states that, according to the online court database, this case is currently pending a decision by the 2nd Provisional Labour Court. Regarding the proceedings initiated by Ms Liliana Jesús Sierra Farfán, the Government states that, according to the online court database, this case is currently pending a ruling by the 4th Provisional Labour Court.

124. The Government adds that, as regards anti-union dismissal measures as a result of the closure of Panamericana Televisión SA, the workers who were dismissed with wages still owed have applied to the courts to initiate the corresponding proceedings. However, no complaints have yet been filed and no anti-union dismissals have been reported in respect of Panam Contenidos SA.
125. *The Committee takes note of this information. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings in connection with dismissals initiated by Ms María Eliza Vilca Peralta, Ms Carmen Rosa Mora Silva and Ms Liliana Jesús Sierra Farfán.*

Case No. 2661 (Peru)

126. In its previous examination of the case in November 2010, the Committee made the following recommendations regarding the issues which remained pending [see 358th Report, para. 797]:
- (a) The Committee suggests that the Government initiate a dialogue with the most representative occupational organizations of the public sector on the possible establishment of consultation machinery with regard to the human resources policy. The Committee requests the Government to keep it informed on the subject.
 - (b) The Committee calls on the Government to initiate a dialogue in order to seek a negotiated solution to the problem of trade union leave, bearing in mind that, in certain major public bodies, restricting such leave to one day a month is perhaps not sufficient to allow union representatives to carry out their functions properly.
 - (c) The Committee requests the Government to indicate whether the first article of Chapter VIII of regional Executive Resolution No. 000480-2008-GR-JUNIN entails a ban on the conduct of union activities at the place of work even when they have been authorized by the employer or are provided for in collective agreements.
 - (d) The Committee firmly expects that the authorities will very soon resolve the matter of the right of personnel employed under the administrative service contract system to join trade unions, and it requests the Government to keep it informed of developments.
127. In its communication dated 7 February 2011, the Government states, in relation to recommendations (a), (b) and (d) of the Committee, that the Constitutional Court recognized the exercise by public employees employed under the administrative service contract system of the right to join trade unions and to strike, and ordered that these arrangements should be regulated. The Government adds, in its communication of 14 September 2011, that a Supreme Decree of 26 July 2011 recognizes the trade union rights of those workers, including the right to strike.
128. *The Committee notes with satisfaction the contents of the decision of the Constitutional Court and the recent Supreme Decree which guarantee the trade union rights of public employees employed under administrative service contracts, including the right to strike. The Committee trusts that, within the framework of the new regulations, it will be possible in the near future to negotiate with the trade union organizations on the issues relating to human resources, as well as on trade union leave as indicated in its previous recommendations.*
129. In its communication dated 3 May 2011, the Government states that the Regional Executive Resolution of Junín No. 000480-2008-GR neither limits nor prohibits the freedom of association of public employees and officials in the workplace, as stated by the head of the Regional Government of Junín. *The Committee notes this information.*

Case No. 2667 (Peru)

130. The Committee last examined this case at its March 2010 meeting, and on that occasion made the following recommendations [see 356th Report, paras 1075–1091]:

- (a) As regards the allegations concerning the dismissal of Mr David Elíaz Rázuri, Secretary for Defence of the National United Trade Union of Workers of Nestlé Peru SA (SUNTRANEP) and member of the workers' committee which negotiated the 2007 list of demands, the Committee requests the Government to keep it informed of the final outcome of the legal proceedings before the Sixth Labour Court of Lima initiated by the union official in question.
- (b) As regards the allegations concerning failure to adhere to the terms of the 2007 collective agreement and alleged anti-union attitudes displayed by the company, the Committee urges the Government to keep it informed of developments in those proceedings and to send a copy of any rulings that have already been handed down.
- (c) As regards the allegations of anti-union attitudes and delaying tactics on the part of the company during negotiations on the collective agreement and intimidation and replacement of striking workers during the strike that occurred in October 2008, the Committee requests the Government to keep it informed of the company's appeal of the decision imposing the fine, as well as of the sanctions proceedings initiated against the company for failure to comply with the collective agreement and the replacement of striking workers, currently under way before the Second Subdirectorate for Labour Inspection.

131. In its communication of 7 February 2011, the Government states that, with regard to the appeal lodged by the company Nestlé Perú SA against the decision imposing a fine for violations of freedom of association, the appointed enforcement officer, in communication No. 928-2010-MTPE/4/11.01 dated 24 November 2010, reported that decision No. 02-2009-MTPE/4/10.101 suspended the enforcement proceedings against the company Nestlé Perú SA. This is the result of the administrative appeal lodged by the company calling for the fine to be overturned. Moreover, in decision No. 5, dated 19 July 2010, the evidence submitted by both parties was admitted and it was determined that the files should be referred to the Civil Public Prosecutor's office in Lima. This case is currently awaiting a decision by that authority.

132. Regarding the proceedings initiated by Mr David Elíaz Rázuri in connection with his dismissal, the Government indicates that, according to the online court database, in ruling No. 109-2009, the Sixth Labour Court of Lima upheld the appeal against dismissal. However, on 27 April 2010, Nestlé Perú SA in turn lodged an appeal against that ruling. Subsequently, in decision No. 21, dated 2 July 2010, the Sixth Labour Court of Lima upheld the appeal with suspensive effect. This case is currently pending a decision by the Labour Tribunal.

133. As regards the proceedings initiated by the National United Trade Union of Workers of Nestlé Perú SA (SUNTRANEP) in relation to alleged failure to comply with the 2007 collective agreement, the Government indicates that in a ruling dated 11 March 2010, the Second Civil Tribunal of Lima declared inadmissible the *amparo* (protection of constitutional rights) filed by SUNTRANEP. However, on 21 April 2010, SUNTRANEP filed an appeal against that ruling on grounds of constitutional violation. Subsequently, in a decision dated 6 September 2010, the Constitutional Court declared the application for *amparo* inadmissible. The decision in question indicates that, according to clause 48 of the collective agreement, "this [provision] expired on 31 December 2007, but would continue to apply until amended by a subsequent collective agreement", which was not duly acknowledged by SUNTRANEP. Therefore, since proof of certain facts is required, the Constitutional Court decided that the remedy of *amparo* is not the appropriate channel for

resolving this case. Lastly, according to the court report obtained from the online court database, decision No. 17 of 7 January 2011 ordered that the case be set aside.

134. *The Committee takes note of this information. As concerns allegations that legal proceedings are overly lengthy, the Committee recalls the importance it attaches to such proceedings being concluded expeditiously, as justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 104]. The Committee requests the Government to keep it informed of the outcome of: (1) the administrative appeal lodged by Nestlé Perú SA against the fine imposed for violation of freedom of association; and (2) the proceedings regarding the dismissal of Mr David Elíaz Rázuri, Secretary for Defence of SUNTRANEP, currently before the Labour Tribunal.*

Case No. 2671 (Peru)

135. In its previous examination of the case in March 2011, the Committee requested the Government to clarify whether the trade union official Mr Franklin Reategui was currently providing services to Hermilio Valdizán de Huánuco National University [see 359th Report, para. 134].
136. In its communication dated 3 May 2011, the Government reports that, following a court order, the aforementioned trade union official (the non-renewal of whose contract based on anti-union grounds was brought to the attention of the judicial authority) has been working at Hermilio Valdizán de Huánuco National University since 1 November 2009.
137. *The Committee notes this information with satisfaction.*

Case No. 2675 (Peru)

138. The Committee last examined this case at its June 2010 meeting, when it invited the Government to examine, with the most representative workers' and employers' organizations, a way of ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights [see 357th Report, para. 875].
139. In its communication of 7 February 2011, the Government reaffirms its commitment to granting and recognizing the right to freedom of association, adopting the necessary steps to guarantee the free exercise of the right to organize, and continuing to promote procedures for adequate collective bargaining in accordance with legislation in force and the international labour standards that have been ratified to that end. The Government states that freedom of association and the right to organize impose an obligation on the State to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize, and to prevent all acts of anti-union discrimination, such as making employment of a worker conditional on not joining a union or relinquishing union membership, or dismissing or otherwise prejudicing a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours (Article 11 of Convention No. 87 and Article 1 of Convention No. 98). According to the Government, the different labour regimes that exist have been regulated with a view to promoting job creation in order to provide Peruvian citizens with employment conditions and benefits in line with the progressive development of the country. Without prejudice to the above, and as a token of the State's interest in further enhancing compliance with the right to freedom of association, the Ministry of Labour and Employment Promotion has been carrying out

inspections to monitor compliance with applicable social and labour standards by companies engaged in non-traditional export activities.

140. The Government indicates that the Congress of the Republic, through draft laws Nos 2241/2007-CR and 2272/2007-CR, has undertaken the revision of the Act concerning non-traditional exports. The Government reaffirms its commitment to the promotion of collective bargaining and peaceful means of resolving labour disputes; the Government has carried out these actions to create the necessary conditions to allow parties to bargain freely and to allow it to intervene in cases of probable inequality to guarantee opportunities for development and effective collective bargaining.

141. *The Committee takes note of this information.*

Case No. 2697 (Peru)

142. The Committee last examined this case at its March 2011 meeting and, on that occasion, requested the Government to inform it: (1) 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; and (2) of the outcome of the judicial proceedings initiated by the trade union leaders Mr Elías Vilcahuamán, Secretary-General of the Federation of Workers of the National Public Registries System (FETRASINARP), Ms Adriana Delgado Angulo, Under-Secretary for Organization of the National Office of the Superintendent of Public Registries (SUNARP) and Ms María Yolanda Zaplana Briceño, Deputy Secretary-General of SUNARP and SUNARP 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, in relation to their dismissals [see 359th Report, paras 141–143].

143. In a communication dated 3 May 2011, the Government states, with regard to the judicial proceedings initiated by the trade union leaders that: (1) Mr Elías Antonio Vilcahuamán Ninanya; respondent: SUNARP; file No. 04067-2008-0-1501-JR-CI-06; Labour Court of Huancayo – Judicial District of Junín. Status of the proceedings: on 21 June 2010, Order No. 27 was issued stating the following: the respondent SUNARP has appeared; the civil complaint against Registry Zone No. VIII, Huancayo Office, has been pleaded; the evidence presented has been accepted for consideration; the claim has been responded to; on 6 January 2011, a notice of appearance was submitted; (2) Ms Rosemary Alexandra Almeida Bedoya, Ms Nelly Cecilia Marimón Lino, Ms Ana Elizabeth Mujica Valencia, Ms Miriam Reyes Candela, Ms Rocío del Carmen Rojas Castellanes, Ms María Yolanda Zaplana Briceño and Ms Adriana Jesús Delgado Angulo; respondent: Registry Zone No. IX SUNARP; file No. 00495-2008-0-1801-JR-LA-29; 29th Labour Court of Lima. Status of the proceedings: the file is ready for a ruling to be issued.

144. As to the issue which has arisen between FETRASINARP and SUNARP, the Government states that, on 13 December 2010, the arbitration process concerning the collective bargaining processes corresponding to the years 2007–08, 2008–09 and 2009–10 was formally initiated. In this regard, the Court decided by a majority vote regarding the following points: food allowance; mobility allowance; education allowance; paid holidays; birthday leave and bonuses following the conclusion of collective agreements.

145. Finally, the Government states that: (1) the judicial proceedings are ongoing and were pursued by the parties in their respective channels until approximately January 2011; and (2) the arbitration award issued on 11 January 2011 definitively resolves the list of claims in the complaint concerning the collective bargaining processes that arose from the lists of

dispute grievances for the years 2007–08, 2008–09 and 2009–10 and that was submitted by the Union of Workers of Registry Zone No. IX, Lima Office, SUNARP.

146. *The Committee notes this information and requests the Government to send it copies of the decisions handed down regarding the ongoing judicial proceedings concerning the dismissals of the trade union leaders of SUNARP.*

Case No. 2703 (Peru)

147. On last examining the case, at its March 2011 meeting, the Committee trusted that the Constitutional Court would hand down a ruling in the 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 359th Report, paras 144–146]. This case was submitted by the General Confederation of Workers of Peru (CGTP).
148. In its communication dated 3 May 2011, the Government attaches a copy of the ruling of the Constitutional Court dated 10 January 2011, noting that the threat of infringement of the trade union rights of the persons in question has been lifted, in particular because four workers of Hogar Clínica San Juan de Dios, including Ms Mónica Elisa Meneses La Riva and Mr Ángel Teófilo Tarazona Rodríguez, signed a termination agreement. As to the other unionized workers, including the General Secretary, the ruling states that the Subdirector for Collective Bargaining of the Ministry of Labour declared the enterprise's request for collective dismissal on economic and structural grounds inadmissible, with the workers being reinstated in their posts.
149. *The Committee notes this information with satisfaction. Finally, the Committee requests the Government to send its reply regarding the recent allegations made by the Federation of Peruvian Light and Power Workers (FTLFP) dated 21 and 28 August 2011.*

Case No. 2724 (Peru)

150. The Committee last examined this case at its November 2010 meeting [see 358th Report, paras 798–826] and on that occasion made the following recommendations:
- (a) The Committee requests the Government to ensure that ESSALUD continues to deduct union dues from the members of SINESSE that have requested it.
 - (b) The Committee requests the Government to keep it informed of the final outcome of the *amparo* proceedings instituted by Ms Cecilia Grados Guerrero, General Secretary of the SINESSE National Executive Board, and Ms Carmen Chávez Cabrera, General Secretary of the Edgardo Rebagliati Martins National Hospital Nurses' Union, against the administrative decision imposing on them the sanction of a five-month suspension without pay.
151. In a communication of 7 February 2011, the Government states that, through letter No. 283–2010-MTPE/4.10, the Lima Higher Court of Justice was requested to provide information on the status of the *amparo* proceedings instituted by Ms Cecilia Grados Guerrero and Ms Carmen Chávez Cabrera. The Lima Higher Court of Justice, through letter No. 12838-2010-SG-CSJLI/PJ, forwarded letter No. 184-2010-5 Const. of the Fifth Constitutional Court of Lima, in which the judge of said court states the following: (a) on 23 October 2009, the order admitting the claim presented by Ms Carmen Chávez Cabrera against the State Health Service (ESSALUD) was issued; (b) on 12 January 2010, ESSALUD challenged the claim and formulated exceptions regarding lack of jurisdiction and failure to exhaust administrative remedies; (c) Resolution No. 11 of 26 August 2010 provides for the resolution of exceptions and for transfer for decision; and (d) through

Resolution No. 12 of 15 December 2010, it was ruled that the exceptions submitted by the respondent were unfounded and the proceedings were declared free from defects, that being the current status of the present proceedings.

- 152.** As to the recommendation that ESSALUD continue to deduct union fees from the members of SINESSS, the Government states that, through letter No. 284-2010-MTPE/4.10, ESSALUD was requested to provide information in that regard. The Government is still awaiting a reply to that request, which will be duly transmitted.
- 153.** *The Committee notes this information. The Committee requests the Government to keep it informed regarding any decision handed down relating to the amparo proceedings instituted by the trade union leaders, Ms Cecilia Grados Guerrero and Ms Carmen Chávez Cabrera, against the administrative decision imposing on them the sanction of a five-month suspension without pay. Furthermore, the Committee once again requests the Government to ensure that ESSALUD continues to deduct trade union dues from the members of SINESSS that have requested it.*

Case No. 2771 (Peru)

- 154.** At its March 2011 meeting, the Committee made the following recommendations regarding the issues which remained pending [see 359th Report, para. 1092]:
- (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 the seven months of detention.
- 155.** In its communication dated 1 March 2011, the complainant organization, the General Confederation of Workers of Peru (CGTP) alleges that the trade union leaders Mr Pedro Condori Laurente and Mr Antonio Quispe Tamayo have been held in detention since 11 January 2011 on the basis of a judicial order concerning the alleged offence of resistance and violence against the authorities for having peacefully called for respect for the law and specifically for having urged the police, in July 2010, not to remove the body of a dead miner without the Prosecutor being present.
- 156.** In its communication of 3 May 2011, the Government states that the said leaders have been freed and that it has requested information on the criminal proceedings under way against them.
- 157.** The Government further states that the appeal referred to in recommendation (a) has yet to be ruled on by the High Court of Lima, although the Prosecutor has made a request for a dismissal order. As to the compensation of the trade union leaders Mr Pedro Condori Laurente and Mr Claudio Boza requested by the Committee, the Government states that the interested parties have been freed but that compensation for miscarriages of justice may only be claimed in case of a final ruling or an acquittal. However, as pointed out above, the process is at the appeal stage.
- 158.** *The Committee notes this information and reiterates the recommendations it made at its March 2011 meeting.*

159. *As regards the alleged detention of trade union leaders, the Committee requests the Government to inform it of the circumstances in which the detention was carried out and of developments concerning the proceedings under way against those two trade union leaders.*

* * *

160. 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
1962 (Colombia)	November 2002	June 2008
2006 (Pakistan)	November 2000	June 2010
2096 (Pakistan)	March 2004	March 2011
2169 (Pakistan)	June 2003	June 2011
2192 (Togo)	March 2003	March 2011
2229 (Pakistan)	March 2003	June 2010
2304 (Japan)	November 2004	November 2010
2341 (Guatemala)	March 2011	–
2383 (United Kingdom)	March 2005	March 2011
2384 (Colombia)	June 2008	June 2009
2399 (Pakistan)	November 2005	June 2011
2478 (Mexico)	March 2010	March 2011
2488 (Philippines)	June 2007	June 2011
2490 (Costa Rica)	November 2008	March 2011
2512 (India)	November 2007	March 2011
2518 (Costa Rica)	March 2010	March 2011
2540 (Guatemala)	November 2008	March 2011
2595 (Colombia)	June 2009	March 2010
2604 (Costa Rica)	November 2008	March 2011
2614 (Argentina)	March 2010	June 2011
2626 (Chile)	March 2010	March 2011
2638 (Peru)	June 2010	March 2011
2639 (Peru)	March 2011	–
2652 (Philippines)	March 2010	–
2676 (Colombia)	June 2010	June 2011
2679 (Mexico)	June 2010	March 2011
2680 (India)	November 2009	June 2011
2695 (Peru)	March 2010	March 2011
2700 (Guatemala)	March 2010	March 2011
2701 (Algeria)	June 2010	–
2705 (Ecuador)	November 2009	June 2011
2718 (Argentina)	March 2010	March 2011
2722 (Botswana)	June 2010	March 2011

Case	Last examination on the merits	Last follow-up examination
2744 (Russian Federation)	June 2010	March 2011
2746 (Costa Rica)	June 2011	–
2747 (Islamic Republic of Iran)	June 2011	–
2755 (Ecuador)	June 2010	March 2011
2756 (Mali)	March 2011	–
2769 (El Salvador)	March 2011	–
2772 (Cameroon)	June 2011	–
2775 (Hungary)	June 2011	–
2777 (Hungary)	June 2011	–
2782 (El Salvador)	March 2011	–
2783 (Cambodia)	March 2011	–
2787 (Chile)	June 2011	–
2790 (Colombia)	June 2011	–
2791 (Colombia)	June 2011	–
2818 (El Salvador)	June 2011	–

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

162. In addition, the Committee has just received information concerning the follow-up of Cases Nos 1787 (Colombia), 1865 (Republic of Korea), 1991 (Japan), 2160 (Bolivarian Republic of Venezuela), 2216 (Russian Federation), 2241 (Guatemala), 2251 (Russian Federation), 2257 (Canada), 2268 (Myanmar), 2291 (Poland), 2301 (Malaysia), 2355 (Colombia), 2356 (Colombia), 2362 (Colombia), 2422 (Bolivarian Republic of Venezuela), 2423 (El Salvador), 2428 (Bolivarian Republic of Venezuela), 2433 (Bahrain), 2434 (Colombia), 2450 (Djibouti), 2474 (Poland), 2533 (Peru), 2557 (El Salvador), 2575 (Mauritius), 2590 (Nicaragua), 2591 (Myanmar), 2603 (Argentina), 2611 (Romania), 2613 (Nicaragua), 2616 (Mauritius), 2634 (Thailand), 2654 (Canada), 2658 (Colombia), 2664 (Peru), 2669 (Philippines), 2674 (Bolivarian Republic of Venezuela), 2677 (Panama), 2690 (Peru), 2698 (Australia), 2699 (Uruguay), 2717 (Malaysia), 2719 (Colombia), 2725 (Argentina), 2730 (Colombia), 2735 (Indonesia), 2736 (Bolivarian Republic of Venezuela), 2737 (Indonesia), 2754 (Indonesia), 2757 (Peru), 2760 (Thailand) and 2764 (El Salvador), which it will examine at its next meeting.

CASE NO. 2733

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

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

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

- 163.** The Committee last examined this case at its November 2010 meeting, when it presented an interim report to the Governing Body [358th Report, paras 124–157 approved by the Governing Body at its 309th Session (November 2010)].
- 164.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case twice. At its May–June 2011 meeting [see 360th 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 its next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.
- 165.** Albania has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 166.** At its November 2010 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:
- (a) The Committee requests the Government to supply the texts of the new law relating to trade union assets as adopted, as well as of Decisions Nos 85/2001 and 5/2004 of the High Court and Decision No. 24/2002 of the Constitutional Court.
 - (b) The Committee urges the Government, in keeping with the principles of tripartism and social dialogue, to enter into full and meaningful consultations with the relevant social partners, with a view to finding a mutually acceptable and definitive solution as regards the property in question, thus clarifying the rights and responsibilities and ensuring that the trade unions in the country may carry out their activities in full knowledge thereof. Given that the administration of property was likely to constitute an important means by which the trade unions were able to effectively function and defend the interests of their members, as stated by the Government itself in its reply, the Committee expects that the solution found with respect to the question of trade union property will ensure that the unions have available to them the necessary means to pursue their legitimate trade union

activities. Bearing in mind the extremely negative consequences that a total and definitive removal of any rights to these assets entails for the complainant and for the Albanian trade union movement as a whole, the Committee requests the Government to undertake the necessary consultations without delay and to keep it informed of the outcome of these discussions.

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

B. The Committee's conclusions

- 167.** *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.*
- 168.** *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.*
- 169.** *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].*
- 170.** *The Committee recalls that the complainant organization alleges in this case the violation of the right to property of workers' organizations following the adoption of a law confiscating the assets of all Albanian trade unions.*
- 171.** *The Committee notes from a communication sent to the ILO that several Albanian trade unions have filed a complaint with the Constitutional Court claiming the abrogation as incompatible with the Constitution of Act No. 10159 of 15 October 2009 "On the abrogation of Act No. 8340/1 of 6 May 1998 'On adjusting consequences deriving from the implementation of Decree No. 204 of 5 June 1992 concerning the properties of trade unions'", as well as the suspension of its implementation. The Committee understands that, in its judgment of 18 June 2010, the Constitutional Court has ruled in favour of the trade unions holding that Act No. 8340/1 of 6 May 1998 had recognized the trade unions as owners of the relevant property gained through the implementation of the 1992 Decree, and that the contested Act therefore infringes the principle of legal certainty and the trade unions' right to property.*
- 172.** *The Committee requests the Government to indicate without delay the measures taken or contemplated as a consequence of the Constitutional Court judgment of 18 June 2010 abrogating Act No. 10159 of 15 October 2009. While regretting that the complainant organization has not provided the information requested by the Committee in regard to the allegations that in 2007 the two Albanian trade union confederations were expelled from their premises and not permitted to exercise their normal activities, the Committee*

requests the Government to ensure that the complainant's full access to its rights is restored. The Committee requests to be kept informed of any developments in this respect.

The Committee's recommendations

173. *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 indicate without delay the measures taken or contemplated as a consequence of the Constitutional Court judgment of 18 June 2010 abrogating Act No. 10159 of 15 October 2009.***
- (b) *While regretting that the complainant organization has not provided the information requested by the Committee as concerns the allegations that in 2007 both Albanian trade union confederations were expelled from their premises and not permitted to pursue their activities, the Committee requests the Government to ensure that the complainant's full access to its rights is restored. The Committee requests to be kept informed of any developments in this respect.***

CASE NO. 2805

DEFINITIVE REPORT

**Complaint against the Government of Germany
presented by
the Freie Arbeiterinnen- und Arbeiter-Union (FAU)**

Allegations: The complainant alleges that a local court has incorrectly issued an order denying the complainant's status as a union, thereby impeding the complainant in its attempts to reach a collective bargaining agreement with the employer in the course of a labour dispute, and facilitating the employer's demand that the complainant pay a fine for its supposed violation of the order

- 174.** The complaint is contained in communications from the Freie Arbeiterinnen- und Arbeiter-Union (FAU) dated 9 April, 16 June and 21 August 2010.
- 175.** The Government forwarded its response to the allegations in a communication dated 11 October 2010.
- 176.** Germany 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

177. In its communications dated 9 April, 16 June and 21 August 2010, the complainant alleges that a local court has incorrectly issued an order denying the complainant's status as a union, thereby impeding the complainant in its attempts to reach a collective bargaining agreement with the employer in the course of a labour dispute, and facilitating the employer's demand that the complainant pay a fine for its supposed violation of the order.
178. According to the complainant, the FAU is a German rank-and-file union and represents the German section of the International Workers' Association (IWA).
179. The complainant indicates that, in the course of a labour dispute of its Berlin section (ASy-Berlin) with a local cinema concerning a collective agreement, the aforementioned local FAU section has been denied by a local court the right to collective bargaining and to other measures aiming at collective bargaining, as well as the right to call itself a trade union (*Gewerkschaft*) or rank-and-file union (*Basisgewerkschaft*).
180. The complainant further reports that the management of the local cinema has subsequently demanded that a "noticeable" fine (up to €250,000 or prison) be imposed on its legal representatives for supposed infringement of a court decision. In a later communication dated 16 June 2010, the complainant confirms that the Berlin section of the FAU was sentenced to pay a fine of €200 for using the term "union" in its local statutes.
181. In the complainant's view, both the court decisions and the fine constitute a clear violation of ILO Conventions Nos 87 and 98 ratified by Germany. In its capacity as a relatively small and young organization, the complainant believes that the rights of minority unions as established by the ILO and guaranteed by countries such as Spain, Italy or France are infringed in Germany. The complainant highlights that, while the court decision currently affects solely FAU Berlin, it could easily be applied to any other section of the FAU or similar small organizations in case of labour disputes.
182. In its communication dated 21 August 2010, the complainant informs that the interlocutory injunction against the FAU that prevented it from calling itself a union or grass-roots union has been rescinded. Nonetheless, the complainant states that this important decision does not resolve the main problem underlying the complaint. The court has allowed the FAU to call itself a union as to do otherwise would contravene the freedom of expression; however, the FAU continues to be banned from acting like a union. For instance, it cannot take industrial action and does not have the right to access the workplace of its members.
183. The complainant indicates that the FAU has the right to seek a declaratory judgment before the court on its capacity to conclude collective agreements (*Tariffähigkeit*) – and thus on its status as a union. However, in the complainant's view, this procedure violates Conventions Nos 87 and 98 for the following reasons:
- (i) It would take a long time to complete this procedure (up to two years) and the costs involved go far beyond a simple official registration; thus, the FAU is, according to the complainant, disproportionately disadvantaged.
 - (ii) Equating the capacity to conclude collective agreements with the union status allegedly contravenes the ILO provisions to protect minority unionism.
184. The complainant believes that, while ILO Conventions allow States to pass laws governing collective bargaining, Germany is obviously overreaching itself, in that there is no legal distinction between collective bargaining at company level and at regional level – i.e. the number of members required for a union to be recognized as capable to conclude collective

agreements is in the order of regions. In the complainant's view, this is a violation of ILO Conventions and the reason why the FAU has been prevented from engaging in collective bargaining and has been denied all other genuine union rights.

185. The complainant further highlights the fact that this has not only been a problem for the FAU but also for other unions in the past (e.g. GDL). Finally, it points out that a bill is currently being discussed in Germany that would result in a restriction and impairment of the right to strike, as it would outlaw the existence of multiple collective agreements within one company (*Tarifpluralität*), which had only recently been permitted by the Federal Labour Court.

B. The Government's reply

186. In its communication dated 11 October 2010, the Government declares that the complaint is unfounded, and that there has been no violation of ILO Conventions Nos 87 and 98.
187. According to the Government's understanding, the FAU criticizes: (i) the requirement of the capacity to conclude collective agreements (*Tariffähigkeit*) in order to be recognized as a trade union having the right to conclude collective agreements and hold a strike; and (ii) the length of the procedure for obtaining a declaratory judgment on the capacity to conclude collective agreements under section 97 of the Labour Court Act (*Arbeitsgerichtsgesetz*).
188. As regards the first point, Convention No. 87 guarantees, in the Government's view, freedom of association only in general terms and does not address directly the capacity to conclude collective agreements and the trade union status. The Government indicates that the freedom of association referred to in the Convention is guaranteed in the German legal system by Article 9(3) of the Basic Law, which protects the freedom to form, join or withdraw from an association and provides an institutional guarantee of the right of association. Accordingly, workers and employers, without distinction, have the right to establish organizations of their own choosing. No authorization by the Government or by an administration is required in order to establish such organizations. Workers and employers also have the right to join organizations of their own choosing and without authorization. There is no restriction on the right of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.
189. Similarly, the Government believes that the capacity to conclude collective agreements and the trade union status are not regulated in Convention No. 98. The promotion of machinery for voluntary negotiation between employers' and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements, mentioned in the Convention, has been implemented in Germany primarily through the Collective Agreements Act (*Tarifvertragsgesetz*).
190. The Government deems it is compatible with the fundamental right of freedom of association to allow organizations to take part in collective bargaining autonomy, only if they are in a position to shape in a meaningful way, through collective agreements, working life within the space provided by the legal system. In its view, it is therefore not objectionable to make the capacity of workers' organizations to conclude collective agreements subject to certain minimum requirements, such as a certain organizational structure that enables the organization to carry out its tasks, and the ability to assert itself vis-à-vis their social counterpart, which ensures that the latter cannot reject bargaining offers out of hand. A balancing of interests through the conclusion of a collective agreement is possible only if a workers' organization is so effective that the employer side

will have to engage in bargaining and conclude a collective agreement; otherwise, it would depend on the employer's goodwill.

191. The Government stresses that, even if a workers' organization does not yet have the ability to assert itself, it is still an association protected by the fundamental right of freedom of association. The establishment and activity of the association remain free. Individual workers are not prevented from joining the association and contributing to its acquiring the necessary ability to assert itself.
192. As regards the second point, the Government states that, in a social State governed by the rule of law such as the Federal Republic of Germany, a person must, in the event of a dispute, refer to the courts if it feels that its rights have been infringed. Such access to the courts does not, however, rule out the fact that the law provides for fees for use of the court system, the amount of which is set according to the scale of litigation.

C. The Committee's conclusions

193. *The Committee notes that, in the present case, the complainant alleges that a local court has incorrectly issued an order denying the complainant's status as a union, thereby impeding the complainant in its attempts to reach a collective bargaining agreement with the employer in the course of a labour dispute, and facilitating the employer's demand that the complainant pay a fine for its supposed violation of the order.*
194. *The Committee notes the complainant's indication that, in the course of a labour dispute with a local cinema concerning a collective agreement, FAU Berlin has been denied by a local court the right to collective bargaining and to other measures aiming at collective bargaining (in particular boycott), as well as the right to call itself a trade union (Gewerkschaft). While the interlocutory injunction that prevented it from calling itself a union has been rescinded with reference to the freedom of expression, FAU Berlin continues to be banned from acting like a union (e.g. collective bargaining, industrial action or access to the workplace of its members); from the information available, the Committee notes that, in the absence of trade union status, FAU Berlin is not entitled to participate in meetings of the works council. Furthermore, it notes the complainant's indication that FAU Berlin has the right to seek a declaratory judgment before the court on its capacity to conclude collective agreements (Tariffähigkeit) – and thus on its status as a union; however, this procedure would be long (up to two years) and costly going far beyond a simple official registration. In the complainant's view, equating the capacity to conclude collective agreements with the union status contravenes ILO principles. Moreover, there is no legal distinction between collective bargaining at company level and at regional level – i.e. the number of members required for a union to be recognized as capable to conclude collective agreements is in the order of regions. Finally, the complainant points out that a bill is currently being discussed that would outlaw the existence of multiple collective agreements within one company (Tarifpluralität).*
195. *The Committee notes the Government's view that the complaint is unfounded and that there has been no violation of Conventions Nos 87 and 98, since they only guarantee freedom of association and collective bargaining in general terms and do not directly address the capacity to conclude collective agreements and the trade union status. The Committee notes that the Government deems it is compatible with the fundamental right of freedom of association to allow organizations to take part in collective bargaining autonomy, only if they are in a position to shape in a meaningful way, through collective agreements, working life within the space provided by the legal system. In its view, it is therefore not objectionable to make the capacity of workers' organizations to conclude collective agreements subject to certain minimum requirements, such as a certain organizational structure that enables the organization to carry out its tasks, and the ability*

to assert itself vis-à-vis their social counterpart, which ensures that the latter cannot reject bargaining offers out of hand. A balancing of interests through the conclusion of a collective agreement is possible only if a workers' organization is so effective that the employer side will have to engage in bargaining and conclude a collective agreement; otherwise, it would depend on the employer's goodwill.

196. The Committee observes that the present case essentially involves a question of legal recognition of the status of a trade union with the capacity to conclude collective agreements and the negative consequences which the denial of such recognition entails.
197. In this regard, the Committee has always considered that it is not necessarily incompatible with Article 3 of Convention No. 87 (according to which workers' and employers' organizations have the right to organize their administration and activities and formulate their programmes without interference by the public authorities) to provide for the nomination of the most representative trade union as an exclusive bargaining agent. Nevertheless, the Committee has pointed out on several occasions that where, under the system in force, the most representative trade union enjoys preferential or exclusive bargaining rights, decisions concerning the most representative organizations should be made by virtue of objective and pre-established criteria so as to avoid any opportunities for partiality or abuse (see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 962).
198. In this context, the Committee notes from the longstanding relevant jurisprudence (most recently confirmed by the Federal Labour Court in its ruling of 28 March 2006) that a workers' association, in order to have the status of a trade union (Gewerkschaft), needs to fulfil the following minimum requirements for obtaining the capacity to conclude collective agreements. The workers' association must: (i) have, according to its statutes, the objective of pursuing the interests of its members in their capacity as employees; (ii) be willing to conclude collective agreements; (iii) be freely established, free of "adversaries" and independent; (iv) be organized at a level above workplace level; (v) recognize as binding the current collective bargaining law; and (vi) be able to carry out its duties as bargaining partner in a meaningful way, which implies a certain assertiveness vis-à-vis the social counterpart, a position of strength and a certain efficiency of the organization. The Committee understands that, according to this jurisprudence, the capacity to conclude collective agreements for the claimed area of competence is one and indivisible. For this purpose it is sufficient if the assertiveness and organizational efficiency are not negligible at least in part of the claimed area of competence. A partial capacity to conclude collective agreements, limited to certain regions, professions or industries does not exist. It shall not suffice to possess assertiveness and organizational efficiency vis-à-vis one company or employer. Assertiveness and organizational efficiency of the workers' association can be evaluated according to the number of its members, the capacity to exercise pressure on the employer owing to the degree of specialization of its members or the fact that it has already concluded collective agreements. Accordingly, only a workers' association with the capacity of concluding collective agreements has the status of a trade union (Gewerkschaft). The right to take industrial action (including strike, boycott, etc.) is inextricably linked to the capacity of concluding collective agreements (Tarifverträge). However, a workers' association without that capacity still is protected by article 9(3) of the Basic Law enshrining freedom of association.
199. In the case under consideration, the Committee observes that the Labour Court of Berlin and the Higher Labour Court, in their decisions of 7 October 2009 and 16 February 2010 respectively, have ruled on the basis of objective and pre-established criteria. The Committee takes note, in particular, that the courts held that, since the area of competence of FAU Berlin proclaimed in its statutes was the city of Berlin, whereas the number of its members was around 100 (which meant a degree of organization of slightly above

0 per cent), FAU Berlin did not possess the attributes of assertiveness and organizational efficiency that were necessary to be capable of concluding collective agreements. While the court acknowledged that, being a young organization, its assertiveness and organizational efficiency could only be assessed in a prognostic manner, there was no indication that FAU Berlin could acquire the capacity of concluding collective agreements in the near future. The Committee notes from the relevant ruling that the fact that FAU Berlin had recently shown a not insignificant assertiveness vis-à-vis the local cinema Babylon Berlin, did not suffice to establish the capacity of concluding collective agreements, as this was an individual employer with about 30 employees and thus did not form a non-negligible part of the claimed area of competence of the city of Berlin.

200. The Committee further observes from the longstanding relevant jurisprudence that, in the event of the denial of its capacity to conclude Tarifverträge (i.e. collective agreements with both contractual provisions on the mutual rights and obligations of the parties and normative provisions with direct and mandatory effect on all employment relationships bound by the collective agreement), the relevant workers' organization has nonetheless the right to conclude with the employer or an employers' organization accords to the benefit of third parties, which have no normative effect and necessitate that a corresponding arrangement be agreed between employer and employee. In these circumstances, the Committee considers that the court's non-recognition, on the basis of objective and pre-established criteria, of the complainant as a trade union with the capacity to conclude collective agreements with normative effects, does not infringe the principles of freedom of association, the more so because the complainant organization could apply again to the court for recognition of its capacity if the situation changed.
201. As regards the negative consequences entailed by the denial of this recognition and, in particular, the allegation of being banned from acting like a union, the Committee notes that, while FAU Berlin has not been granted by the court the official status of Gewerkschaft ("trade union"), it is still, according to the Government, regarded as an association protected by the fundamental right of freedom of association enshrined in article 9(3) of the German Basic Law, which implies that not only its establishment but also its activities are free and individual workers may join it. Considering that, regardless of the distinct terms used at the national level, FAU Berlin is a workers' organization falling under the scope of Convention No. 87, the Committee points out the importance which it attaches to the fact that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim (see **Digest**, para. 359). The Committee therefore requests the Government to take all necessary measures to ensure that FAU Berlin may carry on activities that enable it to further and defend the interests of its constituents in accordance with Conventions Nos 87 and 98, in particular publicly expressing its opinion, accessing the workplace of union members and, if it is representative at the level of the relevant enterprise, participating in meetings of the works council.
202. Finally, as regards the complainant's indication that a bill is currently being discussed that would ban the existence of multiple collective agreements within one company (Tarifpluralität), the Committee understands that the abovementioned legal initiative has stalled. Should the initiative advance, the Committee requests the Government to provide information of any developments in this regard directly to the Committee of Experts on the Application of Conventions and Recommendations.

The Committee's recommendations

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

- (a) *Recalling the principles and findings concerning the rights of minority trade unions enounced in its conclusions, the Committee requests the Government to take all necessary measures to ensure that FAU Berlin may carry on activities that enable it to further and defend the interests of its constituents in accordance with Conventions Nos 87 and 98, in particular publicly expressing its opinion, accessing the workplace of union members and, if it is representative at the level of the relevant enterprise, participating in meetings of the works council.*
- (b) *The Committee requests that, should the legal initiative to ban the existence of multiple collective agreements within one company (Tarifpluralität) advance, the Government provide information of any developments in this regard directly to the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2788

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

Complaint against the Government of Argentina presented by

- **the Teachers' Association of Entre Ríos (AGMER) and**
- **the Confederation of Education Workers of Argentina (CTERA)**

Allegations: The complainant organization alleges lack of good faith on the part of the authorities in collective bargaining in the education sector in the Province of Entre Ríos, contests the decision of the provincial authorities to deduct wages for strike days and alleges that head teachers who did not communicate the names of teachers who took part in the strike were disciplined and a criminal prosecution was initiated for contempt of court in relation to disobedience of a judicial conciliation order

204. The complaint is contained in a communication from the Teachers' Association of Entre Ríos (AGMER) dated 8 June 2010. The Confederation of Education Workers of Argentina (CTERA) supported the complaint.

205. The Government sent its observations in a communication dated 24 May 2011.

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

A. The complainant's allegations

- 207.** In its communication dated 8 June 2010, the AGMER states that it is an entity with legal recognition granted by Ministry of Labour and Social Security (MTYSSN) Resolution No. 505 dated 22 June 1993 and that it is registered under No. 1518 as a first-level trade union entity, covering the territory of the province of Entre Ríos, Republic of Argentina. It also states that it is affiliated to the CTERA, which is a second-level trade union entity (federation), covering the whole territory of the Republic of Argentina.
- 208.** AGMER indicates that the Government has ratified Convention No. 87 and Conventions Nos 151 and 154. It adds that article 14bis of the National Constitution of Argentina guarantees trade unions, as a fundamental right, the right to strike and that the second paragraph of article 75(22) of the National Constitution, for its part, grants constitutional character to a series of international treaties on human rights, including the New York Covenants of 1966, under which Conventions Nos 87, 151 and 154 are recognized as having the same rank. The Covenant on Economic, Social and Cultural Rights further establishes, specifically, that States parties undertake to guarantee the right to strike (article 8.1(d)). This circle of protection of freedom of association is closed by the first paragraph of article 75(22) of the National Constitution, which grants it supra-legal status with respect to other international treaties, including the ILO Conventions.
- 209.** The National Constitution also establishes the representative, republican and federal system and, finally, each Provincial State has legislative powers and, with reference to collective bargaining in the public administration, the convocation procedure must necessarily be included in the legislation of each province. The complainant organization adds that the Constitution of the province of Entre Ríos recognizes “The rights, declarations and guarantees set out in the National Constitution, which that said Constitution deems to be reproduced, shall not be understood as negating other rights and guarantees not listed therein but which derive from the principle of sovereignty of the people, the republican form of government and humankind as such ...” (article 5). Thus, the rights contained in the National Constitution are incorporated and respected in the provincial framework and these include freedom of association and the right to organize, collective agreements, the right to strike and guarantees of the trade union status of trade union representatives.
- 210.** In this regard, the province of Entre Ríos has amended its Constitution. These amendments came into force in November 2008 and, among other guarantees, approved the provision in article 82 that: “Work is a right which the State shall protect and promote.” In particular, the same instrument establishes: (a) collective bargaining which guarantees the principle of inalienability, progressiveness, primacy of reality, indemnity and, in case of doubt, interpretation in favour of the worker; and (b) “the general regulatory framework of the provincial and municipal public employee, with the participation of the workers, shall ensure compliance with regulations on health, safety and prevention of accidents ...”. The complainant organization considers that although the legal framework and the rights of all those who work as employees of the State in the province of Entre Ríos are clearly defined, in the particular case of the teachers, as will be seen, these rights and guarantees have been clearly and repeatedly infringed.

- 211.** The complainant organization indicates that in 2008, direct industrial action measures were approved and implemented by decision of the AGMER and the other teachers' representative trade unions, based on the pursuit of a legitimate wage reform, among other labour claims which have been ongoing for several years. These measures, which were legal and in compliance with the trade union statutes, were voluntarily and massively supported by Entre Ríos teachers, who refused to perform tasks, in the exercise of the direct constitutional right to strike enshrined in article 14bis of the National Constitution and other relevant legislations.
- 212.** These measures were clearly claims-related and sought to secure the constitutional guarantee of "fair remuneration" for all workers represented by the trade unions in the sector. Despite the fact that these trade union actions were "legitimate means of trade union action" (enshrined in Act No. 23551), the Government of the province of Entre Ríos and the General Education Council issued a constant, monthly and regular series of regulations which attacked the right to strike with the purpose of: (1) making deductions from the wages of those who exercised that right; (2) taking action against head teachers who did not "hand over" the list of teachers taking part in the strike, in order to make the deductions; and (3) making a note in the personal file of each of the sanctioned teachers.
- 213.** The complainant organization indicates that the many meetings held between teaching unions, the educational and financial authorities of the province and the Governor himself were public meetings aimed at achieving a reform of remuneration to place teachers in a position to perform their work in decent conditions. All these negotiations plainly and clearly failed because the meetings were held without any offer of a genuine reform of wages or measures to ensure decent and safe conditions of work. In the face of the collapse of the negotiations, direct industrial action measures were mandated by teachers' assemblies acting in accordance with express statutory, legal and constitutional provisions.
- 214.** According to the complainant organization, the reality is that, the "respect" of the public authorities for the right to strike is merely empty words, mere declarations without substance in government practice. On the contrary, State legislation issued at the same time has the quite opposite effect, since the implementation of wage deductions for strike days has a real and substantial impact on teachers' wages. This is a sanction of a pecuniary character, which is totally illegal, since the industrial action measures were adopted with the utmost legality and there was no declaration of illegality of those measures. This conduct is unacceptable and incompatible with a democratic State and the rule of law, since by a series of actions, such as the public warnings by the State Prosecutor that the teachers would be liable to disciplinary proceedings and dismissal, it was sought to neutralize the right to strike by instilling fear of disciplinary proceedings and consequent sanctions among those who exercised that right.
- 215.** The complainant organization considers that the conduct displayed in official circles was illegal and intimidating, because it subjugated the right to strike, without requesting or declaring the illegality of those actions and without, as required by article 9 of Act No. 14786, warning the teachers to return to their normal work. Faced with the exhaustion of the negotiations to resolve the dispute and faced with the immovable, unreasonable and recalcitrant attitude adopted by the State of the Province of Entre Ríos with regard to fulfilling its obligations, the industrial action decided by the trade unions took place.
- 216.** The complainant organization states that in the face of this industrial action, which obviously had massive support from the teachers, the provincial authorities' only reply was to issue regulations to allow deductions for strike days. By doing so, they attacked the teaching profession in the province with provisions which clearly conflicted with the constitutional guarantee. This being the case, the deduction ordered by the State, apart from a dogmatic assertion lacking in any justification, constitutes "penalization" in

violation of a right which should be strongly guaranteed. The complainant indicates that, for that reason, it is addressing this complaint to the Committee, on constitutional and supranational grounds, concerning the statement in the preamble of the resolution of the General Education Council that “If it is not performed (it refers to performance of work), remuneration should not be paid for the time when the services ceased to be provided and in proportion to the length of time when the labour was withdrawn.”

- 217.** The complainant organization considers that penalization for individual participation in the industrial action which was collectively decided is illegal, as the background and justification of the trade union action is the prior failure of the provincial state to comply with the constitutional requirement to revise wages in line with the cost of living, set out in the Constitution of 1933 and in the current revised text. It should be emphasized that the principle of legality must preside over all acts of government and constitute the basic guarantee for the foundation of a democratic state and rule of law. The deductions made are an administrative sanction and, thus, an expression of the State’s power of sanction and punishment, which affects the right to strike, and thus has clear constitutional implications.
- 218.** The complainant organization indicates that there is a procedure in Argentina instituted by a current National Law (Act No. 14786) to resolve collective disputes which cannot be resolved between the parties, and this procedure was not followed by the provincial administration, which makes its action illegal. The Provincial State commits, as a matter of “practice” an act which consists of making deductions from wages for days when teachers took strike action, without ensuring due process and without resorting to the appropriate bodies to determine the reasons behind the industrial action.
- 219.** The complainant organization states that bad industrial practice by the Entre Ríos provincial state and the General Education Council is common. They have repeatedly abused of collective bargaining (Act No. 9624 on Collective Bargaining for Teachers) seeking only to stop the strike action. According to the complainant, this is shown by the fact that they come to the table without genuine wage offers and, when rare and inadequate wage rises are granted, they are not consolidated as pensionable or the basis for future increases, and have no impact on teachers’ benefits (concealed sums which merely diminish teaching wages, made up of various concealed items which are not subject to tax or contributions). Neither did they respond to claims for decent conditions of work, which is shown by the calamitous state of school buildings, and the lack of rooms for school canteens and washrooms.
- 220.** The administrative action in this case was illegal because it not only proceeded without respecting the right to defence or due process, but when it issued Resolution No. 3217 on the deductions, the State had not requested compulsory conciliation through the General Education Council, nor had the trade unions been given legal notice to cease their industrial action. Thus, the administrative acts which are claimed to serve as the legal basis for the deductions are null and void because they are unjustified and lack foundation. According to the complainant, the deduction is compulsive, arbitrary, and unreasonable, and is shown in pay statement as “Deduction for days not worked”, without there having been a prior declaration of the illegality of the declared strike, without ordering compulsory conciliation and without giving notice to the trade unions to cease their industrial action. In short, without waiting for the judicial pronouncement and subjugating the guarantees of the teachers, who were victims of the illegal act. Not only this, but the deduction was applied as an “administrative sanction” without any basis in any constitutional rule of the administrative power. The second part of article 9 of National Act No. 14786, which institutes an administrative proceeding prior to any action, is conclusive when it states: “the strike or voluntary and premeditated reduction in production, below normal limits, shall result for workers in the loss of the entitlement to

remuneration for the period of the strike or reduction in work if they do not cease after receiving notice from the competent authority”.

221. The complainant organization emphasizes that the notice to the striking workers to return to their work is the means of excluding the guarantee of the right to strike. If the judicial or administrative authority does not give this notice, it is not possible to enforce a sanction such as deduction of pay, as in that case, the administrative action violates the principle of reasonableness and fundamentally violates the principle of the hierarchy of law in article 31 of the National Constitution. The complainant also considers that both the Provincial Government and the General Education Council violated their own rules, as they resorted to the courts to stop the strike and, before the court decision, issued administrative rulings under which they claim to legitimize the arbitrary deductions. The lack of a legal provision which legitimizes the deductions for strike days emerges clearly from the very text of Directive No. 30 of 2007 of the Executive Power of the Province, an administrative act of lower rank which can in no way justify the state's action. Indeed, the purpose of that act is “to issue instructions on deductions of pay for the adoption of industrial action by employees of the provincial public administration”, without these “instructions” being in any way supported by a basic legal instrument. For that reason, the complainant organization considers that the directive is purely arbitrary, a caprice of the executive power, tainted with arbitrariness, and should be condemned.
222. The claimant states that the provincial state of Entre Ríos and the General Education Council are not only violating the guarantee of the right to strike by deducting days without following due legal process, but are also in contravention of the international human rights treaties ratified by the Argentine State, ignoring and subjugating their obligations which must be fulfilled on pain of incurring liability under international law. It is thus all the more evident that an act is being committed which lacks any justification, reasonableness of any kind and is totally without legality. For its part, Circular No. 02/07, on the subject of “Reporting on strike days by all employees under the General Education Council” and addressed to departmental managements by the Department of Adjustments and Settlements of the General Education Council, states, with reference to the absence of teachers to participate in the strikes: “In the case concerned here, it is a case of absence, justified by direct industrial action, i.e. not leave requested by the teacher, but failure to attend their place of work ...”. This circular implemented an administrative system for cases when teachers are absent to take part in industrial action, despite the fact that, for the educational body, the offence of strike is, in its own words, “an absence justified by direct industrial action”. It should be clear that the provincial state, which is the teachers' employer, cannot qualify an industrial action as legal or illegal, since it does not have the power to do so. Even if it did have such power, in so doing, it assumes the dual role of judge and party, and cannot claim to settle a dispute based on its own rules which censure all strikes by an incorrect and irrational qualification of illegality. The administrative authority cannot even qualify direct industrial action as such, since that decision is solely reserved for the courts.
223. It is quite clear that the deductions from wages, while not overturning the guarantee of the right to strike, equals to an unacceptable restriction of that right, since the provincial executive power thereby assumes powers that it does not possess. In the case of the teachers affected by the deductions from their pay, it conspires against the integrity of the salary, which is certainly of a subsistence nature, and thus unfairly affects the right of property, the inalienability of which is guaranteed by article 17 of the National Constitution. The provincial state is not only failing in its duty to provide “fair remuneration”, which must be revised for the cost of living, but is in clear breach of the contract between the administration and its employees, and, for this, there is no legal basis.

224. The complainant organization indicates that both national and provincial legislation emphasize the different consequences which a strike may cause to the workers involved, depending on whether or not the strike has been declared illegal. Thus, for example, in the case of “ADEMYS Teachers’ Association against GCBA on incidental processes, the Catamarca and Tucuman Appeal Court, 2nd Chamber, Case No. 33972/1” held that “ ... 1. The judge in the lower court allowed the preventive injunction requested by ADEMYS that the administration should refrain from any act or event which, as a consequence of the industrial action taken by the teachers sector on 17 and 18 September 2008; 1, 2, 15, 16 and 21 October 2008; 18 and 19 November 2008; 17, 18, 25 and 31 March and 1 and 22 April 2009, would affect the full payment of their wages”. It therefore ordered the immediate restitution of the sums which has been deducted on those grounds.
225. The complainant organization states that in the present case, the strike was lawful since it had not been declared unlawful or illegal, and because it was lawful, it must be protected by the legal order and, also because it was lawful, it could not give rise to loss for the workers who took part.
226. The complainant organization adds that since 2005, in the province of Entre Ríos, Act No. 9624 has been in force, which provides for the institution of the “Collective Agreement for Teachers between the General Education Council of the province of Entre Ríos, as employer, and the teachers’ associations with trade union status, in order to agree conditions of work, wages and all matters pertinent to the employment relationship of teachers ...” (article 1). This Act, which was a victory for the teachers in the province, despite being clear as to its procedure, has on several occasions been subject to a distorted and extortionate interpretation and application by provincial governments and the General Education Council (especially during the industrial disputes in mid-2008 and early 2009).
227. During 2008, events occurred which were a repeat of unfair and anti-trade union practices, and the same occurred in 2009. It was a well known and established fact that the AGMER had planned to hold a congress in which decisions would be taken relating to future industrial action on 4 July 2008. Despite the fact that the authorities of the General Education Council and the provincial government had been fully informed of the holding of the meeting on 4 July, on that very same day, the President of the General Education Council issued a convocation to a joint meeting which, surprisingly, was accepted by the administrative body, and the trade unions were convened and notified. This notice reached the trade union after the industrial action had been decided, as shown by a copy of the resolutions of the congress. The trade union refused the convocation because it considered it to be in bad faith on the part of the employer, given that it infringed the provisions of article 6 of the abovementioned Act No. 9624 on Collective Bargaining, where it states: “the parties shall be obliged to negotiate in good faith. This principle implies the following rights and obligations for the parties: (a) attendance at negotiations and hearings notified in due form, with sufficient powers ... (e) making efforts conducive to reaching agreements which take into account the various circumstances of the case”.
228. According to the complainants, none of the above conditions were fulfilled. In their opinion, there is a clear case of bad faith in a self-serving convocation on the same day as decisions were to take place and announced previously by all public media in the province and, as if that were not enough, the State itself failed to produce a wage offer by 30 June 2008. Furthermore, it should also be noted that neither the General Education Council nor the provincial government made efforts conducive to reaching an agreement, but simply maintained silence and then, on the day that decisions were to be taken by the trade unions, they requested the opening of the collective bargaining process. As if that was not enough, before the notice of refusal expressed by the trade unions, the President of the General Education Council, 20 days later, asked the Director of the Provincial Labour Directorate to reiterate the convocation, which never happened, but the reason for that omission by the

administrative body was not explained. It should be explained that the Director of the Provincial Labour Directorate had ample powers to reconvene the parties, as the bargaining process never started, because of the bad faith of the employer. Thus far, it is reasonable to assume that the collective bargaining process provided by law in specified forums had not begun.

229. The complainant organization indicates this comes to the crux of the anti-union action. The General Education Council, despite the required steps being very clear, applied to the labour court requesting compulsory conciliation, giving rise to the action “General Education Council v. Teachers’ Association of Entre Ríos and Association of Technical Teachers re Compulsory Conciliation, Act No. 9624” which was heard in Labour Court No. 3 of Paraná. The labour judge, entirely and absolutely incorrectly, ordered compulsory conciliation because she considered that: “... from Case No. 915216, filed in the Provincial Labour Directorate, emerges the substantiation of the various stages which, under the law, must be considered, on the one hand, the existence of a collective industrial dispute as defined by law and, on the other, the convening of a conciliation hearing and its failure ... In this context, and in accordance with the foregoing legal provision, the Director of the Provincial Labour Directorate, after notification of the direct action measures and the application submitted by the President of the General Education Council, decided in a resolution dated 4 July to convene the collective bargaining committee on 28 July. The trade unions having been notified, they refused to attend the invitation to the meeting, an act of refusal which, apart from the reasons on which the refusal was based which fall outside the matters to be considered under the law, implies in fact a refusal to continue the dialogue and is thus an act, failure to attend, which closes the administrative hearing, exercised in favour of “the freedom to exercise the rights to which they are entitled”... and thus giving rise to the conditions set out in article 16 of Act No. 9624 ...”.
230. The complainant adds that, as another clear demonstration of unfair conduct and bad faith, the General Education Council requested compulsory conciliation before the court on 26 August 2008, i.e. one day before the commencement of the industrial action (strikes) which were to take place on 27, 28 and 29 August 2008. In other words, one month later than that fixed by the Provincial Labour Directorate (which was for 28 July 2008), the General Education Council requested the conciliation based on a decision of the AGMER congress (refusal of the convocation to the administrative collective bargaining meeting) communicated by the trade union on 8 July 2008, i.e. one month and 20 days before the application to the court. In light of this court decision, the AGMER lodged an appeal, which was granted by the appeal judge, i.e. the court decision was not upheld and, consequently, was not enforceable.
231. According to the complainant organization, the provincial government, at the time when the judicial measure was requested on 26 June 2008, did not have any offer to make. One must wonder, therefore, what was the core and principal purpose of initiating a collective bargaining process by the provincial executive, if its opposite number had replied that the proposal was insufficient and the latter, in turn, stated that there was no better offer or any possibility of one. The answer is obvious; the only intention is to use the collective bargaining mechanism to stop direct action measures decided by the trade unions. It should be noted that since the start of the proceedings, the conduct of the authorities could be characterized as in bad faith, in that they certainly already knew the answer that would be given by the workers’ side. Despite that, the teachers of the province, long-time advocates of dialogue, decided to participate in the bargaining committee with the object, logically, of obtaining a different result from that which, unfortunately, due to the employer’s action, occurred and which consisted of the total breakdown of the bargaining process in the administrative forum.

- 232.** According to the complainant, the bad faith is evident not only in the request to convene a joint meeting, as described, but also the entire bargaining process conducted by the administrative side. The AGMER indicates that on 11 March 2009, the employers attended and said that the offer was “a wage increase involving a monthly outlay of some 7 million pesos ...”. As this was exactly the same wage offer that had already been rejected by the teachers’ unions, the AGMER members included on the agenda, among other things, “holding a budget and wage discussion, taking into account that the union congress had already rejected, as insufficient, the offer formulated by the Government of the Province on 26 February 2009, the same as expressed in this offer, relating to an increase which involves a monthly outlay of some seven million pesos ...”. To this, the representatives of the General Education Council replied stating the need to have a break to respond to the points included by the teachers’ representatives. The complainant adds that it was then, in the reply given 24 hours later, that the employers’ true intention and bad faith became clear. Thus, with regard to the applications, they maintain that: “There will be no derogation to the provisions set out in the document of 11 March 2009 to strengthen the administrative legal order governing the education system, in relation to the return of days deducted for strikes in 2008 and non-execution of deductions for strikes in 2009, we uphold the decision of the provincial government to pay days actually worked; it also offers to advance, in addition to the initial wage offer made yesterday, the payment of the teacher’s incentive initially set at six instalments from July 2009 to December 2009, to three instalments in May, July and September this year.”
- 233.** The complainant maintains that what looks like an offer is no such thing. This offer constitutes late payment of a debt by the National State and the Provincial State to the teachers of Entre Ríos which dates from 2004. Moreover, the offer is to pay it in instalments and without any interest or adjustment. The President of the General Education Council herself said that the teaching incentive is a responsibility of the National Government, since the province was only an intermediary between the payer and the beneficiary, and that the Nation does not consider it a debt to the teaching sector. Given the total absence of a reply to any of the bargaining points included by the parties, the bargaining session broke down.
- 234.** The complainant organization indicates that neither the General Education Council nor the Government made efforts conducive to reaching agreement, but simply maintained the same offer and even tried to “deck it out” with an improvement by promising to pay sums owed for several years (teaching incentive) and by another debtor (the National State) which had already announced the advance which they wanted to make as an additional or improved offer. The employers have never used this collective bargaining mechanism in “times of peace”, and all their actions are confined to invoking the Act on Collective Bargaining for the sole purpose of disrupting or stopping industrial action, generally strikes decided by teachers when for a long time their claims for better conditions of work have been ignored. This is what shows the bad faith argued above, in that, for the employer, this does not and never has constituted a genuine tool for bargaining with its employees as the law intended. They respect neither its spirit nor its letter.
- 235.** The complainant organization states that unlike the unfair attitude and bad faith shown by the employer’s action, on 4 March 2009, i.e. two days after calling for collective bargaining during 2009, it issued Resolution No. 521/09 CGE which states: “article 1: authorize departmental heads of schools, after identifying head teachers who did not report the non-attendance of teaching staff of their schools, due to strikes by those staff during 2008, to apply to them the so-called “warning”, which is recorded in their personnel record ...”. This regulation implies totally unfair conduct and, moreover, is clearly unconstitutional, as, among other things, it applies a general and indiscriminate sanction without any consideration of the particular situation of each head teacher, it attacks the principle of innocence, the right of defence, due process, the principle of legality of all

rights and guarantees of constitutional and supra-legal rank contained in international treaties. According to the complainant, the genesis of this provision clearly shows that the employer is acting in bad faith, by requesting a bargaining round and two days later, without giving any reasons, without listening, without requiring discharge, without any possibility of defence, punishes head teachers who did not report the non-attendance of teaching staff.

236. This punishment is imposed on head teachers without any sanction being provided at any time by legislation, as the relevant legislation (Entre Ríos Teachers' Regulations) does not contain "warning" entered in the personnel record as a possible sanction (article 61 and following), without any possibility of defence. This resolution has only one purpose: persecution of those who exercised the legitimate right to strike and for that reason did not attend work. We must not fail to point out that head teachers are not civil servants but teachers who are promoted to management posts by competitive selection in accordance with rules issued by the State itself. They are not seconded civil servants and thus do not have legal personality in their own right, they have their own system of authorization, a salary scale common to all employees subject to the General Education Council and, as such, are covered by the Teachers' Regulations, for which reason they have the same rights and obligations as the rest of the sector, including the right to take industrial action.
237. This anti-union attitude displayed by the State is designed to "discourage" industrial action by trade unions, as those affected see that if they observe the decisions of the teachers' unions, even though made within the framework of the law, as in this case, they will be "individually" attacked by the employer. Finally, another significant fact because of its political implications, impact on trade unions and manifest impact on rights, is the criminal prosecution of trade union leaders of the Teachers' Association of Entre Ríos.
238. The AGMER indicates that, in the face of the clear violation of the law evidenced by the bad faith of the state employer, it decided not to accept compulsory conciliation and to confirm the strikes on 28 and 29 August 2008 and to instruct its lawyers to file the corresponding appeal against the court order which incorrectly ordered compulsory conciliation. Subsequently, the employers appeared before the labour court and requested legal measures to be taken in relation to the failure to comply with the appealed court order, in clear reference to the initiation of a criminal prosecution for alleged commission of an offence under the Argentine Criminal Code. Specifically, proceedings were initiated against "Elizar Sergio, Madoz Marta, Budino Luis César, Sánchez Zulma, Sánchez Norma and Rodríguez Patricia for contempt of court". These proceedings are being heard in Magistrate's Court No. 8, in the town of Paraná, Case No. 2684. This offence for which the officials, at the time members of the central executive committee of the Teachers' Association of Entre Ríos, are being investigated, is set out in article 239 of the Criminal Code which provides that "a person who disobeys a public official in the legitimate exercise of his functions shall be punishable by a prison sentence of 15 days to one year".
239. Apart from the fact that in the present case, there is no offence, there was no contempt of court nor did those now charged act in any way illegally. It should be emphasized that when the State itself resorts to the criminal law, it is because it seeks to escalate the industrial dispute with the vehemence engendered by the power of punishment. In a democratic State subject to the rule of law, the power of punishment is, at the least, a last resort, i.e. it arises when there is no other law that can be applied. However, in the present case, an industrial dispute which is supposed to be settled by conciliation of the parties, this is incompatible with conduct which criminalizes the constitutional right to strike and the labour and administrative right to fight for the integrity of their wages and fair increases, decent and fair conditions of work, and health and safety at work.

240. It should be emphasized that the accused in the criminal case are teachers who held office as officials of Entre Ríos teachers' trade unions, who were elected to defend their labour rights, which they did always strictly within the framework of the Constitution and the laws governing that activity. That is why it should be emphasized that the claims of the civil servants who initiated the case are intended to frighten workers who fight for their rights. The fact that a criminal prosecution has been instituted is solely for the purpose of creating a state of fear in the teaching profession.

B. The Government's reply

241. In its communication dated 24 May 2011, the Government states that the Provincial Labour Directorate (DPT) of the Province of Entre Ríos replied, in relation to the application of the Provincial Act No. 9624/05 on Joint Negotiations, that, before considering the dispute in 2008, it is necessary to describe briefly the disputes since 2005, and show the attitude of the complainant organization throughout those disputes. In 2005, the President of the General Education Council of the province issued Instruction No. 084-02364/05 at the request of a self-constituted parents' group, formed in defence of public education to safeguard the educational cycle and essential right to education of their children who were affected by the direct industrial action carried on by various trade unions. In the light of this request, the DPT immediately called a series of hearings to deal with the dispute. The dispute itself referred to teachers' claims for a reform of wages, derogation of Provincial Act No. 8330, conditions of work and school buildings, and the Education Finance Act. It was led by various teaching unions; the AGMER, the Argentine Union of Private Teachers (SADOP), the Association of Technical Teachers (AMET), and the Argentine Union of Teachers (UDA). The dispute led to strikes on 25, 26 and 27 July 2005; 3 and 4 August 2005, and 11 and 12 August 2005.
242. On that occasion, the DPT convened a hearing for 5 August 2005, arriving at an agreement in principle which was ultimately rejected by the trade union leadership, with a further strike on 11 and 12 August 2005. Given that the dispute was escalating, compulsory conciliation was called within the time limit of 15 days. This conciliation was not accepted and the powers of the Directorate to call it were challenged. Under the Federal Labour Pact (No. 25212) the proceedings were referred to the Secretariat of Labour of the Nation, in order to request its intervention to expedite the matter. The latter, by Resolution No. 275/05, recognized the competence and powers of the DPT to intervene in collective industrial disputes arising in the territory of the province. Thus, Resolution No. 442/05 of the DPT of 19 August 2000 was issued, confirming the order for compulsory conciliation and indicating that the direct industrial action should cease. Neither was this measure accepted by the trade union. The DPT indicates that, despite the indications given and despite the failure to respect the bargaining measures, sanctions were not applied, nor was the right to strike infringed.
243. The provincial authority adds that in 2008, under the framework of the new regulation (articles 7 and 16 of Act No. 9624) the DPT was requested to intervene. The latter set the hearing for 28 July 2008. The hearing was not attended by the complainant organization, despite having encouraged the drafting and passing of the Act. Article 16 of the Act provides for judicial intervention, by an order for compulsory conciliation, which was also not respected by the AGMER. The DPT emphasizes that, despite that, sanctions were not imposed.
244. The provincial authority indicates that in 2010, the AGMER announced industrial action for 26 and 27 July, and the General Education Council requested an order for compulsory conciliation. The President of the General Education Council indicates that, in application of the Act on Collective bargaining for Teachers, an increase was granted in two stages (Act of 17 February 2010), while bargaining continued. Resolution No. 401/10 of the DPT

of 23 June 2010 was not accepted and was disputed by the AGMER, arguing that Act No. 9624 on collective bargaining contained a mechanism which can lead to an order for compulsory conciliation by a national court, and in the present case, the employer was both judge and party in the matter. It explains that there was no collective bargaining mechanism in the province, as the province had adopted the terms of the National Act on Collective Bargaining for Teachers.

- 245.** On 24 July 2010, the trade union was notified of the application for an order for compulsory conciliation. Upholding the provincial state on 25 July 2010, the Civil and Commercial Court of First Instance, No. 1, Paraná, Secretariat No. 1 in the case of “Provincial Council for Children, Adolescents and the Family v. AGMER and others/precautionary injunction”, the Court definitively confirmed the compulsory conciliation convened by the DPT. Despite that, the trade union again refused to comply with the order, and took direct industrial action on 25 and 26 July 2010. On this occasion, the National Secretariat of Labour was asked to intervene, and it issued Resolution No. 1077 of 2 August 2010, which ordered the AGMER to participate in the compulsory conciliation ordered by the General Labour Directorate of the Province of Entre Ríos, subject to the provisions of article 56(3) of Act No. 23551, which was notified to the trade union of 5 August 2010.
- 246.** In conclusion, the provincial authority argues that the allegations contained in the complaint should be rejected in their entirety, as there had been no violation whatsoever of freedom of association. It emphasizes that the AGMER, as indicated, never complied with the provisions which, at national or provincial level, provide for compulsory conciliation prior to the adoption of direct industrial action. Moreover, despite that, no proceedings were ever adopted or initiated to apply sanctions. All the measures taken by the provincial authority were within its powers and competence to hear collective industrial disputes in its territory.
- 247.** The provincial authority adds to the information provided by the General Education Council of the province, concerning the other allegations made by the trade union, the following: (1) Sanctions on the grounds of exercise of the right to strike by teachers. It is emphatically denied that a financial penalty was imposed, since the right to strike is a right enshrined in the National Constitution, article 14bis, thus the exercise of that right is not punishable conduct. What was applied was non-payment of remuneration for non-attendance at work, which, while authorized by law, does not give rise to remuneration, because the only act which gives rise to remuneration is work; (2) Absence of prior proceedings. It is highlighted, primarily, that, in reality, it was the trade union itself which did not comply with the law, when it did not respect the conciliation procedure laid down, which in turn establishes that the proceedings must take place prior to strike action (article 2(f) of Act No. 14786). The latter must be initiated by the trade union which is promoting the strike action, which in this case specifically did not happen. It states that the trade union had already refused to comply with the court order for compulsory conciliation laid down in the provincial jurisdiction, which included the order to suspend the strike action pending conciliation proceedings (articles 8 and 11 of the Act). This conduct shows that it was the trade union itself, which did not observe the law and the proceedings prior to taking direct industrial action (article 2(f) of Act No. 14786), as is shown in the previous paragraph. It is reiterated that, even so, the strike action was not declared illegal, but, simply, the days not worked were not paid and a settlement was sought through conciliation; (3) Bad faith in collective bargaining. The truth of the matter is that it is the trade union which openly and clearly rejected the conciliation route, which failed to attend judicial and administrative hearings and which discredited those proceedings. This wholly justifies the judicial proceeding which the Act on Collective Bargaining for Teachers, article 16, states very clearly: “on the breakdown of the said administrative conciliation proceedings, any of the parties may apply to the labour court in

the city of Paraná for a compulsory conciliation order”. However, the trade union refused judicial conciliation, yet, quite paradoxically, used it to examine and reject the Government offer. In short, it appears that the trade union considers that the collective bargaining process is a victory for the workers when they achieve the results sought by the trade union and discredit it when that is not the case; (4) Administrative proceedings against head teachers. It explains mildly that the “warning” is not a punishment. It does not have punitive character and no penalty is applicable. It is a corrective measure set out in Resolution No. 1427/02 of the General Education Council of 15 May 2002, which governs the procedure for the preparation of the teacher’s annual assessment. These measures do not give rise to any diminution in the assessment score, unlike disciplinary measure; and (5) Criminal prosecution of trade union leaders. The General Education Council points out that the complainant organization should have accepted the court decision which ordered the compulsory conciliation, and that non-compliance with a judicial decision in any system is an offence. It considers, lastly, that the comments on state public policies are irrelevant to the central reason for the complaint, i.e. the exercise of the right to strike by state teachers.

248. The provincial authority indicates that there are no grounds for the present complaint, since, even with the profusion of dates and details provided by the trade union, the Act on Collective Bargaining for Teachers was applied, and that Act was approved with the active participation of the AGMER and, secondly, article 16 provides “on the breakdown of the said administrative conciliation proceedings, any of the parties may apply to the labour court in the city of Paraná for a compulsory conciliation order”.

C. The Committee’s conclusions

249. *The Committee observes that in the present case, the complainant organization alleges lack of good faith on the part of the Government of the Province of Entre Ríos and the General Education Council in collective bargaining in the education sector (offers of supposed improvements outside the scope of the provincial powers, absence of genuine offers of wage increases or illegal offers of payments and refusal to consider claims concerning conditions of work) and disputes the decision of the authorities of the province to make deductions from wages for days of legal strikes carried out in the sector in 2008. The complainant organization also alleges that head teachers were punished for not communicating the names of teachers who took part in the strike and that criminal proceedings for contempt of court in relation to the compulsory conciliation order were initiated against the trade union leaders named in the complaint.*
250. *With respect to the alleged lack of good faith on the part of the provincial authorities in the collective bargaining, the Committee notes that the Government of the Province of Entre Ríos indicates that the complainant organization had repeatedly refused conciliation on the matters under negotiation, and that the authorities had not imposed sanctions, and in particular points out that: (1) during the direct industrial action in 2005, compulsory conciliation was ordered which was rejected by the trade union but sanctions were not imposed; (2) in the context of the dispute in 2008, the DPT invited the parties to a hearing but the complainant organization did not accept the invitation and although the court ordered compulsory conciliation, the AGMER did not attend; (3) sanctions were not imposed on the complainant organization; (4) in 2010, in the context of a new dispute, the AGMER again did not accept the compulsory conciliation which was ordered by the court; and (5) the AGMER had publicly and openly refused the conciliation route and did not attend administrative or court hearings.*
251. *In this respect, the Committee finds that it is apparent from the allegations and the Government’s reply that for years industrial relations in the teaching sector in the Province of Entre Ríos have been attended with difficulties. In these circumstances, the*

Committee recalls that it has on many occasions emphasized that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of Decisions and Principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 935]. The Committee requests the Government to ensure that the principle is respected.

252. *As regards the disputed decision to make deductions from teachers' wages for the days when they took part in a strike in 2008, the Committee notes that the Government of the Province of Entre Ríos states that a financial sanction was not applied, since the right to strike is a right enshrined in the National Constitution, but what was applied was non-payment of wages for non-attendance at work. The Committee considers 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] and will therefore not pursue its examination of these allegations.*
253. *With regard to the alleged sanctions "warnings" which were apparently imposed on head teachers who did not communicate the names of teachers who took part in the strike, the Committee notes that the Government of the Province of Entre Ríos states that the "warning": (1) is not a sanction and is not punitive in character; (2) no penalty is applicable; and (3) it is a corrective measure set out in Resolution No. 1427/02 of the General Education Council which does not give rise to any diminution on the professional assessment, unlike disciplinary measures. Taking this information into account, the Committee will not pursue its examination of these allegations.*
254. *Lastly, with regard to the allegation concerning the initiation of criminal proceedings for contempt of court in relation to the compulsory conciliation order against the trade union officials named in the complaint, the Committee notes that the Government of the Province states that failure to comply with a court decision in any system is an offence. The Committee recalls that no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike [see **Digest**, op. cit., para. 672] and requests the Government to provide a copy of the final judgment.*

The Committee's recommendation

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

The Committee recalls that no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike and requests the Government to provide a copy of the final judgment relating to the criminal proceedings for contempt of court in relation to the compulsory conciliation order against trade union officials of the AGMER named in the complaint.

CASE NO. 2798

DEFINITIVE REPORT

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

- **the Association of Judicial Employees
of the Autonomous City of Buenos Aires
(AEPJCABA) and**
- **the Argentine Judicial Federation (FJA)**

Allegations: The complainant organizations allege that although the Association of Judicial Employees of the Autonomous City of Buenos Aires (AEPJCABA) has demonstrated that it is the most representative in the sector – according to data provided by the Council of the Magistrature, and to which no objections have been raised – the administrative authorities still have not dealt with its application for trade union status, filed in 2006

- 256.** The complaint is contained in a communication from the Association of Judicial Employees of the Autonomous City of Buenos Aires (AEPJCABA) and the Argentine Judicial Federation (FJA) on 29 June 2010.
- 257.** The Government sent its observations in a communication in May 2011.
- 258.** 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

- 259.** In its communication of 29 June 2010, the AEPJCABA and the FJA state that they have submitted the present complaint against the Government of Argentina owing to the unusual delay in granting the trade union status requested by the AEPJCABA, detailed in administrative Case No. 1.090.319/04. The facts point to a failure to recognize the trade union or, worse still, to uphold the principles of freedom of association. The complainant organizations request the Committee to urge the Government of Argentina to grant trade union status and trade union rights to the abovementioned organization, thus putting an immediate end to the flagrant violations of freedom of association.
- 260.** The complainant organizations indicate that the association in question is a first-level trade union entity, with trade union registration granted by the Ministry of Labour, Employment and Social Security by means of Decision No. 63/2003, registration number 2260. The information in Case No. 1.090.319/04 indicates that the trade union association was the most representative, in accordance with the provisions of article 25 of the Act on Trade Union Associations, with a view to the granting of trade union status in the following segment of the sector: “dependent workers in a permanent or temporary employment relationship, employed as administrative and maintenance staff, deputy clerks of court, deputy clerks dealing with administrative matters and heads of division by the judiciary of

the autonomous city of Buenos Aires, within the zone covered by that city”. A comparison process was launched, to determine which union was more representative, with the assessment period running from December 2005 to May 2006, in line with the provisions of Act No. 23551.

261. The complainants indicate that, in December 2006, the National Directorate of Trade Union Associations (DNAS) established – in a lengthy and well-founded statement – that the trade union had met all the requirements laid down in Act No. 23551, approved the request for trade union status from the AEPJCABA and transmitted the draft decision to the Secretariat of Labour of the Ministry. This document expressly stated that “the applicant had provided proof of the number of paying members, exceeding the percentage stipulated in article 25 of Act No. 23551 and, as there were no entities with trade union status, with a proven number of paying members, already in existence in the same category of persons and geographical area covered by the application, the advice was to accept the application, granting the applicant trade union status”. This statement was supported by the Head of the Trade Union Structure Department of the DNAS, the Deputy Director of the DNAS and the Director of the DNAS. On 1 February 2007, the case file was referred to the Secretariat of Labour, together with the draft decision, which was then read and signed by the Deputy Minister. On 8 March 2007, the Deputy Minister of Labour sent the case file and draft decision for the consideration of the Minister of Labour. The case file was returned to the DNAS on 18 April 2007. On 18 July 2007, the legal service of the Ministry of Labour, Employment and Social Security stated that it was necessary to determine which was the most representative trade union entity, comparing the membership of the abovementioned association and the Union of Employees of the National Judiciary (UEJN), as both trade union associations were competing to represent a similar segment of the sector, in order to ensure that trade union status was granted to the most representative union.
262. The complainants state that both the AEPJCABA and the UEJN were merely registered entities in the segment of the sector in dispute. In this specific case, both associations had launched their application for trade union status in parallel (the AEPJCABA had been the first to do so) and, as there was no other association with trade union status already in existence, trade union status could be granted to either trade union entity, as existing legislation did not provide for a specific solution in this situation. The Ministry of Labour, Employment and Social Security was of the opinion that it was necessary to set the same time frame to compare the two associations, in order to establish which was the most representative. Both associations agreed to proceed in this manner. The DNAS also supported that decision and summoned the complainant association and the UEJN to a hearing to assess their representativeness, on 4 October 2007. The hearing proceeded according to plan. Once again, the AEPJCABA demonstrated that it was the more representative trade union association in the segment of the sector in which it wished to hold trade union status. However, the UEJN did not attend the hearing, delaying the process on the grounds that it had lodged an appeal for reconsideration and hierarchical re-examination against the decision to call the hearing.
263. The administrative appeal was rejected, and the DNAS set a new hearing date to give the UEJN the opportunity to provide proof of the membership it claimed to have. On 30 November 2007, a hearing was held to establish the UEJN’s representativeness on the basis of its membership register, also attended by the AEPJCABA in order to exercise its right to control. In Case No. 1-2015-1251170-07, the AEPJCABA contested the hearing and the examination of documents, the UEJN having failed to respond to the notice served to exercise its right to defence. Subsequently, on 1 April 2008, and in order to obtain further knowledge of the facts, an official request was sent to the Council of the Magistrature of the Autonomous City of Buenos Aires to request information on the number of dependent workers employed as administrative and maintenance staff, deputy

clerks of court, deputy clerks dealing with administrative matters and heads of division working for the Judiciary of the Autonomous City of Buenos Aires who were members of the AEPJCABA and members of the UEJN, with the same status, during the period December 2005 to May 2006 (inclusive), broken down by month.

- 264.** On 8 May 2008, the UEJN lodged an appeal for reconsideration and hierarchical re-examination of the official request of 1 April 2008, stating that this request was unjust and irrelevant. On 19 May 2008, the DNAS decided to reject the appeal for reconsideration lodged by the UEJN on the grounds that the official request for further clarification was a preparatory, and therefore unappealable, measure (article 80 of the Regulatory Decree issued by LNPA). The UEJN was informed of this decision on 26 May 2008, without it having expanded on the grounds for its pending appeal for hierarchical re-examination. In turn, the Council of the Magistrature of the Autonomous City of Buenos Aires responded to the request for data, broken down by month, as follows:

Month	Members of the UEJN	Members of the AEPJCABA
December 2005	146	230
January 2006	144	232
February 2006	141	235
March 2006	143	238
April 2006	138	240
May 2006	132	261

This report – never questioned in the administrative case file – demonstrates that the complainant association is the most representative in the segment of the sector in which it is requesting trade union status, and thus has fulfilled and complied with all the provisions of article 25 et seq., of Act No. 23551, and the corresponding Regulatory Decree No. 467/88.

- 265.** The AEPJCABA had been registered, in line with the provisions of Act No. 23551, by means of Decision No. 63/2003 issued by the Ministry of Labour, Employment and Social Security and had been active for more than six months (a requirement set out in subparagraph (a) of article 25). Moreover, the AEPJCABA's membership constituted more than 20 per cent of the workers it sought to represent. This fact emerged from the various reports supplied by the employer (the Council of the Magistrature of the Autonomous City of Buenos Aires), the most recent of which was collated in the form of Case No. 1.270.454/08. The latter demonstrated that the AEPJCABA had a larger average number of paid-up trade union members than the UEJN, and this figure constituted more than 20 per cent of the average number of workers it sought to represent. These average figures were calculated over the six-month period immediately preceding the date on which the application was submitted, namely from December 2005 to May 2006 (a requirement stipulated in subparagraphs (b) and (c) of article 25).
- 266.** In this case, the segments of the sector under dispute overlapped with those covered by the Association of State Workers (ATE) and the National Civil Servants' Union (UPCN). The ATE stated its position on the historical coexistence of trade unions in the public sector, while the UPCN expressed its opposition. However, these bodies then failed to attend the relevant hearings to assess representativeness, or to provide evidence of the number of paying members they had in the segment of the sector in dispute, as required under article 28 of Act No. 23551. In this regard, it should be borne in mind that Decision No. 255/03 of the Ministry of Labour, Employment and Social Security, which is currently in force, states that the granting of trade union status to representative trade union associations in the public sector does not, for the abovementioned segment of the sector,

displace any other entities with trade union status already in existence, which continue to enjoy the rights laid down in articles 31, 38 et seq. of Act No. 23551.

267. The complainant organizations state that, in the light of this evidence, they fail to understand the unwillingness of the Ministry of Labour, Employment and Social Security to grant the AEPJCABA the right to trade union status, and with it all the rights and guarantees derived from those statutes, such as: the protection of the courts for trade union representatives; the right to elect delegates; to engage in collective bargaining; to defend and represent vis-à-vis the State and the employers – the individual and collective interests of the workers; the right to participate in the work of supervisory and planning bodies; in line with the relevant legislation; to intervene in collective bargaining and monitor compliance with labour and social security legislation; to collaborate with the State in investigating and resolving workers' problems; to create patrimonies of affectation with the same rights as cooperatives and mutual aid societies; to manage its own social programmes; and, if required, be involved in the management of those set up by law or through collective bargaining agreements.
268. According to the complainants, the information in administrative Case No. 1.090.319 indicates that the Ministry of Labour, Employment and Social Security has remained silent in the face of repeated requests from the AEPJCABA to be granted trade union status. On 19 May 2009, the AEPJCABA requested for the matter to be settled quickly, in line with the provisions of article 10 of Act No. 19549. Given that a special time frame of 90 working days applied in this case, in line with the provisions of article 26 of Act No. 23551, in order to enable the administrative authorities to issue a decision granting trade union status once all the formal requirements had been met, the authorities' tacit refusal (*denegatoria tácita*) was noted on 22 September 2009. Given the arbitrary refusal by the relevant authority to grant the AEPJCABA trade union status, despite the fact that the association had met all the legal requirements, there was no other option available other than to lodge a complaint against this arbitrary treatment before the Committee on Freedom of Association. Under Argentine law, the refusal to grant trade union status places real restrictions on the ability to exercise trade union rights, especially with regard to collective bargaining.
269. According to the complainants, the unlawful nature of the action taken by the relevant authority is demonstrated in the fact that it constitutes a blatant breach of the specific and operational provisions of Act No. 23551 and the corresponding Decree No. 467/88, the National Constitution, international treaties on fundamental rights of equal standing (article 75(22), paragraph 2, of the National Constitution) and ILO Conventions, in line with the jurisprudence of the National Supreme Court of Justice. The AEPJCABA has completed all the procedures required under Act No. 23551 and fulfilled all the requirements stipulated therein. Nevertheless, trade union status has not been granted, denying the association trade union rights on arbitrary grounds, and resulting in serious and real disadvantages. Therefore, this unlawful behaviour on the part of the relevant authorities must be remedied immediately.
270. The complainants indicate that any application for trade union status is judged on the basis of past cases dealt with by the Ministry of Labour, whereby a first-level trade union entity seeking trade union status must have been active for at least six months as an entity which is merely registered, and it must be the most representative association in the category of workers and geographical area in which it operates. The Deputy Labour Minister aptly described the situation, when he stated before the Committee on the Application of Standards, during the 93rd Session of the International Labour Conference, on 7 June 2005, that: "The previous trend had been accelerated by the development of an administrative policy which used the comparison mechanism for representation established in article 28 of Act No. 23551, which was only brought into action to check that there was

no imbalance between the personal and territorial limits of the registered association requesting union status and those of the association which already had union status.” The request for trade union status submitted by the AEPJCABA, is in accordance with the provisions of the Act on Trade Union Associations. Article 25 of that Act stipulates that two conditions must be met in order for trade union status to be granted, namely: (a) the entity is registered and has been active for a period no shorter than six months; and (b) its membership represents more than 20 per cent of the workers it seeks to represent. As all of these requirements were met during the course of the application process, the complainants are of the opinion that the administrative authorities are delaying the final decision to grant or refuse trade union status. The Labour Ministry must take action to decide, once and for all, which position to adopt. It cannot maintain its current state of silence or deploy delaying tactics in the face of requests to settle the matter quickly, or an imminent appeal for the protection of constitutional rights (*amparo*) on the grounds of administrative delays. Prevarication on the part of the Labour Ministry, which has failed to resolve the issue, is preventing an appeal to the courts to resolve the matter once and for all. Indeed, article 62 of Act No. 23551 provides that the refusal of trade union status can be appealed directly before the National Labour Court of Appeal. However, the failure of the administrative authorities to issue a definitive decision is also blocking access to this remedy.

B. The Government’s reply

271. In its communication of May 2011, the Government indicates that having requested the relevant report from the Department of Legal Affairs of the Ministry, the following response was received:

- administrative Case No. 1.090.319/04 was opened following a request for trade union status lodged by the AEPJCABA;
- the DNAS referred the case file to the legal services, informing them that, in administrative Case No. 12.139/05, the UEJN had requested an extension of its trade union status to cover workers providing services for the judicial authorities and/or those directly employed as dependent workers by the public and defence services, the Council of the Magistrature of the Autonomous City of Buenos Aires or bodies belonging to the justice services in the Autonomous City of Buenos Aires. Given the fact that two entities which were merely registered had submitted applications for trade union status covering the same category of workers and geographical area, a review would be required, in order to establish what course of action was necessary;
- in Decision No. 743, dated 16 July 2007, the Directorate-General of Legal Affairs indicated that it was necessary to compare the representativeness of the two trade union associations, in order to determine which was the more representative, in accordance with the guidelines in articles 25 and 28 of Act No. 23551 on trade union associations, and that this was a reasonable solution, in line with the intended spirit of the legislative text. It was proposed that a single date should be set for the end of the assessment period, namely 30 May 2006;
- the case file contains records of hearings to determine representativeness, held on 4 September and 30 November 2007. The AEPJCABA filed a complaint, in the form of administrative Case No. 1.251.170/0, regarding the records relating to the hearing on 30 November 2007;
- on 1 April 2008, the DNAS, in order to obtain further knowledge of the case, sent an official request to the Council of the Magistrature of the Autonomous City of Buenos Aires for information on the number of dependent workers employed as administrative staff and heads of division by the Judiciary of the Autonomous City of

Buenos Aires, who were affiliated to the AEPJCABA and the UEJN, during the period under examination (December 2005–May 2006), broken down by month;

- in administrative Case No. 1.270.552/08, the UEJN appealed for the reconsideration and hierarchical re-examination of the actions of the DNAS on 1 April 2008, on the grounds that the employer had been involved in an issue which should have been resolved between the two trade union entities, and stressing the fact that a complaint had been lodged against that body (the Council of the Magistrature) for unfair practices. The case is currently before the National Labour Court (No. 75);
- on 19 May 2008, the DNAS rejected the appeal for reconsideration, referring the appeal for hierarchical re-examination to a higher instance; administrative Case No. 1.270.454/08 contains the reply of the local Council of the Magistrature;
- on 4 December 2008, the Directorate-General of Legal Affairs referred the case files to the Office of the Minister as that entity was handling Case No. 1.121.139/05, which deals with the application submitted by the UEJN for the extension of its trade union status;
- finally, in Case No. 1.328.506/09, the AEPJCABA indicated procedural issues which violated their rights, and requested that the matter be settled quickly.

272. The Government states that the process has been wholly in line with legislation, involving only understandable delays relating to normal legal proceedings, under Act No. 23551, with regard to the comparison required when two entities which are merely registered apply for trade union status covering the same category of persons and geographic area, a matter which had already been the subject of a legal proceedings involving the Council of the Magistrature. The Government indicates that, without prejudice to the information provided, it is fully committed to submitting to the ILO the follow-up of the entity's application for trade union status.

C. The Committee's conclusions

273. *The Committee notes that, in the present case, the complainant organizations allege that, despite the fact that the AEPJCABA is the most representative union in the sector, according to data provided by the Council of the Magistrature of the Autonomous City of Buenos Aires, and which have never been questioned, the administrative authorities have not granted its request for trade union status, submitted in 2006, thereby preventing the trade union from appealing to the courts or enjoying the various legal benefits derived from recognized trade union status as the most representative trade union (including the right to engage in collective bargaining and manage its own social programmes, and the protection of the courts for trade union representatives).*

274. *The Committee notes that the Government states that: (1) the AEPJCABA submitted an application for trade union status and the UEJN requested an extension of its trade union status and, given the existence of two bodies simultaneously requesting trade union status, covering the same staff and area, it was necessary to determine the action to be taken; (2) the Department of Legal Affairs stated that it was necessary to compare the representativeness of the two trade union associations in order to establish which was the more representative, in line with the provisions of the Act on Trade Union Associations, and suggested setting the date for the end of the assessment period as 30 May 2006; (3) hearings were held on 4 September and 30 November 2007 to determine representativeness, and the AEPJCABA contested the records relating to the meeting of 30 November 2007; (4) on 1 April 2008, the DNAS requested the Council of the Magistrature of the Autonomous City of Buenos Aires, to provide information on the*

number of dependent workers employed in administrative tasks or as heads of division by the judicial authorities of the Autonomous City of Buenos Aires who were members of the AEPJCABA and the UEJN during the period under examination (December 2005–May 2006, broken down by month); (5) the UEJN filed an appeal for reconsideration of the action taken by the DNAS on 1 April 2008, as it was of the opinion that it had involved the employer in a matter which must be resolved between the two entities, and announced that it had lodged a complaint alleging unfair practices against the Council of the Magistrature of the Autonomous City of Buenos Aires; (6) the DNAS rejected the appeal filed by the UEJN and the Directorate of Legal Affairs referred the case, on 4 December 2008, to the Minister's Office, as that body was already dealing with the application for the extension of trade union status submitted by the UEJN; (7) the AEPJCABA drew up a statement indicating the procedural issues which infringed its rights and requested that the matter be settled quickly; and (8) the procedure had involved no unlawful measures, only understandable delays relating to normal legal proceedings, under Act No. 23551, and the assessment process required in cases where two registered trade union organizations applied for trade union status covering the same segment of the sector and category of staff.

275. In this regard, noting that the complainant organization has repeatedly requested, through appropriate legal channels, the granting of trade union status, without any success, the Committee regrets the long period of time which has lapsed (almost five years) without a definite ruling by the administrative authorities on the AEPJCABA's application for trade union status, a situation which has certainly placed the trade union at a disadvantage, as it has been unable to exercise, among others, the right to collective bargaining. Under these circumstances, and bearing in mind that the authorities possess information on the comparison of representativeness, as submitted by the Council of the Magistrature of the Autonomous City of Buenos Aires (informing the Government that the AEPJCABA was the more representative trade union), the Committee urges the Government to take a decision without delay regarding the AEPJCABA's application for trade union status.

The Committee's recommendation

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

The Committee strongly urges the Government to take a decision without delay regarding the AEPJCABA's application for trade union status.

CASE NO. 2817

INTERIM REPORT

Complaint against the Government of Argentina presented by

- the Association of Management Staff of Argentine
Railways and General Ports Administration (APDFA)**

Allegations: The complainant organization alleges that, although it has trade union status, several enterprises in the railway sector refuse to engage in collective bargaining and that the administrative authority has not advanced the bargaining process, despite the proceedings that have been instituted; the complainant organization also alleges acts of harassment and persecution of its members

277. The complaint is contained in a communication from the Association of Management Staff of Argentine Railways and General Ports Administration (APDFA) dated 8 October 2010.
278. The Government sent its observations in a communication of May 2011.
279. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

280. In its communication of 8 October 2010, the APDFA states that, in accordance with the national legislation in force, the APDFA is a primary-level trade union with trade union status, pursuant to Decision No. 364 of the Ministry of Labour, Employment and Social Security. Accordingly, the APDFA enjoys legitimacy and has the capacity to present the complaint. The APDFA states that it is presenting this complaint against the Argentine State for multiple violations of freedom of association and the rights of workers' organizations and representatives guaranteed under Conventions Nos 87, 98 and 135, and Workers' Representatives Recommendation, 1971 (No. 143), in the form of acts of anti-union discrimination, harassment of trade union delegates and activists, and refusal to engage in collective bargaining, among other serious violations, committed by the Ferrosur SA, Roca SA, All Central and All Mesopotámica SA, Nuevo Central Argentino SA, Ferroexpreso Pampeano SA, Belgrano Cargas SA, Ferrovías SA and Ugofe SA enterprises. It states further that the complaint describes some of the serious acts contrary to freedom of association committed by three of these enterprises (Ferrosur SA, All Central and All Mesopotámica SA, and Ferrovías SA), with the complicity of the Ministry of Labour.
281. The APDFA points out that it groups together and represents all dependent employees of the railway sector working as managerial, administrative, technical and/or professional staff, university graduates holding qualifying degrees and currently performing those duties: coordinators, supervisors and all staff performing management, supervisory and control tasks, with or without subordinate staff, irrespective of their employment situation, without distinction based on occupational category, who are working in a dependent

relationship in any enterprise in the sector, including state enterprises or companies at national or provincial level; public, private or mixed enterprises operating railway services; centralized or decentralized public service bodies engaged in activities related to railways; enterprises and/or bodies carrying out repairs and/or maintenance of railway equipment, control and/or operation of movable or fixed assets formerly owned by Ferrocarriles Argentinos and remaining within the remit of the State, control and/or supervision of the management and operation of railway service enterprises; employer enterprises that conclude agreements or contractual or subcontracting arrangements for the operation, sale or performance of tasks inherent in or ancillary to railway activity, industries engaged mainly in the production and/or repair of railway equipment and enterprises providing services to the railway sector. The union's coverage also includes managerial and executive staff working in Argentine ports. Its legally recognized geographical coverage is nationwide.

282. The APDFA's employer was originally the State, as the owner of Ferrocarriles Argentinos, the enterprise responsible for providing railway services on the different branch lines. In the 1990s, however, the privatization policies implemented by the then Government led to the fragmentation of the railways, with concessions being granted for operation of the railway services to several private companies, which thus became the employers of the workers represented by the trade union. The APDFA emphasizes that, under the policies carried out in the 1990s in Argentina, nearly all of the public service enterprises formerly owned by the State were privatized. The APDFA's position was to resist and oppose the Government's decisions to privatize, and to that end it launched a propaganda and public awareness plan to inform society of the serious consequences the process would entail. In response to the APDFA's militant activities, the employers, with the acquiescence of the State, retaliated by withdrawing recognition of the union's representative status; in fact, the workers represented by the union were required to leave the trade union as a condition for being transferred to the concessionaires – in other words, for keeping their jobs. These reprisals, which constitute a violation of freedom of association, were decided and implemented by all of the enterprises referred to in the complaint: Ferrosur SA, Roca SA, All Central and All Mesopotámica SA, Nuevo Central Argentino SA, Ferroexpreso Pampeano SA, Belgrano Cargas SA, Ferrovías SA and Ugofo SA.

283. Since then, despite all the action taken by the APDFA, the union has been prevented from exercising the right to collective bargaining, notwithstanding the fact that, in accordance with the legal provisions, it initiated an administrative procedure with the Ministry of Labour requesting the establishment of a bargaining unit with all the concessionaires. By preventing collective bargaining, the employers achieved their goal: the workers covered by the relevant collective agreements while the railways were being operated by the State were removed from the scope of the agreements by the private companies operating each of the branch lines for which concessions were granted. An unlawful situation, in which workers covered by the APDFA's trade union status are "not covered by the agreement", thus arose in all of the enterprises. Starting in 2001, in the midst of the massive socio-economic and political crisis, the railway managerial staff of all the concessionaires began to organize and join the APDFA, bringing pressure to bear in order to recover their former conditions of employment and push for recognition of the union's representative status in accordance with its legal and constitutional remit.

284. The complainant organization states that the provisions setting out the terms of the grant of the concession and operation of each of the branch railway lines expressly provided for the obligation of the concessionaires to respect the trade unions' representative status and coverage and the conditions of employment enjoyed by the workers at the time of the transfer. Section 42 of Act No. 23696, the State Reform Act, provides that: "During the privatization process implemented in accordance with the provisions of this Act, through any of the modalities and procedures provided for in sections 17 and 18, the worker shall

continue to be protected by all of the legal, collective agreement and administrative institutions of labour law.” Section 43 of the same Act provides as follows: “Trade union coverage: The privatization process shall not in itself alter or change the trade union situation, coverage or membership of the workers employed by a body that is undergoing privatization, unless otherwise provided in a decision of the competent authority in the matter.”

285. Notwithstanding the legal provisions, the reality shows that the managerial and executive staff represented by the APDFA were illegally excluded from the coverage of the collective agreement which they previously enjoyed, while at the same time any bargaining proposals were systematically denied. The complainant organization recalls that Act No. 14250 governing collective labour agreements provides, in section 8, that: “The terms of collective agreements that have been certified shall be binding and may not be modified by individual employment contracts to the detriment of the workers ...”. Section 17 of the same Act provides that: “In the bargaining process for an enterprise collective agreement, the workers shall be represented by the trade union with trade union status covering them ...”. The Collective Bargaining Procedure Act, in section 2, provides that: “The representative body of employers or workers which seeks to engage in bargaining shall inform the other party to that effect in writing, with a copy to the labour administrative authority, indicating: (a) the body’s representative status; (b) the geographical area and category of persons to be covered by the collective agreement sought; (c) the bargaining subject.” Section 3 of the Act provides that: “The recipients of the communication referred to in the previous section shall reply to it and designate their representatives on the commission set up to that end.” The different national laws referring to collective bargaining, read together, thus reflect clearly and consistently the obligation of the enterprise to bargain with the trade union that has trade union status. The obligation to bargain with the trade union that has trade union status, as is the case of the APDFA, is expressly stated and is not open to interpretation.
286. The APDFA alleges that it is the only trade union in the railway sector that has been prevented in practice from bargaining collectively with the different railway concessionaires. The other trade union organizations are not subjected to this arbitrary treatment, and regularly engage in collective bargaining with the enterprises in the sector – the same enterprises that deny the APDFA the exercise of this right. The abovementioned enterprises are in breach of their duty to bargain collectively with this organization and are discriminating with regard to other trade union organizations. The APDFA refers to acts which have occurred in some of these concessionaires, in many cases with the connivance of the competent authority, and which constitute grave violations of freedom of association giving rise to the presentation of the complaint.

Allegations concerning violations of freedom of association in the Ferrosur SA enterprise

287. The APDFA alleges that in 2005, the managerial and executive staff of the enterprise decided to unionize in order to improve their working conditions (hours of work exceeding the legal limits, wage arrears, stress due to constant pressure, workplace harassment, etc.) through participation and collective action. At the same time as the massive influx of members referred to above was occurring, the APDFA, by virtue of the powers recognized by Act No. 14250 on collective bargaining and Act No. 23551 on trade union associations, together with its implementing Decree, No. 467/88, sought to start collective bargaining with a view to improving the situation of the enterprise employees covered by the union’s scope. In response, the Ferrosur SA enterprise, after exerting considerable pressure and threatening mass dismissals, promised to improve conditions, provided the workers withdrew from membership of the union. Unfortunately, the pressure had the desired effect and all of the workers concerned left the union.

- 288.** At the same time, the enterprise began to take legal steps with regard to the Ministry of Labour, which were completely unfounded, for the sole purpose of delaying or preventing bargaining with the APDFA. It should be pointed out that the legal framework for collective bargaining in Argentina grants the capacity to engage in collective bargaining to trade unions that have been granted trade union status by the Ministry of Labour, as is the case of the APDFA, irrespective of whether the workers covered by the scope of the union as recognized by the state authority are members of that union. One of the means used by the enterprise to prevent collective bargaining was to engage in procedural manoeuvres and tactics in the administrative procedure that had been initiated in the Ministry with a view to bargaining. Faced with this situation, the APDFA had no choice but to pursue the administrative procedure to obtain a decision from the competent authority ordering the enterprise, by virtue of the powers vested in it, to bargain collectively with the trade union. As a result, the enterprise filed an appeal for reconsideration, with a subsidiary appeal to a higher administrative authority, against the ministerial decision ordering it to engage in bargaining. At the same time, the APDFA confirmed its position to the same administrative authority with which the enterprise had filed its administrative appeal.
- 289.** The administrative procedure (file No. 1148853/05) was thus referred to the Executive Office of the Ministry of Labour, Employment and Social Security on 21 August 2007. On 29 July 2008, after a year had elapsed without the Ministry having handed down a decision, the trade union formally requested a prompt decision, in accordance with section 25 of the Administrative Procedures Act, asking that authority to cease delaying the procedure and to expedite the collective bargaining process it had been seeking since 2005. At the end of 2010, the APDFA was still unable to exercise effectively the right to collective bargaining and, as a result, was denied the other rights affected by this vital aspect of freedom of association. Time has continued to pass without any change in this serious situation, and the workers in the enterprise, who have been prevented from exercising their rights to organize and bargain collectively, have reported that their working conditions not only have not improved, but have even deteriorated.
- 290.** On 3 November 2009 the APDFA sent another communication notifying the Executive Office of the Ministry of Labour that its representatives in the enterprise had elected a delegate and that it had thus met the employer's requirement (which, as pointed out above, was without legal basis) to the effect that it was essential to have staff delegates on the bargaining committee. At the time this complaint was presented, no decision had been received from the administrative authority either accepting or rejecting the proposal. The Ministry of Labour's silence on the matter is thus again instrumental to the obstructive conduct of Ferrosur SA, in violation of national legislation and Conventions Nos 87 and 98. In January 2010, as a way out of the impasse caused by the paralysis of the administrative procedure that should have led to collective bargaining, the APDFA initiated a new administrative procedure, which unfortunately met the same fate, as the enterprise again failed in its duty to bargain with the union and resorted to various manoeuvres to prevent the bargaining unit from even being set up.
- 291.** The APDFA adds that after the election of delegates in 2004, the enterprise exerted all kinds of pressure to get the delegates and even the members to give up their status. As the years passed, wages and other conditions of employment deteriorated, prompting a new wave of mass unionization by the workers of the enterprise and the election of staff delegates; the enterprise responded by refusing to recognize the legality of the election of the delegates, while denying their capacity to represent the workers and hence rejecting any form of dialogue with them.
- 292.** On 8 July 2010, the enterprise made a statement to the Ministry of Labour challenging the APDFA's call for elections on 22 July. It also stated that: "In the event that elections are held, we declare at the outset that we challenge the appointments that might be made as a

result, as the delegates elected would not be covered by any immunity or guarantee.” In what nearly amounts to an admission of its discriminatory anti-union conduct, it adds that: “as regards the workforce, 912 workers are currently working in FSR [referring to the Ferrosur SA enterprise]. Of these, 460 are covered by the “E” collective agreement signed with the Railway Union (Unión Ferroviaria) (UF); 279 are covered by the “E” collective agreement signed with La Fraternidad (LF) and the remaining 173 – including the general manager – are staff not covered by or excluded from the collective agreement”. It acknowledges that it has arbitrarily and unlawfully relegated a significant percentage of the workforce – the large majority of whom are managerial or executive staff represented by the APDFA – to the category of “not covered by the collective agreement”.

293. After receiving the communication stating the APDFA’s position, the Ministry of Labour issued an ambiguous decision stating that “it is neither appropriate nor relevant to issue a decision on the situation of the category of workers who are not covered by the collective agreement”. Moreover, in addition to denying the representative capacity of the elected trade union delegates and failing to recognize the immunity afforded by the law to union representatives in the enterprise, the anti-union conduct of Ferrosur SA included refusal to provide a notice board, prohibition of assemblies at the workplace and denial of trade union leave.

Allegations concerning anti-union persecution, refusal to engage in collective bargaining and prevention of unionization in the América Latina Logística Central SA and América Latina Logística Mesopotámica SA (All) enterprises

294. The modus operandi in these enterprises is virtually identical to that used by the company mentioned in the preceding paragraph to prevent the exercise of trade union rights. There is such a close resemblance that it practically confirms the assumption that the enterprises have adopted a common concerted strategy, aided by the inaction of the Ministry of Labour. Specifically, in 2007, when elections of staff delegates were convened by the APDFA in accordance with the power vested in it by Act No. 23551 (sections 40 to 46), the enterprise denied the legality of the electoral process and the legitimacy of the delegates who were elected. The enterprise subsequently stepped up its anti-union acts, and on 9 February 2008 the All enterprise dismissed substitute delegate Mr Ramón Darío Alcaraz, after suspending him without cause in 2007. The procedure for lifting trade union immunity as required by Act No. 23551 on occupational associations was not followed during his suspension and dismissal.
295. The APDFA adds that, in view of the manifest illegality of the discriminatory anti-union dismissal, on 13 May 2009 the Fifth Division of the National Labour Court ordered the reinstatement of the dismissed delegate. In addition, in view of the pressure and harassment to which members were being subjected, in the same year the following telegram was sent denouncing the enterprise:

Your anti-union practices, contrary to freedom of association, targeting the Association of Management Staff of Argentine Railways and General Ports Administration (APDFA) and its members working in your enterprise. Such practices include constant pressure on our members to withdraw from membership or to prevent the workers we represent who have not yet joined the union from doing so. In this context, serious acts have been committed in recent years, in which you have made the appropriate and well deserved promotion (the necessary requirements having been met) of several of our members conditional on withdrawing from membership of the APDFA, in a coercive manner that is contrary to the principle of good faith that should govern individual and collective labour relations. Given that such conduct constitutes an unfair labour practice under subsections (b), (c) and (j) of section 53 of Act No. 23551, as well as violating the protection guaranteed in the national Constitution (articles 14bis and 75, paragraph 22) and in Conventions Nos 87, 98 and 111, I warn you to

cease these practices immediately, failing which complaints will be filed with the competent national and international bodies and legal proceedings will be brought to seek guarantees for the free and unrestricted exercise of freedom of association. You have been duly warned.

- 296.** The APDFA states that the All enterprise resorted to all kinds of manoeuvres to evade its duty to bargain with the union. After removing all of its managerial and executive staff from the coverage of the collective agreement in the 1990s, when regular bargaining rounds were once more being resumed in the country, the All enterprise refused to recognize the union's representative capacity, while taking the opposite stance with regard to other trade unions of railway workers, with which it bargained without any problem. This prompted a number of instances of direct action by the APDFA aimed at breaking down employer resistance.
- 297.** The APDFA points out that Act No. 14786 regulates the exercise of the right to strike, which is guaranteed in the national Constitution. This Act provides that once the Ministry of Labour has been informed of a conflict of interests, it may order mandatory conciliation and summon the parties to hearings with a view to reaching agreement. During the period of mandatory conciliation, the parties must restore the situation to what it was before the conflict and cease any direct action they have taken. The Act sets time limits within which the administrative authority may order mandatory conciliation (15 days, which may be extended by another five days); during this period, the parties may not continue or adopt direct action measures. However, to prevent this restriction from becoming a prohibition, the Act provides that once the time limits for mandatory conciliation – i.e. the periods during which direct action measures are suspended – have expired, the Ministry of Labour cannot order it again for the same dispute.
- 298.** The complainant organization alleges that, notwithstanding the above, in the dispute that arose between the APDFA and the enterprise as a result of the latter's refusal to bargain, the administrative authority ordered mandatory conciliation in June 2010, after the time limit for conciliation had expired without the enterprise having rescinded its decision not to bargain, so that the parties were free to exercise the right to strike. Accordingly, the APDFA called for a new direct action measure for 8 October 2010, consisting of a work stoppage and a march to the Ministry of Labour. The APDFA points out that, despite the fact that this was the same dispute, the Ministry of Labour arbitrarily and illegally ordered a new round of mandatory conciliation, the situation being further aggravated by the fact that it notified the union of this measure at the end of the day on 7 October, or during the night of 7–8 October, by posting the notice on the door of the trade union premises: it stood to reason that there would not be anyone in the office to receive the notification. All of this demonstrates the illegality of the action taken by the Ministry of Labour, whose orders amount in practice to a prohibition on the exercise of the right to strike by the workers who are members of the APDFA.

Allegations concerning the Ferrovías SA enterprise

- 299.** The APDFA points out that when Ferrovías SA took over the operation of the railway service on the General Belgrano Railway, this enterprise, as in the cases described above, excluded managerial and executive staff from coverage by the collective agreements and harassed its members with the evident aim of preventing the union from having a presence in the enterprise. Despite the many actions taken and the formal requests filed, the company has continued up to now to deny the right to bargain and conclude a collective labour agreement. As in the case of the other enterprises referred to in the complaint, the company threatened APDFA members with dismissal and succeeded in achieving its objective with respect to many of them. The APDFA adds that a complaint for unfair labour practice was filed in response to that measure and to a sanction that was imposed on

union delegate Mr Darío Corbalán, as a result of which a complaint for unfair labour practice was lodged with the National Labour Court.

B. The Government's reply

- 300.** In its communication of May 2011, the Government states that the Executive Office of the Minister was consulted on the case, and the legal office informed it that it is clear from the records attached to its reply that the Ministry of Labour's attitude has been cooperative, as it has held a number of hearings to address the concern to conclude a collective labour agreement with each of the enterprises involved. In brief, the records of the hearings suggest that the root of the problem lies in an unresolved dispute concerning representative status, with the possibility of a complaint for unfair labour practice being filed with the courts.
- 301.** As regards the complaint of persecution of union officials, as may be seen from the complaint itself, the relevant proceedings have been initiated before the labour court, from which the Government concludes that appropriate legal steps have been taken with regard to the protection of these officials, in accordance with national legislation.

C. The Committee's conclusions

- 302.** *The Committee observes that in this case the complainant organization alleges that, although it has been granted trade union status (a status which confers certain exclusive rights such as the conclusion of collective agreements, protection of union officials, payment of trade union dues through deductions from wages by the employer, the right to undertake and manage social initiatives, etc.), several enterprises in the railway sector (referred to by name in the complaint) refuse to engage in collective bargaining and that the administrative authority has not advanced the bargaining process, notwithstanding the proceedings filed by the complainant organization. The Committee also observes that the complainant organization alleges acts of harassment and persecution of its officials and members (in the Ferrosur SA enterprise, the allegations refer to pressure on members to withdraw from the union, refusal to recognize the election of delegates and to engage in dialogue with elected delegates, refusal to provide a notice board, prohibition on holding union assemblies and denial of trade union leave; in the América Latina Logística Central and América Latina Logística Mesopotámica enterprises, alleged denial of the legality of the trade union election procedure, refusal to recognize elected delegates and dismissal on 9 February 2008 of substitute delegate Mr Ramón Darío Alcaraz whose reinstatement was ordered by the court on 13 May 2009; in the Ferrovías SA enterprise, alleged threats of dismissal against members and sanction imposed on delegate Mr Darío Corbalán).*
- 303.** *As regards the alleged refusal by several enterprises in the railway sector to engage in collective bargaining with the APDFA, despite the fact that it has trade union status, the Committee notes that the Government states that the attitude of the labour ministry has been cooperative and that a number of hearings have been held in order to address the concern to conclude a collective labour agreement with each of the enterprises involved, and that the records of the hearings suggest that the root of the problem lies in a dispute with regard to representative status, with the possibility of a complaint for unfair labour practice being filed with the courts. In this regard, the Committee notes that the Government attaches with its reply a copy of the record of a meeting with the APDFA and several of the enterprises in the sector, in which the parties accept the proposal of the administrative authority to hold hearings in order to address the concern to conclude a collective labour agreement, as well as records of subsequent hearings in April 2011 indicating that an enterprise (Ferrovías SA) cites a dispute regarding representative status*

for bargaining purposes and another enterprise (Ferrosur SA) has set out an agenda to initiate bargaining.

- 304.** *The Committee regrets that the APDFA, which has trade union status, has still not been able to conclude a collective agreement with the enterprises in the sector, despite the time that has elapsed since it expressed its desire to initiate bargaining. In these circumstances, the Committee requests the Government to promptly take all the measures possible to encourage and promote the full development and utilization of machinery for voluntary negotiation between the APDFA and the enterprises concerned with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee requests the Government to keep it informed in this regard.*
- 305.** *As regards the allegations of acts of harassment and persecution of officials and members of the APDFA (in the Ferrosur SA enterprise, alleged pressure on members to leave the union, refusal to recognize the election of delegates and to engage in dialogue with elected delegates, refusal to provide a notice board, prohibition of union assemblies and denial of trade union leave; in the América Latina Logística Central and América Latina Logística Mesopotámica enterprises, alleged denial of the legality of the trade union election procedure, refusal to recognize elected delegates and dismissal on 9 February 2008 of substitute delegate Mr Ramón Darío Alcaraz whose reinstatement was ordered by the court on 13 May 2009; in the Ferrovías SA enterprise, alleged threats of dismissal against members and sanction imposed on delegate Mr Darío Corbalán), the Committee notes that the Government states that, as mentioned by the complainant organization, the relevant proceedings have been initiated before the labour court, from which it concludes that appropriate legal steps have been taken with regard to the protection of these officials, in accordance with national legislation.*
- 306.** *The Committee notes that according to the complainant organization, complaints for unfair labour practices were filed with the judicial authority concerning the alleged threats of dismissal of members and the sanction imposed on delegate Mr Darío Corbalán in the Ferrovías SA enterprise. In this regard, the Committee requests the Government to keep it informed of the final outcome of these judicial proceedings. In addition, the Committee notes that the APDFA alleges that the Fifth Division of the National Labour Court ordered the reinstatement of union delegate Mr Ramón Darío Alcaraz, who had been dismissed from the All enterprise in violation of trade union immunity. The Committee requests the Government to confirm that the trade union delegate has been reinstated without loss of pay.*
- 307.** *As regards the remaining allegations of anti-union discrimination (pressure on members to leave the union, refusal to recognize the election of delegates and to engage in dialogue with elected delegates, refusal to provide a notice board, prohibition of trade union assemblies and denial of trade union leave in the Ferrosur SA enterprise; denial of the legality of the trade union election procedure and refusal to recognize elected delegates in the América Latina Logística Central and América Latina Logística Mesopotámica enterprises; and threats of dismissal of members in the Ferrovías SA enterprise), the Committee regrets the considerable delay of the Government in responding and urges it to carry out an investigation and to inform it of the results.*

The Committee's recommendations

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

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- (a) *The Committee requests the Government to promptly take all the measures possible to encourage and promote the full development and utilization of machinery for voluntary negotiation between the APDFA and the enterprises concerned in the sector, with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee requests the Government to keep it informed in this regard.*
- (b) *The Committee requests the Government to keep it informed of the final outcome of the judicial proceedings for unfair labour practices filed with regard to the alleged threats of dismissal of APDFA members and for the sanction imposed on delegate Mr Darío Corbalán in the Ferrovías SA enterprise.*
- (c) *The Committee requests the Government to confirm that trade union delegate Mr Ramón Darío Alcaraz, who had been dismissed from the All enterprise in violation of trade union immunity, has been reinstated without loss of pay in accordance with the order issued by the judicial authority.*
- (d) *The Committee regrets the considerable delay of the Government in responding and urges it to carry out an investigation into the following allegations of anti-union discrimination: (1) pressure on members to leave the union; refusal to recognize the election of delegates and to engage in dialogue with elected delegates; refusal to provide a notice board; prohibition of trade union assemblies and denial of trade union leave in the Ferrosur SA enterprise; (2) denial of the legality of the trade union election procedure and refusal to recognize elected delegates in the América Latina Logística Central and América Latina Logística Mesopotámica enterprises; and (3) threats of dismissal of members in the Ferrovías SA enterprise. The Committee requests the Government to inform it of the results of the investigation.*

CASE NO. 2739

INTERIM REPORT

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

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

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

309. The Committee last examined this case at its November 2010 meeting and on that occasion presented an interim report to the Governing Body [see 358th Report, paras 289–320]. At its meeting in June 2010, the Committee made an urgent appeal to the Government and drew its attention to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body in its 184th Session (November 1971), it could present a report on the substance of this case at its next meeting if the Government's observations or information had not been received in time. To date no information has been received from the Government.

310. 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. Previous examination of the case

311. The Committee recalls that in its November 2010 meeting, it made the following recommendations [see 358th Report, para. 320]:

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

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

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

B. The Committee's conclusions

- 312.** *The Committee regrets that, despite the time that has elapsed since the last examination of the case, the Government has not provided the information requested, despite being urged to provide its observations or information regarding the case on a number of occasions, including by means of an urgent appeal. Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*
- 313.** *The Committee reminds the Government that the purpose of the whole procedure is to ensure respect for trade union freedoms both in law and in fact; this Committee is therefore convinced that, as the procedure protects governments from unreasonable accusations, governments on their side should recognize the importance of formulating, for objective examination, detailed replies concerning the substance of the allegations made against them [see First Report of the Committee, para. 31].*
- 314.** *Under these circumstances, the Committee finds itself obliged to reiterate the recommendations it made when it examined this case at its meeting in November 2010 [see 358th Report, para. 320]. The Committee expects that in the future the Government will actively cooperate by providing the information or observations requested.*

The Committee's recommendations

- 315.** *In the light of its foregoing interim conclusions, the Committee again invites the Governing Body to approve the following recommendations:*
- (a) *The Committee once again requests the Government to keep it informed of the outcome of the meetings between the National Coordinating Body for the Promotion of Freedom of Association of the State Labour Prosecutor (CONALIS of the MPT) and the representatives of the union confederations to discuss various issues such as those arising from the assistance contribution, and requests the Government to keep it informed with regard to the initiative to establish a tripartite Council of Industrial Relations. The Committee reminds the Government that it may call upon ILO assistance in seeking solutions that are satisfactory to all the parties concerned and are in conformity with the principles of freedom of association.*

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

CASE NO. 2795

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

**Complaint against the Government of Brazil
presented by
the General Union of Workers (UGT)**

Allegations: The complainant organization alleges that the São Paulo State Court of Justice refuses to negotiate the demands presented by the Union of Judiciary Employees of São Paulo State (SUSPJESP) and also objects to the decision by the judicial authority in the context of a “dissidio coletivo” (arbitration) procedure requested by SUSPJESP in relation to a strike

- 316.** The General Union of Workers (UGT) presented a complaint in a communication of 15 June 2010.
- 317.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case on two occasions. At its meeting in May–June 2011 [see 360th 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 its next meeting, even if the requested information or observations had not been received in time. To date, no information has been received from the Government.
- 318.** Brazil has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but it has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

319. In its communication of 15 June 2010, the UGT indicates that for more than two years, the Union of Judiciary Employees of São Paulo State (SUSPJESP) has, without success, been presenting demands concerning a wage review to the São Paulo State Court of Justice and the Government of São Paulo State. The UGT indicates that, under these circumstances, on 28 April 2010, judicial staff had no alternative but to resort to strike action. By going on strike, the public servants are trying to alert the Government and the State Court of Justice of the need to give immediate effect to Act No. 12177/2004, which provides for the consideration on 1 March every year of all demands with financial implications.
320. The UGT indicates that, in May 2010, SUSPJESP filed a request for *dissidio coletivo* (arbitration) before the Special Body of the São Paulo State Court of Justice in relation to a strike and on that occasion the judicial authority violated the decisions of the Committee on Freedom of Association in that regard, by: (1) establishing that “absences due to the participation of Court of Justice officials in strike action will result in deductions, without the possibility of compensation, from pay or from calculations relating to length of service or any other benefit”; (2) confirming “the ban on exercising the right to strike of public servants whose duties relate to the maintenance of public order and security or the administration of justice and of career state employees”; and (3) providing that “the union must refrain from promoting the total or partial stoppage of the activities carried out by the workers it represents, from the time of the notification of the decision, under penalty of a fine of 100,000 reais (BRL) per day, and the union and its officials are ordered, collectively, not to initiate other strikes before a final ruling is made with regard to the present arbitration procedure”.

B. The Committee's conclusions

321. *The Committee deplores the fact that, despite the time which has elapsed since the presentation of the complaint, the Government has not sent its reply concerning the allegations presented by the complainant organization, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case.*
322. *Under these circumstances and in accordance with the applicable procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a substantive report on the case without being able to take into account the information it has sought from the Government.*
323. *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. The Committee expects the Government to be more cooperative in future.*
324. *The Committee observes that, in the present case, the complainant organization alleges that the São Paulo State Court of Justice refuses to negotiate the demands presented by the SUSPJESP and also objects to the decision by the judicial authority in the context of a “dissidio coletivo” (arbitration) procedure requested by the SUSPJESP in relation to a strike, under which it was decided that strike days would be deducted and the union was ordered not to call further strikes until a final ruling is handed down by the judicial authority in relation to the arbitration procedure.*

325. With regard to the alleged refusal by the São Paulo State Court of Justice to negotiate the demands presented by the SUSPJESP, the Committee recalls that Brazil has ratified the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154), which provides in its Article 1 that it applies to all branches of economic activity and that, as regards the public service, special modalities of application of the Convention may be fixed by national laws or regulations or national practice. Under these circumstances, the Committee urges the Government to immediately take all measures within its power to promote collective bargaining between the SUSPJESP and the authorities concerned, so that, taking into account the special modalities for the application of Convention No. 154, the public servants of the sector may exercise the right to collective bargaining. The Committee urges the Government to report on any measures taken in this regard.
326. With regard to the contested decision by the judicial authority, which was adopted in the context of an arbitration request by SUSPJESP, under which it was decided that the strike days would be deducted and which called on the union not to call further strikes until a final ruling is handed down by the judicial authority in relation to the arbitration procedure, the Committee recalls that it has underlined, on numerous occasions, that “salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 654], and that in a context of voluntary arbitration, the fact that further industrial action cannot be taken until a final ruling is handed down is not contrary to the principles of freedom of association. Under these circumstances, the Committee will not pursue its examination of these allegations.

The Committee’s recommendation

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

The Committee urges the Government to immediately take all measures within its power to promote collective bargaining between the SUSPJESP and the authorities concerned, so that, taking into account the special modalities for the application of Convention No. 154, the public servants of the sector may exercise the right to collective bargaining. The Committee urges the Government to report on any measures taken in this regard.

CASE NO. 2318

INTERIM REPORT

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

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

328. The Committee has already examined the substance of this case on six occasions, most recently at its November 2010 session where it issued an interim report, approved by the Governing Body at its 309th Session [see 358th Report, paras 321–334].

329. As the Government has not replied, the Committee has been obliged to adjourn its examination of this case. At its May 2011 meeting [see the Committee's 360th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report (1972), approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the observations or information requested had not been received in due time. To date, the Government has not sent any information.
330. Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

331. In its previous examination of the case, the Committee made the following recommendations [see 358th Report, para. 334]:
- (a) As a general matter regarding all the subsequent issues, the Committee once again strongly urges the Government to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.
 - (b) The Committee requests the Government to take the necessary measures to ensure that Born Samnang and Sok Sam Oeun are exonerated of the charges brought against them and that the bail be returned to them. Furthermore, the Committee once again urges the Government to ensure that a thorough and independent investigation into the murder of Chea Vichea is carried out expeditiously, so as to ensure that all available information will finally be brought before the courts in order to determine the actual murderers and instigators of the assassination of this trade union leader, punish the guilty parties and thus bring to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed in this regard.
 - (c) The Committee once again strongly urges the Government to ensure that a full and independent investigation into the circumstances of trade union leader Ros Sovannareth's murder is finally carried out so as to bring all relevant information before the courts. It also urges the Government to ensure that Thach Saveth may exercise his right to a full appeal as soon as possible, before an impartial and independent judicial authority, and requests to be kept informed of any pending appeals.
 - (d) As concerns trade union leader Hy Vuthy, the Committee once again urges the Government to immediately institute or reactivate a full and independent inquiry into his murder and to keep it informed of all progress made in this regard.
 - (e) The Committee insists that the Government indicate the steps taken for capacity building and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system.
 - (f) The Committee strongly urges the Government, once again, to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of the results of these inquiries.
 - (g) The Committee strongly requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.
 - (h) With regard to the dismissals of Lach Sambo, Yeom Khun and Sal Koem San following their convictions for acts undertaken in connection with a strike at the Genuine garment factory, the Committee once again requests the Government to inform it of the status of their appeals proceedings and to indicate their current employment status.

- (i) The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia.
- (j) Given the lack of progress on these very essential points, the Committee is bound once again to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.

B. The Committee's conclusions

- 332.** *The Committee deeply regrets that, despite the time that has passed since it last examined this case, the Government has not provided its observations, although it has been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.*
- 333.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government.*
- 334.** *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's First Report, para. 31].*
- 335.** *Concerning the murder of the trade union leader Ros Sovannareth, the Committee notes that according to the information provided by the Government to the Committee of Experts on the Application of Conventions and Recommendations the accused, Thach Saveth, was released on bail on 2 March 2011 by the Supreme Court and that the re-investigation of the case has been ordered. The Committee once again strongly urges the Government to ensure that a full and independent investigation into the circumstances of trade union leader Ros Sovannareth's murder is finally carried out so as to bring all relevant information before the courts. The Committee requests the Government to keep it informed of the measures taken in this regard.*
- 336.** *As concerns the trade union leader Hy Vuthy, the Committee understands that the Supreme Court ordered the Phnom Penh Municipal Court to reopen the investigation into his death on 3 November 2010. The Committee requests the Government to confirm this information and once again urges it to immediately institute or reactivate a full and independent inquiry into his murder and to keep it informed of all progress made in this regard.*
- 337.** *Concerning the other allegations, the Committee is bound to reiterate its previous recommendations and firmly expects that the Government will provide its observations without further delay.*

The Committee's recommendations

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

- (a) *The Committee deeply regrets that, despite the time that has passed since it last examined this case, the Government has not provided its observations, although it has been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.*
- (b) *As a general matter regarding all the subsequent issues, the Committee once again strongly urges the Government to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.*
- (c) *The Committee once again urges the Government to take the necessary measures to ensure that Born Samnang and Sok Sam Oeun are exonerated of the charges brought against them and that the bail be returned to them. Furthermore, the Committee once again strongly urges the Government to ensure that thorough and independent investigations into the murders of Chea Vichea, Ros Sovannareth and Hy Vuthy are carried out expeditiously, so as to ensure that all available information will finally be brought before the courts in order to determine the actual murderers and instigators of the assassination of this trade union leader, punish the guilty parties and thus bring to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed in this regard.*
- (d) *As concerns trade union leader Hy Vuthy, the Committee requests the Government to confirm that the Supreme Court ordered the Phnom Penh Municipal Court to reopen the investigation into his death on 3 November 2010.*
- (e) *Recalling the importance it attaches in this case to capacity building and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system, the Committee strongly urges the Government to indicate the steps taken in this regard.*
- (f) *The Committee strongly urges the Government, once again, to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of the results of these inquiries.*
- (g) *The Committee strongly requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.*

- (h) With regard to the dismissals of Lach Sambo, Yeom Khun and Sal Koem San following their convictions for acts undertaken in connection with a strike at the Genuine garment factory, the Committee once again requests the Government to inform it of the status of their appeals proceedings and to indicate their current employment status.*
- (i) The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia.*
- (j) Given the lack of progress on these very essential points, the Committee is bound once again to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.*

CASE NO. 2808

INTERIM REPORT

**Complaint against the Government of Cameroon
presented by
the General Union of Workers of Cameroon (UGTC)**

Allegations: Anti-union interference, decisions taken in retaliation for legitimate trade union activities (deductions from wages, suspension without pay of union members)

- 339.** The complaint is set out in three communications dated 29 July 2010 from the General Union of Workers of Cameroon (UGTC).
- 340.** As the Government has not replied, the Committee was obliged to postpone its examination of this case on two occasions. At its June 2011 meeting [see the 360th 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 (1972), approved by the Governing Body, it could present a report on the substance of the case at its next meeting, even if the requested observations or information had not been received in time. To date, the Government has not sent any information.
- 341.** Cameroon has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

- 342.** In its communications of 29 July 2010, the UGTC states that it acts on behalf of its affiliated organization, the National Union of Employees, Supervisors and Managers of Banks and Financial Establishments of Cameroon (SNEGCBEFCAM), following a number of unsuccessful approaches to the Government.

343. The complainant organization alleges, first, that on 23 July 2009 the Minister of Labour and Social Security (MINTSS) decided to create an ad hoc committee to offer appropriate solutions with regard to wage and other claims made by staff of the National Social Insurance Fund (CNPS). The committee in question, which is made up of 11 members including five MINTSS representatives, three CNPS representatives and three trade union representatives of the unions FENASBOCAM, SNEGCBFCAM, SEMS-CA, worked for nine months with a view to adopting resolutions on wage increases, housing and transport benefits and reimbursement of special deductions made in connection with the fiscal optimization initiative.
344. Following the adoption of the resolutions of the ad hoc committee set up by MINTSS, the Director-General of the CNPS on 15 June 2010 issued a statement to staff on the resolutions in question, expressing strong disapproval of the demands made by SNEGCBFCAM, represented by Mr Isaac Bissala, in the following terms:
- ... following the highly exaggerated demands of SNEGCBFCAM represented by Mr Isaac Bissala, and despite the contrary views expressed by other unions and the individual agreement of staff members regarding the special wage deductions for the purpose of remunerating the fiscal council appointed to carry out the fiscal optimization exercise, and in order to put an end to all discussion of the case, it was decided to annul all the relevant provisions. Thus, with regret at this decision, which was taken in defiance of the clear interests of the workers concerned, the following measures have been adopted ...
345. According to the union, the purpose of the statement was to create inter-union conflict, conflict between staff and SNEGCBFCAM, and conflict between members of different unions. The union also maintains that the statement resulted in a petition being started up and distributed some days later by CNPS officials, along the lines indicated above. In the letter addressed to the Director-General, the petition signatories disparaged SNEGCBFCAM and Mr Bissala and reiterated their support for the Director-General. According to the complainant organization, the petition was distributed at all CNPS centres in order to gather staff signatures through threats and other forms of pressure.
346. Secondly, the complainant alleges that the Director-General, in retaliation against Mr Pierre Amogo Foe, a staff delegate, for his trade union activity in support of claims made on behalf of CNPS staff, had ordered deductions from his wages, in violation of section 75 of the Labour Code and Decree No. 094/197/PM of 9 May 1994 concerning wage deductions. Following these deductions Mr Pierre Amogo Foe reported the matter to the labour inspectorate, which ordered the restoration of his rights. That decision, however, was not implemented by the management, and the wage deductions have continued, causing great hardship to Mr Amogo Foe and his family of 13 children.
347. Thirdly, the complainant alleges that on 6 July 2009, the CNPS Director-General suspended staff delegate Mr Oumarou Woudang without wages for a period of six days for “copying and distributing a trade union notice of strike action during work hours”. The complainant states that not only has the management been unable to prove this allegation but also that, even if it were able to prove it, the strike notice would have been in accordance with ILO Convention No. 135. The complainant also emphasizes that the staff delegate in question has a monthly allowance of 15 hours for the purpose of trade union activities. Following these deductions Mr Oumarou Woudang reported the matter to the labour inspectorate, which did not respond. According to the complainant the suspension of wages has caused serious hardship for Mr Oumarou Woudang’s family.

B. The Committee's conclusions

348. *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 invited on a number of occasions, 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.*
349. *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.*
350. *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 the Committee's First Report, para. 31].*
351. *The Committee recalls that the present case concerns allegations of anti-union interference and decisions taken as reprisals for legitimate trade union activity (deductions from wages, suspension without pay of union members).*
352. *As regards acts of interference by the CNPS Director-General, the Committee notes that, following the adoption of resolutions by the ad hoc committee which was set up by the MINTSS on 23 July 2009 in order to offer appropriate solutions regarding wage and other claims by CNPS staff, and in which unions including SNEGCBFCAM participated, the Director-General is alleged to have issued a statement which disparaged the SNEGCBFCAM represented by Mr Bissala by calling its claims "highly exaggerated" and contrary to the position of other unions, the purpose being to create conflict between CNPS staff and SNEGCBFCAM. The statement in question led, so it alleged, to the drafting and distribution some days later of a petition addressed to the CNPS Director-General against the SNEGCBFCAM and Mr Bissala in order to gather staff signatures by coercion (pressure and threats).*
353. *The Committee recalls that Article 2 of Convention No. 98 establishes the total independence of workers' organizations from employers in exercising their activities. Attempts by employers to persuade employees to withdraw authorizations given to a trade union could unduly influence the choice of workers and undermine the position of the trade union, thus making it more difficult to bargain collectively, which is contrary to the principle that collective bargaining should be promoted [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, paras 855 and 863]. The Committee urges the Government to order an inquiry without delay into the allegations of interference by the Director-General of CNPS in the affairs of the SNEGCBFCAM and to report on the outcome.*
354. *As regards the allegations of anti-union discrimination against staff delegate Mr Pierre Amogo Foe, the Committee notes that following his participation in trade union action in support of claims made on behalf of CNPS staff, the Director-General ordered deductions from his wages, in contravention of section 75 of the Labour Code and Decree No. 094/197/PM of 9 May 1994 regarding wage deductions. The Committee notes that, according to section 75 of the Labour Code, apart from compulsory deductions and reimbursement for facilities provided, deductions from wages may be made only in the*

following cases: where there is a seizure by garnishment; deduction of union dues or insurance payments; or voluntary assignments. The Decree of 9 May 1994 defines the wages subject to deductions and the procedure applicable in cases of voluntary assignments. The Committee notes that Mr Pierre Amogo Foe informed the labour inspectorate, which instructed the CNPS to restore him in its rights. That decision, a copy of which was provided with the complaint, was not implemented by the management and wage deductions have continued, causing serious hardship for Mr Amogo Foe and his family.

355. *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 draws attention to the Workers' Representatives Convention (No. 135) and Recommendation (No. 143), 1971, in which it is expressly established that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or on union membership, or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements [see **Digest**, op. cit., paras 799 and 800]. The Committee urges the Government to inform it whether Mr Amogo Foe's rights have been restored in accordance with the labour inspectorate's decision of 1 February 2010. The Committee expects that Mr Amogo Foe will be fully compensated and that the Government will ensure that such acts of anti-union discrimination do not recur in future, including through the provision of dissuasive sanctions.*
356. *As regards the allegations of anti-union discrimination against staff delegate Mr Oumarou Woudang, the Committee notes that the Director-General of CNPS suspended him for six days without pay, as a final warning before dismissal, in a decision dated 6 July 2009 (a copy of which was supplied with the complaint), for "copying and distributing notice of trade union strike action during working hours". The Committee notes that according to the complainant organization, the management was unable to prove this and that even if it had done so, the action would have been in accordance with Convention No. 135, which has been ratified by Cameroon. The Committee also notes that the staff delegate apparently had an allowance of 15 hours per month for trade union activities. The Committee notes that following the wage deductions, Mr Oumarou Woudang informed the labour inspectorate, which did not respond. The Committee recalls that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., para. 820]. The Committee urges the Government to ensure that the Labour Inspectorate examines the case of Mr Oumarou Woudang and to keep it informed in that regard.*

The Committee's recommendations

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

- (a) *The Committee regrets that the Government has not replied to the complainant organization's allegations, despite having been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in future.*
- (b) *The Committee urges the Government without delay to initiate an inquiry into the allegations of interference by the Director-General of CNPS in the internal affairs of SNEGCBFCAM and to report on the outcome.*
- (c) *The Committee urges the Government to indicate whether the rights of Mr Amogo Foe have been restored in accordance with the labour inspectorate's decision of 1 February 2010. The Committee expects that Mr Amogo Foe will be fully compensated and that the Government will ensure that such acts of anti-union discrimination do not recur in future, including through the provision of dissuasive sanctions.*
- (d) *The Committee urges the Government to ensure that the labour inspectorate examines the case file of Mr Oumarou Woudang and to keep it informed in that regard.*

CASE NO. 2812

INTERIM REPORT

Complaint against the Government of Cameroon presented by

- **the Confederation of Public Sector Unions
of Cameroon (CSP) and**
- **the Confederation of United Workers
of Cameroon (CTUC)**

Allegations: Violent suppression of a peaceful strike by law enforcement officers; arrest of union officials; authorities' refusal to recognize the trade union's existence; occupation of its premises by law enforcement officers to prevent it from holding May Day celebrations

- 358.** The complaint is contained in communications from the CSP dated 6 July 2010, 29 November 2010 and 3 May 2011.
- 359.** The CTUC sent its observations in a communication dated 7 March 2011.
- 360.** The Government sent partial observations in communications dated 15 February, 29 March, 28 June and 1 August 2011.
- 361.** Cameroon 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

- 362. Refusal to recognize the CSP.** In a communication dated 6 July 2010, the complainant organization states that the CSP was established on 11 March 2000. Currently, it is the only one of the seven confederations in Cameroon to represent public servants. The confederation currently brings together 12 of the 17 primary trade unions in existence in this sector with 60,018 members belonging to one or other of its affiliates, which amounts to 30 per cent of public servants.
- 363.** After having been freely established, and in accordance with the regulatory provisions in force in Cameroon (Decree No. 69/DF/7 of 6 January 1969, which regulates the implementation of Act No. 68/LF/19 of 18 November 1968, which subsequently determines the organizational structure of and conditions of approval for associations and professional trade unions not governed by the Labour Code), the complainant organization proceeded to declare its existence to the Prefecture of Mfoundi in Yaoundé. However, the Prefecture did not issue the CSP with a deposit slip, as provided for in the regulations, nor did the complainant organization receive any formal response from the competent authorities. It took more determined measures for the CSP, which, in spite of this, already existed de facto, to secure a copy of the letter sent by the Prefect of Mfoundi informing the Ministry of Territorial Administration and Decentralization (MINATD) of the trade union's existence. However, the Government refuses to recognize the legal personality of the CSP.
- 364.** The complainant organization states that it often finds itself in conflict with the Government and the police, who continually disrupt its activities and intimidate and persecute its members. Furthermore, these practices are becoming increasingly widespread and pose a threat to freedom of association within the public service sector.
- 365.** The complainant organization states that since its establishment it has been the victim of anti-union discrimination at the hands of the Ministry of Labour and Social Security (MINTSS). Not only is the CSP rarely invited to consultations with the Government and other trade union confederations, it has been invariably excluded from the delegation of Cameroon at the International Labour Conference held every year in Geneva. The complainant organization claims that it is the Minister for Labour himself who decides which worker representatives attend the International Labour Conference each year.
- 366. May day Demonstrations.** The complainant organization adds that the Government prohibits it from organizing with full autonomy and freedom demonstrations to commemorate International Labour Day on 1 May each year. The Government has assumed control of organizing demonstrations to commemorate the occasion in Cameroon and has banned all side events, even those organized by trade unions. The complainant organization also claims that workers' protest banners are prohibited and that a price is exacted for participating in the procession.
- 367.** As regards the events of May Day 2009, following previous attempts to change the location, the CSP decided to celebrate May Day on its premises in Mvog-Ada, a busy and popular area of Yaoundé where a number of institutions have their headquarters. The complainant organization claims that all legal provisions regarding public demonstrations were respected. The law provides that a letter declaring the demonstration must be sent to the Deputy Prefect of Yaoundé V. However, on 30 April 2009, the Deputy Prefect sent a letter to the CSP forbidding it from holding the scheduled demonstration, stating that: "I hereby inform you that this meeting, as well as the celebrations you have organized, are prohibited in the light of the fact that the 123rd International Labour Day is to be celebrated in Yaoundé by means of a single meeting presided over by the Minister for Labour and Social Security. This will be the only opportunity for trade unions to

participate in the celebrations. Consequently, no public sideline demonstrations will be allowed”.

368. Despite this ban, which the complainant organization claims to be unfounded, the CSP proceeded with its preparations and took steps to ensure the celebration ran smoothly. However, at around 6 a.m. on May Day morning, the confederation’s headquarters was seized by more than 100 armed police officers while around ten senior officers coordinated the operation under the watchful eye of the Deputy Prefect. The entrance to the headquarters was sealed off and demonstrators and union officials were refused entry. The location of the demonstration (the building’s car park) was occupied by police officers. The vehicles of the law enforcement officers were used to stem the flow of traffic in the area surrounding the confederation’s headquarters. Several altercations with law enforcement officers took place. The intervention lasted until 2 p.m., which, according to the administrative authorities, was to allow the official celebration to take place unhindered.

369. As regards the events of May Day 2010, the complainant organization states that history repeated itself in every respect. This time, in response to the distribution of a CSP leaflet calling for the mobilization of public servants on 1 May 2010, the Deputy Prefect of Yaoundé V sent a letter dated 26 April 2010 prohibiting the latter in the same terms as the previous year. Resisting this provocation, the CSP declared its demonstration on 27 April 2010 in accordance with the legal provisions contained in the Act governing public demonstrations, which stipulate that this must be done 72 hours before the event takes place. Providing no explanation, the office of the Deputy Prefect broke the law by refusing to acknowledge the letter declaring the demonstration. On 28 April 2010, which was still within the established time frame, the CSP made a second attempt by means of a notification from the bailiff. The reaction of the Deputy Prefect was immediate. In a letter dated 26 April 2010, the Deputy Prefect acknowledged receipt of the bailiff’s letter dated 28 April 2010 and reiterated the ban on the public demonstration on the grounds that the established time frame had not been respected. On 1 May 2010, a law enforcement unit similar to that from the previous year was stationed in the grounds from 6 a.m. Conflict and altercations reminiscent of the previous year ensued and lasted until 1 p.m. when the union members involved decided to forcibly occupy the area where the demonstration was to take place by means of a sit in. The scheduled activities (sketches, chants and public addresses) went ahead in a climate akin to that of an uprising. Those artists who were contracted for and invited to the event were forced to perform without sound equipment, as the logistical preparations that had been made were no longer feasible.

370. As regards the events of May Day 2011, the complainant organization was once again prohibited from organizing its own activities by the Deputy Prefect on the grounds that “it is not feasible to have two different locations for the same demonstration in the same city at the same time, as this would only serve to disrupt public order”.

371. Strike and demonstration of 28 November 2007. The complainant organization states that, during the meeting of the confederation council in Yaoundé on 23 December 2006, the confederation executive committee was empowered to take any action necessary regarding the upcoming wage review in the public service sector. In the light of this, the executive committee met and decided to call a 72-hour strike, which was to be punctuated by a sit in on 28 November 2007 in front of the National Assembly as it held an ordinary session to examine the country’s budget for 2008. To this end and in keeping with the legislation in force at the national level, the Government was issued with a strike notice. This strike notice notwithstanding, the CSP followed procedure by sending a letter declaring the demonstration to the Deputy Prefect of Yaoundé III, who is the competent authority for the area in which the demonstration was to be held, with a view to organizing the sit in. The Deputy Prefect’s response was to issue a letter of prohibition.

372. On the day in question, demonstrators came face to face with squadrons of police officers. Despite the force's dissuasive presence, more than 300 people gathered at exactly 11 a.m. to demonstrate. This demonstration was violently dispersed by the police officers, who rammed and struck the demonstrators with truncheons, causing slight injuries to some and serious injuries to others. All banners were seized and shredded. The president of the CSP and members of the executive committee were detained for more than ten hours in the police station attached to the offices of Secretary of State for Defence prior to their release later that evening. The complainant organization states that, following this demonstration, the Ministry of Labour and Social Security unwaveringly proclaimed that the CSP did not have legal personality and that the public demonstration calling for an increase in the salary of public servants was illegal, making the demonstrators liable to sanctions.
373. **Strike and demonstration of 1 October 2010.** Pursuant to one of the resolutions drafted during the confederation's second ordinary congress in Yaoundé on 25, 26 and 27 August 2010, a strike notice dated 1 October 2010 was issued to the Prime Minister on behalf of the President of the Republic. The notice was to be effective from 11 to 13 November 2010, should the Government not reply.
374. As the Government sent no reply, steps were taken to call for strike action. Consequently, the complainant organization set about organizing a peaceful sit in, in front of the offices of the Prime Minister on 11 November 2010 from 10 a.m. until midday. Once the sit in had ended, a memorandum was to be sent to the President of the Republic.
375. In accordance with the current procedures governing public demonstrations, a letter declaring the demonstration was sent to the Deputy Prefect of Yaoundé III, who is the administrative authority of the district where the demonstration was to be held. The Deputy Prefect replied by sending a letter dated 8 November 2010 prohibiting the demonstration on the grounds that the time frame for declaring it had not been respected. The complainant organization claims that it had respected the time frame given that the legal time frame for declaring a demonstration is fixed at 72 hours before the event and that the complainant organization had submitted its declaration on 5 November 2010, six days before the sit in was scheduled to take place. The Deputy Prefect's decision to ban the demonstration was therefore unfounded.
376. On 11 November 2010, the day of the strike, the offices of the Prime Minister and the entire administrative complex, an area covering more than 500 metres, were occupied by hundreds of heavily armed police officers, which disrupted the general activity, particularly the economic activity, of that area. Despite the heavy police presence, around ten union officials managed to infiltrate the lines of police officers and come within a short distance of the offices of the Prime Minister.
377. At around 10.40 a.m., while union representatives were being interviewed by journalists, law enforcement officers decided to launch a violent attack on union members, who were subsequently picked up and taken by force to the main police station in Yaoundé. In addition, a journalist and plain-clothed soldier were inadvertently arrested. After having been identified as such, they were released. Seven union members, including Jean-Marc Bikoko, the President of the CSP; Maurice Phouet Foé, the General Secretary of the SNAEF (an affiliate of the CSP); Thobie Mbassi Ondo, the Director-General of the FECASE (an affiliate of the CSP); Eric Nla'a, the accountant of the CSP; Joseph Ze, the General Secretary of the SNUIPEN (the object of Case No. 2382); Charles Felein Clause, a member of the SNUIPEN; and Effoa Nkili, a member of the SNUIPEN, were also arrested.
378. After having been identified, the seven union members had their mobile telephones and national identity cards confiscated. Each member was then assigned to an investigating officer and questioned for over an hour. Following the questioning, in the absence of their

attorney, who had been turned away, the union members were led to a dilapidated group holding cell to join other inmates. The cell had neither toilets nor running water and the holding conditions constituted a violation of human dignity. They were held in these conditions from just after midday on Thursday 11 November 2010 until 9 a.m. on Friday 12 November 2010 before being handcuffed and transported by the police to the offices of the State Prosecutor. After spending a whole day in a substandard holding cell with 50 other people at the offices of the State Prosecutor, the union members were brought before the State Prosecutor at around 8 p.m.. It was only then that the latter informed them of the charges brought against them: “demonstrating illegally and disrupting public order”. The union members did not admit to the acts and were subsequently released at around 9.30 p.m. to appear freely before the judge on Monday 15 November at 8 a.m. It was only on 13 November 2010 at around 3 p.m. that they regained possession of their mobile telephones and identity cards.

379. On 15 November 2010, the seven union members appeared freely before the Court of First Instance of Mfoundi and pleaded not guilty. At the request of their attorney, who wished to examine the substance of the case against them, the latter was put back to 20 December 2010, then until 7 February 2011 and finally until 21 March 2011. The judge’s absence on that date then caused the case to be put back until 16 May 2011.

380. In a communication dated 7 March 2011, the CTUC states that there is legislative disharmony, as well as discrepancies, between private sector trade unions governed by the Labour Code, which come under the jurisdiction of the union registrar, and public sector trade unions governed by Act No. 68/LF/19 of 18 November 1968 and Enforcement Decree No. 69/DF/7 of 6 January 1969, which come under the jurisdiction of the Ministry of Territorial Administration and Decentralization, and reiterates the observations made by trade unions of workers in Cameroon on several occasions regarding the need to repeal Act No. 68/LF/19 of 18 November 1968 and Enforcement Decree No. 69/DF/7 of 6 January 1969 and the need to align national legislation with ILO standards, in particular by amending the Labour Code and by adopting a single Act on trade unions.

381. Furthermore, the CTUC, while acknowledging the letters prohibiting demonstrations issued by the administrative authorities, regrets the heavy-handed approach adopted by law enforcement officers, the physical violence and the arbitrary arrests that took place and distinguishes between a strike and a public demonstration, which it claims are governed by different legal and regulatory provisions.

B. The Government’s reply

382. In a communication dated 15 February 2011, the Government states that, as regards the CSP’s peaceful sit in of 11 November 2010 in front of the offices of the Prime Minister, the CSP has not been granted legal personality as a trade union in Cameroon and, regardless of whether the CSP was recognized as such, the fact remains that the sit in it organized was not approved by the administrative authority, as a letter issued by the Prefecture had forbidden all public protest demonstrations in the entire Mfoundi department, and that it was on those grounds that the CSP demonstrators were brought before the courts: for demonstrating illegally and disrupting public order. The Government emphasizes that, pursuant to the principle of separation of administrative and judicial power, it cannot become involved in this matter.

383. The Government adds that the law enforcement officers did indeed disperse the demonstrators in front of the offices of the Prime Minister and that the CSP members were taken to the main police station in Yaoundé for demonstrating illegally and disturbing public order. The Government explains that the case is pending before the Court of First Instance of Mfoundi and that, consequently, the Government must refrain from taking a

decision until a verdict has been handed down. The Government reiterated its position in a communication dated 28 June 2011.

384. In a communication dated 29 March 2011, the Government states that the problems concerning the legal personality of the CSP will be solved following the amendment of the Labour Code of Cameroon and the adoption of a law on trade unions; and that, consequently, the ban on public demonstrations affecting the trade union is merely the upshot of it not having legal personality. The Government reiterated its position in a communication dated 1 August 2011. It added that a preliminary draft law on the establishment and functioning of social organizations was being examined by the Ministry.

C. The Committee's conclusions

385. *The Committee recalls that this case refers to allegations concerning the violent suppression of a peaceful strike by law enforcement officers, the arrest of union officials, the authorities' refusal to recognize the trade union's existence, as well as the occupation of its premises by law enforcement officers to prevent it from celebrating May Day.*
386. *The Committee notes that after having been freely established in 2000, and in accordance with the regulatory provisions in force, the CSP declared its existence to the Prefecture of Mfoundi in Yaoundé. However, the Prefecture did not issue the CSP with a deposit slip, as provided for in the regulations, nor did the CSP receive any formal reply to their request for legal personality.*
387. *The Committee notes that, according to the Government, the problems concerning the legal personality of the CSP will be solved following the amendment of the Labour Code of Cameroon and the adoption of a law on trade unions. However, the Committee also notes that, according to the CSP, while preliminary work on the amendment of the Labour Code has been the subject of some discussion, for the last few years and for no official reason, no further discussion has taken place. As regards the law on trade unions, according to the CSP, no such discussion had ever taken place and there was no evidence of willingness on the part of the Government to move forward with the proposal.*
388. *The Committee also notes that, for many years, the Committee of Experts on the Application of Conventions and Recommendations has been requesting the Government to take the necessary measures to amend both Act No. 68/LF/19 of 18 November 1968, which makes the decision to grant legal personality to a trade union or a professional association of public servants subject to prior approval from the Minister responsible for territorial administration, and section 6(2) of the Labour Code of 1992, which provides that the supporters of a hitherto unregistered trade union who act as if it were already registered are liable to have legal proceedings instituted against them, while section 166 of the Labour Code prescribes heavy fines for union members committing this offence. On this final point, the Committee of Experts on the Application of Conventions and Recommendations noted that the Government had announced that the draft law to amend and complement certain provisions of the Labour Code had been adopted by the National Consultative Committee for Labour, which meant that penalties and/or fines would no longer be prescribed to sanction this offence. The Committee recalls that public servants, like all other workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests. Therefore, a law providing that the right of association is subject to authorization granted by a government department purely in its discretion is incompatible with the principle of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 219 and 273]. The Committee urges the Government, in consultation with the most representative organizations of workers and employers, to accelerate the process of*

legislative reform while guaranteeing full respect for the principles of freedom of association of public servants, and expects that, in the near future, the CSP will be able to lawfully represent its members and exercise all attendant rights. The Committee urges the Government to keep it informed of any developments concerning this process of reform and to inform it of the practical measures taken in this regard as soon as possible. The Committee invites the Government to avail itself of the technical assistance of the Office in this respect.

- 389.** *As a general rule, the Committee recalls that the requirement of administrative permission to hold public meetings and demonstrations is not objectionable per se from the standpoint of the principles of freedom of association. The maintenance of public order is not incompatible with the right to hold demonstrations so long as the authorities responsible for public order reach agreement with the organizers of a demonstration concerning the place where it will be held and the manner in which it will take place [see **Digest**, op.cit., para. 141]. As regards International Labour Day celebrations on May Day, the Committee notes that the complainant organization states that the Government prohibits it from organizing with full autonomy and freedom demonstrations to commemorate International Labour Day on 1 May each year and that the Government has assumed control of organizing demonstrations to commemorate the occasion and has banned all side events. In particular, the Committee notes that on at least three occasions, on 1 May 2009, 2010 and 2011, the CSP was forbidden from organizing a public demonstration at its headquarters despite having declared the demonstration in keeping with the relevant legal provisions and on the grounds that “International Labour Day is to be celebrated in Yaoundé by means of a single meeting presided over by the Minister for Labour and Social Security. This will be the only opportunity for trade unions to participate in the celebrations”. After having proceeded to organize celebrations regardless, its headquarters was seized by the police and demonstrators and union officials were refused entry. The Committee notes that, according to the Government, the ban on public demonstrations affecting the trade union is merely the upshot of it not having legal personality and that this will be solved following the amendment of the Labour Code of Cameroon and the adoption of a new law on trade unions.*
- 390.** *The Committee considers that the CSP’s lack of legal personality owing to the shortcomings of the national legislative framework and the Government’s failure to reply to the CSP’s request to be granted recognition by virtue of Act No. 68/LF/19 of 18 November 1968 should not jeopardize the fundamental right to freedom of association. The Committee recalls that the membership of a State in the International Labour Organization carries with it the obligation to respect in national legislation freedom of association principles and the Conventions which the State has freely ratified, namely Conventions Nos 87, 98 and 135 [see **Digest**, op. cit., para. 16]. The Committee also notes that the preamble of Act No. 96-06 of 18 January 1996 regarding the Constitution of the Republic of Cameroon provides that: “the people of Cameroon affirm their attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and Peoples’ Rights and all duly ratified international conventions pertaining thereto, and to the following principles in particular ...: freedom of communication, freedom of the press, freedom of assembly, freedom of association and the right to strike, all of which are guaranteed in the conditions established by law” and expressly provides in its section 45 that “duly approved or ratified treaties and international agreements shall, following publication, take precedence over national laws”.*
- 391.** *The Committee recalls that the right to organize public meetings and processions, particularly on the occasion of May Day, constitutes an important aspect of trade union rights. The holding of public meetings and the voicing of demands of a social and economic nature on the occasion of May Day are traditional forms of trade union action.*

Trade unions should have the right to organize freely whatever meetings they wish to celebrate on May Day, provided that they respect the measures taken by the authorities to ensure public order. Permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused. Lastly, the inviolability of trade union premises and property is a civil liberty, which is essential to the exercise of trade union rights, and the access of trade union members to their union premises should not be restricted by the state authorities [See **Digest**, op. cit., paras 136, 137, 142, 178 and 192]. The Committee requests the Government to ensure that, in the future, those principles are fully respected and expects the new legislation to guarantee full respect for those principles.

392. As regards the strikes, public demonstrations and the arrest of the union officials, the Committee notes that the complainant organization organized the first strike, punctuated by a sit in, on 28 November 2007 in front of the National Assembly as it held an ordinary session to examine the country's budget for 2008. To this end and in keeping with the national legislation in force, the Government was issued with a strike notice. This strike notice notwithstanding, the CSP followed procedure by sending a letter declaring the demonstration to the Deputy Prefect of Yaoundé III, who is the competent authority for the area in which the demonstration was to be held. The Deputy Prefect's response was to issue a letter of prohibition. On the day in question, the peaceful demonstration was violently dispersed by police officers who rammed and struck the demonstrators with truncheons, causing slight injuries to some and serious injuries to others. The Committee also notes that the president of the CSP and members of its executive committee were detained for more than ten hours on the premises of the Secretary of State of Defence prior to their release late into the evening.
393. The Committee notes that around three years later, on 11 November 2010, another strike, once again punctuated by a sit in, had been voted for and organized by the CSP. Once the sit in had ended, a memorandum was to be sent to the President of the Republic. A strike notice had previously been issued to the Prime Minister on behalf of the President of the Republic on 1 October 2010. Once again, a letter declaring the demonstration had been sent to the administrative authority of the district where the demonstration was to be held within the specified legal time frame. Once again, the Deputy Prefect responded by banning the demonstration.
394. On the day in question, the peaceful demonstration was once again violently dispersed by law enforcement officers, leading to union members being picked up and taken by force to the main police station in Yaoundé. Seven union members, including Jean-Marc Bikoko, the President of the CSP; Maurice Phouet Foé, the General Secretary of the SNAEF (an affiliate of the CSP); Thobie Mbassi Ondo, the Director-General of the FECASE (an affiliate of the CSP); Eric Nla'a, the accountant of the CSP; Joseph Ze, the General Secretary of the SNUIPEN (the object of Case No. 2382); Charles Felein Clause, a member of the SNUIPEN; and Effoa Nkili, a member of the SNUIPEN, were arrested, questioned and detained for more than 24 hours in extremely poor conditions. They were able to reclaim their identity cards and personal belongings on 13 November. The Committee notes that the seven union members appeared before the Court of First Instance of Mfoundi on 15 November 2010 and pleaded not guilty. The case was put back to 20 December 2010, then until 7 February 2011 and finally until 21 March 2011. The judge's absence on that date then caused the case to be put back to 16 May 2011. The Committee observes that no new information on the referral of the case has been brought to its attention.
395. In this regard, the Committee notes that, in its reply, the Government only reiterates that the CSP is a trade union without legal personality and that the sit in organized on 11 November 2010 was illegal because it had not been approved by the authorities. It is

for this reason that the CSP demonstrators were brought before the courts for demonstrating illegally and disturbing public order. The Government explains that the case is still pending before the Court of First Instance of Mfoundi and that, consequently, it must refrain from taking a decision until a verdict has been handed down. The Committee recalls that in general, the use of the forces of order during trade union demonstrations should be limited to cases of genuine necessity [see **Digest**, op. cit., para. 150]. The Committee also recalls that the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike; such measures entail serious risks of abuse and are a grave threat to freedom of association. No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike. Furthermore, the arrest and sentencing of trade unionists to long periods of imprisonment on grounds of the “disturbance of public order”, in view of the general nature of the charges, might make it possible to repress activities of a trade union nature [see **Digest**, op. cit., paras 93, 671, 672]. The Committee requests the Government to respect trade union demonstrations and to ensure that this type of demonstration can take place in the future. Noting that the case involving the seven union members who were arrested during the sit in that took place on 11 November 2010 is still pending before the Court of First Instance of Mfoundi, the Committee expects the case to be settled swiftly. It requests the Government to keep it informed in this regard and to provide it with a copy of all relevant legal decisions.

- 396.** As regards the allegations concerning the violent intervention of law enforcement officers during the demonstrations, the Committee recalls that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [see **Digest**, op. cit., para. 140]. The Committee requests the Government to conduct an inquiry into this allegation and to issue instructions in order to prevent such actions from reoccurring.
- 397.** The Committee recalls that detained trade unionists, like all other persons, should enjoy the guarantees enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights according to which all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person [see **Digest**, op. cit., para. 54]. As regards the conditions in which the union members were detained and the CSP’s allegation of ill-treatment, the Committee requests the Government to indicate whether an independent inquiry has been conducted in order to clarify the facts, determine responsibility, punish those responsible and prevent the repetition of such acts.
- 398.** Lastly, the Committee takes note of the allegation that the CSP was rarely invited to consultation meetings with the Government and other trade union confederations and had been invariably excluded from the delegation of Cameroon at the International Labour Conference held every year in Geneva. The complainant organization claims that it was the Minister of Labour himself who decided which worker representatives attended the International Labour Conference each year. While it recalls that the question of representation at the Conference falls within the purview of the Conference Credentials Committee, the Committee has reiterated the special importance it attaches to the right of workers’ and employers’ representatives to attend and to participate in meetings of international workers’ and employers’ organizations and of the ILO [see **Digest**, op. cit., para. 766]. The Committee expects the Government to consult the CSP on issues concerning the interests of its members and urges the Government to send its observations in this regard.

The Committee's recommendations

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

- (a) *The Committee urges the Government, in consultation with the most representative organizations of workers and employers, to accelerate the process of legislative reform while guaranteeing full respect for the principles of freedom of association of public servants, and expects that, in the near future, the CSP will be able to lawfully represent its members and exercise all attendant rights. The Committee urges the Government to keep it informed of any developments concerning this process of reform and to inform it of the practical measures taken in this regard as soon as possible. The Committee invites the Government to avail itself of the technical assistance of the Office in this respect.*
- (b) *Observing that the Government has not duly respected the right to demonstrate as a way of celebrating May Day, the Committee requests the Government to ensure that, in the future, those principles are fully respected and expects the new legislation to guarantee full respect for those principles.*
- (c) *The Committee requests the Government to respect trade union demonstrations and to ensure that this type of demonstration can take place in the future. Noting that the case involving the seven union members who were arrested during the sit in that took place on 11 November 2010 is still pending before the Court of First Instance of Mfoundi, the Committee expects the case to be settled swiftly. It requests the Government to keep it informed in this regard and to provide it with a copy of all relevant legal decisions. As regards the allegations concerning the violent intervention of law enforcement officers during the demonstrations, the Committee requests the Government to conduct an inquiry into this allegation and to issue instructions in order to prevent such actions from reoccurring.*
- (d) *As regards the conditions in which the union members were detained and the CSP's allegation of ill-treatment, the Committee requests the Government to indicate whether an independent inquiry has been conducted in order to clarify the facts, determine responsibility, punish those responsible and prevent the repetition of such acts.*
- (e) *While it recalls that the question of representation at the Conference falls within the purview of the Conference Credentials Committee, the Committee has reiterated the special importance it attaches to the right of workers' and employers' representatives to attend and to participate in meetings of international workers' and employers' organizations and of the ILO. The Committee expects the Government to consult the CSP on issues concerning the interests of its members and urges the Government to send its observations in this regard.*

CASE NO. 2842

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

**Complaint against the Government of Cameroon
presented by
the General Confederation of Free Workers of Cameroon (CGT-Liberté)**

***Allegations: The complainant organization
alleges attempts by the authorities to interfere
with the choice of its officials and, following one
such failed attempt, a decision by the
Government to end all collaboration with the
organization***

400. The complaint is contained in a communication dated 15 March 2011 from the General Confederation of Free Workers of Cameroon CGT-Liberté.
401. The Government sent its observations in a communication dated 11 May 2011.
402. Cameroon 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

403. In its communication of 15 March 2011, CGT-Liberté states that its internal affairs have been subject to repeated government interference for more than two years and that, since November 2010, it has been completely deprived of freedom of association and its right to collective bargaining.
404. CGT-Liberté states that, as at 20 February 2011, it represented three national trade union federations, six national trade unions, 16 departmental trade union federations, including 12 in the process of being established, around 40 departmental unions, more than 150 trade union branches and at least 250 staff delegates in various sectors.
405. The complainant organization states that CGT-Liberté, like other local trade union centres, has had its share of conflict caused by the divergent opinions of its officials, and that the Minister of Labour and Social Security (MINTSS), following several attempts to place someone of his choosing at the head of the confederation, compelled it, through a letter dated 23 June 2009 (a copy of which was provided with the complaint), to convene an “extraordinary congress” in order to elect legitimate and uncontested leaders. The complainant organization claims that this is contrary to section 5 of the Labour Code, section 9 of Law No. 90/053 of 19 December 1990 on freedom of association, and Article 3 of ILO Convention No. 87, which Cameroon has ratified, and is evidence of the Government's interference.
406. Enjoying the wide-ranging support offered by the Bureau for Workers' Activities (ACTRAV) of the ILO Subregional Office in Yaoundé, CGT-Liberté's three factions worked tirelessly to reconcile the diverging opinions within the confederation and to make timely preparations for holding a full congress in accordance with its statutes. The Minister of Labour and Social Security subsequently sent a letter of encouragement to CGT-Liberté

dated 29 January 2010, a copy of which was provided with the complaint, just as his Ministry's newsletter announced that the Minister's cousin (Pierre Essindi Minkoulou) was standing as a candidate for the presidency of CGT-Liberté. The complainant organization adds that, during a meeting on 14 September 2010, the Minister reiterated that the key to the Ministry re-establishing its cordial relations with CGT-Liberté was the election of a particular individual. The complainant organization nevertheless went ahead with its full congress, which was held in accordance with the complainant organization's own statutes.

- 407.** Following the full congress on 4 and 5 November 2010 in Mbalmayo, which saw the election of new union officials and a return to normality within the confederation, the Minister still refused to lift the suspension of collaboration with CGT-Liberté, explaining in a letter dated 8 February 2011 to the registrar of unions (a copy of which was provided with the complaint) that: "I note with regret that the congress held in Mbalmayo only saw the resignation of Mr Pierre Essindi Minkoulou and Mr Benoît Essiga, thereby demonstrating that the substantive problem has still not been resolved, leaving me no choice but to prolong the suspension of our collaborative relations". According to the complainant organization, the motive used to justify this refusal to resume collaboration is completely fictitious, as both of the individuals mentioned in the letter left CGT-Liberté in order to set up the CTUC (in the case of Pierre Essindi Minkoulou) and the confederation "ENTENTE" (in the case of Benoît Essiga). Furthermore, in accordance with section 3 of the Law on freedom of association, individuals are free to join or resign from CGT-Liberté and its affiliated organizations at any time.
- 408.** The complainant organization states that this led to CGT-Liberté's exclusion from official activities and events involving workers' organizations, national and international commissions and programmes to assist workers' organizations, social elections (staff delegates), the International Labour Conference, preparations for International Labour Day 2011, and so on. The complainant organization adds that it reported the Government's actions in letters addressed to the Minister for Labour and Social Security, the registrar of unions, and the President of the Republic (copies were provided with the complaint), all of which went unanswered.

B. The Government's reply

- 409.** In its communication of 11 May 2011, the Government states that it has always refrained, through the intermediary of the Minister of Labour and Social Security, from interfering in the internal affairs of trade unions, in accordance with section 5 in Chapter 1 of the 1992 Labour Code. The Government considers the claim that the Minister attempted to "place someone of his choosing at the head of CGT-Liberté" to be superfluous, absurd, repugnant and unfounded.
- 410.** The Government adds that CGT-Liberté was confronted with serious internal conflict and that the Minister had only sought to calm the situation. The letter dated 23 June 2009 was simply an appeal for calm, and it was out of concern to make the social partners assume their responsibilities that the Minister informed all trade union leaders that he would no longer collaborate with trade union centres which still had two or even three different centres of authority. The Government emphasizes that CGT-Liberté, which was established in 2003, has been and will remain a social partner of the Government in Cameroon and at the International Labour Conference.
- 411.** The Government also points out that it does not deprive any trade union of its right to existential freedom and to collective bargaining, and that the reported exclusion of CGT-Liberté from official activities and events, national and international commissions and programmes and social elections, is consistent with the move to suspend collaboration with any trade union which shows serious internal divisions. In short, this was a general

public order measure. The Government concludes by pointing out that, if the trade union centre wishes to regain its privileged position, it should seek to heal its internal divisions and promote social dialogue in the interests of restoring the internal harmony necessary for its proper functioning.

The Committee's conclusions

412. *The Committee observes that the complainant organization alleges attempts by the authorities to interfere in its choice of leaders and, following one such failed attempt, a decision by the Government to cease all collaboration with the organization.*
413. *With regard to the Government's interference in the internal affairs of CGT-Liberté, the Committee notes the indications that CGT-Liberté's three factions (EKEDI, ESSIGA, and NKOU) worked tirelessly to heal the internal divisions within the confederation and to make timely preparations for holding a full congress. The Minister of Labour and Social Security subsequently sent a letter of encouragement to CGT-Liberté dated 29 January 2010, a copy of which was provided with the complaint, just as his Ministry's newsletter announced that the Minister's cousin (Pierre Essindi Minkoulou) was standing as a candidate for the presidency of CGT-Liberté. The Committee notes that, according to the complainant organization, during a subsequent meeting with the Minister on 14 September 2010, the latter reiterated that the key to the Ministry re-establishing its collaboration with CGT-Liberté was the election of a particular individual. The Committee notes that the complainant organization nevertheless went ahead with the holding of the full congress, which was held in accordance with the complainant organization's statutes. The Committee notes that the Government categorically denies this allegation of interference, stating that it has always refrained, through the intermediary of the Minister of Labour and Social Security, from interfering in the internal affairs of trade unions, in accordance with section 5 in Chapter 1 of the 1992 Labour Code, and that the letter dated 23 June 2009 was simply an appeal for calm. The Committee notes, however, that this letter invited CGT-Liberté to convene an extraordinary congress within a certain time limit in order to elect officials, and suspended all collaboration with the complainant organization pending the restoration of uncontested legitimacy.*
414. *The Committee recalls that conflicts within a trade union should be resolved by its members. In the case of internal dissension within one and the same trade union federation, by virtue of Article 3 of Convention No. 87, the only obligation of the government is to refrain from any interference which would restrict the right of the workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes, and to refrain from any interference which would impede the lawful exercise of that right. The Committee considers that the Government's invitation to CGT-Liberté to convene an extraordinary congress within a certain time limit in order to elect new leaders and the suspension of all collaboration with the complainant organization pending the restoration of uncontested legitimacy is contrary to the principle of non-interference by governments in unions' internal affairs.*
415. *Furthermore, when the authorities intervene during the election proceedings of a union, expressing their opinion of the candidates and the consequences of the election, this seriously challenges the principle that trade union organizations have the right to elect their representatives in full freedom [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 434 and 1117]. The Committee therefore urgently requests that the Government refrain from any form of interference in the internal affairs of CGT-Liberté in the interests of allowing its members to organize their administration and activities and to elect their representatives freely.*

416. The Committee further notes that, following the complainant organization's full congress on 4 and 5 November 2010 in Mbalmayo, the Minister of Labour and Social Security refused to lift the suspension of collaboration imposed on CGT-Liberté, explaining in a letter dated 8 February 2011 from the registrar of unions, a copy of which was provided with the complaint, that, "I note with regret that the congress held in Mbalmayo only saw the resignation of Mr Pierre Essindi Minkoulou and Mr Benoît Essiga, thereby demonstrating that the substantive problem has not in fact been resolved, leaving me no choice but to prolong the suspension of our collaborative relations." The complainant organization alleges that the motive used to justify this refusal to resume collaboration is completely fictitious, as both the individuals mentioned in the letter left CGT-Liberté in order to set up the CTUC (in the case of Pierre Essindi Minkoulou) and the confederation "Entente" (in the case of Benoît Essiga). Furthermore, in accordance with section 3 of the Law on freedom of association, individuals are free to join or resign from CGT-Liberté and its affiliated organizations at any time.
417. The Committee notes CGT-Liberté's claim that this led to its exclusion from official activities and events involving workers' organizations, national and international commissions and programmes to assist worker's organizations, workplace elections (staff delegates), the International Labour Conference, participation in the International Labour Day 2011, and so on.
418. The Committee notes that the Government, in its reply to these allegations, points out that it does not deprive any trade union of its right to existential freedom and collective bargaining, and that the reported exclusion of CGT-Liberté from official activities and events, national and international commissions and programmes, workplace elections, and so on, is consistent with the move to suspend collaboration with any trade union that shows internal divisions (organizations comprising a number of factions). In short, this was a general public order measure. The Government concludes by pointing out that, if the trade union centre wishes to regain its privileged position, it should seek to heal its internal divisions and promote social dialogue in the interests of restoring the internal harmony necessary for its proper functioning.
419. The Committee recalls that the principle laid down in Article 2 of Convention No. 87, that workers and employers shall have the right to establish and join organizations of their own choosing, implies for the organizations themselves the right to establish and join federations and confederations of their own choosing. The free exercise of the right to establish and join unions implies the free determination of their structure and composition of unions. By according favourable or unfavourable treatment to a given organization as compared with others, a government may be able to influence the choice of workers as to the organization which they intend to join [see **Digest**, op. cit., paras 710, 333 and 340]. The Committee considers that the Minister's decision to suspend all collaboration with trade union centres such as CGT-Liberté, where internal divisions persisted, amounts to interference in their internal affairs.
420. The Committee notes that the Government in its reply emphasizes that CGT-Liberté, which was established in 2003, has been and will remain a social partner of the Government in Cameroon and at the International Labour Conference. In the light of the information provided, and given that the complainant organization had held a full congress at which new leaders were elected in accordance with the relevant laws and union regulations, the Committee urgently requests that the Government recognize without delay the legitimacy of the elected leaders of CGT-Liberté and resume its social dialogue with that organization so that it may participate in all official activities and events, national and international commissions and programmes, and workplace elections.

The Committee's recommendations

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

- (a) *The Committee urgently requests that the Government refrain from any form of interference in the internal affairs of CGT-Liberté in the interests of allowing its members to organize their administration and activities and to elect their representatives freely.***
- (b) *The Committee urgently requests that the Government recognize without delay the legitimacy of the elected leaders of CGT-Liberté and resume its social dialogue with that organization so that it may participate in official activities and events, national and international commissions and programmes and workplace elections.***

CASE NO. 2814

INTERIM REPORT

Complaint against the Government of Chile presented by

- the Sindicato Número Dos El Bosque (SNDB) and**
- the National Federation of Forestry Sector Transport Trade Unions (Federación Nacional de Sindicatos del Transporte Forestal) (FNSTF)**

Allegations: The dismissal of 65 trade union members for taking part in a strike and anti-trade union practices in the forestry transport sector

422. The complaint is set out in a communication submitted by Trade Union Number Two “El Bosque” (Sindicato Número Dos El Bosque – SNDB) and the Federation of National Forestry Sector Transport Trade Unions (Federación Nacional de Sindicatos del Transporte Forestal – FNSTF), dated 26 August 2010. The SNDB presented new allegations in a communication dated 26 August 2011.

423. The Government sent its observations in a communication dated 1 March 2011.

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

A. The complainants' allegations

425. In a communication dated 26 August 2010, the SNDB and the Federation of National Forestry Sector Transport Trade Unions and Allied Workers of Chile alleged that the abovementioned trade union called a general work stoppage, starting on 24 March 2009, on the grounds of the company's failure to pay wages for a seven-day week, in spite of the fact that article 45 of the Chilean Labour Code provides for remuneration for the seventh day of a calendar week (and public holidays), and the serious lack of security at the

workplace, with lorries travelling through the territory of the indigenous Mapuche community (considered a “red zone” or zone of ethnic unrest), both by day and by night. The strike aimed to attract the attention of the forestry sector company, Forestal Mininco SA, namely the parent company which awards contracts for forestry and forestry sector transport services to subcontractors. The strike lasted for three days and ended on 27 March 2009, following the signing of an agreement with the Chilean National Labour Director, who agreed that a statement would be issued, within a period of 30 days, calling on the employers to pay wages for a seven-day week.

426. Nevertheless, the complainant organizations claim that the company Servicios Forestales El Bosque SA subsequently dismissed only the workers who were trade union members, on the grounds that they had been absent from work for two consecutive days, when in fact they had been exercising their right to strike.
427. The complainant organizations have submitted the case which was presented before the Labour Court in Los Angeles on 31 August 2009, and call into question the criteria used by the competent judge to rule against the 36 complainants, who were all trade union members (these workers had been dismissed; a total of 65 workers lost their jobs). They also brought complaints relating to other issues presented before the authorities, regarding anti-trade union practices and the company’s failure to comply with the provisions of the collective bargaining agreement.
428. In their communication dated 26 August 2011, the complainant organizations enclosed a copy of the ruling of the Labour Court in Los Angeles, dated 22 July 2011, which fined Servicios Forestales El Bosque SA 100 tax units for unfair or anti-trade union practices (the failure to deduct trade union dues for the benefit of the complainant trade union, obstacles to collective bargaining and favouritism towards another trade union).

B. The Government’s reply

429. In its communication dated 1 March 2011, the Government indicated that the complainant organizations referred to a strike (general work stoppage) held from 24 to 27 March 2009, held in protest against the company’s failure to pay wages for a seven-day week, under the provisions of article 45 of the National Labour Code, which aims to guarantee remuneration for Sundays and public holidays for workers paid exclusively on a daily basis. The work stoppage also intended to demonstrate the workers were unhappy with the prevailing lack of security at work, namely the fact that they were required to travel, by both day and night, through areas viewed to be zones of ethnic unrest involving the Mapuche indigenous community. According to the allegations, the strike aimed to raise Forestal Mininco SA’s awareness of these problems. However, while steps were being taken to end the strike (general work stoppage), Servicios Forestales El Bosque SA allegedly dismissed only the workers who were trade union members, on the grounds that they had been absent from work for two consecutive days, namely the period during which they had been exercising their right to strike.
430. With regard to the other issues mentioned in the complaint (the trade union’s agreement with the National Labour Directorate, as well as the reference to the “parent company” status of Forestal Mininco SA), the Government indicates that these issues are in no way related to any anti-trade union practices, and it therefore has no comments to make on those matters. However, it wishes to explain that the reference to “parent company” status relates to provisions on subcontracted labour, as laid down in Chilean procedural legislation, namely article 183 of the Labour Code, which stipulates that, in order for a company to hold “main” enterprise (parent company) status vis-à-vis a contractor or subcontractor, a number of criteria must be met and, consequently, the existence of a mere civil relationship between the two companies does not imply the existence of any labour

obligations (these circumstances are set out in the provisions of article 183 of the Labour Code and Decree No. 141, dated 2005, issued by the Labour Directorate).

- 431.** The Government states that the right to strike and collective bargaining is enshrined in article 19(16), subparagraphs (4) and (5) of the Chilean Constitution, and in article 303 et seq. of the Labour Code. These provisions stipulate that, in Chile, collective bargaining is an essential prerequisite to the right to strike, without which no strike action can take place. The parties may meet on as many occasions as are deemed necessary during a set period of time (45 or 60 days, depending on the case), in order to negotiate common labour conditions and wages. It is only if the two parties fail to achieve an agreement within the time frame laid down by law that the workers obtain the prerogative to exercise their right to strike, in which case their labour contracts are suspended (article 377 of the Labour Code) and the workers are under no obligation to be present at work during the strike period, while the employer is under no obligation to remunerate the striking workers.
- 432.** In this case, and in line with what has already been established, the situation described does not meet the criteria for strike action, as laid down in the National Labour Code, because the strike was not preceded by a process of collective bargaining. Thus, the labour contracts of these workers were not suspended as a result of the work stoppage, and their obligations towards the company remained unchanged, especially the duty to be present at work. The workers failure to fulfil that duty provided the grounds for their dismissal under article 160(3) of the Labour Code, namely the failure of an employee to turn up to work without a valid reason for two consecutive days, two Mondays in any given month or a total of three days in any one month. The behaviour of the workers, namely the work stoppage organized outside of the framework of the collective bargaining process, also constituted a violation of the principle whereby the employer had the right to organize, manage and run their own company, in line with the provisions of article 306 of the National Labour Code.
- 433.** The information above is also supported by Decree No. 0648 of the National Labour Directorate, dated 7 February 2011 which, in line with its inspection mandate under Chilean law, stipulates that “with regard to the mass dismissals during the month of March 2009, the acting inspector indicates that, according to the information obtained, the reason for the dismissals was an unlawful strike, namely one not preceded by a process of collective bargaining”.
- 434.** The Government stresses that article 19(12) of the Chilean Constitution guarantees the right to protest, in that it provides for freedom of expression, without any kind of censure. Thus, the workers’ individual or collective right to protest is not in any way limited to the collective bargaining process, as workers may legitimately demonstrate their discontent as regards economic and social matters affecting their interests by exercising this constitutional right. However, a complete, uninterrupted work stoppage, lasting two days and called without prior warning, seems an excessive response, as it upsets the fair balance between workers and employers, with regard to the framework of normal labour relations and participation, thereby also affecting other constitutional rights.
- 435.** The Government, having established that, under Chilean legislation, the dismissals in question had all been legitimate and justified, needs to determine whether only trade union members were dismissed, or whether the dismissals also affected workers who were not trade union members, in order to determine whether the workers’ employment contracts were terminated on arbitrary grounds, suggesting that these workers had been unfairly dismissed. The Government states that the ruling of the Labour Court in Los Angeles, dated 31 August 2009 (RIT-0-6-2009), as well as Decree No. 0648 of the Labour Directorate, dated 7 February 2011, which reported on the action taken by the Labour Directorate in this matter, revealed no signs of arbitrary discrimination with regard to the

dismissal only of workers who were trade union members. Moreover, the dismissed workers did not file any complaints or take legal action in the labour courts alleging anti-trade union practices.

436. To conclude, a reading of the complaint in question, the attached background documents and the contents of Decree No. 0648 of the National Labour Directorate, does not seem to indicate any violation of 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), both of which Chile has ratified. The Government wishes to reiterate the information stated above, namely the fact that the workers' claims were rejected by the court in its ruling of 31 August 2009 (RIT 0-6-2009 and 0-12-2009), and the claimants' appeal for annulment was dismissed by the Concepción Court of Appeal (Case No. 76-2009). Furthermore, the appeal launched by the workers on 10 November 2009 for the "unification of jurisprudence", was rejected by the Supreme Court (case No. 9301/2009). Finally, it should be added that the workers not involved in these legal proceedings signed their respective settlements.
437. The Government, given the fact that state bodies are required to remain independent and respect the obligation "not to perform judicial functions, assume jurisdiction of cases pending before the courts, review the grounds for or contents of court rulings or reopen terminated proceedings", undertakes to keep the Committee on Freedom of Association informed of the progress made on the issues still pending in this matter.

C. The Committee's conclusions

438. *The Committee observes that, in the case presently under examination, the complainant organizations allege, first of all, anti-trade union practices by the company Servicios Forestales El Bosque SA. The Committee notes that these allegations have already been dealt with in a ruling by the Labour Court of Los Angeles on 22 July 2011, which issued the company with a fine for anti-trade union practices. In the substantive part of the ruling, the court indicated the following:*

In light of these considerations, and in line with the provisions of articles 289 et seq. and 446 et seq. of the Labour Code, the court rules that:

- I. *The respondent, namely Servicios Forestales El Bosque SA, as indentified above, engaged in unfair or anti-trade union practices, which had an impact on freedom of association, by asking the workers who had not participated in collective bargaining process to choose the trade union organization to which the company would pay their legal contribution; the company also failed to withdraw the percentage of trade union members' dues owed to Trade Union Number Two, in line with the provisions of article 346 of the Labour Code, from the wages of those workers – who performed similar tasks – and to whom the company had granted a Christmas/holiday bonus before 28 December 2010, namely when the only collective agreement in force containing these benefits was the one which had been negotiated with Trade Union Number Two.*
- II. *As a result, the respondent is required to pay a fine of 100 monthly tax units to the National Training and Employment Service (Servicio Nacional de Capacitación y Empleo).*
- III. *Moreover, as there is, to date, no proof that these unfair practices have ceased, once the sentence has been carried out and thereafter, the percentage stipulated in article 346 of the Labour Code must be withdrawn for the workers mentioned in part I of this ruling, and paid to Trade Union Number Two.*
- IV. *Once the sentence has been carried out, the Labour Directorate shall be officially informed and sent a copy of this judgement, in compliance with the provisions of article 294bis of the Labour Code.*
- V. *The accused party is required to pay the legal costs, amounting to 500,000 pesos.*

439. *In light of the information above, the Committee will not pursue its examination of these allegations.*
440. *The Committee also notes that the complainant organizations allege that a three-day strike held in March 2009, relating to the non-payment of wages and the lack of security experienced by transport workers travelling through a zone of ethnic unrest involving the Mapuche indigenous community, led to the dismissal of 65 trade union members. The complainant organizations state that the strike aimed to attract the attention of the company Forestal Mininco SA, namely the parent company contracting transport and forestry sector services from subcontractor employers, and that Servicios Forestales El Bosque SA was responsible for dismissing 65 workers, who were all trade union members. The complainant organizations stress that the strike ended on 27 March 2009, after an agreement was reached with the National Labour Director, who agreed to issue a statement calling on the employers to pay wages for a seven-day week (that is to say, including public holidays and Sundays, in line with the provisions of the Labour Code). Finally, the complainant organizations enclose the ruling of the Court of First Instance, relating to the dismissal of 36 workers, which indicates that “as the fact that the reason for the complainants’ failure to perform the duties stipulated in their contracts with Servicios Forestales El Bosque SA was their participation in a strike called by the trade union to which they belonged, which meant that they were unable to autonomously decide whether to work or not, was not recorded in the complaints as the grounds for their absence from work on 25 and 26 March 2009, it cannot be taken into account by the court without leading to a ruling on matters which had not been presented before the court, and which would make the court’s verdict subject to annulment.*
441. *The Committee notes the Government’s statements, according to which: (1) under the legislation in force in Chile, collective bargaining constitutes an essential prerequisite to the right to strike, without which no strike action can take place; the collective bargaining process allows the relevant parties to meet on as many occasions as are necessary within a set time frame (45 or 60 days, depending on the case), in order to negotiate common working and wage conditions; (2) only if the parties cannot reach an agreement within the time frame established by law do the workers have the prerogative to exercise their right to strike, in which case the labour contract is considered suspended (article 377 of the Labour Code), so that the workers are under no obligation to be present at the workplace during the strike, while the employer is under no obligation to pay their wages; (3) in the specific case brought by the complainant organizations, the situation described did not meet the criteria for strike action under the provisions of the National Labour Code, as it had not been preceded by a process of collective bargaining; as a result, the labour contracts of those workers were not suspended as a consequence of the strike, and their obligations towards the company remained unchanged, especially their duty to be present at work. The workers’ failure to fulfil that duty resulted in their dismissal, in line with the provisions of article 160(3), of the Labour Code relating to the failure of a worker to perform their duties without a valid reason on two consecutive days, two Mondays in any given month or a total of three days during that period of time; (4) the description of the behaviour of the workers, namely a complete work stoppage outside of the context of collective bargaining does, on the other hand, constitute a breach of the principle whereby the employer has the right to organize, manage and run their own company, as laid down in article 306 of the National Labour Code; (5) Decree No. 0648 of the National Labour Directorate, dated 7 February 2011, in accordance with its inspection mandate under Chilean law, stipulates that: “with regard to the mass dismissals which took place in March 2009, the acting inspector indicates that, according to the information gathered, the workers were dismissed following an unlawful strike, namely a strike which took place outside the context of a collective bargaining process”; (6) the workers’ right to protest permits them to legitimately demonstrate their dissatisfaction with their economic and social circumstances and is not limited to the context of the collective bargaining process;*

however, a complete, uninterrupted work stoppage lasting two days and called without prior notice appears excessive, as it upsets the fair balance between workers and employers with regard to normal labour relations and participation, and also has an impact on other constitutional rights; (7) the reading of ruling RIT 0-6-2009, issued by the Los Angeles Labour Court, namely the Court of First Instance, on 31 August 2009, and Decree No. 0648, issued on 7 February 2011, which provides information regarding action taken by the Labour Directorate in this matter, reveal no indication of arbitrary treatment, namely the dismissal of only the workers who were trade union members. Moreover, the dismissed workers did not file any claims with a labour court or appeal for the protection of the courts with regard to anti-trade union practices; (8) the judicial authorities rejected the claims of the dismissed workers in a ruling issued on 31 August 2009 (RIT 0-6-2009 and 0-12-2009) and the workers' subsequent appeal for annulment before the Court of Appeal in Concepción (Case No. 76-2009) was also dismissed, as was the workers' appeal for "unification of jurisprudence" before the Supreme Court, on 10 November 2009 (Case No. 9301/2009); (9) the workers not involved in these court proceedings (29 of the workers, according to the information available) signed their respective settlements.

442. The Committee concludes that, according to the Government, the dismissal of the 65 trade union members was the result of a work stoppage, lasting two days and implemented without prior notice, and was linked to the fact that the legislation in force does not allow workers to exercise their right to strike outside of the framework of a collective bargaining process. The Government stresses the fact that the abovementioned trade union members submitted no allegations of anti-union practices relating to the strike to the judicial authorities, but instead filed complaints relating to other matters.
443. The Committee is of the opinion that calling a strike if necessary, to protest against the non-payment of part or all of the workers' wages and demand better security for transport and forestry services constitutes a legitimate trade union activity, including in cases where there is no negotiation process under way to draw up a collective bargaining agreement. In particular, the Committee notes that the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 531].
444. In the present case, in light of the principles mentioned above, although the Government has stressed that the strike was called without prior notice, the Committee observes that, according to the Government's reply, Chilean legislation does not, in any case, permit strike action (with or without prior notice) outside of the context of the collective bargaining process. The Committee also observes that, in the case presented before the Court of First Instance, the dismissed workers did not indicate any connection between their dismissal and the strike or work stoppage. However, as the Government has not sent the rulings of the Concepción Court of Appeal or the Supreme Court ("appeal for unification of jurisprudence") relating to the claims presented by the members of the complainant trade union, the Committee requests the Government to send these rulings, as well as Decree No. 0648 of the National Labour Directorate, dated 7 February 2011, so that it may pronounce itself on these allegations in full knowledge of all the facts of the case.

The Committee's recommendation

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

In order to pronounce itself on this case in full knowledge of all the facts relating to the unlawful nature of the strike or work stoppage by the complainant, as well as the dismissal of trade union members, the Committee requests the Government to send the text of the rulings of the Concepción Court of Appeal and the Supreme Court, with regard to the cases brought by the complainant organizations, as well as Decree No. 0648 of the National Labour Directorate, dated 7 February 2011.

CASE NO. 2710

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

Complaint against the Government of Colombia presented by

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

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

446. The Committee last examined this case at its November 2010 meeting [see 358th Report, approved by the Governing Body at its 309th Session, paras 382–422].

447. The Government sent its observations in a communication dated 27 March 2011.

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

A. Previous examination of the case

449. In its previous examination of the case, the Committee made the following recommendations [see 358th Report, para. 422]:

- (a) With regard to the acts of violence allegedly perpetrated on the company's premises by anti-riot police, the Committee, while noting the different versions of events supplied by the complainant organization and the Government and, while deeply regretting that a number of workers sustained injuries, requests the Government to keep it informed of the outcome of the administrative inquiry and of the ruling handed down on the complaint lodged by the company in connection with the damage caused to its installations.
- (b) With regard to the alleged disappearance of the president of the Santa Marta branch of SINTRAIME, José de Jesús Orozco, the Committee notes the Government's statement that he returned to work as normal after the work stoppage and therefore did not disappear on 19 April 2009 as asserted by the complainant organization, but that it has nevertheless sought information on the alleged incidents from the competent authorities. The Committee requests the Government to keep it informed of the matter and to send it

the relevant information when it becomes available. It also requests the Government to send its observations on the alleged arrest of several workers and to inform it whether they are presently at liberty and if any penal charges have been brought against them.

- (c) With regard to the refusal to negotiate the list of demands, the Committee requests the Government to indicate whether the planned negotiations have begun and expects that they will enable an agreement to be reached that will put an end to the dispute. It requests the Government to keep it informed of any progress in this area.
- (d) With regard to the banning of the work stoppage by the workers affiliated to SINTRAIME, the Committee requests the Government to keep it informed of the outcome of the appeal for protection lodged by the company against SINTRAIME for violating the freedom to work of non-strikers and to send it a copy of the relevant ruling.
- (e) With regard to the anti-union dismissals alleged by FUNTRAENERGETICA (a committee of several union leaders), the Committee deeply regrets that the Government has not provided any information on the subject and requests it to do so without delay.

B. The Government's reply

- 450.** In its communication dated 27 March 2011, the Government states with regard to the acts of violence allegedly committed on the premises of the enterprise by anti-riot police that, as repeatedly pointed out by the Government, the State rejects violence in any form, regardless of the perpetrator. Accordingly, it has launched a number of activities aimed at improving social dialogue and further strengthening the preventive inspection system, in order to create spaces for social dialogue between the actors involved in production and workers' organizations in a collaborative environment. However, the Government reiterates that the national police has exceptional powers to use force to prevent disruption of the public order and to restore it; it will only use means authorized by law, opting for effectiveness while causing the least damage to personal integrity and property. Police officers are legally authorized to use physical force in the performance of their duties if they cannot enforce compliance with the law by other means such as dialogue, persuasion or warning. In the present case the police responded to the urgent need to restore public order, and it is important to recall that the work stoppage held by SINTRAIME was not peaceful, as there was serious damage to the installations of the enterprise.
- 451.** As regards the administrative investigation against SINTRAIME for violation of the freedom to work of non-striking workers, the Government states that the enterprise reiterates that the work stoppage led by the SINTRAIME trade union was not peaceful: damage was caused to rail installations, workshops and doors of the enterprise facility. In addition, it barred workers' access to the facility and halted operations in the facility, to the detriment of the enterprise's operations and of other persons relying on those operations to carry out their work, causing economic and operational losses. Acts of vandalism were also committed on the installations and machinery of the enterprise, forcing the enterprise to call the police to safeguard its property and staff.
- 452.** That situation prompted the enterprise to file an application for the strike to be declared illegal, as it considered the work stoppage to be an improper suspension of the activities of an enterprise. The Supreme Court of Justice declared the stoppage illegal in ruling No. 40428 of 3 June 2009.
- 453.** Given that the actions of the trade union constituted a violation of the prohibitions applicable to trade unions as laid down in the Substantive Labour Code, the enterprise submitted a request to the Ministry of Social Protection asking that the relevant penalties be applied, and that the union be fined for the violence and material damage caused to the enterprise. In addition, it filed administrative proceedings against SINTRAIME for the acts of violence committed during the strike, which, it alleged, jeopardized the state property managed by the enterprise. The proceedings are currently under way in the Ministry of

Social Protection, under the responsibility of Inspector No. 16, and are pending a decision on a request for evidence submitted by the defendant trade union.

454. As regards the allegations concerning the president of the Santa Marta branch of SINTRAIME (Mr José de Jesús Orozco), the Government states that, upon requesting information from the competent authorities, it was informed that proceedings have been brought against the union official by local public prosecutor's office No. 28 of Bosconia for presumed damage to property involving the burning and destruction of a dump truck. The proceedings are now in the trial stage in the El Copey court of mixed jurisdiction.
455. As regards the allegation that several workers had been arrested, the Government states that according to the information it has received, no worker is being held in custody for the events of 24 March 2009.
456. As regards the refusal to negotiate the list of demands, the enterprise states that the process of collective bargaining with SINTRAIME started on 4 September 2009 in compliance with a judgment order handed down in *tutela* proceedings by the Supreme Court of Justice (ruling No. 24753 of 15 September 2009). Meetings were scheduled for 4, 5, 11, 12, 18, 19 and 23 November 2009, with four to ten hours of meetings per day, and paid leave was granted to the workers designated as bargaining representatives during the entire period of direct bargaining. The enterprise adds that it granted SINTRAIME 12.5 million pesos as bargaining costs and issued 21 airline tickets to enable union bargaining representatives and advisers to travel during the direct bargaining phase. Despite the offers made by the enterprise, no agreement was reached during bargaining between the enterprise and the union, and the union therefore opted to refer the case to an arbitration tribunal. In decision No. 00001497 of 29 April 2010, the Ministry of Social Protection ordered the establishment of an arbitration tribunal to examine and settle the collective labour dispute between the enterprise and SINTRAIME. On 4 August 2010, the Ministry of Social Protection constituted the tribunal, with one arbitrator appointed by the enterprise, another by SINTRAIME and the third from the Ministry roster. The tribunal began its sessions on 27 January 2011, with a ten-day deadline to settle the dispute. The enterprise explains that even in the absence of a collective agreement, it grants SINTRAIME the same benefits as those laid down in the collective agreement concluded with SINTRAVIFER (another trade union in the enterprise, with which a collective agreement was negotiated), according to the principle of equality among its workers; it lists some of the benefits, such as allowances, non-statutory bonuses, premiums and wage increases, including a 4.17 per cent wage increase granted in January 2011.
457. As regards the *tutela* proceedings instituted against SINTRAIME, the enterprise states that the SINTRAVIFER trade union reported in its written statement that SINTRAIME violated its right to work, arbitrarily blocking access to the facilities, and since this was an illegal work stoppage it affected the workers, as the employer stopped paying their wages. SINTRAIME's conduct affected not only the workers and their daily livelihoods, but also the general interest of transport users to whom the enterprise provided its services. The Labour Appeals Chamber of the Supreme Court of Justice ruled on 19 May 2009 that the *tutela* proceedings were irreceivable on the grounds that an appeal judgment was still pending regarding the Supreme Court ruling declaring the strike illegal and that, given that another judicial remedy was pending, the appropriate procedure was that provided for in Act No. 1210 of 2008 (declaration of a strike). This ruling was contested, and on 14 July 2009 the Criminal Chamber of the Supreme Court of Justice upheld the ruling handed down by the court of first instance, on the grounds that "*as the Labour Appeals Chamber of this Court had already pointed out, another judicial remedy is pending, which is the special brief, priority summary procedure laid down for this purpose in Act No. 1210 of 2008*". The enterprise explains further that the ruling handed down by the Chambers of the Supreme Court in these *tutela* proceedings upheld the ruling declaring the strike illegal, on

the grounds that that ruling was the appropriate mechanism for determining whether the union was acting in accordance with the law; this was done in the ruling handed down on 3 June 2009 by the Labour Chamber of the Supreme Court, which found that the work stoppage led by SINTRAIME was illegal and infringed the regulatory framework governing the prohibitions applicable to trade unions.

458. As regards the anti-union dismissals alleged by FUNTRAENERGETICA (a committee of several union officials), the Government reiterates that the declaration of illegality of the strike is no longer within the Ministry's remit and that the judicial authority had accordingly declared the strike illegal in a ruling handed down on 3 June 2009. According to the Government, the enterprise requested the Ministry of Social Protection for authorization to terminate the contracts of employment of the workers who had actively participated in the illegal work stoppage, and to that end instituted the required disciplinary proceedings, observing due process and the right to defence.
459. In addition, the Ministry of Social Protection, in decision No. 2470, refrained from issuing a decision on the request submitted by the legal representative of the enterprise on the grounds that it was not competent to do so, stating, in the reasons for the decision, that it is the enterprise, as the party to the employment relationship and holder of the rights deriving therefrom, which examines the facts, determines their nature, exhausts the procedure and takes a decision; it is responsible for its actions, given that dismissal and the circumstances surrounding it may give rise to disputes, rights and conflicts that must be settled by the competent bodies. Accordingly, the Ministry was not competent to issue a decision on the request, and therefore left the enterprise the freedom, under its own responsibility, to take the decisions it deemed appropriate, based on the Supreme Court ruling declaring the strike illegal. In line with the reasoning given in decision No. 2470 of 2009, the enterprise provided the information and documents attesting that it had initiated a procedure to determine the individual conduct and degree of participation of each of the workers it intended to dismiss. According to the information provided by the enterprise, it followed the guidelines and procedures established by the law for such decisions.
460. The enterprise states that due process was fully observed in terminating the contracts of employment. It referred to the competent judicial and administrative authorities to determine that SINTRAIME's presence and conduct from 24 March to 19 April 2009 in the work stoppage were entirely illegal. In taking the decision to terminate the employment contracts of the persons who had actively participated in the illegal stoppage held by the trade union, the enterprise complied fully with all of the procedures established by the law and precedent. The workers were given the opportunity to present their arguments, by requesting them to explain their conduct and describe their participation in the legal work stoppage. The procedure was exhausted in compliance with the requirements and with article 29 of the Political Constitution and section 115 of the Substantive Labour Code. Since the legislation provides for several authorities to which persons – in this case, the workers – may appeal if they feel their rights are being infringed, the workers who participated in the strike and whose contracts were terminated by the enterprise in accordance with the Substantive Labour Code have brought their case to the courts, so that it will be a judge of the Republic, acting in full independence, who issues a ruling on the arguments put forward by the parties.
461. In this regard, the enterprise states that *tutela* ruling No. 2009-00035 of the Eighth Municipal Criminal Court refers to observance of the legal procedures for termination of the employment contracts of the persons who had actively participated in the illegal work stoppage. The issue of whether the dismissals were legal and appropriate was examined in the context of *tutela* proceedings when 35 workers brought an action against the enterprise. Ruling in first instance, the Eighth Municipal Criminal Court rejected the *tutela* proceedings instituted by the workers on the following grounds: “*there is no flagrant*

indication of violation of trade union immunity, precisely because it is the enterprise itself and the plaintiffs, who were aware that the strike in which they participated as members of SINTRAIME had been declared illegal in a decision handed down by the Supreme Court of Justice on 3 June 2009; they submitted to the Ministry of Social Protection documents and information justifying the termination of the contracts of employment of some of the employees who participated in the work stoppage, which, according to section 65 of Act No. 50 of 1990 ... In view of the above, this court finds that the defendant complied with the legal provisions in terminating the contracts of employment of the plaintiffs". The decision was upheld by the 51st Criminal Court of the Backlog Reduction Circuit on 15 December 2009, which ruled that: "*In the light of the foregoing legal framework, this court finds that the matter raised by the plaintiff cannot be construed as a violation of fundamental rights or unlawful conduct attributable to the enterprise, in which disciplinary proceedings were brought against several of the plaintiffs.*"

462. The enterprise adds that 30 of the 35 dismissed workers have court cases pending with the 20th Labour Court of the Bogotá Circuit, filed under No. 2009-700, seeking reinstatement.

C. The Committee's conclusions

463. The Committee recalls that the allegations pending in this case refer to acts of violence by police, anti-union dismissals and arrests of trade unionists.
464. As regards the acts of violence allegedly committed in the premises of the FENOCO enterprise by anti-riot police, the Committee notes that the Government reiterates that police officers are legally authorized to use physical force in the performance of their duties if they cannot enforce compliance with the law by other means such as dialogue, persuasion or warning, and that, in the present case, the police responded to the urgent need to restore public order, as the work stoppage held by SINTRAIME was not peaceful. The Committee notes that the Government refers to damage to property and acts of vandalism committed on the installations and machinery of the enterprises. As regards the administrative investigation initiated against SINTRAIME for damage to rail installations, workshops and doors of the enterprise facility, the Committee observes that, according to the enterprise, the administrative proceedings are now under way in the Ministry of Social Protection, under the responsibility of Inspector No. 16, pending a decision on the request for evidence submitted by the defendant trade union. As a general principle, the Committee recalls that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 667]. The Committee requests the Government to keep it informed of developments and to send a copy of the decision once it is handed down.
465. As regards the tutela proceedings instituted against SINTRAIME for violating the right to work of non-striking workers, the Committee notes that the enterprise links this legal action to the acts of violence mentioned above and that it states that: (1) the Labour Appeals Chamber of the Supreme Court of Justice ruled on 19 May 2009 that the tutela proceedings were irreceivable on the grounds that an appeal judgment was still pending regarding the ruling declaring the strike illegal; (2) this ruling was contested, and on 14 July 2009 the Criminal Chamber of the Supreme Court of Justice upheld the ruling handed down by the court of first instance; and (3) the issue of the legality of the strike was decided in the ruling handed down on 3 June 2009 by the Labour Chamber of the Supreme Court, which found that the work stoppage led by SINTRAIME was illegal and infringed the regulatory framework.

- 466.** *As regards the allegations concerning the disappearance of the president of the Santa Marta branch of SINTRAIME (Mr José de Jesús Orozco), the Committee recalls that the Government had stated, in its previous reply, that after the work stoppage he had resumed his normal work for the enterprise, and hence had not disappeared on 19 April 2009 as stated by the complainant organization; in its reply, the Government indicated that it had requested information from the competent authorities on the matters raised in the allegation. The Committee observes that the Government does not provide any new information on the whereabouts of this trade union official and therefore reiterates its previous recommendation and urges the Government, and the complainant organization, to send new detailed information, without delay, on the alleged facts and on the whereabouts of this trade union official.*
- 467.** *As regards the allegation that several workers had been arrested after the work stoppage held by SINTRAIME, the Committee notes that, according to the Government, no worker is currently being held in custody for the events of 24 March 2009. The Committee requests the Government to provide information on the alleged arrests of workers immediately following the work stoppage in March 2009, and which the Committee understands were temporary, and if there are any penal charges pending against them.*
- 468.** *As regards the refusal to negotiate the list of demands presented by SINTRAIME, the Committee notes that, according to the enterprise: (1) the process of collective bargaining with SINTRAIME started on 4 September 2009; (2) despite the offers made by the enterprise in terms of economic benefits and trade union leave, no agreement was reached; (3) the trade union opted to refer the matter to an arbitration tribunal, which began its sessions on 27 January 2011, with a ten-day deadline to settle the dispute. The Committee observes that according to the enterprise, even in the absence of a collective agreement, it grants SINTRAIME the same benefits as those laid down in the collective agreement concluded with SINTRA VIFER, according to the principle of equality among its workers. The Committee requests the Government to send it the arbitration award handed down on the list of demands presented by SINTRAIME.*
- 469.** *As regards the anti-union dismissals alleged by FUNTRAENERGETICA, the Committee notes that, according to the enterprise, 35 dismissed workers brought an action against the enterprise and that, ruling in first instance, the Eighth Municipal Criminal Court rejected the tutela proceedings instituted by the workers on the grounds that: “there is no flagrant indication of violation of trade union immunity”, a decision which was upheld by the 51st Criminal Court of the Backlog Reduction Circuit on 15 December 2009. The Committee notes further that 30 of these 35 workers have court cases pending with the 20th Labour Court of the Bogotá Circuit, seeking reinstatement. The Committee requests the Government to keep it informed in this regard and to send a copy of the rulings handed down.*

The Committee’s recommendations

- 470.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *As regards the administrative investigation initiated against SINTRAIME for damage to rail installations, workshops and doors of the enterprise facility, the Committee observes that, according to the enterprise, the administrative proceedings are now under way in the Ministry of Social Protection, under the responsibility of Inspector No. 16, pending a decision on the request for evidence submitted by the defendant trade union. The*

Committee requests the Government to keep it informed of developments and to send a copy of the decision once it is handed down.

- (b) As regards the allegations concerning the disappearance of the president of the Santa Marta branch of SINTRAIME (Mr José de Jesús Orozco), the Committee observes that the Government does not provide any new information on the whereabouts of this trade union official, and therefore reiterates its previous recommendation and urges the Government, and the complainant organization, to send without delay new detailed information on the alleged facts and on the whereabouts of this trade union official.*
- (c) As regards the allegation that several workers had been arrested after the work stoppage held by SINTRAIME, the Committee, while noting that, according to the Government, no worker is currently being held in custody for the events of 24 March 2009, requests the Government to provide information on the alleged arrests of workers immediately following the work stoppage in March 2009, and which the Committee understands were temporary, and if there are any penal charges pending against them.*
- (d) As regards the refusal to negotiate the list of demands presented by SINTRAIME, the Committee observes that the trade union opted to refer the dispute to an arbitration tribunal and requests the Government to send the arbitration award handed down in this context.*
- (e) As regards the anti-union dismissals alleged by FUNTRAENERGETICA, the Committee notes that 30 dismissed workers have court cases pending with the 20th Labour Court of the Bogotá Circuit, seeking reinstatement. The Committee requests the Government to keep it informed in this regard and to send a copy of the rulings handed down.*

CASE NO. 2793

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

Complaint against the Government of Colombia presented by

- **the Confederation of Workers of Colombia (CTC) and**
- **the National Union of Workers of Family Compensation Funds (SINALTRACAF)**

Allegations: Systematic violations of collective agreements in force as regards union leave and wages

- 471.** The complaint is contained in two communications from the Confederation of Workers of Colombia (CTC) and the National Union of Workers of Family Compensation Funds (SINALTRACAF) dated 24 and 27 May 2010. SINALTRACAF sent additional information in communications dated 11 August and 9 November 2010.

472. The Government sent its observations in communications dated 18 February and 4 March 2011.
473. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant organizations' allegations

474. In its communications of 24 May, 11 August and 9 November 2010, SINALTRACAF states that since 2005 the Government has been implementing administrative intervention measures concerning a number of family compensation funds (Comfenalco Tolima, Comfatolima, Comcaja, Confaca, Comfaba, Comfaoriente and Comfaboy), and the suspension of this measure is now being sought. A number of petitions have been addressed to the Superintendency for Family Benefits setting out the juridical arguments for discontinuing the intervention, according to which it grants sweeping powers to a public official, the Special Intervention Agent, who acts in the place of elected officials, thereby preventing workers from participating in the formulation of guidance given to the directors of the family compensation funds.
475. The complainant organization highlights the systematic violation of the collective labour agreement, due process and the right of association, by the administrative director of the Comfenalco Tolima Family Compensation Fund (hereinafter "the Fund"), by the Special Intervention Agent and by the Superintendency for Family Benefits. The complainant organization explains that there have been violations of the relevant collective agreements, in particular the clause on trade union leave of absence (clause 4 of the collective agreement in force) and the clause concerning the Labour Relations Committee (clause 12 of the 2001 collective agreement) according to which at least one meeting of that Committee must be held each month. The complainant organization stresses that in 2010, there were no such meetings, and that without sound relations and communication between workers and employer it is difficult to maintain a healthy working climate.
476. The complainant organization also explains that the Fund has not complied with the clauses relating to wage levels (clauses 1 and 8 of the collective agreement in force, clauses 13 and 14 of the 2007–08 collective agreement), staffing levels (clause 29 of the 1995 collective agreement), and increased allowances for replacing absent workers (clause 35 of the 2001 collective agreement), and that it has signed and deposited two collective agreements with the Ministry of Social Protection, Tolima Territorial Directorate, the first with SINALTRACAF and the second with the Association of Workers of Comfenalco Tolima (ASTRACOMTOL), in contravention of Decree No. 904 of 1951.
477. The complainant organization complains of unwarranted interference by the administration of the Fund and of Comfatolima, which granted leave of absence to all the members of SINALTRACAF for the purpose of attending the meetings of July 2009 and March 2010, without consultation with the Ibagué sectional subdirectorate, and alleges that pressure was applied by various representatives of the employers including by the Fund's fiscal inspector to encourage attendance at the March 2010 meeting in which, with the sponsorship of the directors of the two family compensation funds in question and without reaching a quorum, a sectional subcommittee of SINALTRACAF was elected in parallel with the legitimate one elected in July 2009 whose mandate was due to expire in July 2011. Labour proceedings were initiated on this issue and are still under way before the First Labour Court of Ibagué Tolima Circuit. The complainant organization emphasizes that the Fund claims recognition as a party to the proceedings through a petition with

which it also seeks to freeze the automated deductions of union dues, leave of absence, and ultimately the collective agreement in force.

- 478.** The complainant organization adds that trade union leave has been denied to the national officials of SINALTRACAF by the administrative director charged with managing the Fund by the Superintendency, including permanent union leave negotiated under the collective agreement in force, on the pretext that it was not known which of the union's national executive committees is the legitimate one; this is despite the fact that the other presumed executive committee is granted leave including at least one permanent leave arrangement; the situation needs to be changed by the Fund's administration by granting union leave and other such entitlements established for trade union representatives under article 39, paragraph 4, of the Constitution.
- 479.** The complainant organization alleges that the administrative interventions in Comfatolima and Comcaja prevent participation by workers' representatives in the Fund's direct council and ultimately in drafting any guidelines which they might provide for the sound administration of the Fund.
- 480.** The complainant organization indicates that Comfenalco Tolima and Comfatolima have disregarded the numerous summonses by the Ministry of Social Protection in connection with the alleged repeated non-observance of the collective agreement, as a result of which the territorial body passed two resolutions on 28 and 30 July 2010 under which these funds were fined the sums of 10.3 million pesos and 7.721 million pesos respectively for ignoring the orders of the labour inspector in the investigation instigated at the request of SINALTRACAF.
- 481.** Furthermore, in its communication of 9 November 2010, the complainant organization states that violations continue, aggravated by harassment of union officials in the form of disciplinary proceedings for using union leave granted under the collective agreement, and the unwarranted withholding of union dues also continues under the terms of a procedural order given by the First Labour Court of Ibagué Circuit.

B. The Government's reply

- 482.** In its communication of 18 February 2011, the Government states that the Office for Cooperation and International Relations requested information from the Territorial Directorate in the Department of Tolima and from the Superintendency of Family Benefits. The Superintendent sent his observations in a note dated 11 February 2011.
- 483.** The Superintendent states that, in the light of a review of Superintendency records, there has been no complaint from SINALTRACAF for alleged violations of union rights by the compensation funds Comfatolima, Comfenalco Tolima, Comcaja, Comfaca and Comfaboy.
- 484.** As regards Comfenalco Tolima, the Superintendent states that there are now three unions: two industry unions (SINALTRACAF and SINDICAJAS) and one company union (ASTRACOMTOL). SINALTRACAF, as an industry union, has members from Comfenalco Tolima and Comfatolima. There is an internal dispute both within the national executive committee, in which two separate committees claim to represent workers (one headed by Mr César Lozada and the other by Mr Saúl Betancourt Rico), and in the union's Ibagué section, where there also appear to be two separate entities claiming the right to represent workers in negotiations with the Fund. The Superintendent states that in Bogotá a national general assembly of delegates took place and elected an executive committee headed by Mr César Lozada, but that despite his election the previous committee headed by Mr Saúl Betancourt Rico continues to operate.

485. The Superintendent indicates that the section SINALTRACAF is the majority union and ASTRACOMTOL the minority union. Both have signed collective agreements with the Fund and these expired in December 2010. According to the information received, and given that the legal status of the two boards has not been determined, the Fund negotiated a list of demands with ASTRACOMTOL, which has an active labour committee with which the Fund has previously concluded collective agreements in the past two years. SINDICAJAS is an industry union that is currently inactive.
486. The Superintendent states that on 14 December 2010 the Head of Strategic Development of the Family Compensation Fund informed SINALTRACAF that two lists of demands had been presented by the same union, and asked it to ascertain with which of the executive committees talks would be conducted. Mr Saúl Betancourt Rico, as national president of SINALTRACAF, sent out a number of letters requesting leave of absence from the administration to allow attendance by his committee's members at union meetings; this request was turned down by the administration, and the union's national executive headed by Mr César Lozada also denied the legitimacy of the other committee in favour of its own. The administration accordingly, as the matter came under its remit, sought a legal clarification from the Ministry of Social Protection and the matter is under consideration. The First Labour Court of Ibagué Circuit is currently considering which of the two executive committees is legally constituted.
487. The Superintendent sets out in the following terms some of the background facts which, in his view, confirms that SINALTRACAF's union rights have not been violated.
- (1) Mr Saúl Betancourt Rico, in a written application to the Fund, sought the application of the fourth clause of the collective agreement, that is, permanent leave of absence. The Fund did not consider this request because it deemed it to be not appropriate in terms of its own interests and in the absence of legal clarity.
 - (2) On 28 March 2009, a general assembly elected an executive committee with the following members: César Lozada, Luis Alberto Ogaza Furnieles, Mario Rubén Conteras Parada, María Rosario Castro Ríos, Jairo Díaz Méndez, Sebastián Quintero Valencia, Flor Mery Vargas Guerrero, Juan Marín Almeida Castro, Doralía Rocha Herrán and Elizabeth Liñán Rapalino.
 - (3) On 6 April 2009, Mario Rubén Conteras Parada, General Secretary of SINALTRACAF, informed the Fund by fax of the SINALTRACAF national delegates' assembly on 28 March 2009. In the same communication he reported that Mr Saúl Betancourt Rico (a worker at the company) and René Bitar Castellón were in the process of being expelled by the union for holding a national assembly of delegates in Ibagué on 22 March 2009 without a quorum being reached.
 - (4) On 21 April 2009, the 11th Civil Municipal Court, ruling on the legal protection case (*tutela*) of first instance brought by Mr Saúl Betancourt Rico against Mr César Lozada for failure to respect due process and the right of association, considered that the plaintiff's case was not proven.
 - (5) On 6 July 2009 SINALTRACAF informed the company of the election, by the ordinary general assembly of delegates held on 4 July 2009 in Ibagué, of an executive committee with the following members: Ana Elvia Casas Espinosa, María Edith Suárez de Ramírez, Ana Cristina Buitrago Reyes, Martha Isabel Durán Llano, María Cristina Castro Rondón, Saúl Betancourt Rico, José Manzur Parra Rodríguez, Fernando Rodríguez Pomar, Luz Ángela Hernández and Liliana María Arias Ospina.

- (6) On 16 July 2009 the Seventh Municipal Civil Court ruled on the *tutela* action instigated by Mr Saúl Betancourt Rico against the Fund on the grounds that he believed his right of association and collective bargaining had been infringed, and requesting application of the fourth clause of the collective agreement concerning permanent union leave of absence and appointment of a replacement. This application was rejected on the grounds that there is another means of legal redress available. It was explained that at this time the executive committee was headed by Mr César Lozada.
- (7) On 4 August 2009, the Ministry of Social Protection ordered the administrative director of the Fund to attend an administrative labour hearing and an investigation was started into claims that the collective labour agreement had been violated.
- (8) On 6 January 2010, through resolution No. 0553 (a copy is provided with the complaint), the Ministry of Social Protection declined to adopt administrative measures against the Fund. The Ministry considered that the union was afflicted with an internal dispute, as there were two executive committees elected in what was presumed to be a legitimate manner and which met the requirements which were subject to verification by the depositary.
- (9) In a communication dated 22 January 2010, SINALTRACAF informed Comfenalco that 14 of its members had been expelled by a decision adopted on 28 March 2009 by the national delegates' assembly and confirmed by the same national assembly held on 15 December 2009 in Bogotá; the members in question were notified of their expulsion on 6 August 2009. It should be noted that the signatory to this communication which reached the Fund on 26 January 2010 was Mr César Lozada as chairperson of the national executive committee.
- (10) On 26 January 2010, SINALTRACAF, represented by Mr César Lozada, demanded a freeze on all assets arising from the collective agreement, which were supposed to be transferred to the sectional subcommittee because of the expulsion of certain members of that body. On the same day SINALTRACAF, in a letter signed by Mr Mario Rubén Contreras, General Secretary of the National Executive Committee, reported that she had sent 14 notices to workers informing them of their expulsion from the union and two addressed to the administration. Although the normal procedure for delivery of personal correspondence was followed, the workers in question refused to accept the notices which were then returned to SINALTRACAF, with the appropriate records of what had occurred. The Fund received from SINALTRACAF notification of the expulsion of the workers in question.
- (11) On 3 February 2010, the corporation was informed of the election of the National Executive Committee of SINALTRACAF with the following members: Saúl Betancourt Rico, Arnold Sandoval, María Luisa Bríñez, Gloria Bernal, Reinal Bitar Castellón, Jesús Martínez, Jenny Morales, José Manzur Parra, Luz Divia Angulo and Liliana García. On the same day the Ministry of Social Protection reported that SINALTRACAF had elected an executive committee and provided a copy of the certificate of deposition No. 006 dated 29 January 2010, in which once again Mr Saúl Betancourt Rico is identified as the president.
- (12) On 4 March 2010, in Ibagué, a general assembly of SINALTRACAF members was held and elected another executive subcommittee for the Ibagué sectional subdirectorates with the following members: Darcy Janeth Huerfía Moreno, Óscar Flórez Sandoval, Adriana del Rocío Arango, Carlos Alberto Delgado, César Augusto Cruz Bernal, Guillermo Gómez González, Luis Ernesto Bernal, Dubeeney Díaz Mayorga, María Cristina Parra Ovalle and Edzel Castro Sierra. The Ministry of Social Protection, Tolima Territorial Directorate, informed the Fund of this election on

11 March as did the members of the executive committee on 17 March of that year. On 13 April 2010 the corporation was informed of a new rotation of posts in the sectional subcommittee headed by Fernando Rodríguez.

- (13) On 14 April 2010, Darcy Janeth Huerfia, chairperson of one of the executive committees of SINALTRACAF, informed the Fund of a rotation within the executive subcommittee. The Fund also received a communication from Mr César Lozada stating that this national board recognized only the sectional subcommittee headed by Ms Darcy Janeth Huerfia.
- (14) On 15 April 2010, the Fund responded to the request made by Ms Darcy Huerfia, chairperson of one of the SINALTRACAF executive subcommittees, for union leave for the subcommittee most recently registered with the Ministry of Social Protection. On 5 May 2010, the Ministry of Social Protection, through its legal office and in response to a request from the Fund, issued a legal clarification regarding the internal union dispute arising from the existence of two sectional executive subcommittees.
- (15) On 3 June 2010, the Fund was informed of the registration of a SINALTRACAF sectional committee in the municipality of Honda, consisting of workers Luis García and Luis Martínez.
- (16) On 28 June 2010, following the examination of the case in the proceedings initiated by the sectional executive subcommittee headed by Fernando Rodríguez against the one headed by Ms Darcy Janeth Huerfia with the aim of determining who could claim to represent the union in question, the Fund applied to the judge for authorization to deposit amounts corresponding to trade union dues as a guarantee. This was approved on 7 July 2010 and confirmed in an official communication to the Banco Agrario de Colombia from the First Labour Court of Ibagué Circuit.
- (17) On 10 July 2010, the Fund was informed of the formal record of a change in the Ibagué sectional executive subcommittee in the form of a rotation of posts. On 15 July 2010, the Fund informed the two Ibagué sectional executive subcommittees that union leave had been refused from that date until such time as a ruling was handed down by the First Labour Court of Ibagué Circuit. On 28 October 2010, the First Labour Court refused the payment order sought by the SINALTRACAF sectional subcommittee headed by Fernando Rodríguez, which was intended to ensure payment of union dues (a copy of the order is provided with the complaint).
- (18) On 29 October 2010, the backlogs chamber attached to the Sixth Labour Court of Ibagué Circuit in a judgement hearing rejected the claims made by SINALTRACAF against the Fund in which it had sought a ruling that the collective agreement signed on 19 February 2009 by the Fund and ASTRACOMTOL was illegal.
- (19) On 25 January 2011, the Ministry of Social Protection adopted resolution No. 01598 according to which “in the light of the foregoing considerations, union leave of absence for the person claiming to be the current chairperson is dependent on the resolution of an internal dispute within SINALTRACAF. We therefore reiterate that no liability can be attributed to the Fund, and hence this dispute can only be resolved by a circuit labour judge in the light of the Constitutional Court ruling No. C-465 of 2008”. It follows from the previous account of the Fund’s actions that no violation of trade union rights can be confirmed, as the internal union dispute has created an administrative burden for the company. The latter has tried to act impartially in accordance with the guidelines given by the Ministry of Social Protection which is responsible for settling these disputes.

488. As regards the sanction imposed by the Ministry of Social Protection, the Superintendent states that although the Fund was fined by the Ministry for failing to attend hearings, this does not in the Fund's view constitute a violation of labour laws and regulations. The Superintendency reiterates that it has always been attentive to any disputes arising within family compensation funds subjected to intervention measures, although it has in such cases referred the matter to the Ministry of Social Protection for appropriate action in accordance with its mandate. The fact that the Fund has been subjected to administrative intervention does not confer on the Superintendency powers other than those specifically set out in law, and does not relieve the Ministry of Social Protection of the obligation to continue to exercise the functions of inspection, supervision and monitoring of trade union organizations.

489. The Government states that according to the information received from the Tolima Territorial Directorate, action was taken along the following lines:

- As regards the failure to respect leave arrangements agreed between the company and the union, as alleged by Mr Saúl Betancourt Rico, an investigation was started and led initially to resolution No. 0553 of 6 January 2010 (a copy is provided with the complaint). The complaint refers specifically to the failure to respect the permanent union leave for its chief official. On this occasion the Territorial Directorate refrains from applying any administrative measures against the Fund in the light of indications that the chairperson of the national executive committee was no longer Mr Saúl Betancourt Rico, as new elections, in which Mr César Lozada had been elected to that post, had been registered with the Ministry of Social Protection. This situation was construed as evidence of a dispute within the union and for that reason it was decided not to take action.
- An appeal against the administrative act was filed by Mr Saúl Betancourt Rico, and resolution No. 0629 of 1 February 2010 upheld the decision of first instance in that it had been shown that although Mr Betancourt Rico was chairperson of the executive committee on 22 March 2009, the union subsequently appointed a new executive committee with Mr César Lozada as chairperson (record No. 012, deposited on 2 April 2009 with the Labour and Social Security Inspectorate based in Zipaquirá). Subsequently in resolution No. 0651 of 8 February 2010, the previous decision of the Territorial Directorate was again upheld, as the Ministry of Social Protection cannot refuse registration of new trade union executive bodies. There was clearly an internal dispute within the union and the consequences of this should not be borne by the Fund. At that time Mr Betancourt Rico had not shown himself to be entitled to permanent leave of absence for union activities and had been unable to show that he was chairperson of the executive committee, and hence the original decision is upheld.
- Once Mr Betancourt Rico had demonstrated his status as executive committee chairperson, the coordinating body of the Inspection and Oversight Group attached to the Territorial Directorate adopted resolution No. 0692 of 16 February 2010, according to which, while there was no proof of any systematic non-observance of the collective agreement, it had been noted that there had been only four meetings of the Labour Relations Committee, although according to the collective agreement there should be such a meeting once a month. In the light of the foregoing, it was decided to order the Fund to comply henceforth with the collective agreement or face sanctions. In response to this resolution, Enrique González Cuervo, the administrative director responsible for the Fund, filed an appeal for reversal. This was later followed by the adoption of resolution No. 0830 of 8 April 2010 and administrative act No. 0942 of 19 May 2010.

- Through Order No. 00567 of 22 April 2010, the Fourth Labour Inspector of Tolima was instructed to proceed with an administrative labour investigation in the Fund in connection with the complaint presented by Mr Saúl Betancourt Rico regarding the violation of the fourth clause of the collective labour agreement (concerning permanent union leave). The employer, in this case the administrative director, was required to give testimony and to provide the relevant documents in order to clarify the facts. A hearing was scheduled initially for 9 June 2010, but the director was excused by the Head of Strategic Development of the Family Compensation Fund on the grounds that it was not possible for the director to attend, and a new date was requested and fixed for 17 June 2010. The date was changed a third time to 21 July 2010 but once again a postponement was requested.
 - From the foregoing it can be concluded that there was no real will on the part of those involved to comply with the three requirements stated by the Ministry of Social Protection, to which little importance appeared to be given, while it was clear that the Head of Strategic Development of the Family Compensation Fund was fully authorized to comply and to provide the documents asked of her; accordingly the Ministry of Social Protection, Tolima Territorial Directorate, in accordance with its statutory authority, adopted a final resolution No. 01137 on 28 July 2010 and confirmed that decision through resolutions Nos 01243 of 30 August 2010 and 6 September 2010, fining the Fund Comfenalco Tolima 10.3 million pesos.
- 490.** In its communication of 4 March 2011, the Government sends the Fund's observations on the allegations made by SINALTRACAF which reiterate the information provided by the Superintendent for Family Benefits. As regards the possible suspension of the administrative intervention measure to which this body is subject, the Fund states that it is not appropriate to refer to this measure because it was adopted and implemented by the natural supervisory body for the family benefits system, and the Fund is not competent to call it into question.
- 491.** The Fund adds that on 27 January 2011, in response to the complaint filed by Mr Saúl Betancourt Rico and Mr Fernando Rodríguez Pomar representing one of the executive committees of the Ibagué sectional subdirectorate of SINALTRACAF, the Ministry of Social Protection, Territorial Directorate Tolima, decided in resolution No. 01614 (a copy is attached to the complaint) to refrain from any administrative measures against the Fund, and ordered the shelving of the proceedings for lack of any legal basis to the complaint contesting the legitimacy of the collective negotiations which the Fund had conducted successfully with the union ASTRACOMTOL. By the same reasoning, in resolution No. 1653 of 15 February 2011 adopted by the territorial directorate of the Ministry of Social Protection (copy attached with the complaint) it refrained from applying any administrative sanctions against the Fund because it considered unfounded the complaint concerning the alleged refusal by the Fund to negotiate a list of demands, which had been filed by one of the executive subcommittees of the Ibagué sectional subdirectorate of SINALTRACAF headed by Fernando de la Cruz Rodríguez Pomar. This decision legally confirms the Fund's position, endorses its procedures for dealing with the dispute within SINALTRACAF, and keeps the Fund out of a dispute which is outside its remit and must be settled by the ordinary judicial authorities (the First Labour Court of Ibagué Circuit) to which it has been referred.
- 492.** Lastly the Government emphasizes that the Ministry of Social Protection has acted diligently in the present case and taken the necessary corrective measures in accordance with its area of competence. According to the information provided by the Superintendency and the information available to the Ministry, the present case has included issues relating to the internal problems of the unions concerned.

C. The Committee's conclusions

493. *The Committee notes that in the present case the complainant organizations allege systematic violation of the collective agreements in force with regard to trade union leave of absence, deduction of union dues from wages, and wage increases, by the family compensation funds, to the detriment of the complainant union SINALTRACAF, and failure to hold regular meetings of the Labour Relations Committee.*
494. *The Committee notes in this regard that according to the complainant organizations: (1) an administrative intervention measure applied since 2005 in a number of family compensation funds prevents participation by elected officials, especially those of trade unions; (2) Comfenalco Tolima (the Fund) concluded a collective agreement with a minority union, the Association of Workers of Comfenalco Tolima (ASTRACOMTOL); and (3) there were acts of interference and pressure placed on union officials at election assemblies of SINALTRACAF, and a second executive committee was elected in an irregular way without the requisite quorum having been reached at the meeting in question.*
495. *The Committee also notes the comments of the Superintendent for Family Benefits and of the Fund communicated by the Government, according to which: (1) no complaint has been filed by SINALTRACAF for alleged violations of trade union rights by the compensation funds Comfatolima, Comfenalco Tolima, Comcaja, Comfaca and Comfaboy; (2) there are now three unions at Comfenalco Tolima: two industry unions (SINALTRACAF and SINDICAJAS) and one company union (ASTRACOMTOL); (3) the two industry unions signed a collective agreement with the Fund which expired in December 2010; (4) there is an ongoing internal dispute in SINALTRACAF (the complainant organization), both within the National Executive Committee where two separate committees are in dispute (one headed by Mr César Lozada and the other by Mr Saúl Betancourt Rico), and in the Ibagué section where there are also apparently two separate committees claiming the right to represent workers in negotiations with the Fund; (5) two lists of demands were submitted and are currently before the First Labour Court of Ibagué Circuit, which will determine which is the legally constituted executive committee; (6) the Ministry of Social Protection fined the Fund for failing to attend certain hearings which it had been ordered to attend; that, however, does not in its view constitute a violation of trade union laws and regulations; and (7) the fact that the corporation is subject to administrative intervention does not give the Superintendency powers other than those specifically set out in law and does not relieve the Ministry of Social Protection of the obligation to continue to exercise the functions of inspection, supervision and monitoring of trade union organizations.*
496. *The Committee notes the Government's statements to the effect that: (1) as regards the failure to respect union leave agreed between the Fund and the union, as alleged by Mr Saúl Betancourt Rico (signatory to the complaint), an administrative investigation was started and led initially to resolution No. 0553 of 6 January 2010 (a copy is attached to the complaint) in which the Territorial Directorate refrains from applying any administrative measures against the Fund in the light of indications that the chairperson of the national executive committee was no longer Mr Saúl Betancourt Rico, as new elections, in which Mr César Lozada had been elected to that post, had been registered with the Ministry of Social Protection; (2) this situation was construed as evidence of a dispute within the union and for that reason it was decided not to take any action; (3) Mr Betancourt Rico was not shown to be entitled to permanent leave of absence for union activities as he was unable to show that he was chairperson of the executive committee; (4) subsequently he produced proof of his status as chairperson (the Committee nevertheless draws attention to the fact that according to the Superintendent for Family Subsidies, judicial proceedings are under way to decide which is the legitimate executive committee); and (5) when this*

occurred, the coordinating body of the Inspection and Oversight Group attached to the Territorial Directorate adopted the resolution of 16 February 2010, in which it expressed the view that although there was no proof of any systematic non-observance of the collective agreement, it had been noted that there had been only four meetings of the Labour Relations Committee, although according to the collective agreement there should be such a meeting once a month; it was therefore decided to order the Fund to comply henceforth with the collective agreement or face sanctions; the Administrative Director did not attend a hearing to give testimony, and the Territorial Directorate therefore passed a resolution on 28 July 2010 fining the Fund the sum of 10.3 million pesos. The Committee also notes that according to the Superintendent for Family Subsidies, the collective agreement signed by SINALTRACAF expired in December 2010.

- 497.** As regards the alleged systematic violation of the clauses of the collective agreement concerning trade union leave and wage increases, the Committee notes that the Government, the Superintendence for Family Subsidies, and the Fund, state that they took no action because they did not know which union executive committee was the one legitimately elected. The Committee notes that in this case, there is an internal dispute within SINALTRACAF which has been referred to the judicial authority (the complainant union refers to the existence of proceedings and the Superintendent for Family Subsidies notes that the case is being examined by the First Labour Court of Ibagué Circuit with a view to ascertaining which of the union executive committees is legally constituted); the Government states also that Mr Betancourt Rico provided proof of his status as “chairperson” which made it possible to begin investigations into the violations of the collective agreement alleged in this case. The Committee expects that the courts will rule on this case without delay in order to allow the union to function effectively. The Committee requests the Government to communicate the ruling eventually handed down concerning the legitimate elected executive committee and to inform it of the outcome of the investigations concerning violations of certain clauses of the collective agreement. The Committee considers that it should be possible to implement the clauses of the collective agreements concerning wages once the administrative authority has determined the amounts owed to the workers. The Committee firmly expects that the proceedings will be concluded soon, and that once the current proceedings have been concluded, SINALTRACAF will be able to begin negotiations with the employer with a view to renewing the collective agreement that expired in December 2010.
- 498.** As regards the alleged administrative intervention in the family compensation funds and the application to suspend that measure, the Committee notes that according to the complainant organization, the Superintendency, in implementing such a measure, is granting sweeping powers to a public official, the Special Intervention Agent, who acts in the place of elected officials, thereby preventing workers from participating in the formulation of guidance which the body in question provides for the directors of family compensation funds. The Committee also notes that according to the Superintendency, the fact that the Fund is subject to administrative intervention does not confer on the Superintendency powers other than those specifically set out in law and does not relieve the Ministry of Social Protection of the obligation to continue to exercise the functions of inspection, oversight and monitoring of trade union organizations. The Committee takes due note of the economic intervention measures in the family compensation funds but considers that this should be compatible with periodic consultations with union representatives. The Committee notes the administrative sanction imposed on the Fund for failure to hold regular meetings of the Labour Relations Committee.
- 499.** As regards the alleged persistence of violations, aggravated by harassment of union officials in the form of disciplinary proceedings for using union leave agreed under the collective agreement, and the unwarranted withholding of union dues through a

procedural order adopted by the First Labour Court of Ibagué Circuit, the Committee requests the Government to send its observations in this regard.

The Committee's recommendations

500. *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 communicate the ruling eventually handed down concerning the legitimately elected union executive committee, and to inform it of the outcome of the administrative investigations into alleged violations of certain clauses of the collective agreement. The Committee firmly expects that the judicial proceedings will be concluded soon, and that once the proceeding are concluded, SINALTRACAF will be able to begin negotiations with the employer with a view to renewing the collective agreement that expired in December 2010.*
- (b) As regards the alleged disciplinary proceedings against union officials for using the trade union leave allowed under the collective agreement in force, and the unwarranted withholding of union dues through a procedural order issued by the First Labour Court of Ibagué Circuit, the Committee requests the Government to send its observations in this regard.*

CASE NO. 2796

INTERIM REPORT

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

Allegations: The complainant organization alleges the termination of employment of members of the National Trade Union of Health Service Workers (SINALTRAINSALUD) employed at the Hospital San José de Buga, who were members of the Associated Work Cooperative "SOLIDEZ"; pressure on workers of the company AJE Colombia SA to prevent them from joining a union and to force them to sign a collective agreement; dismissal of a number of workers following the establishment of a trade union

501. The complaint is set out in two communications from the General Confederation of Labour (CGT) dated 3 and 10 June 2010.

502. The Government sent its observations in communications dated 30 November 2010 and February 2011.

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

A. The complainant's allegations

National Trade Union of Health Service Workers (SINALTRAINSALUD)

504. In its communication of 3 June 2010, the General Confederation of Labour (CGT) states that on 17 February 2010, the National Trade Union of Health Service Workers (SINALTRAINSALUD) was established (by workers of the hospitals San Juan de Dios de Cali, San Rafael en El Cerrito and San José de Buga) and joined by members of cooperatives who offer their services directly to the hospitals in question, and in particular, members of the Associated Work Cooperative "SOLIDEZ".
505. The complainant organization adds that, as a result of the above, the management of the Hospital San José de Buga started a campaign of anti-union harassment against the workers of "SOLIDEZ" who were members of the union, and applied pressure on officials of the cooperative to initiate disciplinary proceedings against workers who provided services for the hospital, San José de Buga, and in particular, against Ms María Yamileth Betancourt Serrato, a member of SINALTRAINSALUD, who was unilaterally suspended by the cooperative on the grounds that disciplinary proceedings against her had been initiated, and against Ms Ismined Barona Acevedo, a founder of SINALTRAINSALUD, who was the subject of an investigation into events that had taken place eight months before the union was established, the aim being to destabilize the union and forced the worker in question to resign her membership of it.
506. In addition, the union's President José Ancizar Gallego Cardona, was transferred from his post as a porter at the Hospital San José de Buga to a site outside the hospital premises, with inferior working conditions, suggesting anti-union harassment in that this prevented him from maintaining contact with other workers.

National Trade Union of the Food and Milk Industry (SINALTRALAC) and the National Trade Union of Workers of AJE Colombia EU (SINTRA AJE Colombia)

Imposition of a collective agreement and anti-union dismissals

507. In its communication of 10 June 2010, the CGT states that on 14 February 2009, the Bogotá Section Committee of the National Trade Union of the Food and Milk Industry (SINALTRALAC) was founded by 23 workers at the Enterprise AJE Colombia SA.
508. On 16 February 2009, other workers of the enterprise in question set up the National Trade Union of Workers of AJE Colombia EU (SINTRA AJE Colombia) in accordance with the labour regulations in force. The complainant organization adds that on 19 February 2009, the company, aiming to prevent workers from joining the union, imposed a collective agreement to which workers were obliged to sign up if they wished to keep their jobs. In addition, on 5 March 2009, three production plant workers who had recently joined, Mr Luis Enrique Peña Aroca, Mr Carlos Samir Sierra Farfan and Mr Hernando López Puentes, were dismissed but subsequently reinstated by order of the judge in a decision dated 2 June 2009 because their trade union rights had been violated. The complainant

organization also states that 26 workers were dismissed on 3 April 2009, following a decision to establish the Cali section of SINALTRALAC.

- 509.** The complainant organization indicates that the workers who joined the union were subjected to intensive efforts to persuade them to renounce their membership.
- 510.** On 6 November 2009, the company informed the following union officials of its decision to terminate their employment contracts for presumed infringements of internal regulations (consumption of intoxicating beverages), despite the fact that nothing of the kind occurred: Ms Sandra Patricia Mejia Rendon; Ms Any Dahiary Ramirez Diaz; Mr Nelson Dario Garzon Parra; and Mr John Henry Aguazaco Castañeda. The complainant organization states that, on 16 February and 9 March 2009, the Bogotá subsection of SINALTRALAC and SINTRA AJE Colombia presented lists of claims to the company, a state of affairs which according to the law implies special protection for the workers in the sense that they cannot be dismissed unless there is a demonstrable cause established by the employer. Under the circumstances, the company dismissed Ms Diana Carolina Castro Mendieta, for the same reasons as for the union officials already mentioned.

Harassment and threats against trade unionists

- 511.** The complainant organization states that Mr Fredy Alberto Caicedo Aritizabal was dismissed because he had disregarded his own medical incapacity for work and had been seen by company managers participating in sports activities which were prohibited in his case; this, it is claimed, shows that the company harasses its workers even in their private activities.
- 512.** In addition, on 23 March 2010, while engaged in pre-sales activity in the municipality of Soacha, Department of Cundinamarca, Mr John Henry Aguazaco Castañeda, President of SINTRA AJE Colombia, was approached by three individuals in a white van. The individuals in question forced him, at gunpoint, to get into the van, and told him that if orders failed to get to the customers, it would be better for him not to return if he did not wish to disappear with the company's goods. Faced with this, apart from informing the company's legal representative of the company of what had happened, intervention was requested to ensure that failures to make deliveries to customers ceased, given that workers' lives were being put at risk unnecessarily. To date, no solution has been found and the authorities have not voiced an opinion.
- 513.** The complainant organization alleges that in the context of trade union harassment, constant summons are being issued to hearings concerning the following workers:
- Mr Alexander Zuluaga Camelo, cited for allegedly taking more time than usual to take telephone calls without permission;
 - Mr Henry Cruz Correa, cited for alleged disrespect towards Mr Jonatan Bonilla when told by the latter that by opening a container of soft drink he had not complied with requirements of sale and made it impossible for the company to exchange the product;
 - Mr Ender Buelvas Catalan, Mr John Henry Aguazaco Castañedas, Mr Nelson Darío Garzón Parra, Ms Any Dahiary Ramírez Díaz and Ms Sandra Patricia Mejía, cited for allegedly selling products to customers whom they did not actually visit;
 - Mr Omar Ospina Ramirez, cited for damaging the loading bay with the forklift, when the worker in question had requested that safety measures be put in place to prevent such accidents, since serious accidents had occurred because of the company's inaction.

514. According to the complainant organization, during the hearings for Mr Alexander Zuluega Camelo, Mr Henry Cruz Correa, Mr Ender Buelvas Catalan and Mr Omar Ospina Ramirez, in order to ensure due process and a proper defence for workers implicated in the alleged offences, trade union delegates were allowed to attend, but were not allowed to ask questions or to demand or refute evidence.

B. The Government's reply

National Trade Union of Health Service Workers (SINALTRAINSALUD)

515. In a communication of February 2011, the Government states that according to the enterprise, the foundation San José de Buga has never had any relationship as an employer or any contractual relationship with Ms María Yamileth Betancourt Serrato. Ms Betancourt, according to the statements by the company and the CGT, was an associate of the cooperative "SOLIDEZ", with which the hospital had on 1 January 2009, entered into a collaboration agreement under which the cooperative, in full independence and autonomy, had undertaken to carry out the various procedures required by the foundation; these were carried out by the cooperative's staff under the terms of the relevant collective work agreement (attached with the company's reply).
516. The company states that the various procedures instigated by the cooperative did not involve the foundation as they concerned autonomous internal decisions that were exclusively a matter for the cooperative. The company also states that, through the judicial proceedings to enforce rights (*acción de tutela*) initiated by Ms Betancourt, the Second Municipal Criminal Court upheld the rights of the plaintiff, ordered the cooperative to reinstate her, and thereby exonerated the foundation. Ms Betancourt has been reinstated in the cooperative.
517. As regards Ms Ismined Barona Acevedo, the company states that it never had any relationship with her, that she was a member of the cooperative "SOLIDEZ", and that the company did not know why she was called to give testimony. Ms Acevedo is now a member of the associated work cooperative "contratos CTA" with which the hospital, San José de Buga has concluded a service contract for certain processes.
518. Lastly, the company states that on 26 March 2010, the cooperative decided to terminate the contract with the foundation, which had been in force since 31 July 2010.
519. The Government emphasizes that there exists legal provisions protecting the right of association which can be invoked by trade unions. That being the case, and given that the complaint makes no reference to any proceedings arising from any alleged violation of the right of association, the Government invites the complainant organization to explore all the available national legal means of redress. The Government states that these questions can be raised within the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT).
520. The Government also states that it approved a number of decrees prohibiting and preventing the misuse of temporary service agencies and cooperatives. These decrees clarify the scope of any contractual relations between temporary service agencies, cooperatives, workers and third parties hiring them, and establish the parameters in which they operate (Decrees Nos 4369 and 4588 of 2006, Act No. 1233 of 2008). The Government states that the pre-cooperatives and associated work cooperatives are non-profit making organizations pertaining to the social sector, their members being persons who are the cooperative managers and contribute directly to the cooperative's capacity for

economic, professional or intellectual activities, with the aim of producing goods, carrying out works or providing services for the benefit of its members and of the wider community (section 3 of Decree No. 4588 of 2006).

National Trade Union of the Food and Milk Industry (SINALTRALAC) and the National Trade Union of Workers of AJE Colombia EU (SINTRA AJE Colombia)

Imposition of a collective agreement and anti-union dismissals

521. In a communication dated 30 November 2010, the Government states that according to the company against which the complaint is made, the company was informed of the establishment of the union organizations but not of the possible membership.
522. As regards the alleged imposition of a collective agreement with a view to preventing workers from joining the union, the company states in reply, that the collective agreement in question was the result of a list of demands presented by a group of non-union workers. Furthermore, the workers who did not sign up to the collective agreement did not lose their jobs because in fact not all the workers are covered by it but still remain with the company (230 workers out of a total of 306 signed up to the collective agreement).
523. As regards the dismissal of Mr Luis Enrique Peña Aroca, Mr Carlos Samir Sierra Farfan and Ms Hernando López Puentes, the company states that they were reinstated by means of a legal protection ruling (*fallo de tutela*) of first instance. Subsequently, the criminal court of Funza district rescinded the judgement reinstating the workers. Their employment contracts were terminated as a result of a change in the internal organization of the service lift section as indicated by the judge in his ruling of 22 July 2009 (attached to the company's reply). In view of the fact that the reinstatement order was rescinded, the company again terminated the employment contract on the assumption that no violation of freedom of association had been involved. The company emphasizes that the dismissal of the workers did not affect the union's stability or existence, since the workers concerned made up less than 1 per cent of the total SINALTRALAC membership.
524. As regards the dismissal of 26 workers following the establishment of the Cali subsection of SINALTRALAC, the company maintains that the reason for the dismissals was not the establishment of the union, but the fact that a decision had been taken some months previously to close down a number of unproductive and loss-making sections of the company. The sales division in Cali was closed down and the employment contracts of all sales staff were terminated irrespective of their union membership. There are no grounds for describing these events as constituting harassment of workers who had decided to join the union, since many workers are currently union members (76 of SINALTRALAC and 76 of SINTRA AJE Colombia).
525. As regards the dismissal of trade union officials, Ms Sandra Patricia Mejía Rendón, Ms Any Dahiary Ramírez Díaz, Mr Nelson Darío Garzón Parra, and Mr John Henry Aguazaco Castañeda, the company states that they were dismissed for serious dereliction of contractual obligations, as shown by the disciplinary proceedings which took place, and the appropriate proceedings were initiated with the courts to remove their trade union immunity. The workers were informed of that decision. The company emphasizes that the proceedings in question are still in progress and that none of the workers has yet been dismissed as the judicial proceedings have not yet been concluded.

526. As regards the dismissal of Ms Diana Carolina Castro Mendieta, who was a member of the union and whose dismissal was, according to the union, irregular, the company replies that her employment contract was terminated for sound reasons relating to serious misconduct specified in the document provided by the company, which indicates that she failed to carry out her duties and was dismissed for that reason. The actions of Ms Castro Mendieta resulted in claims being made against the company. In addition, the company states that the worker in question initiated *tutela* proceedings with the Funza Municipal Criminal Judge, but all her claims were dismissed in a ruling of 10 December 2009, on the grounds that there had been no infringement of freedom of association (a copy of the ruling is provided with the company's reply).

Harassment and threats against trade unionists

527. As regards the dismissal of Mr Fredy Alberto Caicedo Aristizabal, who can be seen in a video recording practising sports when he was supposed to be incapacitated, the company states that he was seen at a public event carrying out activities prohibited by his doctor and the recording had been made by chance, without there being any intention to place him under surveillance. It also states that his contract was terminated for irresponsible behaviour by absenting himself from the workplace without notice on 6 October 2009, which disrupted the normal functioning and administration of the company, and for disrespect to his superiors. The company points out that there are judicial mechanisms available to him to defend the rights, which in his view have been infringed, and that he has to date made no formal complaint.
528. As regards the threats against Mr John Henry Aguazaco Castañeda, President of SINTRA AJE Colombia (he was allegedly approached by three individuals in a van who identified themselves as members of a group on the margins of legality, and forced to get into the vehicle with threats to the effect that if orders failed to reach customers he would "disappear"), the company states that it knows of this case and advises the worker to inform the competent authorities as it is beyond the company's authority. It also requested to be kept informed, but maintains that the worker has thus far not made use of the available judicial or administrative means of redress.
529. As regards the allegation that there was a failure to comply with due process of law provided for in section 115 of the Substantive Labour Code, by restricting the presence of union representatives during hearings, the company states that in all such proceedings involving union members, two representatives of their trade union are allowed to attend and, are allowed to speak in order to make any statements they consider to be relevant. The company expresses surprise that the CTG considers the employer's disciplinary authority to constitute anti-union harassment, especially where there have been manifest derelictions of duty on the part of the unionized workers concerned.
530. The Government states that it requested information from the Cundinamarca Territorial Directorate which sent a letter on behalf of the coordinator of the group for prevention, inspection, supervision and monitoring, to which was attached a copy of Resolution No. 000431 of 24 February 2010, ordering an investigation into the complaint concerning refusal to negotiate the list of demands presented by SINALTRALAC against the company AJE COLOMBIA EU. The Coordinator exonerated the company of any infringement of sections 353 and 354 of the Substantive Labour Code, as superseded by section 39(c) of Act No. 50 of 1990. This body launched an administrative inquiry into the complaint filed by the union organization, in response to which the labour authority exonerated the company as there had been consensual dialogue between the parties when they had met, including in the office of the Head of the Special Inspection and Supervisory Unit, and the parties had discussed the subject and reached agreements on a direct settlement procedure. The Ministry of Social Protection had ruled on the complaint presented by the union in the

light of the refusal to negotiate, but it is not known if the union has filed any administrative, judicial or criminal complaint regarding alleged violation of the right of association.

C. The Committee's conclusions

531. *The Committee observes that in the present complaint the complainant organization alleges: (1) termination of employment of members of the National Trade Union of Health Service Workers (SINALTRAINSALUD) employed in the Hospital San José de Buga and members of the cooperative "SOLIDEZ"; and (2) pressure on workers at the company AJE Colombia SA to prevent them from joining a trade union and to make them sign a collective accord, and the dismissal of a number of workers following the establishment of a trade union.*

National Trade Union of Health Service Workers (SINALTRAINSALUD)

532. *With regard to SINALTRAINSALUD, the Committee notes that according to the complainant organization: (1) the administration of the Hospital San José de Buga took steps aimed at eliminating the trade union by terminating the employment of workers who joined the said union; (2) the President of the union, Mr José Ancizar Gallego Cardona, was transferred from his post as a porter to a workplace outside hospital premises, with inferior conditions of work, suggesting anti-union harassment; and (3) the hospital management started a campaign of anti-union harassment against members of the union employed by the cooperative "SOLIDEZ", putting pressure on managers of the cooperative to instigate disciplinary proceedings against workers who provided services for the foundation Hospital San José de Buga, and in particular, against Ms María Yamileth Betancourt Serrato, as well as Ms Ismined Barona Acevedo, founder of SINALTRAINSALUD. At the same time the Committee observes that the Government has stated in general terms that: (1) it approved a number of decrees aimed at prohibiting and preventing the misuse of temporary service agencies and associated work cooperatives, clarifying the scope of relations between the temporary service agencies, associated work cooperatives, workers and third parties hiring them, and setting the parameters in which they operate; and (2) the complaint makes no mention of any complaints or proceedings initiated in connection with alleged violations of the right of association.*
533. *As regards the allegations concerning the transfer of the President of SINALTRAINSALUD, Mr José Ancizar Gallego Cardona, from his post as a porter at the Hospital San José de Buga to a workplace outside hospital premises, with inferior conditions of work, suggesting anti-union harassment, the Committee notes that the Government confines itself to inviting the complainant organization to make exhaustive use of the available national judicial remedies or to submit these questions to the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT). The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest of decisions and principles of the***

Freedom of Association Committee, fifth (revised) edition, 2006, para. 799]. The Committee urges the Government to send detailed observations on this allegation.

534. As regards allegations of pressure by the San José de Buga foundation to persuade the associated work cooperative to initiate disciplinary proceedings against two trade unionists, the Committee notes that the hospital denies any such pressure. The Committee observes that the Government states that, according to the hospital: (1) the foundation San José de Buga has never had any employment or contractual relationship with Ms María Yamileth Betancourt Serrato, who was a member of the cooperative “SOLIDEZ” with which the hospital had signed a collaboration agreement on 1 January 2009 (attached to the company’s reply); (2) the proceedings initiated by the cooperative were initiatives in which the foundation did not intervene; (3) the foundation San José de Buga has never had any employment or contractual relationship with Ms Ismined Barona Acevedo and it is not clear why she was called on to make statements; (4) Ms Barona Acevedo is a member of the cooperative “contratos CTA”, with which the foundation Hospital San José de Buga has signed a service agreement; (5) in March 2010 the cooperative “SOLIDEZ” terminated the collaboration agreement with the Foundation and this decision entered into force in July 2010; and (6) Ms Betancourt has been reinstated in the cooperative in question in accordance with a ruling of the Second Municipal Criminal Court. The Committee notes that the allegations raise the issue of the use of cooperatives to disguise an employment relationship and recalls that it had previously requested the Government to ensure that associative labour cooperatives are not used to undermine genuine labour relations with the aim of prejudicing trade unions or their members [see 324th Report, Case No. 2051, para. 370].

National Trade Union of the Food and Milk Industry (SINALTRALAC) and the National Trade Union of Workers of AJE Colombia EU (SINTRA AJE Colombia)

Imposition of a collective accord and anti-union dismissals

535. As regards the allegation that the company imposed a collective accord with the aim of preventing workers from joining the union, the Committee observes that according to the company, the collective accord was the result of a list of demands presented by a group of non-unionized workers, and that not all the workers have signed up to the collective accord, although they all remain employed by the company. Furthermore, the Committee notes that according to the Government, the Cundinamarca Territorial Directorate sent a copy of Resolution No. 000431 of 24 February 2010 ordering an investigation into the complaint regarding refusal to negotiate the list of demands presented by SINALTRALAC against the company, and exonerating the company on the grounds that there had been consensual dialogue between the parties when they met including in the office of the head of the special inspection and supervision unit, and the parties had discussed the subject and reached agreements on a direct settlement procedure. The Committee wishes to emphasize that the Collective Agreements Recommendation, 1951 (No. 91), emphasizes the role of workers’ organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exists, and that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might, in certain cases, be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see **Digest**, op cit., paras 944 and 945]. The Committee also draws attention to the fact that the Committee of Experts on the Application of Conventions and Recommendations has recalled, in its observation of 2009, the need to ensure that collective accords are not used to undermine the position of trade union organizations, and to the need to ensure the possibility in practice to conclude collective agreements with

them, and requested information on the measures adopted to encourage and promote the full development and utilization of voluntary collective bargaining, in accordance with Article 4 of Convention No. 98, and to ensure that the conclusion of collective accords negotiated directly with the workers is only possible in the absence of a trade union and that it is not carried out in practice for anti-union purposes. The Committee requests the Government to take the necessary steps to ensure that this principle is respected at the company, and to keep it informed of any new development in that regard.

536. As regards the dismissals of trade union members, Mr Luis Enrique Peña Aroca, Mr Carlos Samir Sierra Farfan and Mr Hernando López Puentes, the Committee notes that according to the company the dismissals in question – based on false accusations concerning consumption of intoxicating beverages – were in fact due to changes to the internal organization of the forklift section and did not affect the union's stability or existence, since the workers in question made up less than 1 per cent of the total SINALTRALAC membership. The Committee notes that the workers were reinstated through a legal enforcement ruling (fallo de tutela) of first instance, and subsequently, the Funza circuit judge rescinded the ruling in question on the grounds that a more appropriate procedure was available before the Labour Judge: "The tutela proceedings do not constitute a parallel process, and the First Instance Court was therefore not authorized to enforce protection for the fundamental rights of association, equality and labour, and consequently to order the reinstatement of the plaintiff without any break in contract, as that pertains exclusively to the competence of the labour judge who must give a ruling on this point". The Committee observes that the company confirmed, once again, the termination of the employment contracts on the assumption that there had been no violation of freedom of association. Given these considerations, the Committee wishes to emphasize that refusal of legal protection (tutela) does not in this case imply that there had been no violation of freedom of association, but rather that the competent judge to decide on the issue of reinstatement of the workers is the labour judge. In view of the divergent accounts of the complainant organization and the company regarding the cause of the dismissals, the Committee requests the Government to state whether the workers have brought a case before the labour judge.
537. As regards the dismissal of 26 workers following the establishment of the Cali subsection of SINALTRALAC, the Committee notes that the company denies the anti-union nature of the dismissals and maintains that they resulted from the company's decision to close unproductive sections, and that all the workers affected were dismissed irrespective of their union membership. Furthermore, SINALTRALAC continues to exist and some workers are still members of it.
538. Lastly, as regards the dismissal of Mr Alberto Caicedo Aristizabal, the Committee observes that according to the company, the dismissal in question was due to serious misconduct (unjustified absence from work), and not for union-related reasons, and that the worker has not filed any complaint in relation to any violation of his trade union rights.
539. As regards the dismissal of the trade union officials Ms Sandra Patricia Mejía Rendón, Ms Any Dahiary Ramírez Díaz, Mr Nelson Darío Garzón Parra and Mr John Henry Aguazaco Castañeda, the Committee notes that proceedings were initiated to suspend these workers' trade union immunity, and that these proceedings are now under way, so that the workers remain employed by the company and are awaiting the judicial rulings. The Committee requests the Government to keep it informed in this regard and to communicate a copy of any rulings handed down.
540. As regards the dismissal of Ms Diana Carolina Castro Mendieta, the Committee notes that according to the company, the worker in question was dismissed for serious misconduct (dispatch of orders which had not come from customers), rather than for anti-union

reasons. The Committee notes that, according to the company, the Funza municipal criminal judge, who examined the tutela application filed by the worker, dismissed all her claims in a judgment of 10 December 2009, on the grounds that there had been no violation of freedom of association (a copy of the ruling was provided with the company's reply). Consequently the Committee will not pursue its examination of this allegation.

Harassment and threats against trade unionists

- 541.** As regards the alleged threats against Mr John Henry Aguazaco (according to which he was approached by three individuals in a van who identified themselves as members of a group on the margins of legality and forced to get into the vehicle), the Committee notes that according to the complainant organization, the worker was threatened in terms suggesting that "if orders don't get to the customers, you shouldn't come back or you might disappear with the company's goods". The Committee also notes that according to the company: (1) once it learned of what had happened, it advised the worker to inform the competent authorities, as the matter was beyond the company's remit; (2) it asked to be kept informed; and (3) to date, the worker has not communicated any information in this regard. The Committee invites the complainant organization to report these threats to the competent authorities, and trusts that the Government will take the necessary steps to conduct an independent investigation into these allegations and to ensure protection of the union official in question against any act of intimidation.
- 542.** Lastly, the Committee notes that the Government has not provided any information on the allegations relating to the following union members: Mr Alexander Zuluaga Camelo, Mr Henry Cruz Correa, Mr Ender Buelvas Catalan and Mr Omar Ospina Ramirez. The Committee requests the Government to send its observations in this regard.

The Committee's recommendations

- 543.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *As regards the allegations regarding the transfer of the President of SINALTRAINSA, Mr José Ancizar Gallego Cardona, from his post as a porter at the Hospital San José de Buga to a workplace outside the hospital premises, with inferior working conditions, suggesting anti-union harassment, the Committee urges the Government to send detailed observations on this allegation.*
 - (b)** *Recalling that, pursuant to Article 4 of Convention No. 98, the Government must guarantee that direct negotiations of collective agreements with employees are possible only in the absence of a trade union and that such negotiations should not be used in practice for anti-union purposes, the Committee requests the Government to ensure respect for this principle at the company AJE Colombia EU, and to keep it informed of new developments in this regard.*
 - (c)** *As regards the dismissals of trade union members, Mr Luis Enrique Peña Aroca, Mr Carlos Samir Sierra Farfan and Mr Hernando López Puentes, the Committee requests the Government to indicate whether the workers have initiated any proceedings before the labour judge.*

- (d) *As regards the dismissals of trade union officials, Ms Sandra Patricia Mejía Rendón, Ms Any Dahiary Ramírez Díaz, Mr Nelson Darío Garzón Parra, and Mr John Henry Aguazaco Castañeda, and the proceedings under way to suspend trade union immunity, the Committee requests the Government to keep it informed in this regard and to communicate a copy of any court rulings handed down.*
- (e) *As regards the alleged threats against union official, Mr John Henry Aguazaco, the Committee invites the complainant organization to report these threats to the competent authority, and trusts that the Government will take all the necessary measures to conduct an independent investigation into these allegations and to ensure protection of the union official in question from any act of intimidation.*
- (f) *As regards the allegations concerning Mr Alexander Zuluaga Camelo, Mr Henry Cruz Correa, Mr Ender Buelvas Catalan and Mr Omar Ospina Ramírez, the Committee requests the Government to send its observations on this matter.*

CASE NO. 2804

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

**Complaint against the Government of Colombia
presented by
the Association of Public Servants of the Ministry of Defence and the Health
Service Institutions of the Armed Forces and the National Police (ASEMIL)**

Allegations: The complainant organization alleges that Decree No. 535 of 2009 restricts and violates the right to collective bargaining of public employees and that the Ministry of Defence claims that the Decree does not allow for negotiations with public employees regarding certain matters

544. The complaint is contained in a communication of the Association of Public Servants of the Ministry of Defence and the Health Service Institutions of the Armed Forces and the National Police (ASEMIL) dated 21 July 2010. ASEMIL transmitted additional information in communications dated 1 July 2010, received on 14 February 2011, and 12 October 2011.
545. The Government transmitted its observations in communications dated 14 January and 3 October 2011.
546. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant organization's allegations

547. In its communication dated 21 July 2010, ASEMIL states that Decree No. 535 of 2009, issued by the Government to regulate article 416 of the Substantive Labour Code, restricts and violates the right to collective bargaining of public employees.
548. ASEMIL states that it has fallen foul of this restriction. Based on the abovementioned Decree, the Ministry of National Defence refused to negotiate regarding the points contained in the list of demands and the trade union organization requested the Government to repeal that Decree, although that request went unheeded. ASEMIL states that the Single Confederation of Workers (CUT) is in the process of lodging an appeal for annulment against Decree No. 535, with ASEMIL joining in that appeal on the basis that the Decree clearly contravenes both the Constitution and national labour legislation and that it was issued by an authority that is not competent in the matter, the Government. The appeal is currently before the Council of State – Second Section.
549. More specifically, the complainant organization states that it submitted a list of demands by the public employees of the Ministry of Defence on 3 February 2010. The Ministry convened an initial meeting on 10 March 2010, and weekly meetings were scheduled jointly in order to reach agreements. Talks were extended for a further 20 days. The Ministry of Defence negotiating team stated that there was no way of reaching an agreement regarding any of the points related to the working conditions of the public employees. Prior to formally beginning negotiations concerning the list of demands, the Ministry categorically stated that: “The Ministry of National Defence, complying with the provisions of the aforementioned Decree, is prepared to hold consultations with the trade union organization over which you preside, in strict compliance with the provisions of Decree No. 535, of 2009. This Decree clearly states that any matters falling outside of the labour domain, such as organizational structure, staffing, the management, administration and inspection competencies of the State, administrative procedures and the merit principle as an essential element in the public service, shall be excluded from consultations concerning working conditions. This Ministry is prepared to move ahead with the process of consultations provided that the conditions contained in article 3 of the aforementioned Decree have been met.” This erroneous position was confirmed in writing through a communication dated 13 May 2010, in which the trade union was specifically informed of the points that would not be discussed, given that they were specifically excluded from the scope of collective bargaining in the light of Decree No. 535.
550. The process continued under these restrictions, but no negotiations took place because the representatives of the Ministry of Defence hid behind the implementation of the Decree in order to avoid, at all costs, an agreement that would improve the working conditions of the public employees of the Ministry. ASEMIL attempted, both in writing and at the round table, to convince the Ministry’s negotiating team of the importance of making a real effort to push ahead with the process, while bearing in mind the spirit of collective bargaining. The final record of discussions was signed and stands as proof of the ineffectiveness of the negotiating process and the legal upheaval created by the Decree.
551. Furthermore, ASEMIL states that Legislative Act No. 01 of 2005 hinders collective bargaining on pensions, prejudicing those workers who are nearing the age when they will have the right to their pensions.
552. The complainant organization highlights that a precedent exists involving ASEMIL and the Ministry of National Defence regarding non-compliance with international agreements. ASEMIL made allegations in 1999 and 2007, denouncing, among other things, refusal to negotiate, non-compliance with Conventions Nos 151 and 154, and refusal to grant time

off for trade union activities for the members of the national and regional executive boards (Case No. 2015 (closed) and Case No. 2522 (follow up)).

553. Finally, in communications dated 1 July 2010, received on 14 February 2011, and 12 October 2011, ASEMIL states that the Central Military Hospital and the Officers' Club entered into a collective bargaining process with ASEMIL to improve working conditions. According to the complainant organization, negotiations were satisfactory and two collective labour agreements were reached, one of which was formalized through Resolution No. 1100, dated 18 November 2010 (attached to the ASEMIL communication), handed down by the Director of the Central Military Hospital and duly deposited with the Ministry of Social Protection; the other collective agreement has been deposited on 27 September 2011. ASEMIL highlights that the agreements reached with the hospital (an institution which is part of the Ministry of Defence) and the Officers' Club are an example of how it is possible to enforce the fundamental collective bargaining rights of public employees.

B. The Government's reply

554. In communications dated 14 January and 3 October 2011, the Government confirms that ASEMIL previously made allegations relating to refusal to negotiate and alleged non-compliance with ILO Conventions Nos 151 and 154 on the part of the Ministry of National Defence (Case No. 2015 (closed) and Case No. 2522 (follow up)).
555. As to Decree No. 535, of 2009, the Government states that during the 98th Session of the International Labour Conference (ILC) in June 2009, it reported that: "Decree No. 535 of 2009 had been issued, which provided for the procedures and bodies to develop the consultation processes in state entities, giving priority to dialogue as a means to address working conditions in the public sector and to regulate employer-worker relations in public entities. This Decree had opened a new chapter in the right to collective bargaining for public employees in Colombia. Despite only being issued recently, this Decree had already brought concrete and satisfactory results. It should be pointed out that consultation processes had taken place in the District of Bogota, in the Ministry of Social Protection and the Ministry of Education, and, in the case of the latter entity, an agreement had been concluded with the Colombian Federation of Educators (FECODE)."
556. The trade union organization refers to the submission of a "list of demands", on behalf of the public employees of the Ministry of National Defence, which, in line with Decree No. 535, of 24 February 2009, regulating article 416 of the Substantive Labour Code and issued with the aim of establishing bodies within which consultation between the trade union organizations of public employees and public sector bodies might take place, initiated the series of meetings. The Government states that, from the very outset of the meetings, the Ministry of National Defence informed the trade union representatives that the abovementioned document could not be discussed by the administration in the form in which it had been submitted, given that, as had previously been pointed out on a number of occasions, collective bargaining for public employees was restricted, with organizational structure, staffing, the management, administration and inspection competencies of the State, administrative procedures and the merit principle as an essential element of the public service being excluded from consultations. Consultation regarding wages is possible at a regional level, in line with the limits set by the national Government, but consultation on benefits is not permitted.
557. The Government adds that this rule does not apply to high-ranking employees of institutions occupying managerial positions which involve the adoption of policies or guidelines. Therefore, despite the fact that the Ministry of National Defence was fully prepared to comply with the provisions of Decree No. 535, of 2009, it was not possible to

reach an agreement owing to the contents of the list, which involved a flagrant violation of the Constitution and of the laws governing collective bargaining for public employees.

- 558.** As to Conventions Nos 151 and 154, the Government highlights that ILO Convention No. 151 establishes that it must be applied to all persons employed by public authorities and that measures appropriate to national conditions shall be taken to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations. ILO Convention No. 154 states that the Convention applies to all branches of economic activity and that, as regards the public service, special modalities of application of this Convention may be fixed. As a public body, the Ministry of National Defence must comply with the regulations in force.
- 559.** The Government states that the above information is in line with the contents of Ruling No. C-1234, of 2005, which declared article 416 of the Substantive Labour Code to be enforceable:

On examining article 55 of the Constitution, the Chamber finds that it guarantees the right to "collective bargaining" in order to regulate employment relationships, including trade union organizations of public employees, and article 416 restricts the submission of lists of demands or the signing of collective agreements to those trade unions. Turning to the examination process, the matter in question is the restrictions contained in article 416 of the Substantive Labour Code, and therefore, despite the fact that there have not been any developments regarding this matter in terms of legislation at the level of Congress, the restriction contained in the legal provision is enforceable because, although the right to "collective bargaining" of trade unions of public employees is not mentioned, it is not specifically prohibited either. Therefore the provision is constitutional with regard to the matter in question, although subject to reserves until the legislator has introduced regulations in this regard. This declaration of constitutionality cannot be interpreted as the prohibition of the right of trade unions of public employees to carry out collective bargaining in the wider sense of the term. On the contrary, those organizations can submit claims, demands and queries, which must be dealt with. Trade unions of public employees can have recourse to one of a number of mechanisms designed for consultation regarding their working conditions and wages. In turn, this right must be exercised in line with the restrictions attached to the condition of public employee enjoyed by the members of these organizations, that is to say, although they can seek consultation, the State can take unilateral decisions regarding wages and working conditions.

- 560.** As to collective bargaining on pensions, the Government states that article 48 of the Political Constitution established that social security was to be provided in line with the principles of efficiency, universality and solidarity. The general pensions system is set out by Act No. 100 of 1993 following these principles. In order to achieve harmony regarding pensions, when developing the constitutional precept, Act No. 100 of 1993 clearly required respect for acquired rights "in accordance with previous legislative provisions, accords or collective agreements", but also made it clear that this "should not prejudice the right of denunciation which the parties enjoy and that the arbitration tribunal would settle differences between the parties". The foregoing shows the clear intention to align collective agreements and accords with the provisions of Act No. 100 of 1993 and that pensions cannot simply be considered a consequence of an employment relationship, but are a benefit derived from the social security system organized by the legislator. However, given that the Constitution guarantees the right to collective bargaining, with the exceptions provided for by law, and the intention of Act No. 100, as set out in section 11, was to put an end to the practice of establishing special rules in pension matters, in line with the statements made by the Supreme Court of Justice, which has repeatedly stated that pension benefits should be harmonized with Act No. 100 of 1993, in practice not only have collective agreements not been harmonized with the Act, but agreements continue to be concluded in which entities undertake to assume new pensions obligations directly, giving

preference to certain workers and breaching the equality that the Constitution wished to impose on the social security system. Furthermore, the Government states that, within the context of the pension regime, the legislator established the requirements for access to that regime, as well as those elements that the system guarantees to beneficiaries.

- 561.** The Government highlights that, in the case of the public sector, agreement-based schemes have been created without quantifying their final effect, with the result that inequitable regimes have been created which ultimately endanger the very existence of the respective establishments. The private sector is also affected in a similar way. It has become clear that the ongoing operations of many enterprises in this sector have been affected by the cost of their pension liabilities. According to the Government, the above reasons serve to justify the establishment under Act No. 100 of the provision to the effect that pension regimes shall not be covered by collective bargaining. The main aim of Legislative Act No. 01 of 2005, is to ensure the effectiveness of the right to a pension for all those inhabitants who fulfil the legal requirements regarding the recognition of said right, on an equal footing, free of preference, and equally in favour of all, including the workers. The limitation relating to collective bargaining on pensions is certainly an issue, but the right of Colombian workers to have access to a pension is an entirely separate matter. Legislative Act No. 01 of 2005 was drawn up with the aim of safeguarding the wealth of the State, but not with the intention of undermining the right to organize and freedom of association, as claimed by the complainant organization. Finally, it should be pointed out that there are no ongoing administrative labour disputes brought by ASEMIL for alleged violation of trade union rights.
- 562.** The Ministry of Defence confirms the information provided by the Government and states that it respects, but does not share, ASEMIL's position regarding its opposition to the Decree based on its scope, content and form. The complainant organization is opposed to the legislation and not to the Ministry, which did no more than comply fully with the contents of the legislation regulating article 416 of the Substantive Labour Code. It was in this way that the request for consultation was processed, the round table set up, representatives appointed and invested with powers, multiple meetings were held and the trade union association made aware of which issues fell within its remit and could be the subject of consultations. Furthermore, the Ministry gave clear indications regarding those aspirations held by ASEMIL with regard to which the Ministry could provide no legal solution because it was not competent to do so and finally, on 13 May 2010, ASEMIL was informed in writing of the reasons why agreements could not be reached. All of this shows that there was dialogue, an attempt at consultation and absolute respect for the trade union organization, as well as a process that that was carried out within the framework of the law which is not to the satisfaction of the trade union organizations, as can be seen by the complaint against Decree No. 535 of 2009. However, in no way can it be claimed that the Government or the Ministry of National Defence is disregarding the rights of the trade unions.

C. The Committee's conclusions

- 563.** *The Committee observes that, according to the allegations, Decree No. 535 of 2009 restricts and violates the right to collective bargaining for public employees and the Ministry of National Defence argues that the Decree does not allow for negotiations with public employees concerning certain issues.*
- 564.** *The Committee notes that the complainant organization states that there are precedents in the form of attempts at collective bargaining between ASEMIL and the Ministry of National Defence and that ASEMIL submitted a list of demands and the Ministry convened an initial meeting on 10 March 2010, with weekly meetings being scheduled jointly in order to reach agreements. However, according to the allegations, prior to the formal*

opening of negotiations on the list of demands, and based on the abovementioned Decree, the Ministry categorically refused to negotiate concerning the points contained in the list of demands, pointing out that they were excluded from the scope of collective bargaining. The complainant organization states that it requested the Government to repeal this Decree and CUT has lodged an appeal for annulment against Decree No. 535, which is currently before the Council of State – Second Section. Finally, ASEMIL states that Legislative Act No. 01, of 2005, hinders negotiations on pensions.

- 565.** The Committee notes that the Government states that: (1) ASEMIL has already made allegations relating to refusal to negotiate and alleged non-compliance with ILO Conventions Nos 151 and 154 on the part of the Ministry of National Defence (Case No. 2015 (closed) and Case No. 2522 (follow up)); (2) from the outset of the meetings, the Ministry of National Defence informed the trade union representatives that the list of demands could not be discussed by the administration in the form in which it had been submitted; (3) collective bargaining for public employees is restricted; (4) despite the fact that the Ministry of National Defence was fully prepared to comply with the provisions of Decree No. 535, of 2009, it was not possible to reach an agreement owing to the contents of the list, which involved a flagrant violation of the Constitution and of the laws governing collective bargaining for public employees; (5) as a public body, the Ministry of National Defence must comply with the regulations in force; (6) as to pensions, the main aim of Legislative Act No. 01 of 2005 is to ensure the effectiveness of the right to a pension for all those inhabitants who fulfil the legal requirements regarding the recognition of said right, on an equal footing; for that reason, and to avoid abuses, pensions in general are excluded from the scope of collective bargaining; and (7) there are no ongoing administrative labour disputes brought by ASEMIL for alleged violation of trade union rights.
- 566.** The Committee also notes that, according to the Ministry of National Defence, which confirms the information provided by the Government and the complainant organization, it is clear that there was dialogue, an attempt at consultation and absolute respect for the trade union organization, as well as a process that was carried out within the framework of the law which is not to the satisfaction of the trade union organizations, as can be seen by the appeal made against Decree No. 535 of 2009. However, in no way can it be claimed that the Government or the Ministry of National Defence is disregarding the rights of the trade unions.
- 567.** As to the allegation that the Ministry of National Defence refuses to negotiate with ASEMIL regarding the list of demands submitted by the latter organization, the Committee notes in particular that the Government states that the Ministry merely applied the provisions of Decree No. 535 of 2009, which restricts the scope of collective bargaining for public employees.
- 568.** The Committee notes that neither the complainant organization nor the Government specify the matters with regard to which it was not possible to reach an agreement, nor do they attach a copy of the list of demands. The Committee observes that article 2 of the Decree in question guarantees public employees the right to consultation with the employer public body through their trade union organizations, with the aim of: (1) fixing working conditions; and (2) regulating relations between employers and employees. Moreover, paragraph 1 states that “any issues falling outside of the labour domain, such as organizational structure, staffing, the management, administration and inspection competencies of the State, administrative procedures and the merit principle as an essential element in the public service, shall be excluded from consultations on working conditions”. The Committee recalls that matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and

allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation, etc.; these matters should not be excluded from the scope of collective bargaining by law. Moreover, with regard to a denunciation relating to the refusal to bargain collectively in the public sector regarding certain matters, the Committee has recalled the view of the Fact-Finding and Conciliation Commission on Freedom of Association: “there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation”. It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 913 and 920]. The Committee expects that the Government will ensure respect for those principles with regard to the matters covered by collective bargaining.

569. Finally, the Committee notes the information provided by the complainant organization, according to which CUT lodged an appeal for annulment of Decree No. 535 of 2009 (in which ASEMIL joined) which is currently before the Council of State – Second Section. The Committee states that it examined the Decree in question at its November 2009 meeting [see 355th Report, Case No. 2662] and observes that a number of collective agreements have been concluded based on that Decree without any disagreements arising in its regard. Furthermore, the Committee highlights that the Committee of Experts on the Application of Conventions and Recommendations stated, in its 2010 observation concerning the application of Convention No. 98, that it: “... is aware that the Decree is very short, can be improved and establishes principles which probably require further regulation to comply more effectively with its objectives and to extend in practice collective agreements in the various institutions. While from a technical viewpoint such regulation may well be appropriate, the Committee recalls that the Convention does not require exhaustive regulation, but rather is compatible with systems that envisage a minimum of interference by the State in collective bargaining in the public sector”. The Committee requests the Government and the complainant organization to keep it informed regarding the appeal for annulment lodged by the CUT and to transmit a copy of any ruling issued.
570. As to Legislative Act No. 01 of 2005 prohibiting negotiation on pensions, the Committee notes that the Government states that, in the case of the public sector, agreement-based schemes have been created without quantifying their final effect, with the result that inequitable regimes have been created which ultimately endanger the very existence of the respective establishments. The Committee also notes that, according to the Government, the main aim of Legislative Act No. 01 of 2005 is to ensure the effectiveness of the right to a pension for all those inhabitants who fulfil the legal requirements regarding the recognition of said right, on an equal footing, with pensions being excluded from collective bargaining.
571. The Committee states that it has already examined Legislative Act No. 01 of 2005 and recalled that: “... it recognizes the right of States to regulate pension schemes but underlines the necessity to respect the principle of collective bargaining in so doing. The adoption of a legal system for pensions does not generally fall within the jurisdiction of the Committee. However, it can examine to what extent the principles of freedom of association have been respected in adopting that system. Therefore, the Committee observes that until Legislative Act No. 01 was issued, it was legal to establish pensions clauses in collective agreements, in particular clauses that improved on the legal provisions, and so this was done on numerous occasions between private and public

enterprises and public bodies with various trade union organizations. On those occasions, the parties regulated the mode and amount of pensions applied to workers in the enterprise or the sector through collective bargaining The Committee requests the Government, in view of the particular circumstances of this case and in order to ensure harmonious industrial relations in the country, to hold new in-depth consultations on retirement and pension with the parties involved in order to find a solution acceptable to all the parties concerned in accordance with the Conventions on freedom of association and collective bargaining ratified by Colombia, in particular ensuring that the parties involved in collective bargaining can improve the legal provisions on retirement and pension schemes by mutual agreement.” [See 349th Report, paras 661 et seq.] The Committee reiterates its previous conclusions and recommendations on this matter and requests the Government to ensure that the parties involved in collective bargaining are free to negotiate in good faith on matters related to retirement and pension schemes with a view to achieving a mutual agreement.

The Committee’s recommendations

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

- (a) The Committee expects that the Government will ensure respect for the principles relating to the matters covered by collective bargaining.**
- (b) The Committee notes the information according to which CUT lodged an appeal for annulment of Decree No. 535 of 2009 (in which ASEMIL joined), which is currently before the Council of State – Second Section. Consequently, the Committee requests the Government and the complainant organization to keep it informed in that regard and to transmit a copy of any ruling issued.**
- (c) The Committee reiterates its previous conclusions and recommendations concerning pensions and requests the Government to ensure that the parties involved in collective bargaining are free to negotiate in good faith on matters related to retirement and pension schemes with a view to achieving a mutual agreement.**

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

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

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

573. The Committee last examined this case on its merits at its November 2010 meeting where it issued an interim report, approved by the Governing Body at its 309th Session [see 358th Report, paras 447–461].
574. The Korean Confederation of Trade Unions (KCTU) provided new allegations in a communication dated 7 December 2010 and 28 September 2011.
575. The Government provided partial observations in communications dated 14 January, and 30 August and 4 October 2011.
576. The Republic of Korea has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

577. At its November 2010 meeting, the Committee made the following recommendations [see 358th Report, para. 461]:
- (a) The Committee once again urges the Government to proceed with the MTU's registration without delay and to ensure that national decisions concerning the MTU's application for registration recognize the principle that all workers may be guaranteed the full exercise of their freedom of association rights. Furthermore it once again requests the Government to ensure that the Committee's conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.

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

B. Additional information submitted by the complainants

- 578.** In communications dated 7 December 2010 and 28 September 2011, the KCTU sent new information in relation to the situation of the current President of the MTU, Mr Michel Catuira. According to the complainant, Mr Catuira has served as President of the MTU since 2008. The complainant states that in these functions, Mr Catuira has been at the forefront of work to address violations of the rights of migrants and has spoken out against restrictions established under the Employment Permit System (EPS), including by vocally criticizing the government's policy of immigration raids and the deportation of undocumented migrant workers. The complainant further indicates that Mr Catuira came to South Korea as a migrant worker in 2006 and always maintained an employment relationship with a registered employer as required under the EPS. The complainant states that in March 2010, Mr Catuira followed the legally required procedures to be hired in a new company but soon after his hire, the company fell on hard times and there was little work for him to do. In July 2010, while the MTU carried out a sit-in protest against the G20-related crackdown, the Ministry of Employment and Labour East Seoul Office called Mr Catuira and his employer to the center to be questioned concerning suspicions about the validity of their employment relationship. According to the complainant, the center did not find any legal problem but continued to pressure President Catuira through his employer.
- 579.** The complainant states that on 23 November 2010, Mr Catuira received a summons from the Seoul Immigration Service to appear before a special investigation team to be questioned based on "suspicion of violations of the Immigration Control Act in the course of applying for a workplace transfer and with relation to actual performance of work duties at present". An MTU lawyer was told in response to his inquiries that the investigation concerned violations of provisions of the Immigration Control Act (ICA), including article 17 which prohibits foreigners from engaging in political activities. Mr Catuira received a second summons on 6 December and appeared before the investigation team on 22 December. Mr Catuira was questioned in detail in relation to his employment. There was no mention of article 17 according to the complainant, but the immigration office claimed that Mr Catuira's workplace did not exist and that Mr Catuira's visa may be revoked under article 89(1) of the ICA. In the meantime, the Ministry of Employment and Labour East Seoul Office sent a notice revoking the permit to employ foreign workers of Mr Catuira's employer due to lack of sufficient need. The complainant further states that, on 10 and 14 February 2011, the Seoul Immigration Service notified Mr Catuira and his lawyer that "permission for extension of stay" (his residence permit) had been cancelled and that an order for him to leave the country by 7 March had been issued. Mr Catuira's lawyer filed an administrative suit against the Seoul Immigration Service's actions and a petition for an injunction to stop the execution of all punitive immigration measures until the trial was complete. On 2 March 2011, the Seoul 12th Administrative Court granted the injunction and, according to the complainant, stated that suspension of these measures was "urgently necessary to prevent damages difficult to correct".

580. The complainant further states that Mr Catuira had to look for another employer before the expiration date of his employment contract on 7 March 2011, as under the EPS, migrant workers' residence permits are dependent on their being employed. Extension of residence permits for EPS workers during this period of job-hunting is routine and usually granted on the day on which it is applied for according to the complainant who, however, indicates that Mr Catuira's application dated 4 March was denied on March 17, on the grounds that he had used "dishonest means" to obtain his permit. The complainant states that the Immigration Service then ordered Mr Catuira to leave South Korea by 31 March. On 22 March, Mr Catuira applied for another type of visa which is normally granted to foreigners who are involved in legal proceedings, undergoing medical treatment or, for other humanitarian reasons but was notified of the denial of his application on 29 March.

581. The complainant indicates that, on 15 September 2011, the Seoul 12th Administrative Court issued a verdict in favour of Mr Catuira ordering the cancellation of all punitive immigration measures taken by the Seoul Immigration Service against him, including the cancellation of his "permission to transfer workplaces", "permission for extension of stay" (resident permit) and "order to leave the country" on 10 February 2011, as well as the "denial of application for extension of the residence period" and "notice of requirement to leave the country" taken on 17 March after the Court injunction was issued. According to the complainant the Court explicitly recognized the rights of migrant workers to form and participate in labour unions as protected under the Constitution and international law and ruled that "based on the protection provided to foreigners under article 6 of the Constitution ... [and under provisions of multiple international human rights conventions] ... it is correct to understand the basic rights enjoyed by workers including the rights to association and collective action, etc., as applying to migrant workers who are incorporated into South Korean society as well". According to the complainant, the Court also stated that in light of the Seoul Immigration Service's deportation of MTU officers in the past, "it is suspected that the [immigration measures taken against Mr Catuira] were taken, not for the ostensible reason given, but, in fact, because of the plaintiff's activities as chief of the migrant trade union". The complainant further indicates that the Court held, contrary to the Seoul Immigration Service's claims, that the company where Mr Catuira had been employed did in fact exist and that "there is no evidence worthy of note to suggest that [Mr Catuira] obtained his permits in a false or otherwise unlawful manner ... the Seoul Immigration Service's measures against Catuira were unlawful".

582. According to the complainant, on 16 September 2011, the day after the Court issued its decision, Mr Catuira went to the Seoul Immigration Service Office to renew his residence permit but, despite the clear ruling of the Court, the Immigration Service refused the renewal, saying that it planned to wait until the outcome of its appeal of the verdict. The complainant alleges that this is a clear refusal to enact the Court's decision and expresses its firm belief that, particularly in light of the past targeting of MTU officers, punitive immigration measures taken against Mr Catuira are part of an attempt to weaken the MTU by penalizing its officers.

C. The Government's reply

583. In a communication of 14 January 2011, the Government stated that the Ministry of Employment and Labour conducted an investigation on Mr Catuira to verify the validity of his visa status pursuant to the Act on the Employment of Foreign Workers and the Immigration Control Act, which is independent and irrespective of his union activities. According to the Government, the decision to verify the visa status of Mr Catuira was made because it was deemed that Mr Catuira did not maintain a legitimate employment relation with his employer named on the submitted visa document, as required under the visa for Non-Professional Employment (E-9) granted to Mr Catuira under the Government's EPS. The Government indicates that the business establishment that

Mr Catuira belonged to, and was supposed to work for, was not in operation and that from March to December 2010, Mr Catuira's actual working days translated to a total of 2-3 days.

- 584.** In July 2010, after being informed of the dubious employment relation concerning Mr Catuira at a virtually inoperative workplace, the East Seoul Job Centre arranged an interview with Mr Catuira and his employer to genuinely conduct fact-finding without prejudice. During the interview, both of them stated that the employment contract was signed back in March 2010, and the business had been suspended since May 2010 due to financial difficulties. The Government points out that its investigation found no evidence that attests to the entity as a workplace such as, an emblem and production facilities and that, instead, an education facility was located at the stated address of the workplace. It states that all pointed to slim chances of resuming business and it was construed that Mr Catuira was engaged in an employment contract in paper and name alone but was not in actual service. The Government indicates that, based on these findings, the East Seoul Job Centre informed Mr Catuira that he could select a new "fully operative" workplace of his own choice and enter into an employment contract with the new employer to maintain his visa status. On 1 December 2010, the Ministry of Employment and Labour revoked his employer's employment permit in accordance with the Act on the Employment of Foreign Workers and concluded that Mr Catuira's employment status was in violation of the purpose of the EPS. On 6 January 2011, Mr Catuira appeared at the East Seoul Job Centre to apply for a workplace transfer and was provided with references of suitable workplaces.
- 585.** The Government further states that, apart from the investigation of the Ministry of Employment and Labour, the Immigration Service summoned Mr Catuira on 23 November 2010 to appear before the Seoul Immigration Office to investigate the validity of his legal residence in the Republic of Korea in accordance with article 81 of the Immigration Control Act which stipulates that immigration control officers may ask any question or demand to present necessary materials to foreigners, the foreigners' employers and other relevant parties, in order to investigate whether or not any foreigner sojourns lawfully pursuant to the Act and any order issued under the Act. On 21 December 2010, the Immigration Service interviewed Mr Catuira who stated in his deposition that his actual workload was much lighter than expected, making him engaged in actual work only for two to three days during his overall claimed employment period. In its communication dated 4 October 2011, the Government indicates that the investigation of the Immigration Service on the legitimacy of Mr Catuira's activities during his alleged employment period within the specified scope of his E-9 visa status resulted in the cancellation of his sojourn extension permit and of his workplace change permit on 10 February 2011. Mr Catuira was accordingly ordered to leave the country by 7 March 2011 at that time. The Government adds that, following Mr Catuira's appeal of the decision of the Immigration Office and the Court's granting, on 2 March 2011, of a suspension of the immigration measures, the Seoul Immigration Office rejected his application for re-extension of stay on 7 March for the reason that "Mr Catuira violated the Immigration Control Act by obtaining the sojourn permit using illegitimate means (...)." Mr Catuira also filed a case against this decision and on 15 September 2011, the Seoul Administrative Court handed down its ruling that given the fact that the business existed at the time when the sojourn extension permit and the workplace change permit were granted in March 2010, it cannot be construed that the permits were obtained by illegitimate means, and therefore all of the decisions of the Seoul Immigration Office should be cancelled. The Government states that the Immigration Office plans to appeal against the court's decision and that it will, together with the Job Center, proceed in accordance with the court's final ruling and related laws.

586. The Government affirms that the investigations and interviews conducted were legitimate measures taken by a sovereign state to ensure compliance of its immigration laws, irrelevant of freedom of association, and were not intended to suppress the MTU or to deport Mr Catuira.
587. In a communication dated 30 August 2011, the Government further indicates that the Supreme Court is yet to hand down its decision on the case which has been pending since 23 February 2007. The Government, as the defendant of the case, has made every effort to assist the Supreme Court to make a decision based on sufficient information by submitting supplementary reports explaining its reasons for appeal. The Government, as well as the MTU, the CFA, employers' and workers' organizations at home and abroad, expect the decision to be handed down as soon as possible.
588. Meanwhile, the Government explains that foreign workers with a valid working visa are granted the same labour rights as Korean citizens including the right to establish a trade union and the right to collective bargaining, as mentioned in the previous observations provided by the Korean Government. Currently, there are three trade unions established by foreign workers in the Republic of Korea, including one that was set up on 25 February 2011 by six foreign English teachers in Gwangju who submitted a union establishment report and received the union establishment certificate from the Government.
589. The Korean Government is making continuous efforts to protect the working conditions and ensure the rights and interests of foreign workers. In an effort to eradicate violations of foreign workers' human rights, an additional number of support centres for foreign workers has been set up in areas densely populated by foreign workers, counselling centres for foreign workers have been newly established, inspections of workplaces on violations of working conditions and illegal employment have been conducted, and training for employers and workers to help foreign workers adapt to the workplace have been provided. On 1 July 2011, the Government opened a counselling centre for foreign workers, where they can get counselling on labour problems in their mother tongues. At present, counselling services are available in ten languages among the 15 countries that send workers to the Republic of Korea under the EPS, and the Government plans to continuously expand the number of available languages and counsellors.
590. In addition, the Government is providing pre-employment training to new foreign workers, workplace adaptation training to those who changed workplaces, and training to employers who hire foreign workers in order to enhance the understanding of the employers and foreign workers on the Act on Foreign Workers' Employment and other related labour laws. The Government continuously conducts inspections on workplaces that hire foreign workers through the EPS. During the period of May to June 2011, the Government conducted inspections on 1,800 workplaces with regard to their compliance to the Labour Standards Act as well as rules and regulations concerning the EPS.

D. The Committee's conclusions

591. *The Committee recalls that this case concerns allegations that, against a background of an allegedly generalized discrimination against migrant workers intended to create a low-wage and easily exploitable labour force, the Government refused to register the MTU and carried out a targeted crackdown on the MTU by successively arresting its officers and subsequently deporting many of them. The Committee takes note of the new serious allegations provided by the complainant in relation to the situation of the current President of the MTU, Mr Michel Catuira. The Committee observes that the Government has allegedly pressured Mr Catuira's employer and taken extensive punitive immigration measures against Mr Catuira, including, by cancelling "permission to transfer workplaces", "permission for extension of stay" (resident permit) and by ordering him to*

leave the country. The Committee notes that the complainant firmly believes that such measures are part of an attempt to weaken the MTU by penalizing its officers in light of past targeting of MTU officers.

592. As regards the allegations of harassment of Mr Catuira, the Committee notes the Government's indication, in its January 2011 communication, that the Ministry of Labour and Employment and the East Seoul Job Centre had investigated this employment relationship given that there were doubts as to its legitimacy. Following the necessary fact-finding including interviews with Mr Catuira and his employer, the Job Center found that he was engaged on paper only leading to the revocation of the permit of employment of his employer and the illegitimacy of his employment situation. Separately, the Immigration Office inquired into the legal residence of Mr Catuira and the legitimacy of his activities and cancelled his work and sojourn permits. The Committee further notes the Government's affirmation that the investigations and interviews conducted were legitimate measures taken by a sovereign state to ensure compliance of its immigration laws, irrelevant of freedom of association, and were not intended to suppress the MTU or to deport Mr Catuira.
593. The Committee also takes note of the verdict issued on 15 September 2011, by the Seoul 12th Administrative Court cancelling all punitive immigration measures taken by the Seoul Immigration Service against the MTU President including the cancellation of the permit to transfer workplaces, cancellation of the extension of residence period and order to leave the country, denial of application for extension of the residence period and notice of requirement to leave the country taken on 10 February and 17 March 2011. The complainant provides a translation of the ruling providing that "[T]here is no evidence worthy of note to suggest that [President Catuira] obtained his permits [of employment and residence] in a false or otherwise unlawful manner" in relation to the Seoul Immigration Service's claim that the company where President Catuira was employed, did not exist and its cancellation of his visa. The Committee notes that the Government provides a similar summary of the decision in this respect. In relation to President Catuira's activities as the leader of the MTU, the Court explicitly recognized the rights of migrant workers to form and participate in labour unions, as protected under the Constitution and international law, and ruled that "[I]t is correct to understand the basic rights enjoyed by workers, including the rights to association and collective action, etc., as applying to migrant workers who are incorporated into South Korean society as well". According the complainant, the Court also stated that in light of the Seoul Immigration Service's deportation of MTU officers in the past, "it is suspected that the [immigration measures taken against Mr Catuira] were taken, not for the ostensible reason given, but, in fact, because of the plaintiff's activities as chief of the migrant trade union".
594. The Committee notes with deep concern the serious allegations that the Government targeted Mr Catuira because of his activities in the MTU. While the Government affirms that the measures taken in respect of Mr Catuira were irrelevant to the question of freedom of association, the Committee observes that he is the President of a migrant union which has been seeking its registration to represent migrant workers for several years now. In this respect, the Committee notes the Court's recognition that the basic rights of workers apply to migrant workers and the doubts it has expressed over whether the immigration measures taken against Mr Catuira were wholly unrelated to his activities as leader of the MTU.
595. The Committee recalls that Article 2 of Convention No. 87 is designed to give expression to the principle of non-discrimination in trade union matters, and the words "without distinction whatsoever" used in this Article mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc. [see **Digest of decisions and principles of the**

Freedom of Association Committee, fifth (revised) edition, 2006, para. 209]. The Committee has interpreted this right to include migrant workers on numerous occasions regardless of their legal status [see *op. cit.*, para. 214]. The Committee further recalls that measures of deportation of trade union leaders, while legal appeals are pending, may involve a risk of serious interference with trade union activities.

596. While taking due note of the information provided by the Government concerning the rights of foreign workers and the regular inspections carried out at workplaces with foreign workers, the Committee urges the Government to refrain from any measures which might involve a risk of serious interference with trade union activities and might lead to the arrest and deportation of trade union leaders for reasons related to their election to trade union office. It requests the Government to submit detailed information on the current status of Mr Catuira's work permit in reply to the complainant's communication of 28 September 2011, and any other information related to this case.
597. Noting with concern the complainant's allegations in its latest communication that the Seoul Immigration Service refused to renew the residence permit of Mr Catuira on 16 September despite the decision of the Court, the Committee requests the Government to enforce the decision of the Administrative Court cancelling all punitive measures until a final judgment had been rendered, including by granting the renewal of Mr Catuira's residence permit as requested by the Court.
598. The Committee further regrets that these allegations and recent judicial developments arise within a framework in which the case concerning the application for registration of the MTU has been pending with the Supreme Court for over four years now. The Committee expresses its firm expectation that the Government will proceed with the registration of the MTU without delay and supply full particulars in relation to this matter, as well as in reply to its previous recommendations. The Committee once again requests the Government to ensure that the Committee's conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.
599. Finally, while noting efforts made by the Korean Government to protect the labour rights of foreign workers with a valid working visa, including their right to organize and to collective bargaining, the Committee once again requests the Government to undertake an in-depth review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee requests to be kept informed of the progress made in this regard.

The Committee's recommendations

600. *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 refrain from any measures which might involve a risk of serious interference with trade union activities and might lead to the arrest and deportation of trade union leaders for reasons related to their election to trade union office. It requests the Government to enforce the decision of the Administrative Court cancelling all punitive measures until a final judgement has been rendered, including by granting*

the renewal of Mr Catuira's residence permit. The Committee requests the Government to submit detailed information on the current status of Mr Catuira's work permit in reply to the complainant's communication of 28 September 2011 and any other information related to this case.

- (b) The Committee expresses its firm expectation that the Government will proceed with the registration of the MTU without delay, and supply full particulars in relation to this matter.*
- (c) The Committee once again requests the Government to ensure that the Committee's conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.*
- (d) The Committee once again requests the Government to undertake an in-depth review of the situation concerning the status of migrant workers in full consultation with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee requests to be kept informed of the progress made in this regard.*

CASE NO. 2571

DEFINITIVE REPORT

Complaint against the Government of El Salvador presented by

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

supported by

the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)

Allegations: Anti-union dismissals, acts of intimidation against trade unionists at the Calvoconservas El Salvador SA de CV enterprise, and establishment of a trade union made up of company chiefs and trusted staff

601. The Committee last examined this complaint at its June 2011 meeting [see 360th Report, approved by the Governing Body at its 311th Session (June 2011), paras 612–619].

- 602.** The Government sent new observations in a communication dated 13 May 2011. In a communication dated 9 August 2011, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) supported the complaint of the complainant federation (FESTSSABHRA).
- 603.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 604.** At its June 2011 meeting, the Committee made the following recommendations on the issues that were still pending [see 360th Report, para. 619]:
- As regards the allegations of anti-union dismissal of Ms Berta Aurelia Menjivar (founder member of the trade union branch), and of Mr Joaquín Reyes (member and former union official), Mr José Antonio Valladares Torres and Mr Roberto Carlos Hernández (union officials), and non-payment of wages owed to them, the Committee requests the Government to keep it informed of the final outcome of the legal proceedings against Mr José Antonio Valladares Torres and to send a copy of the court rulings already given regarding the other union officials concerned.
 - Concerning the alleged intimidation against trade unionists, in particular the stationing inside the plant of armed guards who called on workers not to join the SGTIPAC, the Committee requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome.
 - As regards the alleged recognition as a legal entity of a trade union (the Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as the negotiation of a collective agreement between that union and the company, the Committee once again requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome.
 - The Committee requests the Government to obtain information on the pending questions through the employers' organization concerned.

B. New reply from the Government

- 605.** In its communication dated 13 May 2011, the Government states with regard to the alleged dismissals that with respect to the individual labour case brought by Ms Berta Aurelia Menjívar (founding member of the trade union branch) against Calvoconservas El Salvador SA de CV, the First Labour Court of San Salvador, in a ruling issued at 9.15 a.m. on 5 July 2007, acquitted Calvoconservas El Salvador SA de CV. Ms Berta Aurelia Menjívar was claiming compensation for wrongful dismissal and for holiday pay, bonus entitlement and overdue wages corresponding to the first two weeks of February 2007. The above ruling was appealed by the complainant Ms Berta Aurelia Menjívar, and the case was consequently brought before the First Appeal Chamber of the Labour Court of San Salvador, which upheld the ruling (mentioned above), namely, it cleared Calvoconservas El Salvador SA de CV of having to pay Ms Berta Aurelia Menjívar compensation for wrongful dismissal and other employment benefits (the Government attaches copies of the rulings).
- 606.** With respect to the individual labour case brought by Mr Roberto Carlos Hernández (trade union official) against Calvoconservas El Salvador SA de CV, the Government states that the Fourth Labour Court of San Salvador, in a ruling issued on 24 September 2007, cleared Calvoconservas El Salvador SA de CV of the complaint filed against it by the worker Mr Roberto Carlos Hernández, relating to the payment of a benefit equivalent to salaries

that had remained unpaid for reasons attributable to the employer. The abovementioned ruling was challenged by Mr Roberto Carlos Hernández, who filed an appeal before the Second Appeal Chamber of the Labour Court of San Salvador, which upheld the ruling under appeal, in other words, it absolved the Calvoconservas El Salvador SA de CV enterprise of the payment of compensation for wrongful dismissal and other employment benefits (the Government attaches copies of the rulings).

607. In the case of Mr José Joaquín Reyes (member and former union official), the Government reports that, in accordance with the labour inspection report dated 15 June 2007, Mr José Joaquín Reyes signed a severance document dated 15 March 2007, terminating his temporary employment contract with the Calvoconsignataria Centroamericana SA de CV enterprise, exonerating the enterprise from any labour-related claims, as was indicated in paragraph 3 of the note dated 28 May 2009 (the Government attaches a copy of the inspection report).

608. Concerning the final outcome of the legal proceedings brought before the civil court of La Unión by the Calvoconservas El Salvador SA de CV enterprise against Mr José Antonio Valladares Torres, the Government reports that on 20 October 2009, the court in question issued a final ruling, dismissing the petition for the termination of the individual employment contract between the Calvoconservas El Salvador SA de CV enterprise, represented by Mr Miguel Ángel Peñalva Arigita, and the worker Mr José Antonio Valladares Torres, on the grounds that the latter enjoyed trade union immunity. In that respect, the court ordered that the worker should continue working in the plaintiff enterprise. The ruling was implemented on 14 December 2009, in the absence of any appeals (the Government attaches a copy of the ruling).

609. As regards the recommendation “(b) *Concerning the alleged intimidation against trade unionists, in particular the stationing inside the plant of armed guards who called on workers not to join the SGTIPAC, the Committee requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome*”, the Government reports that, on 14 December 2010, the special unit on gender and the prevention of discrimination in respect of employment of the labour authority carried out an inspection to verify the situation; during the inspection, workers of the Calvoconservas El Salvador SA de CV enterprise were interviewed, and they indicated that there were no acts of intimidation against unionized workers and that the enterprise in question had not employed security guards who were stationed as armed guards inside the plant. Also interviewed during the inspection was worker and union official, Ms Vilma Yamilet Ramos Fuentes, minutes and agreements secretary of the union (SGTIPAC), who confirmed that there had been no security guards in that enterprise and that the unionized workers were not subjected to any form of intimidation (the Government encloses a copy of the inspection report).

610. With regard to the recommendation relating to the Union of Workers of Calvoconservas El Salvador SA de CV (STECCESSACV) (the text of the recommendation was as follows: “*As regards the alleged recognition as a legal entity of a trade union (the Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company heads and trusted individuals, as well as the negotiation of a collective agreement between that union and the company, the Committee once again requests the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome*”), the Government states that it acknowledges the omission by the State of El Salvador with regard to the repeated observations that the Committee on Freedom of Association has issued on this matter to the Government of El Salvador since 2007, when the complaint was presented, and wishes to inform the Committee that it recognizes its legal and moral obligation to reply to the observations made by the Committee on Freedom of Association. In this regard, the new administration, which came

into office in 2009, broadened the investigation and confirms the following information, on the basis of the existing records and archives:

- With regard to the recognition of the trade union STECCESSACV as a legal entity, the Government reports that although, under section 213, paragraph (a), of the Labour Code, the constituent act of a trade union must indicate, among other things, “the activity that *they carry out and that forms the basis of the relationship*”, the constituent act of the STECCESSACV omitted this information, which the Ministry of Labour should have asked for at the time, in 2007, in order to prevent the establishment of employer-controlled trade unions, made up of company chiefs and trusted staff. The certification issued by the Calvoconservas El Salvador SA de CV enterprise, recognizing the employee status of the 40 founding members of the STECCESSACV, does not specify the activities or positions of the 40 workers or their relationship with the enterprise. Despite this, on 3 July 2007, the STECCESSACV was granted legal personality.
- The omission of this requirement and the late submission, on 26 March 2008, of the request by the Second Disputes Secretary of the SGTIPAC to the then Director General of Inspection for an inspection suggests that it is most likely that the General Labour Directorate of this State department, between the time that “the request” for legal personality was filed and the time that such personality was “granted”, on 3 July 2007, had no evidence that the union in question was made up of workers, managers and trusted staff of the Calvoconservas El Salvador SA de CV enterprise. Unfortunately at the time, in 2008, no action was taken in response to this inspection request, thus affecting the right to freedom of association and specifically the right to adequate protection against any act of interference, as described in Article 2 of ILO Convention No. 98.
- The Government adds that, on 10 September 2009, Mr Daniel Ernesto Hernández Castillo, General-Secretary of the Union of Workers of the Food Processing Industry (SITIPA), submitted to the General Labour Inspection Directorate a request for inspection into the “operation of the STECCESSACV”, which was “allegedly” composed of chiefs, trusted staff and employer representatives of the Calvoconservas El Salvador SA de CV enterprise, and for coercing the union officials of the SITIPA, and workers in general, not to join the SITIPA. In response to this request, on 24 and 25 September 2009, the special unit for gender and the prevention of discrimination in respect of employment of this State department conducted an inspection in the Calvoconservas El Salvador SA de CV enterprise and found that the Calvoconservas El Salvador SA de CV enterprise had violated section 229, paragraph (ch), in conjunction with section 205, paragraphs (b) and (ch), of the Labour Code, and Article 2 of ILO Convention No. 98, by carrying out acts of indirect coercion, by allowing officials of the STECCESSACV to give new staff “a document to sign” at the time of their recruitment, in other words a STECCESSACV membership form. In the same inspection report, the labour inspector recommends that the enterprise should refrain from carrying out acts of indirect coercion and ensure that workers are entitled to join any of the three unions within the enterprise. In response to the request for inspection, on 11 November 2009, a further inspection was conducted, during which it was found that the violation of section 229, paragraph (ch), in conjunction with section 205, paragraphs (b) and (ch), of the Labour Code and Article 2 of ILO Convention No. 98 “*had been remedied, as acts of indirect coercion no longer took place, as the Calvoconservas El Salvador SA de CV enterprise was not allowing STECCESSACV officials to give membership forms to newly recruited staff*” (as indicated in the abovementioned inspection report).

- On 5 May 2011, a further investigation was conducted at the Calvoconservas El Salvador SA de CV enterprise, to determine whether there were employer representatives and workers in positions of trust among the STECCESSACV founding members, as has been claimed by the SGTIPAC and the SITIPA. The results of this investigation are conclusive and confirm the claims made in 2007 and 2008, respectively, by the SGTIPAC and the SITIPA. This inspection revealed that, of the 40 founding members of the STECCESSACV, on 27 May 2007, five founding members were company chiefs, and 16 founding members held supervisory positions, and were presumably representatives of the employer under section 3 of the Labour Code. On the other hand, it is worth noting that Mr Salvador Augusto Escamilla Fuentes was not serving as a chief or supervisor but as an electrician, but with a monthly salary of US\$1,050.15, as was the case with Ms Nidia Armida Cruz de Álvarez, who, even though she clearly is neither a chief nor a supervisor, receives a monthly salary of US\$900.15, well above the US\$195.00 monthly salary paid to operators at the time of the establishment of the STECCESSACV. It should also be noted that the Calvoconservas El Salvador SA de CV enterprise agreed that the STECCESSACV could provide membership forms to newly recruited staff as noted during the inspection conducted on 24 and 25 September 2009. There is no doubt that these are acts of interference by the Calvoconservas El Salvador SA de CV enterprise. In this respect, paragraph 858 of the *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, holds that “as regards allegations of anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, as well as the alleged efforts made to create puppet unions, it considers such acts to be contrary to Article 2 of Convention No. 98, which provides that workers’ and employers’ organizations shall enjoy adequate protection against any acts of interference by each other or each other’s agents in their establishment, functioning or administration.” Given this situation, the Government informs the Committee on Freedom of Association that, as a new administration, it acknowledges the violation by the Government of El Salvador, in 2007 and 2008, of the right to freedom of association recognized by the Constitution of the Republic, and of ILO Conventions Nos 87 and 98, on the grounds that it did not demand that the constituent act of the STECCESSACV provide details of the post or activity that the 40 founding members of the union in question carried out for the Calvoconservas El Salvador SA de CV enterprise, a situation that led to the granting of legal personality to a trade union that had over 25 per cent of members with employer representation functions. It should be noted, furthermore, that, in less than three months, a collective labour agreement was negotiated with the STECCESSACV, which is the party to that contract, a situation that complicates this situation given that, by law, there can be only one collective labour agreement per enterprise. This situation could be rectified by establishing an allied agreement the next time the collective agreement is reviewed, to somehow restore the spirit of the original collective labour agreement. With regard to the collective agreement, the Government states that, in accordance with File No. 12 of 2007, which was processed in the Department of Collective Labour Relations of the General Labour Directorate, the process of negotiating the collective agreement began on 22 September 2007, and ended on 11 November 2007, as part of the direct negotiation stage, in which the current Ministry did not intervene at all.
- In conclusion, the Government states that, by decision of 7 February 2008, the General Labour Directorate dismissed the application for the conclusion of a collective labour agreement submitted by Mr Alexander Reyes, Secretary-General of the SGTIPAC, for being inadmissible on the grounds that, pursuant to paragraph 4 of section 272 of the Labour Code, “in an enterprise there can only be one collective labour agreement, whose provisions shall apply to all employees of the enterprise

who have subscribed to it, even if they do not belong to the contracting union, as well as to workers who join the enterprise during the period when the collective labour contract or agreement is in force.”

- Finally, the Government considers that it has complied with the recommendations made by the Committee on Freedom of Association and requests that the present case be treated as closed.

C. The Committee's conclusions

- 611.** *The Committee observes that the pending issues refer to allegations of anti-union dismissals at the Calvoconservas El Salvador SA de CV enterprise and the establishment of a trade union within the enterprise made up of staff in positions of trust and executive posts.*
- 612.** *With respect to the pending allegations of dismissals of union officials, the Committee notes that on 15 March 2007, the trade union member and former union official, Mr José Joaquín Reyes, signed a severance document for the liquidation of benefits due, which served as a voluntary termination of the employment contract that bound him to the enterprise, freeing it of any claim. The Committee also notes, with interest, that according to the Government, in accordance with a judicial ruling (that the Government encloses), the enterprise reinstated the union official, Mr José Antonio Valladares Torres, in his post on the grounds that he could not be dismissed on account of his trade union immunity.*
- 613.** *With regard to the request made during the previous examination of the case to provide the text of the rulings relating to other trade union members, the Committee notes the Government's indication that the first instance and appeal rulings that it provides, concerning Ms Berta Aurelia Menjívar (founding member of the trade union branch) and Mr Roberto Carlos Hernández (union official), absolved the enterprise of the payment of compensation for wrongful dismissal and other employment benefits. The Committee observes that it appears from the rulings handed down concerning Ms Berta Aurelia Menjívar (founding member of the trade union branch, according to the allegations) that this trade union member did not ask to be reinstated but rather requested the payment of compensation for wrongful dismissal, which was denied as she was unable to directly prove her dismissal (the only thing that was proven, on the basis of witness statements, was that she worked for more than two days, in a relationship of subordination, for the enterprise and that there was no evidence of a written contract); in any event, Ms Berta Aurelia Menjívar did not lodge her appeal within the legally stipulated period of 15 days following the alleged dismissal. As for the rulings relating to Mr Roberto Carlos Hernández (union official, according to the allegations), it appears from the rulings that this union official did not ask to be reinstated, but instead requested the payment of wages that had not been paid for reasons attributable to the employer; the ruling upholds the fact that the parties were bound by an employment relationship and that Mr Roberto Carlos Hernández had the status of trade union official, but does not uphold the dismissal (allegedly on 29 March 2007) and notes that the legal action was not lodged within the legally stipulated time frame. Taking account of these rulings and the fact that the alleged acts date back to 2007, the Committee will not pursue its examination of these allegations.*
- 614.** *Concerning the alleged intimidation against trade unionists, in particular the stationing inside the plant of armed guards who called on workers not to join the SGTIPAC, the Committee had requested the Government to conduct an investigation without delay into these allegations and to keep it informed of the final outcome. The Committee notes that in compliance with this recommendation the Government ordered an inspection of the enterprise in December 2010, which found that the SGTIPAC trade union officials and workers denied the presence of guards or of intimidation against workers or trade*

unionists. Given these circumstances, and unless the complainant organizations provide additional information on the subject, the Committee will not pursue its examination of these allegations.

- 615.** *As to the inquiry requested by the Committee into the alleged recognition as a legal entity of a trade union (the Union of Workers of Calvoconservas El Salvador SA de CV) within the company, comprising company chiefs and trusted individuals, as well as the negotiation of a collective agreement between that union and the company, the Committee notes the Government's statements, following the corresponding investigation, to the effect that: (1) according to the allegations, five founding members of the STECCESSACV had the status of company chiefs and 16 founding members were supervisors, which is why, under prevailing legislative provisions, they were representatives of the employer; (2) the enterprise agreed that this trade union could provide membership forms for new staff, which constitutes an act of interference committed by the enterprise in violation of ILO Conventions Nos 87 and 98. This is the responsibility of the former Ministry, which granted legal personality to a union that had over 25 per cent of members with employer representation functions, which led to the union in question negotiating a collective agreement; (3) this complicates the situation, as under prevailing legislation there can only be one collective agreement that applies to all workers; (4) consequently, the collective agreement request submitted by the representatives of the other trade union (SGTIPAC), the complainant organization in the present case, was not declared admissible; (5) the next time the collective agreement is reviewed this situation can be rectified by establishing an allied agreement (between trade unions) in order to achieve a true collective agreement. Under these circumstances, the Committee requests the Government to ensure that unions with a substantial membership with employer representation functions should not be able to engage in collective bargaining on behalf of the other workers.*

The Committee's recommendations

- 616.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to ensure that unions with a substantial membership with employer representation functions should not be able to engage in collective bargaining on behalf of the other workers.*
 - (b) Concerning alleged intimidation against trade unionists, including the stationing inside the plant of armed guards, the Committee will not pursue its examination of these allegations, unless the complainant organizations provide additional information on the subject.*

CASE NO. 2781

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

- **the Trade Union of Salvadorian Public Transport Workers (STITCPAS)**
- **the Trade Union of Employees and Workers of the Municipality of Mejicanos (SETRAMME)**
- **the Trade Union of Workers of the Municipality of Nejapa (ASITAMUNE) and**
- **the Trade Union of Schoolteachers with Community Participation (SIMEDUCO)**

Allegations: Attempts to obstruct the establishment of trade unions, anti-union discrimination

617. The complaints are contained in communications of May 2010 from the Trade Union of Salvadorian Public Transport Workers (STITCPAS), the Trade Union of Employees and Workers of the Municipality of Mejicanos (SETRAMME), the Trade Union of Workers of the Municipality of Nejapa (ASITAMUNE) and the Trade Union of Schoolteachers with Community Participation (SIMEDUCO).

618. The Government sent its observations in a communication dated 4 November 2010.

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

A. The complainants' allegations

620. In its communication of 20 May 2010, STITCPAS claims that, according to a notarized record issued on 6 February 2010 in San Salvador, STITCPAS was established as an industrial trade union in the presence of 43 founding members who endorsed and approved the record along with the 75 articles of the trade union's by-laws. On 15 February 2010, the union submitted an application for legal personality to the Ministry of Labour and Social Security together with a list of the founding members.

621. According to STITCPAS, on 23 February 2010, Mr Juan Uclides Hernández, Mr Isaac Ernesto Treminio Orellana, Mr Luis Alonso Méndez Lovo and Mr Luis Alonso Baires Ramírez were dismissed on the grounds that their services were no longer required, when in fact they were dismissed for establishing the trade union, which runs counter to article 47 of the Constitution of the Republic, human rights treaties, the ILO Constitution, and section 248 of the Labour Code, as all these workers are founding members of the union. The workers requested the Ministry of Labour and Social Security to carry out an inspection to ascertain the facts but their request went unanswered.

622. On 1 March 2010, the Ministry of Labour and Social Security requested the trade union to provide the exact address of the companies “FBF”, “Violeta” and “Manolo”. The same day, the trade union sent a written reply containing the information requested.
623. In a telephone call made on 25 March 2010, the head of the National Department for Social Organizations of the Ministry of Labour and Social Security requested the trade union to prove the employment status of a number of workers who were members of the new trade union. The trade union representative replied that he could only provide the daily rosters for workers on the eastern routes. The head of the National Department for Social Organizations indicated that this information was sufficient to establish that there was an employment relationship between the workers and the employer.
624. On 6 April 2010, the trade union sent a written reply containing proof of the employment relationship in the form of: the daily roster of the workers on the eastern routes as issued by Mr Ernesto Anzora, the manager responsible for the eastern routes; and a sworn statement by Mr Rosember Guardado Rodríguez, Mr Santos Miguel Crespín and Mr Luis Alonso Baires, together with various testimonies, as the workers never signed an employment contract or received social security benefits. However, despite having submitted the aforementioned documentary evidence and testimonies in order to confirm the employment status of another 13 workers, the Ministry of Labour and Social Security on 8 April 2010 saw fit to deny legal personality to the trade union, as reflected in decision 22/2010, which, in its third preambular paragraph states: “... that pursuant to the provisions laid down in section 211, paragraph (1), of the Labour Code, according to which a minimum of 35 members is required to establish a trade union and enable it to operate, a requirement that was not met in this case, given that these formalities have served to confirm the employment status of only 31 of the workers who participated in the establishment of the trade union, which may be deduced from the aforementioned facts and numbered provisions, it is not possible for the Ministry of Labour and Social Security to grant legal personality to the trade union”. However, STITCPAS maintains that 43 workers were founding members of the trade union.
625. In its communication of 20 May 2010, SETRAMME claims that on 23 June 2008 an unscheduled inspection was carried out on the premises of the Mejicanos Municipal Authority by the Ministry of Labour and Social Security, during which it was noted that the Municipality of Mejicanos, of which the Mayor is the legal representative, had committed 11 contraventions under section 18 of the Labour Code for not having signed an extension of the individual employment contracts of the following workers: José Israel Menjívar Guardado, Johny Alexander García, Marcial Alvarado Herrera, Santos Erasmo García López, Guillermo Antonio López Carranza, Carmen Elena Hernández Escobar, José Modesto Córdova Murillo, Reyna Vásquez Hernández, Jorge Humberto López Molina, Julián Hernández Morales and Domingo Sorto Hernández. These individuals, who on that date were members of the Municipal Workers’ Association (ATRAM), were threatened with dismissal by the municipal government if they did not leave the trade union. A time limit of ten working days was set for the contraventions committed under section 18 of the Labour Code to be remedied, but the Municipality of Mejicanos failed to act on the Ministry’s recommendation.
626. On 4 September 2008, the Ministry of Labour and Social Security carried out a second inspection on the premises of the Mejicanos Municipal Authority to ascertain whether the contraventions noted during the previous inspection had been remedied. The second inspection had a negative outcome as the Municipality of Mejicanos had failed to rectify the contraventions of section 18 of the Labour Code which it had committed by not signing the extension of the individual employment contracts of the 11 workers. A management representative stated that: “every possible measure is being taken to transfer those workers to other posts pursuant to the Municipal Administrative Careers Act”. As a result of the

municipal government's threats of dismissal, several members of ATRAM left the association.

627. On 20 July 2009, SETRAMME was established as a trade union of public servants in the presence of 40 founding members who provide services for the Municipality of Mejicanos.

628. Pending the decision of the Ministry of Labour and Social Security of the Republic of El Salvador allowing ATRAM to become a trade union of public servants, on 9 September 2009, some members of ATRAM approached the Labour Rights Centre of the Central American University's Human Rights Institute to call on the staff of that institution to lodge a complaint with the labour inspectorate regarding unlawful acts against both union members and the members of the union's executive committee. The allegations relate specifically to the following points:

- the establishment of two payrolls, the first of which was signed on 25 August 2009 and the second on 31 August 2009. The second reveals a deduction of between US\$20 and US\$26 from union members' wages, including those of executive committee members on days when it convened;
- threats of dismissal against organized workers, the executive committee, and in particular against Mr Carlos Enrique Salinas, made by the head of the municipal government and the head of the municipal department for the environment;
- the fact that since September 2009, staff employed by the Municipality of Mejicanos have not received social security certificates for the month of September;
- the five-month delay in payments from the Pension Funds Administrator for the months of May, June, July, August and September 2009;
- delays in paying administrative staff;
- harassment and arbitrary transfers of field staff, especially members of ATRAM and its executive committee;
- threats and workplace harassment directed at all Municipality of Mejicanos staff by the head of the municipal government, the head of the municipal department for the environment, the head of the municipal department for environmental sanitation and the overall supervisor, stating that if they supported the trade union in its protest action in support of legal entitlements, they would be dismissed;
- non-payment of group life insurance, which is administered by a central insurance body; and
- the Mejicanos municipal government's refusal to recognize ATRAM as an organization.

629. ATRAM and SETRAMME requested the Mayor of the Municipality of Mejicanos and the Municipal Council, firstly, to revoke the decision taken by the Municipal Council on 26 August 2009, whereby it suspended Thursday as a weekly rest day for ATRAM members until it could provide the municipal authorities with proof of legal personality, despite the fact that ATRAM had unsuccessfully applied for legal personality on several occasions; and, secondly, to cancel any time off granted in this context by any public servant during the period 2003–06. SETRAMME explains that Thursday is not a rest day for union members but is the day set aside for the activities of ATRAM and the new trade union, SETRAMME.

- 630.** On 23 September 2009, ATRAM lodged a complaint with the labour inspectorate regarding unlawful acts against union members, namely, two administrative penalties comprising deductions from wages not provided for under the Municipal Administrative Careers Act of the Republic of El Salvador, for having missed the deadline for submitting social security certificates and delayed payments from the Pension Funds Administrator. On 24 September 2009, the Ministry of Labour and Social Security granted SETRAMME legal personality. That same month, the trade union lodged a complaint with the labour inspectorate regarding unlawful acts against union officials Mr Julio Trejo Beltrán, Mr Franklin Samuel Parada Pérez and Mr Carlos David Martínez, which included an administrative penalty consisting in a deduction from wages not provided for under the Municipal Administrative Careers Act of the Republic of El Salvador while, in addition, all union members and other workers were obliged to sign two payrolls. One payroll reflected the deduction while the other showed their full wages without deductions. Furthermore, they are currently receiving their social security certificates between ten and 15 days after the deadline. The trade union also complained of the constant harassment of workers in the workplace at the hands of their immediate superiors, the head of the municipal department for the environment, the head of the municipal department for environmental sanitation and the overall supervisor, intended to force the workers to resign.
- 631.** In October 2009, a complaint was filed regarding unlawful acts against union member Mr José Mauricio Andrade, who in August had been forced to sign two payrolls. It was then that he realized that unlawful deductions were being made from the other workers' wages by means of the two payrolls, one of which reflected the deduction while the other showed their full wages without deductions.
- 632.** SETRAMME alleges that to date no inspector has been sent by the Ministry of Labour and Social Security to investigate the situation. In October 2009, the trade union was told that the Ministry of Labour and Social Security was not competent to carry out such an inspection, as those workers were covered by the Municipal Administrative Careers Act.
- 633.** In October 2009, nine union officials filed a complaint against the Municipality of Mejicanos in the form of a request for an inspection, with the Directorate-General of Inspections of the Ministry of Labour and Social Security, stating that, since 2007, the administration had failed to provide the members of ATRAM and other employees of the Municipality of Mejicanos with the means necessary to do their work and protect their health, and that their working conditions were insalubrious. Furthermore, they complained of constant harassment in the workplace at the hands of their immediate supervisors, the head of the municipal department for the environment, the head of the municipal department for environmental sanitation and high-ranking officials, intended to force the workers to resign.
- 634.** In its communication of 18 May 2010, ASITAMUNE alleges that, on 22 July 2009, the workers of the Municipality of Nejapa met in order to establish the Trade Union of Workers of the Municipality of Nejapa (ASITAMUNE) and duly submitted the relevant documents to the Ministry of Labour and Social Security. As part of the process of granting legal personality, the Ministry sent an official letter to the Nejapa Municipal Council in order to verify the employment status of the union's founding members, as provided for under the Civil Service Act, the stated aim of which is to regulate relations between the State or municipalities and public servants, to offer them protection and employment stability, to ensure the effectiveness of public institutions, and to ensure that the public administration is based on the recruitment and promotion of staff by merit.
- 635.** ASITAMUNE also claims that, on 29 July 2009, the municipality dismissed several founding members of the trade union, including Mr Manfredo García Nerio, Ms Deisy Yanira Mejía Velásquez and Mr José Lino Mendoza Arias, who are members of the

union's executive committee, which in fact is the main reason why they cannot be dismissed. This was clearly retaliation for the officials having incited the workers to exercise their constitutional right to freedom of association in the defence of their rights. They were dismissed after taking the preliminary steps towards establishing the trade union before it was legally registered. On 9 October 2009, the Ministry of Labour and Social Security acknowledged that, when it dismissed the three workers, the trade union was already in the process of being registered.

- 636.** According to the municipality, the legal and constitutional protection granted to union officials does not apply in the case of employees of the Municipality of Nejapa because their employment conditions are governed by a special law, distinct from the Labour Code, which is the Municipal Administrative Careers Act. This claim is inaccurate, as it is the Constitution itself that protects union officials. The Ministry of Labour and Social Security has neglected its duties by failing to carry out inspections or take steps to verify the violations allegedly perpetrated by the municipality. The administration claims that it is not competent to carry out inspections within decentralized bodies such as municipalities, and despite the workers' request for the Attorney-General's Office to intervene, since September 2009, it has neither acted on the request nor taken steps to ensure that due process of law is followed.
- 637.** In its communication of 20 May 2010, SIMEDUCO, a trade union established on 27 September 2008, alleges that, on 31 December 2009, Mr Amado de Jesús Ramos Prieto, the trade union relations secretary, a Nahuatl language teacher in the Nahuatl-speaking areas of the indigenous Izalcos region and a trade union official, was dismissed. Since 1 April 2007, he had worked for the non-governmental organization (NGO) "Círculo Solidario de El Salvador".
- 638.** In the light of this unfair dismissal, the trade union requested and secured from the Directorate-General of Inspections of the Ministry of Labour and Social Security an unscheduled inspection of the premises of the non-governmental organization in question, which found that Mr Amado de Jesús Ramos Prieto, owing to his position as a trade union official, had been the object of labour discrimination when an arbitrary decision was taken not to renew his contract for another year. The inspection confirmed the contraventions reported by the worker and led to a report ordering the organization to remedy the contraventions or face a fine. However, even following a second inspection and a subsequent conciliation hearing, the worker was not reinstated.
- 639.** On 11 December 2009, Mr Amado de Jesús Ramos Prieto received a memorandum from his employer notifying him of his dismissal with effect from 31 December 2009, which prompted him to apply to the Attorney-General's Office for the purpose of instituting legal proceedings against the NGO "Círculo Solidario de El Salvador" on the grounds of unfair dismissal by his employer; these proceedings are still ongoing.

B. The Government's reply

- 640.** In its communication of 4 November 2010, the Government, with regard to the case brought by STITCPAS, states that sections 211 and 219 of the Labour Code provide that a minimum of 35 members is required in order to establish a trade union and that in order for it to exist legally, it must obtain legal personality, which is granted following the approval of the union's by-laws and confirmation of the employment status of the 35 founding members.
- 641.** The trade union, on applying for legal personality from the Ministry of Labour and Social Security, submitted a copy of the minutes of the meeting at which the trade union was established by 43 founding members, as well as two copies of the union's by-laws and a

certified copy of the minutes of the meeting at which they were approved. In this context, on 22 February 2010, the Ministry of Labour and Social Security ordered the relevant letters to be sent to the employers, requesting them to confirm the employment status of the union's 43 founding members. Each one of the employers received an official notification of the order with the exception of three that were not notified owing to the inaccuracy of the address provided. The trade union was informed of the situation and was asked to provide the correct addresses of the employers in order to expedite its application for legal personality.

642. The Government states that the replies fell into three categories: (a) employers that confirmed the employment status of 14 of the union's founding members; (b) employers that failed to confirm the employment status of 15 of the union's founding members; and (c) employers that did not reply at all. This means that the employment status of only 14 of the union's founding members is legally recognized (section 219 of the Labour Code).
643. With regard to case (b) *employers that failed to confirm the employment status of 15 of the union's founding members*, the Ministry of Labour and Social Security ordered inspections to be carried out, which led to confirmation of the employment status of three of the 15 founding members in question. It should be noted that the "inspections", although not provided for in such cases by the Labour Code or the Act on the structure and functions of the labour and social security sector, have proved to be an essential tool in establishing the employment status of union members, which is a legal requirement that must be fulfilled before trade unions can be granted legal personality.
644. The employment of 31 of the 43 founding members of STITCPAS has thus been confirmed. However, the fact remains that a minimum of 35 members with confirmed employment status is required for the union to obtain legal personality, according to section 219 of the Labour Code.
645. With regard to the trade union's arguments cited above, the submission of a record of attendance for one working day (16 February 2010) is not sufficient to allow an employment relationship to be established by presumption, given that, for such a presumption to be valid, proof is required that one person provides a service to another for more than two consecutive working days, as stipulated in section 20 of the Labour Code.
646. With regard to the allegations made by the interested party (the refusal to grant legal personality to STITCPAS without receiving the testimonies that otherwise would have confirmed the employment status of a number of the union's founding members), the Ministry of Labour and Social Security has revoked its previous decision to refuse legal personality to the trade union and has requested the testimonial evidence offered by STITCPAS.
647. With regard to the trade union's allegations concerning the failure to carry out the necessary inspections following the dismissal of Mr Juan Uclides Hernández, Mr Isaac Ernesto Treminio Orellana, Mr Luis Alonso Méndez Lovo and Mr Luis Alonso Baires Ramírez, the Directorate-General of Inspections of the Ministry of Labour and Social Security has ordered the relevant inspections, which are currently ongoing.
648. With regard to the complaint lodged by SETRAMME, the Government notes that municipal labour relations are governed by section 1 of the Municipal Administrative Careers Act, while the bodies responsible for implementing it in the interests of settling any internal labour disputes arising within the municipal administration are the municipal commissions for administrative careers, as stipulated in section 17 of the Municipal Administrative Careers Act. Moreover, section 2, paragraph 2, of the Labour Code states that: "The Code is not applicable in cases where the relationship between the State,

municipalities, autonomous or semi-autonomous official institutions, with their employees is of a public nature, as in the case of appointments to posts specified in the Wages Act as dependent on the General Fund or Special Fund of the institution in question or included in the municipal budget, or when the relationship originates from a contract for the provision of technical or professional services”. In the light of this, the Government explains that, as the SETRAMME case concerns employees who were appointed to their post, the Ministry of Labour and Social Security declined to carry out unscheduled inspections requested by SETRAMME members.

649. The Ministry of Labour and Social Security is competent in cases involving municipal public servants employed under temporary or casual contracts for educational, consultative, advisory and training purposes among others, as set out in section 2, paragraph 3, of the Municipal Administrative Careers Act; this stipulates that employment relationships involving such temporary workers are governed by the Labour Code. The Ministry is therefore only competent to hear cases involving alleged violations of labour rights affecting temporary workers hired by municipalities; cases involving municipal public servants who are part of the municipal administrative careers system come under the terms of the Municipal Administrative Careers Act, which establishes the relevant procedures and designates the authorities competent to settle internal disputes arising from an employment relationship.

650. With regard to the workers’ allegations concerning unlawful acts committed by the Mejicanos municipal government (unlawful deductions from wages of between US\$20 and US\$26, threats of dismissal against the members of SETRAMME’s executive committee, failure to provide them with the relevant social security certificates, delayed payments from the Pension Funds Administrator in May, June, July, August and September 2009, delay in paying administrative staff, harassment and arbitrary transfers of field staff, threats and harassment directed against all staff by the heads of various municipal departments, non-payment of group life insurance, and refusal to recognize ATRAM, the Government reiterates that it is the Municipal Administrative Careers Act that regulates municipal labour relations and that the municipal commissions for administrative careers are the authority responsible for settling any internal disputes arising within the municipal administration, as stipulated in section 21, paragraph 3, of the Act. The Ministry of Labour and Social Security is therefore not competent to deal with applications from workers of the Municipality of Mejicanos. The Government nevertheless maintains that the municipal workers “are not left without legal protection or in a legal limbo because there is no law to protect them” as they claim; it is rather that the complainant organizations failed to direct their requests to the competent authority, which is the Mejicanos municipal commission for administrative careers.

Complaint concerning the violation of the right to freedom of association of ASITAMUNE officials

651. With regard to the case brought by ASITAMUNE concerning the dismissal of the municipal employees and union officials Mr Manfredo García Nerio, Ms Deisy Yanira Mejía Velásquez and Mr José Lino Mendoza Arias, the Government notes that this case also relates to an employment relationship arising from an administrative act in the form of an “appointment”. In this case, the competent authority is the Nejapa municipal commission for administrative careers, as stipulated in section 17 of the Municipal Administrative Careers Act and section 2 of the Labour Code. That being the case, the Ministry of Labour and Social Security was unable to carry out the labour inspection requested by the trade union, for the reasons cited in the previous case involving SETRAMME.

652. Moreover, between November and December 2009, the union officials referred their case to the Attorney-General's Office in order for it to be settled in court. The Ministry of Labour and Social Security accordingly requested information on the steps taken by the Attorney-General's Office. The Ministry will inform the Committee of these once it has received a reply.
653. These considerations notwithstanding, the Salvadorian State acknowledges that the Municipality of Nejapa has adversely affected the exercise of the right to freedom of association by abolishing the posts of Mr Manfredo García Nerio, Ms Deisy Yanira Mejía Velásquez and Mr José Lino Mendoza Arias, without placing them in posts of a similar or higher grade in accordance with section 53 of the Municipal Administrative Careers Act, offering instead to compensate them for the loss of their posts, which constitutes a violation of the right to adequate protection against acts of anti-union discrimination in respect of their employment set out in article 47, paragraph 6, of the Constitution of the Republic and Article 1 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). In view of this and in accordance with 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), steps will be taken to raise awareness of both the protection given to the right to freedom of association and the special protection given to trade union officials. It is important to note that the full exercise of the right to freedom of association is a work in progress in the country owing to the scant protection currently given to labour rights and the lack of cooperation between workers and employers in ensuring the protection of those rights. With its lead role in the public labour administration, the Ministry of Labour and Social Security is making every effort to establish and consolidate a State that is genuinely governed by the rule of law.
654. With regard to the case brought by SIMEDUCO concerning the dismissal of the trade union official Mr Amado de Jesús Ramos Prieto, the Government notes that on 2 March 2010, Mr Jesús Ramos Prieto visited the offices of the Directorate-General of Inspections of the Ministry of Labour and Social Security and requested an inspection in order to confirm his employment status. The request was granted and a special inspection was carried out on 18 March 2010, followed by a second inspection on 6 April 2010, which revealed that the NGO "Círculo Solidario de El Salvador", where Mr Ramos Prieto was employed, had not remedied the contravention noted during the initial inspection. As a result, the case was referred to the Department for Industry, Commerce and Services Inspections for the appropriate fine to be imposed. At that stage, the special representative of the NGO "Círculo Solidario de El Salvador" contested the special inspection, describing it as inaccurate and arguing that the case had been detrimental to the foundation as it was forced to pay wage arrears attributed to the employer without any legal basis. The Department for Industry, Commerce and Services Inspections determined that line of argument to be invalid and pointed out that, in accordance with article 47, paragraph 6, of the Constitution of the Republic and section 248, paragraph 1, of the Labour Code, trade union officials cannot be dismissed, transferred or given less favourable employment conditions. Furthermore, it determined that the foundation had violated section 29, paragraph 2, of the Labour Code by dismissing Mr Amado de Jesús Ramos Prieto without due process and by owing him wage arrears which had arisen from factors attributable to the employer. The Ministry is currently considering the matter of a fine.
655. Mr Ramos Prieto is fully entitled to bring his case before a court, and accordingly visited the offices of the Attorney-General on 22 January 2010 in search of a labour attorney to represent him. On 15 February 2010, he referred his case to the Santa Tecla labour court in the Department of La Libertad in order to institute the relevant proceedings, which are ongoing.

656. However, on 7 May 2010 an out-of-court settlement was reached (a copy of which is provided by the Government) whereby Mr Amado de Jesús Ramos Prieto receives from the NGO “Círculo Solidario de El Salvador” the sum of US\$10,692 in wage arrears attributable to the employer, which fulfils his legal entitlement to protection from dismissal during the period of his election and term of office as a trade union official; and the sum of US\$712.80 in compensation. In the record of the settlement, Mr Amado de Jesús Ramos Prieto is declared free of any further liability that might arise from the employment relationship and the NGO “Círculo Solidario de El Salvador” is similarly granted a full and final settlement. Therefore, while Mr Amado de Jesús Ramos Prieto’s rights were violated by the organization he worked for, the fact remains that the State responded in the appropriate way through the relevant institutions.

C. The Committee’s conclusions

657. *With regard to the alleged dismissal of four STITCPAS officials (Mr Juan Uclides Hernández, Mr Isaac Ernesto Treminio Orellana, Mr Luis Alonso Méndez Lovo and Mr Luis Alonso Baires Ramírez) on 23 February 2010 following the trade union’s establishment by 43 workers on 15 February of the same year (35 being the legal minimum), the Committee notes that the labour inspectorate is currently carrying out inspections, requests the Government to inform it of the outcome of those inspections and, should the anti-union dismissal of the four officials be proven, to take measures to reinstate them without loss of pay or statutory benefits. The Committee requests the Government to keep it informed of any developments in this regard.*
658. *The Committee also takes note of the allegation made by STITCPAS that, despite having submitted proof of the employment status of 13 of its members with various transport companies, as requested by the Ministry of Labour and Social Security (given that, according to STITCPAS, they are genuine workers despite not having an employment contract or receiving social security benefits), the Ministry subsequently refused to grant legal personality to STITCPAS as it could confirm the employment status of only 31 of the workers (instead of the legal minimum of 35).*
659. *The Committee takes note of the Government’s statements in which it confirms that, in the course of the registration procedure, during which a number of employers opted not to divulge the employment status of some union members, the employment status of 31 of the 43 founding members of STITCPAS was confirmed, although the fact remains that a minimum of 35 members with confirmed employment status is required in order for a trade union to obtain legal personality, under the terms of section 219 of the Labour Code. With regard to the trade union’s argument that it had submitted a record of attendance for one working day (16 February 2010), this was not sufficient to prove the existence of an employment relationship by presumption, given that, for such a presumption to be valid, proof is required that one person provides a service to another for more than two consecutive working days, as stipulated in section 20 of the Labour Code. Nevertheless, the Committee welcomes the fact that, in the light of the complaint lodged with the Committee (regarding the refusal to grant legal personality to STITCPAS without having received the testimonies that otherwise would have confirmed the employment status of a number of the union’s founding members), the Ministry of Labour and Social Security has revoked its previous decision to refuse legal personality to the trade union and has requested the testimonial evidence offered by STITCPAS. The Committee requests the Government to keep it informed of any developments in this regard.*
660. *With regard to SETRAMME’s complaint, the Committee takes note of the allegations regarding: acts of anti-union discrimination against its officials and members of the previous workers’ association ATRAM; threats of dismissal; the refusal to extend the contracts of 11 members of ATRAM after the municipal government threatened them with*

dismissal if they did not leave the trade union, which resulted in the departure of several members from ATRAM; the refusal to recognize ATRAM; unlawful financial penalties, including deductions from the wages of officials and other members of SETRAMME; considering Thursday to be a rest day for workers who are members of ATRAM and SETRAMME when it is in fact the day set aside for the organizations' activities; as well as other violations of labour laws and the Ministry of Labour and Social Security's failure to carry out the inspections requested by the trade union.

- 661.** *The Committee takes note of the Government's statements according to which: (1) municipal labour relations are governed by section 1 of the Municipal Administrative Careers Act, and the bodies responsible for implementing the Act in the interests of settling any internal labour disputes arising within the municipal administration are the municipal commissions for administrative careers, as stipulated in section 17 of the Municipal Administrative Careers Act, which establishes the relevant procedures and designates the authorities competent to settle internal disputes arising from a given employment relationship. Section 2, paragraph 2, of the Labour Code states that: "The Code is not applicable in cases where the relationship between the State, municipalities and autonomous or semi-autonomous official institutions and their officials is of a public nature, as in the case of appointment to a post specified in the Wages Act as dependent on the General Fund or Special Fund of the institution in question or included in the municipal budget, or when the relationship originates from a contract for the provision of technical or professional services". In the light of this, the Government explains that, as the SETRAMME case concerns employees who were appointed to their posts, the Ministry of Labour and Social Security declined to carry out the unscheduled inspections requested by SETRAMME members; (2) the Ministry of Labour and Social Security is only competent in cases involving public servants employed under temporary or casual contracts for educational, consultative/advisory and training purposes, among others, as stipulated in section 2, paragraph 3, of the Municipal Administrative Careers Act, which stipulates that employment relationships involving such temporary workers are governed by the Labour Code; and (3) with regard to the workers' allegations concerning unlawful acts (including unlawful deductions from wages of between US\$20 and US\$26, threats of dismissal made against the members of SETRAMME's executive committee, failure to provide them with the relevant social security certificates, delayed payments from the Pension Funds Administrator in May, June, July, August and September 2009, delay in paying administrative staff, harassment and arbitrary transfers of field staff, threats and harassment directed against all staff by the heads of various municipal departments, non-payment of group life insurance, and refusal to recognize ATRAM), the Government reiterates that it is the Municipal Administrative Careers Act that regulates municipal labour relations and that the municipal commissions for administrative careers (and not the Ministry of Labour and Social Security) are the authorities responsible for settling any internal disputes arising within the municipal administration, as stipulated in section 21, paragraph 3, of the Act. Nonetheless, the municipal workers "are not left without legal protection or in a legal limbo"; rather, the complainant organizations failed to direct their requests to the competent authority, which is the Mejicanos municipal commission for administrative careers.*
- 662.** *The Committee draws attention to the number and seriousness of these allegations which, should they prove to be founded, would constitute serious violations of ILO Conventions Nos 87 and 98. Noting the Government's insistence that the authority competent to hear the allegations in the present case is not, contrary to SETRAMME's claim, the Ministry of Labour and Social Security but rather the Mejicanos municipal commission for administrative careers, the Committee invites SETRAMME to formally present its allegations to the municipal commission, and requests SETRAMME and the Government to inform it of the outcome of this process. The Committee notes, however, that in another part of its reply, the Government states that: "the full exercise of the right to freedom of*

association is a work in progress in the country owing to the scant protection currently given to labour rights and the lack of cooperation between workers and employers in ensuring the protection of those rights". The Committee considers that various aspects of the present case bear testament to the fragility and ineffectiveness of the framework protecting union rights at the municipal level, and requests the Government to hold consultations without delay with the most representative organizations of workers and employers in order to examine and improve the situation so as to afford adequate protection to union rights in the municipal sector, and to keep it informed of any developments in this regard.

- 663.** However, the Committee wishes to point out that, with regard to one of the allegations made by SETRAMME, concerning the refusal to extend the contracts of 11 members of ATRAM who had previously been threatened with dismissal by the municipal government if they did not leave the union (the Ministry of Labour and Social Security was the competent authority as the case involved temporary workers), SETRAMME claims that the Municipality of Mejicanos did not respect the time frame established by the labour inspectorate for rectifying the alleged contraventions. The Committee considers that the situation of workers under temporary contracts in the Municipality once again bears testament to the shortcomings of the framework protecting trade union rights at the municipal level. The Committee urges the Government to take steps to give effect to the decisions of the labour inspectorate to extend the employment contracts of the 11 ATRAM members and to keep it informed of any developments in this regard.
- 664.** With regard to the allegation concerning the dismissal of the union officials Mr Manfredo García Nerio, Ms Deisy Yanira Mejía Velásquez and Mr José Lino Mendoza Arias on 25 July 2009 following the establishment of ASITAMUNE – and specifically, according to the allegations, for establishing the union and for having encouraged workers to exercise their constitutional right to freedom of association – the Committee takes note of the Government's statements according to which: (1) the Ministry of Labour and Social Security was unable to carry out the inspection requested by ASITAMUNE as it is not competent in such matters, since municipal labour relations are regulated by the Municipal Administrative Careers Act and are the responsibility of the municipal commissions for administrative careers, in this case, the Nejapa municipal commission for administrative careers, which is responsible for resolving internal disputes arising from an employment relationship; (2) the trade union referred the case to the Attorney-General's Office in order for it to be settled in court, and requests to be kept informed by the latter; (3) the Municipality of Nejapa has adversely affected the exercise of the right to freedom of association by abolishing the posts of the three union officials without placing them in posts of a similar or higher grade in accordance with section 53 of the Municipal Administrative Careers Act, offering instead to compensate them for the abolition of their posts, which constitutes a violation of the right to adequate protection against acts of anti-union discrimination in respect of their employment as stipulated in article 47, paragraph 6, of the Constitution of the Republic and Article 1 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); (4) steps will be taken to raise awareness of both the protection given to the right to freedom of association and the special protection given to union officials; and (5) the Ministry of Labour and Social Security is making every effort to establish and consolidate a State that is genuinely governed by the rule of law.
- 665.** The Committee notes with regret that, according to the Government's reply, the Municipality of Nejapa failed to honour its obligation to ensure respect for section 53 of the Municipal Administrative Careers Act by abolishing the posts of the three union officials without placing them in posts of a similar or higher grade. The Committee notes that, according to the Government, the question of the dismissal of the three union officials has been referred to the Attorney-General's Office in order for it to be settled in court, and

requests the Government to keep it informed of any measures adopted by that authority. The Committee requests the Government to communicate its conclusions to the Municipality of Nejapa, to draw attention to the importance the Committee attaches to the Municipality's effective implementation of section 53 of the Municipal Administrative Careers Act, and to reinstate the union officials without loss of pay or statutory benefits.

- 666.** *With regard to the allegation concerning the dismissal on 31 December 2009 of the SIMEDUCO official Mr Amado de Jesús Ramos Prieto following the decision not to renew his contract owing to his status as a union official, the Committee takes note of the Government's statements according to which: (1) inspections were carried out on the premises of the NGO "Círculo Solidario de El Salvador" (his employer) in March and April 2010 and revealed a breach of legislation that had not been remedied by the employer, and for which a fine is currently being considered; (2) the administrative authority determined that the employer's appeal was invalid, given that, in accordance with article 47, paragraph 6, of the Constitution of the Republic and section 248, paragraph 1, of the Labour Code, union officials cannot be dismissed, transferred or given less favourable employment conditions; furthermore, it determined that the foundation had violated section 29, paragraph 2, of the Labour Code by dismissing Mr Amado de Jesús Ramos Prieto without due process and by owing him salary arrears attributable to the employer; (3) the trade union official referred his case to the Santa Tecla labour court in the Department of La Libertad in order to institute the relevant proceedings but, on 7 May 2010, he concluded an out-of-court settlement under which he received from the NGO "Círculo Solidario de El Salvador" the sum of US\$10,692 in salary arrears attributable to the employer, which fulfils his legal entitlement to protection from dismissal during the period of his election and term of office as a union official; and the sum of US\$712.80 in compensation; in the record of the settlement, Mr Amado de Jesús Ramos Prieto is declared free of any further liability that might arise from the employment relationship, and the NGO "Círculo Solidario de El Salvador" is similarly granted a full and final settlement. Under these circumstances, while the Committee regrets the anti-union dismissal of the union official, it notes that he reached an out-of-court settlement with his employer, thereby ending his employment relationship with the latter and forgoing the right to reinstatement guaranteed to him under national law. The Committee will therefore not pursue its examination of this allegation.*

The Committee's recommendations

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

- (a) With regard to the alleged dismissal of the four STITCPAS officials (Mr Juan Uclides Hernández, Mr Isaac Ernesto Treminio Orellana, Mr Luis Alonso Méndez Lovo and Mr Luis Alonso Baires Ramírez) on 23 February 2010 following the establishment of the trade union, the Committee notes that the labour inspectorate is carrying out inspections, and requests the Government, should the anti-union dismissal of the four union officials be proven, to take steps to reinstate them without loss of pay or statutory benefits. The Committee requests the Government to keep it informed in this regard.*
- (b) With regard to the allegations concerning the refusal to grant legal personality to STITCPAS after being able to confirm the employment status of only 31 of its 43 members (the legal minimum being 35), the Committee, in the context of the present complaint, welcomes the fact that the Government has revoked its decision to refuse to grant legal personality to*

STITCPAS in order to receive the testimonial evidence offered by STITCPAS regarding the employment status of a number of its members. The Committee requests the Government to keep it informed in this regard.

- (c) With regard to SETRAMME's allegations, the Committee invites the trade union to formally present its allegations to the Mejicanos municipal commission for administrative careers and requests SETRAMME and the Government to inform it of the outcome of these proceedings. The Committee draws attention to the number and seriousness of these allegations which, should they be confirmed, would constitute serious violations of ILO Conventions Nos 87 and 98.*
- (d) With regard to the allegations concerning the refusal to extend the contracts of 11 members of ATRAM who had previously been threatened with dismissal by the Mejicanos municipal authorities if they did not leave the union, the Committee urges the Government to take steps to give effect to the decisions of the labour inspectorate to extend the employment contracts of these 11 workers, and to keep it informed in this regard.*
- (e) With regard to the allegation concerning the dismissal of the union officials Mr Manfredo García Nerio, Ms Deisy Yanira Mejía Velásquez and Mr José Lino Mendoza Arias on 25 July 2009 following the establishment of ASITAMUNE, the Committee notes with regret that, according to the Government's reply, the Municipality of Nejapa failed to honour its obligation to ensure observance of section 53 of the Municipal Administrative Careers Act by abolishing the posts of the three union officials without placing them in posts of a similar or higher grade. The Committee also notes that the question of the dismissal of the three union officials has been referred to the Attorney-General's Office in order for it to be settled in court, and requests the Government to keep it informed of any measures adopted by that authority. The Committee also requests the Government to communicate its conclusions to the Municipality of Nejapa, to draw attention to the importance the Committee attaches to the Municipality's effective implementation of section 53 of the Municipal Administrative Careers Act, and to reinstate the union officials without loss of pay or statutory benefits.*
- (f) The Committee considers that various aspects of the present case bear testament to the fragility and ineffectiveness of the framework protecting union rights at the municipal level, and requests the Government to hold consultations without delay with the most representative organizations of workers and employers in order to examine and improve the situation.*

CASE NO. 2836

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

Complaint against the Government of El Salvador presented by

- **the Democratic Workers' Confederation (CTD) and**
- **the Trade Union of Workers of the Legislative Assembly (SITRAL)**

Allegations: The dismissal of a trade union official who worked for the Legislative Assembly following the establishment of a trade union; the non-recognition of this trade union; and the pressure put on members to leave the union

- 668.** The complaint is contained in communications from the Democratic Workers' Confederation (CTD) and the Trade Union of Workers of the Legislative Assembly (SITRAL), dated 16 December 2010 and 6 February 2011 respectively.
- 669.** The Government sent its observations in a communication dated 23 May 2011.
- 670.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

- 671.** In their communications of 16 December 2010 and 6 February 2011, the CTD and SITRAL claim that the trade union SITRAL was established on 31 July 2010 and was granted legal personality in September 2010.
- 672.** The members of the Legislative Assembly have taken a negative attitude to the establishment of the trade union SITRAL. Moreover, the trade union's requests to open a dialogue with the authorities of the Legislative Assembly and, in particular, with the members of the Farabundo Martí National Liberation Front (FMLN), have met with the party members' refusal. Furthermore, the anti-union attitude of the party members has also been negative, insofar as pressuring trade union members to leave the union or else face dismissal has led to more than a dozen withdrawals from SITRAL. In addition, there has been an orchestrated campaign to attribute the establishment of SITRAL to an FMLN initiative to put pressure on FMLN party member Sigfrido Reyes to assume the presidency of the Legislative Assembly. The fervour of the anti-union campaign was such that, on 5 November 2010, the members of the Legislative Assembly's governing body refused to have dealings with the trade union officials, on the grounds that its members did not belong to the institutional system and were simply public servants taken into the confidence of certain members of Parliament, and thus did not recognize their right to freedom of association.
- 673.** Furthermore, the complainant organizations claim that, on 1 December 2010, the Director of Human Resources of the Legislative Assembly sent a written communication to the Secretary-General of SITRAL, Mr Luis Alberto Ortega Ortega, notifying him of the termination of both his employment relationship with the Legislative Assembly and his

employment contract. While the trade union has made repeated attempts to alert the members of the Legislative Assembly to the need to open a dialogue in order to resolve the contradictions arising from the exercise of the right to freedom of association, efforts to hold a hearing for that purpose have proved futile and the Legislative Assembly's governing body still refuses to recognize the trade union.

- 674.** The evidence of this refusal and of interference with the right to freedom of association consists of the letters of withdrawal from the union (copies of which have been enclosed with the complaint) that Mr Fidel Crespín, Mr Héctor Santiago Fernández Carballo, Mr José Ebanan Quintanilla Gómez and Mr Luis Alonso Lara Guillen, were pressured into tendering by the party members. Other similar cases will be brought to the Committee's attention in due course. The CTD points out that the Constitution provides that, for the duration of the election period and mandate of trade union officials, and for one year from them having left service, they may not be dismissed, suspended for disciplinary reasons, transferred or given less favourable employment conditions other than for a just cause as previously determined by the competent authority.
- 675.** The complainant organizations claim that the Secretary-General of SITRAL was dismissed for having been elected Secretary-General by the members of the trade union for a term lasting until July 2011. The governing body's refusal to conduct a hearing and the anti-union measures and practices to which affiliated workers within the Legislative Assembly were subject prompted SITRAL to send a written communication to the Office of the Human Rights Procurator. Subsequently, the Minister of Labour urged the parties to come together and take steps to restore social harmony. However, this initiative did not yield the desired results.
- 676.** The complainant organizations' claim that the dismissal of the Secretary-General of SITRAL violates ILO Conventions Nos 98 and 135, as well as of the Constitution (as mentioned above) and section 248 of the Labour Code, which provides that trade union officials are to receive special protection for the duration of, and for, a year following the fulfilment of their mandate. The only way to dismiss, suspend or give trade union officials less favourable working conditions is through obtaining prior consent from the Minister of Labour and Social Security. This consent was never obtained in the case of Mr Luis Alberto Ortega Ortega, thereby proving that the Legislative Assembly acted arbitrarily.
- 677.** The complainant organizations enclose a copy of the legal advice obtained, in the form of a note requested by the governing body of the Legislative Assembly, containing considerations relating to SITRAL), which reveals the existence of certain discriminatory tendencies towards the trade union. The recommendations contained therein include requesting a formal document detailing the process of establishing the trade union from the Ministry of Labour and Social Security, a legal investigation of the trade union, an investigation of each union member and the potential dissolution of SITRAL. Also enclosed is a copy of the communication from the Director of Human Resources, dated 3 December 2010, addressed to the coordinator of the FMLN parliamentary group, which states that effect was given to the instructions issued by the group not to extend certain contracts, including that of Mr Luis Alberto Ortega Ortega, who is a press officer. Copies of three letters from workers who are members of SITRAL notifying their irrevocable withdrawal from the union have also been enclosed. In the letters, the workers explain that they have received explicit orders from their superiors forbidding them from joining such an organization. This is proof of the continual efforts to repress the trade union.
- 678.** Lastly, SITRAL encloses a copy of the communication sent by the Secretary-General of the union to the Ministry of Labour and Social Security, denouncing his dismissal for having been elected by the workers to serve as Secretary-General of SITRAL, which violated established union and labour rights. He requested that the Ministry of Labour and

Social Security investigate the case in order to show that his labour rights had been violated.

B. The Government's reply

679. In its communication of 23 May 2011, the Government indicates that, on 21 September 2010, the Secretary of State for Labour and Social Security passed Resolution No. 56/2010, which granted legal personality to and called for the registration of SITRAL, a professional association of workers providing a service to, or on behalf of, the Legislative Assembly. In this regard, it is important to point out that the members of the aforementioned trade union have a labour relationship with the legislative body, which is a state institution, irrespective of its parliamentary components, to which the unionized employees are attached.

680. On 9 December 2010, the National Department of Social Organizations called for the registration of SITRAL's governing body, which was to carry out its functions from 27 November 2010 to 30 July 2011 and, incidentally, led to Mr Luis Alberto Ortega Ortega being elected President of the provisional governing body by the founding assembly of the trade union and to him taking up the post of Secretary-General.

681. The Government adds that, on 1 December 2010, the Legislative Assembly, without having instituted the necessary legal and administrative proceedings, determined not to extend the employment contract between Mr Luis Alberto Ortega Ortega and the legislative body, which was to expire on 31 December 2010. He was notified of the decision by means of a note from the Director of Human Resources of the aforementioned institution.

682. In this regard, the Government points out that the final paragraph of article 47 of the Constitution guarantees trade union immunity, the aim of which is to preserve the job security of the members of trade union governing bodies, and reads as follows: "The members of trade union governing bodies shall be Salvadoran by birth and, for the duration of the election period and their mandate and for one year from having left service, they shall not be dismissed, suspended for disciplinary reasons, transferred or given less favourable employment conditions other than for a just cause as previously determined by the competent authority." Furthermore, the Government recalls that both Article 1 of ILO Convention No. 98 and Article 4 of ILO Convention No. 151 provide that:

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to:
 - [...]
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

683. The Government adds that, in the light of the above considerations, it is obvious that the Legislative Assembly has violated the right to freedom of association of the public servants who are members of SITRAL, as well as the guarantees to preserve the job security of the members of trade union governing bodies. This situation must be rectified by means of the legal mechanisms available to affected workers within the framework of the institutional legal order.

684. In this regard, the Government indicates that, on 9 March 2011, Mr Luis Alberto Ortega Ortega submitted the corresponding application for *amparo* against the Legislative Assembly to the Constitutional Chamber of the Supreme Court of Justice on the grounds that his constitutional right to freedom of association and occupational stability had been violated. His application was assigned the reference number 94/2011 and is currently being examined to determine its legality and admissibility. Therefore, a final decision has yet to be taken on the case.
685. With regard to the complainant organizations' call for the Secretary of State for Labour to fulfil their legal mandate to protect workers' labour rights, the Government explains that, in accordance with article 86 of the Constitution, "Public servants shall have no powers other than those expressly conferred upon them by law" and, in this respect, it is important to point out that it is outside the competence of the Ministry of Labour and Social Security to hear or take decisions on public sector labour disputes (article 1 of the Civil Service Act and section 2 of the Labour Code). The authorities competent in hearing and settling such disputes are those that make up the civil service system, in this case, the civil service commissions and tribunal or, failing that, the administrative litigation division or the Constitutional Chamber of the Supreme Court of Justice. The parties have brought their case before this authority in the manner described previously and within a framework of respect for the institutional structure of the Salvadoran legal system. For this reason, there was no failure on the part of the Secretary of State to comply with their institutional obligations by not carrying out the investigation called for by the complainant organizations. The Government wishes to draw attention to the fact that the Secretary of State met with representatives of SITRAL's governing body in order to explain the legal reasons preventing the Ministry from conducting the investigation.
686. As regards the allegations by the complainant organizations that public servants of the Legislative Assembly pressured several members of the trade union into leaving the union, the Government indicates that, apart from the letters of withdrawal in which some members cite personal reasons for leaving the union, and, in one case, even management responsibilities, there is no evidence to suggest that these members were indeed put under pressure. However, if such pressure was applied, it would undoubtedly constitute a serious violation of the right to freedom of association.
687. As has been outlined above, it remains outside the competence of the branch of the public administration responsible for labour, in other words the Ministry of Labour and Social Security, to hear this type of complaint, as it relates to situations that occurred in the public sector, and there are separate regulations for settling this type of dispute. However, those persons who were allegedly put under pressure have the possibility of instituting legal proceedings before the competent jurisdictional authorities with a view to restoring those union rights that were allegedly violated.
688. Lastly, the Government emphasizes that the State, within the framework of its constitutional obligations and of respect for the country's democratic institutions, is currently taking the appropriate legal steps to honour its obligation of guaranteeing the full exercise of the right to freedom of association within the national territory, and will keep the Committee on Freedom of Association informed of any developments and the content of the Constitutional Chamber of the Supreme court of Justice's final ruling on the application for *amparo* submitted by Mr Luis Alberto Ortega Ortega.

C. The Committee's conclusions

689. *The Committee notes that in the present case the complainant organizations claim that the members of the governing body of the Legislative Assembly have refused to recognize and open a dialogue with SITRAL since it was granted legal personality on 29 September 2010,*

and have, in particular through the members of a political party, mounted an anti-union campaign and engaged in anti-union practices aimed at forcing trade union members to leave the union, 12 cases of which have been recorded (the complainant organizations enclose a copy of three letters of withdrawal). Furthermore, they have taken the decision not to extend the contract of the Secretary-General, Mr Luis Alberto Ortega Ortega, which violates the Constitution, the relevant ILO Conventions and the Labour Code.

- 690.** *The Committee takes note of the Government's statement, according to which: (1) it is obvious that the Legislative Assembly (by taking the decision not to extend the employment contract of SITRAL's Secretary-General) has violated the right to freedom of association, as well as the guarantees to preserve the job security of the members who form trade union governing bodies; (2) The Secretary-General of SITRAL has submitted an application for amparo to the Constitutional Chamber of the Supreme Court of Justice on the grounds that his constitutional right, to freedom of association and occupational stability have been violated, the admissibility of which is currently being determined. The Committee will be kept informed of any developments in proceedings and the final ruling on the case; and (3) The Ministry of Labour and Social Security was not in a position to follow up the request it received to investigate whether union rights had indeed been violated, given that hearing and taking a decision on public sector labour disputes is outside its area of competence (the Government states that the competent authorities are the civil service commissions and tribunal or, failing that, the administrative litigation division or the Constitutional Chamber of the Supreme Court of Justice).*
- 691.** *With regard to the failure by the governing body of the Legislative Assembly to recognize SITRAL and its refusal to open a dialogue with the union, the Committee notes that the Government has made no specific reply to this allegation. The Committee wishes to recall that freedom of association is a fundamental labour right and that all State bodies should therefore recognize and open a dialogue with trade unions that have been legally established within this framework, as is the case with SITRAL.*
- 692.** *The Committee firmly expects that the governing body of the Legislative Assembly will recognize the trade union SITRAL without delay and will open a constructive dialogue with this organization.*
- 693.** *With regard to the alleged decision not to renew the employment contract of SITRAL's Secretary-General, Mr Luis Alberto Ortega Ortega, the Committee notes that the Government views this decision as having violated the right to freedom of association and the guarantees to preserve the job security of trade union officials and is awaiting the ruling of the Constitutional Chamber of the Supreme Court of Justice after the trade union official, Mr Luis Alberto Ortega Ortega submitted an application for amparo. The Committee requests the Government to inform it of the contents of the final ruling. The Committee stresses that the public authorities must lead by example in guaranteeing the exercise of the trade union rights enshrined in ILO Conventions Nos 87, 98, 135, and 151, especially when the Legislative Assembly is the branch of the State that approved and ratified these fundamental Conventions and when both the Constitution and national legislation protect trade union officials against anti-union dismissal.*
- 694.** *In the light of the above, the Committee considers that, in order to ensure compliance with both national legislation and ILO Conventions Nos 87, 98, 135 and 151, the employment contract of the Secretary-General of the trade union should, pending the final ruling, be extended so that he is reinstated without loss of pay.*
- 695.** *With regard to the alleged pressure applied by the members of a political party of the Legislative Assembly, causing various members of SITRAL to leave the union, the Committee emphasizes that, according to these allegations, this proved effective in a dozen*

cases and that the complainant organizations have enclosed copies of three letters of withdrawal. The Committee notes the Government's statement regarding these allegations and, moreover, that the Government indicates that, apart from the letters of withdrawal in which some members cite personal reasons for leaving the union and, in one case, even management responsibilities, there is no evidence to suggest that these union members were indeed put under pressure. However, if such pressure was applied, it would undoubtedly constitute a serious violation of the right to freedom of association. Furthermore, the Government reiterates that it remains outside the competence of the branch of the public administration responsible for labour, in other words, the Ministry of Labour and Social Security, to deal with this type of complaint, which relates to situations that occurred in the public sector. However, there remains the possibility of instituting legal proceedings before the competent jurisdictional authorities with a view to restoring those union rights that were allegedly violated. The Committee considers the complainant organizations' allegations, which are consistent with the anti-union context depicted in the preceding paragraphs, to be serious enough to justify the conduct of a rapid investigation in order to clarify the facts. Should the allegations of anti-union pressure prove to be founded, this practice should be remedied and sufficiently dissuasive sanctions should be imposed. The Committee takes note of the Government's statement to the effect that matters involving labour relations in the public sector remain outside the competence of the Secretary of State for Labour, which prevents the Secretary from ordering an investigation, but points out that failure to investigate is tantamount to absolving in this case those allegedly responsible for pressuring members of the trade union SITRAL into leaving the union. An independent authority should therefore be in a position to investigate these allegations in order to gather sufficient evidence to support the case when it is brought before the jurisdictional authorities. The Committee requests that measures be taken to carry out the aforementioned investigation.

696. While the Committee is fully aware of the consequences of the separation of powers, it requests that the Government communicate its conclusions to the Legislative Assembly and firmly expects that the governing body of the Legislative Assembly will immediately extend the employment contract of the Secretary-General of SITRAL, Mr Luis Alberto Ortega Ortega, pending the final outcome of this official's application for amparo, recognize the trade union without delay, and open a constructive dialogue with that organization.

697. Lastly, the Committee requests the Government to keep it informed of any measures taken to follow up the aforementioned conclusions and recommendations.

The Committee's recommendations

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

- (a)** *While the Committee is fully aware of the consequences of the separation of powers, it requests that the Government communicate its conclusions and recommendations to the Legislative Assembly and firmly expects that the governing body of the Legislative Assembly will, pending the final outcome of this official's application for amparo, immediately extend the employment contract of the Secretary-General of SITRAL, Mr Luis Alberto Ortega Ortega so that he is reinstated without loss of pay, recognize the trade union without delay and open a constructive dialogue with that organization.*

- (b) The Committee requests the Government to keep it informed of any measures taken to follow up the aforementioned conclusions and recommendations.*

CASE NO. 2785

DEFINITIVE REPORT

**Complaint against the Government of Spain
presented by
the Trade Union of Air Traffic Controllers (USCA)**

Allegations: Alteration by the authorities of certain clauses of a collective agreement freely concluded between the complainant organization and the employer (AENA)

- 699.** The complaint is contained in a communication from the Trade Union of Air Traffic Controllers (USCA) dated 3 June 2010.
- 700.** The Government sent its observations in communications dated 14 September 2010 and 20 May 2011.
- 701.** Spain 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

- 702.** In its communication of 3 June 2010, the Trade Union of Air Traffic Controllers (hereafter referred to as "the USCA") explains that it is the majority union and thus represents the vast majority of Spain's air traffic controllers, and that the controllers work directly under the public body responsible for Spanish airports and aviation (hereafter referred to as "AENA") and indirectly under the Ministry of Development, which includes AENA in its administrative structure. The Ministry is responsible for laying down AENA's performance guidelines, for approving its annual objectives, for following up its activities and, without prejudice to its other areas of competence, for monitoring its effectiveness in accordance with current regulations.
- 703.** The USCA explains that the first collective agreement it concluded with AENA was approved by a decision of 4 March 1999 and was to remain in force until 31 December 2004. However, Agreement 4.3 of the aforementioned text provides that the collective agreement will be automatically extended by 12 calendar months from its date of expiry, provided that it is not renounced by either party. Furthermore, Agreement 4.4 of the same text explicitly provides that: "Despite the agreement having been renounced, all its provisions shall remain in force during the interim period between its expiry date and the publication of its replacement". The registration of this far-reaching and complex collective agreement was preceded by a favourable report from the Ministry of the Economy and Finance and the Ministry of Territorial Policy and Public Administration.

- 704.** The USCA notes that the text of the collective agreement encompasses all aspects of the professional services provided by the controllers and this fact alone is a testament to the willingness to negotiate and the good faith demonstrated by both parties during the negotiation of such a complex text.
- 705.** The USCA further notes that the parties held several meetings to negotiate a new text to replace the current collective agreement, which were unilaterally interrupted by AENA on 2 February 2010 when its representatives withdrew from the negotiating table (the USCA encloses a copy of the letter from AENA's Director of Human Resources dated 2 February 2010 communicating the unilateral break in negotiations). The USCA emphasizes that, throughout the process of negotiating a second text, there were no calls for strike action or any other type of collective action or mobilization.
- 706.** The USCA further alleges that three days following AENA's unilateral break in negotiations, Royal Decree-Law No. 1/2010, which had been approved by the Government at the request of the Ministry of Development, entered into force, laying down certain working conditions for civil air traffic controllers while simultaneously regulating air traffic services and setting out the obligations incumbent on the providers of such services. The aforementioned Decree-Law, which was enacted as a matter of urgency, substantially altered the basic conditions of all contracts of employment which, in this case, had been freely and independently negotiated between AENA and the USCA under the first collective agreement and subsequent agreements, which, in spite of their non-statutory nature, are not any less binding upon the parties. This applies to matters such as shift patterns; working hours (first transitional provision); the altering or substitution of pre-established shifts; alterations to working hours; shift start times; advance publication of rotas; rest periods during working hours; day and night-time breaks; movement outside the workplace; leave and holidays; special leave on the grounds of age; and offences.
- 707.** Once validated by the Congress of Deputies, the aforementioned Decree-Law was treated as a bill, subject to an emergency procedure, and repealed by Act No. 9/2010 (with a single overriding provision), the text of which, in terms similar to those used in the Decree itself, also disregards the agreement reached as a result of collective bargaining. The act makes no mention of the ratification of the fundamental ILO Conventions Nos 87 and 98, which must be considered and complied with unless, given the circumstances, they were to be denounced, which would be unthinkable.
- 708.** The USCA alleges that it was not consulted in any way prior to the adoption of the legislative text.
- 709.** According to press releases dated three days after the entry into force of the aforementioned Decree-Law, the country's majority trade unions, the General Union of Workers (UGT) and the Confederation of Workers' Committees (CCOO), expressed their concern that the legal provision could "set a precedent" if it were to be applied to other groups working under the authority of a public body. Furthermore, they described the decree as "a blatant violation of the controllers' collective agreement".
- 710.** As to the health and safety of air traffic controllers, the USCA states that the measures adopted (which entail substantial changes to their working conditions) have given rise to new occupational risks for that group of workers, without compulsory updates to the risk assessment procedure having been carried out.
- 711.** Lastly, the USCA draws attention to the principles of the supervisory bodies of the ILO, on the compulsory nature of collective agreements and the principles according to which "State bodies should refrain from intervening to alter the content of freely concluded collective agreements, as this runs counter to the principle of collective bargaining.

B. The Government's reply

712. In its communication of 14 September 2010, the Government states that the enactment of Royal Decree-Law No. 1/2010 and Act No. 9/2010 has in no way affected the freedom of association of air traffic controllers or their right to engage in timely negotiations with the body for which they provide services to establish their labour rights and obligations. The enactment of the aforementioned legal provisions has provided a framework for the delivery of these services, as required in view of two basic circumstances:

- (a) First, the nature of the activity for which the services are provided (air traffic), which affects a number of basic individual and collective rights (including the right to free movement of persons and goods), aside from the question of air traffic safety, which in Spain is governed by the provisions of EU Regulation No. 2096/2005/CE of 20 December, which lays down common requirements for providing aviation services, as well as by other EU provisions that regulate the Single European Sky initiative.
- (b) Second, the parties failed to reach an agreement, as demonstrated by the fact that, while the collective agreement expired on 31 December 2004, a new agreement had still not been reached five years later, in spite of the numerous and frequent offers made by the employer, which has held 65 meetings around the negotiating table in order to conclude the second collective agreement, during which it submitted up to ten proposals based on the regulations of the Single European Sky initiative (compliance with the initiative is compulsory in Spain), whereas the workers' representatives submitted only one proposal, which failed to take into account any of the aspects that had to be altered, in order to be aligned with EU law.
- (c) Given the situation, the aforementioned legal provisions only temporarily alter the working conditions of the AENA controllers. While these alterations are minimal, they remain nonetheless essential in order to achieve the desired objectives.

713. The above does not constitute a violation of the Spanish air traffic controllers' freedom of association (which has not been affected in any way), or of their right to collective bargaining, which, similarly, has not been affected in any way. However, there are certain conditions governing this right:

- This right may be subject to internal legal restrictions in accordance with the provisions of Spanish employment regulations (Workers' Statute Act), without these restrictions constituting a violation of the right to collective bargaining enshrined in international instruments, such as ILO Conventions Nos 87 and 98.
- Second, the special status enjoyed by certain workers, as set out in ILO Convention No. 98, article 6, concerning public servants must be taken into account. It should be noted that, in Spain, air traffic controllers who work for AENA are public employees who provide an essential public service. Similarly, this category of public employees necessitates a special adherence to the principles and rules laid down by the State to regulate the provision of these services.

714. Lastly, the fact that the entry into force of the legal provisions approved by the Spanish State (Royal Decree-Law No. 1/2010 and Act No. 9/2010) has not affected the collective bargaining framework but has led to the setting up of a new committee to negotiate the future collective agreement within the framework provided by these legal provisions is a testament to the right to collective bargaining. To date, the negotiating committee has held more than 18 meetings, including two information sessions.

- 715.** The Government further notes that the USCA brought a case of collective dispute before the National High Court on the grounds that the alterations to the working conditions of air traffic controllers, stemming from the implementation of the Royal Decree-Law No. 1/2010 of 5 February and subsequently by Act No. 9/2010 of 14 April, were illegal, thereby requesting the restoration of the working conditions laid down in the first collective agreement concluded between AENA and the USCA. In its ruling of 10 May 2010 (a transcription of which has been enclosed), the Social Chamber of the National High Court categorically rejected the case of collective dispute brought by the USCA, deeming the authorities' intervention to be not only justified but essential, opportune and proportionate owing to its minimal and temporary impact on the first collective agreement in the interests of guaranteeing the safety and continuity of air traffic services.
- 716.** The Government explains that official reports underscored the need to safeguard the economic viability of AENA, which had run up a substantial deficit, to urgently bring air traffic services into line with EU regulations and for an overhaul of the current air traffic system in the interests of guaranteeing the safety and continuity of the service, all of which pointed to the urgent need to adopt measures in order to regulate issues such as working hours, rest periods and training. According to these reports, it is a question of confronting a serious threat to both the national and European air traffic system.
- 717.** The Government has prepared comments on the aforementioned court ruling, in which it indicates that jurisprudence attaches great importance to the principle of the law of the land prevailing over the agreement, specifying that, with regard to the division of labour between the legislature and the collective bargaining process, the legislature is entitled by law to enter reservations on certain matters, which would normally be regulated by means of collective bargaining, should exceptional circumstances or special cases arise. Given that the law prevails over the agreement without prejudice to the right to collective bargaining, the National High Court refers to constitutional doctrine when laying down the guidelines for identifying the essential content of fundamental rights. In this regard, the National High Court stipulates that "... no fundamental right is absolute, in other words, all rights are restricted in the way that all fundamental rights are restricted by the need to ensure their compatibility with the other rights and legal provisions enshrined in the Constitution, which leads to the belief that legislative intervention is required to seek out solutions in the case of conflict between rights and legal provisions of constitutional standing, which would need to be the subject of deliberations in the light of the general consensus that the restriction of fundamental rights must be supported in the Constitution, given the inadequate nature of the support that can be offered by the simple interests of the respective parliamentary majority. The European Convention on Human Rights has maintained the same criterion and makes reference throughout the text to measures necessary in a democratic society whereby restrictions may only be placed on such rights in the interests of safeguarding values such as public safety, health and the impartiality of the judiciary. Therefore, restrictions may be placed on fundamental rights only when concurrent with a vital community interest. However, should restrictions prove necessary, it is not enough to merely state the existence of such an interest without also acknowledging the need to protect it within the framework of fundamental rights to the extent that the restriction of fundamental rights is justified. The deliberations between the stakeholders must respect the principle of proportionality, which is the tool used to ascertain whether the actions leading to the restriction of fundamental rights have respected the limits established in the Constitution. In such cases, three requirements must be met:
- (1) The intervention must possess the means to achieve its end.
 - (2) The intervention must be necessary and used as a last resort.

- (3) It must be proportional in the strict sense of the term. In other words, it must not excessively curtail the right or interest on which the restriction was placed. This requirement is the most important since the principle of proportionality and essential content are not synonymous, given that, according to scientific doctrine, respect for essential content, for all intents and purposes, overlaps with the third requirement set out above in such a way that it is not enough for the legislature's intervention to be adequate and necessary, rather it must score reasonably well in terms of proportionality. These three requirements having been met, the court ruling of 10 May 2010 on the case of the air traffic controllers concluded that the fundamental right to the freedom of association, of which collective bargaining forms an integral part, had not been violated. The ruling stated that "it has been proven beyond all doubt that AENA was not in a position to guarantee the safety and continuity of its air traffic services or to honour the country's international obligations, in particular EU Regulations Nos 2096/2005 /CE and 1070/2009/CE, proving that, in 2011, AENA was still not in a position to fulfil the community requirements laid down by the European Commission for the air traffic network, given Spain's central role in air traffic both in Europe and worldwide, owing to the high frequency of its air traffic. The ruling also noted that AENA's economic viability has been gravely compromised, making it one the most inefficient air traffic service providers in Europe, as is evident from the report of the Directorate-General of Civil Aviation, which is the regulatory body and executive office for aeronautical policy, which was based on the reports of EUROCONTROL.
- 718.** Among other things, the ruling notes the USCA's insistence that there were no exceptional circumstances or any urgent need for the Government, and subsequently for the legislature, to intervene, as the situation had been ongoing for 20 years. However, it does not accept the USCA's assessment, as the continuation for over 20 years of a situation such as the one in question, whereby collective bargaining was used in fraud of law to reach a formal agreement on insufficient working hours, only for collective bargaining to be used later in order to extend working hours, which resulted in controllers undertaking hundreds of hours of overtime, in violation of the overtime limits laid down in article 35, 2ET, does not constitute a state of normality but rather a permanent state of exception that no responsible administration can tolerate, as it is subject to the principle of legality in accordance with the provisions of article 103, 1CE.
- 719.** It should be acknowledged that the intervention of the legislature was not only necessary but vital to ensure a return to "normality", in other words, a return to legality. To this end, the legislature was obliged to impose temporary measures relating to the current service provider, which created the conditions necessary for an ordered transition to a new organizational structure of civil air traffic service providers by legislative means. These measures affected the essential aspects of collective bargaining, which have given rise to the situation in question. It is inconceivable that collective bargaining could be used to resolve the situation, as demonstrated by the failure to negotiate the terms of the agreement following 75 fruitless meetings.
- 720.** The Government also notes the decision taken by the Ombudsman in relation to the calls for entering a plea of unconstitutionality against Royal Decree-Law No. 1/2010 of 5 February, to the effect that no such plea was entered.
- 721.** In accordance with the above, the Government concludes that the exercise of the right to freedom of association and collective bargaining has not been violated.
- 722.** In a report sent by the Government, AENA refers to the statement of the complainant organization, in which the organization affirms that throughout the process of negotiating a new collective agreement to replace the first (which was extended as of 31 December

2004), there were no calls for strike action or any other type of collective action or mobilization. AENA confirms that this indeed is the case, which corresponds with the proven facts recorded in ruling No. 047/2010 of the Social Chamber of the National High Court, which also appear in procedure No. 41/10, initiated at the request of the USCA against AENA, the Ministry of Development and the Ministry of the Economy and Finance on the grounds of collective dispute, which considers the following facts as established:

The industrial relations between air traffic controllers as a collective and their employers have been greatly strained; the main points of contention, which have been reported in the media, include the following:

[...]

6. The delays experienced at Madrid Barajas airport on 2 and 3 January 2009 owing to seven air traffic controllers being off on sick leave.

7. The closure of two runways at Madrid Barajas airport on 23 July 2009 owing to a lack of air traffic controllers due to illness and the remaining controllers' refusal to work overtime.

8. The delays to flights from Madrid Barajas airport to the Canary Islands on 27 December 2009 owing to several controllers being off on sick leave and the remaining controllers' refusal to work overtime.

9. The closure of two runways at Madrid Barajas airport on 1 January 2010 owing to a lack of air traffic controllers due to illness and the remaining controllers' refusal to work overtime.

10. The controllers' announcement that from 1 April 2010 they would work only their statutory, basic day of 12 hours.

- 723.** Furthermore, AENA notes that, in addition, the complainant organization seems to have deviated from the content of the following paragraph of the statement of proven facts contained in the ruling:

As of 31 December 2004, the expiry date of the first collective agreement, a total of 65 meetings have been held between AENA and the USCA without any satisfactory outcome.

On 2 February 2010, when reaching an agreement proved impossible, AENA broke negotiations with the USCA, notifying the air traffic controllers to this effect through a communication dated 5 February 2010, which has been placed on record and is incorporated herein by reference.

- 724.** Furthermore, AENA notes that following the entry into force of the aforementioned legal provisions, a new negotiating committee has been set up to negotiate the terms of the future collective agreement within the framework provided for in these legal provisions, which is a testament to the right to collective bargaining. To date, the negotiating committee has held numerous meetings.

- 725.** In its communication of 20 May 2011, the Government announced that Spain was submitting its comments on the case, which would appear in the reports prepared by the relevant authorities of the Ministry of Development – the Civil Aviation Directorate and the AENA, as well as the Directorate-General for Labour of the Ministry of Labour and Immigration.

- 726.** The Directorate-General of Civil Aviation of the Ministry of Development notes that the adoption and entry into force of Act No. 9/2010 of 14 April did not affect the framework of collective bargaining as, following the entry into force of this act, a negotiating committee was set up to negotiate the terms of the second collective agreement of these workers, which is a testament to the right to collective bargaining. The activities of the negotiating committee have already yielded preliminary results as, in August 2010, the

AENA and the USCA signed a basic agreement with 12 points. On 29 December 2010, the negotiating committee ratified the agreement on the negotiation procedure, which had been provisionally adopted by a number of the members of the negotiating committee and in which the parties had set 1 January 2011 as the deadline for negotiating the terms of the second collective agreement, explicitly stating that, “should discrepancies regarding any of the matters that are the subject of the negotiation persist and thereby prevent a consensus from being reached that would otherwise lead to the signing of the agreement, in the present document both parties undertake to bring any such discrepancies before a binding arbitral procedure with which they must comply in full”.

727. The deadline set by both parties for negotiating the terms of the collective agreement having passed, the parties jointly informed the appointed arbitrator that no consensus had been reached over the course of the negotiations. The arbitral procedure began on 1 February 2011 and resulted in an arbitral award that concluded the second collective agreement for air traffic controllers employed by the AENA. The agreement will remain in force until 31 December 2011.
728. The Government maintains that the intervention of the Spanish legislature in the matter concerning collective bargaining was necessary, opportune and proportionate in the interests of restoring legality and guaranteeing citizens the right to free movement, as well as the safety and continuity of air traffic.
729. The intervention was temporary and had minimal impact, as demonstrated by the adoption of the second collective agreement for air traffic controllers employed by the AENA.
730. The public body AENA draws attention to the laborious negotiating process that took place within the negotiating committee (which began following the entry into force of Royal Decree-Law No. 1/2010 of 5 February, and of Act No. 14/2010 of 14 April, which supersedes and repeals it), a process which was brought to an end following numerous meetings by the signing of the second collective agreement, the fruit of an “arbitral compromise”, reached by the parties on 23 December 2010, ratified at the negotiating table on 29 December 2010 and published together with name of the arbitrator in the *Official Bulletin of the State* on 26 January 2011. Agreement 13 of those contained in the arbitral compromise provides that: “The temporal and effective scope of the arbitral award rules out the possibility of any further proceedings, cases on the grounds of collective dispute or strikes resulting from the resolved matter” while Agreement 15 provides that: “This arbitral compromise is similar in both nature and effectiveness to a statutory collective agreement, and as such will be registered, deposited and published in the *Official Bulletin*, with the management of AENA being responsible for taking the necessary formalities.
731. The Directorate-General for Labour of the Ministry of Labour and Immigration provides detailed information on the different aspects of the arbitral compromise and of the arbitration process and draws attention to the fact that the temporal and effective scope of the arbitral award rules out the possibility of further proceedings, cases on the grounds of collective dispute or strikes resulting from the resolved matter, and to the fact that it deals with “all points of negotiation that have yet to be agreed upon. Therefore, the arbitral award shall only overlook aspects on which an explicit agreement has been reached or issues that the parties have not explicitly agreed to bring before the arbitration procedure. Furthermore, the unanimous decision to submit any discrepancies to an impartial third party who will resolve them does not constitute, to quote from the arbitral award itself, an abnormal outcome or a failure of the collective bargaining process. Nonetheless, it does not signal the conclusion or the explicit withdrawal of the complaint lodged by the USCA, despite the fact that the arbitral award successfully replaced the first collective agreement between the air traffic controllers and AENA. It is undoubtedly the failure to negotiate the terms of the agreement that belied the USCA’s complaint”.

732. The Directorate-General for Labour provides a detailed account of the interpretation of the jurisprudence relating to the principle of good faith in negotiation and draws attention to the fact that the deadlock reached during the negotiations of the second collective agreement was overcome firstly by AENA's acceptance of an arbitral compromise on 11 January 2011, involving representatives from both AENA and the USCA, in accordance with the provisions of articles 90, paragraphs 2 and 3, and 91 of the Workers' Statute Act and Royal Decree No. 713/2010 of 28 May on the registration and submission of collective employment agreements, and secondly by the adoption, registration and official publication of the arbitral award, which includes the full text of the second collective agreement for air traffic controllers employed by AENA, which entered into force on 10 March 2011.

C. The Committee's conclusions

733. *The Committee notes that in this complaint, the complainant organization alleges that the negotiations between the USCA and the public body AENA aimed at replacing the collective agreement, which expired on 31 December 2004, were interrupted on 2 February 2010 when AENA's representatives withdrew from the negotiating table. According to the USCA, three days following this unilateral break in negotiations, Royal Decree-Law No. 1/2010 entered into force (the contents of which were subsequently enshrined in Act No. 9/2010 adopted by the Chamber of Deputies, which used terms similar to those used in the Royal Decree-Law), which, responding to an urgent need, altered the working conditions set out in the collective agreement, with reference to shifts, working hours, rest periods, movement outside the workplace, leave, holidays and offences. The USCA alleges in particular the interference of the authorities in the collective bargaining process, which constitutes a violation of ILO Convention No. 98, and the lack of consultation and notes that the new regulations have given rise to new occupational risks for air traffic controllers. Lastly, the USCA claims that the alleged acts occurred in the context of a negotiation process during which there were no calls for strike action or any other type of collective action or mobilization.*
734. *The Committee notes the Government's statements, according to which (1) the legal provisions contested by the complainant organization temporarily alter certain working conditions of air traffic controllers, who provide an essential public service; (2) it was necessary to bring this service into line with the provisions of EU Regulation No. 2096/2005, which lays down common requirements for all States providing air travel services, and with other EU provisions regulating the Single European Sky initiative, compliance with which is compulsory in Spain, which affect air traffic safety and the fundamental right to free movement of persons and goods; (3) the legal provisions were contested as a new collective agreement still had not been concluded (the previous one having expired on 31 December 2004) following five years of negotiations and despite the numerous and frequent offers made by the employer over the 65 meetings held at the negotiating table, which resulted in the submission of up to ten proposals based on the regulations of the Single European Sky initiative, whereas the workers' representatives only submitted one proposal, which failed to take into account any of the aspects that had to be altered; (4) the contested legal provisions (which the Government insists were only temporary in nature) did not affect the collective bargaining framework as, following their entry into force, a new negotiating committee was set up to negotiate the terms of the future collective agreement; (5) on 10 May 2010, the judicial authority (the Social Chamber of National High Court) categorically rejected the case brought by the complainant organization; (6) with regard to the complainant organization's allegation that the authorities intervened during a negotiation process during which there were no calls for strike action or any other type of collective action or mobilization, the Government and AENA quote the relevant section of the ruling of the judicial authority, where it is stated that the industrial relations between air traffic controllers as a collective*

and their employers have been greatly strained and that the points of contention, dating from 2009, include delays to flights owing to employees repeatedly being off on sick leave, their refusal to work overtime and the controllers' announcement that as of April 2010 they would work only their statutory, basic day. The Committee notes that the Government has not responded to the alleged lack of consultation with the USCA when drafting the contested legal provisions but understands that, in addition to the situation of urgency declared by the Government, the numerous meetings and negotiations held with the public body AENA (which is directly answerable to the Ministry of Development) allowed the authorities to gain sufficient insight into the point of view and position adopted by the trade union.

735. The Committee further notes the second reply from the Government, in which it is stated that, following the temporary measures introduced by the authorities, the negotiating committee comprising both USCA and AENA representatives resumed the negotiation of the second collective agreement, which led to the decision, taken on 23 December 2010, to submit any discrepancies to an arbitrator (jointly appointed on 11 January 2011), who subsequently issued an arbitral award that included the full text of the second collective agreement concluded between the air traffic controllers, represented by the USCA, and AENA, which entered into force on 10 March 2011. Furthermore, the arbitral award rules out the possibility of any further proceedings or cases on the grounds of collective dispute resulting from the resolved matter.
736. The Committee wishes to recall the principle of free and voluntary negotiation, and in particular the principle according to which: "State bodies should refrain from intervening to alter the content of freely concluded collective agreements" [see the **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1001]. However, the Committee considers air traffic control to be an essential service in the strict sense of the term [see the **Digest** op. cit., para. 585] and that, in such cases, certain types of intervention by the authorities are not incompatible with the principles of collective bargaining. In particular, the Committee considers recourse to compulsory arbitration in cases where the parties do not reach an agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) [see **Digest**, op. cit., para. 994].
737. Furthermore, the Committee has noted the contents of the legal decision on this case, the Government's arguments for invoking reasons of safety and the urgent need to comply with the EU regulations on air travel services, as well as its statement to the effect that following years of negotiations aimed at concluding the second collective agreement, a deadlock had been reached, which had to be broken in spite of five years and 65 fruitless meetings between the parties. In this regard, the Committee recognizes that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities may be justified in stepping in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part [see **Digest**, op. cit., para. 1003].
738. In the light of this, the Committee, while noting that, following the lodging of the complaint, the parties agreed to appoint an arbitrator to settle their differences and that the award issued by the arbitrator includes the text of the second collective agreement between the USCA and AENA, which entered into force in March 2011, has decided that this case does not call for further examination.

The Committee's recommendation

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

CASE NO. 2741

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

- the Transport Workers Union of America AFL–CIO (TWUA) and**
- the Transport Workers Union of Greater New York,
AFL–CIO, Local 100 (Local 100)**

Allegations: The complainants allege that state legislation bars all strikes in the public sector, imposes excessive penalties on illegal strikes and severely restricts the right to bargain collectively of transport workers in the public sector through compulsory arbitration

740. The complaint dated 10 November 2009, is contained in a communication from the Transport Workers Union of Greater New York, AFL–CIO, Local 100 (Local 100) and the Transport Workers Union of America, AFL–CIO (TWUA). The complainants subsequently provided additional information on 16 December 2009 and 14 March 2011.

741. The Government sent its observations in a communication dated 15 April 2011.

742. The United States has not 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), or the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

743. In their communication dated 10 November 2009, Local 100 and TWUA state that the Public Employees' Fair Employment Act of 1967 (Article 14 of the New York Civil Service Law, known as the "Taylor Law") bars all strikes in the public sector through a blanket prohibition on strikes or "any concerted stoppage of work" or even a "slowdown" in the public sector (sections 201(9), 209(5) and 210). The complainants further point out that the Taylor Law provides for compulsory interest arbitration in place of the right to strike and excessive penalties for illegal strikes including imprisonment of trade union leaders, heavy fines and suspension of dues check off. The Taylor Law also includes a requirement that unions seeking to represent public sector workers in collective bargaining must affirm in writing that the union "does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such strike" (207(3)(b)). According to the complainants, these provisions of the Taylor Law constitute a serious infringement of ILO Conventions Nos 87 and 98, both on its face and as applies to a 60-hour strike undertaken by Local 100 between 20 and 22 December 2005.

744. The complainants state that they filed the present complaint following the conclusion of substantial litigation in domestic courts regarding the 2005 strike and its consequences for Local 100. The complainants indicate that they are aware that they have not exhausted domestic remedies but chose not to explore certain avenues of appeal, considering courts have thus far not been sympathetic to challenges to the validity of the Taylor Law or

similar restrictions on public sector workers' right to strike. They refer to a number of judicial decisions showing that the Taylor Law has survived numerous judicial challenges as the courts have found it to conform to domestic rights norms, including the United States and New York State constitutions.

745. Local 100 represents more than 38,000 workers, who include, virtually all those employed within the public transportation services of New York City. The 20–22 December 2005 strike took place in the context of the negotiation of a new contract between TWUA and Local 100 and agencies of the Metropolitan Transportation Authority (MTA) in New York City following the expiration of the collective bargaining agreement scheduled on 15 December 2005. According to the complainants, the entire negotiations were marked by bad faith on the part of the employer which was demonstrated, among others, by the following indicators. First, the complainants allege that the employer demanded the union acceptance of a different system of pension and health-care benefits (to the detriment of newly hired employees) in the absence of economic constraints on the employer. According to the President of Local 100, writing contemporaneously: “they demanded arbitration before even trying to resolve the contract, and hours before the contract expired, the MTA spent its 1 billion surplus”. The complainants also indicate that the employer submitted an economic proposal merely days before the Local 100 contract was to expire, sent representatives with no actual power to negotiate on its behalf, and had the employer representative with plenary bargaining authority appear at negotiations just one hour before the collective agreement was set to expire.
746. On 12 December 2005, three days before the set expiration date of the collective agreement, the Attorney General of New York, acting at the behest of the employer, sought an injunction against any potential strike by Local 100 pursuant to section 210(1) of the Taylor Law, which provides that no public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike. The injunction was granted on 13 December (*New York City Transit Authority v. Transport Workers Union Local 100*, 35 A.D.3d).
747. On 20 December, five days after the contract expired, with the employer continuing to refuse to bargain in good faith, Local 100 went on strike. The complainants state that at no point during the strike was any threat presented to the health and safety of residents of the metropolitan New York area and that the strike was peaceful and orderly. On 22 December, the employer dropped its demand. The parties arrived at a tentative agreement on a new contract a few days later according to the complainants. The employer however refused to honour the agreement and eventually an arbitration panel awarded the contract the parties had agreed in the negotiations that ended the strike.
748. The complainants further indicate that during the first day of the strike, the court deemed the union to be in criminal contempt of the injunction and imposed a fine of \$1 million for every day that the strike endured. On 19 April 2006, the court determined that the union would be fined \$2.5 million for its 60-hour strike and that individual employees would lose two days' wages for every day of the strike. Local 100 would also forfeit automatic dues deduction as provided for in the Taylor Law.
749. The complainants state that the fine, in combination with the forfeiture of automatic dues deduction (which, just in the three months immediately after implementation cost the union over \$1 million in lost revenue) created a severe financial burden on Local 100 and its members. They claim that the material impact was devastating as the union had to expend in order to seek dues from individual members and devote a large percentage of staff time and of its budget to this task during the 19 months before automatic dues deduction was finally restored on 10 November 2008 (only upon receipt of an undertaking from Local 100 that it would not go on strike in the future). It also resulted in a significant loss

of revenue for TWUA as 30 per cent of Local 100's revenue is passed on to the national level, representing 25 per cent of the TWUA revenue.

750. Additionally, the complainants indicate that, on 24 April 2006, the President of Local 100 was sent to prison to serve a ten-day sentence imposed for his role in violating the injunction (*New York City Transit Authority v. Transport Workers Union of America*, 2006 N.Y. Misc. Lexis 4046 (Sup. Ct. Kings Co.2006) affirmed 37 A.D.3d679 (App.Div 2d Dept.2007)).
751. The complainants state that the sanctions imposed on the union following the strike were so disproportionate that it would be fair to speculate that it was designed to cripple and even destroy the union as well as deter other unions from contemplating strike action. Similarly, the complainants argue that that the punitive fine on individual workers could well be understood as a calculated attempt to undermine support for the union. Furthermore, the prison sentence adds to the elements of intimidation and harassment alongside the financial penalties resulting in stripping the capacity of the union to adequately represent their members in the future and in a chilling effect on other unions.
752. In their communication of 16 December 2009, the complainants indicate that the collective bargaining agreement, signed by two sub-agencies of the employer after the strike of December 2005, expired on 15 January 2009. Although negotiations for a new contract had begun months before, the parties were unable to reach agreement on all terms. A second collective bargaining agreement with another sub-agency of the employer expired on 31 March 2006, and the parties were unable to reach an agreement more than 2.5 years later. On 6 January 2009, a joint declaration of impasse was submitted to the Public Employment Relations Board (PERB) with the aim of seeking interest arbitration under section 209 of the Taylor Law with respect to both agreements. Hearings were held in April, May and June 2009 involving the submission of substantial testimonial and documentary evidence by the parties. On 9 June 2009, the panel issued an award for the sub-agency of the employer covering the period from 1 April 2006 to 31 March 2009, a period that had already elapsed in its entirety. On 11 August 2009, the panel issued an award for the workers of the three sub-agencies with respect to terms and conditions of employment for the period running until 15 January 2012. The complainants indicate that the employer made no effort to implement the award despite a decision of New York State Supreme Court enforcing the award in all respects. The complainants state that, one year after the expiration of the collective agreement, they were still looking forward to the possibility of years of litigation following the compulsory arbitration process and expressed concerns on the implications of such deliberate delays in concluding a collective bargaining agreement.
753. The complainants ask the Committee to recommend that the United States take action to ensure that New York State legislates, and interprets state laws in accordance with international obligations. The complainants further asked the Committee to recommend redress for Local 100, at a minimum through a reimbursement of the fines imposed on the union as well as on individuals, and a payment to assist the union in recouping losses during the nearly 18 months it was deprived of dues check off. They also urged the Committee to reiterate the urgent need to ratify Conventions Nos 87 and 98 at the earliest opportunity for the Government of the United States.
754. Finally, in a communication of 14 March 2011, the complainants point out that legislative attacks on the right to freedom of association are emanating from at least 20 states and that this nationwide assault on the right to collective bargaining directly implicates the issues in this case as those who seek to ban public sector bargaining are seeking to delegitimize internationally protected trade union activity in the public sector. Failure to address

restrictions by the states on the right to freedom of association has resulted in a national crisis according to the complainants.

B. The Government's reply

755. In a communication dated 15 April 2011, the Government states that the national public sector unionization rate is currently 36.2 per cent and has remained relatively constant over the past several decades.
756. The Government further states that the United States' unique, decentralized and diverse system of government is rooted in the United States Constitution which establishes a federalist regime in which the national Government exercises only those powers the Constitution expressly affords to it. All other powers are reserved to the 50 states or to the people themselves. These principles have been reaffirmed many times including by Executive Order (EO) 13132, which specifically prohibits federal agencies from submitting to Congress legislative proposals that would "interfere with functions essential to the States' separate and independent existence" (section 5(a)). The Government indicates that state and local labour-management relations are often seen as "essential functions" of states and local governments "separate and independent existence". The regulation of labour relations in the United States respects the constitutionally-mandated distribution of power among the national, state and local governments. When Congress enacted the National Labor Relations Act (NLRA), it specifically excluded state and local government employers from the scope of the law, thereby deferring to principles of federalism.
757. Labour laws in each state reflect the balance of employer and employee rights that has been struck by each state's governing bodies. While each state has chosen a somewhat different regulatory approach, most have constitutional provisions or legislation that expressly guarantees the right to freedom of association for public employees. The Government indicates that 25 states and the District of Columbia have enacted comprehensive labour laws for the majority of public employees which cover inter alia methods of resolving a bargaining impasse. Thirty-five states have public employee relations boards which are usually quasi-judicial administrative agencies charged with administering the collective bargaining statutes of public employees and provide a forum for labour-management dispute resolution. In addition, almost every state provides a dispute resolution system with mediation, arbitration and/or fact-finding procedures to assist with labour-management disputes and contract negotiations.
758. As regards New York State, the Government states that it has the highest unionization rate in the country at 24.2 per cent (in the public and private sector). The Government indicates that the Taylor Law governs public sector labour-management relations at every level of government and that it provides public employees with important rights, including the right to organize and the right to be represented by employee organizations. Public employee unions also have the right to collectively bargain with their public employers to determine the terms and conditions of their employment.
759. The Government states that, while the Taylor Law prohibits public employees from engaging in a strike, it established a three-member PERB, a neutral, independent agency charged with administering a dispute resolution system for public employees (section 209). The Taylor Law provides general mediation and fact-finding procedures for all covered employees and even contains special binding arbitration procedures for transportation workers when the PERB certifies that a contract negotiation cannot be voluntarily resolved (section 209(5)). The Government also states that the State of New York has enacted an "agency-shop" statute that also allows for automatic dues deductions for state and local employees covered by a collective bargaining agreement.

- 760.** The Government points out that New York City and its transit workers have been parties to collective bargaining agreements for more than 40 years, including an agreement that ran from 16 December 2002 through 15 December 2005. Negotiations of the terms of a successor agreement began in October 2005, and continued up until Local 100 elected to strike on 20 December 2005. According to the Government, the complainants did not invoke the Taylor Law's dispute resolution system before the strike declaration and the strike was declared after only 1.5 months of negotiations and without the statutorily provided mediation or binding arbitration which had proven successful in the past.
- 761.** The United States recognizes that the authority of its national government is constrained by its democratic federal system, and limits the authority of the national government to modify directly state labour-management relations laws such as the Taylor Law. The Government, nevertheless, indicates that the United States does take challenges to such laws seriously and accordingly will continue to promote the principles of freedom of association and collective bargaining throughout the country. The national government states that it has recently undertaken prominent activities to further these principles including through the Federal Mediation and Conciliation Services (FMCS). The FMCS provides a number of services for use in the public sector at both the federal, state and local levels, including the dispute resolution in collective bargaining processes. The Government also points out that it set examples in its management of labour-management relations in the federal sector, particularly with the signature and ongoing implementation of EO 13522 and EO 13496 by President Obama. EO 13522, which was signed on 9 December 2009, established a cooperative and productive form of labour-management relations throughout the executive branch. It created the National Council on Federal Labour-Management Relations to advise the President and required all federal agencies to create labour-management forums, to increase collaboration and monitor improvements in areas identified by participants to the forum and, finally, it established several pilot projects in which certain executive departments will bargain over certain issues. Implementation of EO 13522 is already under way. EO 13496 was signed on 30 January 2009 and requires federal government contractors and their subcontractors to post, in conspicuous places in and about workplaces where contracted work is performed, notices to employees about their rights under the NLRA. The Government indicates that it will continue to promote these important principles at the federal and state levels.

C. The Committee's conclusions

- 762.** *The Committee notes that the allegations made by Local 100 and TWUA concern state legislation restricting the right to strike of public transport workers, and its application in a strike undertaken by Local 100 between 20 and 22 December 2005. More specifically, the complainants refer to the Public Employees' Fair Employment Act of 1967 (Article 14 of the New York Civil Service Law, known as the "Taylor Law") which bars all strikes in the public sector through a blanket prohibition on strikes or "any concerted stoppage of work" or even a "slowdown" in the public sector (sections 201(9), 209(5) and 210). The complainants further point out that the Taylor Law provides for compulsory interest arbitration in place of the right to strike and excessive penalties for illegal strikes including imprisonment of trade union leaders, heavy fines and suspension of dues check off. The Taylor Law also includes a requirement that unions seeking to represent public sector workers in collective bargaining must affirm in writing that the union "does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such strike" (section 207(3)(b)).*
- 763.** *The Committee takes due note of the Government's response which states that, while the Taylor Law prohibits public employees from engaging in a strike, it does establish a dispute resolution system for public employees through the PERB and general mediation*

and fact-finding procedures, including special binding arbitration procedures for transportation workers. The Government also indicates that the complainants did not use this dispute resolution system, which has been successful in the past, before going on strike.

764. The Committee observes in this respect, that the complainants allege that the entire collective bargaining negotiations were marked by bad faith on the part of the employer who demanded arbitration before even trying to resolve the dispute. According to the complainants, indicators of bad faith include the fact that the employer spent its 1 billion surplus hours before the expiration of the collective agreement but made no concessions in the negotiations, sent representatives with no actual power to negotiate on its behalf, and sent a representative with plenary bargaining authority just one hour before the collective agreement was set to expire. The Committee further observes that, according to the Government, the complainants did not invoke the Taylor Law dispute resolution framework before a strike declaration.
765. The Committee recalls that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 935]. The Committee further recalls that any intervention by the public authorities in collective disputes must be consistent with the principle of free and voluntary negotiations; this implies that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent and recourse to these bodies should be on a voluntary basis, except where there is an acute national crisis [see **Digest**, op. cit., para. 1004]. The Committee requests the Government to encourage the parties to take all steps for good faith bargaining in the future.
766. As regards the use of prior arbitration procedures, the Committee observes that, in the Taylor Law, these procedures are set out in a framework in which all strike action in the public service is fully prohibited. In addition, the complainants have set out their overall concerns as regards the respect and implementation of final awards in their allegations concerning a later arbitration procedure resulting in two awards issued by the PERB, of which one, issued on 11 August 2009, has not been implemented by the employer to date, despite a favourable decision from the New York Supreme Court. The Committee observes that the Government has not provided any information on the lack of enforcement of the PERB arbitration award of 11 August 2009, and trusts that it will take all necessary measures to effectively enforce the decision of the Supreme Court concerning the implementation of the award. The Committee requests the Government to keep it informed of steps taken.
767. As regards the overall prohibition of strike action in the public service under the Taylor Law, the Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests [see **Digest**, op. cit., para. 521]. While the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population), the Committee recalls that the transportation sector, including metropolitan transport, does not constitute an essential service in the strict sense of the term [see **Digest**, op. cit., paras 576 and 587].

- 768.** *The Committee notes, however, that a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met or that facilities operate safely and without interruption [see **Digest**, op. cit., para. 607]. Respect for the obligation to maintain a minimum service of the underground railways' activities to meet the minimal needs of the local communities is not an infringement of the principles of freedom of association [see **Digest**, op. cit., para. 617]. The Committee recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see **Digest**, op. cit., para. 612]. Furthermore, the Committee recalls that in the absence of agreement between the parties, the establishment of minimum services should be handled by an independent body [see **Digest**, op. cit., paras 613 and 618].*
- 769.** *The Committee, in light of the principles above and notwithstanding the existence of the dispute resolution framework, considers that the restrictions of the right to strike in the transportation sector as set out in the Taylor Law are not in conformity with the principles of freedom of association. While noting the Government's reference to the Federalist system of constitutional government, the Committee nevertheless requests the Government to take steps aimed at bringing the law into conformity with freedom of association principles so that only (1) public servants exercising authority in the name of the State and (2) workers of essential services in the strict sense of the term may be restricted in their right to strike. The Government may, however, if it so desires, consider providing for a negotiated minimum service in the public transportation sector, in line with the principles enumerated above.*
- 770.** *The Committee further notes that, pursuant to the Taylor Law, sanctions were imposed upon the complainants following the strike for violating an injunction granted by the Attorney General of New York, acting at the behest of the employer, against any potential strike. Local 100 was fined \$2.5 million for a 60-hour strike and forfeited automatic dues deduction for 19 months while its President was sent to prison to serve a ten-day sentence. Strikers were also subjected to individual fines through deductions of two days' wages for every day of strike. The Committee further observes that the peaceful and orderly nature of the strike undertaken by Local 100 has not been disputed in the Government's reply.*
- 771.** *The Committee duly observes that the sanctions imposed were related to the violation of an injunction granted on the basis of section 210(1) of the Taylor Law, which does not permit any strike action in the public service and, in the case at hand, is contrary to the principles of freedom of association.*
- 772.** *The Committee recalls that, like the Committee of Experts on the Application of Conventions and Recommendations, it considers that criminal sanctions should not be imposed on any worker for participating in a peaceful strike and therefore, measures of imprisonment should not be imposed on any account: no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike [see **Digest**, op. cit., para. 672 and 358th Report, Case No. 2742, para. 279].*

773. In these circumstances, the Committee expresses its deep concern at the seriousness of the penal and financial sanctions imposed on Local 100 in relation to a strike that lasted less than three days. The Committee considers that these penalties are likely to have had a significant damaging effect on the financial resources of the union and may have hindered its activities as well as its capacity to adequately represent its members and have had an intimidating effect on the right to organize. Moreover, the Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., para. 475]. In the present case, the Committee considers that the withdrawal of the check-off facility cannot be justified. Finally, in respect of individual workers, while taking note 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], the Committee considers that additional sanctions, such as deductions of pay higher than the amount corresponding to the period of the strike, amount in this case to a sanction for the exercise of legitimate industrial action. The Committee therefore urges the Government to take measures without delay to ensure that the union is fully compensated in respect of the sanctions and the withdrawal of check-off and to take steps for the compensation of Mr Toussaint for his ten-day detention and the additional sanctions imposed against the striking workers. The Committee urges the Government to keep it informed of developments in this respect.
774. Finally, the Committee welcomes the initiatives taken by the Government at the federal level to promote collective bargaining in the public service and trusts that it will take the necessary measures to promote full respect for freedom of association principles throughout the country. The Committee urges the Government to keep it informed of developments in this respect. The Committee invites the Government to consider taking the necessary measures for the ratification of Conventions Nos 87 and 98.

The Committee's recommendations

775. *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *While noting the Government's reference to the Federalist system of constitutional government, the Committee nevertheless requests the Government to take steps aimed at bringing the state legislation, through the amendment of the relevant provisions of the Taylor Law, into conformity with freedom of association principles so that only (1) public servants exercising authority in the name of the state and (2) workers of essential services in the strict sense of the term may be restricted in their right to strike.*
 - (b) *The Committee therefore urges the Government to take measures without delay to ensure that the union is fully compensated in respect of the sanctions and the withdrawal of check-off and to take steps for the compensation of Mr Toussaint for his ten-day detention and the additional sanctions imposed against the striking workers. The Committee urges the Government to keep it informed of developments in this respect.*
 - (c) *The Committee expects the Government to take all necessary measures to effectively enforce the decision of the Supreme Court with regard to the PERB arbitration award.*

- (d) *Noting the initiatives at the federal level to promote collective bargaining in the public service, the Committee trusts that the Government will continue taking measures to promote full respect for freedom of association principles throughout the country.*
- (e) *The Committee urges the Government to keep it informed of developments in respect of all above recommendations.*
- (f) *The Committee invites the Government to consider taking the necessary measures for the ratification of Conventions Nos 87 and 98.*

CASE NO. 2516

INTERIM REPORT

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

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

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

- 776.** The Committee last examined this case at its June 2010 meeting [see 357th Report, paras 591–628]. By a communication dated 11 March 2011, Education International (EI) submitted additional information related to this case.
- 777.** The Committee has been obliged to postpone its examination of the case on two occasions [see 358th and 359th Reports, paras 7 and 5, respectively]. At its meeting in May–June 2011, 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 (1972), 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 [see 360th Report, para. 5]. To date, the Government has not sent any information.
- 778.** Ethiopia had 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

779. At its June 2010 meeting, the Committee considered it necessary to draw the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein and made the following recommendations [see 357th Report, paras 4 and 628]:

- (a) The Committee requests the Government to provide all relevant information on the application in practice of the Charities and Societies Proclamation.
- (b) The Committee once again urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It urges the Government to keep it informed of the progress made in this respect.
- (c) The Committee once again urges the Government to take the necessary steps to ensure that the freedom of association rights of civil servants, including teachers in the public sector, are fully guaranteed. It requests the Government to keep it informed of all progress made in this respect.
- (d) The Committee urges the Government to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. The Committee requests the Government to keep it informed of the steps taken in this regard, the results of the inquiry, as well as that of any other investigations that have been carried out in relation to these allegations.
- (e) The Committee urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.
- (f) The Committee requests the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie, as well as adequate indemnities or penalties constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It requests the Government to keep it informed in this respect.
- (g) The Committee requests the Government to provide information on the alleged denial of reinstatement of Woldie Dana and Berhanu Aby-Debissa and to reply in substance to the allegations of dismissal of two trade union leaders, Nikodimos Aramdie and Wondewosen Beyene.
- (h) The Committee requests the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists and to provide a detailed reply as to its outcome.
- (i) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.
- (j) The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.

B. The complainants' new allegations

780. In its communication dated 11 March 2011, EI provides additional information related to the obstruction in the registration process of the National Teachers' Association (NTA) as a professional association, the absence of independent and full inquiries for extrajudicial

killings, arbitrary arrests and torture, the pressure to close down union's regional offices and the adoption of new legislation and regulations depriving the teachers from the public sector of their union rights.

- 781.** In particular, EI recalls that after the NTA was denied registration by the Ministry of Justice, the organization brought the case before the Federal First Instance Court in Addis Ababa. The court dismissed the case considering that the Ministry of Justice should not be sued as it was no longer in charge of registration affairs and that the NTA had to ask a State Agency yet to be formed in line with the newly proclaimed Charities and Societies Proclamation. On 19 April 2010, the Federal High Court upheld this decision.
- 782.** EI indicates that on 2 February 2010, the NTA representatives submitted a new application for registration with the new State Agency, the Charities and Societies Agency (CSA). However, the request for registration was verbally denied by the CSA. The Agency provided similar reasons to those provided by the Ministry of Justice in December 2008: lack of support from the Ministry of Education and from the Ethiopia Teacher Association (ETA), and similarity of the names of the ETA and NTA.
- 783.** The NTA representatives asked the CSA for its response in writing in order to enable the NTA to report the matter to the founding members and to file a petition to the Board of the CSA. The CSA declined the NTA's request and by doing so, violated article 3.3 of Regulation No. 168/2009 on Charities and Societies, according to which, "When the Agency denies the application for registration it shall notify the applicant in writing by stating the reason for the denial". Furthermore, according to EI, when acknowledging receipt of the NTA's request for an official reply, a CSA officer in charge advised the NTA representatives to give him more time in order to sort out the matter through negotiation rather than through written correspondence, which might take longer and cause both parties inconvenience. He also delayed the audience complaining that he was too busy to dedicate time to the NTA.
- 784.** On 16 March 2010, the NTA petitioned to the Director-General of the CSA, but the latter only referred the matter to the same officer, who in turn, informed that he was interviewing government officials in the Ministry of Education, leaders of the new ETA, school principals and teachers in order to see if they would support the formation of a second national teachers association. Verbally, he indicated that the response was negative.
- 785.** On 7 May 2010, NTA representatives requested, in writing, the Director-General of the CSA to take the following actions: (1) order the registration of the NTA and issue a certificate of registration without further delay; or (2) inform the NTA in writing of the refusal to register; and (3) to provide the NTA with the address of the Board of the CSA in order for the NTA to be able to appeal grievances. In this respect, EI explains that according to article 68.2 of Proclamation No. 621/2009 "Where the Agency does not issue a certificate of legal personality or does not make known that it will not issue it, the applicant may apply to the Board not later than 15 days from the time limit prescribed in the sub-article". Without a written reply from the Agency, the NTA could not exercise its right under this provision.
- 786.** EI further informs that on 28 August 2010, NTA founding members and 15 regional teachers' delegates agreed to tentatively suspend the attempts for registration until the formation of a new government. However, the elections did not bring change to the composition of the CSA. Therefore, on 12 October 2010, the NTA resumed its endeavour and after obtaining the address of the CSA Board, on 20 October 2010, went to the Board to submit a letter of appeal. The complainant alleges that when the NTA representatives asked the CSA Director-General's assistant secretary, who accepted the letter of appeal, to sign and stamp the seal of the Board on a copy of the letter, so that it could serve as a

receipt for submission, the assistant responded positively. However, while she was signing and stamping the letter, she received a call, allegedly from within the Agency, following which, she erased the stamped seal and returned the letter to the NTA representatives with annulled seal without any explanation. The NTA believes that the assistant secretary has been intimidated.

- 787.** EI indicates that after failed efforts of the NTA representatives to meet the CSA members, they were told on 24 December 2010 that the NTA case was under the investigation by the Institution of the Ombudsman and that they had to wait for its outcome. The CSA officers informed the NTA representatives that they had no mandate to treat cases under investigation by the Ombudsman or the Human Rights Commission, and that the NTA could receive response in writing from the CSA in line with the findings and recommendations to be released by the ombudsman's office. The CSA officers warned the NTA representatives not to come to the CSA office unless they receive a call or an official letter to do so. The NTA believes, however, that this is a new delaying tactic aimed at preventing the NTA from taking the case to the court, as the steps provided for by the law are not completed yet. The NTA representatives believe that this tactic is designed to wear down the NTA and for teachers to gradually give up their struggle for the establishment of an independent union.
- 788.** EI further informs that as per one of the registration requirements, the NTA had opened temporary offices in some selected regions, taking into account the fact that there should be at least an office in each region where the founding members of NTA came from. The offices are therefore located in the following areas: Addis Ababa, serving as headquarters, Hawassa, Arba-Minch, Ambo, Harar, Dire-Dewa, Baher-Dar, Gonder, Korem and Alemata. Some of the offices are located in rented private properties or private houses of highly committed trade unionists.
- 789.** EI alleges that the NTA representatives face two main problems in this connection. Firstly, they are under surveillance of the government security agents. EI claims that the harassment by security agents and government authorities is exacerbated partly at the request of the new ETA leadership. Their purpose is to intimidate teachers to quit their contact with the NTA and subsequently to force them to give up their longstanding demand for formation of an independent union. Secondly, landlords ask for at least six months of rent to be paid in advance and increase the rent from time to time which the NTA cannot afford, pending its registration as teachers' union. In addition, some landlords have indirectly been forced by security agents to ask the NTA for license to show for what purpose the NTA uses the offices. The NTA is therefore often forced to move some of its offices or even close some of them down. Furthermore, the NTA is also forced to do so because its representatives have been advised to be vigilante because under the pretext to search offices with no license, security agents and the police could use Proclamation No. 621/2009–Registration and Regulation of Charities and Societies and Proclamation No. 652/2009 on Anti-Terrorism as a legal umbrella to accuse the NTA representatives of violating the legislation in force; they may also break into NTA offices to look for evidence to justify their action and confiscate documents and office equipment, as they had repeatedly done to the former ETA. Moreover, NTA teachers, particularly its founding members and prominent activists, are afraid that security agents in collaboration with the police may accuse them of being guilty of a concocted crime, as it already happened to several colleagues in the former ETA.
- 790.** EI further alleges that despite repeated requests by the Committee on Freedom of Association, no independent inquiries into extrajudicial killings, arbitrary arrests and torture while in detention have been carried out by the Government. EI refers in particular, to the murder on 8 May 1997 of Mr Assefa Maru, Deputy General Secretary of former ETA and Executive Committee Member of the Ethiopian Human Rights Council (Case

No. 1888), and torture and mistreatment while in detention of the following trade unionists: Meqcha Mengistu, Anteneh Getnet, Tilahun Ayalew, Bernahu Aba-Debissa, Woldie Dana and Kassahun Kebede. With regard to these trade unionists, EI provides the following information:

- Meqcha Mengistu, Chairperson of the former ETA branch and Coordinator of the EI/ETA EFAIDS Programme, had not yet been reinstated in his job following his release;
- Anteneh Getnet, Tilahun Ayalew and Berhanu Aba-Debissa are all reported missing. Their respective families have never obtained compensation for the absence of means of survival during their detention;
- Woldie Dana had been reinstated in his job; and
- Kassahun Kebede fled the country shortly after his release in July 2007.

791. EI also alleges that Kinfe Abate, Wondewosen Beyene and Nikodimos Aramdie activists in the former ETA, dismissed because of their union activities, and Elfinesh Demissie, suspended for 36 days, had not been paid or received any compensation, despite the Committee’s recommendation to this effect.

792. EI indicates that the Government has not yet initiated the amendment of Civil Servant Proclamation No. 377/2004 of 26 February 2004 and of the Labour Proclamation, as requested by the Committee of Experts on the Application of Conventions and Recommendations so as to ensure the right of civil servants, including teachers in public schools, to form and join trade unions.

793. EI also indicates that in addition to Proclamation No. 621/2009 on the Registration and Regulation of Charities and Societies, other legislative texts were enacted which further infringe upon the rights under the ILO Conventions ratified by Ethiopia. These include Council of Ministers’ Regulation No. 168/2009 on Charities and Societies to reinforce Proclamation No. 621/2009; Proclamation No. 652/2009 on Anti-Terrorism, which gave absolute power to the police and security agents, allowing them to take any action against a person or an organization suspected of terrorism. As a result, many teachers had distanced themselves from union activities fearing that those activities might be perceived to be political or touch upon the government’s affairs. Finally, EI alleges that, according to the *Ruling Party Publication for the Senior Cadres*, which is a “political directive book issued by the Ethiopian People’s Revolutionary Democratic Front (EPRDF)”, no independent trade unions or civil organizations are allowed to act in Ethiopia.

794. EI concludes by alleging that the Ethiopian Government has not taken any steps to ensure the right of civil servants, including public teachers, to defend their occupational interests through neutral collective bargaining.

C. The Committee’s conclusions

795. *The Committee deeply regrets that, despite the time that has elapsed since the last examination of this case by the Committee, the Government has not provided any new information nor replied to 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 therefore urges the Government to be more cooperative in the future.*

796. 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.
797. 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].
798. At the outset, the Committee recalls that the present case refers to the allegations relating to the exclusion of teachers in the public sector from the right to join trade unions by virtue of the national legislation; refusal to register the NTA (previously ETA) and interference in its administration and activities; and harassment, arrest, detention and maltreatment of teachers in connection with their affiliation, first to the ETA, and now to the NTA. The Committee further recalls that it has been addressing very serious allegations of violations of freedom of association involving governmental interference in the administration and functioning of the ETA, and the killing, arrest, detention, harassment, dismissal and transfer of members and leaders of ETA since November 1997 (see Case No. 1888).
799. The Committee notes the information submitted by EI. With regard to the registration of the NTA (recommendation (b)), the Committee recalls that the Government has previously referred to the newly adopted Charities and Societies Proclamation establishing the CSA, a registering authority, and in this respect indicated that the NTA could submit its request for registration to the CSA and, if registration was denied, the NTA had a right to submit a complaint to the court. The Committee notes with deep concern the information submitted by EI according to which, despite numerous attempts to that effect before the CSA and its Board, the NTA remains without registration,. The Committee notes that in the absence of an official communication stating that the registration is denied and indicating the reasons therefore, the NTA cannot submit a complaint to the court. The Committee deeply deplores that three years after the NTA's request for the registration, this organization is still not registered. It recalls that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 295]. The Committee once again draws the Government's attention to its responsibility in ensuring that this right is respected in law and in practice. While noting that the issue is currently being examined by the ombudsperson, the Committee strongly urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It urges the Government to keep it informed in this respect.
800. With regard to the Charities and Societies Proclamation (recommendation (a)), the Committee notes that in its report to the Committee of Experts on the Application of Conventions and Recommendations, the Government indicated that the law was promulgated after extensive public discussions involving all stakeholders, and entered into force after the expiry of the period of time which was given to associations and various charities and societies to align themselves with its requirements. According to the Government, the Charities and Societies Proclamation aims at enhancing the participation of civil society organizations in developmental efforts of the country; it clearly defines and

regulates charities and societies and provides the necessary safeguards and due process in the framework of democratization efforts; and no trade union or related association raised complaints on being aggrieved or restrained by this new law. The Committee notes that in its 2010 comments, the Committee of Experts noted with concern that the Charities and Societies Proclamation organizes an ongoing and close monitoring of the organizations established on its basis and gives governmental authorities great discretionary powers to interfere in the registration, internal administration and dissolution of the concerned organizations with respect to those falling within its scope, which appear to encompass civil servants, including teachers and that a number of provisions of the Proclamation raise issues of compatibility with the Convention. The Committee therefore strongly urges the Government to take the necessary measures, without delay, to ensure that the Charities and Societies Proclamation is not applicable to workers' and employers' organizations and that such organizations are ensured effective recognition through legislation which is in full conformity with the Convention. The Committee requests the Government to provide information on all steps taken in this regard.

801. *The Committee further notes EI's indication that Council of Ministers' Regulation No. 168/2009 on Charities and Societies to reinforce Proclamation No. 621/2009; Proclamation No. 652/2009 on Anti-Terrorism, as well as the Ruling Party Publication for the Senior Cadres, according to which no independent trade unions or civil organizations are allowed to act in Ethiopia, further infringe upon the rights under the ILO Conventions ratified by Ethiopia. The Committee expresses its concern at the allegation that the Proclamation on Anti-Terrorism gave an absolute power to the police and security agents, allowing them to take any action against a person or an organization suspected of terrorism. The Committee notes that EI further alleges that the Government has not yet initiated the amendment of Civil Servant Proclamation No. 377/04 of 26 February 2004 and of the Labour Proclamation, as requested by the Committee of Experts on the Application of Conventions and Recommendations so as to ensure the right of civil servants, including teachers in public schools, to form and join trade unions. The Committee urges the Government to provide all relevant information on the application in practice of the Council of Ministers' Regulation to reinforce Charities and Societies Proclamation, as well as on Proclamation No. 652/2009 on Anti-Terrorism. It requests the Government to take the necessary measures to ensure that the existing legislation in general, and the Anti-Terrorism Proclamation, in particular, are not used in practice to intimidate and harass trade unionists. The Committee strongly urges the Government to take the necessary steps to ensure that the freedom of association rights of civil servants, including teachers in the public sector, are fully guaranteed. It urges the Government to keep it informed without delay of all measures taken in this respect.*
802. *The Committee notes with deep regret the complainant's allegation that no independent inquiries into extrajudicial killings, arbitrary arrests and torture while in detention have been carried out by the Government (recommendation (e)). The Committee therefore once again urges the Government to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. The Committee urges the Government to keep it informed without delay of the steps taken in this regard, the results of the inquiry, as well as that of any other investigations that have been carried out in relation to these allegations.*
803. *With regard to the cases of dismissals and suspension (recommendations (f) and (g)), the Committee notes with concern the complainant's allegation that except for Woldie Dana, who has been reinstated in his job, other trade unionists have not been. In particular, EI alleges that Kinfu Abate, Wonderwosen Beyene and Nikodimos Aramdie have not been reinstated or paid any compensation. In this respect, the Committee recalls that as regards*

the dismissal in 1995 of Kinfé Abate, it had previously requested the complainants to provide relevant and detailed information in respect of this dismissal [see 353rd Report, para. 1010]. The Committee once again invites the complainant to provide further information in this respect. The Committee further notes that according to EI, Berhanu Aby-Debissa is reported missing. In these circumstances, the Committee once again urges the Government to provide without delay information on the alleged denial of reinstatement of Nikodimos Aramdie and Wondewosen Beyene.

804. Noting with regret that according to EI, the wages lost during the 36 days of illegal suspension have not yet been paid to Elfinesh Demissie, the Committee urges the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie, as well as adequate indemnities or penalties constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It urges the Government to keep it informed in this respect without delay.
805. The Committee notes with regret new allegations of harassment submitted by EI, which includes surveillance and intimidation of the NTA activities. The Committee requests the Government to provide its observations thereon. The Committee once again urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.
806. The Committee further urges once again the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists which occurred between February and August 2008 and to provide a detailed reply as to its outcome.
807. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

The Committee's recommendations

808. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***
 - (a) ***The Committee deeply regrets that, despite the time that has elapsed since the last examination of this case by the Committee, the Government has not provided any new information nor replied to 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 therefore urges the Government to be more cooperative in the future.***
 - (b) ***The Committee strongly urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It urges the Government to keep it informed of the progress made in this respect.***

- (c) *The Committee strongly urges the Government to take the necessary measures, without delay, to ensure that the Charities and Societies Proclamation is not applicable to workers' and employers' organizations and that such organizations are ensured effective recognition through legislation which is in full conformity with the Convention. It requests the Government to provide information on all steps taken in this regard.*
- (d) *The Committee urges the Government to provide all relevant information on the application in practice of the Council of Ministers' Regulation to reinforce Charities and Societies Proclamation, as well as on Proclamation No. 652/2009 on Anti-Terrorism. It requests the Government to take the necessary measures to ensure that the existing legislation in general, and the Anti-Terrorism Proclamation, in particular, are not used in practice to intimidate and harass trade unionists and to keep it informed of all measures taken in this respect.*
- (e) *The Committee strongly urges the Government to take the necessary steps to ensure that the freedom of association rights of civil servants, including teachers in the public sector, are fully guaranteed and to keep it informed of all progress made in this respect.*
- (f) *The Committee once again urges the Government to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. It urges the Government to keep it informed without delay of the steps taken in this regard, the results of the inquiry, as well as that of any other investigations that have been carried out in relation to these allegations.*
- (g) *The Committee once again invites the complainant to provide further information on the dismissal in 1995 of Kinfe Abate.*
- (h) *The Committee once again urges the Government to provide without delay information on the alleged denial of reinstatement of Nikodimos Aramdie and Wondewosen Beyene.*
- (i) *The Committee urges the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie, as well as adequate indemnities or penalties constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It urges the Government to keep it informed in this respect without delay.*
- (j) *The Committee requests the Government to provide its observations on the new allegations of harassment of NTA activists submitted by EI.*
- (k) *The Committee once again urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent*

activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.

- (l) The Committee once again urges the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists which occurred between February and August 2008 and to provide a detailed reply as to its outcome.*
- (m) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
- (n) The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.*

CASE NO. 2723

INTERIM REPORT

Complaints against the Government of Fiji presented by

- **Education International (EI) and**
- **the Fijian Teachers' Association (FTA)**
- **the Fiji Islands Council of Trade Unions (FICTU)**
- **the International Trade Union Confederation (ITUC)**

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

- 809.** The Committee last examined this case at its November 2010 meeting, when it presented an interim report to the Governing Body [358th Report, paras 523–558 approved by the Governing Body at its 309th Session (November 2010)].
- 810.** The complainants submitted new allegations in communications dated 18 February and 10 March 2011. The International Trade Union Confederation (ITUC) has associated itself with the complaint and has supplied additional information dated 1 and 8 August and 1 and 4 November 2011. The Fiji Islands Council of Trade Unions (FICTU) has associated itself with the complaint and has provided additional information dated 23 September 2011.
- 811.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case on two occasions. At its meeting in May–June 2011 [see 360th 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 not sent any information.

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

A. Previous examination of the case

- 813.** In its previous examination of the case in November 2010, the Committee made the following recommendations [see 358th Report, para. 558]:

- (a) In light of the disruptions in the judicial system in Fiji and the apparent absence of any constitutional guarantees, the Committee requests the Government to take the necessary steps to ensure that Mr Koroi is immediately reinstated in his former position as a school principal without loss of pay or benefits and to keep it informed of developments.
- (b) The Committee urges the Government to refrain from any further interference in the internal affairs of the FTA and to permit Mr Koroi, as its legitimate representative, to carry out his representation functions at the relevant forums, including the Education Forum, the Fiji Teachers' Registration Board, the JCC and the CSB.
- (c) The Committee invites the complainant organizations to provide any relevant additional information and urges the Government to reply fully and without delay to the allegations of acts of violence against trade union leaders and anti-union harassment.
- (d) The Committee also requests the Government to respond in detail to the most recent allegations concerning restrictions on union meetings, on the freedom of movement of trade unionists and on union membership, restriction of the right to express opinions through the press and the abolition of representative bodies or of their tripartite composition.
- (e) Given the seriousness of the complainants' allegations and the absence of a complete picture of the situation on the ground, the Committee invites the Government to accept an advisory tripartite mission from the ILO to clarify the facts and assist the Government and the social partners in finding appropriate solutions in conformity with freedom of association principles.
- (f) The Committee draws the Governing Body's attention to the extreme seriousness and urgency of the issues involved in this case.

B. The complainants' new allegations

Allegations concerning act of anti-union discrimination against Mr Koroi

- 814.** In its communications dated 18 February and 10 March 2011, the complainant organizations Education International (EI) and the Fijian Teachers' Association (FTA) indicate that the dismissal of the FTA President, Mr Tevita Koroi, from his position as school principal, is still in force. They welcome the Committee's recommendations of November 2010, which call for the immediate reinstatement of Mr Koroi into his civil servant position in the Fiji public service. The recommendations have been communicated in December 2010 by the FTA to the Chairman and the Permanent Secretary of the Public Service Commission (PSC), as well as to the Permanent Secretary for Labour and Industrial Relations, and a formal follow-up has been sent in January 2011. The complainants state that the FTA representatives had an audience with the PSC Permanent Secretary on the matter and were verbally informed that the PSC would first be seeking a legal opinion on the recommendations from the office of the Solicitor General. In its communication of 10 March 2011, the complainants indicate that, by way of a letter of 22 February 2011, the Fiji PSC has rejected the FTA's request for reinstatement of Mr Koroi stating that the present complaint does not have any bearing on his termination.

- 815.** As regards the argument in the Government's reply that Mr Koroi has not exhausted the appeals process of the PSC on his termination decision, effective from 30 April 2009, the complainants reiterate the chronology of events in Fiji at the time, in particular that the Fiji Constitution was abrogated on 10 April and that the PSC Appeals Board, together with the courts and all avenues of seeking redress, were made redundant so that the mediation process of the Labour Ministry was the only option available. In their view, to state that avenues for appeal have not been exhausted is not correct when the system does not have such mechanisms in place. The complainant organizations also contest "that government has had to deal with Mr Koroi on a number of occasions regarding his participation in political activities and public comments", as he had not received any such formal or verbal communication from the PSC.
- 816.** The complainants further highlight that Mr Koroi is the president of an association which has existed for over 70 years whose former presidents have all been civil servants exercising the same powers provided for under the same PSC Code of Conduct, Trade Union Act and relevant regulations, without one being disciplined. Mr Koroi's predecessors, who had also represented the association at public forums, education and civil society meetings, as well as former presidents of other public sector unions, went on to become senior government officials, diplomats and ministers despite having taken active positions in the promotion of democracy.
- 817.** According to the complainant organizations, Mr Koroi was among the leading, most senior, and most successful, school principals of the country at the time of his termination and had been a school principal for 20 years, during which he has proved himself as a school administrator who has turned schools around from deserted, dilapidated and low academic achievers to some vibrant and disciplined schools. At the time of his first appointment as school principal in 1988, he was the youngest principal at the time, and the youngest to be appointed as President of the FTA. Mr Koroi's records in the secondary school education in Fiji speak volumes and had been attained within the same system that has now turned against him.
- 818.** The complainants underline that whenever Mr Koroi participates at public forums outside his school, he does so in his position as president of his association and not as principal of his school. He does not take advantage of his FTA presidency against his principal's roles, and keeps the line clear between these roles as he effectively follows proper procedures in attending to issues. According to the complainants, Mr Koroi is very much aware of the regulations guiding his role as a school principal, particularly within his school, and those that protect him as a trade union leader. With reference to the statement of the PSC Chairman, in his letter of 22 February 2011 that Mr Koroi "spoke against the Government" during the Movement for Democracy meeting on 5 December 2008, the complainants firmly deny this allegation and again emphasize that Mr Koroi was speaking in his capacity as the FTA President and not addressing students but rather a gathering of union leaders, civil society leaders, politicians and community leaders who wanted a quick return to democracy in Fiji; this was not done during school hours but during the school holidays, and not in the school premises but at the FTA headquarters. In their view, to state that Mr Koroi acted outside his jurisdiction as a union leader and civil servant is baseless as precedents have been set by his predecessors.

Allegations concerning other serious infringements of trade union rights

- 819.** The complainant organizations EI and the FTA, in their communication dated 18 February 2011, and the ITUC – the new complainant in the case – in its communications dated 1 and 8 August 2011, have submitted new allegations concerning: (i) assault, harassment, intimidation and arrest of trade unionists for their exercise of the right to freedom of

association; (ii) trade union and civil rights of freedom of expression, access to media and freedom of assembly; and (iii) Government attack on trade union rights by executive decree.

Assault, harassment, intimidation and arrest of trade unionists

820. The complainants denounce a series of acts of assault, harassment, intimidation and arrest of trade unionists for their exercise of the right to freedom of association. In chronological order, it is alleged that, on 10 February 2011, a prominent lawyer, Mr Anand Singh, was taken from his home at about 9 p.m. to the army barracks for questioning in connection with rumours of threats to the regime. There were at least two other citizens who were taken up that same night.

821. In particular, the complainants allege that, on repeated occasions, the Government has assaulted and harassed the highest-ranking trade union official in Fiji, Mr Felix Anthony, National Secretary of the Fiji Trade Union Congress (FTUC) and General Secretary of the Fiji Sugar Workers' Union. They indicate that, on 12 February 2011, around 8 p.m., Mr Anthony was taken from his home by three uniformed military officers and driven to military barracks in Lautoka. While being transported, the officers threatened him and his family and repeatedly questioned him as to whether he knew of any attempts to overthrow the government and whether he supported the current regime. Mr Anthony denied any knowledge of any such attempts. He was dropped off at his home around 10 p.m. and was warned that worse things could happen to him next time. On 18 February 2011, Mr Anthony was told that the Prime Minister wanted to meet him at a sugar mill in Ba, which is on the western side of Fiji. He attended the meeting together with two other top officials of the unions. At the meeting, Mr Anthony was accused of being the cause of problems in the sugar mills and, during a walk around the mill with mill officials, was shown some of the problems, including the failed upgrade of the mill – an issue over which the union had no input. According to the complainants, they were then ordered to drive to Namaka, where they were called into the office to meet with military officials. After a short discussion, the soldiers began to beat Mr Anthony and the other trade union officials present. The physical and verbal assault continued for roughly two hours. The complainants state that they were then driven to Namaka Airport military barracks, an hour's drive from Ba, where Mr Anthony and his colleagues were again physically assaulted by military personnel in civilian clothing. Mr Anthony sustained damage to his eardrum as a result of the beating. The other two union officials sustained physical injuries which also required medical attention. They were finally released around 9.30 p.m. with threats of further violence. On 2 March 2011, the ITUC General Secretary, having reported these incidents to the International Labour Organization (ILO) asking for immediate intervention, the Director-General wrote to the Government of Fiji shortly thereafter, registering his serious concern, asking the Government to investigate the incident, transmitting any information in that regard and noting that the Committee on Freedom of Association had recommended a tripartite mission to Fiji that the ILO fully supported. The complainants stress that no action has been taken in response to this letter and report that, on 1 April 2011, while Mr Anthony was having lunch with friends, the military officer responsible for his earlier beating approached him and warned him of further beatings in the presence of friends. The interim Government's harassment of trade unionists continued when Mr Anthony sought to participate in the 100th International Labour Conference (ILC) in June 2011. The Government failed to deposit the credentials of Mr Anthony, who has been nominated by the FTUC, the most representative trade union body, to represent Fijian workers at the ILC. The Credentials Committee examined an objection filed by the ITUC on this matter and concluded that:

... by the Government's own admission, it had purposefully ignored the nomination made by the organization that it had itself consulted for the purpose of the nomination of the delegation. As the Committee has stressed in the past, governments must accept the most

representative organizations' choice regarding the persons to be nominated as the Employers' and the Workers' delegates. Refusal to do so is a clear violation of their obligation under article 3, paragraph 5, of the ILO Constitution.

The Credentials Committee concluded that the Government's actions "raise[d] doubts as to the Government's impartiality vis-à-vis the FTUC, considering the allegations that there is a deterioration of trade union rights in the country". The complainants agree with the Credential Committee's conclusion that the decision to deny credentials to Mr Anthony to attend the ILC was most likely in retaliation for his exercise of fundamental trade union rights in Fiji. In its most recent communication, the ITUC condemns the alleged arrest on 4 November 2011 of Mr Felix Anthony, the police search of both the union office and his home and his retention in custody without charges.

- 822.** Furthermore, the complainant organizations allege that, immediately following the 100th ILC, military officers assaulted Mohammed Khalil, President of the Fiji Sugar and General Workers' Union – Ba Branch. On 22 June 2011, at about 9 p.m., two army officers assaulted Mr Khalil and accused him of being a union strongman. He was made to wallow in the mud, was stomped on and dragged around in full view of his colleagues and other onlookers. The army officers denounced him and Mr Anthony (who was not present at the time) for their union advocacy and demanded during the beating that he submit his resignation from the union by 3 p.m. the next day before commencing his normal shift or he would face the same treatment. Mr Khalil did not resign. In the complainant's view, not only the assault on Mr Khalil is a grave violation in its own right but, moreover, the beating was in retaliation for statements made by his colleague Mr Anthony at the ILC and thus constitutes yet another serious violation of freedom of association.
- 823.** The complainants further denounce that, on 3 August 2011, Mr Daniel Urai, President of the FTUC and General Secretary of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE), and Nitin Goundar, an organizer with NUHCTIE, were detained and questioned at the Nadi Police Station. They were charged with "unlawful assembly", apparently for having met with and advised union members regarding pending collective negotiations with hotel management. They were released on bail on 4 August, with a hearing date set for 31 October 2011. The complainants also denounce that, on 29 October 2011, Mr Urai was arrested again, this time at the airport upon his return from the Commonwealth Heads of Government Meeting in Perth, Australia, where he spoke out against human and trade union rights violations perpetrated by the Fijian Government. Although he has not yet been charged with any offence, he remains in custody. The arrest of trade unionists for conducting trade union activity is a serious breach of the right to freedom of association.

Freedom of assembly, freedom of expression and access to media

- 824.** According to the complainants, the Public Emergency Regulations (PER) in force since April 2009 have continued to be renewed on a monthly basis giving unchecked powers to the Government to ban unauthorized gatherings, even though there has been no single incident of protest against the current regime. Article 3 grants the police the authority to prohibit any procession, meeting or assembly, and any such gathering may be dispersed by the police or the army, even where there was no prior formal prohibition issued. The police and the army have the discretion to use force if the procession, meeting or assembly has not been dispersed after giving due warning. Those participating in a prohibited gathering are guilty of an offence under the law. Also, articles 5–7 grant police sweeping authority to limit the free movement of persons and article 18 grants similar authority to arrest and detain them. The complainants state that, in practice, these regulations have greatly affected the regular work of trade unions in Fiji. Trade union activities such as seminars, workshops and meetings, if they happen at all, require a permit. Organizations continue to

apply for meeting permits, which are granted with strict conditions, including military officers attending the meetings, listening to the deliberations, approving the meeting agenda and even selecting the persons who may speak or participate in such activities. According to the complainants, on 14 July 2011, the FTUC applied to hold a two-day workshop on reforms to the employment law. The Government denied the request explaining that “the FTUC had not supported the current Government”. On 15 July, the National Union of Factory and Garment Workers applied for a permit to hold a union meeting, which was denied citing the PER 2009. Sometimes permits are also issued late which occasionally does not allow unions to obtain the desired quorum. In its communication dated 23 September 2011, the FICTU indicates that, on 25 August, the permit for the FICTU affiliate, the Communication, Mining and General Workers Union, to organize a public meeting was refused. Similarly, permits for meetings of the national federation FICTU have also been refused on 16 July and 27 August 2011. On 12 July, the permit to organize a march and rally for FICTU affiliates, workers and pensioners was refused for security reasons. On 19 September 2011, the permit for the annual general meeting of the Transport Workers Union (TWU), a FICTU affiliate, was refused indicating that “all the meetings of union members are on hold until further directive ...”.

- 825.** The complainants further allege that heavy media censorship continues to be experienced by the people of Fiji since the implementation of the Media Decree in 2010. Article 16 of the PER puts all media under the control of the Government by requiring any broadcaster or publisher to submit all materials that may be published or broadcast for prior review and authorization. Military personnel are present in all media outlets (TV, radio and newspaper) and screen all news. Comments by the general public, trade unions and civil society organizations are denied publication. While the Committee’s recommendations were sent to most media outlets of the country, the complainants deplore that they never found their way to any of the news columns, as trade union statements have been prohibited from being printed or aired. In their view, there is basically no freedom of expression or freedom of speech in the country.

Government attack on trade union rights by executive decree

- 826.** According to the complainants, the Government of Fiji has issued, since 2009, a series of decrees that severely curtails fundamental and other trade union rights and completely undermines the principles of freedom of association, especially for workers in the public service but also for workers in public entities and workers in several key unionized industries such as sugar and air transportation. In this context, they highlight, in a communication dated 18 February, that there has not been any salary adjustments for most civil servants since the end of 2006, except for members of the disciplinary forces (twice since 2007) and for nurses and the police (in 2010); it is the first time that the Fiji public service has not awarded cost of living adjustments across the board for all civil servants, thus favouring only certain sectors. Moreover, the complainants indicate that the adopted decrees simultaneously eliminate access to judicial review and redress for past, present and future violations of rights, and that these numerous changes, which are inimical to the rights and interests of workers, were made without any prior consultation with the relevant trade unions. The complainants describe the main features of the abovementioned decrees as follows:

- (a) State Services Decree of 14 April 2009 (No. 6). Article 17 abolished the Public Services Appeal Board, which was established under the Public Service (Amendment) Act 1998, to review complaints by public service workers with regard to the failure to promote, disciplinary actions undertaken by the employer, or transfers between districts. The Decree even terminated all pending or partly heard appeals, so that public servants lost the right to any administrative review with regard to those matters (a Public Services Disciplinary Tribunal was later established, but only to

review disciplinary actions). Article 17 also immediately lowered the mandatory retirement age from 60 to 55; as a result, over 2,000 public servants were forcibly retired and new recruitment and advancement is taking place on a contract basis with senior positions being filled by non-civilian personnel.

- (b) Administration of Justice Decree of 16 April 2009, as amended up to February 2010 (No. 9). The Decree re-established the nation's judicial system. However, under article 5, courts were divested of their jurisdiction to hear any challenges whatsoever to the Fiji Constitution Amendment Act 1997, the Revocation Decree 2009, and any other decrees made or to be made by the President after 10 April 2009. Article 23(3) terminated any pending challenges to the legality of any decrees or declarations made between 5 December 2006 and 9 April 2009 and most decisions made by any executive branch official during that time. The Decree specifically referenced any decision to terminate any employment on any grounds between 5 December, 2006 and 7 January, 2007. It affected several public sector unions which were unable to pursue justice arising out of work-related grievances. The Decree, as amended in May 2009, went one step further by terminating the review of any proceedings, claims, disputes or grievances that challenges or challenged any decision made by the Public Service Commission between 5 December 2006 and 9 April 2009 in relation to the terms and conditions of employment of public officers, including any changes to remuneration. The Decree, as amended in February 2010, went even further by divesting the courts of jurisdiction to hear any challenge by any person regarding any decision or order by the Government to restructure or reform the public service, alter or amend the terms and conditions of employment of any person in any public office or public service, or any changes to terms of services, including remuneration. Any pending claim with regard to those issues was immediately terminated. As of February 2010, the dispute settlement provisions of the Employment Relations Promulgation (ERP) of 2007 was the only forum for relief on individual cases (it would turn out to be short-lived). Moreover, the Decree was extended beyond the public service workers to include other public entities – and thus more unionized workers.
- (c) Trade Disputes Decree of 2009 (No. 10).
- (d) Employment Relations Amendment Decree of 16 May 2011 (No. 21). The Decree amended article 3 of the ERP 2007 to exclude all public service workers from its coverage. Roughly 15,000 workers in Fiji's public service lost, overnight, their fundamental trade union rights as well as other rights. Today, public service workers, a majority of the workforce of Fiji, enjoy none of the rights set forth in Conventions Nos 87 and 98. Furthermore, the Decree prohibits public service workers and their unions from taking any action, proceeding, claim dispute, or grievance of any kind that arose or could arise under the ERP before any tribunal. The Decree also nullifies any order of any competent tribunal in any action brought under the ERP. The only protections not eliminated by the Decree are those arising under the Workmen's Compensation and the Health and Safety at Work Acts.
- (e) Proposed Critical Industries in Financial Distress Decree. Pursuant to article 23 et seq., employers that have applied for and have received a declaration of financial distress from an arbitrator may apply to unilaterally terminate existing collective bargaining agreements. To overcome concerns raised by a union, the employer only needs to show that the decision to terminate the agreement is "a reasonable exercise of the company's business judgement", that the collective agreement "in any way reduced the productivity of the company, or makes it uncompetitive, or is not an industry norm," "the balance of convenience favours rejecting the agreement" or "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution" (article 26). Although article 27

does require the employer to make a proposal to the union regarding the modifications to the agreement it deems are necessary, to provide the union with information necessary to evaluate the proposal, and to make an effort to meet and confer with the union, the union has very little opportunity or leverage to bargain collectively to reach truly necessary, fair and equitable modifications. The draft Decree makes it all too easy for employers to dispense with existing collective bargaining agreements negotiated with their unions.

(f) Essential National Industries (Employment) Decree 2011. The application of this Decree, which was gazetted on 29 July 2011 and which, according to Legal Notice No. 81 dated 8 September 2011, has entered into force on 9 September 2011, will, in the complainant's view, virtually destroy the independent trade union movement and as such the strongest voice amongst the civil society in Fiji, not only with regard to public service workers but also to many workers outside the public service. Below are some of the most objectionable provisions.

- Under article 6, all existing trade union registrations in designated industries are effectively cancelled; in order to operate, unions are required to re-register under the Act according to new and highly problematic procedures. The complainant condemns the cancellation of a union registration by the executive branch as a serious infringement of the principles of freedom of association. In order to re-register, the union is required to undergo new elections of leadership under procedures that fail to comport with principles of freedom of association. Thus, under article 7, all union leaders such as officer bearers, officers, representatives and executives must be employed by the designated corporations they represent. Those that run afoul of this provision face steep civil and penal sanctions – a fine of up to 50,000 Fiji dollars (FJD) or imprisonment of up to five years for individuals and up to FJD100,000 for the union.
- Under article 10, a union must first apply to the Prime Minister to seek to be elected or re-elected as representative of the bargaining unit and supply the required information. It remains unclear whether the Prime Minister has additional discretion to allow an applicant to seek to represent the bargaining unit – especially in light of article 12. The complainants are deeply concerned that in practice the Decree could amount to prior authorization by the Government. Upon receipt of an application, the Prime Minister has complete discretion, under article 11, to decide the composition and scope of the bargaining unit with no opportunity to appeal that decision.
- A “bargaining unit” is defined in article 2 as a group of at least 75 workers employed by the same employer, apparently precluding workers from having any representation in essential enterprises where there are less than 75 workers. Moreover, only one entity can represent the bargaining unit. The union will be registered as representative of the bargaining unit only if 50 per cent + 1 of all workers in the bargaining unit vote affirmatively in its favour, rather than 50 per cent + 1 of those voting – a standard which makes it more difficult to win an election – especially given the pressure that the Government will exercise on workers to reject the trade union as a representative.
- Even once a union is elected, the registrar may cancel the registration of the union and force a new election at any time if, upon receipt of a complaint from an employer, it finds there is sufficient evidence that the union no longer enjoys the requisite minimum support. In such case, the collective agreement is voided and the employer may impose the terms and conditions of employment. The union must stand every two years for re-election as representative of the workers (article 9), which will put substantial strain on the administration of the union. If

the workers no longer want to be represented by that union, the decree already provides a procedure to call for new elections under article 16.

- Under article 8, all existing collective agreements are null and void 60 days after the Decree enters into force. New agreements are to be negotiated by the parties before the expiry of the 60 days under new highly restrictive procedures; however, if no agreement is in place in accordance with the new procedures, the company may unilaterally implement new terms and conditions through a new collective agreement or individual contracts. In the complainant's view, this ensures that unions will be unable to bargain a fair contract, as it will encourage an employer to surface bargain for 60 days and then impose terms in the absence of a mutually accepted collective agreement.
- The new rules for collective negotiation (part 4) also raise several major concerns. Article 21(3) provides for a bargaining period that may last up to three years. If there is no agreement after three years, either party may seek the intervention of the Prime Minister under article 21(4), who may impose a final and binding agreement. That agreement shall be binding on the parties for two years. Under article 22, collective bargaining agreements do not expire. Instead, they are subject to amendment every five years in the absence of an agreement to the contrary. There appears to be no mechanism to amend an agreement by mutual consent outside the amendment period. Employers may, according to article 23, reopen the agreement if they are considered to be in financial distress. If bargaining fails to result in a new collective agreement in this case, the employer may request and the Prime Minister may impose new terms and conditions with reference only to the employer's proposals and any additional information the Prime Minister may see fit to consult.
- The complainants also criticize the dispute settlement machinery established by the Decree. Under article 26, no dispute may be brought to the courts; collective bargaining agreements must include a dispute resolution procedure of discipline and discharge, and interpretation and application of the agreement; such disputes must be settled internally or by the employer's designated reviewing officer; disputes involving an issue of over FJD5 million may be brought to the Prime Minister for binding determination. In no case, however, can any worker or union bring a claim to a judicial or quasi-judicial (neutral) person or body. According to the complainant, this all but ensures that there will be no access to industrial justice.
- Finally, the complainant denounces that the Decree poses serious restrictions on the right to strike. article 27(1) is categorical in stating that "no job actions, strikes, sickouts, slowdowns or other financially or operationally harmful activities shall be permitted at any time for any reason". Notably, there is no such categorical prohibition on employers' economic weapons, such as lockouts. The Decree goes further to state that such actions are "expressly prohibited" in connection with efforts to obtain registration, efforts to influence the outcome of bargaining or in the course of collective bargaining, and in disputes over the interpretation or application of a collective bargaining agreement. Despite article 27(1), article 27(2) provides that a union may strike if the parties failed to reach a new collective agreement after three years of bargaining – and even then only after a 28-day notice period and prior written approval from the Government. Moreover, the Prime Minister has to verify the results of the secret ballot to authorize the strike. The complainant highlights that, in the highly unlikely case of a strike, the employer may lock out the workers and unilaterally impose terms and conditions of employment. Also, the Prime Minister may at any time declare illegal any strike in an essential industry. A person that violates

the law may be subject to a fine of FJD50,000 and five years in jail; the union may face a FJD250,000 sanction. The worker who remains on strike after a strike is declared illegal by the Prime Minister will face a fine of up to FJD100,000 or imprisonment of up to ten years; the union may face a fine of not more than FJD250,000.

- In addition, article 24(2) and (3) provides that no person in a designated company that operates full time shall be entitled to overtime pay for work performed on the weekends or on public holidays. In the airline industry, workers are simply not entitled to overtime pay under any circumstances, unless otherwise agreed by the employer and the union. article 24(4) prohibits automatic dues deduction unless the employer agrees to do so – which, according to the complainant, is unlikely to happen. Finally, article 30 provides that the validity of the Decree itself and decisions by government officials, or any corporation taken under it, are unreviewable before any tribunal. The Decree goes so far as to extinguish any pending claims under the ERP 2007. Thus, workers and unions in essential industries have absolutely no redress for any violation of what is left of their rights at work.

- The FTUC considers this Decree as an effort to decimate the unions in the sugar and airline industries.

- (g) Elimination of dues deduction in the public sector. As of 4 August 2011, the Government prohibited automatic dues deduction for all public service workers by a decree amending the Civil Service Act. The obvious intent of the Decree is to attempt to financially weaken public sector unions, requiring them to collect dues from each member by hand.

827. In conclusion, the loss of these fundamental rights by decree, the inability to even challenge the validity of their loss, in addition to the extinction of all pending claims, is clearly contrary to the country's obligations under international labour law and represents further evidence of deepening authoritarianism in Fiji. There is no question that this case is and continues to be serious and urgent. The ITUC and the EI urge the Committee to recommend that the Government of Fiji immediately stop all violence and threats of violence and arrests directed towards trade unionists and their families; ensure that Fiji's workers and their trade unions can operate in a climate that is free from fear and intimidation; amend Fiji's labour legislation so that it is in full compliance with ILO Conventions – particularly Nos 87 and 98; and rescind the PER 2009, to enable unions to carry out their legitimate role and activities, and the Media Decree to enable unions to be able to raise issues of concern through the media and its own publications. In light of the gravity and urgency of the situation, the complainants request the Committee to send a preliminary mission to the country. In its communication dated 23 September 2011, the FICTU makes a number of other serious allegations and requests in particular that the impact of the PER on trade union rights in Fiji be reviewed by the Committee.

C. The Committee's conclusions

828. *The Committee regrets that, despite the time that has elapsed since the last examination of the complaint, it has not received the Government's reply, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case.*

829. *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the*

information which it had expected to receive from the Government in respect of all the pending matters.

830. The Committee recalls that the purpose of the whole procedure established by the ILO for the examination of allegations of violations of freedom of association is to promote respect for 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.

Act of anti-union discrimination against Mr Koroi

831. The Committee notes with regret from the communications dated 18 February and 10 March submitted by the complainant organizations EI and the FTA that the dismissal of the FTA President, Mr Tevita Koroi, from his position as school principal, is still in force and that, by way of a letter of 22 February 2011, the PSC has rejected the FTA request for reinstatement stating that the present complaint does not have any bearing on Mr Koroi's termination. The Committee further notes that with reference to the Government's reply, the complainants reiterate that they could not exhaust the avenues for appeal because the system did not have such mechanisms in place and that, prior to his dismissal Mr Koroi had not received any formal or verbal communication from the PSC regarding his participation in political activities and his public comments. According to the complainant organizations, Mr Koroi was among the leading, most senior and most successful school principals of the country at the time of his termination. The Committee also notes the complainant's reaffirmation that Mr Koroi was speaking in his capacity as the President of the FTA and not as school principal, was addressing a public gathering of union leaders, civil society leaders, politicians and community leaders and not students; and that the speech was not delivered during school hours but rather during the school holidays, and not in the school premises but at the FTA headquarters.
832. In the absence of the Government's observations, the Committee finds itself obliged to reiterate the conclusions it made with regard to Mr Koroi when it examined this case at its meeting in November 2010 [see 358th Report, paras 547–554]:

The Committee notes that, in the present case, the complainants allege dismissal of a trade union leader in the public service education sector and ongoing anti-union harassment and interference with internal trade union affairs.

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

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

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

The Committee notes that the information provided by the complainant and by the Government coincides in that Mr Koroi was suspended from his position as school principal on 10 December 2008 and his employment in the civil service was subsequently terminated on

30 April 2009, due to a public statement made during a meeting in December 2008. The Committee notes, however, the conflicting versions of the two parties as to the nature and purpose of the statement and the justifiability of the dismissal. While the complainants believe that the speech at the FTA headquarters in Suva was held by Mr Koroi in his capacity as FTA President and constitutes a legitimate trade union activity, the Government considers that, by making a public statement of political nature directed against the Government, Mr Koroi has violated sections 6 and 7 of the Public Service Act and General Orders 309(c) thus breaching his terms and conditions of employment.

In previous cases of dismissal of trade union leaders, the Committee has repeatedly highlighted that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom. It has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 799 and 804].

The Committee considers that the issue at stake is whether or not Mr Koroi's public statement can be considered as a legitimate trade union activity and wishes to recall that it has already reviewed on previous occasions the question of normal trade union activities as opposed to activities outside the trade union sphere. The Committee notes that sections 6 and 7 of the Public Service Act and General Orders 309(c) contain a blanket prohibition for civil servants to speak in public on matters of a political nature. In this regard, the Committee points out that, firstly, in its opinion, teachers do not carry out tasks specific to officials in the state administration; indeed, this type of activity is also carried out in the private sector. In these circumstances, it is important that teachers with civil servant status should enjoy the guarantees provided for under Convention No. 98 [see **Digest**, op. cit., para. 901]. Secondly, the Committee wishes to reaffirm that measures, although of a political nature and not intended to restrict trade union rights as such, may nevertheless be applied in such a manner as to affect the exercise of such rights, and that a general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government's economic and social policy. The freedom of expression which should be enjoyed by trade unions and their leaders should also be guaranteed when they wish to criticize the Government's economic and social policy. For the contribution of trade unions and employers' organizations to be properly useful and credible, they must be able to carry out their activities in a climate of freedom and security. This implies that, in so far as they may consider that they do not have the basic freedom to fulfil their mission directly, trade unions and employers' organizations would be justified in demanding that these freedoms and the right to exercise them be recognized and that these demands be considered as coming within the scope of legitimate trade union activities [see **Digest**, op. cit., paras 36, 157, 206 and 503]. More generally, the Committee wishes to emphasize the importance which it places on respect for the basic civil liberties of trade unionists and for employers' organizations, including freedom of expression, as essential prerequisites to the full exercise of freedom of association, and considers that the statement made by Mr Koroi (which has not been contested by the Government) falls fully into the realm of speech that should be protected, particularly as it was a view expressed outside the employment relationship.

The Committee notes that the FTA has indicated that it has filed a dispute with the Ministry of Labour, considering that there are no other avenues for appeal through the national court system as a result of the abrogation of the Constitution of Fiji but that it has so far received no response from the Ministry. While the Government for its part reports that Mr Koroi has not yet appealed against the PSC decision at the PSC Appeals Tribunal and that

the FTA has withdrawn the filed employment dispute and still not lodged an employment grievance to the Mediation Service under the Employment Relations Promulgation, 2007, the Committee recalls that the Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see *Digest*, op. cit., para. 817]. Thus, in light of the abovementioned principles, the disruptions in the judicial system in Fiji and the apparent absence of any constitutional guarantees, the Committee requests the Government to take the necessary steps to ensure that Mr Koroi is immediately reinstated in his former position as a school principal without loss of pay or benefits and to keep it informed of developments.

As regards the allegation that the Ministry of Education instructed on 11 August 2009 that Mr Koroi would no longer be accepted as a representative of the FTA at various forums, the Committee draws the Government's attention to the fact that, given that workers' organizations are entitled to elect their representatives in full freedom, the dismissal of a trade union leader, or simply the fact that a trade union leader leaves the work that he or she was carrying out in a given undertaking, should not affect his or her trade union status or functions unless stipulated otherwise by the constitution of the trade union in question [see *Digest*, op. cit., para. 411]. Noting that the FTA continues to consider Mr Koroi to be the president of the union, the Committee urges the Government to refrain from any interference in this regard and to permit Mr Koroi, as the legitimate representative of the FTA, to carry out his representation functions at the relevant forums, including the Education Forum, the Fiji Teachers' Registration Board, the JCC and the CSB.

Assault, harassment, intimidation and arrest of trade unionists

833. The Committee notes the complainant's new allegations concerning the following acts in chronological order: (i) on 10 February 2011, a prominent lawyer, Mr Anand Singh, was taken from his home at about 9 p.m. to the army barracks for questioning in connection with rumours of threats to the regime; (ii) on 12 February 2011, around 8 p.m., Mr Felix Anthony, National Secretary of the FTUC and General Secretary of the Fiji Sugar Workers, was taken from his home by three uniformed military officers who threatened him and his family, repeatedly questioned him about purported attempts to overthrow the Government; subsequently, he was dropped off at his home around 10 p.m. and was warned that worse things could happen to him; (iii) on 18 February 2011, Mr Anthony was convened to a meeting at a sugar mill in Ba that he attended together with two other top officials of the unions and at which he was accused of being the cause of problems in the sugar mills; they were then ordered to drive to Namaka to meet with military officials who after a short discussion began to beat Mr Anthony and the other trade union officials present and physically and verbally assaulted them for roughly two hours; they were then driven to Namaka Airport military barracks, where Mr Anthony and his colleagues were again physically assaulted by military personnel in civilian clothing, sustaining physical injuries (including damaged eardrum) which required medical attention; they were finally released with threats of further violence; (iv) on 1 April 2011, the military officer responsible for his earlier beating approached Mr Anthony and warned him of further beatings in the presence of friends; (v) when Mr Anthony sought to participate in the 100th ILC in June 2011, the Government refused to deposit his credentials, although he had been nominated by the FTUC, the most representative trade union body in Fiji; (vi) following the ILC, on 22 June 2011, at about 9 p.m., two military officers assaulted Mr Mohammed Khalil, President of the Fiji Sugar and General Workers Union – Ba Branch, denounced him and Mr Anthony (who was not present at the time) for their union advocacy and demanded during the beating that he submit his resignation from the union by 3 p.m. the next day before commencing his normal shift or he would face the same treatment; Mr Khalil did not resign; in the complainant's view, the beating of Mr Khalil was in retaliation for statements made by his colleague Mr Anthony at the ILC; (vii) on 3 August 2011, Mr Daniel Urai, President of the FTUC and General Secretary of the

NUHCTIE, and Nitin Goundar, an organizer with NUHCTIE, were detained and questioned at the Nadi Police Station, were charged with “unlawful assembly” apparently for having met with and advised union members and were released on bail on 4 August, with a hearing date set for 31 October 2011; (viii) on 29 October 2011, Mr Urai was arrested again upon his return from the Commonwealth Heads of Government Meeting in Perth, Australia, where he spoke out against the human and trade union rights violations in Fiji, and remains in custody, although he has not yet been charged with any offence; and (ix) on 4 November 2011, Mr Felix Anthony has been arrested, his home and union office have allegedly been searched by police and he remains in detention apparently without charges. In addition, the Committee bears in mind that, according to the 2009 allegations of the complainant organizations, Mr Attar Singh, General Secretary of the FICTU, had been taken to the military camp and tortured, that his home and car had been vandalized, that his office had on two occasions been the target of fire bombs, and that other trade union leaders such as Mr Taniela Tabu, General Secretary of the Viti National Union of Taukei Workers, had also experienced similar types of treatment.

834. In light of the above, the Committee expresses its deep concern at the numerous alleged acts of assault, harassment and intimidation of trade union leaders and members for their exercise of the right to freedom of association, in particular the recent recurring acts of physical assault and harassment against the FTUC National Secretary, which have triggered an informal intervention of the Director-General. The Committee deeply regrets that the Government has not replied to these allegations and wishes to recall that the rights of workers’ and employers’ organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. As regards allegations of the physical ill-treatment of trade unionists, the Committee has recalled that governments should give precise instructions and apply effective sanctions where cases of ill-treatment are found. 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. In the event of assaults on the physical or moral integrity of individuals, the Committee has always considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 44, 50, 52 and 55]. The Committee therefore urges the Government to conduct an independent investigation without delay into the incidents alleged above transmitting detailed information with regard to its findings and the action taken as a result. Considering that acts of intimidation and physical violence against trade unionists constitute a grave violation of the principles of freedom of association and that the failure to protect against such acts amounts to a *de facto* impunity, which can only reinforce a climate of fear and uncertainty highly detrimental to the exercise of trade union rights, the Committee urges the Government to take all necessary measures without delay to ensure the full respect of the above principles in the future.
835. With particular regard to the allegation that an act of assault against a trade union leader was perpetrated in retaliation for statements made by his colleague, Mr Anthony, at the ILC, the Committee considers that the functioning of the Conference would risk being considerably hampered and the freedom of speech of the Workers’ and Employers’ delegates paralysed if the relevant delegates or their associates were victims of assault or arrest due to the expression of views at the Conference. It urges the Government to take full account of this principle in the future and to ensure that no trade unionist suffers retaliation for the exercise of freedom of expression.

- 836.** Furthermore, the Committee is equally alarmed by the arrest on 4 November 2011 and retention in custody without charges of the FTUC National Secretary; by the arrest of the FTUC President on 29 October 2011 and his retention in custody without charges; and by the earlier arrest and overnight detention on 3 August 2011 of the FTUC President and NUHCTIE General Secretary and a NUHCTIE member and the criminal charges with unlawful assembly brought against them on the grounds of failure to observe the terms of the Public Emergency Regulations. First and foremost, it wishes to recall that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular, and that the arrest, even if only briefly, of trade union leaders and trade unionists, and of the leaders of employers' organizations, for exercising legitimate activities in relation with their right of association constitutes a violation of the principles of freedom of association. The Committee further emphasizes that the arrest and detention of trade unionists without any charges being laid or court warrants being issued constitutes a serious violation of trade union rights [see **Digest**, op. cit., paras 62, 64 and 69]. With reference to its conclusions concerning the Public Emergency Regulations as enounced below, the Committee further considers that, while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, the arrest of, and criminal charges brought against, trade unionists may only be based on legal requirements that in themselves do not infringe the principles of freedom of association. The Committee urges the Government to take full account of these principles in the future. With respect to the abovementioned trade unionists in particular, it urges the Government to take the necessary measures to ensure that the FTUC National Secretary and the FTUC President are immediately released from custody and that all charges against them and the NUHCTIE members are immediately dropped, and to keep it informed of any developments in this regard without delay, including the outcome of the hearing on 31 October 2011.
- 837.** With regard to the alleged search of the union office and of Mr Anthony's home by the police, the Committee recalls that any search of trade union premises, or of unionists' homes, without a court order constitutes an extremely serious infringement of freedom of association [see **Digest**, op. cit., para. 182] and requests the Government to provide its observations on this allegation.

Lack of freedom of assembly, freedom of expression and access to media

- 838.** The Committee notes from the complainant's allegations and available information that: (i) as a result of the monthly renewed Public Emergency Regulations in force since April 2009, trade union activities such as seminars, workshops and meetings, require a permit, which is either refused (for example, on 14 July 2011, refusal of a permit for the FTUC workshop on reforms to the employment law; on 15 July, refusal of a permit for the meeting of the National Union of Factory and Garment Workers; on 13 August, revocation of a permit for a meeting of the FTUC National Council; on 16 July and 27 August, refusal of a permit for FICTU meetings; on 19 September, refusal of a permit for the annual general meeting of the TWU; etc.), or issued late (which occasionally precludes the desired quorum) or granted with strict conditions (including military officers attending the meetings, listening to the deliberations, approving the meeting agenda and even selecting the persons who may speak or attend); and (ii) as a result of the Media Decree and the Public Emergency Regulations, heavy media censorship continues to be experienced in Fiji, and trade union statements have been prohibited from being printed or aired, which is the reason why the Committee's recommendations, which were sent by the complainants to most media outlets of the country, have been denied publication.

839. In this regard, the Committee, expressing particular concern at the official statement dated 19 September 2011 when refusing a permit for the TWU that “all the meetings of union members are on hold until further directive ...”, recalls that the Committee of Experts on the Application of Conventions and Recommendations has emphasized that the freedom of association Conventions do not contain any provision permitting derogation from the obligations arising under the Convention, or any suspension of their application, based on a plea that an emergency exists. In cases of repeated renewals of the state of emergency, the Committee has pointed out that the resolution concerning trade union rights and their relation to civil liberties, adopted by the ILC in 1970, states that “the rights conferred upon workers’ and employers’ organizations must be based on respect for ... civil liberties ... and that the absence of these civil liberties removes all meaning from the concept of trade union rights”. It also wishes to generally reiterate that the ILC has pointed out that the right of assembly, freedom of opinion and expression and, in particular, freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers, constitute civil liberties which are essential for the normal exercise of trade union rights (resolution concerning trade union rights and their relation to civil liberties, adopted at the 54th Session, 1970) [see **Digest**, op. cit., paras 38, 193 and 194]. As regards freedom of assembly in particular, the Committee recalls that permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused. Moreover, the Committee has cautioned that, where a representative of the public authorities can attend trade union meetings, this may influence the deliberations and the decisions taken (especially if this representative is entitled to participate in the proceedings) and hence may constitute an act of interference incompatible with the principle of freedom to hold trade union meetings. With respect to freedom of opinion and expression, the Committee recalls that the right to express opinions through the press or otherwise is an essential aspect of trade union rights [see **Digest**, op. cit., paras 132, 142 and 155]. Stressing that freedom of assembly and freedom of opinion and expression are a sine qua non for the exercise of freedom of association, the Committee therefore urges the Government to take full account of the principles enounced above in the future and refrain from unduly impeding the lawful exercise of trade union rights. It further requests the Government to provide detailed information without delay in reply to the FICTU communication dated 23 September 2011, and in particular as regards the impact of the PER on freedom of association and the alleged general ban on trade union meetings.

Infringement of trade union rights by executive decree

840. The Committee notes that, according to the complainants, the Government has issued, since 2009, a series of decrees that severely curtail fundamental and other trade union rights and completely undermines the principles of freedom of association, especially targeting workers in the public service (for example, Employment Relations Amendment Decree No. 21 of 16 May 2011 which excludes 15,000 public service workers from the coverage of the ERP 2007) and also workers in public entities. The Committee has repeatedly held that the standards contained in Convention No. 87 apply to all workers “without distinction whatsoever”, and are therefore applicable to employees of the state; it was indeed considered inequitable to draw any distinction in trade union matters between workers in the private sector and public servants, since workers in both categories should have the right to organize for the defence of their interests [see **Digest**, op. cit., para. 218]. The Committee therefore urges the Government to take all necessary measures to ensure that public servants enjoy the guarantees enshrined in Convention No. 87.

841. The Committee notes the complainants’ indication that several decrees (for example, State Services Decree No. 6 of 14 April 2009, Administration of Justice Decree of 16 April 2009 as amended, Employment Relations Amendment Decree No. 21 of 16 May 2011, and the Essential National Industries (Employment) Decree No. 35 of 29 July 2011) collectively

eliminate the access to the judicial or administrative review of the legality of the decrees themselves or of any executive decision (including decisions of the PSC) concerning the public service (including with regard to the terms and conditions of employment of public servants) or other selected sectors; and terminate pending or ongoing judicial or administrative procedures in this regard. The Committee further notes with regret from the allegations that all changes were decided without any prior consultation with the relevant trade unions. In this regard, the Committee emphasizes the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights and recalls that due process would not appear to be ensured if, under the national law, the effect of a state of emergency is that a court cannot examine, and does not examine, the merits of the case [see **Digest**, op. cit., paras 85 and 1074]. The Committee urges the Government to take all necessary measures to ensure that prior consultations are undertaken with the relevant workers' organizations on proposed legislation affecting trade union rights, and considering that due process should normally include the existence of a right to appeal to the courts as regards administrative decisions, to amend the relevant legislation without delay so as to guarantee access to courts.

842. *The Committee further notes the special emphasis put by the complainant on the Essential National Industries (Employment) Decree, which has entered into force on 9 September 2011, the implementation of which, in the complainant's view, will virtually destroy the independent trade union movement and, as such, the strongest voice amongst the civil society in Fiji, as it seeks to decimate the unions in the sugar and airline industries. In general, the Committee considers that this Decree gives rise to a number of violations of Conventions Nos 87 and 98 and the principles on freedom of association and collective bargaining. In particular, the Committee wishes to draw the Government's attention to its considerations regarding the following shortcomings:*

- (i) Under section 6, all existing trade union registrations in essential national industries are effectively cancelled; in order to operate, unions are required to re-register under the Act. The Committee has on many prior occasions underlined that legislation which accords the minister the complete discretionary power to order the cancellation of 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., para. 689].*
- (ii) Section 7 provides that union officials must, subject to severe civil and penal sanctions, be employees of the designated corporations they represent. Noting that a required step to re-register the union is the election of new union officials, the Committee wishes to recall that the requirement of membership of an occupation or establishment as a condition of eligibility for union office is not consistent with the right of workers to elect their representatives in full freedom [see **Digest**, op. cit., para. 407].*
- (iii) According to sections 10–12, a union must apply to the Prime Minister in writing to be elected or re-elected as representative of the bargaining unit, the Prime Minister shall determine the composition and scope of a bargaining unit for the purposes of conducting elections for its representative, and the registrar shall conduct and supervise elections in the bargaining unit. Noting the concerns expressed by the complainant at the extent of discretion of the Prime Minister when allowing an applicant to seek to represent the bargaining unit, the Committee reiterates that a law providing that the right of association is subject to authorization granted by a government department purely in its discretion is incompatible with the principle of freedom of association. Moreover, the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right*

to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves [see **Digest**, op. cit., paras 273 and 391].

- (iv) Part 3 in conjunction with section 2 seek to establish the role of representatives – union or not – as collective bargaining agents. The Committee understands that the term “representative” may include a union delegate or an elected workers’ representative. In this regard, it considers that, as guaranteed by the Workers’ Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), where there exist, in the same undertaking, both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned. Direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, is detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see **Digest**, op. cit., paras 945 and 946]. The Committee urges the Government to take the necessary measures without delay to ensure that the application of the legislation will be in full conformity with the above principles.
- (v) Under sections 12 and 14, there is a single representative elected to represent workers in the bargaining unit, and a union will be registered as representative of the bargaining unit only if 50 per cent + 1 of all workers in the bargaining unit affirmatively vote in its favour. Taking into account that the wording of section 14, especially subsection 4, seems to indicate that the figure 50 per cent + 1 appears not only to be the percentage necessary for a union to be the exclusive bargaining agent, but also for a union to be registered, the Committee recalls that the right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create – if the workers so choose – more than one workers’ organization per enterprise. While a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered; what constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed. In any event, a minimum membership requirement of 30 per cent of the workers concerned to establish an organization is too high. Thus, a provision imposing a minimum membership of 50 per cent would not be in line with Convention No. 87 [see **Digest**, op. cit., paras 287, 288 and 315].
- (vi) According to section 8, all existing collective agreements are null and void 60 days after the decree enters into force, and new agreements are to be negotiated by the parties before the expiry of the 60 days; otherwise, the company may unilaterally implement new terms and conditions through a new collective agreement or individual contracts. The Committee wishes to emphasize that a legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining. In examining allegations of the annulment and forced renegotiation of collective agreements for reasons of economic crisis, the Committee was of the view that legislation which required the renegotiation of agreements in force was contrary to the principles of free and voluntary collective bargaining enshrined in Convention No. 98 and insisted that the Government should have endeavoured to ensure that the renegotiation of collective agreements in force resulted from an agreement reached between the parties concerned [see **Digest**, op. cit., paras 942 and 1021]. In addition, no clear and imperative reasons have apparently been provided concerning any need for economic stabilization in a specific context. The legislation has effect on whole sectors without any reference to

specific provisions that cannot be implemented in the framework of an acute national crisis, but rather provides for wholesale intervention in all collective agreements. The Committee thus considers that the abrogation of collective agreements, as well as the unilateral imposition of conditions of employment failing to come to an agreement is contrary to Article 4 of Convention No. 98 concerning the encouragement and promotion of collective bargaining.

- (vii) Pursuant to section 27, and subject to severe civil and penal sanctions, strikes in essential national industries in connection with efforts to obtain registration, efforts to influence the outcome of bargaining or in the course of negotiations, and disputes over the interpretation or application of a collective agreement are expressly prohibited. The bargaining unit may only go on strike if the parties failed to reach a collective agreement after three years of bargaining, subject to a 28-day notice period and prior written approval from the Government. The Prime Minister may, by order, declare any strike or lockout in any essential national industry unlawful. According to the Essential National Industries and Designated Corporations Regulations 2011, the above restrictions on the right to strike apply to the following sectors currently considered as “essential national industries”: financial industry (including customs); telecommunications industry; civil aviation industry; and public utilities industry (including electricity and water). The term “essential national industries” is defined in section 2 of the Decree as industries which are: (i) vital to the present and continued success of the Fiji national economy, or gross domestic product, or those in which the Government has a majority and essential interest; and (ii) declared as essential national industry by the ministry under regulations made pursuant to this Decree. In this regard, the Committee wishes first to highlight that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. The Committee recalls that the right to strike may only be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the state; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population). Accordingly, electricity services, water supply services and the telephone service may be considered to be essential services where the right to strike could be restricted or prohibited, and the prohibition of the right to strike of customs officers, who are public servants exercising authority in the name of the state, is not contrary to the principles of freedom of association. However, radio and television, banking and civil aviation more generally do not constitute essential services in the strict sense of the term. By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service “essential”, and thus the right to strike should be maintained [see **Digest**, op. cit., paras 522, 576, 579, 585, 587 and 592]. The Committee further wishes to emphasize that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved. Moreover, penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike [see **Digest**, op. cit., paras 628 and 668].

- (viii) Under section 26, disputes over discipline and discharge, and the interpretation or application of a collective agreement must be settled internally or by the employer's designated reviewing officer without recourse to a judicial or quasi-judicial body;

disputes involving an issue of over FJD5 million (US\$2.78 million) which remained unresolved may be referred to the Prime Minister for a final and binding determination. The Committee considers that all disputes relating to a question of right (for example, the termination of a worker), regardless of the amount of money involved, should be fully appealable to the courts; in the first instance, they could be arbitrated.

- 843.** *In view of the numerous issues raised above, the Committee deeply regrets the issuance on 8 September 2011 of the implementing regulations under section 31 of the Essential National Industries (Employment) Decree 2011, and urges the Government to amend its provisions without delay, in full consultation with the social partners, so as to bring it into conformity with Conventions Nos 87 and 98, ratified by Fiji. The Committee requests the Government to keep it informed of the steps taken in this regard.*
- 844.** *Finally, the Committee notes from the allegations that, as of 4 August 2011, the Government prohibited automatic dues deduction for all public service workers by a decree amending the Civil Service Act, which, in the complainants' view, aims at financially weakening public sector unions, requiring them to collect dues from each member by hand. The Committee further notes that, similarly, section 24(4) of the Essential National Industries (Employment) Decree 2011, prohibits automatic dues deductions unless the employer agrees to do so – which, according to the complainant, is unlikely to happen. The Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided. It requests the Government to take the necessary measures to ensure that the check-off facility continues to be granted in the relevant sectors.*
- 845.** *Given the seriousness of the complainants' allegations and the absence of a complete picture of the situation on the ground, the Committee urges the Government to accept a direct contacts mission to the country in order to clarify the facts and assist the Government in finding, together with the social partners, appropriate solutions in conformity with freedom of association principles.*
- 846.** *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 also draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.*

The Committee's recommendations

- 847.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) In light of the ongoing reshuffle of the judicial system in Fiji and the apparent absence of any constitutional guarantees, the Committee requests the Government to take the necessary steps to ensure that Mr Koroi is immediately reinstated in his former position as a school principal without loss of pay or benefits and to keep it informed of developments.*
 - (b) The Committee urges the Government to refrain from any further interference in the internal affairs of the FTA and to permit Mr Koroi, as its legitimate representative, to carry out his representation functions at the relevant forums, including the Education Forum, the Fiji Teachers' Registration Board, the JCC and the CSB.*

- (c) *Expressing its deep concern at the numerous alleged acts of assault, harassment and intimidation of trade union leaders and members for their exercise of the right to freedom of association, in particular the recent recurring acts of physical assault and harassment against the FTUC National Secretary, the Committee urges the Government to conduct an independent investigation without delay into these incidents and transmit detailed information with regard to its findings and the action taken as a result. The Committee urges the Government to take all necessary measures without delay to ensure, in the future, the full respect of the principles enounced in its conclusions in this respect. With particular regard to the allegation that an act of assault against a trade union leader was perpetrated in retaliation for statements made by the FTUC National Secretary at the ILC, the Committee urges the Government to ensure that no trade unionist suffers retaliation for the exercise of freedom of expression.*
- (d) *Alarmed by the arrest on 4 November 2011 and retention in custody without charges of the FTUC National Secretary, by the arrest of the FTUC President on 29 October 2011 and his retention in custody without charges, as well as by the arrest and overnight detention on 3 August 2011 of the FTUC President and the NUHCTIE General Secretary and a NUHCTIE member and the criminal charges of unlawful assembly brought against them on the grounds of failure to observe the terms of the Public Emergency Regulations, the Committee urges the Government to take full account of the principles enounced in its conclusions in the future, and urges the Government to take the necessary measures to ensure that the FTUC National Secretary and the FTUC President are immediately released from custody and that all charges against them and the NUHCTIE members are immediately dropped, and to keep it informed of any developments in this regard without delay, including the outcome of the hearing on 31 October 2011.*
- (e) *With regard to the alleged search of the union office and of the FTUC National Secretary's home by the police, the Committee requests the Government to provide its observations on this allegation.*
- (f) *Stressing that freedom of assembly and freedom of opinion and expression are a sine qua non for the exercise of freedom of association, the Committee urges the Government to take full account of the principles enounced in its conclusions in the future and refrain from unduly impeding the lawful exercise of trade union rights. It further requests the Government to provide detailed information without delay in reply to the FICTU communication dated 23 September 2011, and in particular as regards the impact of the PER on freedom of association and the alleged general ban on trade union meetings.*
- (g) *As regards the alleged infringement of trade union rights by executive decrees, especially targeting workers in the public service, the Committee urges the Government to take all necessary measures to ensure that public servants enjoy the guarantees enshrined in Convention No. 87, to amend the relevant decrees without delay so as to guarantee access to courts, and to*

ensure, in the future, that prior consultations are undertaken with the relevant trade unions on proposed legislation affecting trade union rights.

- (h) With particular regard to the Essential National Industries (Employment) Decree, which has entered into force on 9 September 2011, and considering that it gives rise to a number of violations of Conventions Nos 87 and 98 and the principles on freedom of association and collective bargaining, the Committee deeply regrets the issuance on 8 September 2011 of the implementing regulations under section 31 of the Decree and urges the Government to amend its provisions without delay, in full consultation with the social partners, so as to bring it into conformity with Conventions Nos 87 and 98, ratified by Fiji. The Committee requests the Government to keep it informed of the steps taken in this regard.*
- (i) The Committee also requests the Government to take the necessary measures to ensure that the check-off facility continues to be granted to trade unions in the public sector and the relevant sectors considered as “essential national industries”.*
- (j) Given the seriousness of the complainants’ allegations and the absence of a complete picture of the situation on the ground, the Committee urges the Government to accept a direct contacts mission to the country in order to clarify the facts and assist the Government in finding, together with the social partners, appropriate solutions in conformity with freedom of association principles.*
- (k) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*
- (l) The Committee also 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. 2750

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

**Complaint against the Government of France
presented by
the Confédération générale du travail–Force ouvrière (CGT–FO)**

Allegations: The complainant alleges that the Act of 20 August 2008 to renew social democracy and to reform working hours and its implementing texts infringe the provisions of the ILO’s Conventions on freedom of association and the right to bargain collectively, which have been ratified by France

- 848.** The complaint appears in communications dated 2 December 2009, and 28 June and 11 July 2011 from the Confédération générale du travail–Force ouvrière (CGT–FO).
- 849.** The Government sent its observations in communications dated 8 June 2010, 29 October 2010, 14 January 2011 and 3 October 2011.
- 850.** France has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Workers’ Representatives Convention, 1971 (No. 135).

A. The complainant organization’s allegations

- 851.** In its communication dated 2 December 2009 the CGT–FO denounces the passing of a law and a number of implementing texts for infringing the principles of freedom of association and the right to bargain collectively, namely: Act No. 2008-789 of 20 August 2008, to renew social democracy and to reform working hours (hereafter “the Act”), section 42 of Act No. 2009-526 of 12 May 2009 to simplify and clarify the law and to simplify procedures, and circular No. 20 of 13 November 2008 regarding the Act to renew social democracy and to reform working hours. It provided additional information in communications dated 28 June and 11 July 2011.
- 852.** The CGT–FO states that the Act modifies the mandatory criteria for trade union representativity when appointing one or more union delegates with authority to engage in collective bargaining. The complainant explains that union representation in France has been traditionally based not only on general criteria (membership, independence, contributions, experience and age of the trade union, and patriotic attitude during the Occupation) but also on the presumption of representativity that is conferred at the industry or enterprise level on organizations affiliated to first-tier organizations whose own representativity is unchallengeable. Since 1966, five confederations have benefited from this presumption of representativity at the national and interoccupational level: the CFDT, CFTC, CFE–CGC, CGT and CGT–FO. Some trade unions that are not affiliated to these confederations have acquired their representativity at the industry or sectoral level.

- 853.** According to the CGT-FO the new Act incorporates a number of general criteria, such as respect for republican values, financial independence or transparency, the requirement that the organization obtain at least 10 per cent of votes cast in the first round of elections for union representatives on the works committee or for union delegates at the enterprise or establishment level – or a combined total of 8 per cent of votes cast in the first round of occupational elections at the industry level. At the interoccupational level an organization must, in addition to obtaining at least 8 per cent of the votes, be simultaneously representative in the industrial, construction, trade and services sectors. The criterion of representativity based on voting strength in occupational elections at every level would henceforth be assessed every four years.
- 854.** However, at the level of enterprises with 50 or more employees, the Act provides that organizations that meet the criteria of respect for republican values and independence and have been legally established for less than two years may designate a representative from a dedicated union branch even if they are not representative under the election criterion. Any such representative enjoys the same prerogatives as a union delegate except for the authority to negotiate collective agreements.
- 855.** The CGT-FO contends that the Act could have the effect of denying many unions that have signed collective agreements the right to bargain collectively, as a result of subsequent occupational elections whose outcome might depend on a variety of transient factors and which might thus prevent them from attaining the minimum representativity requirement. Moreover, the new system is liable to generate situations where an organization is recognized as being representative at the national or interoccupational level but may nevertheless find it difficult to establish its presence at the enterprise or industry level. Ultimately, then, the new Act would merely undermine and reduce freedom of association and the right to bargain collectively.
- 856.** The complainant also questions the means that the new system affords non-representative organizations to represent at least their own members or the workers who have voted for them. From the standpoint of the Committee on Freedom of Association's principles, the Government should take steps to ensure that organizations deemed non-representative in terms of elections, and which are thus excluded from engaging in collective bargaining, are at least able to make their claims known to the parties to the negotiations and, specifically to the employer. The CGT-FO suggests that non-representative organizations should be invited to take part in consultations held prior to the negotiations themselves. Lastly, the complainant points to situations where organizations are deemed to be non-representative and are excluded from consultations because they have not obtained 10 per cent of votes cast at the higher level of the public establishment concerned, whereas they have done so comfortably in elections at the level of the unit.
- 857.** With regard to the mandate of union delegates, the complainant feels that the four-year period set by the Act is far too long for organizations deemed to be representative to be granted exclusive rights in collective bargaining. The CGT-FO suggests that it might be possible to review the question of representativity within the enterprise before the four years have elapsed, to offset the conferral of exclusive negotiating rights.
- 858.** Regarding the appointment of union delegates, the complainant also challenges the new legal requirement that they should be appointed from among the candidates in occupational elections who obtained at least 10 per cent of votes cast in the first round of the most recent elections to the works committee (section L2143-3 of the Labour Code). Such a condition restricts the freedom of workers' organizations to elect their representative freely, organize their management and activities without the public authorities intervening in any way to restrict this right, in accordance with Article 3 of Convention No. 87. The complainant refers to a judgement dated 20 May 2011, issued by the Metz city court

(attached to the complaint), regarding a case in which, despite the fact that a list of candidates for election to an enterprise committee had obtained a number of votes clearly higher than the required proportion, which is set by law at 10 per cent (17.2 per cent of the 209 votes cast by 262 employees registered under the three categories “workers”, “employees” and “supervisors and managers”), the company contested the union in question’s appointment of its representative on the grounds that he had not been included on the list of candidates for election chosen by the staff. In this regard, the complainant organization denounces the fact that the court was able to judge null and void the union’s appointment of its delegate on grounds that section L2143-3 of the Labour Code must be subject to narrow interpretation in order not to allow trade unions to distort the law and appoint whoever they wish, irrespective of the votes cast by the workers. According to the complainant organization, this is clearly a violation of the right of workers’ organizations to freely elect their representatives, organize their management and their activities, as set out in Convention No. 87. The CGT-FO particularly regrets that the court considered that the law clearly stipulated that a union delegate can only be a person who has been appointed by his or her employee peers, without distinguishing between, on one hand, the freedom of a union to elect its own representatives by an internal vote held among its members, and election of company committee delegates by all employees, including those who are not union members or are members of different unions, on the other. Also, according to the CGT-FO, the role of the union delegate responsible for representing the union within the company, particularly in the context of collective bargaining, is clearly separate from that of the staff representative in an enterprise committee, who does not have a role in collective bargaining and whose functions are related to the management of social and cultural activities and information on the economic situation of the enterprise. Furthermore, the CGT-FO points out that, as it is worded, the judgement could lead, in certain cases, a trade union to appoint a representative from among other candidates (including from another trade union), and only in the absence thereof, one of its own members. Lastly, the CGT-FO refers to other serious consequences of such a reading of the law, demonstrated by recent events, including if a trade union delegate, standing as a candidate in political elections, behaves in violation of the statutes of the union, which sees fit to dismiss them from union duties and replace them. Such a situation could result in a union, which has taken a decision to ensure respect for its statutes, finding itself without legal representation for collective bargaining within the enterprise.

- 859.** The complainant organization also refers to a decision issued by the Court of Cassation, dated 29 June 2011, which relies on the same reading of section L2143-3 of the Labour Code, recalling that only when a union no longer has a candidate who fulfils the condition of having stood for election and having received more than 10 per cent of the votes can it appoint a delegate from among the other candidates or, in the absence thereof, from among its members within the enterprise.
- 860.** The duration of the union delegates’ mandate stipulated in the Act is a further restriction on trade unions’ freedom to manage their affairs and elect their officials as they see fit. For example, the four-year mandate stipulated in the Act could prevent a union from renewing the mandate of certain officials if it wishes to do so before the scheduled works committee or staff delegate elections. The new provision could have repercussions at every level and thus further diminish a trade union’s freedom to manage its own affairs, since officials are usually elected from among the members of the enterprise-level union where the mandate is for four years. The CGT-FO’s constitution, for instance, provides for a three-year mandate, which is the statutory interval between two Congresses.
- 861.** As to the representatives of union branches of trade unions that are deemed to be non-representative, their mandate under the new Act expires at the end of the first occupational elections to be held following their appointment if the trade union that appoints them is not recognized as being representative at the enterprise level. They can

then not be reappointed as union branch representatives until six months before the next occupational elections to be held in the enterprise (section L2142-1-1 of the Labour Code). The Act could thus prevent the establishment of a newly created trade union in an enterprise in the event of its appointing a branch union representative but failing to win enough votes in the subsequent occupational elections. According to the Act, the representative loses his or her mandate and for a while is no longer able to represent the union; this would constitute interference in the exercise of trade union duties and violate the union's internal decision-making procedures.

- 862.** The complainant recalls that prior to the Act a non-representative trade union could neither set up a union branch nor appoint a union delegate; however, once it acquired representativity, it was completely at liberty to manage its affairs and appoint a union delegate. The new Act, by contrast, is more restrictive since, with 10 per cent minimum requirement in occupational elections, the criteria are more difficult to meet. In the past, once an organization was established at the enterprise level, its representativity was definitive unless challenged in court; but this is no longer the case.
- 863.** The complainant also challenges the new rule governing the validity of collective agreements. The Act subordinates their validity to their being signed by one or more trade unions which have won at least 30 per cent of the votes cast in interoccupational elections (sections L2232-2, L2232-6 and L2232-12 of the Labour Code). However, this new rule is liable to give rise to situations where organizations deemed legally representative under the Act – and therefore theoretically empowered to negotiate and conclude agreements – are in practice, not allowed to sign those agreements because they have not obtained 30 per cent of votes cast that are required under the Act. Moreover, the reasons given for the provision in the 2008 Act and in the application circular of 13 November 2009, explicitly refer to the prospect of collective agreements eventually being adopted by majority vote.
- 864.** According to the CGT-FO, a threshold of 30 per cent, and eventually 50 per cent, for collective agreements to be declared valid is contrary to Article 4 of Convention No. 98, in a system where the pluralism of trade unions has traditionally been the rule, as such a high threshold will reduce the likelihood of their being validated and goes against the objective of promoting the broadest possible development and utilization of voluntary collective bargaining procedures. In the past, there was no such requirement for validation. It was only when the option of derogating from the more favourable terms of sectoral collective agreements was introduced at the enterprise level that a procedure for validating works agreements was established in Act No. 2004-391 of 4 May 2004. However, validation was still dependent on the signatories to the sectoral agreement, whose decision was invariably taken on the basis of lack of opposition from one or more majority trade unions (with 50 per cent representativity).
- 865.** The complainant notes that the Act provides for the possibility of negotiating, at the level of enterprises employing over 200 workers, with one or more employees mandated by one or more organizations recognized as being representative at the national level if there is no union delegate and the elections have not been officially declared invalid. However, such a possibility has to be provided for in an extended sectoral agreement. Finally, if there is no union delegate and no other means of negotiating in the enterprise, negotiations with the representative of a union branch is permissible as a last resort. The Act makes the validity of any agreement thus concluded dependent on its approval by a majority of the workforce; if it is not so approved, the agreement is considered null and void (section L2232-14 of the Labour Code). The complainant considers that the conditions laid down in the Act for validating the agreement are open to challenge under Convention No. 98 and under the principle laid down by the Committee on Freedom of Association to the effect that “in so far as the persons who conclude collective agreements are trade union representatives, the requirement that they be approved by an absolute majority of the workers involved may

constitute an obstacle to collective bargaining that is incompatible with the provisions of Article 4 of Convention No. 98". Moreover, the possibility of negotiating with elected staff representatives has existed only since the Act of 4 May 2004 in enterprises that are bound by extended sectoral agreements providing specifically for that type of negotiation. The Act also does away with the dependence of this provision on collective bargaining, which can be considered as contrary to Convention No. 98.

- 866.** The complainant considers that all the possibilities of derogation provided for in the Act are liable to weaken the position of enterprise-level unions, whereas in the ILO's instruments the preference goes to workers' organizations as one of the two parties to collective negotiations, and representatives of unorganized workers are mentioned only in the absence of such organizations (Article 2(1), Collective Agreements Recommendation, 1951 (No. 91)). The absence of a staff delegate does not mean that there is no trade union, even a legally representative union. The Act requires that the union delegate be appointed from among candidates in occupational elections who obtain more than 10 per cent of the vote. Yet, in small and medium-sized enterprises especially, a situation may arise in which no union delegate is appointed despite the existence of a representative trade union, if the trade union does not wish (or no longer wishes) to appoint a delegate from among the eligible candidates to represent it. In this case, the representative trade union has no way of being represented at the negotiating table. Under the new Act an employer could thereupon engage in enterprise-level negotiations with other mandated representatives, to the detriment of the trade union.
- 867.** The complainant recalls that the ILO's Workers' Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), contain explicit provisions guaranteeing that, where both trade union representatives and elected representatives exist in an enterprise, appropriate measures must be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned. Yet there are instances where the Act goes against that principle.
- 868.** The complainant states that, by and large, the 20 August 2008 Act is in practice a legislative transcription of a "joint position" that was signed by two of the three main employers' organizations and two of the five representative union confederations. Although all the representative union confederations took part in the negotiations, the provisions that were eventually incorporated into the "joint position" were not agreed to by all the negotiating parties since, in the view of the complainant, they were liable to undermine their rights in terms of freedom of association and collective bargaining.
- 869.** The CGT-FO recalls that under the old legislation, although some of its provisions relating to trade union rights, union representativity and the right to bargain collectively, were debatable, France had at least managed to enjoy a particularly high level of coverage by collective agreements (97.7 per cent of employees in 2004); only 2.3 per cent (350,000 employees) were not covered by any agreement or statutory text. Most of the latter are somewhat outdated, but agreements are regularly amended and supplemented. Between 1998 and 2008, for instance, 119 new collective agreements were concluded, some of them on an entirely new basis, others as a reformulation of obsolete agreements, and yet others by the consolidation or splitting up of existing agreements. In 2008 alone, over 27,100 enterprise-level agreements were signed.

B. The Government's reply

- 870.** In its communications dated 8 June 2010, 29 October 2010, 14 January 2011 and 3 October 2011, the Government describes the Act as one of the mainstays of its labour law reform. Its aim is to reaffirm the legitimacy and role of collective bargaining as an essential means of modernizing industrial relations, so as to ensure that legislation and

collective bargaining play complementary roles. Social dialogue needs to be based on organizations that are strong and legitimate, and this means reforming union representativity so as to enhance the legitimacy of the partners to negotiations which are themselves founded on modern criteria that are reassessed periodically and irrefutably, notably on the basis of voting strength in elections.

871. In the spirit of section L.1 of the Labour Code the Government submitted a set of guidelines to its social partners on 18 June 2007, inviting them to discuss the criteria for trade union representativity, the rules for validating collective agreements and collective bargaining in small and medium-sized enterprises. On 26 December the Government sent the social partners another document requesting that the negotiations be broadened to include the financing of trade unions and occupational organizations and the question of hours of work. It was on the basis of these two sets of guidelines that the negotiations, in which the complainant organization took part, led to the drafting of a "Position paper on representativity, social dialogue and trade union financing" that was signed on 9 April 2008 by two employers' organizations (MEDEF and CGPME) and two workers' confederations (CGT and CFDT). The Act was drawn up on the basis of the joint position paper, with the idea of conferring as much legitimacy as possible on the social partners and of reaffirming the legitimacy and scope of collective agreements. In the Government's view, the Act focuses strictly on the promotion and utilization of collective bargaining referred to in Article 4 of Convention No. 98.
872. The Act sets out to modernize the system of representativity of trade unions by doing away with the unchallengeable presumption of representativity that was accepted in the past and by founding it instead on modern criteria that are reassessed periodically and irrefutably, notably on the basis of voting strength in elections. The earlier system was justified in the historical context of the post-war period as a means of facilitating the development of trade unionism in the enterprise and of avoiding multiple and systematic disputes. Nowadays, however, the idea that union representativity can be conferred on certain organizations by the State is no longer understood by the rank and file and can even contribute to a sense of marginalization.
873. The Government considers that the Act is perfectly in line with Paragraph 3 of ILO Recommendation No. 163, which provides that measures adapted to national conditions should be taken so that representative employers' and workers' organizations are recognized for the purposes of collective bargaining, and so that in countries in which the competent authorities apply procedures for recognition with a view to determining the organizations to be granted the right to bargain collectively, such determination is based on pre-established and objective criteria with regard to the organizations' representative character, established in consultation with representative employers' and workers' organizations.
874. In responding to the complainant's allegations, the Government refers to a recent ruling of the French Supreme Court of Appeal (*Cour de cassation*) on 20 August 2008 Act (Cass. soc., 14 April 2010, Nos 09-60.426 and 09-60.429).
875. With regard to the complainant's questioning of the new criteria based on voting strength in elections for determining a trade union's representativity, the Government recalls that the Act merely reflects a proposal contained in the joint position paper adopted on 9 April 2008, which called for new criteria for representativity. Section L2122-1 of the Labour Code now stipulates that, to be recognized as representative, trade unions must obtain at least 10 per cent of the votes cast in the first round of the most recent elections for the permanent members of the works committee, for the single staff delegation or, in their absence, for the staff delegates. The minimum threshold of 10 per cent of votes cast in occupational elections for a union to be considered representative is a more objective

criterion, inasmuch as its legitimacy is acquired by vote. Under the new Act the employees vote to choose the organization that will negotiate on their behalf at every level. By placing all trade unions on an equal footing from the date on which occupational elections are held, the Act meets the objective of promoting collective bargaining in accordance with Article 5 of Convention No. 154. It does not in any way undermine the freedom to establish trade unions or for such unions to operate at the enterprise level.

876. Regarding the complainant's doubts as to the means available to non-representative organizations to represent their members and the suggestion that steps be taken to ensure that they are able to make their claims known to the parties to the negotiations, and specifically to the employer, the Government recalls that Recommendation No. 163 mentions several ways of promoting collective bargaining, one of which is the recognition of workers' and employers' organizations. According to the Recommendation, the right to engage in collective bargaining may be restricted to representative trade unions. Moreover, prior to the new Act, the right to negotiate collective agreements was likewise restricted exclusively to representative trade unions. The Act has merely added the criterion of voting strength in elections. Lastly, the Government refers to the Supreme Court of Appeal's ruling on 14 April 2010 that States are free to reserve the right to engage in collective bargaining for representative trade unions, which is not prohibited by ILO Conventions Nos 98 and 135.

877. The Government adds that the Act has introduced new rules for developing the presence of trade unions in the enterprise. In future, any union that has been lawfully constituted for at least two years is entitled to the same prerogatives as were previously restricted to representative organizations, provided that they meet the criteria of respect for republican values and of independence and that their occupational and geographical coverage includes the enterprise concerned. The Act thus introduces a new mandate, i.e. that of the representative of a non-representative trade union in enterprises with over 50 employees. It is now possible for a non-representative union to establish itself and operate at the enterprise level, since a union branch representative enjoys the same prerogatives as a union delegate, except for the authority to negotiate collective agreements (section L2142-1-1 of the Labour Code).

878. With regard to the complainant's questioning of the four-year period referred to in the Act for measuring voting strength in trade union elections, the Government makes a distinction between the duration of the mandate of elected members of works committees or staff delegates and the period over which a union's voting strength in elections is measured, which is a four-year cycle at the sectoral, national and interoccupational level. The mandate of elected members of works committees and of staff delegates was increased to four years under Act No. 2005-882 of 2 August 2005; however, this 2005 Act stipulates that a sectoral agreement, group agreement or enterprise agreement, as appropriate, can determine that the mandate of staff delegates and of staff representatives on works committees, enterprise committees, central works committees and group committees may be from two to four years. Thus, the voting strength of a trade union, in order to determine its representativity at the enterprise, establishment or group level, can now be measured over a shorter period than four years.

879. The Government notes that the CGT-FO challenges the new condition laid down in section L2143-3 of the Labour Code to the effect that union delegates must be appointed from among the candidates to occupational elections who obtain at least 10 per cent of the votes cast in the first round of the most recent elections for the works committee or for the single staff delegation or for the staff delegates. However, contrary to the contention of the CGT-FO, the right of organizations to elect representatives of their own choosing refers not to the freedom of representation of trade unions in collective negotiations but to the right to elect their leaders in full freedom. Regarding the alleged interference by the public

authorities in the internal management of trade unions, the Government concludes from its reading of the *Digest of decisions and principles of the Freedom of Association Committee* that their right to conduct their activities freely must be interpreted as the right for trade unions to engage in lawful activities in defence of their occupational interests. Consequently, the condition imposed by the Act as to the choice of union delegates does not constitute an intervention that is liable to restrict or impede the lawful exercise of the right of trade unions to elect their representatives in full freedom and to organize their administration and activities, within the meaning of Article 3 of Convention No. 87. To the contrary, the purpose of this condition is to strengthen workers' relationships with representatives who have the authority to negotiate and sign collective agreements, thereby enhancing the representatives' legitimacy. The Government refers to the ruling of the Supreme Court of Appeal, which states that "the obligation for representative unions, in choosing a union delegate, to give priority to the candidates who obtain at least 10 per cent of the votes cast does not conflict with any prerogative that is inherent in freedom of association and, inasmuch as it helps to ensure that the employees themselves determine who is best equipped to defend their interests in the enterprise and to engage in negotiations on their behalf, it does not constitute arbitrary interference in the function of the trade union".

- 880.** The Act also makes sure that a representative trade union cannot be excluded from negotiating by stipulating that, "should there not be any other candidate in the enterprise or establishment who meets the condition set in the first paragraph above (10 per cent of votes cast), a representative trade union may appoint a union delegate from among the other candidates or, if there is none, from among its members within the enterprise or establishment" (section 5.I of the Act, codified under section L2143-3 of the Labour Code).
- 881.** With regard to the CGT-FO's allegation that the provisions of the Act dealing with representatives of a union branch are also incompatible with the right of trade unions to elect their representatives in full freedom, on the grounds that they have a direct impact on the duration of the mandate of the union branch representative, the Government points out that the creation by law of union branch representatives is intended to permit unions which are not representative in enterprises with over 50 employees but which meet various conditions to establish themselves and operate in those enterprises, with an eye to the next occupational elections. The appointment of a representative can help the organization concerned to attain the threshold of 10 per cent of votes cast and thus be recognized as representative within the enterprise. That is the objective of section L2142-1-1 of the Labour Code, which states: "The mandate of the union branch representative expires following the first occupational elections to be held after his appointment, if the union that appointed him is not recognized as representative within the enterprise. Employees who lose their mandate as union representative in this way may not be reappointed as a union branch representative until six months preceding the next occupational elections to be held in the enterprise." Should an employee thus lose his or her mandate, the union which made the appointment is free to appoint another employee as its union branch representative. Moreover, the employee originally appointed may be reappointed as from six months prior to the subsequent occupational elections in the enterprise.
- 882.** Consequently, the legal framework for the duration of a union branch representative's mandate cannot be regarded as tantamount to state intervention that is liable to restrict or impede the lawful exercise of the right of organizations to elect their representatives in full freedom in accordance with Article 3 of Convention No. 87. Referring to the position of the Committee of Experts on the Application of Conventions and Recommendations cited by the complainant, to the effect that any provision, irrespective of its form, which restricts or prohibits re-election to trade union office is incompatible with Convention No. 87, the Government argues that this means the right of trade unions to elect their officials in full

freedom in the course of internal elections and that it is therefore irrelevant to the case in point.

- 883.** As to the CGT-FO's claim that the Act would weaken the situation of trade unions in the enterprise by granting elected representatives, or even employees duly mandated by representative trade unions in the sector concerned, the right to negotiate collective agreements, even where representative unions already exist in the enterprise, the Government states that the Act is designed to take on board the difficulty of implementing collective bargaining in small and medium-sized enterprises, owing to the very limited representation of the employees. Thus, it broadens and clarifies the framework within which collective bargaining can be undertaken with elected representatives or duly mandated employees. Under the earlier Act No. 2004-391 of 4 May 2004, which had already introduced the possibility of an extended sectoral agreement providing for collective agreements in enterprises with no union delegate to be negotiated and concluded by elected works committee members, by staff delegates or even by duly mandated employees should no representative be forthcoming from occupational elections, very few agreements were signed at the sectoral level (less than 20 in 2008). The signatories of the joint position paper considered that the requirement that there be a prior sectoral agreement might explain why negotiations of this kind never really caught on. They therefore chose to do away with the requirement for prior authorization by extended sectoral agreement while defining strictly the conditions and procedure for resorting by derogation to this kind of collective bargaining. The new Act merely incorporates this proposal.
- 884.** The first condition for engaging in this type of bargaining is that there should be no union delegate in the enterprise, hence no representative trade union. In enterprises with over 200 employees that have no union delegate, agreements may be concluded with the staff representatives or, where there are none, with an employee who has been duly mandated by a trade union which is representative at the sectoral level in enterprises where elections for staff representatives have been officially declared null and void. In line with the joint position, the Act stipulates that an agreement that has been concluded under the derogation procedure enters into force only once it has been signed by duly elected trade union officials who obtained a majority of votes in the most recent elections and once it has been validated by a joint sectoral committee. Moreover, where there is no union delegate or where the occupational elections have been declared null and void, agreements that have been negotiated with an employee who has been mandated by a representative trade union within the sector must be approved by a majority of the votes cast by the employees of the enterprise concerned.
- 885.** The Government points out that the example cited by the complainant is that of a trade union that does not wish to appoint a union delegate from among those of its candidates who obtained fewer than 10 per cent of votes cast. If there is no union delegate, the organization can have no representative present during the negotiations, which are then liable to be blocked. If a union refuses to appoint one of its candidates who obtained more than 10 per cent in the vote, that is a sovereign decision of the organization concerned, which thus places itself in a situation where it cannot exercise the powers to which it is entitled by virtue of its representativity. When this happens, the employer still has the option of engaging in collective bargaining with elected representatives or with an employee who has been duly mandated by a trade union to negotiate an agreement that will be validated by a vote of the workforce. In the Government's opinion, such a procedure is in full conformity with the definition of collective agreements as set out in Paragraph 2(1) of ILO Recommendation No. 91.
- 886.** The Government makes the point that this option takes precedence over negotiations with a union branch representative (section L2143-23 of the Labour Code). Since the latter is representing a trade union that has not met the minimum requirement of 10 per cent of the

votes cast by the employees, it is only logical that negotiations should only be possible when all other means of bargaining collectively have been exhausted. That is precisely the intention of the Act, which dismisses the possibility of negotiating with a union branch representative so long as a union delegate is present or there exists the option of negotiating with an elected or duly mandated employee. The purpose of this provision is to favour negotiations with participants whose legitimacy derives from votes cast by the workforce in occupational elections and it cannot have the effect of weakening the position of trade unions vis-à-vis elected representatives.

- 887.** The complainant also challenges the new rules for validating agreements, and specifically the 30 per cent threshold for representativity required under the Act for one or more trade unions to sign a collective agreement validly, but the Government points out that the provisions relating to the validity of agreements merely reflect the joint position of the social partners in opting for an intermediate stage before moving toward the conclusion of agreements by absolute majority – an issue that has been postponed until future negotiations.
- 888.** The Government points out that the validity of enterprise, sectoral and interoccupational agreements is dependent, on the one hand, on their having been signed by one or more representative trade unions which alone or together obtained at least 30 per cent of the votes cast in the most recent occupational elections at the level concerned and, on the other, on the absence of any opposition from representative trade unions that obtained a majority of votes cast. These rules entered into force on 1 January 2009 for enterprises and will do so no later than five years after publication of the Act for sectoral and interoccupational agreements.
- 889.** The Government concludes by stating that it would not seem, from early data on negotiations at the enterprise level since the Act came into force, that there has been any decline in the volume of collective bargaining, any more than there was a drop in the number of collective agreements concluded in 2009. On the contrary, the gradual increase in the number of agreements signed in recent years appears to have been maintained.
- 890.** In a communication dated 29 October 2010 the Government expressed the wish to supply further information in reply to the allegations, including the views of the representative organizations which signed the joint position paper of April 2008.
- 891.** In a communication dated 14 January 2011 the Government sent additional observations and also attached observations which the signatories of the joint position paper of April 2008 (CGT, CFDT, MEDEF, CGPME) made in relation to the complaint, these organizations having been consulted by the Ministry of Labour. The Government indicates that the conformity of the Act with the French Constitution and international standards has been reaffirmed by the national courts. The Supreme Court of Appeal (the highest court in France) declared, in response to a recent query about the Act's conformity with international conventions, that States are free to restrict the right to engage in collective bargaining to representative trade unions, which is not prohibited by ILO Conventions Nos 98 and 135 (Cass. soc. 14 April 2010, Nos 09-60.426 and 09-60.429). The Constitutional Council, in two rulings on priority issues of constitutionality dated 7 October and 12 November 2010, declared the Act of 20 August 2008 to be in conformity with the principles of freedom of association, equality before the law and worker participation in the collective determination of conditions of work as guaranteed by the French Constitution.
- 892.** The Government recalls that the system prior to the Act of 20 August 2008 was based on presumed representativity which was unchallengeable and not subject to any time limit, whose origins lay in the historical context of the post-war period. However, the social

partners who signed the joint position paper of 9 April 2008 concluded that the system had reached its limits. In order to strengthen social dialogue and the influence of collective agreements and tackle very low levels of unionization in the private sector (around 5 per cent), the organizations which signed the joint position paper proposed modernizing the system governing the representativity of workers' trade unions by eliminating the unchallengeable presumption of representativity and basing this on revamped criteria subject to periodic and irrefutable reassessment, taking particular account of voting strength in elections, which is the direct expression of the will of the workers. For this reason the provisions of the Act concerning the intervals for measuring union voting strength replicate those proposed by the joint position paper. Moreover, the choice to reassess voting strength in the light of the results of occupational elections in enterprises stems from the high rate of employee participation in these elections (around 66 per cent).

893. The Government declares that, with respect to the public service, an agreement was signed on 2 June 2008 by the CGT, CFDT, FSU and UNSA. Based on the principles of social democracy deriving from the Act, this agreement also chooses to take account of voting strength via the results of occupational elections (elections to technical committees) to determine union representativity. The agreement was transposed by Act No. 2010-751 of 5 July 2010 concerning the renewal of social dialogue and comprising various provisions relating to the public service.

894. The Government indicates that the maximum four-year mandate for staff representatives seemed reasonable to the organizations which signed the joint position paper since transparency regarding terms of office and continuity with respect to negotiators are needed to create high-quality social dialogue. The duration of the mandate of elected members of works committees or staff delegates was increased to four years by Act No. 2005-882 of 2 August 2005, and this duration was therefore determined prior to the adoption of the Act of 20 August 2008. Moreover, section 96 of the Act of 2 August 2005 states that a sectoral agreement, group agreement or enterprise agreement, as appropriate, can determine that the mandate of staff delegates and staff representatives on works committees (at enterprise or establishment level), central works committees and group committees may be from two to four years. At the enterprise level, the duration of the mandate can therefore be freely fixed initially at less than four years by prior collective agreement concluded with the representative trade unions. It is for the social partners to decide on the duration that is most appropriate to the local context.

895. On the other hand, any holding of early elections would have to be justified by objective criteria (for example, an increase or reduction in the workforce, restructuring, etc.), since a shift in the balance of power among unions would be difficult to define in objective terms. As regards the grounds justifying such elections, the Labour Code specifies certain circumstances arising, for example, from restructuring of the enterprise or establishment (sections L2314-28 and L2324-26 of the Labour Code). Hence, even though a trade union can now request the opening of negotiations on this subject, the signing of any agreement depends on the unanimous consent of all the representative unions in the enterprise, along the lines of an election held to appoint additional delegates (apart from those currently holding office) to take account of any increase in the size of the workforce between two elections. The Supreme Court of Appeal considered, in a ruling of 13 October 2010, that an additional election can only be held if provision is made for it through a collective agreement signed by all the unions present in the enterprise.

896. The Government emphasizes that the holding of early elections is a serious action that calls into question the mandates of the elected representatives already holding office. Allowing a single union acting alone to call for early elections would therefore entail a number of risks, by giving any union – especially a minority or non-representative union – such a prerogative, and would undermine the position of elected staff representatives already in

office. Moreover, failure to establish objective criteria relating to variations in the workforce or changes in the legal status of the enterprise in order to open negotiations with a view to early elections would run counter to the obligation of fairness towards the electorate, who cast their votes in the light of a given situation (especially a specific term of office determined in advance). Calling into question existing electoral mandates might create an unstable climate of constant campaigning for elections which would undermine the continuity required for accomplishing a mandate and distort the perspective needed for evaluating negotiated collective agreements and union action in the enterprise. Finally, the frequent calling into question of mandates would also prevent voters from evaluating in the long term whether representatives had performed their duties and discharged their mandates satisfactorily.

- 897.** The Government concludes that changing the maximum four-year term of office during an existing mandate would therefore run the risk of constantly calling into question organizations recognized as representative in the enterprise and undermine the Act's objective of conferring legitimacy on the players concerned.
- 898.** As regards the question of the choice of union delegates from among the candidates for occupational elections who have obtained at least 10 per cent of the vote, the Government points out that union delegates do not necessarily have to be elected and adds that the criteria for the appointment of a union delegate established by the Act of 20 August 2008 replicate those of the joint position paper of 9 April 2008.
- 899.** The Government indicates that unlike in other countries, especially within Europe, collective agreements in France do not apply solely to unionized employees but grant wider benefits to all employees covered by their scope; employees in an enterprise might therefore not be acquainted with the person who had signed the agreement binding them all and who had been under no obligation to justify his actions as negotiator to them. Hence, to strengthen the position of collective bargaining and bearing in mind that the signing of an enterprise or establishment agreement by a union delegate is binding on the whole work unit, it appeared necessary to reinforce the legitimacy of the union delegates themselves.
- 900.** The Government bases its position on the ruling of the Supreme Court of Appeal, which stated that "the obligation for representative unions, in choosing a union delegate, to give priority to the candidates who obtain at least 10 per cent of the votes cast does not conflict with any prerogatives that are inherent in freedom of association and, inasmuch as it helps to ensure that the employees themselves determine who is best equipped to defend their interests in the enterprise and to engage in negotiations on their behalf, it does not constitute arbitrary interference in the functioning of the trade union". The Government also recalls that the Constitutional Council, in a decision of 12 November 2010, confirmed that section L2143-3 of the Labour Code concerning new conditions for the appointment of union delegates is in conformity with the French Constitution. The Council considered "that, by imposing the obligation on representative unions, in choosing union delegates, to give priority to the candidates who obtained at least 10 per cent of the votes cast in the first round of the latest occupational elections, section L2143-3 involves employees in the appointment of the persons recognized as being the best equipped to defend their interests in the enterprise and engage in negotiations on their behalf; that, in adopting this section, the legislator has not disregarded the principle of freedom of association set forth in the sixth subparagraph of the Preamble of 1946".
- 901.** With regard to recent court decisions, in particular the decision of 20 May 2011, of the Metz city court, which, pursuant to section L2143-3 of the Labour Code, annulled the appointment of a union representative, the latter not having been chosen from among candidates for election to the enterprise committee who had themselves received at least 10 per cent of votes cast, or the decision of 29 June 2011 of the Court of Cassation which

annulled the appointment of a trade union representative who was not chosen among the candidates presented by the union in question who obtained at least 10 per cent of the votes cast, the Government declared that the judge had rightly noted and sanctioned attitudes that had the effect of circumventing the legal requirements. Finally, with regard to the situation described by the complainant in which the latter would be forced to revoke a representative who, for example, behaved in violation of the statutes of the union, the Government considers that this does not, as such, limit or impede the lawful exercise of the right of the union to elect another representative, as long as the new person meets the requirements of section L2143-3 of the Labour Code.

- 902.** The Government's view is that, under the provisions of the Act, unions are totally free to choose the candidates which they wish to nominate for election and, consequently, the persons which they may subsequently appoint as union delegates. Moreover, the Act has taken care to compensate for any situation in which it is impossible to appoint a union delegate for a representative union which no longer has any candidates who obtained at least 10 per cent of the votes in the elections. Here it allows the representative union to appoint a union delegate from among the other candidates or, failing that, from among its members within the enterprise or establishment. Hence a representative union will never be placed in a situation where it is no longer able to choose its representative.
- 903.** As regards the provisions of the Act concerning union branch representatives, the Government indicates that the Act replicates the joint position, which limits the duration of the mandate of the union branch representative to the interval between two elections held in the enterprise. This restriction stems from the fact that the function of the union branch representative is to establish the presence of the branch so that the union which has appointed him obtains results at the next occupational elections which enable it to be recognized as representative, and to then appoint a union delegate having more extensive prerogatives. The mandate of the union branch representative expires at the end of the first occupational elections following his appointment since the union which has appointed him is not recognized as representative.
- 904.** According to the Government, the organizations which signed the joint position paper considered that any representative who was unsuccessful in attaining the 10 per cent threshold needed for his union to be recognized as representative would be unlikely to secure representativity for the union at the next occupational elections. It therefore seemed logical to them that another person should be appointed as union branch representative with a view to the possible formulation of a new electoral strategy. The union thus remains free to appoint a different employee as union branch representative. Moreover, the Government emphasizes that the Act of 20 August 2008 has introduced a measure of flexibility vis-à-vis the joint position on this precise point: the employee originally appointed may be reappointed as union branch representative as from six months prior to the subsequent occupational elections in the enterprise.
- 905.** The Government asserts that initial data available regarding the results of negotiations at enterprise level suggest that there was no apparent decline in the level of collective bargaining or the number of agreements concluded in 2009. On the contrary, the slight increase in the number of agreements signed in recent years seems to have continued.
- 906.** The Government adds that, apart from the fact that the reform of trade union representativity has recently been reaffirmed in national law by the highest judicial authorities in France, the provisions of the Act of 20 August 2008 relating to social democracy have been complemented by Act No. 2010-1215 of 15 October 2010, which seeks to enable more than 4 million employees working in very small enterprises – where occupational elections are not mandatory – to participate in the assessment of union voting strength and, consequently, in the determination of union representativity at the sectoral,

national and interoccupational levels. To this end, the Act of 15 August 2010 provides for a regional ballot in which voters opt solely for a given union, not for any named candidates; the ballot takes place every four years and is open to the staff of enterprises having fewer than 11 employees. In an opinion issued on 29 April, the Council of State emphasized that any failure to meet the obligation to measure union voting strength in very small enterprises “would undermine the whole mechanism established by the Act of 2008”.

- 907.** The Government emphasizes that it is devoting special attention, in conjunction with all the closely associated social partners, to following up on the Act of 20 August 2008 complemented by the Act of 15 October 2010 and their implementing texts. The High Council for Social Dialogue (HCDS), which was established by the Act of 20 August 2008, comprises all representative trade unions at the national and interoccupational levels, including the CGT-FO, representatives of the employers’ organizations and also representatives of the Ministry of Labour. In 2013 the HCDS is due to issue an opinion on the results of the assessment of union voting strength. It has met several times since the promulgation of the Act of 20 August 2008 and will continue to meet on a regular basis up to 2013 in order to discuss any issues that might have an impact on the assessment of voting strength. All draft implementing legislation arising from the Act of 20 August 2008, complemented by the Act of 15 October 2010, will be referred to the HCDS prior to adoption. The HCDS is empowered to submit to the Labour Minister the conclusions to be drawn from the application of the Act and also the conclusions to be drawn from the report to be presented to Parliament by the end of 2013 (section 16 of the Act).
- 908.** The Government concludes by indicating that the Act is largely the result of the work of the social partners, and the assessment that it is organizing closely involves all the social partners, including the CGT-FO. A recommendation by the Committee on Freedom of Association requesting the Government to revise certain provisions of the Act would be tantamount to calling for the principal social partners in France to change their joint position, without even waiting for the cooperative assessment provided for by the lawmakers. The Government would therefore like the Committee to invite the Governing Body to consider that this case does not call for further examination.
- 909.** The CGT made a number of observations concerning the reform of trade union representativity, indicating that it has been one of the instigators of the reform. The parliamentary debate concerning the Act of 20 August 2008 took place in July 2008 further to interoccupational negotiations at national level among the representative workers’ confederations (CGT, CFDT, FO, CFTC, CFE-CGC) and the employers’ organizations (MEDEF, CGPME, UPA). These negotiations concluded with the signing of the joint position paper by the CGT, CFDT, MEDEF and CGPME on 9 April 2008. The joint position was unanimously validated in April 2008 by the CGT executive committee and in May by 80.4 per cent of the votes of its national committee, the supreme decision-making body between two congresses representing all CGT departmental federations and unions. The CGT recalls the salient points of the negotiations relating to the joint position of 9 April 2008. It recalls in particular that, in contrast to the opposition that they had expressed in the Economic and Social Council in 2006, MEDEF and CGPME finally accepted the idea of basing union representativity on voting strength.
- 910.** The CGT indicates that the freedom and right to establish an enterprise trade union are upheld by the Act of 20 August 2008. Subject to simple criteria aimed at ensuring “union authenticity”, any union may establish an enterprise branch, appoint a representative who enjoys the same protection against dismissal as the delegate of a representative union, and submit a list of candidates for the first round of elections to the representative staff bodies under the same conditions as a representative union. The same guarantees thus apply to any newly established union, whether or not it is affiliated to a representative confederation. It is therefore undeniable that, in the context of trade union pluralism in

France, the reform of representativity has increased the freedom to establish unions. The CGT points out that it also asked for newly established unions to be able to have their representativity verified within a reasonable period of time by being able to hold occupational elections without having to wait for the expiry of the four-year period prescribed by law, but this request was not accepted by the employers or incorporated into the Act.

- 911.** The CGT also refers to the additional issue of setting a representativity threshold, i.e. specifying the minimum voting strength that would give a union the right to participate in collective bargaining. Union and employer expectations, albeit different, eventually converged in a positive response to this question. It was thus acknowledged in the joint position paper that a minimum of 10 per cent of the votes cast would be needed to achieve representativity. It was in response to a request from the unions which did not sign the joint position paper that this threshold was lowered to 8 per cent at the sectoral, national and interoccupational levels.
- 912.** As regards the new conditions to be met for appointing trade union delegates, the CGT indicates that a compromise was found by the signatories of the joint position paper. Any union delegate must in principle be appointed from among the candidates for elections, whether or not he is actually elected, with the sole proviso that he obtains a minimum number of votes. The organizations which signed the joint position paper considered that this did not constitute a constraint which jeopardized the freedom of unions to appoint their delegates, otherwise they would not have accepted this provision. In the vast majority of situations – apart from certain enterprises where the level of unionization is very high and unions can avoid combining mandates for election and representation – union delegates are already likely to stand for election. In general, the CGT sees no major difference between voting strength in relation to an individual candidate and in relation to the whole list to which he belongs. Setting an individual threshold for voting strength did not therefore seem a *de facto* constraint on the freedom of a representative union to appoint the delegate of its choice. The CGT also notes that the Act has not made this provision into an absolute constraint, the lawmakers having considered that it could not impede the representative union's right to appoint a delegate at any time. If it proves impossible to appoint a delegate from the lists of candidates for occupational elections, the union can make its choice from among any other employees.
- 913.** As regards the validation of collective agreements, the CGT recalls that the employers' organizations and three confederations were opposed to the validation of agreements being based on the most democratic rule proposed jointly by the CGT and the CFDT, namely that of signing an agreement on the basis of majority voting, according to which the combined voting strength of the signatory unions must exceed 50 per cent of the votes cast. However, a compromise was found, based on a minimum threshold to be reached by the signatory unions to secure approval of the agreement (set at 30 per cent of the votes cast) and on a right of opposition available to the representative unions whose combined voting strength forms a majority. The CGT accepted this compromise provision since it prevents, for the time being, the provisions of collective agreements being imposed on employees by union representation of a decidedly minority nature. In addition, it is mentioned as transitory, since there is the prospect of collective agreements eventually being adopted by majority vote. However, the CGT continues to call strongly for the validation of collective agreements by majority union voting strength.
- 914.** The CGT considers that, with regard to the setting of criteria or thresholds for establishing the representativity of unions and hence their capacity to engage in collective bargaining, the Committee on Freedom of Association of the ILO Governing Body recognizes their legitimacy since the very concept of the most representative organizations of employers and workers is established by article 3, paragraph 5, of the ILO Constitution.

- 915.** By way of conclusion, even though it considers the Act incomplete and it continues to make major demands in the area of social democracy, the CGT declares that the first part of the Act of 20 August 2008 constitutes a major step forward in responding to long-standing demands. Thanks to the new rules on representativity, in which voting strength appears to be the key criterion, the legal concept of union representativity comes close to the workers' interpretation of the term, namely the capacity to have their occupational issues taken into consideration and to bring their expectations regarding labour relations to all levels of dialogue and negotiation. Moreover, thanks to the new rules on validation of the various types of agreement at the enterprise, sectoral and interoccupational levels, collective bargaining is finally beginning to be recognized as a collective right of workers exercised by their representative trade unions. This is an indisputable advance in social democracy, with which trade unionism has every reason to be concerned in order to develop further and ensure its future.
- 916.** In its observations concerning the complaint, the CFDT recalls that at the beginning of 2008 the five French confederations currently recognized as representative actively participated in negotiations on changes to the rules concerning union representativity. These negotiations took place within the customary framework and in full observance of trade union freedoms. They were concluded on 8 April 2008 with a position paper which each organization was free to sign. The CFDT decided to sign the paper and considers that the complaint submitted by the CGT-FO reflects differences of opinion among the trade unions in France.
- 917.** Moreover, the CFDT declares that, as it had wished, the Government established a High Council for Social Dialogue (HCDS) whose task is to examine the implementation of the mechanisms established by the Act. All the representative unions, including the CGT-FO, are members of the Council.
- 918.** The CFDT considers that the Act makes the recognition of union representativity and the process of establishing a union easier since a non-representative union can now be represented in the enterprise by a union branch representative. This new mandate comes to an end at the time of the following elections since the aim is to secure representativity by obtaining at least 10 per cent of the votes during the elections. If, despite everything, the union fails to become representative, it still has the means to remain present and appoint a representative – which it was unable to do under the previous legislation.
- 919.** Moreover, the CFDT points out that a representative union can appoint as a union delegate any person who has been a candidate (titular or alternate) for one of the elections for staff representatives and has obtained at least 10 per cent of the votes, without necessarily being elected. The freedom of appointment conferred on unions is actually considerable, especially as the vast majority of candidates put forward by a union that will be recognized as representative will generally have attained or exceeded 10 per cent of the votes. The slight constraint of appointing a person who has been a candidate simply obliges the union to think ahead regarding who it wishes to represent it when submitting the list of candidates for election. But this constraint is more than compensated for by the strengthening of the links between the employees and the union, which consolidates its legitimacy and freedom. Given that the union acts on behalf of the employees, particularly when it performs its role as negotiator, it is normal and useful for the employees to be acquainted with the person who has the authority to conclude collective agreements which concern them directly.
- 920.** As regards the duration of mandates, the CFDT considers that, at the time elections are held, unions and employees are aware of the duration of the mandate that will follow the elections. Interrupting the mandate before its normal expiry date would be tantamount to changing the conditions for holding the elections and calling into question the contract

entered into with the voters. The CFDT recalls that under the current legislation a significant change in the size of the enterprise or the resignation of a majority of elected representatives may lead to the holding of new elections. However, the CGT-FO's demand aimed at enabling a non-representative union to call for early elections would appear to be completely unjustified since this would undermine the scope and legitimacy of the election and thus weaken any union sponsoring a list of candidates.

921. In its observations MEDEF emphasizes that in its view the Act of 20 August 2008 represents a qualitative leap in the history of social dialogue in France. The procedure whereby it was formulated was exemplary since the social partners had the possibility to negotiate and reached a joint position, after nearly one year of negotiations. MEDEF observes that representativity used to be conferred by the State but is now based on election results. It considers that the new representativity criteria adopted by the Act are objective, modern and fair, and make for a more accurate reflection of employees' views. The Act has thus strengthened the legitimacy of the parties concerned and opened the area of negotiation to organizations that more legitimately reflect the employees who they represent. Finally, MEDEF recalls that the Act of 20 August 2008 contains a review clause and that an appraisal of its positive effects will therefore be conducted. After four years of implementation of the Act, it will thus be possible to draw clear conclusions on the basis of a mandatory review.

922. The CGPME declares in its observations that it fully endorses the Government's reply and considers that it is neither proven nor established that the Act of 20 August 2008 infringes the provisions of ILO Conventions Nos 87, 98, 135 and 154, which have been ratified by France.

C. The Committee's conclusions

923. *The Committee notes that the complaint relates to the conformity of the Act of 20 August 2008 to renew social democracy and to reform working hours, and of its implementing texts, with the principles of freedom of association and with the right to bargain collectively as set out in the relevant ILO Conventions and Recommendations, notably Conventions Nos 87, 98 and 135, which have been ratified by France. The texts challenged also relate to section 42 of Act No. 2009-526 of 12 May 2009 to clarify the law and simplify procedures, and circular No. 20 of 13 November 2008 relating to the Act.*

924. *The Committee notes that in June 2007, as part of a reform of France's labour legislation, the Government submitted to its social partners – the three main employers' organizations and five representative trade union confederations (one of which is the complainant) – a set of guidelines inviting them to discuss the criteria for trade union representativity, the rules for validating collective agreements and collective bargaining in small and medium-sized enterprises. Another document was sent to the social partners in December 2007 requesting that they broaden the negotiations to include the financing of trade unions and occupational organizations and the question of hours of work. On the basis of the two sets of guidelines the negotiations among the social partners resulted in the signing on 9 April 2008, by two employers' organizations (MEDEF and CGPME) and two trade union confederations (CGT and CFDT), of a "Joint position paper on representativity, the development of social dialogue and the financing of the trade union movement". The Committee notes that, although all the union confederations benefiting from the unchallengeable presumption of representativity took part in the consultations, the wording ultimately used in the joint position paper was not agreed to by all the social partners that participated in the discussions, and that one employers' organization and three confederations chose not to sign the position paper. That said, the Committee notes the Government's statement that the Act is a legislative transcription of the joint position paper.*

925. *The Committee notes that, according to the Government, the Act is one of the mainstays of its labour law reforms and sets out to modernize the system of representativity of trade unions and of validating collective agreements. The Act does away with the unchallengeable presumption of representativity that was the rule in the past and founds trade union representativity instead on modern criteria which are reassessed periodically and irrefutably, notably on the basis of voting strength in elections. According to the Government, the earlier system was justified in the historical context of the post-war period as a means of facilitating the development of trade unionism in the enterprise and of avoiding multiple and systematic disputes. Nowadays, however, the idea that indefinite union representativity can be conferred on certain organizations by the State is no longer understood by the rank and file and can even contribute to a sense of marginalization. The Committee notes the Government's assertion that the Act is altogether in line with Paragraph 3 of ILO Recommendation No. 163, which provides that measures adapted to national conditions should be taken so that representative employers' and workers' organizations are recognized for the purposes of collective bargaining, and so that in countries in which the competent authorities apply procedures for recognition with a view to determining the organizations to be granted the right to bargain collectively, such determination is based on pre-established and objective criteria with regard to the organizations' representative character, established in consultation with representative employers' and workers' organizations.*
926. *The Committee notes that according to the complainant, on the contrary, the Act violates in many respects the provisions of Conventions Nos 87, 98 and 135 ratified by France, as well as other instruments dealing with freedom of association and the right to bargain collectively. The complainant recalls that the legislation that was previously in force, though questionable in certain respects, had at least made it possible for France to enjoy an exceptionally high degree of coverage by collective agreements (97.7 per cent of employees in 2004). The Committee notes the complainant's contention that this can be explained by the fact that, in the past, trade union representativity was based not only on general criteria but also on the presumption of representativity conferred at the industry or enterprise level on organizations affiliated to first-tier organizations. Since 1966, five confederations have benefited from this presumption of representativity at the national and interoccupational level: the CFDT, CFTC, CFE-CGC, CGT and CGT-FO. Some trade unions that are not affiliated to these confederations have acquired their representativity at the industry or sectoral level.*
927. *The Committee notes that the Act has done away with the presumption of representativity, which is now determined by voting strength in occupational elections. Trade unions must henceforth meet the criteria set out in sections L2121-1 et seq. of the Labour Code: respect for republican values; independence; financial transparency; at least two years' establishment in the geographical and occupational area of the enterprise; influence attested by activity and experience; membership and contributions; and share of votes cast (at least 10 per cent in the first round of the most recent elections for the permanent members of the works committee, for the single staff delegation or, in their absence, for the staff delegates, and initially 8 per cent of votes cast in occupational elections). In addition, there is a specific criterion for each level: an evenly spread territorial presence at the sectoral level, and simultaneous representativity in the industrial, construction, trade and services sectors at the national and interoccupational level (sections L2122-1, L2122-5, L2122-6 and 2122-9 of the Labour Code).*
928. *The Committee notes that, according to the CGT-FO, the new criterion regarding voting strength could have the effect of denying many unions that have signed collective agreements the right to bargain collectively, as a result of subsequent occupational elections whose outcome might depend on a variety of transient factors and which might thus prevent them from attaining the minimum representativity requirement. Moreover, the*

new system is liable to generate situations where an organization is recognized as being representative at the national or interoccupational level but may nevertheless find it difficult to establish its presence at the enterprise or industry level. According to the CGT-FO, the new Act would merely undermine and reduce freedom of association and the right to bargain collectively.

- 929.** *The Committee also notes the Government's observation that the Act simply reflects a proposal contained in the joint position paper adopted on 9 April 2008, which called for new criteria for representativity. The minimum threshold, laid down by section L2122-1 of the Labour Code, of 10 per cent of votes cast in occupational elections for a union to be considered representative is an objective criterion, inasmuch as its legitimacy is acquired by vote. The Government adds that, by placing all the trade unions on an equal footing from the date on which the occupational elections are held, the Act does not in any way undermine the freedom to establish trade unions or for such unions to operate at the enterprise level and meets the objective of promoting collective bargaining in accordance with Article 5 of Convention No. 154.*
- 930.** *The Committee notes the views of the employers' organizations which signed the joint position paper communicated by the Government in January 2011. It notes that MEDEF emphasizes that in its view the Act of 20 August 2008 represents a qualitative leap in the history of social dialogue in France and that the procedure whereby it was formulated was exemplary since the social partners had the possibility to negotiate and reached a joint position, after nearly one year of negotiations. MEDEF observes that the Act has strengthened the legitimacy of the players and opened the area of negotiations to organizations providing a more legitimate reflection of the employees who they represent. MEDEF also recalls that the Act of 2008 contains a review clause and that an appraisal of its positive effects will therefore be conducted. The Committee also notes that the CGPME declares that it fully endorses the Government's reply and considers that it is neither proven nor established that the Act of 20 August 2008 infringes the provisions of ILO Conventions Nos 87, 98, 135 and 154, which have been ratified by France.*
- 931.** *With regard to the means that the new system affords non-representative organizations to represent at least their own members or the workers who have backed them, the Committee notes the complainant's opinion that steps should be taken to ensure that organizations deemed non-representative in terms of elections, and which are thus excluded from engaging in collective bargaining, are at least able to make their claims known to the parties to the negotiations and, specifically, to the employer. One option they propose would be for non-representative organizations to be invited to take part in consultations held prior to the negotiations themselves. The Committee also notes the Government's response, to the effect that Recommendation No. 163 mentions several ways of promoting collective bargaining, one of which is the recognition of workers' and employers' organizations. According to the Recommendation, the right to engage in collective bargaining may be restricted to representative trade unions. Moreover, prior to the Act of 20 August 2008, the right to negotiate collective labour agreements was likewise limited to representative trade unions. Lastly, the Government refers to the ruling of the Supreme Court of Appeal on 14 April 2010, that States are free to restrict the right to engage in collective bargaining for representative trade unions, which is not prohibited by ILO Conventions Nos 98 and 135. In addition, according to the Supreme Court of Appeal, the fact that the employees at professional elections participate in the determination of trade unions to represent them in collective bargaining does not weaken the trade union representatives for the benefit of elected representatives, each retaining their own responsibilities. Furthermore, the Committee notes that the Supreme Court of Appeal referred the matter to the Constitutional Council, which issued a decision dated 7 October 2010 stating that section L2122-2 of the Labour Code, setting the threshold for trade union*

representativity in enterprises and institutions at 10 per cent of the votes cast in occupational elections, is consistent with the Constitution.

932. In order to understand the present case better, the Committee feels it might be useful to recall that, broadly speaking, the system of labour relations considered here is based on the notion that workers can be represented by several trade unions at every bargaining level, from the enterprise to the interoccupational level. Even though the most representative organizations may have precedence in terms of collective bargaining, the system does not depend on the status of bargaining agent being granted exclusively to a single organization that has been mandated to negotiate with the employer on behalf of the entire workforce. Under the system considered here, therefore, the employer may, in order to reach an agreement at the enterprise level, engage in negotiations with one or more workers' organizations. The same applies to occupational and interoccupational negotiations.
933. With regard to the recognition of representative organizations that are empowered to bargain collectively, the Committee recalls, in the first place, that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 950]. The Committee has in the past also recalled that the fact of establishing in the legislation a percentage in order to determine the threshold for the representativeness of organizations and grant certain privileges to the most representative organizations (in particular for collective bargaining purposes) does not raise any difficulty provided that the criteria are objective, precise and pre-established, in order to avoid any possibility of bias or abuse [see **Digest**, op. cit., para. 356]. As for the rights of non-representative unions, minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim [see **Digest**, op. cit., para. 359].
934. Regarding the process of change in the system of occupational relations as a whole, the Committee observes that the system that prevailed prior to the adoption of the Act of 20 August 2008 functioned for many years on the basis of criteria of presumed or attested representativity, resulting in an exceptionally high level of coverage by collective agreements. The Committee observes that the Government initiated the reform of the existing system in consultation with the employers' and workers' representative organizations, and that it recognizes that the Act was adopted in the light of a joint position paper signed by some of those organizations. Welcoming the spirit of consultation that the Government has demonstrated, yet obtaining the unresolved differences of opinion which resulted in the present case, the Committee encourages the Government to continue to promote dialogue which gives the fullest possible effect to the views of all the organizations. In this regard, the Committee welcomes the establishment by the Act of 20 August 2008 of a High Council for Social Dialogue (HCDS) which comprises all representative trade unions at the national and interoccupational levels, including the complainant in this case, representatives of employers' organizations and representatives of the Ministry of Labour. It observes that the HCDS has met several times since the promulgation of the Act and will continue to meet on a regular basis up to 2013 to discuss any issue that might have an impact on the assessment of union voting strength.
935. The Committee notes that the CGT-FO challenges the new legal requirement that trade union delegates be appointed from among the candidates in occupational elections who obtain at least 10 per cent of the votes cast in the first round of the most recent elections to the works committee (section L2143-3 of the Labour Code). The complainant believes that

this requirement restricts the freedom of workers' organizations to elect their representatives freely and to organize their management and activities without intervention by the public authorities, in accordance with Article 3 of Convention No. 87. The Committee takes note of the judgement dated 20 May 2011, issued by the Metz city court (attached to the complaint), to which the complainant organization referred, regarding a case in which, despite the fact that a list of candidates for election to an enterprise committee had obtained a number of votes clearly higher than the required proportion, which is set by law at 10 per cent (17.2 per cent of the 209 votes cast by 262 employees registered), the enterprise contested the union in question's appointment of its representative on the grounds that he had not been included on the list of candidates for election chosen by the staff. The Committee notes that the court judged null and void the union's appointment of its delegate on grounds that section L2143-3 of the Labour Code must be subject to narrow interpretation in order not to allow trade unions to distort the law and appoint whoever they wish, irrespective of the votes cast by the workers. The Committee notes that, according to the complainant organization, given that the law clearly stipulates that a union delegate can only be a person who has been appointed by his or her employee peers, the court did not distinguish between, on one hand, the freedom of the union to elect its own representatives by an internal vote held among its members, and election of company committee delegates by all employees, including those who are not union members or are members of a different union. Also, the role of the union delegate responsible for representing the union within the company, particularly in the context of collective bargaining, is clearly separate from that of the staff representative in an enterprise committee, who does not have a role in collective bargaining and whose functions are related to the management of social and cultural activities and information on the economic situation of the enterprise. Furthermore, the Committee notes the concern expressed by the CGT-FO that the judgement could lead, in certain cases, a trade union to have to appoint a representative from among other candidates (including from another trade union) and, only in the absence thereof, one of its own members. Lastly, the Committee takes note of the reservation expressed by the CGT-FO regarding the other serious consequences to which that interpretation of the law could lead, as demonstrated by recent events. The complainant organization raised the issue of a union delegate who stood as a candidate in a political election acted in violation of the statutes of his union. The union in question was thus obliged to dismiss him from his union duties and replace him. The CGT-FO points out that such a situation could result in a union, which has taken a decision to ensure respect for its statutes, finding itself without legal representation for collective bargaining within the enterprise.

936. The Committee observes that the complainant organization also refers to a decision issued by the Court of Cassation, dated 29 June 2011, which uses the same reading of section L2143-3 of the Labour Code, recalling that only when a union no longer has a candidate in the enterprise or establishment who fulfils the condition of having stood for election and having received more than 10 per cent of the votes can it appoint a delegate from among the other candidates, or in the absence thereof, from among its members within the enterprise.
937. According to the complainant, the duration of the union delegates' mandate stipulated in the Act is a further restriction on trade unions' freedom of choice in managing their affairs and electing their officials. In the complainant's opinion, the four-year period stipulated in the Act is much too long for organizations deemed to be representative to be granted exclusive rights in collective bargaining, and it therefore suggests the possibility of reassessing the representativity in the enterprise before the end of that period. This possibility would serve as a guarantee offsetting the granting of exclusive collective bargaining rights.

938. *The Committee notes that the Government makes a distinction between the duration of the mandate of elected members of works committees or staff delegates and the period over which a union's voting strength in elections is measured, which is a four-year cycle at the sectoral, national and interoccupational level. Although the duration of the mandate of elected members of works committees and of staff delegates was increased to four years under Act No. 2005-882 of 2 August 2005, a sectoral agreement, group agreement or enterprise agreement, as appropriate, can determine that the mandate of staff delegates and of staff representatives on works committees (at enterprise or establishment level), central works committees and group committees may be from two to four years. To determine the representativity of trade unions at the enterprise, establishment or group level, voting strength can thus now be measured over a shorter period than four years.*
939. *The Committee notes the Government's emphasis on the fact that the maximum four-year mandate for staff representatives seemed reasonable to the social partners who signed the joint position paper since transparency regarding terms of office and continuity with respect to negotiators are needed to create high-quality social dialogue. The Committee notes the Government's view that any holding of early elections would have to be justified by objective criteria (for example, an increase or reduction in the workforce, restructuring, etc.), since a shift in the balance of power among unions would be difficult to define in objective terms. The Committee notes the indication that, among the grounds justifying such elections, the Labour Code specifies certain circumstances arising, for example, from restructuring of the enterprise or establishment (sections L2314-28 and L2324-26 of the Labour Code). Hence, even though a union can now request the opening of negotiations on this subject, the signing of any agreement depends on the unanimous consent of all the representative unions in the enterprise, along the lines of an election held to appoint additional delegates (apart from those currently holding office) to take account of any increase in the size of the workforce between two elections. The Committee notes that the Supreme Court of Appeal considered, in a ruling of 13 October 2010, that an additional election can only be held if provision is made for it through a collective agreement signed by all the unions present in the enterprise.*
940. *The Committee notes that, in the Government's view, the holding of early elections is a serious action that calls into question the mandates of the elected representatives already holding office. Allowing a single trade union acting alone to call for early elections would therefore entail a number of risks, by giving any union – especially a minority or non-representative union – such a prerogative, and would undermine the position of elected staff representatives already in office. The Government considers that failure to establish objective criteria relating to variations in the workforce or changes in the legal status of the enterprise in order to open negotiations with a view to early elections would run counter to the obligation of fairness towards the electorate, who cast their votes in the light of a given situation (especially a specific term of office determined in advance). The Government also feels that calling into question existing electoral mandates might create an unstable climate of constant campaigning for elections which would undermine the continuity required for accomplishing a mandate and distort the perspective needed for evaluating negotiated collective agreements and union action in the enterprise. Finally, the frequent calling into question of mandates would also prevent voters from evaluating in the long term whether representatives had performed their duties and discharged their mandates satisfactorily.*
941. *The Committee also notes the observations made by the CFDT, included in the Government's reply which considers that, at the time elections are held, unions and employees are aware of the duration of the mandate that will follow the elections. Interrupting the mandate before its normal expiry date would be tantamount to changing the conditions for holding the elections and calling into question the contract entered into with the voters. According to the CFDT, under the current legislation a significant change*

in the size of the enterprise or the resignation of a majority of elected representatives may lead to the holding of new elections. However, the demand of the complainant aimed at enabling a non-representative union to call for early elections would appear to be completely unjustified since this would undermine the scope and legitimacy of the election and thus weaken any union sponsoring a list of candidates.

942. *The Committee further notes the Government's statement that the right of organizations to elect representatives of their own choosing refers not to the freedom of representation of trade unions in collective negotiations but to the right to elect their leaders freely. According to the Government, the right of trade unions to conduct their activities in full freedom must therefore be interpreted as the right to engage in lawful activities in defence of their occupational interests. Hence, the condition imposed by the Act concerning the choice of union delegates from among the candidates who have gained at least 10 per cent of the votes in elections does not constitute a form of intervention that is liable to restrict or impede the lawful exercise of the right of trade unions to elect their representatives in full freedom and to organize their administration and activities, within the meaning of Article 3 of Convention No. 87. On the contrary, the purpose of this condition is to strengthen the link between workers and their representatives who have the authority to negotiate and sign collective agreements.*
943. *The Committee notes the Government's indication that collective agreements in France do not apply solely to unionized employees but grant wider benefits to all employees covered by their scope; employees in an enterprise might therefore not be acquainted with the person who had signed the agreement binding them all and who had been under no obligation to justify his actions as negotiator to them. Hence, to strengthen the position of collective bargaining and bearing in mind that the signing of an enterprise or establishment agreement by a union delegate is binding on the whole work unit, it appeared necessary to reinforce the legitimacy of the union delegates themselves.*
944. *The Committee notes that the Government bases its position on the ruling of the Supreme Court of Appeal, which states that "the obligation for representative unions, in choosing a union delegate, to give priority to the candidates who obtained at least 10 per cent of the votes cast does not conflict with any prerogatives that are inherent in freedom of association and, inasmuch as it helps to ensure that the employees themselves determine who is best equipped to defend their interests in the enterprise and to engage in negotiations on their behalf, it does not constitute arbitrary interference in the functioning of the trade union". The Government also recalls that the Constitutional Council, in a decision of 12 November 2010, confirmed that section L2143-3 of the Labour Code concerning new conditions for the appointment of union delegates is in conformity with the French Constitution. The Council considered "that, by imposing the obligation on representative unions, in choosing union delegates, to give priority to the candidates who obtained at least 10 per cent of the votes cast in the first round of the latest occupational elections, section L2143-3 involves employees in the appointment of the persons recognized as being the best equipped to defend their interests in the enterprise and engage in negotiations on their behalf; that, in adopting this section, the legislator has not disregarded the principle of freedom of association set forth in the sixth subparagraph of the Preamble of 1946".*
945. *The Committee notes the Government's view that, under the provisions of the Act, unions are totally free to choose the candidates which they wish to nominate for election and, consequently, the persons which they may subsequently appoint as union delegates. Regarding the judgment of 20 May 2011 of the Metz city court and the decision of 29 June 2011 of the Court of Cassation whereby both instances annulled, pursuant to section L2143-3 of the Labour Code, the designation of union representatives who were not chosen from candidates with at least 10 per cent of the votes cast, the Committee notes*

the Government's view that the judge rightly observed and sanctioned attitudes that had the effect of circumventing the legal requirements. The Committee also notes that with regard to the situation described by the complainant in which the latter would be forced to revoke a representative who, for example, behaved in violation of the statutes of the union, the Government considers that it is not likely to limit or impede the lawful exercise of the right of organizations to elect their representatives as it does not prevent the trade union from appointing another representative, as long as the new person meets the requirements of section L2143-3 of the Labour Code.

946. *The Committee further notes the views of the other trade unions on this matter. The Committee notes the CGT's indication, included in the Government's reply, that the organizations which signed the joint position paper considered that this did not constitute a constraint which jeopardized the freedom of unions to appoint their delegates. In the vast majority of situations – apart from certain enterprises where the level of unionization is very high and unions can avoid combining mandates for election and representation – union delegates are already likely to stand for election. In general, the CGT sees no major difference between voting strength in relation to an individual candidate and in relation to the whole list to which he belongs. Setting an individual threshold for voting strength did not therefore seem a de facto constraint on the freedom of a representative union to appoint the delegate of its choice. The Committee notes the CFDT's view, included in the Government's reply, that the freedom of appointment conferred on unions is actually considerable, especially as the vast majority of candidates put forward by a union that will be recognized as representative will generally have attained or exceeded 10 per cent of the votes. The slight constraint of appointing a person who has been a candidate simply obliges the union to think ahead regarding who it wishes to represent it when submitting the list of candidates for election. But this constraint is more than compensated for by the strengthening of the links between the employees and the union, which consolidates its legitimacy and freedom. In the CFDT's view, given that the union acts on behalf of the employees, particularly when it performs its role as negotiator, it is normal and useful for the employees to be acquainted with the person who has the authority to conclude collective agreements which concern them directly.*

947. *The Committee recalls that freedom of association implies the right of workers and employers to elect their representatives in full freedom and to organize their administration and activities without any interference by the public authorities [see **Digest**, op. cit., para. 454]. The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves [see **Digest**, op. cit., para. 391]. The public authorities should therefore refrain from any interference which might restrict the exercise of this right, whether as regards the holding of trade union elections, conditions of eligibility or the re-election or removal of representatives. Without wishing to question the legitimacy of this system for election of trade union representatives to works committees, the Committee considers that the right of workers' organizations to organize their administration and activities in accordance with Article 3 of Convention No. 87 includes the freedom for organizations recognized as representative to choose their union delegates for the purpose of collective bargaining. The Committee also considers that trade unions should have the possibility of being assisted by advisers and expects the system established on the basis of occupational elections not to exclude this possibility. In light of the above, the Committee invites the Government to consider the possibility, in consultation with the social partners in the framework of the HCDS, to revise the legislation in light of this principle.*

- 948.** *Regarding the duration of the mandate of union delegates and the frequency of the assessment of trade union voting strength, which the Act stipulates should cover a four-year cycle at the occupational branch level and national and interoccupational levels, the Committee notes that the duration of the mandate of union delegates can be shortened by agreement and that the measurement of voting strength for determining union representativity at the enterprise, establishment or group level can accordingly cover a shorter period than four years. The Committee also notes the possibilities established by the legislation in force with regard to the holding of new elections following objective changes in the size of the workforce, restructuring, etc. Moreover, the Committee duly notes the concerns expressed by the organizations which signed the joint position paper regarding the need to ensure a degree of stability in the occupational election process. However, the Committee has had occasion to underline the importance of certain guarantees being ensured in cases where representative unions are recognized as bargaining agents in a unit. The Committee invites the Government to ensure that the HCDS will review the sufficiency of the legislation in this regard within the framework of its assessment of the impact of the new legislation.*
- 949.** *As regards branch representatives of non-representative trade unions, the Committee notes that under the new Act their mandate would expire at the end of the first occupational elections to be held following their appointment since the trade unions that appoint them are not recognized as being representative within the enterprise. They can then not be reappointed as union branch representatives until six months before the next occupational elections to be held in the enterprise (section L2142-1-1 of the Labour Code). The complainant denounces the fact that the Act could prevent the establishment of a newly created trade union in an enterprise in the event of its appointing a union branch representative but failing to win enough votes in the subsequent occupational elections. Moreover, in the complainant's view, the Act's stipulation that such a representative necessarily loses his or her mandate would constitute interference in the exercise of trade union duties and violate the union's internal decision-making procedures.*
- 950.** *The Committee notes the Government's reply to the effect that the creation by law of union branch representatives is intended to permit non-representative unions which meet various conditions in enterprises with over 50 employees to establish themselves and operate in those enterprises, with an eye to the next occupational elections. The appointment of a representative can help the organization concerned to attain the threshold of 10 per cent of votes cast and thus be recognized as representative within the enterprise. The Government states that that is the objective sought by section L2142-1-1 of the Labour Code which states: "The mandate of the union branch representative expires following the first occupational elections to be held after his appointment, since the union that appointed him is not recognized as representative within the enterprise. Any employee who loses his mandate as union representative in this way may not be reappointed as a union branch representative until six months preceding the next occupational elections to be held in the enterprise".*
- 951.** *The Committee notes the Government's indication that the social partners who signed the joint position paper considered that any representative who was unsuccessful in attaining the 10 per cent threshold needed for his union to be recognized as representative would be unlikely to secure representativity for his union at the next occupational elections. It therefore seemed logical to them that another person should be appointed as union branch representative with a view to the possible formulation of a new electoral strategy. The union thus remains free to appoint a different employee as union branch representative. The Committee observes that the Government emphasizes that the Act of 20 August 2008 has introduced a measure of flexibility vis-à-vis the joint position on this precise point: the employee originally appointed may be reappointed as union branch representative as from six months prior to the subsequent occupational elections in the enterprise.*

952. *The Committee notes that the creation of a union branch representative is intended to permit unions that are not representative to establish themselves and operate in those enterprises, with an eye to the next occupational elections. Although it considers that such measures may contribute to the development of collective bargaining, the Committee is of the opinion that the choice of union branch representative, too, should respect the same principles of autonomy vis-à-vis the public authorities as are laid down in Article 3 of Convention No. 87. The Committee considers that, pursuant to Article 3 of Convention No. 87, the appointment and duration of the mandate of a union branch representative should be freely determined by the union concerned, in accordance with its constitution. The Committee considers that it is for the union to decide on the person who is best equipped to represent it within the enterprise and to defend its members in their individual claims, even when that person fails to obtain 10 per cent of the votes cast in occupational elections.*
953. *With regard to the possibility of engaging in collective bargaining, the Committee takes note of the provisions in the Act to the effect that, in enterprises with over 200 employees that have no union delegate (i.e. where there is no representative trade union), agreements may be concluded with the staff representatives or, where there are none, with an employee who has been duly mandated by a trade union which is representative at the sectoral level in enterprises where elections for staff representatives have been officially declared null and void. The Act stipulates that an agreement that has been concluded under this derogation procedure enters into force only after it has been signed by duly elected trade union officials who obtained a majority of votes cast in the most recent elections and it has been validated by a joint sectoral committee. Moreover, where there is no union delegate or where the occupational elections have been declared null and void, agreements that have been negotiated with an employee who has been mandated by a trade union which is representative within the sector must be approved by a majority of the votes cast by the employees of the enterprise concerned. The Committee notes further that, as a last resort, the Act provides for the possibility of negotiating, at the level of an enterprise with over 200 employees, with a representative of a non-representative trade union where there is no union delegate or where the elections have been declared null and void, provided that the validity of the agreement reached is confirmed by a majority vote of the employees concerned.*
954. *The Committee notes the complainant's reference to the Workers' Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), which give precedence to workers' organizations as one of the two parties to collective negotiations, referring to unorganized workers only when no such organization exists (Collective Agreements Recommendation, 1951 (No. 91)). The Committee notes the complainant's fear that the Act might have the effect of weakening the situation of trade unions in the enterprise, citing instances where it would allow elected representatives, or even employees duly mandated by representative trade unions in the sector concerned, to negotiate collective agreements even if representative unions already exist in the enterprise. The complainant considers that the validation of an agreement concluded by a union branch representative appointed by a trade union that is representative at the national and interoccupational level, as provided for in the Act, would be open to challenge from the standpoint of Convention No. 98 and of the principle laid down by the Committee on Freedom of Association to the effect that "in so far as the persons who conclude collective agreements are trade union representatives, the requirement that they be approved by an absolute majority of the workers involved may constitute an obstacle to collective bargaining which is incompatible with the provisions of Article 4 of Convention No. 98".*

955. *The Committee notes the Government's emphasis on the fact that the purpose of the Act is primarily to take on board the difficulty of engaging in collective bargaining in small and medium-sized enterprises, owing to the very limited representation of the employees. The Act broadens and identifies more clearly the framework within which collective bargaining can be undertaken with elected representatives or duly mandated employees. Under the earlier Act No. 2004-391 of 4 May 2004, which had already introduced the possibility of an extended sectoral agreement providing for collective agreements in enterprises with no union delegate to be negotiated and concluded by elected works committee members, by staff delegates or even by duly mandated employees should no representative be forthcoming from occupational elections, very few agreements were signed at the sectoral level (less than 20 in 2008). The Committee notes the observation that those who had signed the joint position considered that the requirement that there be a prior sectoral agreement might explain why negotiations of this kind never really caught on and chose to do away with the requirement for prior authorization by extended sectoral agreement while defining strictly the conditions and procedure for resorting by derogation to this kind of collective bargaining. The first condition for engaging in this type of bargaining is that there should be no union delegate in the enterprise, hence no representative trade union. In enterprises with over 200 employees that have no union delegate, agreements may be concluded with the staff representatives or, where there are none, with an employee who has been duly mandated by a trade union which is representative at the sectoral level in enterprises where elections for staff representatives have been officially declared null and void. In line with the joint position, the Act stipulates that an agreement that has been concluded under the derogation procedure enters into force only once it has been signed by duly elected trade union officials who obtained a majority of votes in the most recent elections and has been validated by a joint sectoral committee. Moreover, where there is no union delegate or where the occupational elections have been declared null and void, agreements that have been negotiated with an employee who has been mandated by a representative trade union within the sector must be approved by a majority of the votes cast by the employees of the enterprise concerned.*
956. *Finally, the Committee notes the Government's observation that the example cited by the complainant is that of a trade union that does not wish to appoint a union delegate from among those of its candidates who obtained at least 10 per cent of votes cast. If there is no union delegate, the organization can have no representative present during the negotiations, which are then liable to be blocked. If a union refuses to appoint one of its candidates who obtained more than 10 per cent in the vote, that is a sovereign decision of the organization concerned, which thus places itself in a situation where it cannot exercise the powers to which it is entitled by virtue of its representativity. When this happens, the employer still has the option of engaging in collective bargaining with elected representatives or with an employee who has been duly mandated by a trade union to negotiate an agreement that will be validated by a vote of the workforce. In the Government's opinion, such a procedure is in full conformity with the definition of collective agreements as set out in Paragraph 2(1) of ILO Recommendation No. 91. This bargaining option takes precedence over negotiations with a union branch representative (section L2143-23 of the Labour Code). Since the latter is representing a trade union that has not met the minimum requirement of 10 per cent of the votes cast by the employees, it is only logical that negotiations should only be possible when all other means of bargaining collectively have been exhausted. That is precisely the intention of the Act, which dismisses the possibility of negotiating with a union branch representative so long as a union delegate is present or there exists the option of negotiating with an elected or duly mandated employee.*
957. *While duly noting the strict conditions imposed by the Act on resorting to collective bargaining by derogation, the Committee wishes to draw the Government's attention to the need to ensure that the implementation of those provisions does not in practice lead to a*

tendency to resort more systematically to negotiating with elected or duly mandated representatives to the detriment of negotiations with union delegates.

- 958.** Furthermore, the Committee observes that the new legislation establishes new rules for validating agreements, notably by introducing an additional condition for the validation of an enterprise or establishment agreement that makes its validity dependent on its being signed by one or more trade unions which have won at least 30 per cent of the votes cast in interoccupational elections (sections L2232-2, L2232-6 and L2232-12 of the Labour Code).
- 959.** The Committee notes that the complainant organization challenges these provisions on the grounds that they are liable to give rise to situations where organizations deemed legally representative under the Act – and therefore theoretically empowered to negotiate and conclude agreements – are in practice not allowed to sign those agreements because they have not obtained 30 per cent of votes cast that are required under the Act. Moreover, the reasons given for the provision in the Act and in the application of the circular of 13 November 2009 explicitly refer to the prospect of collective agreements eventually being adopted by majority vote (50 per cent), in which case this provision of the Act relating to the validity of agreements would be even more in conflict with Convention No. 98. According to the CGT-FO, a threshold of 30 per cent, and eventually 50 per cent, in a country where the pluralism of trade unions has traditionally been the rule, would inevitably reduce the likelihood of their being validated. It contends that these provisions go against the objective of promoting the broadest possible development and utilization of voluntary collective bargaining procedures called for in Convention No. 98. In the past, there was no such requirement for validation. It was only when the option of derogating from the more favourable terms of sectoral collective agreements was introduced at the enterprise level that a procedure for validating works agreements was established in Act No. 2004-391 of 4 May 2004. However, validation was still dependent on the signatories to the sectoral agreement, whose decision was invariably taken on the basis of lack of opposition from one or more majority trade unions (with 50 per cent representativity).
- 960.** The Committee notes the Government's statement that the Act's provisions relating to the validity of agreements merely reflect the joint position of the social partners in opting for an intermediate stage before moving toward the conclusion of agreements by absolute majority – an issue that has been postponed until future negotiations. The Government goes on to mention that, in the case of enterprise, sectoral and interoccupational agreements, their validity is dependent, on the one hand, on their having been signed by one or more representative trade unions which alone or together obtained at least 30 per cent of the votes cast in the most recent occupational elections at the level concerned and, on the other, on the absence of any opposition by representative trade unions which obtained a majority of votes cast. These rules entered into force on 1 January 2009 for enterprises and will do so in 2014 for sectoral and interoccupational agreements. In conclusion, the Government states that early data available on the results of negotiations at the enterprise level suggest that there was no apparent decline in the level of collective bargaining or in the number of collective agreements concluded in 2009. On the contrary, the slight increase in the number of agreements signed in recent years appears to have continued.
- 961.** The Committee wishes in the first place to recall that, concerning specifically the question of exclusive representation in collective bargaining, systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association [see *Digest*, op. cit., para. 950]. It considers that the principle of promoting collective bargaining as laid down in Convention No. 98 is compatible with both systems, and that legislation that

sets a threshold for the validation of collective agreements goes against neither Article 4 of that Convention nor the objective of promoting the broadest possible development and utilization of voluntary collective bargaining procedures, especially if the threshold has been set in consultation with the social partners and if it is not too high.

962. *The Committee notes the Government's indication that the follow-up to the Act of 20 August 2008 complemented by the Act of 15 October 2010 (which aims to enable employees working in very small enterprises to participate in the assessment of trade union voting strength) and their implementing regulations is the subject of special attention from the Government in conjunction with all the social partners, who are closely associated with this follow-up. The Committee further notes that all draft implementing legislation arising from these Acts, including with respect to any eventual transition to the adoption of collective agreements by majority vote, must be referred to the HCDS prior to adoption. The HCDS is due to issue an opinion in 2013 on the results of the assessment of union voting strength and on any issue that may have an impact on the assessment. The HCDS is empowered to submit to the Ministry of Labour the conclusions to be drawn from the implementation of the Act and also the conclusions to be drawn from the report of Parliament which must be presented before the end of 2013 (section 16 of the Act).*

963. *The Committee invites the Government, within the framework of the HCDS set up for this purpose, to review the various points to which its attention has been drawn and to take appropriate steps should issues or obstacles affecting freedom of association and the right to collective bargaining come to light in the context of the application of the legislation. It requests the Government to keep it informed of the conclusions drawn and opinions issued by the HCDS.*

The Committee's recommendation

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

The Committee invites the Government, within the framework of the HCDS set up for this purpose, to review the various points to which its attention has been drawn and to take appropriate steps where issues or obstacles affecting freedom of association and the right to collective bargaining have been identified in the context of the application of the Act of 20 August 2008 and its implementing texts. It requests the Government to keep it informed of the conclusions drawn and opinions issued by the HCDS.

CASE NO. 2841

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

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

Allegations: The complainant organization alleges that staff in the oil sector were requisitioned on prefectural orders during industrial action in October 2010

965. The complaint is contained in a communication from the General Confederation of Labour (CGT) dated 17 February 2011.
966. The Government sent its observations in a communication dated 3 June 2011.
967. France 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), 1971.

A. The complainant's allegations

968. In a communication of 17 February 2011, the CGT alleges violations of freedom of association, and in particular the right to strike, by requisitioning orders issued by the authorities during the industrial action in October 2010.
969. The complainant organization recalls that in France in October 2010, there was a remarkable national protest against pension reform. Workers from every sector exercised their right to strike and extraordinarily large demonstrations were organized (several million people took to the streets), with massive public support. The complainant organization alleges that, in this context, the Government's attitude was irresponsible on several counts: it completely refused to negotiate with the trade union organizations; it tried to debilitate the industrial action and abused its power to requisition striking workers. According to the CGT, several prefectural authorities implemented multiple requisitions in the oil sector, which was one of those most involved in the industrial action. They issued back-to-work orders for several days before withdrawing them just before the judicial authorities ruled on their legality, in order to avoid any convictions. In the complainant's opinion, the requisitions had two objectives: maintaining economic activity by minimizing the impact of the strikes, and putting a stop to the national protests. Employees of different oil companies therefore suffered a clear violation of their right to strike. Requisitioning constitutes a very effective obstacle to exercising the right to strike, in that striking workers who are requisitioned and refuse to return to work are committing a criminal offence and are liable to six months' imprisonment and a €10,000 fine. In fact, according to the complainant, in October 2010, some 160 workers were requisitioned and received notifications from the prefect detailing the criminal sanctions to which they would be liable if they refused to return to work.
970. The complainant organization points out that, under several orders of 22 October 2010 (prefectural back-to-work orders Nos 183/DSCS/SIDPC and SIDPC 2010-303), the prefects of Yvelines and Seine-et-Marne requisitioned the majority of the striking workers at the Gargenville oil storage depot and the Grandpuits refinery. The aim of the requisitions was to restore the fuel supply in the Ile-de-France region, especially at Roissy-Charles de Gaulle airport. Faced with such a violation of their right to strike, the workers concerned and the trade union organizations tried to have the back-to-work orders suspended. French law includes a provision for an emergency procedure that enables the administrative judge to halt a serious and manifestly illegal violation of a fundamental freedom. However, invoking that procedure did not have the desired effect in so far as, by a decision of the Council of State (decision No. 343966 of 27 October 2010), the highest administrative court authority, the workers were forced to return to work. According to the CGT, the Council of State seems to have been influenced by an alarmist presentation of the facts by the Office of the Public Prosecutor. It was impossible to challenge that version because the nature of the emergency procedure does not allow for thorough investigations to be conducted. In the opinion of the CGT, the prefects, who were responsible for the requisitions, are representatives of the State. They are under the direct control of the Government, and their actions (in this case, back-to-work orders) are therefore the Government's responsibility.

971. According to the complainant organization, the conditions required under national legislation in order to implement requisitions were not respected. The complainant organization recalls that requisitions are highly regulated in French law and that, under the terms of the General Local Authorities Code (CGCT), striking workers can be requisitioned only under the following conditions: “in an emergency, when required by a real or foreseeable breach of the peace, public health, public order and public safety and when the means at the prefect’s disposal no longer allow him to pursue the objectives for which he has powers of enforcement, he may, by means of an order setting out the grounds for the decision, and for all, several or only one of the communes in the department, requisition any good or service, requisition any persons needed for that service to function or that good to be of use and prescribe all appropriate action until the breach of the peace has come to an end or the conditions to maintain public order are in place” (article L. 2215-1, paragraph 4).

The same Code also stipulates that: “The order setting out the grounds for the decision establishes the nature of the requisitioned services, the duration of the requisition and how it will be carried out.”

972. The CGT also recalls that it is clear from parliamentary debates that the legislator’s intention at that time was to provide a general tool that would enable prefects to best maintain public order. The Minister of the Interior at the time, responding to fears that prefects would be given excessively broad powers to counter the freedoms of citizens, claimed that the provision would be useful to respond to natural disasters, industrial accidents, health risks and social emergencies with exceptional material means: “This is not about giving prefects an additional power: the power of requisition already exists. It is just that it is defined in such a myriad of scattered, and somewhat ambiguous legal texts, that I wanted to put the power of requisition, which all elected officials know is crucial for expediting repayments and strengthening the State’s efficiency, on a stronger legislative footing.”

973. The CGT also recalls that domestic law provides for requisitioning for one reason only: protecting public order. Challenging the prefects’ interpretation of the law as expressed in the October 2010 prefectural orders, the complainant argues that these orders violate Conventions Nos 87 and 98, in that their only objective was to restore economic activity. The complainant quotes statements made by the Minister of the Interior, who said, “The only aim of this operation is to make the fuel stocks in this refinery available in order to meet the needs of the people of the Ile-de-France region.” The October 2010 requisitions do not comply with the definition in domestic law, let alone that of the ILO. The requisitioning of striking workers is only admissible when the strike is in an essential sector or in circumstances of the utmost gravity. The CGT points out that neither of these justifications was applicable to the October 2010 requisitions.

974. Firstly, the complainant organization considers that the requisitions affected a sector that does not fall within the definition of essential services in the strict sense of the term. The CGT recalls that the Committee on Freedom of Association has indicated that requisitions can only be implemented when work stoppages take place in essential sectors. French legislation follows the Committee’s jurisprudence in this regard in that it limits the use of requisitioning to emergency situations that undermine peace, public health, public order and public safety. It also imposes the condition that prefects must be left with insufficient means to put an end to that situation, apart from the requisitions. The CGT points out that its complaint does not refer to the legislation itself, but the Government’s abusive interpretation of it in the orders issued by the prefects. The complainant regrets that the prefects made a direct link between maintaining economic activity and the notion of public order. By making that link, the prefects depicted the disruptions, which resulted from the strike, as themselves constituting a threat to public order in sectors that are “particularly

crucial to maintaining economic activity”. According to the CGT, maintaining economic activity does not fall within the scope of public order. The complainant organization indicates that the main difficulty lies in the definition of public order, in so far as maintaining economic activity was turned into part of the public order remit.

- 975.** Moreover, the CGT regrets the fact that this abusive interpretation was validated by the Council of State in a judgement handed down on 27 October 2010. It recognized that “prefects may requisition the striking employees of a private company if its work is particularly important to maintaining economic activity, meeting the basic needs of the population or operating public services when the disturbances caused by the strike threaten public order, and the prefects may only take the necessary measures, as required by the emergency and proportionate to the requirements of public order”. The complainant notes that administrative justice therefore found requisitioning admissible for the purpose of maintaining economic activity, which is different from a situation in which it is necessary to meet the basic needs of the population or one in which the strike constituted a threat to public order. The complainant adds that it was not the administrative judge’s responsibility to determine how two fundamental freedoms – the right to strike and the freedom to do business – could coexist, but rather in this case, to decide whether exercising the right to strike, which is recognized as a fundamental freedom, undermined public safety, public health or even public order. Order relates to maintaining order on the streets and in public places, health relates to safeguarding public health, and safety relates to emergency services in case of accidents, human and natural disasters, fires, floods, armed attacks or terrorism. The complainant organization recalls that, during consideration of the draft law on requisitions, the new article L.2215-1 of the CGCT had been presented as “aiming to respond to emergency situations, such as natural disasters, or exceptional situations – industrial disasters, health risks, social emergencies – where the prefect is forced to use exceptional material means”. Noting that the grounds for some of the orders were weak, referring to disturbances, not breaches of public order, the complainant regrets that the Council of State found that mere disturbances were admissible grounds to justify requisitioning striking workers, when the law requires there to be a breach of public order. The CGT recalls that, since the very purpose of a strike is to cause a disturbance, the limitation on exercising the right to strike should be a breach of public order only, which was not the case in this instance.
- 976.** The complainant organization highlights the fact that the Committee’s jurisprudence has never included the storage, distribution, transport or transformation of fuel on its list of economic and industrial sectors that could possibly be subjected to restrictions on the exercise of the right to strike. On the contrary, the complainant recalls that the Committee has had to point out on several occasions that no restrictions could be imposed on those services without seriously violating the freedom of association guaranteed in Convention No. 87.
- 977.** The complainant recalls that the Committee on Freedom of Association has drawn up a list of services that can be considered essential and for which restrictions to the full exercise of strike action are applicable (in general, the establishment of a minimum service). The complainant notes that oil refineries and fuel production, transport and distribution, however, appear on the list of services on which no restriction to the exercise of the right to strike can be imposed. The Government should have limited the scope of the possible requisitions to the sectors identified by the Committee. But it reasoned that maintaining economic activity could also justify requisitioning. Such an abusive reading of the legal texts has enabled requisitioning to become more widespread, which constitutes a violation of freedom of association. Furthermore, the complainant considers that, by advocating the freedom to do business, the Government has exceeded its authority. Defending the freedom to do business, when the businesses in question are private companies, does not fall within the scope of public order.

- 978.** Although the complainant observes that the Committee on Freedom of Association finds requisitioning striking workers admissible when a State is facing “circumstances of the utmost gravity”, the complainant notes that there is nothing in the grounds for the prefectural back-to-work orders or the arguments the Government subsequently put forward to justify the requisitions that could be construed as “circumstances of the utmost gravity”. The workers’ strike in oil refineries in October 2010 clearly caused disruption, and the Government justified the requisitions by citing the situation at Roissy-Charles de Gaulle airport and, more generally, the situation in the Ile-de-France region. The complainant observes that, in this case, only one part of the national territory was affected by the disruption. Furthermore, the level of disruption adds nothing that would justify describing the situation last October as “circumstances of the utmost gravity”.
- 979.** In the case of Roissy-Charles de Gaulle airport, prefectural order No. SIDPC 2010-303 of 22 October 2010 cited health risks, a lack of accommodation and food, and the risk of riots. In order to explain those risks, the prefectural order merely states that the airport is a transport hub, and would therefore not be equipped to accommodate all the passengers transiting through it, in the event that air traffic was brought to a standstill. The complainant observes that the seriousness of the risks cited in the prefectural order is alarming (health risks, a lack of accommodation and food, a risk of riots ...), despite the fact that there is no evidence to justify the existence of such risks. The complainant points out that the possibility that riots might break out because of the strike should have been more thoroughly justified by the authorities. By way of comparison, when the volcano erupted in Iceland, airports were closed, a huge number of flights were cancelled and passengers who were in transit were stranded. The disruption at that time was much more serious than in October 2010 and affected the whole of Europe. However, at no time was any mention made of a risk of rioting. The same is true for the potential accommodation and food issues faced by the stranded passengers; there was no indication that such risks existed, according to the complainant. The CGT also points out that, in general, as soon as the number of passengers stranded at an airport – for whatever reason – reaches the airport capacity saturation point, the authorities are expected to take all the necessary measures to prevent more passengers from arriving.
- 980.** The complainant therefore concludes that it is difficult to see how the work stoppage by the employees of the Grandpuits and Gargenville refineries could have endangered public order, when a much bigger crisis several months earlier had no effect on public safety. The complainant also points out that, on the contrary, the huge public support for the protests against the pension reform would eliminate any such risk. The level of public support for the protest against the pension reform is undeniable and remained huge until the strikes had ended. By way of example, the complainant recalls that some 3.5 million people attended the demonstration organized on 12 October, according to the press. Similarly, the opinion polls conducted during the protests showed that the protests enjoyed strong support from the public. In a poll carried out on 15 and 16 October 2010, 71 per cent of the French stated that they supported or had sympathy with the protests against the pension reform bill. The complainant alleges that, by requisitioning the striking workers, the Government very clearly intended to hinder the continuation of the protests; the hindrance was all the more symbolic since those involved were workers at oil refineries in Ile-de-France and the refinery workers’ strike was receiving a great deal of media coverage. The Government’s aim was therefore to put an end to the strike action at the refineries.
- 981.** The complainant also alleges that the prefectural orders cited the need to guarantee that emergency vehicles could be refuelled and, more generally, the risks related to difficulties with the fuel supply in Ile-de-France, in order to justify the requisitions. The complainant alleges that the prefects implemented such an exceptional measure despite the lack of any direct or indirect breach of public order. It recalls that, in this case, public order would only have been disrupted in as far as priority vehicles (ambulances, police ...) would not have

been supplied with fuel. However, the complainant points out that the strikers themselves requested that measures be put in place to ensure that those vehicles would be refuelled. Furthermore, many service stations were still operating and prefectural decisions could have been taken to ensure they were used for refuelling those vehicles. In any case, had there been any threat to the refuelling of priority vehicles, it was the prefects' responsibility to issue the necessary orders to organize priority fuel distribution for those vehicles. The CGT notes that, by contrast, the aim of the prefectural back-to-work orders was to restore the normal fuel supply for all vehicles in the Ile-de-France region, not put an end to extremely serious circumstances.

- 982.** The complainant is also astonished that risks related to traffic congestion on the roads were invoked in order to justify the requisitions. It recalls that traffic congestion on the roads is a persistent problem in Ile-de-France. The complainant points out that extremely heavy snowfall on the roads on the night of 8 to 9 December 2010, which resulted in motorists being stranded for several hours, did not lead the authorities to implement exceptional measures, even though it was not a question of a risk of congestion, but real congestion on the roads.
- 983.** The complainant points out that there were alternatives available to requisition, but they were never considered. The complainant cites the situation in another region (Eure) where a prefectural order was issued to organize fuel distribution to priority vehicles (prefectural order No. D5/B2/10-0052 of 21 October 2010). In that case, a list of the priority vehicles was drawn up, and the modalities for the fuel distribution were established. The complainant recalls that in Ile-de-France the strikers had requested that a mechanism be put in place for refuelling emergency vehicles, but the authorities' objective was clearly to restore the fuel supply for all vehicles. The complainant recalls that, even in the case of an essential service, the Council of State has already had to sanction the authorities by suspending requisitions in the health sector owing to a lack of investigation into alternatives (decision No. 262186 of 9 December 2003). In its reasoning, the Council indicated that "by imposing such a general measure, without giving consideration to redeploying activities to other healthcare facilities or providing a limited level of service, and without investigating whether the essential needs of the population could be met in some other way, taking account of the health-care capacity in the department, the prefect had erred in law". The complainant also regrets that the Council of State concluded in its decision of 27 October 2010, that, in order to be viable, the alternatives to requisitioning would have had to prove more effective than the requisitions themselves. Furthermore, in order to justify the requisitions, the Council of State suggested that the depletion of fuel reserves constituted a threat to airline safety, because of the risk that mistakes could be made in calculating the reserves. The complainant recalls that, in this case, there was never any threat to airline security because, in the event of a fuel shortage, flights are simply cancelled.
- 984.** In conclusion, the complainant alleges that the sole objective of the requisitions in October 2010 was the total restoration of economic activity. The Government cannot deny this, in the light of comments that have revealed its determination to restore normal fuel storage and distribution services, rather than providing a minimum service. The requisitions therefore aimed, not to put an end to a crisis in an essential service, but to prevent the continuation of strike action in oil refineries that do not provide an essential service in the strict sense of the term. This political objective and the administrative measures taken by the prefects seriously violate fundamental ILO Conventions Nos 87 and 98.

B. The Government's reply

- 985.** The Government sent its observations in a communication dated 3 June 2011. Firstly, the Government recalls that, in France, 2010 was a year marked by the reform of the pension system. After the official announcement in February 2010, consultations with the social partners began in April 2010. The pension reform bill was first considered in the National Assembly on 7 September 2010 and it was finally adopted on 27 October 2010, before being promulgated by the President of the Republic. Act No. 2010-1330 of 9 November 2010 was published in the *Official Gazette* on 10 November 2010. The Government points out that the preparation of the Act met with protests throughout 2010, particularly the days of protest organized by several different professions. The prospect of Parliament adopting the Act resulted in an upsurge in protest at the beginning of October 2010. Nationwide turnout for the one-day strike on 12 October 2010 was between 1.23 million, according to the Ministry of the Interior, and 3.5 million, according to the unions. The one-day strike on 28 October 2010 was less forceful, with a turnout of between 556,000 according to the Ministry of the Interior and 2 million according to union sources. The protests continued in November.
- 986.** According to the Government, the protests took the form of strikes and blockades in companies in several sectors, including the oil sector, with mainland France's 12 oil refineries blockaded by renewable strikes. The Government explains that, faced by the risk of a national energy crisis, the authorities had to requisition striking workers in three cases: in the Grandpuits refinery (Seine-et-Marne); in the fuel depots in Donges (Loire-Atlantique); and Gargenville (Yvelines). The requisitions were decided under prefectural orders pursuant to article L. 2215-1, paragraph 4, of the CGCT (CGCT), which provided that: "in an emergency, when required by a real or foreseeable breach of the peace, public health, public order and public safety and when the means at the prefect's disposal no longer allow him to pursue the objectives for which he has powers of enforcement, he may, by means of an order setting out the grounds for the decision, and for all the communes in the department or several or one of them only, requisition any good or service, requisition all persons needed for that service to function or that good to be of use and prescribe all appropriate action until the breach of the peace has come to an end or the conditions to maintain public order are in place. The order setting out the grounds for the decision establishes the nature of the requisitioned services, the duration of the requisition measures and the modalities of its application."
- 987.** With regard to the department of Yvelines, a prefectural order of 22 October 2010 requisitioned some of the striking workers at the Gargenville fuel depot (order No. SIDPC 2010-303) for six days. The Gargenville depot supplies fuel to Roissy-Charles de Gaulle airport, which has a daily fuel consumption of 15,000 m³. At the time of the requisition, the airport was not supplied by any other source. Since the strike had lasted so long, on the day the back-to-work order was issued, the airport had fuel reserves for only three more days; supplying Roissy from Gargenville requires a minimum of three days to process and deliver the fuel needed for the aircraft. On 21 October 2010 at 6 p.m., the day before the order was issued, there were useable fuel stocks for only a few days, and a four-day period is required before each delivery is available. The process involves filling an 18,000 m³ tank, monitoring the fuel in that tank, then transferring it into a dispenser tank. According to the Government, these figures demonstrate how urgent it was to mobilize the fuel stocks that were available at the Gargenville depot.
- 988.** The Government points out that the Roissy-Charles de Gaulle hub is not equipped, should air traffic come to a halt, to host all the passengers who transit through it, since there is not enough hotel accommodation at the airport and in the surrounding area (over 5 million passengers per month and about 600,000 between Monday, 18 October and the evening of Thursday, 21 October 2010, 70 per cent in transit, without any accommodation). The

Government was therefore keen to ensure that the airport continued to provide a public service and avoid the risks of endangering public order because of a lack of hotel accommodation (particularly the risk of passengers in turmoil, with no accommodation, health risks in the event of a massive influx of passengers, given that the airport's capacity to accommodate and feed people is insufficient and the dates of the strike coincided with the beginning of the holiday period).

- 989.** Taking up the example cited by the complainant organization, the Government points out that, when flights were interrupted because of the Icelandic volcano eruption and even though European airspace was closed and there were very few passengers, the prefect for the security and safety of the Roissy-Charles de Gaulle and the Bourget airport hubs had to requisition two gymnasiums in order to accommodate the transit passengers, owing to the shortage of hotel accommodation at Roissy airport. Such a situation would have been both impossible and unacceptable with the number of travellers who normally transit through Roissy.
- 990.** The Government adds that a fuel shortage has a direct effect on airline security since companies, particularly crews, have to take account of the situation in their routing calculations, bearing in mind the available reserves. An error in calculation can result in an aeroplane in distress, or even a crash because it runs out of fuel. In that regard, even though the Directorate-General of Civil Aviation (DGAC) had sent detailed instructions to the airline companies for them to fill up with fuel outside French territory, the situation was disruptive to the internal organization of companies operating in France with the risk of human error when calculating the fuel reserves for one flight or another.
- 991.** Furthermore, the Government states that there is a need to guarantee the fuel supply for emergency vehicles, those used for home care, to deliver pharmaceutical and medical products and to maintain public order. In this respect, the Government points out that the Gargenville depot constituted a strategic delivery point for the department's service stations, particularly because the strike was affecting the other depots. The Government points out that, on the day the back-to-work order was issued for the Gargenville site, the fuel shortage in the Ile-de-France area had reached a critical point: 43 per cent of the Ile-de-France service stations had run out of fuel completely, and 29 per cent were in great difficulty, which was seriously affecting the area's public services operations. The Government states that the situation reached the stage where several public transport companies in the suburbs and refuse collection vehicles were unable to function. Basic services (emergency, rescue, home care, public order maintenance) were no longer guaranteed. The Government recalls that fuel shortages have a direct and indirect effect on traffic and road safety, as exemplified by the vehicles abandoned on the roads near the airports and the queues of tankers surrounding the fuel depots.
- 992.** The Government notes that all the reasons it has indicated led the prefect of Yvelines to take appropriate measures to contain the public order unrest that was occurring at the time and any future trouble resulting from the fuel shortage, bearing in mind that at the time the order was issued, none of the other depots in the Ile-de-France area had yet to be requisitioned. The back-to-work order was therefore well within the scope of article L. 2215-1, paragraph 4, of the CGCT, as the Versailles urgent applications judge has acknowledged, as have the urgent applications judges in Nantes (orders of 22 and 25 October 2010-PJ 2 and 3), and Melun (orders of 22 and 25 October 2010-PJ 4 and 5).
- 993.** The Government emphasizes that, having examined the basis of article L. 521-2 of the Administrative Code of Justice – which enables administrative judges to make urgent, provisional rulings and order any measure necessary to protect a fundamental freedom faced with a serious and manifestly illegal violation by the authorities – the urgent applications judge at the Versailles administrative court rejected the applicants' appeal in

an order of 23 October 2010. He ruled that, while taking account of the fact that the disputed requisition constituted a limitation to the exercise of the right to strike, which is a fundamental freedom, the back-to-work order was not manifestly illegal. The applicants appealed this decision before the urgent applications judge of the Council of State. He reviewed the extent to which the requisition was in conformity with the principles of necessity and proportionality and noted the absence of alternative solutions that were available immediately and would have been equally effective, then confirmed the refusal to suspend the requisition.

994. With regard to the department of Seine-et-Marne, the Government indicates that the prefect issued a series of back-to-work orders for workers at the Total refinery in Grandpuits on 17 October 2010 in order to ensure security at the refinery and during deliveries (prefectural orders Nos 138/DSCS/SIDPC to 170/DSCS/SIDPC of 17 October 2010 concerning requisition of services). The Grandpuits refinery supplies several distribution points in Ile-de-France and Seine-et-Marne. The fact that production had stopped in several refineries for over a week had prevented deliveries to service stations, and a number of them had completely run out of fuel or were in great difficulty. It was therefore necessary to guarantee the fuel supply for emergency vehicles, those used for home care, to deliver pharmaceutical and medical products and to maintain public order. Public transport was no longer operating. According to the Government, the situation was likely to give rise to serious public order disturbances (queues causing traffic problems, tension at service stations) and, given that there was a nationwide shortage, no other supply sources in the department could be mobilized quickly. The Government points out that the back-to-work orders were withdrawn the following day under a prefectural order (prefectural order No. 182/DSCS/SIDPC concerning the withdrawal of prefectural orders).

995. The Government explains that a new prefectural order was issued on 22 October (prefectural order No. 183/DSCS/SIDPC), but was suspended the same day by the Melun administrative court in Seine-et-Marne. In this case, the judge considered that the order “was a serious and manifestly illegal violation of the right to strike and its implementation must therefore be suspended”. The judge reproached the prefect of Seine-et-Marne for having “requisitioned nearly the entire staff of the refinery, resulting in almost normal service, rather than the minimum service required to ensure public order and safety” (Melun administrative court, 25 October 2010, *CGT et al. v. The Prefect of Seine-et-Marne*, urgent application). New prefectural orders were issued on 22 October (prefectural order No. 185/DSCS/SIDPC), 23 October (prefectural order No. 186/DSCS/SIDPC), 24 October (prefectural order No. 187/DSCS/SIDPC) and 26 October (prefectural order No. 188/DSCS/SIDPC). The urgent application filed against the order of 24 October was rejected by the Melun administrative court on 25 October. According to the judgement, the strike, which had been under way since 12 October 2010, was seriously compromising petrol supplies for emergency services vehicles. It was not apparent from the judgement that the prefect had any other means of obtaining the desired result, and only 14 workers out of the approximately 170 concerned were requisitioned, without any allegations that the number was excessive in relation to the tasks that needed to be performed. The judge concluded that the prefectural order did not seem disproportionate to the extent that it constituted a grave and clearly illegal violation of the right to strike (Melun administrative court, urgent application, 25 October 2010).

996. Furthermore, the Government points out that, on 22 October 2010 in the Loire-Atlantique region, the Nantes administrative court rejected the urgent application filed by four workers from the Donges-Melun-Metz (SFDM) depot in Donges contesting the back-to-work order issued by the prefect, which they claim violated their right to strike. The judges considered that: “by issuing back-to-work orders for only four workers and by putting the contested provision in place, the intention and effect of which were not to ensure that the depot functioned normally but rather to prevent serious disruption to the provision of

energy throughout the country, the prefect of Loire-Atlantique did not disproportionately threaten the right to strike, given the urgent needs that had to be met in western France” (Nantes administrative court, 22 October 2010, No. 1007766).

997. According to the Government, the context in which the prefect issued the requisitioning orders was cited as a reminder of the scale of the blockades in the oil sector, where the strike, which began on 12 October 2010, continued in ten out of 12 refineries from 14 October and would affect all refineries by 25 October. Many fuel depots and oil terminals were blocked from 12 October. In that regard, the Government specifies that an inter-ministerial crisis unit to ensure “sustainable petrol restocking” was established on 11 October and became active on 18 October 2010.
998. The prefectural orders requisitioning the striking workers were issued in an emergency situation, in which there was a widespread and sustainable blockade to fuel provisions. The first requisition orders were issued five days after the refinery blockades had begun in the case of the Grandpuits refinery in Seine-et-Marne, and more than a week later in the case of the fuel depots in Gargenville in Yvelines and Donges in the Loire-Atlantique region. According to the Government, those back-to-work orders were issued to keep public order, which was being threatened by the scale and persistence of the blockades of oil depots and refineries. The orders, by choice, only requisitioned a limited number of workers and were intended not to cause an excessive threat to the right to strike.
999. Regarding the analysis of the prefectural orders to establish whether or not they were in line with domestic law and with regard to ILO Conventions, the Government points out that the latter respond to the requirements set by article L. 2215-1, paragraph 4, of the CGCT. They are therefore in line with domestic law and respect the principles enshrined in Conventions Nos 87 and 98 with regard to freedom of association and collective bargaining. The Government recalls that in France the right to requisition workers is only allowed in exceptional circumstances, in the event of an actual or potential disturbance of public order. It also respects, *de facto*, the right to strike and to freedom of association, in accordance with the recommendations of the Committee on Freedom of Association which grant recourse to requisition in the most serious circumstances, or for essential services.
1000. Regarding the interpretation of French law on the issue of requisition, the Government points out that, contrary to the allegations made by the CGT, which state that the requisition orders of October 2010 were issued on the basis of a misinterpretation of French law, including through establishing a direct connection between maintaining economic activity and the notion of public order, the prefectural requisition orders expressly focused on public order, with particular emphasis on re-establishing the provision of fuel for care and security vehicles. In that regard the Government recalls that article L. 2215-1, paragraph 4, of the CGCT is the legal basis for the right to prefectural requisition in France, which defines the notion of public order as “in an emergency, when required by a real or foreseeable breach of the peace, public health, public order and public safety ... the prefect ... may, by means of an order setting out the grounds for the decision ..., requisition any good or service, requisition any persons needed for that service to function or for that good to be of use ...”. Requisition is therefore connected with public order, including public safety, peace and security. French jurisprudence sets out the conditions for implementing a prefectural requisition as a means of maintaining public order. The National Council also considered that “while the prefect, under his or her authority as provided for under article 2215-1, paragraph 4 of the CGCT, can legally requisition striking workers He or she can only take the measures necessary in an emergency and proportionate to the needs of public order, including public health requirements” (National Council, 9 December 2003, No. 262186).

- 1001.** According to the Government, the examination of prefectural orders shows that their primary focus was on maintaining public order, and in particular preventing threats to public safety and security. They are therefore not intended to maintain economic activity, as the complainant organization states. The decisions issued by administrative judges, on urgent petitions, support that conclusion. In this regard, the Melun administrative court based its decision to reject the petition to suspend the implementation of the order issued on 24 October 2010, recalling that “the strikes by fuel refinery and depot workers in France, and particularly the strike affecting the Total depot at Grandpuits in Seine-et-Marne ... are seriously compromising the provision of fuel for emergency services vehicles” and “the wording of the order itself states that the measures it provides for are intended solely to ensure the provision of that fuel as a matter of priority, with no other fuel production or distribution”.
- 1002.** The Government adds that the examination of prefectural orders and decisions issued by the administrative judge also serve to show that the requisitioning orders have an intentionally limited scope in terms of the duties that the requisitioned workers are required to perform. These administrative measures are therefore not intended to resume normal functions at the oil sites in order to maintain economic activity, as the complainant would suggest. Intentional limits on the tasks that the requisitioned workers are asked to perform are specifically mentioned in the order issued by the prefect of Seine-et-Marne, No. 187/DSCS/SIDPC, which states that: “the requisitions are not intended for the production of new crude oil products, but rather the use of the refinery’s existing stocks”. Order No. 188/DSCS/SIDPC issued by the prefect of Seine-et-Marne is just as specific, stating that: “the scope of the requisitions is not intended for the production of new crude oil products, but rather to receive diesel from the enterprise SFDM by pipeline, stock it and mix it”. In that regard, the administrative judge also checked the legality of the prefectural requisition orders by measuring the importance of the tasks to be fulfilled by the requisitioned workers. The administrative court of Nantes thus considered that the requisition of workers from the Donges depot was not intended to ensure business as usual at the site. On the contrary, the Nantes administrative court suspended the order issued on 22 October 2010 by the prefect of Seine-et-Marne, No. 183/DCSC/SIDPC, on grounds that “by requisitioning almost all the staff of the Total refinery at Grandpuits ... the order resulted in the resumption of almost normal service, rather than the minimum service required to ensure public order and safety”.
- 1003.** The Government also emphasizes that the prefectural orders being contested only ordered the requisition of a limited number of refinery staff. In this regard, the orders specifically stated that the limited number of persons requisitioned responded to the strict need to re-establish public order and did not constitute an excessive restriction to the right to strike. By way of an example, the Government refers to order No. 187/DSCS/SIDPC issued by the prefect of Seine-et-Marne, requisitioning staff of the Total refinery in Grandpuits, which requisitioned seven workers per watch team, whereas a normal service for the production and dispatch of super unleaded 95, super unleaded 98 and diesel generally requires three 14-person teams working in eight-hour shifts. In reality, this order requisitioned 23 of the 400 workers employed by the refinery. Similarly, the order issued by the prefect in Yvelines, No. SIDPC 2010-303, dated 22 October 2010 ordering the requisition of workers of the Gargenville oil depot, called for three workers per watch team, which was equivalent to “14 per cent of the total staff of the site”. In Loire-Atlantique the prefectural requisitions pertained to four workers, while the SFDM site in Donges has a total of more than 30 employees.
- 1004.** The Government points out that the orders also respected the principle of proportionality with regard to the duration of requisitions. In that regard, the order issued by the prefect of Yvelines, No. SIDPC 2010-303, dated 22 October 2010, is “binding for a period of six days, from the day of issuance” (article 2), the order issued by the prefect of Seine-et-

Marne, No. 187/DSCS/SIDPC, dated 24 October 2010, is “binding from Monday, 25 October 2010 at 6 a.m. until Tuesday, 26 October at 10 p.m.” (article 2), and the final requisition order, No. 188/DSCS/SIDPC, issued by the prefect of Seine-et-Marne is “binding from Tuesday, 26 October 2010 at 3.30 p.m. until Friday, 29 October 2010 at 10 p.m.” (article 2).

- 1005.** Regarding the reference to the notion of essential services, in the strict sense of the term, as it appears in recommendations issued by the Committee on Freedom of Association, the Government takes note of the fact that, according to the *Digest of decisions and principles of the Freedom of Association Committee*, the right to strike can be restricted or even prohibited ... in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. It also notes that the Committee suggests two lists, one of services that can be considered essential, and the other of services that are not essential services in the strict sense of the term, which includes oil facilities, and the production, transportation and distribution of fuels. Lastly, it points out that the Committee stipulates that the notion of “essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.”
- 1006.** In the Government’s opinion, the concept of “essential services” should not be applied during labour disputes without considering the impact of the strike on the life and personal safety or health of all or part of the population. According to the Government, therefore, the prefectural requisition orders issued in October 2010 respect the recommendations made by the Committee, since the total and prolonged stoppage of work in the oil sector caused disturbances to the refuelling of security and emergency services vehicles, which are “essential services” in the strict sense of the term, resulting in a risk to the security and health of part of the population. The statement made by the CGT that oil facilities are not included on the list of “essential services” is not sufficient grounds on which to deem the requisitions illegal. The Government also emphasizes that a week after the strike began, the National Union of Nurses (SNIIL) stated that, “in at least 17 departments the provision of patient care at home could no longer be guaranteed”.
- 1007.** Moreover, the Government observes that the Committee pointed out that “whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation”. The Government considers that the oil sector, while not an “essential service” in the strict sense of the term, is, however, an important sector of the economy. In that regard, the prefectural requisition orders issued in October 2010 in respect of that important sector, owing to the risks that the blockades would incur for “essential sectors” in the strict sense of the term, fell well within the context defined by the Committee.
- 1008.** Describing the context of October 2010 as “circumstances of the utmost gravity”, the Government observes that the complainant bases its argument on the situations at Roissy-Charles de Gaulle Airport and in the Ile-de-France region, which played a significant role in motivating the prefect of Yvelines to issue back-to-work order No. 2010-303, requisitioning striking workers from the Gargenville refinery. The complainant considers that the context could not be categorized as “circumstances of the utmost gravity”, which would have justified the requisition of striking workers. The Government recalls that the Committee on Freedom of Association considered that “the use of the military and requisitioning orders to break a strike over occupational claims, unless these actions aim at

maintaining essential services in circumstances of the utmost gravity, constitutes a serious violation of freedom of association”. The Government states that the prefectural requisition orders issued in October 2010 were not intended to break the strike. All of the back-to-work orders were of limited duration, and intentionally restricted the number of workers they requisitioned, not all of whom were even striking. In reality, the prefectural requisition orders only applied to a limited number of oil sites: of the 12 refineries in France only two received requisition orders, which were of a limited scope. It is therefore difficult to believe that these requisitions broke the entire strike, which was also being held at other oil sites.

- 1009.** Regarding the complainant organization’s opinion that the “risk of riots” at Roissy-Charles de Gaulle airport was unfounded, that the refuelling of priority vehicles was not under threat and that the risk of the main roads in the region becoming congested owing to problems of fuel supplies in service stations was not manifest, the Government states that the prefectural requisition orders were issued in anticipation of the risk of a threat to public order, as provided for under article L. 2215-1, paragraph 4, of the CGCT, with the aim of reducing potential difficulties caused by widespread and sustained blockade of the country’s oil sites. Action in anticipation of threats to public order precludes an a posteriori evaluation of the degree of unrest that the strikes and blockades could have caused, since its very aim is to prevent that unrest. It is therefore unjustified to compare unforeseen situations that have had specific and unpreventable consequences, with the repercussions of the strikes in the oil sector, the consequences of which were prevented by the issuing of prefectural requisitioning orders.
- 1010.** Regarding the complainant’s allegations that the Government did not seek alternatives to requisition, particularly the requisition order issued by the prefect of Yvelines, No. 2010-303, which did not provide for alternative measures like those taken in the department of Eure, where a list of priority vehicles was drawn up, the Government points out that the order in question was not a proper alternative, since it prioritized access to fuel, rather than the restocking of fuel distribution points. The Government also states that the widespread and sustained blockade restricted the prefects’ opportunities to put alternative measures to requisitions in place. Furthermore, the Government stipulates that the prefectural requisition orders issued in October 2010 specifically mentioned efforts to seek alternative solutions to requisition to ensure refuelling and referred to the fact that a widespread and sustained blockade of the oil sites concerned was unacceptable. In that regard, the orders were strictly in line with article L. 2215-1, paragraph 4, of the CGCT, pursuant to which “... when ... the means at the prefect’s disposal no longer allow him to pursue the objectives for which he has powers of enforcement, he may, by means of an order setting out the grounds for the decision requisition any good or service ...”. The Government thus recalls that order No. SIDPC 2010-303 of 22 October 2010, issued by the prefect of Yvelines, justifies the requisition of workers at the Gargenville site by stating that “the strike is affecting other depots”. Similarly, the Seine-et-Marne prefectural order No. 187/DSCS/SIDPC, dated 24 October 2010, observes that “ceasing production in several refineries in France for more than a week is preventing fuel supplies from reaching service stations, many of which are currently completely out of stock while others are running very low; given the latent shortage across the country no other source of fuel supply can be mobilized quickly in the department”.
- 1011.** The Government adds that the administrative judge sought alternative measures. By way of example, the Government refers to the Nantes administrative court, which evaluated the legality of the prefectural order requisitioning workers from the Donges fuel depot, noting that the prefect did not have any alternative solutions: “the plea that the prefect of Loire-Atlantique should have, prior to issuing the requisition order under dispute, ordered the requisition of the aforementioned stations and put other measures in place to enable litigious requisition can only be dismissed, given the shortages that the prefectural

authorities were faced with, owing to consumer trends” (Nantes administrative court, judgement dated 22 October 2010).

- 1012.** The Government states that the national movement against pension reform continued into the month of November, with days of inter-professional action organized on 6 and 23 November, and with strikes and blockades in several other economic sectors. The drop in mobilization resulted more from the adoption of the pension reform law and its publication on 10 November 2010, than on requisition orders issued in the oil sector in October.
- 1013.** Given the explanations provided, the Government states that it is neither demonstrated nor proven that the prefectural requisition orders issued against striking workers in the oil sector during the industrial action in October 2010 against pension reform infringe the provisions of ILO Conventions Nos 87 and 98, to which France is party.

C. The Committee’s conclusions

- 1014.** *The Committee notes that the complaint submitted by the CGT denounces the requisition of staff in the oil sector during a strike in October 2010.*
- 1015.** *The Committee notes that, according to the information provided by the complainant organization and the Government, there was a considerable national movement in France during 2010, in protest against pension system reform. The reform, which was announced in February 2010, was the subject of consultations between the social partners, which began in April 2010, and a pension reform bill, which was presented to the National Assembly on 7 September 2010: the bill was adopted on 27 October 2010, enacted as Act No. 2010-1330 of 9 November 2010, and published in the Official Gazette on 10 November 2010. The Committee observes that the drafting of the Act had met with protest throughout 2010, culminating in the organization of days of inter-professional action, which increased nearer the time of the adoption of the bill by parliamentarians in October 2010. Nationwide turnout for the one-day strike on 12 October 2010 was between 1.23 million, according to the Ministry of the Interior, and 3.5 million, according to the unions. The Committee notes that the protest movement was joined by all sectors, and received large-scale public support.*
- 1016.** *The Committee notes the allegation that, when faced with workers who were exercising their right to strike during the days of industrial action, the Government’s attitude was irresponsible on several counts: it refused to enter into any negotiations with trade union organizations; it tried to weaken the industrial action; and it abused its power to requisition striking workers, particularly in the oil sector, one of the most active sectors in the protests. The Committee points out that, according to the complainant, the requisitions had two objectives: maintaining economic activity by minimizing the impact of the strikes, and putting a stop to the national protests.*
- 1017.** *The Committee notes the complainant organization’s statement that, through a number of orders, including orders Nos 183/DSCS/SIDPC and SIDPC 2010-303 of 22 October 2010, the prefects of Yvelines and Seine-et-Marne ordered the requisition of most of the striking workers from the fuel depot in Gargenville and the Grandpuits refinery. According to the complainant organization, those requisitions were intended to ensure the fuel restocking in the Ile-de-France region and, more specifically, at Roissy-Charles de Gaulle airport.*
- 1018.** *The Committee notes the statement that the workers concerned, as well as the trade unions, tried to obtain, through an urgent application to the administrative judge, the suspension of the requisition orders, which, they said, constituted violations of their right to strike. The Committee notes that the administrative judge and, in particular, the highest*

administrative legal authority, through order No. 343966 issued on 27 October 2010, did not grant that appeal and forced the workers to return to work. According to the CGT, the Council of State seems to have been influenced by an alarmist presentation of the facts by the Office of the Public Prosecutor, which could not be contested since the urgent application procedure does not allow for a thorough investigation to be conducted.

- 1019.** *The Committee notes that, according to the complainant, the conditions set in national law for the issuing of requisitions were not respected. The complainant recalls that requisitions are highly regulated in French law and that, under the terms of the CGCT, the law applicable under these circumstances, striking workers can be requisitioned only under the following conditions: “in an emergency, when required by a real or foreseeable breach of the peace, public health, public order and public safety and when the means at the prefect’s disposal no longer allow him to pursue the objectives for which he has powers of enforcement, he may, by means of an order setting out the grounds for the decision, and for all, several or only one of the communes in the department, requisition any good or service, requisition all persons needed for that service to function or that good to be of use and prescribe all appropriate action until the breach of the peace has come to an end or the conditions to maintain public order are in place” (article L. 2215-1, paragraph 4). The Code also stipulates that: “the order setting out the grounds for the decision establishes the nature of the requisitioned services, the duration of the requisition and how it will be carried out”. In this regard, the Committee notes that, in the opinion of the complainant, national law provides for requisitions with one singular aim: to protect public order.*
- 1020.** *The Committee notes that the complainant challenges the prefects’ interpretation of the law as expressed in the October 2010 prefectural orders, and that it states that those orders violated Conventions Nos 87 and 98 in that their only objective was to restore economic activity. The Committee observes that the complainant reports that statements were made by the Minister of the Interior, who said, “the only aim of this operation is to make the fuel stocks in this refinery available in order to meet the needs of the people of the Ile-de-France region”.*
- 1021.** *The Committee notes furthermore that, according to the complainant, the requisitions affected a sector that does not fall within the definition of essential services in the strict sense of the term, and in which a requisition would be ordered when there was not a public order emergency. In this regard, the complainant organization points out that French legislation is in line with the Committee’s jurisprudence, in that it prescribes the use of requisitions in emergencies where there is a breach of the peace, where public safety, peace and security are threatened, and on the condition that the prefects have no means at their disposal, other than requisition, to bring an end to that threat.*
- 1022.** *The Committee notes that the complainant does not take issue with the domestic laws per se, but rather with the Government’s misinterpretation thereof, which is manifested in the orders issued by the prefects. According to the complainant, the prefectural orders were in fact issued to meet concerns about maintaining economic activity in the region, which is not the same as a situation in which it is necessary to meet the basic needs of the people, or one in which a strike constitutes a threat to public order. The complainant regrets that the prefects established a direct link between maintaining economic activity and the notion of public order. The prefects presented the disruptions arising as a result of the strike as constituting a threat to public order in sectors that are “particularly important for maintaining economic activity”. Furthermore, according to the CGT, maintaining economic activity does not fall within the scope of public order. The complainant points out that the main problem lies in the definition of public order, and in the understanding of maintaining economic activity as an issue of public order.*

- 1023.** *The Committee notes that the complainant regrets the fact that this misinterpretation was validated by the judicial authorities, including the Council of State, which recognized, in order No. 343966, issued on 27 October 2010, that “the prefect may requisition striking workers from a private enterprise the activities of which are particularly important for maintaining economic activity, meeting the basic needs of the population, or ensuring the function of public services during disturbances resulting from the strike, which present a threat to public order. He may only take measures that are necessary, required by the emergency situation and proportionate to the requirements of public order”. The Committee notes that, according to the CGT, given that the very purpose of a strike is to create a disturbance, restrictions should only be imposed when there is a threat to public order, which was not the case in this instance. The Committee also notes the CGT’s opinion that it is not for the administrative judge to decide how two fundamental freedoms – the right to strike and the freedom to do business – could coexist, but rather, in this case, to determine whether exercising the right to strike, which is recognized as a fundamental freedom, was threatening public security, safety or peace.*
- 1024.** *The Committee notes that, while it admits that the October 2010 strikes clearly resulted in disturbances, the complainant nevertheless points out that the Government used the situation at Roissy-Charles de Gaulle airport, and more generally the situation in the Ile-de-France region, to justify its requisition measures in various fuel depots and oil refineries. The complainant also emphasizes that, in this instance, only part of the national territory was affected by the disturbances and that, furthermore, the impact of those disturbances could not be defined as “circumstances of the utmost gravity”, allowing for requisitions.*
- 1025.** *The Committee notes the statement, according to which, prefectural requisition order No. SIDPC 2010-303, dated 22 October 2010, described the situation at Roissy-Charles de Gaulle airport as posing risks to public security, lack of accommodation and food, and a risk of riots. The complainant expresses surprise that although the order cites such alarming risks, it merely states that the airport is a transport hub, and would therefore not be equipped to accommodate all the passengers transiting through it, in the event that air traffic was brought to a standstill. The complainant emphasizes that there is no evidence of the existence of such risks, and refers to the eruption of the volcano in Iceland as an example of a situation in which several European airports closed, a large number of flights were cancelled and transiting passengers remained stranded. These disturbances were considerably greater than those in October 2010; however, at no point was there ever a threat of rioting, and potential accommodation and food shortages for stranded passengers were never mentioned. It is therefore difficult to see how a strike by workers from Grandpuits and Gargenville could endanger public order, while a much greater crisis a few months earlier had no effect on public security whatsoever.*
- 1026.** *The Committee notes that the complainant also denounces the fact that the prefectural orders invoked the need to guarantee refuelling for emergency services vehicles and, more generally, the risks connected with fuel supply problems in Ile-de-France, to justify the requisitions. According to the CGT, the prefects invoked that exceptional measure despite the lack of any direct or indirect threat to public order, since, in this particular case, there was no evidence that priority vehicles (ambulances, police cars ...) would not have been supplied with fuel, particularly since the strikers themselves had requested that measures be taken to ensure those vehicles were refuelled. The Committee notes that, according to the CGT, many service stations were still operating, and prefectural orders could have been issued to ensure that fuel was supplied for those vehicles. In any case, the prefectural requisitioning orders were issued with the intention of restoring a normal fuel supply for all vehicles in Ile-de-France, rather than putting an end to an extremely serious situation.*

- 1027.** *The Committee notes the statement that alternatives to requisition were available, but were never considered by the Government. As an example, the complainant refers to the situation in another region (Eure), where a prefectural order was issued to ensure that fuel was distributed among priority vehicles. The complainant denounces the fact that by requisitioning striking workers, the Government very clearly impeded large-scale industrial action, which was made even more significant by the fact that this refers to workers from oil facilities in Ile-de-France and that the refinery worker strikes received considerable media coverage. The Government's intention, therefore, according to the CGT, was simply to put a stop to the strikes in the refineries.*
- 1028.** *The Committee observes that, from its point of view, the Government rejects the allegations made by the complainant, according to which the requisition orders issued in October 2010 were based on a misinterpretation of French law, particularly in that they established a direct link between maintaining economic activity and the notion of public order. According to the Government, the prefectural requisition orders were specifically intended to ensure that public order was maintained, particularly through the resumption of fuel provision for care and security vehicles. In that regard, the Government confirms that article L. 2215-1, paragraph 4, of the CGCT constitutes the legal basis for prefectural requisition in France, and defines the notion of public order. The Committee notes that requisition aims to maintain public order, including public safety, peace and security. Furthermore, the administrative judge stipulated the conditions for applying a prefectural requisition order to maintain public order, stating that "while the prefect, in the context of the authority granted him under article L. 2215-1, paragraph 4, of the CGCT can legally requisition striking workers ... he can only take the measures necessary in an emergency and proportionate to the needs of public order, including public health requirements" (order No. 262186 of the Council of State, dated 9 December 2003).*
- 1029.** *The Committee notes that, according to the Government, the examination of the prefectural orders shows that they were intended to maintain public order, including the prevention of threats to public safety and security. The decisions issued by administrative courts, in urgent applications, supported that analysis. In that regard, the Committee observes that the administrative court of Melun decided to reject the request for the suspension of the prefectural order of 24 October 2010, recalling that "the strikes by fuel refinery and depot workers in France, and particularly the strike affecting the Total depot at Grandpuits in Seine-et-Marne ... are seriously compromising the provision of fuel for emergency services vehicles" and "the wording of the order itself states that the measures it provides for are intended solely to ensure the provision of that fuel as a matter of priority, with no other fuel production or distribution".*
- 1030.** *Moreover, the Committee notes that the examination of the prefectural orders and administrative court decisions also shows that the requisitions had a limited scope in terms of the duties that the requisitioned workers were required to perform. Those administrative measures were therefore not intended to resume normal functions at the oil sites. Intentional limits on the types of duties that requisitioned workers were asked to perform were specifically mentioned in order No. 187/DSCS/SIDPC issued by the prefect of Seine-et-Marne: "the requisition is not intended for the production of new crude oil products, but rather for the use of the refinery's existing stocks". Order No. 188/DSCS/SIDPC issued by the prefect of Seine-et-Marne is just as specific: "the requisitions are not intended for the production of new crude oil products, but only to receive diesel from the enterprise SFDM by pipeline, stock it and mix it". The Committee notes that both the complainant and the Government refer to the assessment made by the administrative judge during the examination of how important the tasks were that workers were requisitioned to fulfil. They both referred to the decision by the Nantes administrative court to suspend order No. 183/DCSC/SIDPC of 22 October 2010, issued by the prefect of Seine-et-Marne, on grounds that, "by requisitioning almost all the staff of the Total refinery at Grandpuits ...*

the order resulted in the resumption of almost normal services, rather than the minimum service required to ensure public order and safety”.

- 1031.** *The Committee also notes that the other prefectural orders being contested only ordered the requisition of a limited number of refinery staff. In that regard, the orders specifically stated that the limited number of persons requisitioned responded to the strict need to re-establish public order and did not constitute an excessive restriction to the right to strike. Order No. 187/DSCS/SIDPC issued by the prefect of Seine-et-Marne, on the requisition of staff of the Total refinery in Grandpuits, requisitioned seven workers per watch team, whereas normal service for the production and dispatch of super unleaded 95, super unleaded 98 and diesel comprises three teams of 14, working in eight-hour shifts. The Committee notes that, according to the Government, that prefectural order resulted in the requisition of 23 of the 400 workers employed by the refinery. Moreover, according to the Government, order No. SIDPC 2010-303 issued on 22 October 2010 by the prefect of Yvelines on the requisition of workers of the Gargenville oil depot requisitioned three workers per watch team, which was equivalent to “14 per cent of the total staff of the site”. Lastly, in Loire-Atlantique, the prefectural requisitions pertained to four workers, while the SFDM site in Donges has a total of more than 30 employees.*
- 1032.** *The Committee also notes the statement according to which the orders respected the principle of proportionality with regard to the duration of the requisitions. In that regard, the order issued by the prefect of Yvelines, No. SIDPC 2010-303, dated 22 October 2010, is “binding for a period of six days, from the day of issuance” (article 2), the order issued by the prefect of Seine-et-Marne, No. 187/DSCS/SIDPC, dated 24 October 2010, is “binding from Monday, 25 October 2010 at 6 a.m. until Tuesday, 26 October at 10 p.m.” (article 2), and the final requisition order, No. 188/DSCS/SIDPC, issued by the prefect of Seine-et-Marne is “binding from Tuesday, 26 October 2010 at 3.30 p.m. until Friday, 29 October 2010 at 10 p.m.” (article 2).*
- 1033.** *The Committee notes that, in the Government’s opinion, the concept of “essential services” should not be applied in labour disputes without considering the impact of the strike on the life and personal safety or health of all or part of the population. According to the Government, therefore, the prefectural requisition orders issued in October 2010 respect the recommendations made by the Freedom of Association Committee, since the total and prolonged stoppage of work in the oil sector caused disturbances to the refuelling of security and emergency services vehicles, which are “essential services” in the strict sense of the term, resulting in a risk to the security and health of part of the population. The Government points out that stating that oil facilities are not included on the list of “essential services” is not sufficient grounds to deem the requisitions illegal.*
- 1034.** *Regarding the description of the context of October 2010 as “circumstances of the utmost gravity”, the Government observes that the complainant organization bases its argument on the situations at Roissy-Charles de Gaulle airport and in the Ile-de-France region, which played a significant role in motivating the prefect of Yvelines to issue back-to-work order No. 2010-303, requisitioning striking workers from the Gargenville refinery. The Government points out that, in reality, the prefectural requisition orders only applied to a limited number of oil sites. Thus, of the 12 refineries in France, only two were the subject of received requisition orders of limited scope. It therefore seems difficult for the Government to believe that those requisitions broke the entire strike, which was also being held at other oil sites. The Committee notes, regarding the complainant organization’s opinion that the “risk of riots” at Roissy-Charles de Gaulle airport was unfounded, that the refuelling of priority vehicles was not under threat, and that the risk of the main roads in the region becoming congested owing to problems of fuel supplies in service stations was not manifest, that the Government considers that the prefectural requisition orders were issued in anticipation of the risk of a threat to public order, as provided for under*

article L. 2215-1, paragraph 4, of the CGCT, with the aim of reducing potential difficulties caused by widespread and sustained blockade of the country's oil sites. The Government adds that the anticipation of threats to public order precludes an a posteriori evaluation of the degree of unrest that the strikes and blockades could have caused, since its very aim is to prevent that unrest. The Government therefore considers that it is therefore unjustified to compare unforeseen situations that have had specific and unpreventable consequences, with the repercussions of the strikes in the oil sector, the consequences of which were prevented by the issuing of prefectural requisition orders.

1035. *The Committee observes that, with regard to the complainant's allegations that the Government did not seek alternatives to requisition, particularly in the case of order No. 2010-303 issued by the prefect of Yvelines, which did not provide for alternative measures like those taken in the department of Eure, where a list of priority vehicles was drawn up, the Government points out that the order in question was not a proper alternative, since it prioritized access to fuel, rather than the restocking of fuel distribution points. Moreover, the Government states that the widespread and sustained blockade had restricted prefects' opportunities to put alternative measures to requisition in place. Furthermore, the Committee notes the Government's stipulation that the prefectural requisition orders issued in October 2010 specifically mentioned efforts to seek alternative solutions to requisition to ensure refuelling, and referred to the fact that a widespread and sustained blockade of the oil sites concerned was unacceptable. In that regard, the orders were strictly in line with article L. 2215-1, paragraph 4, of the CGCT, pursuant to which: "... when ... the means at the prefect's disposal no longer allow him to pursue the objectives for which he has powers of enforcement, he may, by means of an order setting out the grounds for the decision requisition any good or service ...". The Government thus recalls that order No. SIDPC 2010-303 of 22 October 2010, issued by the prefect of Yvelines, justifies the requisition of workers at the Gargenville site by stating that "the strike is affecting other depots". Similarly, the Seine-et-Marne prefectural order No. 187/DSCS/SIDPC, dated 24 October 2010, observes that "ceasing production in several refineries in France for more than a week is preventing fuel supplies from reaching service stations, many of which are currently completely out of stock while others are running very low; given the latent shortage across the country no other source of fuel supply can be mobilized quickly in the department".*

1036. *Foremost, the Committee wishes to point out that it has as always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 521]. However, it has also recognized that the right to strike may be restricted or prohibited in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. The Committee also wishes to recall that oil facilities, and the production, transport and distribution of fuel, do not constitute essential services in the strict sense of the term [see **Digest**, op. cit., para. 587].*

1037. *Furthermore, the Committee recalls that: "The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance." [See **Digest**, op. cit., para. 606.]*

- 1038.** *Regarding the motives for the prefectural orders issued in October 2010, which are the subject of this complaint, the Committee observes that the orders were issued with the intention of maintaining public order, and particularly preventing public safety and security risks. The Committee observes that the decisions of the administrative courts, petitioned in urgent applications, back up that assessment. The Committee observes, moreover, that the requisitions were intentionally limited in respect of the work required, the number of workers requisitioned and the duration of the requisitions, in order to respond to the precise need to recover public order and not to impede the right to strike. In this regard, the Committee considered that the requisition of some workers to meet the refuelling needs of priority vehicles could be used in the temporary establishment of a minimum service to respond to problems of public order that could impact the life, health or security of the population.*
- 1039.** *The Committee recalls, however, that it is important that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see **Digest**, op. cit., para. 612]. Any disagreement should be resolved by an independent body, such as the judiciary, rather than by the Government. In this regard, the Committee notes that no preliminary negotiations were undertaken to define the minimum services considered necessary before the prefectural requisition orders were issued. While noting that the Government has pointed out that the prefectural orders issued in October 2010 specifically mention seeking alternatives to requisition to enable fuel to be restocked and has raised the issue of the unacceptable nature of a widespread and sustained blockade of the oil sites concerned, the Committee regrets that the authorities did not make a greater effort to engage in negotiations on the organization of minimum services with the organizations representing the striking workers and the employers concerned, particularly since, according to the information provided, the conflict behind the strikes was not one that had only just begun.*
- 1040.** *Furthermore, with regard to the arguments put forward on the situation at Roissy-Charles de Gaulle airport, which particularly influenced the issuing of Order No. 2010-303 by the prefect of Yvelines, ordering the requisitioning of striking workers from the Gargenville oil refinery, the Committee notes that the complainant organization has suggested the measures were taken for economic reasons, while the Government has presented the situation as causing potential risks to public safety, leading to a lack of accommodation and food, and causing riots. The Government has also stated that the prefectural requisition orders were issued in anticipation of a threat to public order, as provided for under article L. 2215-1, paragraph 4, of the CGCT.*
- 1041.** *The Committee recalls that, in the airport sector, only air traffic control can be regarded as an essential service justifying restrictions on the right to strike. Neither the distribution of fuel to ensure that flights continue to operate, nor transport per se, can be therefore considered essential services in the strictest sense of the term. Moreover, economic consideration should not be invoked as a justification for restrictions on the right to strike. However, the Committee has, in the past, had cause to consider that when a service that is not essential in the strict sense of the term but is part of a very important sector in the country – as could be said of passenger and goods transport – is brought to a standstill, measures to guarantee a minimum service may be justified. Such a service could also be a potential alternative solution in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into*

question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met or facilities operate safely or without interruption [see *Digest*, op. cit., para. 607].

- 1042.** Under these circumstances, and given that requisition measures designed to provide a minimum service in fuel production, transport and distribution establishments make no reference to the participation of the parties concerned, the Committee requests the Government to ensure that, in the future, in situations where a non-essential service is paralysed, but where there is justification for taking measures to ensure a minimum service, the workers' and employers' organizations concerned are involved in the decision-making process, and that measures are not implemented unilaterally.

The Committee's recommendation

- 1043.** In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:

The Committee requests the Government to ensure that, in the future, in cases where a non-essential service is paralysed, but there is justification for taking measures to ensure a minimum operational service, the workers' and employers' organizations concerned are involved in the decision-making process, and that measures are not implemented unilaterally.

CASE NO. 2838

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

Complaint against the Government of Greece presented by

- the International Transport Workers' Federation (ITF)
- the Pan-Hellenic Seamen's Federation (PNO) and
- the Greek General Confederation of Labour (GSEE)

Allegations: The complainants allege that the Government violated their trade union rights by issuing a civil mobilization order to end a lawful strike

- 1044.** The complaint is contained in a communication from the International Transport Workers' Federation (ITF) and the Pan-Hellenic Seamen's Federation (PNO) dated February 2011. In a communication dated 4 April 2011, the complainants provided further information. In a communication dated 11 April 2011, the Greek General Confederation of Labour (GSEE) associated itself to the complaint.
- 1045.** The Government replied in communications dated 24 May 2011.
- 1046.** Greece 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

- 1047.** In their joint communication of February 2011, the ITF and its affiliate, the PNO, which is the supreme Greek trade union organization for seafarers with 14 individual affiliates, indicated that the PNO Executive Board (which is the Federation's third in order constitutional body – the first being the Congress and the second the General Council) decided at its meeting of 26 October 2010 to present to the Minister of Maritime Affairs, Islands and Fisheries and the Minister of Employment and Social Security, as well as the shipowners' associations, the following demands (which had already been presented in December 2009): recruitment and retention of young people to the maritime profession; upgrading of maritime education – retraining and creation of schools for each sector; strict implementation by the competent services of the Ministry of Maritime Affairs, Islands and Fisheries of the national legislation, such as that providing for ten months employment in the coastwise shipping or hours of work; absorption of all unemployed seafarers; speeding up and finalization of procedures for establishing an Independent Special Unemployment Fund for Greek Seafarers; immediate conclusion of satisfactory collective bargaining agreements; coverage by the state budget of all benefits provided by pension funds; clear timetable for adjusting all seafarers' pensions to the level of 80 per cent of acting seafarers wages; to double provident funds benefits for officers and ratings; and the taxation regime of pensioner seafarers should be the same as for acting seafarers.
- 1048.** Following the delivery of these demands and the expiry of the time limit, as prescribed by the relevant Greek legislation, the PNO Executive Board met on 15 November 2010 and decided by secret ballot to call a 24-hour strike across Greek ports, from Tuesday 23 November 2010 at 6 a.m. until Wednesday 24 November 2010 at 6 a.m., with a prospect to escalate the strike if necessary.
- 1049.** On 16 November 2011, the PNO Executive Board issued a press release with which it made known its intention to seek the satisfaction of the abovementioned demands, giving absolute priority to the signing of collective bargaining agreements for those categories of ships for which conclusion of such agreements was still pending.
- 1050.** The complainants further indicate that, on the invitation of the Minister of Maritime Affairs, Islands and Fisheries, a meeting took place on 18 November 2010, with the participation of the PNO Executive Board and the shipowners' association concerned (EEN), but that the meeting produced no results, since the employers' side was not prepared to sign a collective bargaining agreement with the same increase percentage for seafarers employed in coastwise shipping as the one obtained in collective bargaining agreements covering other types of ships (2 per cent).
- 1051.** According to the complainants' indication, there exist in the passenger sector three collective bargaining agreements covering different types of ships, that is: (a) Mediterranean cruise passenger vessels, (b) coastwise passenger – “ro-ro” vessels, and (c) internal trade ferries. For the first and the third type of ships, the respective collective bargaining agreements were renewed for 2010 obtaining 2 per cent increase.
- 1052.** With subsequent decisions of the PNO Executive Board, the strike continued from 24 until 26 November 2010, and from 26 until 28 November 2010 and finally from 28 November until 30 November 2010.
- 1053.** The complainants also indicate that the Minister of Maritime Affairs, Islands and Fisheries in letter No 81/2010 dated 26 November 2010 asked the PNO “to provide the necessary personnel of vessels for the transport of persons and goods by sea, in order to face extraordinary or crucial needs of the society” and made an appeal for “reasonable suspension of strike actions”.

- 1054.** The PNO in replying to the abovementioned letter underlined “the existing gap to determine particular extraordinary or crucial needs of the society”, further stating that there is no independent body which is competent to deal with such cases and which enjoys the confidence of all concerned parties.
- 1055.** The complainants also mention that, contrary to what had happened in the past in similar cases, no legal action had been taken against the PNO concerning the strikes, which had been called pursuant to all the requirements of national legislation and was legitimate.
- 1056.** On 29 November 2010, the Prime Minister, acting on a proposal by the Minister of Maritime Affairs, Islands and Fisheries, issued a civil mobilization order for Greek seafarers effective from 8 p.m. on 29 November 2010 and valid until further notice (i.e. for an indefinite period), applicable to crews employed on coastwise passenger vessels.
- 1057.** According to the complainants, the Government’s Civil Mobilization Order was in clear breach of Conventions Nos 87, 98 and 105, ratified by Greece, and a number of provisions contained in national legislation, as well as in instruments adopted by the European Union and the Council of Europe, all of which established non-obstructed exercise of freedom of association. It was also an attack on the right to personal freedom recognized in article 5 of the Greek Constitution, as well as the prohibition of compulsory work (article 22(4) of the Constitution). The complainants also underlined relevant provisions of the Maritime Labour Convention, 2006 (MLC, 2006) (Article III – Fundamental rights and principles).
- 1058.** The complainants also recalled Case No. 2212, examined by the Committee in March 2003 (330th Report), which concerned the same parties and involved similar facts. The complainants emphasized that the Committee recommended, inter alia, that “unilateral measures are not conducive to harmonious industrial relations and are contrary to Conventions Nos 87 and 98” and requested the Government “to refrain from such measures in the future”. Finally, the complainants recalled that transport does not constitute an essential service in the strict sense of the term according to the Committee, and therefore the right to strike in that sector should not be subject to a prohibition.
- 1059.** In their communication dated 4 April 2011, the complainants provided a copy of a resolution adopted unanimously by the ITF Seafarers’ Section Committee and endorsed by the Federation’s Fair Practices Committee Steering Group in March 2011, which denounces the mobilization order taken by the Greek Government and calls upon the Government to rescind it. The complainants further indicate that the same resolution was adopted unanimously by the European Transport Workers’ Federation (ETF) Maritime Transport Steering Committee and endorsed by the ETF EU Committee meeting in March 2011.
- 1060.** In its communication of 11 April 2011, the GSEE associated itself to the complaint and highlighted that, due to the civil mobilization order, PNO, which is affiliated to the GSEE, as well as its member organizations and the seafarers they represent, were not able to participate in the general pan-Hellenic strikes declared by the GSEE and aimed at safeguarding and promoting the economic and trade union interests of all the working people as well as their interests in the field of labour and social security.

B. The Government’s reply

- 1061.** In a communication dated 24 May 2011, the Government affirmed that Greece fully respects the principles, the rights and the requirements defined in Conventions Nos 87, 98 and 105, which it has ratified. The Government indicated that, by virtue of Act No. 3536/2007, the relevant legislation had been amended so that the requisition of personal services in times of peace might be allowed only to face the country’s defensive

needs or a social emergency against any type of imminent natural disaster or emergency that might endanger the public health. The Government also highlighted relevant provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and of the International Covenant on Civil and Political Rights (1966), which provide that the term “forced or compulsory labour” shall not include any service exacted in case of an emergency or calamity threatening the life or well-being of the community. The Government considered that such a situation occurred in Greece, resulting in the mobilization of sea transport workers.

- 1062.** The Government further stated that the geographic characteristics of Greece and, in particular its insularity, define the importance of and necessity for the unhindered carrying out of island cabotage in order to satisfy the vital needs of a very large number of the country’s population and that the smooth and orderly life on islands in general, which comprises public health as its main element, is directly and decisively linked to sea transport throughout the year. The Government indicated that passenger, R/R passenger and R/R cargo vessels (merchant ships) are the main, and, in some cases, the only means of transport of food, water, pharmaceuticals and other supplies, such as fuel, to islands, the lack of which, as it is commonly known, acknowledged and recognized, jeopardizes public health. The Government also noted that merchant ships substantially contribute to the transport of patients as well as of medical personnel to primary and secondary units of the national health system.
- 1063.** The Government recalled that the strike of the PNO aimed mainly at the drawing up and conclusion of collective agreements for certain categories of ships and, more specifically, at the determination of the increase rate that would be provided by the shipowners. It also recalled that the State does not intervene in free negotiations among the social partners on the determination of working conditions and workers’ salaries.
- 1064.** The Government underlined that the decision for requisition of the seafarers’ personal services had been taken following six continuous days of strikes that had clearly created conditions which put public health at risk. It also emphasized the efforts previously made by the Minister of Maritime Affairs, Islands and Fisheries, having taken into consideration the observations of the Committee on Freedom of Association regarding Case No. 2506 (which concerned the same parties and involved similar facts): (i) a letter was sent to the PNO and to the competent shipowner organizations asking them to proceed immediately to the conducting of dialogue and negotiations in order to determine mutually acceptable working and remuneration conditions and to draw up collective agreements concerning work in the maritime sector; (ii) a meeting was held with the representatives of the PNO and of the Association of Maritime Enterprises with a view to relieving the crisis and to reaching an agreement on the collective agreement concerning the crews of coastal passenger vessels; (iii) a letter was sent to the PNO asking that the necessary vessel crews be made available to transport persons and goods by sea, with a view to meeting urgent or basic needs of the society as a whole; these crews, however, had not been made available; (iv) a communication was issued to invite the parties concerned to start a dialogue immediately, with a view to concluding the collective agreement, so that the strike might end and the problems resulting from the strike might be resolved; (v) a meeting was held with the General Secretary of the PNO and the Chairperson of the Association of Maritime Enterprises, with a view to find a commonly accepted solution and conclude the collective labour agreement which was the main demand of the PNO strike.
- 1065.** The Government noted that the continuous and permanent consultations with the social partners of the maritime sector was a reality and had never ceased and that the consultations between the social partners competent for the merchant marine, in order to determine working conditions through the conclusion of a collective labour agreement for coastal passenger ships, continue.

- 1066.** With regard to some of the recommendations made by the Committee in Case No. 2506, the Government reiterated its reservations about their practical and effective application. It stressed that decisions relating to vessels' staffing could not be an issue to be consulted and agreed upon, and that, on the contrary, such decisions depended on the application of the law (which is based on the directions given and the requirements set by international instruments, such as ILO Convention No. 180 and the MLC, 2006) which aims at the safeguard of the vessels' safety and that of persons on board ships. The Government also pointed to the fact that more than one shipowner operates ships carrying out island cabotage.

The Committee's conclusions

- 1067.** *The Committee notes that the present case concerns allegations that the Government violated the complainants' trade union rights by issuing a civil mobilization order to end a lawful strike.*
- 1068.** *The Committee notes that according to the complainants, on 15 November 2010, the PNO announced its intention to stage rolling strikes as of 23 November 2010 for the resolution of long-standing demands pertaining to employment and social security issues. The Committee understands that these demands were addressed to the Government as they concerned, inter alia, the promotion of seafarers' employment (including the speeding up and finalization of procedures for the establishment of an Independent Special Unemployment Fund for Greek Seafarers) and social security issues (including the coverage from the state budget of all benefits provided by pension funds). The Committee notes that absolute priority, amongst the various demands, was given to the signing of collective bargaining agreements for those categories of ships for which conclusion of such agreements was still pending. With subsequent decisions of the PNO Executive Board, the strike continued from 24 to 30 November 2010. On 29 November 2010, the Prime Minister, acting on a proposal by the Minister of Maritime Affairs, Islands and Fisheries, issued a civil mobilization order for Greek seafarers effective from 8 p.m. on 29 November 2010 and valid until further notice (i.e. for an indefinite period), applicable to crews employed on coastwise passenger vessels.*
- 1069.** *The Committee also notes that according to the complainants, and contrary to what had happened in the past in similar cases, no legal action had been taken against the PNO concerning the strikes, which had been called pursuant to all the requirements of national legislation and was legitimate. According to the complainants, the civil mobilization imposed on striking workers, in this case, maritime workers, was in clear breach of Conventions Nos 87, 98 and 105, ratified by Greece, and a number of provisions contained in national legislation, as well as in instruments adopted by the European Union and the Council of Europe, all of which established non-obstructed exercise of freedom of association, the right to personal freedom, and the prohibition of compulsory work.*
- 1070.** *Furthermore, the Committee understands from the complainants' communications dated 4 and 11 April 2011 that the civil mobilization order has not been lifted and that, for this reason, the PNO, as well as its member organizations and the seafarers they represent, were not able to participate in the general pan-Hellenic strikes declared by the GSEE and aimed at safeguarding and promoting the economic and trade union interests of all the working people as well as their interests in the field of labour and social security.*
- 1071.** *The Committee notes the Government's indication that, by virtue of Act No. 3536/2007, legislation had been amended so that the requisition of personal services in times of peace might be allowed only to face the country's defensive needs or a social emergency against any type of imminent natural disaster or emergency that might endanger the public health.*

According to the Government, such a situation occurred in Greece, resulting in the mobilization of sea transport workers.

1072. The Committee also notes that the Government stated that the geographic characteristics of Greece and, in particular its insularity, define the importance of and necessity for the unhindered carrying out of island cabotage in order to satisfy the vital needs of a very large number of the country's population and that the smooth and orderly life on islands in general, which comprises public health as its main element, is directly and decisively linked to sea transport, throughout the year. According to the Government, passenger, R/R passenger and R/R cargo vessels are the main, and, in some cases, the only means of transport of food, water, pharmaceuticals and other supplies, such as fuel, to islands, the lack of which jeopardizes public health, and merchant ships substantially contribute to the transport of patients as well as of medical personnel to primary and secondary units of the national health system.
1073. The Committee notes that the Government underlined that the decision for requisition of the seafarers' personal services had been taken following six continuous days of strikes that had clearly created conditions which put public health at risk. It also notes the efforts that the Government made before such a decision was taken, having taken into consideration the observations of the Committee on Freedom of Association regarding Case No. 2506, in particular that the Minister of Maritime Affairs, Islands and Fisheries, sent a letter to the PNO and to the competent shipowner organizations asking them to proceed to the conducting of dialogue and negotiations in order to determine mutually acceptable working and remuneration conditions and to draw up collective agreements concerning work in the maritime sector and that he held meetings with representatives of both social partners with a view to relieving the crisis. Also, a letter was sent to the PNO asking that the necessary vessel crews be made available to transport persons and goods by sea, with a view to meeting urgent or basic needs of society as a whole, but these crews had not been made available.
1074. The Committee recalls that, in the course of its examination of Case No. 2506, which involved the same parties and similar facts, it had noted with interest from a communication of the Government dated 2 September 2008 that the issue of minimum services would be addressed, in the event of a general strike in the maritime transport sector, from the time of notification of a strike to its actual staging, given the difficulty of predicting the extent of the minimum service, which largely depends on the time of year and other factors (353rd Report approved by the Governing Body at its 304th Session, March 2009, paragraph 101). The Committee notes with regret that it does not appear from the Government's indications relating to the efforts made between the notification of the strike and the decision to take a back-to-work order that genuine negotiations were conducted on the specific issue of the minimum service to be made available.
1075. While taking due note of the reservations reiterated by the Government about the practical application of the minimum service to be made available, and in particular that the manning of ships is subject to international regulations, the Committee recalls that the minimum service may relate to the number of crossings carried out per day, instead of the number of staff manning the ships.
1076. The Committee once again emphasizes that, although the ferry service is not an essential service, in view of the difficulties and inconveniences that the population living on islands along the coast could be subject to following a stoppage in ferry services, an agreement may be concluded on minimum services to be maintained in the event of a strike [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 615]. Similarly, the transportation of passengers and commercial goods is not an essential service in the strict sense of the term; however, this is a public service of primary

importance where the requirement of a minimum service in the event of a strike can be justified [**Digest**, op. cit., para. 621]. In general, the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [**Digest**, op. cit., para. 612]. Therefore, the Committee requests the Government to take the necessary measures to ensure that any determination on the minimum service to be made available in the event of a strike is the result of negotiations between employers' and workers' organizations of the maritime sector, it being understood that such negotiations could take place, if not before the beginning of a conflict, between the date of the notification of the strike and its possible realization, all the more so in the light of the ongoing civil mobilization. The Committee requests to be kept informed of developments in this respect.

1077. With regard to the civil mobilization order in particular, the Committee notes with great concern that it was apparently still in force at the time of the GSEE communication dated 11 April 2011 in which the GSEE highlighted that, due to the civil mobilization order, the PNO, as well as its member organizations and the seafarers they represent, were not able to participate in the general pan-Hellenic strikes declared by the GSEE. The Committee requests the Government to respond without delay to this allegation and clarify whether the civil mobilization order issued on 29 November 2010 is still in force. If this is the case, the Committee considers that this prolonged duration is out of proportion and amounts to a denial of the right to strike of seafarers contrary to Convention No. 87 ratified by Greece. The Committee emphasizes in this respect that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87 and that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [**Digest**, op. cit., paras 523 and 527]. Therefore, if it has not already done so, the Committee urges the Government to lift the civil mobilization order. The Committee requests to be kept informed in this respect.

1078. The Committee also recalls that in the course of its examination of Case No. 2506, it had noted with interest the Government's indication, concerning the Committee's recommendation on the establishment of an independent authority to bear the responsibility for suspending a strike on the grounds of national security or public health, that it would be favourable towards such an institutional initiative, but that it would need to be provided by law (349th Report approved by the Governing Body at its 301st Session, March 2008, paragraph 123). The Committee notes with regret that there is no indication that such an initiative has been moved forward. The Committee is bound to recall that the responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of the parties concerned [**Digest**, op. cit., para. 571]. It firmly urges the Government to take the necessary measures to ensure that any general suspension or termination of strike is decided in accordance with this principle. The Committee requests to be kept informed of developments in this respect.

1079. Finally, concerning the list of demands presented by the PNO to the Government, the Committee notes that the Government indicates that the continuous and permanent consultations with the social partners of the maritime sector was a reality and had never

ceased and that the consultations between the social partners competent for the merchant marine, in order to determine working conditions through the conclusion of a collective labour agreement for coastal passenger ships, continue. The Committee recalls 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 [*Digest*, op. cit., para. 935]. The Committee also notes that the Government indicates that the State does not intervene in free negotiations among the social partners on the determination of working conditions and workers' salaries. Nevertheless, the Committee understands that the demands were addressed to the Government as they concerned, *inter alia*, the promotion of seafarers' employment (including the speeding up and finalization of procedures for the establishment of an Independent Special Unemployment Fund for Greek Seafarers) and social security issues (including the coverage from the state budget of all benefits provided by pension funds). Stressing that the demands presented by the PNO are long-standing demands and that the absence of agreement on these demands may lead to further conflicts, the Committee urges the Government to take all necessary measures to ensure that negotiations are conducted in good faith and that all parties make every effort to reach an agreement. The Committee requests to be kept informed of developments in this respect.

The Committee's recommendations

1080. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) The Committee requests the Government to take the necessary measures to ensure that any determination on the minimum service to be made available in the event of a strike is the result of negotiations between employers' and workers' organizations of the maritime sector, it being understood that such negotiations could take place, if not before the beginning of a conflict, between the date of the notification of the strike and its possible realization. The Committee requests to be kept informed of developments in this respect.**
- (b) Noting with great concern that the civil mobilization order was apparently still in force at the time of the GSEE communication dated 11 April 2011 in which the GSEE highlighted that, due to the civil mobilization order, the PNO, as well as its member organizations and the seafarers they represent, were not able to participate in the general pan-Hellenic strikes declared by the GSEE, the Committee requests the Government to respond without delay to this allegation and clarify whether the civil mobilization order issued on 29 November 2010 is still in force. If this is the case, the Committee considers that the prolonged duration of the civil mobilization order is out of proportion and amounts to a denial of the right to strike of seafarers contrary to Convention No. 87 ratified by Greece, and therefore, if it has not already done so, the Committee urges the Government to lift the civil mobilization order. The Committee requests to be kept informed in this respect.**
- (c) Noting with regret that, although it indicated in the past that it would be favourable to the establishment of an independent body to bear the responsibility for suspending a strike on the grounds of national security or public health, the Government did not move such an initiative forward, the Committee firmly urges the Government to take the necessary measures to**

ensure that the responsibility for suspending a strike on the grounds of national security or public health does not lie with the Government, but with an independent body which has the confidence of the parties concerned. The Committee requests to be kept informed of developments in this respect.

- (d) *Finally, noting the Government's indication that consultations concerning the list of demands presented by the PNO continue, and stressing that these demands are long-standing demands and that the absence of agreement on them may lead to further conflicts, the Committee urges the Government to take all necessary measures to ensure that negotiations are conducted in good faith and that all parties make every effort to reach an agreement. The Committee requests to be kept informed of developments in this respect.*

CASE NO. 2361

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

Complaint against the Government of Guatemala presented by

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

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

- 1081.** The Committee last examined this case at its meeting of June 2011 and submitted an interim report to the Governing Body [see 360th Report, paras 635–641, approved by the Governing Body at its 311th Session].

- 1082.** The Government sent its observations in communications dated 30 May and 21 September 2011.
- 1083.** 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

- 1084.** In its previous examination of the case, the Committee made the following recommendations [see 360th Report of the Committee, para. 641].

The Committee notes with regret that, despite its urgent appeal, the Government has not provided any information, and accordingly urges it to implement without further delay the Committee's previous recommendations, which are reproduced below.

- With regard to the allegations relating to the dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material and the action taken to dismiss all the members of the executive committee in the context of a process of reorganization by the Minister of Education, the Committee urges the Government once again to provide information, including figures, indicating whether the dismissal affected only unionized workers or whether the reorganization process and subsequent dismissal also affected other workers of the institution in question. The Committee also requests the Government to send a copy of the decision of the Constitutional Court which refused the appeal for *amparo* filed by the executive committee of the union.
- With regard to the collective dispute of an economic and social nature in the Chinautla Municipal Authority, which was the subject of a complaint filed with the judicial authority, and in the course of which 14 trade union members (who according to the Government are still working) and the union leader, Mr Marlon Vinicio Avalos, were dismissed, the Committee urges the Government to inform it without delay concerning the situation in the collective dispute in Chinautla Municipality, whether collective bargaining has taken place and whether the six workers with respect to whom a decision had been reached have been reinstated, and to send information on the situation of the other dismissed workers, including Mr Marlon Vinicio Avalos.
- With regard to the allegations of SITRAMUNICH, according to which the Chiquimula Municipal Authority dismissed or requested the termination of the contracts of employment of several workers (in particular members of the union) and made the payment of wages conditional on resignation of the workers, despite the existence of two judicial proceedings on a “collective dispute of a social and economic nature” (convocation of collective bargaining), whereby any termination of a contract of employment must be authorized by the judge, and noting the designation of a Conciliation Tribunal, the Committee requests the Government to ensure that, while the Conciliation Tribunal is sitting, no further dismissals or terminations of workers' contracts occur in the Chiquimula Municipal Authority and that payment of wages is not made conditional on resignation by the workers or signing of a fixed-term contract. The Committee also requests the Government to take the measures necessary to reinstate those workers who were dismissed without the authorization of the judge, in defiance of a judicial decision on a “convocation to collective bargaining” which prohibits any termination of contracts without judicial authorization, with payment of the wages due. The Committee requests the Government to keep it informed in this respect and to inform it of the decision of the Conciliation Tribunal.

B. The Government's reply

- 1085.** With regard to the anti-union dismissal of 16 members of the Union of Workers of the National Centre for Textbooks and Educational Material (CENALTEX), ordered by the then Minister of Education, the Government reports, in communications dated 30 May and 21 September 2011, that, in 2004, in connection with the process of reorganizing the units of the Ministry of Education, the Minister submitted a request to the National Civil Service Office (ONSEC) for approval in order to allow for the possible elimination of posts considered to be unnecessary, in line with the austerity measures relating to public spending that were being called for by the Government, on the basis of sections 37, 38 and 82 of the Civil Service Act.
- 1086.** Furthermore, the Human Resources Department of the Ministry of Education reports that “with the approval of ONSC, as set out in Decision No. 2004DJ-3352 of 1 September 2004, and in accordance with the study of 29 April 2005 conducted by the General Directorate of Support Projects, it was established that there was a need to close down the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material, and consequently the members of staff working in that centre were removed from their posts”. It was also agreed that each former staff member would receive compensation and other benefits to which they were entitled by law and it is noted that the authorities acted in accordance with the law.
- 1087.** With regard to the Committee's recommendation concerning the number of unionized workers affected by the dismissal, the Human Resources Department of the Ministry of Education reports that the reorganization in question affected all staff working at the centre, and points out that “the dismissal was at no point considered to be an act of reprisal against the workers of the ‘José de Pineda Ibarra’ National Centre for Textbooks and Educational Material, but occurred as a result of a study conducted by the General Directorate of Support Projects, approved by ONSC, which established that CENALTEX was no longer of use and instead represented an unnecessary drain on the state budget; this led to the definitive closure of the centre and the consequent payment of the staff who worked there”. The Government states that the statutory procedures to terminate employment contracts were followed. Furthermore, in its communication of 21 September 2011, the Government indicates that the Constitutional Court denied the remedy of *amparo* (protection of constitutional rights) requested by the executive committee of the Union of Workers of CENALTEX (decision attached).
- 1088.** With regard to the collective dispute of an economic and social nature in the Chinautla Municipal Authority, the Government reports that, in the context of this labour dispute, several complaints of dismissal and claims for reinstatement have been presented and that these have been resolved, as an order was issued for the immediate reinstatement of the complainants and the payment of wages and other benefits owed to them for the period from their dismissal to their actual reinstatement, imposing the respective fine on the employer and issuing legal warnings or cautions as appropriate. On 8 October 2010, two certificates were issued, which were forwarded to the district office of the Public Prosecutor and to the First Criminal Court of the First Instance for Crimes against the Environment, at the request of the respective officials. It is noted that a new collective agreement on working conditions is not being discussed or negotiated because, through no fault of the court, the Conciliation Tribunal was not set up and the proceedings are currently under way.
- 1089.** Furthermore, the Work and Family Court of the First Instance of Chiquimula reports that it called upon the municipal authority not to take reprisals against the workers, or to prevent them from exercising their rights. The parties were informed that henceforth any termination of employment contracts in the Chiquimula Municipal Authority must be

authorized by the court, even when dealing with employees who are not subscribed to the list of demands. An order was issued to establish the Conciliation Tribunal, and the employer was given a deadline of 24 hours to appoint a negotiating delegation and three days to issue a report on the direct negotiation of the list of demands. The employer has not complied with the order. It is noted that a new collective agreement on working conditions has not yet been discussed or negotiated because, through no fault of the court, the Conciliation Tribunal was not set up and the proceedings are currently under way.

C. The Committee's conclusions

- 1090.** *The Committee recalls that the allegations pending in the present case relate to the dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material as a result of a reorganization ordered by the Minister of Education and action taken to dismiss all members of the union’s executive committee; the refusal of the Mayor of Chinautla to negotiate a collective agreement and dismissal of 14 union members and a union leader; and the termination of the contracts of employment of several workers by the Chiquimula Municipal Authority.*
- 1091.** *The Committee notes, with regard to the anti-union dismissal of 16 members of CENALTEX, ordered by the then Minister of Education, that according to the Human Resources Department of the Ministry of Education: (1) the reorganization in question affected all staff working at the centre, and was not an act of reprisal; (2) it all occurred as a result of the study conducted by the General Directorate of Support Projects, approved by ONSEC, which established that CENALTEX was no longer of use and instead represented an unnecessary drain on the state budget, in line with the austerity measures relating to public spending that were being called for by the Government; (3) it was agreed that each worker would receive the compensation and other benefits to which they were entitled by law; and (4) the Constitutional Court denied the remedy of amparo requested by the executive committee of the Union of Workers of CENALTEX. The Committee emphasizes that, although it is not within its competence to comment on economic measures which a government may take in difficult times, it nevertheless notes that decisions involving the dismissal of large numbers of workers should be discussed extensively with the trade union organizations concerned with a view to planning the occupational future of these workers in light of the country’s opportunities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1085]. As the dismissals that took place in 2004 were of an economic nature, affecting all the staff at CENALTEX, and not of an anti-union nature, the Committee will not pursue its examination of these allegations.*
- 1092.** *With regard to the collective dispute of an economic and social nature in the Chinautla Municipal Authority, the Committee notes that, according to the Government: (1) the complaints of dismissal were resolved as an order was issued for the immediate reinstatement of the complainants and the payment of wages and other benefits that were owed to them for the period from their dismissal to their actual reinstatement; and (2) two certificates were issued, which were forwarded to the district office of the Public Prosecutor and to the First Criminal Court of the First Instance for Crimes against the Environment, and the proceedings are under way.*
- 1093.** *With regard to the dispute in the Chiquimula Municipal Authority, the Committee notes that, according to the Government: (1) the municipal authority was called upon not to take reprisals against the workers, or prevent them from exercising their rights; (2) the parties were informed that henceforth any termination of employment contracts in the Chiquimula Municipal Authority must be authorized by the court; (3) an order was issued to establish the Conciliation Tribunal, and the employer was given a deadline of 24 hours to appoint a negotiating delegation and three days to issue a report on the direct negotiation of the list*

of demands; and (4) the employer did not comply with the order and the proceedings are under way.

1094. *With regard to the reinstatement of the six workers in the Chinautla Municipal Authority, with respect to whom a decision had been reached, and the situation of the other dismissed workers, including Mr Marlon Vinicio Ávalos, the Committee notes with interest that, according to the Government, the complaints of dismissal were resolved as an order was issued for the immediate reinstatement of the complainants and the payment of wages and other benefits that were owed to them for the period from their dismissal to their actual reinstatement, and two certificates were issued, which were forwarded to the district office of the Public Prosecutor and to the First Criminal Court of the First Instance for Crimes against the Environment, and the proceedings were under way. The Committee requests the Government to keep it informed in this respect.*

1095. *With regard to the allegations of SINTRAMUNICH, according to which the Chiquimula Municipal Authority dismissed or requested the termination of the contracts of employment of several workers (in particular members of the union) and made the payment of wages conditional on resignation of the workers, despite the existence of two judicial proceedings on a “collective dispute of a social and economic nature”, the Committee recalls that it requested the Government to take the measures necessary to reinstate those workers who were dismissed without the authorization of the court, in defiance of a judicial decision on a “convocation to collective bargaining” which prohibits any termination of contracts without judicial authorization, with payment of wages due, and to keep it informed in this respect and to inform it of the decision of the Conciliation Tribunal. The Committee notes with regret that the Government has not sent the requested information. The Committee requests the Government to indicate without delay whether the workers who were dismissed without the authorization of the court have been effectively reinstated in their posts and have received wages and other benefits due to them.*

1096. *With regard to the collective bargaining process between the Chiquimula Municipal Authority and SINTRAMUNICH, the Committee notes that, according to the Government, an order was issued to establish the Conciliation Tribunal, and the employer was given a deadline of 24 hours to appoint a negotiating delegation and three days to issue a report on the direct negotiation of the list of demands, and that the employer did not comply with the order, with the result that proceedings are under way. The Committee emphasizes that both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence. This principle means that any unjustified delay in the holding of negotiations should be avoided [see **Digest**, op. cit., paras 936–937]. The Committee requests the Government to keep it informed of the follow-up given to the negotiation of the list of demands and to send it a copy of the decision handed down by the Conciliation Tribunal.*

The Committee’s recommendations

1097. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

(a) *With regard to the collective dispute in the Chinautla Municipal Authority, the Committee notes that, according to the Government, two certificates were issued, which were forwarded to the district office of the Public Prosecutor and to the First Criminal Court of the First Instance for Crimes against the Environment, and the proceedings are under way. The Committee requests the Government to keep it informed in this regard;*

- (b) *With regard to the allegations of SINTRAMUNICH, according to which the Chiquimula Municipal Authority dismissed or requested the termination of the contracts of employment of several workers (in particular members of the union) and made the payment of wages conditional on resignation of the workers, despite the existence of two judicial proceedings on a “collective dispute of a social and economic nature”, the Committee recalls that it requested the Government to take the measures necessary to reinstate those workers who were dismissed without the authorization of the court, in defiance of a judicial decision on a “convocation to collective bargaining” which prohibits any termination of contracts without judicial authorization, with payment of the wages due, and to keep it informed in this respect and to inform it of the decision of the Conciliation Tribunal. The Committee requests the Government to indicate without delay whether the workers who were dismissed without the authorization of the court have been effectively reinstated in their posts and have received wages and other benefits due to them; and*
- (c) *With regard to the collective bargaining process between the Chiquimula Municipal Authority and SINTRAMUNICH, the Committee requests the Government to keep it informed of the follow-up given to the direct negotiation of the list of demands and to send it a copy of the decision handed down by the Conciliation Tribunal.*

CASE NO. 2708

INTERIM REPORT

**Complaint against the Government of Guatemala
presented by
the Movement of Trade Unions, Indigenous Peoples and
Agricultural Workers of Guatemala (MSICG)
represented by the following organizations:**

- the Altiplano Agricultural Workers’ Committee (CCDA)
- the General Confederation of Workers of Guatemala (CGTG)
- the Unified Trade Union Confederation of Guatemala (CUSG)
- the National Trade Union and People’s Coordinating Body (CNSP)
- the National Front for the Defence of Public Services and Natural Resources (FNL) and
- the Guatemalan Workers’ Trade Union (UNSITRAGUA)

**supported by
the International Trade Union Confederation (ITUC)**

***Allegations: Interference by the authorities in
the internal affairs of the Guatemalan Workers’
Trade Union (UNSITRAGUA)***

- 1098.** The complaint was presented by the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) represented by the following organizations: the Altiplano Agricultural Workers’ Committee (CCDA), the General Confederation of

Workers of Guatemala (CGTG), the Unified Trade Union Confederation of Guatemala (CUSG), the National Trade Union and People's Coordinating Body (CNSP), the National Front for the Defence of Public Services and Natural Resources (FNL) and the Guatemalan Workers' Trade Union (UNSITRAGUA), in a communication dated 20 April 2009. The International Trade Union Confederation supported the complaint in communications sent on 27 August 2009 and 17 February 2010.

- 1099.** The Government sent its observations in a communication dated 14 June 2011.
- 1100.** As proposed by the Committee on the Application of Standards at the International Labour Conference in June 2010, an ILO mission visited Guatemala on 9–14 May 2011, and received additional information from the Government (Ministry of Labour and Social Welfare) and the social partners (UNSITRAGUA (the original organization)).
- 1101.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1102.** In a communication dated 20 April 2009, the complainant organization states that on 12 December 2008 UNSITRAGUA (the original organization) held an election assembly to elect the members of its national leadership for the period 22 December 2008–21 December 2010. During these elections, Daniel Eduardo Vásquez Cisneros, the international relations coordinator, and Julia Amparo Lotán Garzona, the assistant financial coordinator, were not re-elected. The MSICG indicates that one of the reasons for this was that the two trade union officials had awarded themselves salaries by creating new posts for their own benefit, without the agreement of the board of coordinators or the approval of the assembly of representatives or the UNSITRAGUA general assembly.
- 1103.** Furthermore, the complainant organization indicates that, on 23 December 2008, when the new board of coordinators and sub coordinators took up their duties, the board decided to do away with these new posts, which had been created to benefit certain officials within the organization, without the approval of the board of coordinators or any consultations with the various decision-making bodies within UNSITRAGUA. As a result, keeping the posts would involve sacrificing a significant percentage of UNSITRAGUA's trade union activities. Daniel Eduardo Vásquez Cisneros and Julia Amparo Lotán Garzona were informed of this decision and, in spite of the irregular manner in which they had awarded themselves salaries, and in compliance with Guatemalan legislation, the two trade union representatives were paid all the benefits to which they were entitled under current labour legislation.
- 1104.** According to the complainant organization, certain sums of money had been placed in the hands of the abovementioned trade union members, for the purpose of implementing the organization's trade union activities, as well as the administrator passwords for the organization's official website and email account, and property belonging to the organization. On being informed of the board's decision, the two trade union officials proposed to retain the salaries which they had unilaterally awarded themselves, without the approval of the UNSITRAGUA leadership (owing to a shortage of available funds and the irregular manner in which the salaries had been awarded). Although the trade union members had agreed to provide information on activities carried out, liquidate the funds they had been allocated and return the passwords for the email account or administrator password for the federation's website, as well as property belonging to the organization, they failed to do so.

- 1105.** The complainant organization indicates that on 6 January 2009, the trade union members appeared at the headquarters of the organization, together with a notary, in order to establish evidence of constructive dismissal. They gained unauthorized access to the organization's headquarters, in order to carry out their investigations. As it was not possible to call a labour inspector at that time, and given the risk of the notary including false information in the case file they were drafting, UNSITRAGUA officials decided to ask the national civil police to accompany the two agents, in order to verify that there was no violence involved when the trade union members were requested to leave the headquarters. Subsequently, the board of coordinators was called before the General Labour Inspectorate to establish the facts surrounding the alleged constructive dismissal. The board stated that Daniel Eduardo Vásquez Cisneros and Julia Amparo Lotán Garzona had served as trade union officials, that they had not been re-elected, and that they had been paid all the relevant employment-related benefits for the period during which they had been entitled to a salary. The complainant organization states that, in the meantime, the two trade union members had used the organization's email account and website to make defamatory remarks about the organization, and some of its officials.
- 1106.** The complainant organization adds that, during the second half of February 2008, UNSITRAGUA learned, by unofficial means, that an application process had been launched to establish a trade union federation with the same trade union name, and that the Ministry of Labour and Social Security, in spite of the fact that it had recognized UNSITRAGUA as a trade union partner for over 20 years, had failed to notify the organization of this fact, thereby blocking its access to the corresponding legal remedies. According to the complainant organization, the process of establishing a parallel trade union organization – a move instigated by Daniel Eduardo Vásquez Cisneros and Julia Amparo Lotán Garzona, as part of a strategy against the organizations belonging to the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG), and of efforts to create a pro-Government trade union confederation – had been launched by four of the trade unions affiliated to UNSITRAGUA. UNSITRAGUA (the original organization) then decided to establish a federation with the same trade union name, in order to safeguard its own identity.
- 1107.** The complainant organization stresses that, having failed to notify UNSITRAGUA that an application process had been launched to register its trade union name, and given the existence of certain procedural flaws relating to the process of establishing a parallel trade union federation, the Ministry of Labour and Social Security – instead of following the letter of the law by rejecting the application to register a trade union federation which had failed to attract a minimum of four active trade unions, as required under the provisions of the Guatemalan Labour Code – gave the applicant the opportunity to bring on board additional trade unions, in spite of the fact that the regulations governing the process of establishing a trade union organization are immutable. The Ministry of Labour and Social Security maintained this position in spite of the fact that both UNSITRAGUA (the original organization) and the complainant organization had provided proof of procedural irregularities and requested that it rectify its course of action, bringing it in line with the law. Furthermore, although UNSITRAGUA application has met all the relevant legal requirements, it still remains unregistered.
- 1108.** The complainant organization states that, on 3 April 2009, the members of the board of coordinators and sub coordinators of UNSITRAGUA were informed that a number of cheques issued from the accounts into which the employers deposited their salaries had bounced, as had a number of cheques issued by the organization. The organization contacted the banks in question regarding the reason for the rejection, and was informed that a precautionary order had been issued by the First Chamber of the Labour and Social Security Court to freeze the organization's accounts – as part of the ordinary labour proceedings launched by Daniel Eduardo Vásquez Cisneros claiming employment benefits

for the whole period he had served as a UNSITRAGUA official. The plaintiff had also called for restrictions on the movements of all the officials of the federation, in order to prevent the organization from taking part in any international events to which it may have been invited. This measure financially paralyzed UNSITRAGUA (the original organization), damaging the development of its trade union activities and had a direct impact on the members of its national leadership and their families, as the measures involved completely freezing all salaries.

- 1109.** The complainant organization indicates that, faced with this situation, UNSITRAGUA (the original organization) petitioned the First Chamber of the Labour and Social Security Court to lift the order to freeze the organization's accounts, providing evidence – in addition to the negative impact of the order on the trade union and its members – that Daniel Eduardo Vásquez Cisneros did not hold the status of a worker, but had instead served as a UNSITRAGUA official. A trade union official only received a salary from UNSITRAGUA during 2008. Furthermore, evidence was provided that the money owed for that period had already been paid out and received by the complainant. Nevertheless, the labour court refused to lift the order, and maintained its hostile stance towards UNSITRAGUA's trade union activities, trade union officials and their families.
- 1110.** The complainant organization stresses that it is obvious that both the Ministry of Labour's tacit encouragement of "trade union parallelism", targeting UNSITRAGUA (the original organization), and measures to deliberately freeze the organization's accounts, depriving its officials and their families of their means of support, constitute direct interference by the Government, favouring a parallel application from an organization wishing to establish a trade union federation, as part of a specific strategy to impede UNSITRAGUA's trade union activities and promote the establishment of a pro-Government trade union organization.

B. The Government's reply

- 1111.** In its communication dated 14 June 2011, the Government stated that the General Labour Directorate does not interfere with the internal affairs of trade unions, federations or confederations in Guatemala. The differences between the two groups claiming ownership of the name UNSITRAGUA resulted from a conflict between the members and former members of those organizations.
- 1112.** For its part, the General Labour Directorate indicates that the organization registered under the name of Trade Union Federation UNSITRAGUA submitted an application to establish a trade union federation on 28 January 2009, while the second application (submitted by UNSITRAGUA (the original organization)) was submitted on 3 February 2009, namely six days after the first. The first application was registered under No. 08-2009, and the second under No. 10-2009. Having examined the applications and corresponding documents, the General Labour Directorate concluded that due process had taken place and that all the legal requirements stipulated in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and articles 206–234 of the Labour Code, had been met.

C. The Committee's conclusions

- 1113.** *The Committee notes that in the present case the complainant organization alleges the interference of the authorities (the Ministry of Labour and Social Security and the First Chamber of the Labour and Social Security Court) in the internal affairs of UNSITRAGUA (the original organization), showing favouritism towards one of the blocs produced by a*

split within the organization in 2008. According to the allegations, both groups claim the trade union name UNSITRAGUA and probably property belonging to the trade union.

- 1114.** The Committee takes note of the statements made by the complainant organization, according to which: (1) on 12 December 2008, UNSITRAGUA (the original organization) held an election assembly to elect members of its national leadership for the period 22 December 2008–21 December 2010; (2) Daniel Eduardo Vásquez Cisneros, the international relations coordinator, and Julia Amparo Lotán Garzona, the assistant financial coordinator, were not re-elected (according to the allegations, the two trade union members had awarded themselves salaries by creating new posts for their own benefit, without the agreement of the board of coordinators, the assembly of representatives, or the UNSITRAGUA general assembly); and (3) although both trade union members had control of certain sums of money, the site administration passwords for UNSITRAGUA's official website and email account, as well as property belonging to the organization, no goods, funds or information were ever returned to the organization.
- 1115.** With regard to the alleged interference of the Government in the internal affairs of UNSITRAGUA, the Committee notes that, according to the allegations, the abovementioned trade unionists (Daniel Eduardo Vásquez Cisneros and Julia Amparo Lotán Garzona) arrived at the headquarters of the organization with a notary, in order for the notary to establish evidence of constructive dismissal. Given this situation, the UNSITRAGUA leaders requested the police to be present when they asked the two trade union members to leave the headquarters, in order to verify that no violence had been used. According to the allegations, the Ministry of Labour and Social Security failed to inform the organization that certain trade unions affiliated to UNSITRAGUA (the original organization) had applied to register a trade union federation with the same trade union name. Given the situation, UNSITRAGUA (the original organization) decided to establish a federation under its own trade union name, in order to safeguard its identity. However, in spite of the fact that it had met the legal requirements to establish a federation, it has yet to be registered by the authorities (it is worth noting here that UNSITRAGUA, although it had, in practice, been active for many years, had never previously requested to be registered).
- 1116.** The Committee notes that, according to the complainant organization, the Ministry of Labour and Social Security did not act in accordance with the law, and instead supported the parallel process initiated by Daniel Eduardo Vásquez Cisneros and Julia Amparo Lotán Garzona. Furthermore, the First Chamber of the Labour and Social Security Court ordered the organization's accounts to be frozen, as a precautionary measure within the framework of the ordinary labour proceedings launched by Daniel Eduardo Vásquez Cisneros, to claim employment-related benefits for the entire period of time he had served as a UNSITRAGUA official. He had also requested restrictions to be placed on the movements of UNSITRAGUA officials, in order to prevent the trade union organization from taking part in any international events to which they may have been invited. These measures had financially paralyzed UNSITRAGUA (the original organization), damaging the development of its trade union activities and having an adverse, indirect impact on its national officials and their families. The same labour court also rejected a request for the order to freeze the organization's accounts to be lifted, in spite of the fact that UNSITRAGUA (the original organization) had provided proof that payments had been made to, and received by, the trade union member in question.
- 1117.** The Committee also notes that the Government indicates that the General Labour Directorate does not interfere in the internal affairs of trade unions, federations or confederations in Guatemala. The General Labour Directorate has stated that, in this case, the differences between the two groups claiming ownership of the name UNSITRAGUA resulted from a conflict between the members and former members of the

trade union. Following its examination of the applications and related proceedings, the General Labour Directorate concluded that due process had taken place and that all the legal requirements had been met.

- 1118.** However, the Committee notes that, according to the complainant organization, the alleged interference of the Government is demonstrated in the tacit encouragement by the Ministry of Labour of “trade union parallelism”, targeting UNSITRAGUA (the original organization), and the deliberate order to freeze the funds of the organization and thereby deprive the officials and their families of their means of subsistence. In this regard, the Committee recalls that respect for the principles of freedom of association requires that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 859]. The Committee urges the Government to send its detailed observations relating to the alleged interference and to send all court rulings issued in relation to the legal action taken by Daniel Eduardo Vásquez Cisneros.
- 1119.** With regard to the split which took place within UNSITRAGUA, the Committee notes the information gathered during the mission proposed by the Committee on the Application of Standards at the International Labour Conference in June 2010, which took place in May 2011, was conducted by a former high-level government official (former Prosecutor-General of Colombia) and, inter alia, dealt with the issue of registration and the failure to include UNSITRAGUA and other organizations in the National Tripartite Committee. In particular, the Committee notes that, according to the mission report: (1) UNSITRAGUA (the original organization) is not opposed to the registration of Trade Union Federation UNSITRAGUA and, according to certain authorities in the Ministry of Labour, the registration process involving UNSITRAGUA (the original organization) is still ongoing; (2) UNSITRAGUA (the original organization) is currently involved in the process of establishing a trade union confederation; and (3) the Government has excluded it from all bipartite or tripartite dialogue forums. The Committee notes that, in its view, all representative trade union organizations should sit on the National Tripartite Commission. The fact that UNSITRAGUA (the original organization) is not registered cannot be used as a reason to exclude it, as other organizations on the Commission are also unregistered.
- 1120.** The Committee also notes that according to the same report, the Ministry of Labour and Social Security stated that: (1) the first application has precedence, and the registration process lasted six months because it was necessary to examine all the documents submitted; (2) the case filed by UNSITRAGUA (the original organization) remains open but has not been active for a year and a half; and (3) a good solution would be to begin the process from scratch, addressing the legal defects which have been identified, mainly relating to the name of the organization and the possibility of ensuring that both trade unions and individual workers can directly join the federation. Finally, the Committee notes that the Trade Union Federation UNSITRAGUA (registered organization) has stated that: (1) the split in the federation was necessary, as UNSITRAGUA had lost its trade union nature, mainly as a result of foreign funding, and was controlled by a group of officials from the legal office; (2) in 2010, another split occurred, and certain officials left to join the complainant organization; and (3) it cannot be ruled out that the two blocs may reunite, as trade union unity is vital. In view of this information, the Committee requests the Government to keep it informed of developments in the situation relating to the registration of UNSITRAGUA (the original organization) and to ensure that the organization is registered without hindrance.
- 1121.** With regard to information indicating that the Government has excluded UNSITRAGUA (the original organization) from all bipartite or tripartite dialogue forums, in particular the National Tripartite Commission, the Committee notes that the conclusions of the

mission report on social dialogue indicate that the mission drew the attention of the authorities to the need to include the excluded organizations in the abovementioned Commission, as tripartite dialogue cannot adequately meet its objectives without the participation of a vital part of the trade union movement. In light of these conditions, the Committee requests the Government to take the necessary measures to include UNSITRAGUA (the original organization) in the National Tripartite Commission and to keep it informed in this regard.

The Committee's recommendations

1122. 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 communicate its detailed observations with regard to the alleged interference of the Government in the internal affairs of UNSITRAGUA (the original organization). Furthermore, the Committee requests the Government to send the court rulings relating to the legal proceedings launched by Daniel Eduardo Vásquez Cisneros.**
- (b) With regard to the split within UNSITRAGUA, the Committee requests the Government to keep it informed of developments in the situation relating to the registration of UNSITRAGUA (the original organization) and to ensure that this organization is registered without let or hindrance.**
- (c) With regard to the allegation that the Government has excluded UNSITRAGUA (the original organization) from all bipartite or tripartite dialogue forums, especially the National Tripartite Commission, the Committee requests the Government to take all necessary measures to include the organization in the abovementioned National Tripartite Commission and to keep it informed in this regard.**

CASE NO. 2794

INTERIM REPORT

**Complaint against the Government of Kiribati
presented by
the Kiribati Trade Union Congress (KTUC)**

***Allegation: The complainant organization
alleges the infringement of the right to strike in
the education sector***

- 1123.** The complaint is contained in a communication of the Kiribati Trade Union Congress (KTUC) dated 17 June 2010.
- 1124.** The Government indicated in a communication dated 22 July 2010, that it was currently reviewing the complaint and would soon forward its position and observations as required.
- 1125.** Since there has been no further reply from the Government, the Committee has been obliged to postpone its examination of the case on three occasions. At its May–June 2011

meeting [see 360th 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 its next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.

- 1126.** Kiribati 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

- 1127.** In its communication dated 17 June 2010, the KTUC alleges that the Government violated the right to strike of the Kiribati Union of Teachers (KUT) by declaring its four-day peaceful strike, involving more than 200 teachers from 4 to 7 December 2009, unlawful and, consequently, unfairly dismissed and sanctioned its members following this strike.
- 1128.** The KTUC alleges that the trade dispute, between the Ministry of Education (MOE), the Public Service Office (PSO) and the KUT, that led to the strike, concerned the urgent need of the union to introduce a new separate Collective Bargaining Agreement (CBA) aimed at achieving and enhancing both the effective quality of the terms and conditions of employment for teachers and the effective quality and standard of the teaching profession.
- 1129.** According to the KTUC, the strike of the KUT was lawful since it followed all the legal requirements of the Industrial Relations Code (IRC): (i) the trade dispute was officially submitted to the Minister of Labour by letter on 24 September 2009 (section 7(1) IRC); (ii) on 2 October 2009, the Secretary, on behalf of the Minister, decided, under section 9(1)(a) IRC, to refer the dispute back to the parties for further negotiation; (iii) the KUT immediately, on 9 October 2009, informed the Minister that the current avenue did not work and requested the Minister if it would take further action under section 9(1), as provided by article 10 IRC; (iv) the Minister did not inform the KUT within the seven days' delay that he intended to take a further step under section 9(1) (section 10(2) IRC); (v) according to section 10(2) IRC, the procedures prescribed by the IRC for the settlement of trade disputes were therefore deemed to be exhausted and the KUT was therefore entitled to go on strike, as permitted by sections 27(1) and (2) IRC.
- 1130.** In an effort to come to an agreement, and while the procedures prescribed by the IRC for the settlement of trade disputes were already deemed to be exhausted, the KUT agreed to meet with the MOE and the PSO on 10 and 17 November 2009. No agreement was reached and the KUT reminded the parties during these meetings that the procedure for settlement of the trade dispute has already been exhausted. In a final effort to settle, and while it was not a prerequisite under the IRC, the KUT sent a letter on 25 November 2009 to President Anote Tong requesting him to confirm in writing by 27 November 2009 his final decision and that failing to respond by that time meant that the KUT would be forced to take lawful strike action to promote further settlement by virtue of the IRC.
- 1131.** The KTUC further indicates that the Minister of Labour declared the strike unlawful and that following that decision, immediate sanctions were taken by the Minister of Education (employing ministry) and the PSO against the strikers: (i) deductions of wages during the four-day strike, without awaiting court prosecution by the Minister and final outcome of such court decision; (ii) dismissal and refusal to re-employ some of them; and (iii) disciplinary actions in the form of penalties because of their absence from work during the strike; the whole in contravention to the Trade Unions and Employer Organisations Act and the National Conditions of Service applicable to these workers. The KTUC also

indicates that during the strike, the Minister of Education threatened and intimidated the striking members of the KUT that failure to return to work would lead to their dismissal.

1132. According to the KTUC, the Minister has unfairly and arbitrarily declared the strike unlawful without an independent body which had the confidence of the union involved and with no indication on what specific legal provisions they established their decision. The KTUC indicates that the KUT recalled its members to work on 7 December 2009 after what it thought to be an immediate successful discussion with President Anote Tong who had finally agreed to the urgent need to settle the trade union dispute with the KUT.

B. The Committee's conclusions

1133. *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 by the Committee, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in this case and invites the Government to seek technical assistance from the Office.*
1134. *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. The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for trade union rights in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning allegations brought against them [see First Report of the Committee, para. 31].*
1135. *The Committee notes that this complaint concerns allegations of infringement of the right to strike of the KUT by the Government and acts of anti-union discrimination in connection with this strike which took place from 4 to 7 December 2009.*
1136. *The Committee notes that according to the complainant, while the KUT complied with all the prerequisites to declare a strike under the applicable laws, the Ministry of Labour declared it unlawful and the Ministry of Education and the PSO immediately imposed sanctions (including the deduction of wages during the period of the strike), dismissed several employees who participated in the strike and refused to re-employ them. The Committee further notes that according to the complainant, the strike was declared unlawful by the Government, a party to the trade dispute, and that no written decision was ever handed to the KUT indicating the reasons for considering it illegal. The Committee finally notes that during the strike, the Minister of Education allegedly threatened and intimidated the striking members of the KUT that failure to return to work would lead to their dismissal.*
1137. *The Committee recalls that the responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved. Final decisions concerning the illegality of strikes should not be made by the Government, especially in those cases in which the Government is a party to the dispute [See **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 628 and 629]. The Committee urges the Government to provide detailed information without delay in reply to these allegations.*

- 1138.** *As concerns the alleged threats and intimidation made by the Minister of Education during the strike, to the effect that failure to return to work would lead to the dismissal of the strikers, and the sanctions subsequently imposed, and the dismissal of members of the KUT for the strike action, the Committee recalls that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association. No one should be penalized for carrying out or attempting to carry out a legitimate strike. The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association. However, salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles. In addition, complaints against acts of anti-union discrimination should normally be examined by national machinery which, in addition to being speedy, should not only be impartial but also be seen to be such by the parties concerned, who should participate in the procedure in an appropriate and constructive manner [see **Digest**, paras 654, 658, 660, 666 and 828]. The Committee urges the Government to provide detailed information without delay in relation to these allegations and requests the Government to take the necessary measures to ensure that any worker who has been dismissed for the exercise of legitimate strike action is reinstated in his or her post with payment for lost wages and that the sanctions taken against them are lifted.*
- 1139.** *With regard to the conclusion of the new CBA, the Committee notes that according to the KTUC, the KUT recalled its members to work on 7 December 2009 after what it thought to be an immediate successful discussion with President Anote Tong who had agreed to the urgent need to settle the trade union dispute with the KUT. The Committee requests the Government and the complainant to indicate the status of the negotiations between the MOE, the PSO and the KUT and to indicate whether a new CBA has since been signed.*

The Committee's recommendations

- 1140.** *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 this case and invites the Government to seek technical assistance from the Office.*
 - (b) The Committee requests the Government to provide detailed information in reply to the allegations that the Minister of Labour declared the strike illegal even though the KUT complied with all the prerequisites to declare a strike under the applicable laws.*
 - (c) The Committee further urges the Government to provide detailed information without delay in relation to the allegations of threats and intimidation made by the Minister of Education during the strike, to the effect that failure to return to work would lead to the dismissal of the strikers, as well as the allegations concerning sanctions and the dismissal of members of the KUT for the strike action, and requests the Government to take the necessary measures to ensure that any worker who has been dismissed for the exercise of legitimate strike action is reinstated in his or*

her post, with payment for lost wages and that the sanctions taken against them are lifted.

- (d) *The Committee requests the Government and the complainant to indicate the status of the negotiations between the MOE, the PSO and the KUT and to indicate whether a new CBA has since been signed.*

CASE NO. 2648

INTERIM REPORT

Complaint against the Government of Paraguay presented by

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

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

1141. The Committee last examined this case at its meeting in November 2010, when it presented an interim report to the Governing Body [see 358th Report, paras 765–771]. At its meeting in June 2011, the Committee made an urgent appeal to the Government and drew its attention to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body at its 184th Session in November 1971, it could present a report on the substance of the case at its next meeting, even if it had not received the information or observations of the Government in due time. The Government sent partial observations in a communication dated 30 August 2011.

1142. Paraguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1143. The Committee recalls that at its meeting in November 2010, when examining the allegations of anti-union dismissals and transfers, as well as acts of violence against one woman member during a peaceful demonstration, it made the following recommendations [see 358th Report, para. 771]:

- (a) The Committee deeply regrets that the Government has not provided the information requested or adopted the measures requested, and requests the Government to actively cooperate in the procedure in the future.
- (b) The Committee again urges the Government to take the necessary measures to initiate without delay an investigation into the alleged dismissals of the other two trade union officials, the transfer of SOECAPASA general secretary, Gustavo Acosta, and the mass

transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation. The Committee requests the Government to keep it informed of developments in this regard. It also requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention or sanctioning of anti-union discrimination.

- (c) The Committee again urges the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against the worker, Juana Erenio Penayo.

B. The Government's reply

1144. In its communication of 30 August 2011, the Government states that, as regards the alleged violation of union rights within the Cañas Paraguayas SA enterprise (CAPASA), letters have been sent to the General Labour Directorate and to CAPASA, both of which have sent replies and provided the following information:

- CAPASA reiterates that the workers, Antolín Noguera and Erwin Almada, have been reinstated as employees of the company. Furthermore, it reports that organizational restructuring has been carried out and that, as of 9 June 2008, no new appointments have been made;
- the record of the proceedings *Erwin Almada Casco v. the Cañas Paraguayas SA enterprise* concerning reinstatement to work and the payment of salary arrears, drawn up on 5 August 2008 by the clerk of the court, Silvia Patiño, states that the enterprise's human resources department would give effect to the judicial order to reinstate and pay salary arrears to Erwin Almada Casco;
- the record of the proceedings *Antolín Noguera Zárate and Erwin Almada Casco v. the Cañas Paraguayas SA enterprise (CAPASA)* concerning reinstatement to work and payment of salary arrears, as well as that of the proceedings *Juan Carlos Miranda Martínez v. the Cañas Paraguayas SA enterprise (CAPASA)* concerning reinstatement to work and payments owed, certify the agreements concluded by the parties and establish that a settlement had been reached in the respective proceedings. The enterprise undertook to reinstate the workers in keeping with an agreement approved by the judicial authorities.

The Government also refers to facts relating to a union called the Trade Union of Employees of Cañas Paraguayas SA (SEPCAPASA), and not to the complainant organization, Trade Union of Workers and Employees of Cañas Paraguayas SA (SOECAPASA)

C. The Committee's conclusions

1145. *The Committee recalls that the allegations that had remained pending in this case concern the anti-union dismissal of four officials from the CAPASA, the transfer of SOECAPASA General Secretary, Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation, as well as the assault against the worker Juana Erenio Penayo de Sanabria by one of the company's managers (the complainant organization enclosed with its own complaint a copy of the complaint lodged with the national police).*

1146. *As regards the alleged dismissal of four union officials, the Committee notes that the Government reiterates that Antolín Noguera and Erwin Almada Casco were reinstated to work and reports that, in the context of an agreement approved by the judicial authorities, the enterprise undertook to also reinstate Juan Carlos Miranda Martínez. The Committee*

takes note of this information and requests the Government to keep it informed of the employment status of the fourth SOECAPASA union official who, according to the complainants, was dismissed, although they have not provided the individual's name.

- 1147.** *As regards the other allegations that had remained pending, the Committee deplores the fact that the Government has not sent its observations in this regard and finds itself obliged to reiterate the recommendations it made when it examined this case at its meeting in November 2010 [see 358th Report, para. 771].*

The Committee's recommendations

- 1148.** *In the light of its foregoing interim conclusions, the Committee again invites the Governing Body to approve the following recommendations.*

- (a) The Committee requests the Government to keep it informed of the employment status of the fourth SOECAPASA union official who, according to the complainants, was dismissed.*
- (b) The Committee again urges the Government to take the necessary measures to initiate without delay an investigation into the alleged transfer of SOECAPASA General Secretary, Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation. The Committee requests the Government to keep it informed of developments in this regard. It also requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention or sanctioning of anti-union discrimination.*
- (c) The Committee again urges the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against the worker, Juana Erenio Penayo.*

CASE NO. 2834

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

**Complaint against the Government of Paraguay
presented by
the National Trade Union of Transport Workers (SINATT)**

Allegations: The complainant organization alleges that following the registration of a workers' committee and its delegates at a transport enterprise, the administrative authority revoked its decision and annulled the legalization of the documents and the registration of the delegates

- 1149.** The complaint is contained in a communication from the National Trade Union of Transport Workers (SINATT) dated 11 November 2010. SINATT sent new allegations in a communication dated 9 May 2011.
- 1150.** The Government sent its observations in a communication of 12 May 2011.
- 1151.** Paraguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant organization's allegations

- 1152.** In its communication of 11 November 2010, SINATT states that it is a first-level representative association for all transport workers providing services in the collective passenger transport industry. It adds that, on 1 September 2010, union members Roberto Medina Giménez and Gustavo Klaner called on all those concerned to set up a workers' committee to represent the workers of the transport company La Santaniana SA. The invitation to the initial meeting set a date of 7 September 2010 at 9 a.m. at house No. 485 in Lepacho c/Inca in the city of Asunción, the purpose being accreditation of the workers authorized to establish a trade union.
- 1153.** The complaint organization states that on 7 September 2010 at 10 a.m., 97 workers met in order to hold discussions and as appropriate to set up a committee. Once the officers of the meeting had been elected and the agenda drawn up, it was agreed to form a workers' committee at the transport enterprise, and in accordance with SINATT by-laws the regular and deputy delegates Juan Carlos Martini Núñez and Sergio Coronel, respectively, were elected, as well as other officers. On 8 September 2010, the President of SINATT together with the regular member of the workers' committee submitted an application for registration with the Vice-Ministry of Labour and Social Security, together with the documentation required under section 294 of the Labour Code. On 7 September 2010, SINATT sent registered telegram No. 01870 to the company informing it of the establishment of the workers' committee, the elected delegates who would enjoy the right to union stability, and the duration of their term of office.
- 1154.** The union states that in Resolution No. 1153 of 14 September 2010 adopted by the Vice-Ministry of Labour and Social Security, the documents submitted were duly legalized and the delegates of the workers' committee were registered. The complainant adds that with notes (incoming reference Nos 2141/2010 and 2206/2010) submitted to the Ministry of Justice and Labour, the enterprise brought an action for hierarchical remedy and appeal against Resolution No. 1153 of 14 September 2010 adopted by the Vice-Ministry of Labour and Social Security, contesting the legalization of the documents and the registration of the workers' committee delegates on the following grounds: (a) there is no provision for the establishment of workers' committees in the Labour Code, or in the by-laws of SINATT; (b) SINATT had not complied with section 304(a) of the Labour Code which requires that "(a) the labour administrative authority be informed within ten working days following each election of any changes in the executive committee and of any amendments to the act of constitution and by-laws, for which purpose they shall provide authentic copies of the relevant documents, duly obtaining legal certification and registration of the latter for them to be valid"; and "(b) each year a list be provided to the administrative authority of the names of all persons who have joined or left [the committee]".
- 1155.** SINATT alleges that Ministry of Justice and Labour Resolution No. 791 of 11 October 2010 revoked Resolution No. 1153 of 14 September 2010 of the Vice-Ministry of Labour and Social Security, and consequently cancelled the legalization of the documents and the

registration of the workers' committee delegates at the enterprise. In a written communication (incoming document reference No. 2431 dated 18 October 2010) SINATT applied for the remedy of revocation and appeal against Ministry of Justice and Labour Resolution No. 791 of 11 October 2010. As of the date on which this complaint was made, no final ruling has been given despite the attempts to expedite matters.

- 1156.** SINATT states that the arguments invoked by the Ministry of Justice and Labour to annul the legal personality of the workers' committee at the company have no legal basis or logic. Since its foundation in August 1999 and in accordance with its by-laws, SINATT has established more than 50 workers' committees, all of which are registered with the Vice-Ministry of Labour and Social Security. SINATT states that the transport enterprise La Santaniana SA is part of a holding company comprising 24 companies that belong to one employers' group, in the majority of which there is no union precisely because of the group's anti-union practices. SINATT maintains that, although the workers' rights are inalienable, the founder members of the workers' committee have been coerced into signing a document, the seventh clause of which states that they abide by Ministry of Justice and Labour Resolution No. 791 and expressly refrain from contesting its provisions. According to SINATT, the Ministry of Justice and Labour has acted arbitrarily and illegally by annulling the legal personality of the workers' committee at La Santaniana SA, which under international standards and national law it is not authorized to do.
- 1157.** In its communication of 9 May 2011, SINATT states that together with other transport workers' federations it has presented a number of representations to the Government in connection with workers' demands, and specifically regarding the lack of freedom of association in the sector. It alleges that the Government, through the Ministry of Justice and Labour, undertook to set up a technical committee for the purpose of settling disputes, including the case of the workers' committee at La Santaniana SA. According to SINATT, however, the technical committee was never set up and there has been no response to the representations.
- 1158.** SINATT adds that it and other transport sector organizations in Paraguay held a two-day workshop in January 2011, during which they discussed and adopted a number of conclusions: point 2 of which states that the Ministry of Justice and Labour does not respect freedom of association.
- 1159.** The complainant states that the Ministry of Justice and Labour issued Resolution No. 203 on 11 March 2011, rejecting the application for reconsideration of Resolution No. 791 of 11 October 2010 by which the Ministry had annulled the legal personality of the workers' committee at the enterprise. During this period (almost five months), the employers managed to break up the workers' committee through anti-union measures and without any reaction from the Ministry of Justice and Labour. The rejection of SINATT's application for reconsideration was based on the argument that the principle of legality prevents the Ministry from examining such an appeal. When the employers lodged a similar appeal, however, the Ministry not only allowed it to proceed, but actually ruled in favour of the employers, something that is specifically prohibited by Paraguayan labour law and ILO Convention No. 87.
- 1160.** The complainant organization states that another important aspect of this case is the fact that article 2 of the same Resolution No. 203 states that the SINATT appeal is admissible and requires the Ministry of Justice and Labour to provide all the relevant background documents to the Labour Appeals Court in order to enable the union to substantiate its claim. As of 9 May 2011, however, that material had not been provided for the Labour Court, so that SINATT cannot seek the annulment of the Ministry's arbitrary Resolution No. 791 of 11 October 2010.

- 1161.** Lastly, SINATT states that the Ministry of Justice and Labour, in a formal note, MJT/SG/326 dated 5 May 2011, orders SINATT within 48 hours to communicate its institutional and official position regarding the complaint presented to the ILO. SINATT claims that this constitutes a form of coercion or intimidation, there being no justification for such notice.

B. The Government's reply

- 1162.** In its communication of 12 May 2011, the Government categorically denies that SINATT has any legal right to present a complaint to the ILO's Committee on Freedom of Association, inasmuch as on 16 March 2011 the appeal against Ministerial Resolution No. 791 of 11 October 2010 was referred to the Labour Appeals Court of the capital, of which the union's President was also informed.
- 1163.** The Government adds that the judicial authority has not yet given a definitive ruling on the matter. That means that the normal channels of redress available in Paraguay remain open, but SINATT's lack of legitimacy lies in the fact that the organizers of the assembly which created the works council are not members of the union.
- 1164.** The Government states that the background information in this case shows that in a note, MJT/SGT/N dated 8 September 2010, SINATT sought from the administrative labour authority recognition of the workers' committee delegates at the transport company. Considering that the union organization in question with legal personality is seeking recognition of the delegates elected at the constituent General Assembly of 7 September 2010 in accordance with its by-laws, the Legal Advisory Service issued ruling No. 2387 of 8 September 2010, by which the workers' committee of the transport enterprise La Santaniana SA, was granted recognition and registered in accordance with Resolution No. 1153/2010.
- 1165.** According to case files referred to the Ministry of Justice and Labour (incoming document reference Nos 2141/2010 and 2206/2010) and to the General Directorate of Legal Advisory Services (incoming document reference Nos 931/2010 and 957/2010), the representatives of La Santaniana SA are lodging an action for hierarchical remedy and appeal against Resolution No. 1153 of the Vice-Ministry of Labour and Social Security of 14 September 2010, which grants recognition and registration to the members of the workers' committee of the transport enterprise concerned who are affiliated to SINATT. The argument put forward for this is that there is no provision in the Labour Code or in the by-laws of SINATT for such a works council, and none of the members of the works council belonged to the union. As regards the question whether the works council members at the company are SINATT members, the legal advisors of the General Directorate of Legal Advisory Services met with the Department of Collective Relations and Trade Union Registration, of the Subsecretariat of State for Labour and Social Security, subordinate to the Ministry of Justice and Labour, in order to determine whether the relevant workers are members of SINATT. The background documents of the union available to the Subsecretariat indicate that those listed as members of the workers' committee at La Santaniana SA are not listed as SINATT members, and thus the requirements of section 304 of the Labour Code are not met; according to the provision in question, the union is required under subparagraph (b) each year to give the names of all persons who have joined or left [the committee]. "Article 107 of the SINATT by-laws stipulates that, in order to be elected as a delegate, a member must be at least 18 years of age, hold Paraguayan nationality (either from birth or by naturalization), have at least one year's length of service in his or her job, and must have been a member of the union for the same period. In the case of new enterprises the length of service requirements may be dropped."

1166. The Government cites verbatim other provisions of the SINATT by-laws:

Membership, rights and obligations of members

Article 6. All workers employed in this area of activity, irrespective of their political ideology, religious beliefs, race or nationality, shall be entitled to join SINATT. For a worker to be admitted as a member, he or she shall be required to have expressed a wish to join in writing and that application must be accepted by the national executive committee. The latter is required to give its decision within 15 working days and may not refuse the application without stating a valid reason. Should that period elapse without a decision being given, the application shall be deemed to have been tacitly accepted.

A refusal shall always be subject to confirmation by the general congress of delegates, to which body the national executive committee shall be required to report its decision at the meeting closest in time to the date on which the decision is given.

An application for membership shall be considered to imply that the applicant is familiar with the relevant regulations and undertakes to abide by them.

Article 7. Unsuccessful applicants for membership shall be entitled to contest the refusal before the national congress of delegates which meets on the date closest to the date on which he or she is notified of that decision. The appeal must be made within 15 days of receipt of the notification that application for membership has been refused, and must be substantiated.

Article 8. The worker's application for membership may be refused under the circumstances specified in the relevant laws and regulations if they are reliably established.

Rights and obligations

Article 9. Members who have been members for at least one month and have paid their dues shall be entitled to:

1. Request and receive any due assistance in accordance with its purposes, and also receive other benefits under the by-laws, provided that the requirements of the respective regulations are met.
2. Submit to the national executive committee any project which he or she may consider to be of potential collective benefit for workers in this area of activities.
3. Put forward proposals for consideration by the assemblies.
4. Promote any measure to ensure compliance with the relevant laws and regulations.

Article 10. Members who have been members for at least six months in the area of activity shall be entitled to speak and vote in assemblies and to vote in elections.

1167. The Government adds that none of the participants in the assembly which elected the workers' committee delegates were SINATT members and were thus not subjected, either actively or passively, to the established procedures of the meeting and elections under the (new) SINATT by-laws. Interestingly, SINATT's by-laws contain no legal basis for its auxiliary body (the works council) and was put on notice to establish one. The crucial element is the presentation of the list of new members at La Santaniana SA, which was received in the registry of Ministry of Justice and Labour (Vice-Ministry for Labour and Social Security), incoming document reference No. 37074 dated 20 October 2010.

1168. The Government states that the legal advisory service has also noted that with NDT No. 1295 of 14 September 2010, the Director-General of Labour instructed SINATT to adjust its by-laws within 30 days to provide for the establishment of the works council, on pain of deregistration. The Government states that SINATT has complied with NDT No. 1295 of 14 September 2010, partially amending the SINATT by-laws (incoming document reference No. 34952/2010 at the Vice-Ministry of Labour and Social Security and incoming document reference No. 1000/2010 at the General Directorate of the Legal Advisory Service). Subsequently the Legal Advisory Service issued its ruling No. 645 of 7 October 2010 to the effect that Resolution No. 1153/2010 was annulled by Ministry of

Justice and Labour Resolution No. 791/2010. This was prompted by section 304(b) of the Labour Code, the body of laws in force, and SINATT's own by-laws, the Ministry of Justice and Labour being the highest authority of the labour administration and as such responsible for reviewing and overseeing the administrative acts of its subordinates.

- 1169.** The Government adds that subsequently, according to a note received by the Ministry of Justice and Labour under (reference 2431/2010), SINATT representatives affiliated to the CUT lodged an application for reconsideration and appeal of the Ministry's Resolution No. 791 of 11 October 2010. The Ministry's Legal Advisory Service again passed Resolution, No. 203 of 11 March 2011, rejecting the application for reconsideration and upholding the appeal. The application was referred to the Labour Appeals Court in the city of Asunción, as required by law, on 16 March 2011 with a view to substantiating the application.
- 1170.** The Government states that the resolutions originating from the Vice-Ministry of Labour and Social Security under the Ministry of Justice and Labour in the years 1999, 2000 and 2001, which are provided as proof of recognition and registration of workers' committees at the company (according to SINATT), assumes that delegates and those attending electoral meetings are members of SINATT; they are undoubtedly flawed in the sense that the union's by-laws do not provide an explicit legal basis for this. The Ministry of Justice and Labour has adhered to all the established administrative process, and the terms of the relevant resolutions can be presumed to be legal under Paraguayan law; it is the Ministry's intention to defend freedom of association at all levels, and in this case in particular will have to submit to a judicial ruling. Lastly, the Government emphatically denies that the invitation to establish a workers' committee at SINATT is legal, especially in the company, because the workers in question were not members of the union. Paraguay has ratified ILO Conventions Nos 87 and 98 but cannot depart from legality in order to register a workers' committee whose members are not members of the very union from which the committee is purportedly derived.

C. The Committee's conclusions

- 1171.** *The Committee notes that, in the present case, SINATT alleges that, following initial registration of a workers' committee and its delegates at La Santaniana SA with the administrative authority, the company contested the registration and the Ministry of Justice and Labour, invoking arguments that lacked any legal basis or logic, revoked its previous decision (SINATT states that it has since 1999 set up more than 50 workers' committees which were registered with the Vice-Ministry of Labour and Social Security).*
- 1172.** *In this connection the Committee notes the Government's statements to the effect that: (1) on 8 September 2010, SINATT applied to the administrative labour authority for recognition and registration of a workers' committee at the company referred to; (2) the Legal Advisory Service of the administrative authority approved the application, and the workers' committee was duly granted recognition and registered under Resolution No. 1153/2010 of the Vice-Ministry of Labour and Social Security; (3) the company's representatives lodged an action for hierarchical remedy and appeal against Resolution No. 1153/2010, arguing that there was no provision in the Labour Code or in SINATT's by-laws for the establishment of a works council, and that none of the works council members was a member of SINATT; (4) the attorneys of the General Directorate of the Legal Advisory Service met with the Department of Collective Relations and Trade Union Registration, subordinate to the Ministry of Justice and Labour, in order to ascertain whether the company's workers are members of SINATT; the background documents of the union in question indicated that the persons named in the list of members of the workers' committee are not SINATT members, and the requirements of section 304 of the Labour Code are therefore not met; (5) the SINATT by-laws contained no legal basis for the*

establishment of any auxiliary body like the works council, and SINATT was put on notice to establish one; the Director-General of Labour instructed SINATT to amend its statutes within 30 days to provide for the establishment of a works council on pain of deregistration; (6) on 11 October 2010, Resolution No. 1153/2010 was annulled by Resolution No. 791/2010 of the Ministry of Justice and Labour, in accordance with sections 304(b) and 293(d) of the Labour Code and SINATT's own by-laws; (7) subsequently SINATT lodged an application for reconsideration and appeal of Resolution No. 791 of 11 October 2010, and the application for reconsideration was rejected by the Legal Advisory Service of the Ministry of Justice and Labour, but the appeal was upheld; (8) the appeal was referred to the Labour Appeals Court of Asunción on 16 March 2011; and (9) the Government questions the legality of the SINATT workers' committee at the company because the workers in question were not members of the union.

1173. *The Committee considers that, in the light of the information available to it and unless the complainant organization sends additional information proving the contrary, the allegations in this case would not appear to amount to violations of freedom of association. Nonetheless, taking account of the fact that SINATT lodged an appeal against Resolution No. 791 of 11 October 2010 of the Ministry of Justice and Labour, annulling registration of the workers' committee at the company in question, the Committee requests the Government to keep it informed of the outcome of these proceedings.*

1174. *The Committee wishes to highlight that the information relating to the affiliation of workers to a trade union should be confidential, except of course in cases where trade union dues are deducted on payroll.*

The Committee's recommendation

1175. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

The Committee requests the Government to keep it informed of the final outcome of the appeal lodged by SINATT against Resolution No. 791 of 11 October 2010 of the Ministry of Justice and Labour, which annulled the registration of the workers' committee at La Santaniana SA.

**Complaint against the Government of Peru
presented by
the United Trade Union of SUNAT Employees (SINAUT SUNAT)**

Allegations: The complainant organization alleges that the Office of the National Superintendent of the Tax Administration has committed acts violating trade union rights (illegal deductions for days of strike action; classification of certain activities as essential; lack of interest in dialogue with the trade union; unlawful transfer and initiation of disciplinary proceedings against trade union officials; etc.)

1176. The complaint in this case is contained in a communication from the United Trade Union of SUNAT Employees (SINAUT SUNAT) dated 22 September 2010. SINAUT SUNAT presented new allegations in a communication of 26 November 2010. The Government sent its observations in communications dated 8 February and 3 May 2011.

1177. 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

1178. In its communication of 22 September 2010, the United Trade Union of the Office of the National Superintendent of the Tax Administration (SUNAT) Employees (SINAUT SUNAT) presents the present complaint concerning acts committed by the State of Peru through its institutions: (i) the Office of the National Superintendent of the Tax Administration (SUNAT); and (ii) the Ministry of Labour and Employment Promotion. The complainant organization alleges that SUNAT made unlawful deductions from wages on account of a strike held by members of SINAUT SUNAT. On 17 and 18 December 2009 the members of SINAUT SUNAT exercised their right to strike in accordance with the final decision of the Directorate for Dispute Prevention and Settlement of the Ministry of Labour and Employment Promotion, which had approved the declaration of the strike in Directorate Order No. 153-2009-MTPE/2/12.2 of 18 December 2009.

1179. In the context of recognition of the lawfulness of industrial action, which has been explained previously, under section 77(b) of the consolidated text of the Collective Labour Relations Act, approved by Supreme Decree No. 010 2003-TR (TUO-LRCT), the only lawful deduction for days of strike action is the deduction from wages in proportion to the number of days of stoppage. However, SUNAT ordered the payment of wages for the month of December 2009 with a deduction in addition to the amount proportional to the two days of the strike; the extra deduction was in proportion to the compulsory day of rest – Sunday – and corresponds to the third week of December 2009, in which the stoppage was held. In addition, in the case of the workers who participated in the strike, SUNAT deducted more than the amount due for the employee fund (FESUNAT) and income tax (“fifth category”). This situation was confirmed and denounced by SINAUT SUNAT, which wrote a formal complaint to SUNAT in letter No. 025-2010/SINAUT

SUNAT dated 29 March 2010, but despite the complaint, SUNAT has neither acknowledged nor rectified the unfair deduction.

- 1180.** The complainant organization states that the additional unlawful deductions made by SUNAT, being directly related to the exercise of the right to strike, involve serious infringements under Peruvian law of sections 24.4 and 25.17 of the Regulations made under the General Labour Inspection Act approved by Supreme Decree No. 019-2006-TR. These deductions clearly constitute reprisals against the legitimate exercise of the right to strike. The unlawful deductions described in this paragraph violate the freedom of association of SUNAT employees.
- 1181.** The complainant organization adds that the by-laws of SINAUT SUNAT, approved at its extraordinary general assembly on 24 January 2009, provide that the general assembly of members may decide to impose disciplinary penalties under section 14(f). Specifically, subsection (k) of the by-laws provides that a member of the trade union who does not abide by industrial action measures may, in addition to expulsion, be liable to a financial penalty if so decided by the general assembly. It should be pointed out that the by-laws were approved at an extraordinary general assembly of SINAUT SUNAT and presented to the Ministry of Labour and Employment Promotion, and have not elicited any observations from the labour authority or from SUNAT. In this context, and in accordance with the abovementioned provisions of the by-laws, when it decided to hold the strike on 17 and 18 December 2009 at an extraordinary general assembly on 5 December 2009, SINAUT SUNAT agreed to impose a financial penalty – a fine – on members who did not observe the strike.
- 1182.** Once the strike had ended, as some members of the union had not participated in it, the trade union informed SUNAT of the particulars of the workers who had been fined, so that it could make the necessary payroll deductions. However, as may be seen from letter No. 180-2010 dated 16 April 2010 from the National Directorate of Human Resources to SINAUT SUNAT, SUNAT decided not to deduct the fines levied on the workers who had not participated in the strike held on 17 and 18 December 2009. The decision was based on the fact that, in the view of the representatives of SUNAT, the labour legislation did not provide for such an obligation on the employer. However, it should be borne in mind that the deductions do not involve any expense for the employer, since: (i) they do not require any additional payment; and (ii) they do not call for any analysis, evaluation or verification of data, since the information on the penalties and deductions was provided in full by the trade union. In addition, making the deductions would mean: (i) recognition of the observance of the agreements of SINAUT SUNAT; (ii) recognition of the enforcement power of the trade union with regard to its members, in accordance with its by-laws; and, in this case in particular, (iii) recognition of the observance of the lawful exercise of the right to strike.
- 1183.** The complainant organization considers that the decision not to deduct the fines levied on workers for not having participated in the strike is a deliberate measure intended to discourage the free exercise of the constitutional right to strike agreed on by the members of the trade union, in violation of article 28 of the Constitution, in which the State recognizes the right to strike.
- 1184.** The complainant organization adds that SUNAT scheduled an internal competition to fill vacant managerial posts, and that the competition and its timetable coincided with the dates previously fixed for the strike called by the trade union. In an email sent on 12 November 2009, the National Directorate of Human Resources of SUNAT issued an internal vacancy announcement to cover certain managerial posts through a competition. According to the timetable set out in the paragraph entitled “Applications”, the dates fixed for the competition were the same two days as those on which the trade union had

previously planned to hold the strike, 24 and 25 November 2009, as may be seen from the notification dated 9 November 2009 issued by the Lima-Callao Regional Directorate for Labour and Employment Promotion, and the administrative decision dated 11 November 2009 issued by the Subdirectorate for Collective Bargaining of the Ministry of Labour and Employment Promotion.

- 1185.** Given that the employer had already been informed of the date of the strike, it is obvious that its sudden decision to schedule an internal competition to fill vacant managerial posts was intended to discourage the holding of the strike – an illegal situation which is contrary to the abovementioned article 28 of the Constitution, in which the State recognizes the right to strike.
- 1186.** The complainant organization states that in letter No. 162-2010-SUNAT/2F0000 dated 26 March 2010, the National Directorate for Human Resources informed SINAUT SUNAT of the number and occupations of the workers needed to maintain essential minimum services in the event of a strike, supposedly in accordance with sections 78 and 82 of the TUO-LRCT. The complainant organization considers this communication to be blatantly illegal, given that the provisions cited by SUNAT are not even related to the service it provides, which is tax collection. Specifically, section 78 of the TUO-LRCT provides as follows: “Section 78. Tasks that are essential to the enterprise, the interruption of which would endanger persons, safety or property or prevent the immediate resumption of the normal activity of the enterprise once the strike is over shall be excluded from the suspension of activities.” The complainant organization considers that, in view of the nature of the service provided by SUNAT, the temporary and specific suspension of tax collection would in no case involve endangering persons, safety or property of the institution or prevent the immediate resumption of work. Clearly, the situation referred to in the abovementioned provision on essential services does not cover SUNAT, given the type of service it provides. As for section 83 of TUO-LRCT, it lists essential public services, specifying that such a classification shall only be made through a legal determination.
- 1187.** In this regard, given that sections 78 and 83 specify the essential activities and services giving rise to the obligation laid down in section 82 of the TUO-LRCT under which workers must “... guarantee the presence of the staff necessary to prevent a total interruption of work and ensure continuity of services and activities as required,” and given the fact that, again, tax collection is not included in any of the cases previously mentioned, the workers of SUNAT exercising their legitimate right to strike are not obliged to guarantee minimum services during industrial action, and therefore it is unlawful to designate the number and occupations of workers for that purpose. In this regard, SINAUT SUNAT sent letter No. 037-2010/SINAUT SUNAT dated 31 March 2010 to the National Directorate of Human Resources of SUNAT, in reply to letter No. 162-2010-SUNAT/2F0000. As explained in the preceding paragraphs, it is obvious that by unlawfully notifying the union of the number and occupations of the workers supposedly necessary to maintain essential minimum services in the event of a strike, SUNAT intends to illegally restrict the right to strike of the members of SINAUT SUNAT, in violation of article 28 of the Constitution.
- 1188.** The complainant organization further alleges that SUNAT has withdrawn permission to use the institutional email system to communicate with the members of the union. According to the complainant, the representatives of SUNAT verbally authorized the use of the institutional email for communication with the members of the union, as indicated in the email sent at 5.08 p.m. on 12 April 2010 by Ms Paola Aliaga (general secretary of SINAUT SINAT) to Mr Ricardo Toma Oyama (deputy director for internal revenue of SUNAT). This is evidenced by emails sent by SINAUT SUNAT representatives to communicate among themselves, with SUNAT representatives and with union members on

purely trade union matters. These communications were official and open, and did not warrant any sanction whatsoever, as is clear from the authorization to use the institutional email for communication with union members.

- 1189.** However, states the complainant organization, SUNAT decided for no apparent reason to withdraw permission for communication between the trade union and its members, suddenly saying that the institutional email system was to be used only for work-related purposes, as may be seen from the email sent on 10 April 2010 at 6.19 p.m. Similarly, SUNAT restricted the use of institutional email accounts assigned to union officials, as explained in the email sent at 6.26 p.m. on 13 August 2010 by the communications and public relations secretary of SINAUT SUNAT to the union's general secretary and from the restricted email sent on 4 March 2010 at 1.43 p.m. to a group of members of SINAUT SINAT. The restricted email sent to a group of members of SINAUT SINAT (totalling 1,490) could not be delivered to 946 members, which means that an email must be sent "several times to a smaller number of addressees", as explained in the last part of the email itself. This restriction was imposed on all of the officials of SINAUT SUNAT.
- 1190.** Lastly, in letter No. 150-2010-SUNAT/2F3000 dated 7 September 2010, the department of personnel management of SUNAT issued an express and definitive prohibition on the use of institutional email, including a ban on the use of email for purely trade union purposes. This decision was taken precisely a time when the list of demands presented by SINAUT SUNAT for the period 2010-11 was being negotiated, as may be seen from the following: (i) the list of demands itself, presented by SINAUT SUNAT on 3 March 2010; (ii) the record of the opening session of direct bargaining on the list of demands for 2010-11, dated 22 April 2010; (iii) the record of the conciliation procedure dated 11 June 2010; (iv) the record of the conciliation procedure dated 24 June 2010; (v) the record of the conciliation procedure dated 12 July 2010; (vi) the record of the conciliation procedure dated 22 July 2010; (vii) the record of the conciliation procedure dated 10 August 2010; (viii) the record of the conciliation procedure dated 19 August 2010; (ix) the record of the conciliation procedure dated 1 September 2010; and (x) the record of the conciliation procedure dated 8 September 2010; this being a period when the members of the bargaining committee needed to communicate with the other members of the union to inform them of the agreements reached, hold consultations and receive suggestions in order to take decisions representing the intentions of all of the members.
- 1191.** The complainant organization adds that SUNAT has displayed an evident lack of interest in communicating with SINAUT SUNAT. The representatives of the union have attempted to meet with representatives of the employer in order to resolve, through direct coordination, the difficulties faced by the workers of SUNAT, which they express through the union. However, SUNAT has not taken an interest in holding the meetings requested, displaying an evident lack of interest in resolving the difficulties faced by its workers and expressed through the union. Moreover, states the complainant, SUNAT refuses to grant the trade union the facilities necessary to enable it to function normally (such as additional trade union leave, leave to attend events, recognition of trade union immunity of the members of the executive committee, delegates, deputy delegates and coordinators, access to SUNAT premises to communicate with members, provision of an office for the trade union in the institution, installation of an email account for the union, and authorization of the use of certain SUNAT premises and equipment for trade union activities, authorization to distribute information on SUNAT premises).
- 1192.** The complainant organization adds that SUNAT has violated the trade union immunity of the deputy general secretary of SINAUT SUNAT. On 23 October 2009 issued an unexpected order for the removal of Mr Edmóstin Montoya Jara, deputy general secretary of SINAUT SUNAT, from his post as professional supervisor of the Ad Hoc Public Prosecutor's Office of SUNAT, transferring him to the post of resolution auditor in

Division III of the Complaints Department of the Office of Major National Taxpayers of SUNAT, which is at a lower grade (the Ministry of Labour and Employment Promotion, in violation report No. 2482-2009-MTPE/2/12.3 of 2 December 2009 and a subsequent subdirectorate decision, recognized unfair treatment to the detriment of the deputy general secretary of SINAUT SUNAT, sanctioned SUNAT for the violations and warned it to change its unlawful conduct; however, SUNAT has not done this to date). The complainant organization states further that SUNAT has taken retaliatory action against the organizing secretary of SINAUT SUNAT, Mr Pedro Ángel Chilet Paz, deputy general secretary of SINAUT SUNAT-TI. The latter filed judicial proceedings against SUNAT, requesting that his wages be adjusted to that of other employees in the institution performing the same duties, which involves restoring his wages, also affecting his social benefits. As a result, SUNAT instituted disciplinary proceedings against Mr Chilet Paz, alleging that he was guilty of misconduct for having submitted in his court proceedings copies of payslips of SUNAT employees performing the same duties but earning higher pay. The proceedings initiated by SUNAT are intended as an act of retaliation against the worker for his activity as a union representative, for his participation in collective bargaining for the period 2010-11 and for having instituted legal proceedings against his employer to obtain his employment entitlements that have not been recognized (the Ministry of Labour and Employment Promotion, in violation report No. 1458-2010-MTPE/2/12.3 of 22 July 2010, recognized unfair treatment to the detriment of the secretary of SINAUT SUNAT and proposed the imposition of a penalty for the violations committed, but there has been no change in the unlawful situation).

- 1193.** The complainant organization states that SUNAT has committed the following unlawful acts against the general secretary of SINAUT SUNAT: (a) unlawful caution to Ms Paola Aliaga Huatuco to comply with her working hours, despite the fact that her post is not subject to supervision, according to the employer itself; and (b) disproportionate evaluation and appraisal of Ms Paola Aliaga Huatuco's performance during the period from January to December 2009. In addition, SUNAT issued unlawful written warnings in the form of cautions to union representatives in the Cajamarca office (Mr Manuel Oswaldo Solano Dávila and Mr Eleodoro Américo Paredes Fabián) and to the union representative in the Piura office (Mr Yovanni Javier Nava Larnia was sanctioned by the SUNAT personnel department in memorandum No. 312-2010-SUNAT/2F3000 of 9 March 2010 for having sent an email on 23 November 2009 from his institutional email account assigned by SUNAT). The personnel department considered that the sending of that email constituted a sanctionable disciplinary offence and therefore issued a caution to the worker asking him to abide by the rules on IT and email security.
- 1194.** The complainant organization also alleges violations of freedom of association in the form of action taken by the Ministry of Labour and Employment Promotion against SINAUT SUNAT. The union had planned a strike to be held on 24 and 25 November 2009. Its decision was prompted by SUNAT's evident unwillingness to reach agreement on the list of demands for the period 2008–09. In order to exercise its right to strike lawfully, the union notified the Ministry of Labour and Employment Promotion of its decision in accordance with section 72 et seq. of the TUO-LRCT. These communications were handled under file No. 210704-2008-MTPE/2/12.210 (procedure for declaration of a strike), in which only SINAUT SUNAT was a party. In an administrative decision dated 11 November 2009, the Subdirectorate for Collective Bargaining of the Ministry of Labour and Employment Promotion acknowledged the trade union notification and approved the strike notice.
- 1195.** However, SUNAT unaccountably lodged an appeal against that decision, despite the fact that it was not a party in that administrative procedure, since the purpose of notifying the labour authority of a strike is to enable it to verify the legality of the strike, and therefore the employer is not involved in the procedure. There is no precedent allowing an employer

to oppose the declaration of the authority that has noted that the strike notice has met the legal requirements for its validity. Subsequently, and even more unaccountably, the Subdirectorate for Collective Bargaining of the Ministry of Labour and Employment Promotion issued an administrative decision dated 17 November 2009 allowing the appeal that had been unduly submitted and in reply, ordered the referral of file No. 210704-2008-MTPE/2/12.210 to the Directorate for Dispute Prevention and Resolution of the Ministry of Labour and Employment Promotion.

- 1196.** This decision, which is clearly unjustified, was upheld by the Directorate for Dispute Prevention and Resolution of the Ministry of Labour and Employment Promotion, which responded to the unlawful appeal by issuing directorate order No. 142-2009-MTPE/2/12.2 of 19 November 2009 revoking the administrative decision of 11 November 2009 approving the declaration of the strike and amending it to withdraw its approval. Faced with this situation, the union filed an appeal for review against directorate order No. 142-2009-MTPE/2/12.2 of 19 November 2009; however, the appeal was unjustifiably rejected in a decision of 23 November 2009, without indicating the reasons for the decision. The labour administrative authority did not consider that SUNAT was not a party in the administrative procedure. The employer – in this case, SUNAT – is not a party in the administrative procedure for the declaration of a strike, since it is not the holder of the right in question and does not instigate the individual or collective exercise of this right; neither does it have any right or legitimate interest that may be affected by the lawful exercise of a constitutional right such as the right to strike.
- 1197.** The complainant organization states that the labour administrative authority was mistaken in considering that the procedure for the declaration of a strike is a trilateral procedure. The General Administrative Procedure Act, No. 27444, provides for two types of procedure: ordinary and trilateral procedures. The latter is covered in Chapter I of Title IV, referring to special procedures. It should be pointed out, however, that trilateral procedures are not covered in the Collective Labour Relations Act, and thus the procedure for the declaration of a strike is an ordinary procedure, in which the trade union is the only party and the only one that can legitimately challenge decisions issued by the labour administrative authority.
- 1198.** In the light of the above, the complainant organization considers that the administrative decisions issued by the Subdirectorate for Collective Bargaining of the Ministry of Labour and Employment Promotion in response to the appeal lodged by SUNAT involve acts of interference in trade union activity and hence a violation of the freedom of association of the members of SINAUT SUNAT. The union has requested verification of the legitimacy of the decisions, but no definitive decision has been issued on this request. SINAUT SUNAT requested the head of the institutional oversight body of the Ministry of Labour and Employment Promotion to verify the legality of the administrative decisions. The request for verification was submitted on 14 December 2009 and, in response to letter No. 509-2009-MTPE/8 of 16 December 2009 it was forwarded to the Lima-Callao Regional Directorate of Labour and Employment Promotion of the Ministry of Labour and Employment Promotion, a higher-level body than the Subdirectorate for Collective Bargaining and the Directorate for Dispute Prevention and Settlement. However, the Lima-Callao Regional Directorate of Labour and Employment Promotion of the Ministry of Labour and Employment Promotion has still not issued a decision.
- 1199.** In its communication of 26 November 2010, the complainant organization alleges that SUNAT has instituted disciplinary proceedings against union representatives. It states that Ms María Covarrubias is a SUNAT employee and Defence Secretary of the union, as may be seen from letter No. 091 2009/SINAUT SUNAT of 6 July 2009. The complainant organization states that SUNAT has instituted labour disciplinary proceedings against Ms Covarrubias for alleged misuse of email. The complainant organization alleges that since the establishment of SINAUT SUNAT (2008) the union has been using the

institutional email system for trade union purposes, in order to communicate with members on different matters of interest to the union, without any opposition from the employer. What is more, SUNAT has been using the institutional email to communicate with its employees on various matters relating to the trade union activity of SINAUT SUNAT. The employer, SUNAT, also used the email system to communicate with officials of the trade union.

- 1200.** According to the complainant organization, over more than two years of existence of the trade union, the employer has not made any comments on the use of the institutional email system for trade union purposes. What is more, the employer itself used the system to communicate on trade union matters and to communicate with trade union officials. On 5 October 2010 the Defence Secretary, in the exercise of her right to freedom of association, sent the following via the SUNAT email system: (1) an email to several addressees, including the head of the welfare division, concerning an issue related to interns and youth training, regarding the handling of the deductions for their meals taken in the cafeteria; and (2) report No. 003-2010-SG to a group of members, concerning action taken by SINAUT SUNAT on matters relating to a request for arbitration, presentation of a new complaint to the ILO on anti-union practices, the process of enforcement of a ruling and leave compensation.
- 1201.** On 15 October 2010, the head of personnel of the National Directorate of Human Resources of SUNAT, in electronic memorandum No. 248-2010-SF3000, notified the Defence Secretary of the following: “It has come to our knowledge through an email of one of our employees (who received it via a successive chain of messages to different addressees) that on 5 October 2010 you used the institutional email system for non-work-related purposes, dealing with personal matters during working hours, contrary to section 38(n) and (u) of the Staff Regulations, as well as section 39, which prohibits the use of an email account assigned by the institution for purposes unrelated to assigned duties, and paragraph VI(1) of Circular No. 006-2008, which states that office email is an IT tool provided by SUNAT to its employees exclusively for the performance of their duties, it being prohibited to use it for non-work-related purposes, under paragraph VII(3.1) of the abovementioned circular; you are requested during this inquiry phase to provide a report on the above facts within three working days from the date following that of receipt of this message”. According to the complainant organization, no evidence in support of this accusation was included with the message.
- 1202.** The complainant organization adds that the inquiry against the Defence Secretary occurred precisely at a time when, in the exercise of her duties under the union by-laws, she raised certain concerns to several managers of the National Directorate for Human Resources and/or executives of SUNAT, explaining the standpoint of the trade union on various issues of interest to the union. The union therefore considers that this manoeuvre against a member of the current executive committee constitutes an act of intimidation and harassment of the union representative concerned.
- 1203.** The complainant organization adds that on 5 October 2010, the current communication and public relations secretary, Mr Jorge Carrillo Vértiz, sent report No. 003-2010-SG to a group of union members, informing them of action taken by the union leadership in defence of the union and its members, in accordance with the usual practice normally accepted by the employer, i.e. via institutional email. On 26 October 2010, the personnel director of the National Directorate for Human Resources of SUNAT sent the communications and public relations secretary electronic memorandum No. 249-2010-2F3000, in which he was accused of having used the institutional email system on 5 October 2010 for non-work-related purposes, dealing with personal matters during working hours, and was therefore requested to submit a report on the matters described within three days. It should be pointed out that no evidence was included in support of the

accusations made. Nonetheless, on 27 October 2010 the abovementioned employee attempted to remedy this by sending Mr Jorge Carrillo Vértiz memorandum No. 1138-2010-SUNAT/2F3000 with a copy of the email dated 5 October, as well as the allegedly forwarded mails, in an attachment and giving him three days to submit the requested report.

- 1204.** According to the complainant organization, these disciplinary proceedings against the communication and public relations secretary and the Defence Secretary were prompted by the sending of an email to a group of union members informing them of action taken by SINAUT SUNAT in defence of workers' rights, such as the filing of *amparo* proceedings to reach a settlement on the list of demands for 2008–09 through arbitration; the presentation of a new complaint to the ILO concerning anti-union practices; the status of the execution of a Constitutional Court ruling ordering the standardization of remuneration of all SUNAT employees; and developments in the labour inspectorate with regard to compensation for delayed use of annual leave entitlement. However, it is especially important to mention that the email also informed members that complaints against officials of the National Directorate of Human Resources (including the director of personnel, Ms Miriam Díaz Colmenares) had been filed with the internal oversight body, the Office of the Comptroller General of the Republic and Congress for repeated non-compliance with social and labour legislation. This makes it all the more obvious that the disciplinary proceedings initiated by SUNAT, referred to in the present complaint, in fact constitute a flagrant act of retaliation for the exercise of our activity in defence of our trade union rights, since the official who instituted them is one of the persons against whom our trade union has filed a complaint.

B. The Government's reply

- 1205.** In its communication of 8 February 2011, referring to SINAUT SUNAT's allegations, the Government reports that SUNAT states the following:

- Unlawful deduction from wages on account of the strike held by members of SINAUT SUNAT. Section 77(b) of Supreme Decree No. 010-2003-TR approving the consolidated text of the Collective Labour Relations Act (TUO-LRCT) provides that the effects of a strike include suspension of all the obligations of an individual contract, including that of paying remuneration. Therefore the deduction in this case should have been made only for the two days not worked, in accordance with section 3 of Legislative Decree No. 713, read together with section 3 of the implementing regulations, approved by Supreme Decree No. 012-92-TR. In response to letter No. 180-2010 sent by SINAUT SUNAT, SUNAT has reviewed each of the cases referred to in the complaint, which cover 1,132 workers, in order to determine the amounts deducted and verify the items under which they were deducted and the sums to be reimbursed; this task was completed in October this year. The reimbursement of the amounts deducted for the Sunday began in November. Thus it cannot be said that there was no response to the communication sent by SINAUT SUNAT, since the necessary verification has been carried out.
- Failure to deduct fines imposed on workers by the trade union for not having participated in the strike. SUNAT states that it respects the sanctity of the wages of its employees, and therefore did not deduct the amounts of the fines imposed by the trade union on the workers who did not observe the strike on 17 and 18 December 2009, as there is no legal basis for doing so, since section 28 of Legislative Decree No. 010-2003-TR approving the TUO-LRCT provides that the employer is only obliged to deduct from remuneration the statutory ordinary and extraordinary trade union dues of its unionized workers at the request of their trade unions and with the worker's written consent. The General National Budget System Act provides that

“The uniform payroll system may only be affected by the deductions stipulated by law, by court order or other items accepted by the official or retiree, with the approval of the Director-General of Administration or the person acting as his replacement”. Accordingly, SINAUT SUNAT was informed by letter No. 180-2010-SUNAT/2F0000 that SUNAT is not obliged to deduct fines imposed by the trade union on its members, or contributions arising from particular relationships it may establish.

- SUNAT scheduled an internal competition to fill vacant managerial posts, the timetable of which coincided with the dates previously fixed for the strike. SUNAT states that on 17 April 2009 “Guidelines for filling vacant managerial posts” were approved, in view of the fact that there were managerial posts to be filled; as of that date, preparations were made to carry out the selection procedures to fill the vacancies. SUNAT’s activity and procedures are carried out in a structured and planned manner, and therefore cannot anticipate potential events. Thus, in memorandum No. 345 2009-SUNAT/2F0000 of 28 September 2009, a proposal for filling the vacancies was sent to the Deputy National Superintendent for Internal Revenue. This communication predates the date on which SINAUT SUNAT decided, in an extraordinary general assembly on 24 October 2009, to hold the strike.
- SUNAT took it upon itself to designate part of its activities as essential services, unlawfully requesting its employees, in the event of a strike, to guarantee the presence of the necessary staff to prevent the interruption of its activities. SUNAT states that letter No. 162-2010-SUNAT/2F0000, which it sent to SINAUT SUNAT to inform it of the occupations and number of workers necessary to maintain essential minimum services, was not intended to restrict the workers’ constitutional right to strike, as the letter was based on section 78 of Supreme Decree No. 010-2003-TR, the Collective Labour Relations Act, and on section 67 of Supreme Decree No. 011-92-TR, the Regulations issued under the Collective Labour Relations Act – provisions which set out two cases of exceptions to stoppages. One of these consists of essential public services, which are specifically listed, and which do not cover the tax administration; the second case, which includes work essential to the enterprise, the interruption of which would endanger persons, safety or property or prevent the immediate resumption of the normal activity of the enterprise once the strike has ended, does cover the services of the tax administration; in view of the nature of its functions and of the fact that tax and customs procedures are subject to statutory time limits, it is essential to guarantee the continuity of services to that end.
- SUNAT withdrew permission to use the institutional email system for communications of trade union members. SUNAT states that at no time did it authorize the use of email for purposes other than those strictly related to work, as laid down in sections 38(u) and 39(g) of the SUNAT Staff Regulations. Moreover, it states that in Circular No. 006-2008 of 11 March 2008 it set out rules governing the email system, stipulating that it is an official means of communication and information exchange provided to employees, who should use it exclusively for the performance of their duties, in accordance with section 5.6 of the general provisions of Departmental Decision No. 088-2003-INEI, approving Directive No. 005-2003-INEI on “Rules for the use of email in public administration bodies”, a copy of which is attached. Letter No. 150-2010-SUNAT/2F3000 sent by the Department of Personnel Management to the general secretary of the trade union is a reminder on the appropriate use of email, as is clear from paragraph 4 of the letter, which reads as follows: “You are reminded that this organization has established rules for the use of institutional email, of which all staff members are aware...”; it thus does not constitute a revocation, since, as pointed out above, there was never any authorization to use the email system for purposes other than those laid down in the abovementioned rules.

- SUNAT has displayed an evident unwillingness to communicate with SINAUT SUNAT. SUNAT states that this assertion is unfounded, since it has held a number of meetings with SINAUT SUNAT representatives, such as those held by the National Superintendent of SUNAT on 9 and 20 April 2010, in which it heard union officials Paola Aliaga Huatuco and Edmóstinés Montoya Jara, as well as meetings held on 27 January 2010 and 18 February 2010 with the Deputy National Superintendent for Internal Revenue, and meetings with the National Director of Human Resources on 24 March 2010 and 4 November 2010. In addition, constant efforts are being made to maintain a positive industrial relations climate, and in seeking solutions at both individual and collective levels.
- SUNAT refuses to grant the trade union the facilities necessary to enable SINAUT SUNAT to function normally. Trade union leave: SUNAT states that section 32 of the consolidated text of the Collective Labour Relations Act, approved by Supreme Decree No. 010-2003-TR, provides that the employer is obliged to grant leave to attend events that are mandatory for union officials, up to a limit of 30 calendar days per calendar year and per official; SUNAT has thus met the requirement by granting the following trade union leave: in 2009 and 2010: general secretary, 32 days in 2009 (exceeding the leave by two days) and 21 days in 2010; Defence Secretary, 28 days in 2009 and 21 days in 2010.

Use of offices: as regards facilities consisting in the use of infrastructure, equipment and other items, SUNAT states that it has over 7,000 employees, and the facilities and equipment it has barely cover its needs; it even rents premises in order to perform its functions optimally and provide better working conditions to its employees, who are aware of this. Moreover, at no time did SUNAT restrict access of union officials to any SUNAT premises; it should be borne in mind that SUNAT carries out most of its work with taxpayers and the public during a continuous workday of at least eight hours, and authorization of meetings of unionized employees is granted on condition that it does not affect service and the normal functioning of the institution.

- SUNAT has clearly violated the trade union immunity of the deputy general secretary of SINAUT SUNAT. SUNAT states that under section 36(g) of its Staff Regulations, it has the right to order detachments and/or any other staff movements in order to optimize the institution's performance of its functions. Like any other employer, by virtue of its managerial prerogative, SUNAT exercises the right of "ius variandi", i.e. the power of the employer to change the time, place and manner of performance of the work; accordingly, it ordered the employee's transfer to the Complaints Department of the Office of Major National Taxpayers through personnel action No. 009064, and on the same date, his rotation through personnel action No. 00707 to Complaints Division III-IPCN, in which he is currently working, and which is located in the same building as the Ad Hoc Public Prosecutor's Office of SUNAT, in which Mr Montoya previously worked. There has thus been no reduction in his pay or grade, as attested by the copies of payslips attached. In conclusion, it is pointed out that the trade union protection known as trade union immunity of the union official was not infringed, as his activity as a union official was not affected in any way.
- SUNAT has taken retaliatory action against the organizing secretary of SINAUT SUNAT. SUNAT states that the disciplinary proceedings against Mr Pedro Chilet Paz were instituted in response to a letter from Mr José Cerna Díaz, a SUNAT employee, who stated that he had learned that his payslips had been used without his permission in judicial proceedings for standardization of earnings instituted against SUNAT. Accordingly, the National Office of Human Resources was asked to confirm the information. In addition, in memorandum No. 100-2010/200000-SUNAT, the Regional Office forwarded to the National Office of Human Resources the letters sent by employees Fernando Campos Valdivia and Víctor Aníbal Zúñiga Loayza stating

that they had not provided payslips to any plaintiff or authorized their use for the investigations in the case. In this context, an inquiry was initiated to determine whether an employee could access information relating to another employee without authorization and, specifically, to investigate access to the payslips of the abovementioned employees and, should someone be found to be responsible, to take the applicable disciplinary measures. Based on the preliminary inquiries, according to information from the Office of the Public Prosecutor, it was found that the payslips in question had been included in the file of the judicial proceedings initiated by Mr Pedro Chilet Paz, and hence electronic memorandum No. 00100-2010-2F3000 and memorandum No. 698-2010-SUNAT/2F3000 were sent to him. As a result, after evaluating and reviewing the documents and information, the inquiry found that the matters at issue did not constitute a violation of or non-compliance with the Staff Regulations, and therefore the case was closed, as notified in electronic memorandum No. 227-2010-2F3000.

- SUNAT has committed unlawful acts against the general secretary of SINAUT SUNAT: (a) unlawfully cautioning Ms Paola Aliaga Huatuco to abide by working hours, despite the fact that her post is not subject to supervision, according to the employer itself. SUNAT states that decision No. 067-2006-SUNAT issued rules on working hours, including provisions on staff who are not subject to direct supervision. In addition, under section 5 of the consolidated text of the Act on working time, working hours and overtime, approved by Supreme Decree No. 007-2002-TR, “maximum hours of work do not apply to managerial staff, staff who are not subject to direct supervision and those working intermittently on call, or as caretakers or guards”. As a result, these workers are not entitled to overtime pay, since they do not have normal maximum hours of work. This is the context in which SUNAT includes, among others, staff performing supervisory duties, as in the case of Ms Aliaga, in the category of staff not subject to direct supervision, as their duties are performed partly or entirely outside the workplace, so that they may or may not record the time at which they come to work, and plan their daily work activities, which may be changed according to the circumstances. Workers who are not subject to supervision are assigned a portfolio of tasks that have to be carried out over an eight-hour workday (fixed working hours) so that the employer receives the expected results. That said, the abovementioned rules do not exempt them from the performance of their assigned duties, and it is therefore justified to caution employees not subject to direct supervision to perform their assigned duties, which thus does not constitute a hostile act against the worker, as SUNAT must exercise its managerial prerogative, through its representatives and within the legal framework of the tasks performed and assigned, bearing in mind that for staff who are not subject to direct supervision this prerogative is limited and subject to conditions. The orders issued must thus refer to the work being done or be inherently related to that work, and therefore must be obeyed by staff within the purview of the managerial prerogative; (b) disproportionate evaluation and appraisal of the performance of Ms Paola Aliaga Huatuco during the period from January to December 2009. SUNAT maintains that the performance evaluation of Ms Paola Aliaga Huatuco was carried out in accordance with the Rules on annual performance evaluation, based on objective criteria and in the light of evaluation factors and levels of competence for each one. The evaluation factors are: (i) technical and functional knowledge; (ii) organization of work; (iii) communication; (iv) work attitude. Ms Aliaga’s performance evaluation for 2009 was as follows: technical and functional knowledge – B; organization of work – C; communication – B; and work attitude – C. SUNAT adds that in view of Ms Paola Aliaga Huatuco’s disagreement and in accordance with the procedure laid down in the abovementioned Rules, an appeals board was set up, which reviewed and evaluated the arguments and evidence presented. The investigation was completed on 23 July 2010 and Ms Aliaga was informed of the result on 25 August 2010: the

appeal was declared receivable in part and the grade C for the “organization of work” factor upheld. It is thus not correct to assert that the reason for Ms Aliaga’s negative evaluation was her activity as a trade union official, as the evaluation was based on objective criteria and the procedure followed for her evaluation and subsequent review on appeal was that laid down in the Staff Regulations of the institution.

- SUNAT issued unlawful written warnings in the form of cautions to union representatives in the Cajamarca office. SUNAT states that the cautions were issued to Mr Manuel Oswaldo Solano Dávila and Mr Eleodoro Américo Paredes Fabián in response to a communication which they sent to the Chamber of Commerce and Industry of Cajamarca containing untrue assertions detrimental to SUNAT’s image, as it taxed executives of the institution with mismanagement and moral and ethical decline, and with having been singled out for pay rises and appointed for subjective reasons. The Code of Ethics approved by decision No. 161-2009/SUNAT advocates, among other institutional values, integrity requiring each of us to act consistently with the principles and action of the institution, by maintaining an honest, service-oriented conduct and preserving the good image of a public servant, endeavouring at all times to ensure that our private lives and behaviour are consistent with that image. The assertions made by Mr Solano Dávila and Mr Paredes Fabián were untrue, as the executive bonus by no means constitutes a privilege, but reflects a sound policy that has existed since 2005; accordingly, the abovementioned persons were cautioned to abstain in future from making unfounded assertions affecting SUNAT’s image. SUNAT adds that a “caution” by no means constitutes a disciplinary measure, as section 48 of the Staff Regulations provides that the disciplinary penalties applicable to employees are: verbal warning, written warning, suspension of one to 30 days and dismissal or removal from office; the “caution” is thus a call to attention that may be used by managers in the exercise of their managerial prerogative to correct conduct which, in the light of the circumstances, does not constitute misconduct warranting disciplinary action, and is therefore not entered in the personnel file, as provided in the procedure for cautioning employees, a copy of which is attached.
- SUNAT issued an unlawful written warning in the form of a caution to the union representative in the Piura office. SUNAT states that the caution was sent to Mr Yovanni Nava Lamia for having used the email system for purposes unrelated to his assigned duties, in violation of the rules on IT security, having confirmed that an email was sent on 23 November 2009 which was unrelated to his assigned duties. In addition, the SUNAT Staff Regulations provide that misuse of email constitutes a violation of section 39(g) of those Regulations; appropriate use of email is a requirement imposed on all SUNAT employees, irrespective of whether they are members of a trade union; the more so since the internal IT rules issued by SUNAT do not reflect an internal policy, but are in line with a national policy aimed at optimizing its use through rational utilization.

1206. In its communication of 3 May 2011, referring to the positions of SUNAT and SINAUT SUNAT in regard to the alleged violations of freedom of association, the Government states that the State of Peru considers that collective labour rights are recognized in broad terms, mainly in article 28 and the fourth transitional provision of the Political Constitution of Peru, which provide as follows: “Article 28. The State recognizes the rights to form unions, to engage in collective bargaining, and to strike. It ensures their democratic exercise: (1) it guarantees freedom of association; (2) it fosters collective bargaining and promotes the peaceful settlement of labour disputes. Collective agreements are binding within the scope for which they were concluded; (3) it regulates the right to strike so that it will be exercised in keeping with the social interest. It defines its exceptions and limitations.” “Fourth final transitional provision: Rules relating to the rights and freedoms which the Constitution recognizes shall be interpreted in accordance with the Universal

Declaration of Human Rights and with other relevant treaties and agreements ratified by Peru.”

1207. Accordingly, the Ministry of Labour and Employment Promotion is committed to carrying out the administrative procedures within its remit in order to ensure observance of workers’ fundamental rights, including the right to freedom of association. In addition, the Government states that it has requested information from the Office of the National Superintendent of the Tax Administration (SUNAT) on the disciplinary proceedings initiated against trade union leaders for alleged misuse of institutional email. SUNAT provided the following information in letter No. 099-2011-SUNAT/1A0000 of 4 April:

- SUNAT has not authorized its staff or members of the trade union to use email for purposes other than those which are strictly work-related;
- the Staff Regulations approved by decision No. 235 2003/SUNAT provides as follows: section 38(u): obligation of workers “to comply with IT security rules and obligations on appropriate use of the Internet, software and email provided by SUNAT”; section 39(g): prohibition on “using email accounts assigned by the institution for purposes other than assigned duties”. According to the workers’ obligations and prohibitions laid down by the abovementioned Staff Regulations, these are mandatory for all workers, both unionized and non-unionized;
- the Staff Regulations of SUNAT are linked to the provisions of departmental decision No. 088-2003-INEI approving directive No. 005-2003-INEI on “Rules for the use of email in public administration bodies”, section 5.6 of the general provisions of which provides that: “Email accounts for staff of public institutions shall be used for activities related to the performance of their duties in the institution.”

1208. The Government adds that, without prejudice to the foregoing, it should be pointed out that, in order to verify the new allegations of the United Trade Union of SUNAT Employees, an inspection will be ordered in this matter. The Government states that it has administrative procedures designed to guarantee freedom of association and foster collective bargaining, as well as promoting means of peaceful settlement of labour disputes; this is evidenced, through the action it has taken, by its unrestricted observance of freedom of association and workers’ collective rights in general.

C. The Committee’s conclusions

1209. *The Committee observes that in this case the complainant organization alleges that the Office of the National Superintendent of the Tax Administration (SUNAT) has committed acts violating trade union rights: unlawful deductions (in addition to the days of the strike) for having participated in a strike; failure to deduct from workers’ wages fines imposed by the union for not having participated in a strike; scheduling of an internal competition to fill vacancies, the timetable of which coincides with the dates previously fixed for the strike; designating part of its activities as essential, requiring its employees, in the event of a strike, to guarantee the presence of staff to prevent the interruption of its activities; displaying an evident unwillingness to communicate with the trade union; refusal to grant facilities to the trade union to enable it to function normally; transfer of a union official, issuance of unlawful warnings in the form of cautions and disciplinary proceedings against trade union representatives (in particular, the general secretary and other officials). In addition, the Committee observes that the complainant organization objects to the fact that the labour administrative authority authorized SUNAT to express its views on the declaration of a strike on 24 and 25 November 2009.*

- 1210.** *As regards the alleged unlawful deductions (in addition to the days of the strike) for participation in a strike, the Committee notes that the Government states that: (1) the deduction in this case should have been made only for the two days not worked, in accordance with section 3 of Legislative Decree No. 713, and SUNAT, in response to a letter from the trade union, has reviewed each of the cases referred to in the complaint, which cover 1,132 workers, in order to determine the amounts deducted and the sums to be reimbursed; (2) this task was completed in October 2011, and the reimbursement of the amounts deducted began in November. In the light of this information, the Committee will not pursue its examination of these allegations.*
- 1211.** *As regards the allegation that SUNAT did not deduct from employees' wages the fines imposed by the trade union for not having participated in the strike, the Committee notes that the Government states that SUNAT respects the sanctity of the wages of its employees, and therefore did not deduct the amounts of the fines imposed by the trade union on the workers who did not observe the strike, as there is no legal basis for doing so, and the employer is only obliged to deduct from remuneration the statutory ordinary and extraordinary trade union dues of its unionized workers at the request of their trade unions and with the worker's written consent. In this regard, the Committee considers that SUNAT's decision not to deduct the fines imposed by the trade union on the workers does not in itself violate the principles of freedom of association.*
- 1212.** *As regards the allegations that SUNAT scheduled an internal competition to fill vacant posts, the timetable of which coincided with the dates previously fixed for the strike, the Committee notes that the Government states that SUNAT indicates that: (1) on 17 April 2009 guidelines for filling vacant managerial posts were approved; (2) as of that date, preparations were made to carry out the selection procedures to fill the vacancies; (3) the communication sent in September 2009 containing the proposal for filling the vacancies predates the date on which SINAUT SUNAT decided, in an extraordinary general assembly on 24 October 2009, to hold the strike. The Committee notes this information.*
- 1213.** *As regards the allegations that SUNAT designated part of its activities as essential services, requesting its workers, in the event of a strike, to guarantee the presence of the necessary staff to prevent the interruption of its activities, the Committee notes that the Government states that: (1) SUNAT sent a communication to the complainant organization to inform it of the occupations and number of workers necessary to maintain essential minimum services, and did not intend to restrict the workers' right to strike; (2) SUNAT's letter was based on section 78 of Supreme Decree No. 010-2003-TR, the Collective Labour Relations Act, and on its implementing Regulations, which set out two cases of exceptions to stoppages: one consists of essential public services, which do not cover the tax administration, and the other, which includes work essential to the enterprise, the interruption of which would endanger persons, safety or property or prevent the immediate resumption of the normal activity of the enterprise once the strike has ended, does cover the services of the tax administration; (3) in view of the nature of its functions and of the fact that tax and customs procedures are subject to statutory time limits, it is essential to guarantee the continuity of services to that end.*
- 1214.** *In this regard, while it observes that SUNAT employees are not prohibited from exercising the right to strike, but that provision is made for imposing a minimum service, the Committee recalls that the Government informed the Committee of Experts on the Application of Conventions and Recommendations in its report on Convention No. 87 that "in accordance with section 1 of Supreme Decree No. 013-2006-TR (which amends section 68 of Supreme Decree No. 011-92-TR), it was stipulated that in the event of disagreement on the number and occupation of workers who are to continue working in conformity with section 82 of the Act, the labour authority shall designate an independent body to determine them and that the decision of the independent body will be accepted by the*

labour authority in order to resolve the disagreement". In these circumstances, the Committee trusts that, should a disagreement arise on the number of workers required to guarantee a minimum service in SUNAT in the event of a strike, the parties will be able to refer the matter to the independent body provided for in the legislation.

- 1215.** *As regards the allegations that SUNAT has displayed an evident unwillingness to communicate with the trade union, the Government states that SUNAT indicates that this assertion is unfounded, since it has held a number of meetings with representatives of the trade union (it refers to those held on 9 and 10 April 2010, 27 January 2010 and 18 February 2010, and meetings with the National Director of Human Resources on 24 March and 4 November 2010), and that constant efforts are being made to maintain a positive industrial relations climate. The Committee takes note of this information and hopes that both parties will do everything in their power to maintain harmonious industrial relations.*
- 1216.** *As regards the allegations that SUNAT refuses to grant the trade union the facilities necessary to enable it to function normally (an increase in trade union leave, leave to attend events, recognition of trade union immunity, access to premises to communicate with members, provision of an office and email account, etc.), the Committee observes that the Government states that SUNAT indicates that: (1) section 32 of the consolidated text of the Collective Labour Relations Act provides that the employer is obliged to grant leave to attend events that are mandatory for union officials, up to a limit of 30 days per calendar year and per official; (2) the representatives of SINAUT SUNAT were granted trade union leave in 2009 and 2010 (the number of days is specified), even exceeding 30 days in 2009; (3) as regards facilities consisting in the use of infrastructure, equipment and other items, SUNAT has over 7,000 employees, and the facilities and equipment it has barely cover its needs (it even rents premises); and (4) at no time did SUNAT restrict access of union officials to any SUNAT premises, and, bearing in mind that SUNAT carries out most of its work with taxpayers during a continuous workday of at least eight hours, the authorization of meetings of unionized employees is granted on condition that it does not affect service and the normal functioning of the institution. The Committee takes note of this information.*
- 1217.** *As regards the alleged transfer to a lower post of the deputy general secretary of SINAUT SUNAT, Mr Edmóstin Montoya Jara, the Committee notes that the Government states that SUNAT indicates that: (1) under section 36(g) of its Staff Regulations, SUNAT has the right to order detachments and/or any other staff movements in order to optimize the institution's performance of its functions; (2) like any other employer, by virtue of its managerial prerogative, SUNAT exercises the right of "ius variandi", and accordingly ordered the employee's transfer to the Complaints Department of the Office of Major National Taxpayers through a personnel action, and on the same date, ordered his rotation to the Complaints Division, in which he is currently working; (3) the unit is located in the same building as the Ad Hoc Public Prosecutor's Office of SUNAT, in which Mr Montoya previously worked; (4) there has been no reduction in his pay or grade, as attested by the copies of payslips attached; and (5) the trade union immunity of the union official was not infringed, as his activity as a union official was not affected in any way. The Committee observes that the complainant organization states that the Ministry of Labour and Employment Promotion has sanctioned SUNAT for that action, warning it to change its conduct, and that SUNAT has not done so. In these circumstances, the Committee requests the Government to confirm whether, as affirmed by the complainant organization, the administrative authority ordered the reinstatement in his former post of union official Mr Demóstenes Montoya Jara and, if so, to take steps to ensure that the order is carried out.*

- 1218.** *A regards the allegation that SUNAT has taken retaliatory action against the organizing secretary of SINAUT SUNAT, Mr Pedro Chilet Paz (according to the complainant organization, when the union official filed court proceedings for adjustment of his remuneration to that received by other workers performing the same tasks, SUNAT initiated disciplinary proceedings against him for having submitted other employees' payslips as part of the judicial proceedings), the Committee notes that the Government states that SUNAT indicates that the disciplinary proceedings were instituted in response to a letter from an employee who stated that he had learned that his payslips had been used without his permission in judicial proceedings, and, after evaluating and reviewing the documents and information collected, it was found that the matters at issue did not constitute a violation or non-compliance with the Staff Regulations, and therefore the case was closed. The Committee takes note of this information.*
- 1219.** *As regards the alleged unlawful caution to the general secretary of SINAUT SUNAT, Ms Paola Aliaga Huatueco, to abide by working hours, the Committee notes that the Government states that SUNAT indicates that: (1) decision No. 067-2006-SUNAT issued rules on working hours, including provisions on staff who are not subject to direct supervision, and section 5 of the Act on working time, working hours and overtime provides that maximum hours of work do not apply to managerial staff, staff who are not subject to direct supervision and those working intermittently on call, or as caretakers or guards; (2) as a result, these workers are not entitled to overtime pay, since they do not have normal maximum hours of work; (3) Ms Aliaga carries out supervisory duties and is included in the category of staff not subject to direct supervision (for example, she may or may not record the time at which she comes to work, depending on her daily work activities); (4) the abovementioned rules do not exempt her from the performance of her assigned duties, and the employer is therefore justified in cautioning employees not subject to direct supervision to perform their assigned duties. In this case, the Committee observes a discrepancy between cautioning her to abide by her working hours (the complainant's version) and cautioning her to perform her duties (SUNAT's version). However, the Committee does not have sufficient information to determine whether anti-union harassment or persecution has occurred. In these circumstances, unless the complainant organization sends new information, the Committee will not pursue its examination of these allegations.*
- 1220.** *As regards the disproportionate evaluation and appraisal of the performance of the abovementioned general secretary of SINAUT SUNAT, the Committee notes that the Government states that SUNAT indicates that: (1) the performance evaluation of the trade union official was carried out in accordance with the rules on annual performance evaluation, based on objective criteria and in the light of evaluation factors and levels of competence for each one; (2) in view of Ms Aliaga Huatueco's disagreement and in accordance with the procedure laid down, an appeals board was set up, which reviewed and evaluated the arguments and evidence presented; (3) the investigation was completed on 25 August 2010 and the appeal was declared receivable in part; and (4) it is thus not correct to assert that the reason for the negative evaluation was her activity as a trade union official, as the evaluation was based on objective criteria and the procedure followed for her evaluation and subsequent review on appeal was that laid down in the Staff Regulations of the institution. In the light of this information, and in the absence of information from the complainant organization on any appeal lodged against the administrative appeal decision, the Committee will not pursue its examination of this allegation.*
- 1221.** *As regards the allegation that written warnings were issued in the form of cautions to union representatives in the Cajamarca office (Mr Manuel Oswaldo Solano Dávila and Mr Eleodoro Américo Paredes Fabián) and in the Piura office (Mr Joanna Nava Lamia) and that disciplinary proceedings were initiated against union representatives for alleged*

misuse of email (Defence Secretary Ms María Covarrubias and communication and public relations secretary Mr Jorge Carrillo Vértice), the Committee notes that the Government states that SUNAT indicates that: (1) as regards the representatives of the Cajamarca office, the warning was issued in response to a communication which the persons concerned sent to the Chamber of Commerce and Industry of Cajamarca containing untrue assertions detrimental to SUNAT's image, as it taxed executives of the institution with mismanagement and moral and ethical decline, and with having been singled out for pay rises and appointed for subjective reasons; (2) as regards the union representative of the Piura office, the warning was sent for having used the email system for purposes unrelated to his assigned duties; the SUNAT Staff Regulations provide that misuse of email constitutes a violation of the Staff Regulations, and appropriate use of email is a requirement imposed on all SUNAT employees, irrespective of whether they are members of a trade union; and (3) the warnings do not constitute a disciplinary measure. As regards the disciplinary proceedings for alleged misuse of email against union officials María Covarrubias and Jorge Carrillo Vértiz, SUNAT states that it has not authorized its staff or members of the union to use email for non-work-related purposes; specifically, the SUNAT Staff Regulations prohibit the use of email accounts provided by the institution for purposes unrelated to assigned duties, and the prohibitions are strictly mandatory for all staff, unionized or non-unionized. In these circumstances, observing that the Government states that an inspection order will be issued in the matter, the Committee requests the Government to keep it informed of the outcome of that inquiry. Furthermore, the Committee recalls that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces and the use of email. Recalling that access to employers' facilities should not be exercised to the detriment of the efficient functioning of the enterprise concerned, the Committee suggests that the employer and the workers' organization strive to reach agreement on the modalities for the use of email.

1222. Lastly, the Committee observes that the Government has not sent its observations in regard to the allegations of the complainant organization objecting to the conduct of the labour administrative authority authorizing SUNAT to express its views on the declaration of a strike on 24 and 25 November 2009. The Committee requests the Government to send its observations in this regard.

The Committee's recommendations

1223. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee trusts that, should a disagreement arise on the number of workers required to guarantee a minimum service in the Office of the National Superintendent of the Tax Administration (SUNAT) in the event of a strike, the parties will be able to refer the matter to the independent body provided for in the legislation.*
- (b) *The Committee requests the Government to confirm whether the administrative authority ordered the reinstatement in his former post of union official Mr Demóstenes Montoya Jara, as stated by the complainant organization, and, if so, to take steps to ensure that the order is carried out.*
- (c) *As regards the alleged initiation of disciplinary proceedings against union representatives for alleged misuse of email (Defence Secretary Ms María Covarrubias and communication and public relations secretary Mr Jorge Carrillo Vértiz), the Committee requests the Government to keep it informed*

of the outcome of the inquiry that will be conducted in this regard. Furthermore, as regards the facilities that workers' representatives should enjoy as may be necessary for the proper exercise of their functions, the Committee suggests that the issue of use of the email system by the trade union should be a matter for negotiation between the parties.

- (d) *The Committee requests the Government to send its observations in regard to the allegations of the complainant organization objecting to the conduct of the labour administrative authority authorizing SUNAT to express its views on the declaration of a strike on 24 and 25 November 2009.*

CASE NO. 2825

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

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

Allegations: The complainant alleges anti-union dismissals and transfers and bad faith in collective bargaining processes

1224. The complaint is contained in a communication from the General Confederation of Workers of Peru (CGTP) dated 5 November 2010. The CGTP subsequently sent new allegations in a communication dated 25 January 2011.
1225. The Government sent its observations in a communication dated 3 May 2011.
1226. 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

1227. In its communication of 5 November 2010, the CGTP states that the purpose of the complaint is to report attempts by the government institution entitled National Service of Training for the Construction Industry (SENCICO) to obstruct the exercise of freedom of association as provided for in ILO Conventions Nos 87 and 98, which have been ratified by the Government of Peru. The CGTP requests the Committee to require specific action from the Government in order to ensure the free exercise of freedom of association and collective bargaining.
1228. The Single Union of Workers of the National Service of Training for the Construction Industry (SUTSENCICO) was formed on 28 June 2008 and has a national membership of 110 workers. On 5 September 2008, they presented a list of claims; after completion of the direct negotiations stage in December 2008, they went on to conciliation which ended in May 2009. This was followed by arbitration in an attempt to find a peaceful settlement to the dispute, but these efforts have so far been unsuccessful. According to the CGTP, after the union was created, the workers were coerced by the company into leaving the union; they were prevented from using certain premises for general meetings requested by the

union; union leave was restricted to union officials; and disciplinary measures were applied against union members and officials for alleged breaches of internal regulations. Despite the company's persistent harassment of union members, the union was able to present its initial list of claims to the company and the Subdirectorate for Collective Negotiations.

- 1229.** The CGTP indicates that on 9 September 2009, in the middle of collective talks, the audit commission of SENCICO formally requested in writing information from José Luis Amado Travesaño, who accordingly, on 11 September 2009, requested access to information at the general management office in order to be able to present the required documents within the period specified by the audit commission. On 11 September 2009 he sought an extension of the deadline. On 11 September, with the consent of the general management secretariat, he went to the general management office to help find the documents he needed and was accused of obtaining "restricted" information.
- 1230.** On 25 September 2009, the employer company sent a letter of dismissal to Mr José Luis Amado Travesaño, accusing him of having been in the act of attempting to obtain restricted SENCICO information. This false accusation prompted the union of SENCICO workers to request the Ministry of Labour and Employment Promotion to order a labour inspection. The Directorate of Inspections, following a detailed investigation described in the infraction report no. 2527-2009.MTPE/2/12.3, of 9 December 2009, concludes in point (h) that the dismissal of José Luis Amado Travesaño was not based on any reliably demonstrated cause but on factors which, in the light of the investigation, are not sufficient, reasonable or proportional, and that there are sufficient reasons to believe that factors such as his union membership, involvement in the union's executive committee, and membership of the negotiating committee for the list of claims for 2008-09 and 2009-10, were the real reasons for his dismissal, in retaliation for his union activities and in contravention of the protection given under section 30 of the Single Text of the Collective Relations Act, No. 25593, approved by Supreme Decree No. 010-2003TR, in accordance with section 31(e) of that law. The Ministry of Labour and Employment Promotion accordingly fined SENCICO 5,857.50 new soles (PEN) for committing a very serious infraction i.e. dismissing José Luis Amado Travesaño because of his union membership and despite his trade union immunity (infraction report 2527-2009.MTPE/2/12.3, of 9 December 2009). An application to annul the dismissal of José Luis Amado Travesaño is currently before the court and a date has been set for the presentation of the case in mid-September.
- 1231.** The CGTP adds that on 12 November 2009, SENCICO sent a dismissal notice to Mr Jorge Segundo Pasache Vidal, the union's defence secretary, alleging that he had failed to deal properly with concrete samples sent by customers to SENCICO. This occurred despite the fact the he had applied to change jobs two months in advance. An application to annul the dismissal is currently before the court and a date should be set for the presentation of the case.
- 1232.** The CGTP also alleges that on Thursday, 26 November 2009, the then General Secretary Clemente Rodríguez, was subjected to intimidation by the head of human resources, the head of administration, a human resources specialist and the surveillance supervisor. After visiting a pharmacy to purchase some medicines, he returned to the company premises and was taken to the administrative offices, where he was questioned and told to sign a document without even being allowed to read it. In this case, a conciliatory letter had been sent to officials. Mr Clemente Rodríguez is currently acting as the union's organization secretary and has been transferred to another post as an electrician, although his original post was that of a technical clerk in the central warehouse.

- 1233.** The CGTP states that SUTSENCICO presented its list of claims in September 2008. During that process of collective bargaining, the company has made no counter-proposals in response to the claims. On the contrary, it launched a campaign of harassment and dismissals against union members and, with regard specifically to the collective bargaining process, it had created every possible obstacle to prevent the arbitration tribunal from being set up. Both parties in September 2009 nominated their respective arbitration representatives, but have not agreed on the name of the chairperson of the tribunal. In January, following repeated demands by the union and the CGTP to the Ministry of Labour and Employment Promotion, the Center for the Analysis and Solution of Conflicts (Consensus) of the Pontifical Catholic University of Peru was asked to nominate the chairperson of the arbitration tribunal and in March 2010 duly nominated Dr Carlos Blancas Bustamante. Both parties agreed to this, but after Dr Blancas took up that post, the employers' representative contested his participation and Dr Blancas chose not to take any further part in the tribunal. In June 2010, the Center for the Analysis and Solution of Conflicts (Consensus) reported that Dr Javier Neves Mujica had accepted nomination as chairperson of the arbitration tribunal, a month having passed without the employers' side making any statement on the issue.
- 1234.** The CGTP adds that the union presented the list of claims for the period 2009–10 and the Ministry of Labour and Employment Promotion formally opened the proceedings. The company did not, however, at any time contact the union with an offer of direct negotiations. That being the case, the union decided that the direct negotiations stage was over and requested that conciliation proceedings be started.
- 1235.** As regards the list of claims for 2010–11, the union has presented this list but the employer enterprise has not convened any meeting. The CGTP maintains that for collective bargaining to work effectively, both parties must act in good faith and fairly to ensure a harmonious negotiating process. That means they must make a sincere effort to achieve mutual compromise in order to reach an agreement. However, since good faith cannot be imposed by law, it depends entirely on the voluntary, reciprocal, serious and sustained efforts of the employers and workers. It is thus important that both employers and workers participate in talks in good faith and do everything in their power to reach a reasonable and coherent agreement, that is to say, negotiations must be genuine, efficient, effective and constructive. In the case in question, SENCICO has constantly disregarded the principle of bargaining in good faith.
- 1236.** The CGTP states that on the other hand, since it was not possible to reach a settlement between the parties because of the company's intransigence, the workers are obliged to regard the direct negotiations and conciliation stages as having been exhausted. Nevertheless, while exercising its right to seek recourse to arbitration as an alternative means of finding a peaceful settlement, the employer has repeatedly boycotted arbitration. This approach by the company, aimed at thwarting any settlement, has been encouraged by the systematic decisions of the Ministry of Labour and Employment Promotion, limiting the scope of collective bargaining and effectively vitiating the right of collective bargaining. The union is thus prevented from using collective bargaining to bring about improvements with regard to economic conditions, conditions of work, health and safety, and so on.
- 1237.** The CGTP emphasizes that the union has sought to negotiate and conclude collective labour agreements of benefit to both parties, with respect for the dignity and rights of the workers. The company, however, has to date thwarted any such possibility by obstructing and drawing out the talks, preventing the workers from exercising their right to collective bargaining. This attitude is encouraged by the systematic attempts of the Ministry of Labour and Employment Promotion which, in failing to address the points that have been vetoed by the company, indirectly endorses its attitude in practice. In so doing it sends a

signal of impunity with regard to this breach of good faith to any parties involved in a labour dispute.

- 1238.** The CGTP maintains that SENCICO does not meet the obligations arising from Convention No. 98 with regard to collective bargaining. The Government has also failed in its duty to guarantee the exercise of the right of negotiation and to create the conditions needed to ensure that the issues specified by the ILO as relating to labour relations are addressed in collective agreements.
- 1239.** In its communication of 25 January 2011, the CGTP alleges that the enterprise Farmacias Peruanas SA obstructed the exercise of freedom of association protected by ILO Conventions Nos 87 and 98 and the process of collective bargaining. The CGTP states that Farmacias Peruanas (Boticas Fasa), a Mexican-owned company, has more than 200 branches in the Lima metropolitan area and about 1,500 employees. On 2 December 2009, 36 workers of the company decided in accordance with Peruvian legislation to found the Trade Union of Workers of Farmacias Peruanas SA (SINTRAFASA). The union's executive committee is headed by Hugo Cangalahua, who from that date onwards became the target of harassment, as did the other union officers: the officials were transferred from their places of work to various districts of the Lima metropolitan area. These transfers all had one or more of the following features in common: (a) they involve moves to locations far from the officials' homes; (b) the new locations offer little opportunity for the union officials or members to earn commissions on sales; and (c) they are located in high-risk areas, where the officials and members are subjected to physical danger.
- 1240.** The CGTP adds that on 16 November 2010 all the union members were transferred from one day to the next; their working hours were changed, as was their place of work, which resulted in: (a) more time spent in travelling; (b) higher travel-related costs; (c) reduced income as a result of losing sales commissions; (d) neglect of family life; and (e) high exposure to risk in unsafe working areas.
- 1241.** The CGTP adds that a list of claims from SINTRAFASA was presented to the company on 14 January 2010. The company did not, as it was required to do under Peruvian law, take steps to start collective talks within the statutory period of ten days; that was done only on the union's insistence in July 2010. In the direct talks with the company, the latter did not put forward any counter-proposals in response to the claims.
- 1242.** In August 2010, SINTRAFASA stated that in its view direct talks were over and asked the Ministry of Labour and Employment Promotion to schedule conciliation meetings. This was initiated in August and, at the request of the company, direct dialogue was resumed. The union presented a revised version of its list of claims, but the company still put forward no counter-proposals. The union therefore decided that conciliation should be resumed in the Ministry of Labour and Employment Promotion. The company indicated at the meeting at which dialogue was resumed that it had no counter-proposals in response to the union's claims.
- 1243.** The CGTP considers that for collective bargaining to be effective, both parties must act in good faith and fairly to ensure harmonious negotiations. That means that they must make a sincere effort to achieve mutual compromises in order to reach an agreement. The complainant adds that the fact that the company transferred union officials to other sites during collective talks complicates any effort by the union to hold meetings with its members or advisers and discourages workers from remaining in the union as a result of the obvious economic losses they incur; it is in this regard an act of bargaining in bad faith on the part of the employer. To date, negotiations have been going on for almost 12 months without the company putting forward any counter-proposals in response to the

union's claims. This violates the right to collective bargaining, as article 28(b) of the Political Constitution stipulates that the State is required to promote collective bargaining.

B. The Government's reply

1244. In its communication of 3 May 2011, the Government states that with regard to the complaint against SENCICO, the latter was asked to provide its comments on the union's complaint. SENCICO states that: (a) as regards the dismissals of union officials, both dismissals were found to have been entirely justified, given that José Luis Amado Travesano (organization secretary) had obtained official restricted information from the employer and Jorge Segundo Pasache Vidal (defence secretary) had failed to meet this obligation at work by departing from established work procedures. The dismissals were applied in application of the internal regulations and in accordance with the procedures established under law. It also states that both the individuals concerned have instigated judicial proceedings to enforce their rights, and a ruling is still pending (general management resolutions nos 084-2009.03.00 and 109-2009-03-00 of 30 September and 28 December 2009 respectively authorize payment of social benefits for the workers in question); (b) with regard to the refusal to negotiate the list of claims, SENCICO reported that the list of claims for the period 2008–09 was resolved through an arbitration award of 17 November 2010. As for the demands for the periods 2009–10 and 2010–11, it states that these have, to date, not been resolved and the conciliation stage of the collective bargaining process involving the Ministry of Labour and Employment Promotion has been concluded.

1245. As regards the action of the Ministry of Labour and Employment Promotion, the Government states that the Subdirectorate for Collective Negotiations of the Ministry of Labour and Employment Promotion, in report no. 065-2011-MTPE/1/20.21, communicated the following information:

- *List of claims 2008–09: case file no. 236983-2008-MTPE2/12.210.* Collective bargaining began on 5 September 2008, the principal points of the claims being the following: five-yearly increments; uniforms; increased family allowances; adjustment of voucher values; and duration of benefits, among others. The union on 11 November 2008 sought the conclusion of the direct negotiations stage and the start of conciliation, for which the Subdirectorate for Collective Negotiations scheduled 13 meetings, the last of these on 23 July 2009, at which the union asked that conciliation be declared closed. On 28 September 2009, the union proposed arbitration, an option to which SENCICO agreed; the arbitration award was made on 17 November 2010 and concluded collective bargaining for the period 2008–09. The union nevertheless on 5 January 2011 requested the Ministry of Labour and Employment Promotion to intervene to enforce the arbitration award. The request was upheld by the labour inspection authority, which carried out inspections in order to verify compliance with the arbitration award; it was found that SENCICO indicated that it had not implemented the award with regard to increased economic benefits as the public sector budget legislation for financial years 2008 and 2009 prohibited such increases;
- *Collective agreement 2009–10: case file no. 123942-2009-MTPE/2/12.2010.* Collective talks started on 4 August 2009 on the following specific points: five-yearly increments; uniforms; increases in family allowances; adjustment in voucher values; and duration of benefits, among others. The union on 15 August 2010 sought the conclusion of the direct negotiations stage and the start of conciliation, for which the Subdirectorate for Collective Negotiations scheduled nine meetings, the last one being on 24 March 2011, at which the union asked that the conciliation be declared

closed because, according to SENCICO, the public sector budget legislation for financial years 2009 and 2010 prohibited an increase in economic benefits;

- *Collective agreement 2010–11: case file no. 105669-2010-MTPE/2/12.210.* Collective talks started on 11 August 2010 on the following specific points: five-yearly increments; uniforms; increases in family allowances; adjustment in voucher values; and duration of benefits, among others. The union on 25 November 2010 sought the conclusion of the direct negotiations stage and the start of conciliation, for which the Subdirectorate for Collective Negotiations scheduled six meetings, the last one being on 17 March 2011, at which the union asked that the conciliation be declared closed because SENCICO had not changed its position with regard to the other collective talks that were under way.

1246. The Government adds that the Labour Inspections Directorate conducted the following inspections:

- *Unjustified dismissal of union official José Luis Amado Travesaño.* The Labour Inspections Directorate issued inspection order no. 2527-2009 and the following infractions were noted: (i) unjustified dismissal of the union official José Luis Amado Travesaño; (ii) obstruction of inspection procedures by failing to ensure attendance by company representatives. The Third Labour Inspection Subdirectorate issued resolution No. 639-2010-MTPE/1/20.43 on 5 November 2010 fining SENCICO the sum of PEN3,905 for these infractions.
- *Non-compliance with the arbitration award (list of claims for 2008–09).* In response to the union's complaint, the Second Labour Inspection Subdirectorate issued inspection order no. 1523-2011-MTPE/1/20/4 on 8 February 2011, instructing the labour inspector to verify that the collective agreement agreed under the terms of the arbitration award was being implemented (list of claims for 2008–09). SENCICO was found to be in default of its obligation to pay the remuneration and economic benefits stipulated in the arbitration award. Accordingly, two infractions were noted: (i) a very serious breach of social and labour provisions in force under article 24, clause 24.4, of Supreme Decree No. 019-2006-TR; and (ii) a very serious breach of inspection procedure under the terms of article 46 of Supreme Decree No. 019-2006-TR. A fine of PEN49,572 was proposed, and the penalty procedure has yet to be implemented.

1247. The Government states that it is important to note that the union officials who were dismissed have initiated judicial proceedings with the aim of enforcing their rights. In the case of Jorge Segundo Pasache Vidal, the 17th Labour Court of Lima (case file no. 0800-2009) has ruled that his application for annulment of the dismissal and payment of wage arrears is admissible, and a single hearing was scheduled for 14 July 2011. As regards the case of José Luis Amado Travesaño, the judicial authority has been asked for information on any proceedings initiated by this official.

1248. As regards Farmacias Peruanas SA (Boticas Fasa), the Government states that it has communicated the complaints to Farmacias Peruanas SA with a view to obtaining its comments on the allegations. The company in question, in a letter dated 22 March 2011, stated the following: (1) staff rotation was ordered in keeping with the employer's management prerogatives, which allow the employer to organize an employee's work and determine the form and manner in which the employee is required to work; this is known as *ius variandi*. Such measures were adopted by the employer in relation to more than 400 workers (both union members and non-members), and the aim was not to obstruct the freedom of association of the union's members but to improve business and service quality at the company's branches; and (2) the company indicates that the measure in question had no effect on the collective bargaining round for 2010–11, as the informal meeting arranged

by the Ministry of Labour and Employment Promotion was able to reach agreement on the list of claims, which was presented to the administrative labour authority on 28 January 2011.

- 1249.** The Government adds that without prejudice to anything reported by the enterprise, the National Directorate for Labour Inspections is being asked to carry out inspections at the company Farmacias Peruanas SA, in order to verify the workers' claims.
- 1250.** According to the Government, Peru, through inspections and informal meetings, protects the right of freedom of association and collective bargaining of the complainant trade union organizations. The fundamental rights of freedom of association and collective bargaining are inherent aspects of labour relations for all Peruvians, and the exercise of those rights is encouraged and guaranteed by the State through the various mechanisms that have been implemented and are referred to throughout this report. Through the measures that have been applied, Peru confirms its unconditional respect for trade union freedom and for workers' collective rights in general, by promoting collective bargaining and peaceful settlement of labour disputes. Nevertheless, the Committee will be kept informed of any progress made in the proceedings under way before the judicial authorities and of the outcome of the inspections that have been carried out.

C. The Committee's conclusions

- 1251.** *The Committee notes that in the present case, the CGTP alleges the dismissal of the organization secretary and the defence secretary and acts of harassment against the General Secretary of SUTSENCICO during collective talks in 2009, as well as obstruction and bad faith on the part of SENCICO in talks on the union's lists of claims. The Committee notes that the CGTP also alleges the transfer of officials and of all members of SINTRAFASA, and obstruction and bad faith on the part of the company during talks on the union's list of claims.*

National Service of Training for the Construction Industry (SENCICO)

- 1252.** *As regards the allegations concerning the dismissal of the organization secretary José Luis Amado Travesaño and of the defence secretary, Jorge Segundo Pasache Vidal, the Committee notes that according to the Government, SENCICO has informed it of the following: (1) both dismissals were found to have been entirely justified, given that José Luis Amado Travesaño (organization secretary) had obtained official restricted information from the employer and Jorge Segundo Pasache Vidal (defence secretary) had failed to meet his obligations at work by departing from established procedures; (2) the dismissals were applied in application of the internal regulations and in accordance with the procedures established under law and, (3) both the individuals concerned have initiated judicial proceedings to enforce their rights, and a ruling is still pending. The Committee notes that the Government for its part reports the following: (1) the Directorate of Labour Inspections issued inspection order no. 2527-2009 and the following infractions were noted: unjustified dismissal of the union official José Luis Amado Travesaño; and obstruction of inspection procedures in failing to ensure the presence of company representatives; (2) The Third Labour Inspection Subdirectorates fined SENCICO the sum of PEN3,905 for these infractions; (3) the dismissed union officials have initiated judicial proceedings in order to enforce their rights; and (4) in the case of Mr Vidal, the 17th Labour Court of Lima has ruled his action to annul his dismissal and seek payment of wages to be admissible, and the date of 14 July 2011 has been fixed for the single hearing; while as regards Mr Travesaño, the judicial authority has been asked to provide information on the legal action taken by this union official.*

1253. *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 (revised) edition, 2006, para. 772]. Under these circumstances, the Committee deeply regrets the dismissal – described by the labour inspectorate as unjustified – of the union official Mr Travesaño, and requests the Government: (i) pending a future ruling, to take measures to bring the parties together with a view to bringing about his reinstatement; (ii) to inform it of the implementation of the fine imposed on SENCICO in connection with the dismissal; and (3) to communicate the final outcome of the judicial proceedings in connection with the dismissal. As regards the dismissal of union official Mr Vidal, the Committee requests the Government to inform it whether the labour inspectorate has given a ruling on this dismissal and to inform it of the final outcome of the relevant judicial proceedings.*
1254. *As regards the allegation concerning acts of harassment directed against Clemente Rodríguez, General Secretary of SUTSENCICO (detention of the individual in an office where he was questioned and coerced into signing a document without reading it), the Committee notes that the Government has not communicated its observations in this regard. Under these circumstances, the Committee requests the Government to take the necessary steps to investigate these allegations and, if they are found to be true, to apply the appropriate legal penalties.*
1255. *As regards the allegations concerning obstruction and bad faith on the part of SENCICO in collective talks on the lists of claims presented by the union, the Committee notes the Government’s statements to the effect that according to SENCICO, the list of claims for 2008–09 was settled through arbitration; the lists of demands for 2009–10 and 2010–11 have not yet been settled, and the conciliation stage in the collective bargaining process involving the Ministry of Labour and Employment Promotion has been concluded. The Government states that the Subdirectorate for Collective Bargaining of the Ministry of Labour and Employment Promotion has communicated the following information: (1) as regards the list of claims for 2008–09, a settlement was achieved through arbitration but on 5 January 2011, the union sought the intervention of the Ministry of Labour and Employment Promotion to enforce the arbitration award (the inspection authority noted that SENCICO had not complied and fined it PEN49,572); (2) as regards the list of claims for 2009–10, the union asked for the direct talks to be concluded and for conciliation proceedings to begin in August 2010; the Subdirectorate for Collective Bargaining scheduled nine meetings and the union sought to have this stage concluded because SENCICO had claimed that the public sector budget legislation for 2009 and 2010 prohibited any increase in economic benefits; and (3) as regards the list of claims 2010–11, the union in November 2010 sought to have the direct talks concluded and conciliation to be started, for which purpose the Subdirectorate of Collective Bargaining scheduled six meetings. After the final meeting, the union sought to have that stage concluded because SENCICO had not changed its position in relation to the other collective negotiations that were in progress.*
1256. *The Committee regrets that despite the efforts that have been made and the time that has passed, SUTSENCICO has been unable to conclude a collective agreement, and that when it was agreed that arbitration should be initiated, SENCICO did not abide by the terms of the arbitration award (according to the Labour Inspectorate). The Committee recalls 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” and emphasizes that “agreements should be binding on the parties” [see **Digest**, op. cit., paras 935 and 939]. Under these circumstances, although it understands that the requirement to comply with budget legislation may be a constraint on the parties to*

collective talks in the public sector, the Committee requests the Government to take steps to stimulate and promote the full development of collective bargaining between the union and SENCICO with a view to concluding a collective agreement in the very near future. The Committee request the Government to keep it informed in this regard.

Farmacias Peruanas SA

- 1257.** As regards the alleged transfer of officials and all members of SINTRAFASA, the Committee notes that according to the Government the company claims that: (1) staff rotation was ordered in keeping with the employer's management prerogatives, which allow the employer to organize an employee's work; (2) such measures were adopted by the company in relation to more than 400 workers (both union members and non-members), and the aim was not to obstruct the freedom of association of the union's members but to improve business and quality of service at the company's sites. The Government adds that the National Inspectorate for Labour Inspections was asked to conduct inspections at the company in order to verify the workers' allegations.
- 1258.** In this regard, the Committee recalls that "Protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker" and "a deliberate policy of frequent transfers of persons holding trade union office may seriously harm the efficiency of trade union activities" [Digest, op. cit., paras 781 and 802]. Under these circumstances the Committee requests the Government, as the union has done, to take the necessary steps to investigate these allegations and, if the transfers are shown to be of an anti-union nature, to take steps to ensure that they are annulled. The Committee requests the Government to keep it informed in this regard.
- 1259.** Lastly, as regards the allegations regarding obstruction and bad faith on the part of the company in the collective talks on the union's list of claims, the Committee notes with interest that according to the Government, the company informed it that in an informal meeting arranged by the Ministry of Labour and Employment Promotion, a settlement was reached on the claims for the period 2010–11, which was presented to the administrative labour authority on 28 January 2011. In the light of this information, the Committee will not pursue its examination of these allegations.

The Committee's recommendations

- 1260.** In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:
- (a) *The Committee deeply regrets the dismissal – described by the Labour Inspectorate as unjustified – of the trade union official Mr Travesaño of SENCICO, and requests the Government: (i) pending a future court ruling, to take steps to bring the parties together with a view to bringing about his reinstatement; (ii) to inform it of the implementation of the fine imposed on SENCICO in connection with the dismissal; and (iii) to communicate the final outcome of the judicial proceedings in connection with the dismissal of this union official. As regards the dismissal of trade union official Mr Vidal, also of SENCICO, the Committee requests the Government to inform it as to whether the Labour Inspectorate has taken a decision on this dismissal, and to inform it of the final outcome of the relevant judicial proceedings.*

- (b) *As regards the allegations regarding acts of harassment against the General Secretary of SUTSENCICO, Mr Clemente Rodríguez (detention of the individual in an office where he was questioned and coerced into signing a document without reading it), the Committee requests the Government to take the necessary steps to investigate these allegations and, if they are found to be true, to apply the appropriate legal sanctions.*
- (c) *The Committee requests the Government to take measures to stimulate and promote the full development of collective bargaining between the union and SENCICO with a view to concluding a collective agreement in the very near future. The Committee requests the Government to keep it informed in this regard.*
- (d) *As regards the alleged transfers of officials and all members of SINTRAFASA, the Committee requests the Government to take steps to investigate these allegations and, if they are found to be anti-union in nature, to take steps to annul them. The Committee requests the Government to keep it informed in that regard.*

CASE NO. 2826

INTERIM REPORT

**Complaint against the Government of Peru
presented by
the Federation of Textiles Workers of Peru (FTTP)**

Allegations: Refusal to negotiate a draft branch collective agreement in the textiles sector; refusal to grant union leave to union officials; dismissals of union members; etc.

- 1261.** The complaint is contained in communications from the Federation of Textiles Workers of Peru (FTTP) dated 17 November 2010 and 11 January 2011.
- 1262.** The Government sent its observations in a communication dated 2 March 2011.
- 1263.** 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

- 1264.** In its communications dated 17 November 2010 and 11 January 2011, the FTTP alleges that the executive branch needs to take steps to ensure the resumption of dialogue with the National Labour Council and all its constituent committees, and the agenda should include the minimum living wage and decent work, since Peru still has the lowest minimum wage in the whole of South America, and the private sector commercial employers affiliated to the National Society of Industries are the ones seeking a resumption of dialogue. In this context the executive branch needs to set in motion the repeal of Legislative Decree No. 22342 concerning promotion of non-traditional exports, which authorizes employers to

hire the number of workers they need through contracts of between one and ten years or more.

- 1265.** The complainant organization also requests the Committee on Freedom of Association to recommend that the textile employers affiliated to the Textiles and Clothing Committee of the National Society of Industries and Association of Exporters (ADEX) cease their campaigns to dismiss workers for joining unions under the protection of Legislative Decree 22342. This legislation removes any limit on the renewal of temporary contracts, which leads to abuses of workers' rights including employment instability and, in practice, the impossibility of unionizing. The complainant organization indicates that these problems have been going on for the last 32 years in the textiles sector, and enumerates cases of anti-union dismissals of union members or non-renewals of employment contracts following the establishment of unions in ten companies since 2005. The administrative or judicial authorities have sometimes adopted measures but these are often not implemented in full or only after a time.
- 1266.** The complainant organization requests that the Textiles Committee accede to the request made by the Ministry of Labour and Employment Promotion (MTPE) to agree to negotiations on a list of claims for the textiles and clothing sector presented in 2010, as had been done until 1987, given that since 1990, as a result of neoliberal legislation under the Fujimori regime, conditions have been imposed unilaterally at the enterprise level, weakening the trade union movement and leaving thousands of textile workers in a vulnerable situation, without benefits or access to unions.
- 1267.** The complainant organization also alleges that on 31 May 2002, under the Government of Dr Alejandro Toledo, through Resolution No. 092-2002/SBN-GOJAR, the Superintendency of National Assets ordered that the premises of 900.14 square metres used by the complainant federation at Avenue 28 July 1920 in La Victoria District be returned to the State. An administrative resolution issued by the subsequent Administration No. 095-2007/SBN-GO-JAD of 22 August 2007, ordered the eviction without any prior notice of said premises (resulting in the loss of property and documentation), and some 410.85 square metres are allocated to the "Micaela Bastidas" Mothers' Club affiliated to the Aprista Peruano Party for eventual use as a public canteen. The rest of the premises are to be handed over for use as a clinical records repository for the Casimiro Ulloa Hospital. The premises have been used by the Federation for decades for its trade union activities and was made available by the State on the sole condition that a technical textiles school be built there, a condition that could not be met because of unfavourable labour conditions and lack of financial resources and members. This is, however, a pretext for measures to ensure that such a large textiles union is prevented from re-organizing. The complainant federation draws attention to the role played in this by the economic power of the employers acting with the political authorities, in a process that is fraudulent and does not respect due process.
- 1268.** The complainant organization is demanding that textile companies employing officials of the Federation grant them union leave when they request it. It cites the example of the Federation's General Secretary, who was refused union leave in the company CREDISA – TRUTEX SAA "CREDITEX".
- 1269.** The complainant organization is demanding a debate in the Congress on the following legislation: the General Labour Act (which has been before Congress for eight years); this would clear up existing confusion arising from the many different existing legal texts in this area; the new Participation in Profits Act; the Act on Branch Lists of Claims; Reform of Social Security (after a delay of 50 years); the restoration of the 1979 Constitution, with a demand that all members of Congress do their duty and live up to their election promises by restoring workers' acquired rights as set out in Title I, Chapter V (right to work) of the

1979 Constitution, which contains 16 articles on the guarantee of decent work in Peru; repeal of Legislative Decree No. 22342 on the promotion of non-traditional Exports (referred to above); and the Retirement Act, with a view to lowering the retirement age from 65 to 60 years. Lastly, legislation should give greater powers to the MTPE in the matter of sanctions and their implementation. Procedural reforms are also required to enhance the efficiency, rapidity and independence of the labour courts. Finally, stronger sanctions are needed for violations of labour standards.

- 1270.** Finally, the complainant federation refers to other laws and regulations which, it claims, are not consonant with fundamental labour rights: the Act on productivity and competitiveness (No. 728) of 1997, which legalizes dismissals without any reasons being given and promotes flexibility; Legislative Decree No. 728 as amended; the Statute on labour productivity and competitiveness D.S. 003-97-TR, especially the third title. The legislative decree enumerates different categories of employment contract under which workers can be hired in response to different circumstances. These include: temporary contracts; contracts relating to accidents; and contracts for a particular project or contingency. Executive Decree No. 006-20078-TR implements the regulations set out in Legislative Decree No. 1038 and Statute No. 29245, concerning private third-party subcontracting arrangements. Executive Decree No. 006-2008-TR technically allows the establishment of trade unions, but, like Legislative Decree No. 1038 and Statute No. 29245, allows the automatic dismissal of those who do so. Executive Decree No. 075-2008-PCM, implementing Legislative Decree No. 1057 concerning the special system for administrative hiring in the public services sector, allows contracts for one financial year which can be renewed as often as the contracting entity considers necessary.

B. The Government's reply

- 1271.** In its communication of 2 March 2011, the Government states, in relation to the complainant organization's request to convene the National Council of Labour and Employment Promotion and for its agenda to include the minimum living wage and decent work, that in Extraordinary Meeting No. 32 of 21 May 2010 the social partners confirmed their willingness to resume tripartite dialogue in the National Council for Labour and Employment Promotion (CNTPE), and to call an ordinary meeting, the priority agenda items including the minimum wage and decent work. As regards the minimum wage, the CNTPE in its Ordinary Meeting No. 93 (23 September 2010) declared itself to be in permanent session to review the minimum wage. In Extraordinary Meeting No. 33 (2 December 2010) the report on the increase in the minimum wage was presented and approved by Supreme Decree No. 011-2010-TR (11 November 2010), which provided for an increase in the minimum wage of PEN50. The calculation took account of the methodology of periodic adjustment for the minimum wage approved by the CNTPE on 23 August 2007. The employers' representatives proposed that the Special Commission on Productivity and Minimum Wages revise and analyse the warning indicators given in the report on "Growth in productivity and readjustment of the minimum wage" and the differentiated minimum wage. The workers sought to maintain the methodology of periodic adjustment of the minimum wage approved by the CNTPE but also left open the possibility of resuming discussions on the topic in the future. These viewpoints having been established, the permanent session of the Council was declared closed. Finally, it is important to indicate that discussion on this was exhausted in the light of the recent increase, but the possibility has been left open for further discussions in the future.
- 1272.** As regards decent work, in Ordinary Session No. 94 of 2 December 2010, the "Plan of Action of the Ministry of Labour and Employment Promotion for Decent Work" was submitted to the CNTPE by the Director-General for Fundamental Rights and Occupational Safety and Health. It was agreed to reactivate the Council's standing technical committee on Labour, employment, vocational training and social security, and

that they should collaborate on a decent work programme. The Technical Committee for Labour will review the Plan of Action and the proposals agreed by the employers and workers in order to determine the priority topics for discussion in each of the technical committees. In Ordinary Meeting No. 95 of 27 January 2010, the plenary ratified the working methodology approved by the Technical Committee for Labour by which the development of the four main thrusts of the National Decent Work Programme is devolved to the standing committees: effective observance of the fundamental principles and rights at work and promotion of tripartism and social dialogue – Technical Committee for Labour; economic growth to promote employment – Technical Committee on Employment (topics related to training will be examined with the Technical Committee on Vocational Training); and enhancing the efficiency and coverage of social protection systems – Technical Committee on Social Security.

- 1273.** As regards the technical committees, the Technical Committee for Labour has met on four occasions (21 December 2010, 11 and 18 January and 1 February 2011), at which following a review it adopted as a working paper a proposal by the General Directorate for Fundamental Rights and Occupational Safety and Health on “Outlines of a policy on Objectives II and IV of the National Decent Work Plan”. The workers and employers will present their proposals in advance of the 8 February 2011 session; these will complement the proposal of the General Directorate which will be discussed on a tripartite basis at its 8 February 2011 session. The Technical Committee for Social Security convened on 7 February 2011 in Ordinary Session No. 50. At that meeting it took note of the CNTPE agreements regarding involvement of the Commission in the development of the social protection element of the National Decent Work Plan.
- 1274.** As regards the complainant’s demand to repeal Legislative Decree No. 22342 on the promotion of non-traditional exports, this legislation according to the Government was conceived as part of a policy for promoting non-traditional exports and enterprise creation. In order to achieve this goal a special system was established permitting companies to hire staff in the numbers required in order to meet demands for non-traditional exports where the volume of exports is at least 40 per cent of production. For such contracts, specific legal requirements must be met. In order to ensure compliance with these provisions and to prevent them being abused by exporting companies, the MTPE in 2008 drew up guideline No. 002-2008.MTPE/2/11.4 on labour inspection operations in the textiles sector in an attempt to prevent abuse of such contracts by textile enterprises, and efforts are being made to ensure compliance in those enterprises with social and labour obligations and occupational safety and health requirements.
- 1275.** Nevertheless, the Government states that the system is currently under discussion in the Congress, where two bills have been tabled concerning its repeal. These priority Bills Nos 2241/2007-CR and 2272/2007-CR are to be debated by the full Congress. The Committee for Labour has decided in favour, while the Foreign Trade Committee has indicated its opposition. It will be for Congress to decide whether these provisions for the special labour regime in the non-traditional exports sector are to be repealed.
- 1276.** As regards the request by the complainant organization for the textiles and clothing employers of ADEX to cease their campaigns to dismiss workers for joining unions, the complainant indicates that the textiles employers, under protection of the Act on non-traditional exports, continues to dismiss workers for joining unions. It alludes specifically to the situations that have arisen in some textile companies. In particular, laws already in force, and specifically Act No. 228806 (General Labour Inspection Act and its Regulations) approved by Supreme Decree No. 019-2006-TR, deem the following to constitute serious offences in labour relations: (1) failure to comply with provisions governing fixed-term contracts, whatever the contracts be called, any distortion of their provisions, fraudulent use, or use to violate the principle of non-discrimination; (2) any

acts that affect the freedom of association of workers or of workers' organizations, including acts that impede free affiliation to a union, encourage people to leave a union, obstruct the establishment of a union, impede union representation, use employment contracts with conditions that affect freedom of association, collective bargaining and the right to strike, or any attempts to undertake fraudulent subcontracting, or any other act of interference in the organization of unions; and (3) discrimination against workers for engaging in their union activities, whether on indefinite-term contracts, temporary contracts, working part-time, or other arrangements. The Government indicates that the Regulations of the General Inspection Act specifically state that labour inspection orders may include orders to the employer to the effect that in relation to a given worker, where laws or regulations in force have not been respected, a temporary employment contract shall be deemed to be a contract of indeterminate duration and thereby ensure continuity of the worker's employment, where appropriate. These provisions are intended to safeguard workers' social and labour rights including the right to form and join a union, irrespective of the nature of their employment contract.

- 1277.** The Government sends abundant information on the administrative and judicial measures taken in ten cases involving enterprises cited by the complainant. This information indicates that inspections are being carried out and fines are being imposed for violations of freedom of association where contraventions are found to have occurred.
- 1278.** The Government also states that, between 2006–10, cases were registered involving workers at various companies cited by the complainant. Numerous case files have been registered with the Administrative Conciliation Service, and as regards the Free Judicial Sponsorship Service, cases have arisen concerning disputes between workers and a number of companies over payment of social benefits and/or compensation for arbitrary dismissals in a number of judicial proceedings involving six textile companies.
- 1279.** The Advisory Office of the Subdirectorate for Free Legal Defence and Advice for Workers provides abundant information on workers' rights and on the actions workers can take if they are dismissed for belonging to a union or union's executive body, and requests inspection visits if it considers them to be necessary.
- 1280.** The Government states that the free defence services offered by the MTPE guide and encourage employer enterprises by disseminating socially responsible practices, the aim being to promote the right to equality in all aspects of employment, as provided for in the Political Constitution which enshrines the principle of equal opportunities without discrimination in employment.
- 1281.** As regards the claim by the complainant that the national-level list of demands for the textiles and clothing sector should be discussed at the branch level, the Government states that the Subdirectorate for Collective Negotiations of the MTPE has informed it that:
- Case file No. 51994-2010-MTPE/2/12210 of the FTTP and the Textiles Committee of the National Society of Industries was opened on 12 April 2010 for one year as of 15 March 2010 to 14 March 2011; it covers all textile and clothing workers who were in their post at the time, and the main points of the collective agreement are as follows: 15 per cent increase in daily wage rates, may day and night work bonuses, benefits for school attendance and higher education, family benefits, death benefits, paid leave in cases of death in the family, and so on.
 - On 20 April 2010, the opening of the case file and notification of the parties was ordered with a view to starting the direct negotiations stage in accordance with the Collective Labour Relations Act.

- On 28 April 2010, official notification was sent to the workers regarding the resolution of 20 April 2010; the writ of notification no. 50010 was returned with an indication that it was not possible to proceed.
- As regards Application No. 61148-2010 of 20 April 2010, the National Society of Industries filed an application to return the list of claims. It is claimed that the go-ahead was being given to collective talks in which it could not act in a representative capacity. It refers to the decision taken by the extraordinary general meeting of 5 August 1992, in which the Textiles Committee of the National Society of Industries agreed unanimously not to continue negotiations on such lists of claims by branch of activity, and agreed that each enterprise should negotiate with its own employees on matters concerning wage increases and conditions of work in the light of increased production, productivity and its own economic situation.
- Through a resolution of 18 May 2010 the Subdirectorate for Collective Negotiations asked the National Society of Industries to clarify whether Action No. 61148-2010 was intended as a formal objection to the collective bargaining process.
- Through Application No. 72703-2010 dated 26 May 2010 the National Society of Industries replied that Application No. 61148-2010 is for procedural purposes a formal objection and they endorse its contents.
- With the resolution of 28 May 2010 the Subdirectorate for Collective Negotiations resolved to take account of and add to the case file the statements of the National Society of Industries, which are communicated to the union in order for it to state its own case.
- To date the FTTP has not resolved the objection of the National Society of Industries.

1282. As regards the return of the premises, now held by the Superintendency of National Assets, demanded by the complainant organization, the FTTP indicates that for 55 years it had been granted use of the premises in question by the State, on the sole condition that it had to build a technical school: this it was unable to do and, as a result, the premises were taken from them by the superintendency. Information was requested on this from the superintendency which stated that:

- The State is the owner of the 900.14 square metre site at Avenue 28 July 1920 in La Victoria District, Lima Province and Department, land registry number 46789040 and SINABIP No. 12933 – Lima.
- In Supreme Resolution No. 113-78-VC-4400 of 29 May 1979, the State attributed the 900.14 square metre site in question to the FTTP to serve as its headquarters and as a technical textiles school.
- In Resolution No. 092-2002/SBN-GO-JAR of 31 May 2002, the site which had been allocated to the Federation was re-allocated to the State, on the grounds that in 24 years of use the entity concerned had failed to comply with the conditions concerning the purpose for which it was to have been used.
- The State allocated the site to the Federation for the purpose of building its headquarters and a textiles school; however, as 24 years passed without those conditions being met, steps were taken to reallocate the premises; this is an administrative procedure by which the State reassumes direct administration of the site.

- 1283.** As the premises were free, the Department of Adjudications in Resolution No. 095-2007/SBN-GO-JAD of 22 August 2007, as amended by Resolution No. 121-2008/SBN-GO-JAD of 16 October 2008, allocated 402.34 square metres of the total area of 900.14 square metres to the “Micaela Bastidas” Mothers’ Club for the purpose of creating a public canteen. Resolution No. 095-2007/SBN-GO-JAD does not provide for the eviction of the premises but for their allocation to the Mothers’ Club. Subsequently, in Resolution No. 139-2008/SBN-GO-JAD of 24 November 2008, a 479.80 square metre area was allocated to the Ministry of Health to be used for administrative offices of the José Casimiro Ulloa Emergency Hospital. The National Superintendency for State Assets, as the regulatory body in this area, is responsible for supervising state assets, which includes periodic reviews of any action relating to state assets and of compliance with the purpose for which they have been allocated. On 21 January 2011, a technical inspection was carried out at the premises in question and its use as a public canteen was confirmed.
- 1284.** As regards the allegations concerning refusal to grant union leave to union officials of the FFTP, as for example the General Secretary, who was refused union leave by CREDISA – TRUTEX SAA, the Government states that the regulations of the Collective Labour Relations Act (Supreme Decree No. 011-92-TR) stipulate that the union officials entitled to apply for leave from the employer in order to attend events at which their attendance is required include the General Secretary. Section 4 of the Single Text of the Act in question stipulates that the State, employers and their representatives must refrain from any form of action intended to obstruct or restrict in any way the right of workers to form and join unions, or to intervene in any way in the creation, administration or maintenance of union organizations. It is regarded as a very serious offence under section 25 of the regulations of the General Labour Inspection Act to carry out acts that affect the freedom of association of workers or of their organizations, such as those that impede union representation. These provisions are based on article 28 of the Constitution of the Republic, which enshrines collective rights of unionization, collective bargaining and strike action as fundamental human rights. In the light of this legislative framework, the General Secretary of the Federation should not have any difficulty in obtaining union leave from his employer.
- 1285.** The Government also indicates that the labour inspection directorate of the regional directorate for labour and employment promotion of this sector has reported that as regards the company CREDISA – TRUTEX SAA, there has been no report of any order during 2009–10 to carry out an inspection at the company into any acts relating to freedom of association or ant-union discrimination that might include the sort of acts described by the complainant. Nevertheless an inspection initiative in the area of freedom of association has been instigated (Inspection Order No. 29755-2010).
- 1286.** As regards the request by the complainant federation for the legislative authority to table for debate a series of draft laws that are still pending approval, the Government indicates that according to information provided by the Congress of the Republic:
- As regards the General Labour Act, Bills Nos 67, 128, 271, 610, 815 and 837 have been submitted for discussion; on 16 May 2007 the Labour Committee issued a favourable ruling, and the issue has been on the agenda since 30 May 2007 to be tabled for discussion in the plenary session. On 28 May 2007, the Board of Spokespersons exempted Bill No. 610 from the ruling of the Committee for Economics, Banks, Finance and Financial Intelligence, which on 28 November 2008 decided against the bill.
 - As regards the Act concerning the Participation in Profits Act, Bills Nos 1267, 1670, 1686 and 1804 refer to the topic, and on 8 November 2007, the Labour Committee decided in favour, and this has been on the agenda since 22 May 2008 for debate in the plenary.

In this regard, on 8 November 2007 the Board of Spokespersons exempted Bills Nos 1679, 1686 and 1804 from the ruling of the Committee for Economics, Banks, Finance and Financial Intelligence, which on 18 November 2008 gave a negative ruling.

- As regards the restoration of the Political Constitution of 1979, Bills Nos 129 and 720 have been tabled and have been pending a ruling by the Constitution and Regulations Committee since 11 September and 5 December 2006 respectively.
- As regards the repeal of Legislative Decree No. 22342 (Act concerning non-traditional exports), Bills Nos 2241 and 2271 were tabled, and on 4 June 2008, the Commission for Labour gave a favourable ruling which has been on the agenda since 26 September 2008. The Committee for Foreign Trade and Tourism gave a negative ruling on Bill No. 2241.
- Regarding the lowering of the retirement age from 65 to 60 years, Bill No. 2101 has been pending a decision by the Social Security Committee since 6 February 2008.

1287. It should be noted that in 2009 the Government promulgated the framework Act No. 29344 on universal health insurance, which establishes a legislative framework for universal health insurance in order to guarantee the full and progressive right of all persons to enjoy social health insurance and to provide legal standards on access to insurance and to its regulation, financing, benefits and supervision. The reform of the social health insurance system is thus under way.

1288. As regards the allegations calling into question the effectiveness and independence of the judicial and labour authorities, the Government states that Section III of the Preliminary Title of Act No. 29497 (the new Labour Procedures Act) stipulates the following:

In all labour proceedings judges shall ensure that the inequality of the parties involved does not affect the conduct or outcome and to that end they shall endeavour to ensure real equality between the parties, give priority to substance over form, interpret the requirements and presumptions in respect of procedure in a way that favours continuity of procedure, adhere to due process, judicial protection and the principle of reasonableness. In particular, emphasis shall be placed on these obligations in dealing with pregnant women, minors and disabled persons.

Labour judges have a central role in the conduct of proceedings. They shall prevent and punish conduct contrary to the duty to ensure veracity, probity, fairness and good faith among the parties, their representatives, their legal advisors, and third parties.

Labour proceedings shall be free of charge for the service provider in all instances when the total amount of the claims does not exceed 70 “procedural reference units”.

1289. The legislative framework thus establishes clear parameters to guide judges, who must aim to ensure equality between the parties. This notwithstanding, the concerns expressed by the Federation will be communicated to the judicial authority.

1290. As regards the implementation of the new Labour Procedures Act, the following should be noted:

- (a) With Act No. 29497 approval was given for the Labour Procedures Act, which establishes the principles of directness, orality, concentration, rapidity, efficiency and veracity. Its ninth supplementary provision stipulates that the new law will be implemented progressively in the judicial districts specified by the Executive Council of the Judiciary.

- (b) With Administrative Resolution No. 136-2010-CE-PJ of 13 April 2010 the Executive Council of the Judiciary established the Technical Institutional Team for the Implementation of the Labour Procedures Act.
- (c) Through Administrative Resolution No. 232-2010-CE-PJ of the Executive Council of the Judiciary, approval was given for the timetable for implementation of the Labour Procedures Act for 2010: (i) Tacna judicial district, from 15 July 2010; (ii) Cañete judicial district, from 16 August 2010; (iii) La Libertad judicial district from 1 September 2010; (iv) Arequipa judicial district, from 1 October 2010 and (v) Lambayeque judicial district, from 2 November 2010.

This resolution stipulates that for the purpose of implementing the Act in accordance with the plans, objectives and requirements of the technical team, presiding judges of the aforementioned higher courts are authorized to take any measures that may be necessary. A district commission for the implementation of the Labour Procedures Act must be appointed, headed by the presiding judge of the Higher Court and including a senior judge, a specialist judge, a qualified justice of the peace and the head of the district administration. The commission must coordinate directly with the Technical Institutional Team.

- (d) Through Resolution No. 310-2010-CE-PJ of the Executive Council of the Judiciary, the Cuzco judicial district was included in the implementation timetable for the Labour Procedures Act from 1 December 2010.
- (e) Authorization was given to carry out the induction course on the implementation of Act No. 29497 in Cuzco judicial district from 23 to 27 October 2010.

1291. In summary, the Government states that as regards the request to convene the CNTPE to discuss the issue of the minimum living wage and decent work, this has already been done; that as regards the request to repeal Act No. 22342 concerning the promotion of non-traditional exports, this is still pending a debate in the plenary Congress; as regards the complaint regarding alleged dismissals in the textiles sector of workers wishing to join a union, the MTPE, in the exercise of its investigative powers through the Labour Inspectorate, is enforcing workers' trade union rights.

C. The Committee's conclusions

1292. *As regards the allegation regarding the need to resume dialogue within the National Labour Council (a tripartite body), and for its agenda to include the minimum wage and decent work, the Committee notes with interest the Government's statements to the effect that dialogue in the National Labour Council has been resumed, that following a number of meetings it agreed to an increase in the minimum wage which was approved by a supreme decree, and that the Council is advancing with work on a decent work programme, identifying its objectives and reaching a number of agreements regarding social protection.*

1293. *As regards the request by the complainant federation to repeal Legislative Decree No. 22342, the Act concerning non-traditional exports, the Committee notes that according to the Government, there are two priority bills to repeal the legislative decree in question and they are pending debate in the Congress of the Republic. The Committee requests the Government to keep it informed of the debates on this legislative decree in Congress.*

1294. *As regards the alleged campaigns by the textiles employers to dismiss workers for joining unions since 2005, under protection of the legislative decree referred to above, which according to the allegations facilitates dismissals or non-renewals of contracts for*

anti-union reasons, the Committee notes the Government's statements to the effect that Act No. 28806, the General Labour Inspection Act and its Regulations, as approved by Supreme Decree No. 019-2006-TR, deem the following to be very serious violations in labour relations: (1) non-observance of the provisions relating to fixed-term hiring, whatever the type of contract, attempts to distort the terms thereof, its fraudulent use, or its use in order to violate the principle of non-discrimination; (2) acts which affect the freedom of association of a worker or workers' organizations such as those that impede free affiliation to a trade union, encourage workers to leave the union, obstruct the establishment of unions, obstruct union representation, use temporary employment contracts to undermine freedom of association, collective bargaining and the exercise of the right to strike, or any fraudulent subcontracting arrangements, or any other interference in trade unions; and (3) discrimination against a worker for the free exercise of his or her union activity, whether hired for an indeterminate period, on a temporary contract, working part-time, or under other terms and conditions; in this regard the Regulations of the General Inspection Act stipulate that labour inspection orders may include orders to the employer to the effect that in relation to a given worker, where laws or regulations in force have not been respected, a temporary employment contract shall be deemed to be a contract of indeterminate duration, thereby ensuring a worker's continuity in employment where appropriate.

1295. *The Committee notes that the Government sends abundant information on the administrative and judicial measures taken in connection with the cases of ten enterprises cited by the complainant organization. The Committee notes that, according to the information, inspections have been carried out, and fines have been imposed where violations of freedom of association are found to have occurred; it also notes the various measures mentioned by the Government to promote the exercise of trade union rights.*

1296. *Under these circumstances, given that the authorities have found violations of trade union rights to have occurred in recent years in a number of textiles enterprises, the Committee requests the Government, pending a decision by the Congress on the repeal of the legislative decree criticized by the complainant federation, to take steps to ensure that the Labour Inspectorate is diligent in its efforts to prevent, verify and, as appropriate, punish any act of anti-union discrimination in the textiles sector.*

1297. *As regards the alleged refusal since 2010 by the employers of the textiles sector to bargain collectively at the branch level, the Committee notes the Government's statements to the effect that the Subdirectorate for Collective Negotiations of the Ministry of Labour and Employment Promotion has reported that:*

- *Case file 51994-2010-MTPE/2/12210, of the FTTP and the Textile Committee of the National Society of Industries was opened on 12 April 2010 for a period of one year from 15 March 2010 until 14 March 2011; it covers all textiles and clothing workers who were in their post at the time, the main points of the draft collective agreement being the following: a 15 per cent increase in daily wage rates, May Day bonuses, bonus for night work, benefits for school attendance and further education, family benefits, death benefits, paid leave in the case of death of a family member, and others.*
- *On 20 April 2010, the case file was opened with a view to beginning direct negotiations in accordance with the Collective Labour Relations Act;*
- *On 28 April 2010, an official communication was issued to notify the union of the resolution dated 20 April 2010; as the Notification Writ No. 50010 was returned with an indication that it was not possible to proceed;*

- With Application No. 61148-2010 dated 20 April 2010, the National Society of Industries sought to return the list of claims. It states that a collective bargaining process was being allowed to proceed in which it could not act in a representative capacity. It refers to the decision adopted by the extraordinary meeting of 5 August 1992, in which the Textiles Committee of the National Society of Industries agreed unanimously not to continue negotiating lists of claims at the branch level, and agreed instead that each enterprise should negotiate the list of claims with its workers, whether with regard to wage increases or conditions of work, in the light of increased production, productivity and its economic situation;
- In resolution dated 18 May 2010, the Subdirectorate for Collective Negotiations asked the National Society of Industries to clarify whether Action No. 61148-2010 was intended as a formal objection to the collective bargaining process;
- In Action No. 72703-2010 dated 26 May 2010, the National Society of Industries stated that Action 61148-2010 is for procedural purposes a contesting action, the substance of which it endorses;
- In resolution dated 28 May 2010 the Subdirectorate for Collective Negotiations resolved to take account of and add to the case file the statements of the National Society of Industries, which are communicated to the union in order for it to state its own case; and
- To date the FFTP has not resolved the objection of the National Society of Industries.

1298. *The Committee regrets the delays that have occurred in the administrative proceedings due to objections or communication of information by the parties concerned. The Committee has had occasion to examine the question of the level of collective bargaining in Peru [see 338th Report, Case No. 2375], and refers to the conclusions which it formulated in this regard [see 338th Report, paras 1225–1227]:*

*The Committee recalls that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [see **Digest of decisions and principles of the Freedom of Association Committee**, fourth edition, 1996, para. 781].*

*The Committee recalls that, with regard to the level of collective bargaining, the Collective Bargaining Recommendation, 1981 (No. 163), provides, in Paragraph 4(1), that "measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels". The Committee also recalls that, on previous occasions, it has considered that "according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98 the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority [see **Digest**, op. cit., para. 851]. The Committee has considered that the best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide, by mutual agreement, the level at which bargaining should take place. Nevertheless, it appears that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be truly independent [see **Digest**, op. cit., para. 855]. For its part, the Committee of Experts has stated the following:*

The principle of voluntary negotiation of collective agreements, and thus the autonomy of the bargaining partners, is the second essential element of Article 4 of Convention No. 98. The existing machinery and procedures should be designed to facilitate bargaining between

the two sides of industry, leaving them free to reach their own settlement. However, several difficulties arise in this respect, and an increasing number of countries restrict this freedom to various extents. The problems most frequently encountered concern unilateral decision as to the level of bargaining; the exclusion of certain matters from the scope of bargaining; making collective agreements subject to prior approval by the administrative or budgetary authorities; observance of criteria pre-established by the law, in particular as regards wages; and the unilateral imposition of working conditions.

As was pointed out in Chapter VII, the right to bargain collectively should also be granted to federations and confederations; any restriction or prohibition in this respect hinders the development of industrial relations and, in particular, prevents organizations with insufficient means from receiving assistance from higher level organizations, which are in principle better equipped in terms of staff, funds and experience to succeed in such bargaining. On the other hand, legislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility with the Convention. The choice should normally be made by the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise-level agreements [see General Survey of the Reports on 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), 1994, paras 248 and 249].

In these circumstances, the Committee requests the Government to take the necessary steps to change article 45 of Decree-Act No. 22593 and article 46 of Act No. 27912 to bring them into conformity with the international labour standards and the principles indicated, so that the level of collective bargaining is determined freely by the parties concerned. With regard to the issue of the level of collective bargaining when the parties are not in agreement, the Committee notes the arguments of the decision of the Constitutional Court of 26 March 2003, favouring in such cases collective bargaining at the level of the branch of activity in the construction sector. The Committee notes the Government's interest in promoting collective bargaining in accordance with the national Constitution and with Article 4 of Convention No. 98. However, the Committee believes that, when there is no agreement between the parties as to the level of negotiation, rather than a general decision by the judicial authorities favouring negotiation at the level of the branch of activity, it would be more in keeping with the letter and the spirit of Convention No. 98 and Recommendation No. 163 to have a system established by common accord of the parties in which in each new collective bargaining they may assert their interests and points of view in a specific way. The Committee requests the Government to invite the most representative workers' and employers' organizations to establish a mechanism to resolve conflicts relating to the level at which collective bargaining should take place.

1299. *The Committee reiterates the conclusions and principles enounced in Case No. 2375.*

1300. *As regards the Administrative Resolutions of 2002 and 2007 of the Superintendency of National Assets, by which, according to the allegations, premises that had been used by the Federation for many years were reclaimed on the grounds that it had not established a technical textile school, all of which was done for anti-union reasons in mind and as a result of connivance between the political authorities and the employer, the Committee notes the Government's statements to the effect that: (1) the State is the owner of the 900.14 square metre site where the union premises are located; (2) in Supreme Resolution No. 113-78-VC-4400 of 29 May 1979, the State allocated the premises in question to the FFTP for use as its headquarters and for a textiles school; (3) Resolution No. 092-2002/SBN-GO-JAR of 31 May 2002 reclaimed the site from the Federation in favour of the State, on the grounds that 24 years had passed and the Federation had not complied with the terms of use; according to the Government, the Federation had been granted the use of the premises for the purpose of building its headquarters and a textiles school, but 24 years had passed without that condition being met and accordingly the premises were reclaimed; this was an administrative procedure by which the state resumes direct administration of the premises; (4) as the premises in question were free, the*

Department of Adjudications in Resolution No. 095-2007/SBN-GO-JAD of 22 August 2007, amended by Resolution No. 121-2008/SBN-GO-JAD of 16 October 2008, allocated to the “Micaela Bastidas” Mothers’ Club an area of 402.34 square metres, which is part of the 900.14 square metres area, for the purpose of creating a public canteen; Resolution No. 095-2007/SBN-GO-JAD does not order eviction but allocates the premises to the Mothers’ Club for its use; (5) subsequently, in Resolution No. 139-2008/SBN-GO-JAD of 24 November 2008, some 479.80 square metres of the total 900.14 square metres were allocated to the Ministry of Health for use as the administrative offices of the José Casimiro Ulloa Emergency Hospital; (6) the Superintendency of Public Assets as the regulatory body of the national system for management of state assets carries out periodic reviews in relation to the use of state assets and ensures that the conditions of use are being met; on 21 January 2011, a technical inspection of the premises in question was carried out and their use as a public canteen was confirmed.

- 1301.** Taking this information into consideration, and the fact that the complainant federation had held the premises for many years, the Committee requests the Government to inform it whether the complainant has instigated judicial proceedings and, if not, invites it, taking into account the specific features of this case, to consider the possibility of allocating some public premises to the complainant federation for its use.
- 1302.** As regards the allegation concerning the refusal to grant union leave to officials of the FFTP, for example the case of the General Secretary of the Federation, who was refused union leave by the company CREDISA – TRUTEX SAA “CREDITEX”, the Committee notes that according to the Government the Regulations of the Collective Labour Relations Act, Supreme Decree No. 011-92-TR, stipulate that the trade union officials entitled to request leave from the employer in order to attend meetings at which attendance is mandatory include the General Secretary. According to the Government, section 4 of the Single Text of the Collective Labour Relations Act stipulates that the state, employers, and representatives of either, must refrain from any act intended to coerce, constrain or infringe in any way the right of workers to join unions or to intervene in any way in the creation, management or maintenance of workers’ trade union organizations; it is regarded as a very serious infringement in the area of labour relations, under section 25 of the Regulations under the General Labour Inspection Act, to carry out acts that affect workers’ or their unions’ freedom of association, such as those that might obstruct union representation; the provisions of the Act and Regulations are based on article 28 of the Political Constitution which establishes collective rights of association, collective bargaining and strike action as fundamental rights of the person. The Committee notes that the Government emphasizes that the legislative framework described above is such that the Federation’s General Secretary should not face any obstacle in obtaining union leave from his employer, and that there was no report of any inspection order being issued in 2009–10 against the company in question in connection with any acts in the specific area of freedom of association or “anti-union discrimination” which might include the anti-union acts described by the complainant organization. The Committee welcomes the fact that the Government has initiated an inspection in relation to the issue of freedom of association with Order No. 29755-2010. The Committee requests the Government to inform it of the labour inspection ordered in connection with the granting of union leave to the complainant organization’s General Secretary at the aforementioned enterprise.
- 1303.** As regards the request from the complainant organization that the Legislative Authority table for debate a number of bills awaiting approval, the Committee notes that the Government provides information on the current status of these bills in the Congress. The Committee notes, however, that its terms of reference do not allow it to interfere in the functioning of the legislative branch, especially in areas not connected with freedom of association (institutions, social security).

- 1304.** *Lastly, the Committee requests the complainant organization to send the legal texts which in its opinion are not consistent with trade union rights, to indicate in what way they restrict those rights, and to provide more detail of its allegations regarding deficiencies in the operation of the labour courts (slow procedures, etc.) and on the need to strengthen sanctions in cases of violations of labour law.*

The Committee's recommendations

- 1305.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee requests the Government to keep it informed of the debates in Congress on Legislative Decree No. 22342, the Act concerning non-traditional exports. The Committee requests the Government, pending the decision of Congress on the repeal of the legislative decree criticized by the complainant federation, to take measures to ensure that the Labour Inspectorate is diligent in preventing, verifying and where appropriate punishing, any act of anti-union discrimination in the textiles sector of non-traditional exports.*
- (b) As regards the alleged refusal since 2010 by the textiles sector employers to bargain collectively at the branch level, the Committee reiterates its conclusions and principles as set out in Case No. 2375. In particular, the Committee considers that, when there is no agreement between the parties as to the level of negotiation, rather than a general decision by the judicial authorities favouring negotiation at the level of the branch of activity, it would be more in keeping with the letter and the spirit of Convention No. 98 and Recommendation No. 163 to have a system established by common accord of the parties in which in each new collective bargaining they may assert their interests and points of view in a specific way. The Committee requests the Government to invite the most representative workers' and employers' organizations to establish a mechanism to resolve conflicts relating to the level at which collective bargaining should take place.*
- (c) As regards the Administrative Resolutions of 2002 and 2007 of the Superintendency of National Assets which, according to the allegations, reclaimed the premises which the complainant federation had used for many years, the Committee requests the Government to inform it whether the complainant has initiated any judicial proceedings and, if not, invites it, taking into account the specific features of this case, to consider the possibility of allocating some public premises to the complainant federation for its use.*
- (d) The Committee requests the Government to inform it of the inspection ordered by the Labour Inspectorate in connection with the matter of union leave for the complainant organization's General Secretary in the enterprise where he works.*
- (e) Lastly, the Committee requests the complainant organization to send it the legal texts which in its view are not consistent with trade union rights, and to indicate in what manner they restrict those rights, and more detailed information on its allegations regarding deficiencies in the functioning of*

labour courts (slowness of procedure, etc.) and the need to strengthen sanctions in cases of violation of labour law.

CASE NO. 2831

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

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

***Allegations: Interference by the authorities in
the elections of the Executive Committee of the
Single Union of Public Service Drivers of Lima***

- 1306.** The complaint is contained in a communication from the Autonomous Confederation of Peruvian Workers (CATP) dated 24 November 2010. The organization sent a communication containing additional information on 15 March 2011.
- 1307.** The Government sent its observations in a communication dated May 2011.
- 1308.** 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

- 1309.** In its extensive communications of 24 November 2010 and 15 March 2011, the CATP claims that, since 1997, the administrative authorities of the Ministry of Labour have repeatedly and unlawfully granted recognition to the Executive Committee of the Single Union of Public Service Drivers of Lima headed by Mr Jaime Ravelo (subsequently by Mr Rómulo Máximo Pizarro Bustos), thereby disregarding the Executive Committee (or sector) headed by Mr Rolando Torres Prieto, which in the complainant's view is the legitimate one.
- 1310.** The CATP also claims that, over the years, the Executive Committee headed by Mr Jaime Ravelo (and more recently by Mr Rómulo Máximo Pizarro), and the administrative and judicial authorities have committed various irregularities and acts contrary to the established by-laws.

B. The Government's reply

- 1311.** In its communication of May 2011, the Government states that the complaint refers to an internal dispute within the Single Union of Public Service Drivers of Lima which dates back to 1997 and flares up each time a new Executive Committee is elected. The Government maintains that the administrative authority has complied with all relevant legislation, administrative procedures and judicial decisions. The Government refers to a judicial decision taken on 26 July 2005 in favour of the Executive Committee headed by Mr Jaime Ravelo, which was contested by the complainant organization, and to two similar trade union appeals in 2006 and 2008. The Ministry of Labour complied with these decisions.

1312. The Government adds that a case brought against the Ministry of Labour by Mr Rolando Torres Prieto was declared unfounded by the Court of First Instance in 2010, resulting in an appeal being filed on 20 September of the same year.

C. The Committee's conclusions

1313. *The Committee notes that in this case the complainant organization alleges that, since 1997, the authorities of the Ministry of Labour have repeatedly and unlawfully granted recognition to the Executive Committee of the Single Union of Public Service Drivers of Lima headed by Mr Jaime Ravelo (subsequently by Mr Rómulo Máximo Pizarro Bustos), disregarding the Executive Committee (or sector) headed by Mr Ronaldo Torres Prieto, which, in the opinion of the complainant organization, is the legitimate one.*
1314. *The Committee notes the Government's statement to the effect that the complaint refers to an internal trade union dispute; that judicial decisions have been handed down in favour of Mr Jaime Ravelo, including one in 2010 which was subsequently appealed by Mr Rolando Torres Prieto, who is requesting the dissolution of the Executive Committee in question. The Government states that it has shown unwavering respect for all relevant legislation, administrative procedures and judicial decisions.*
1315. *The Committee recalls that when internal disputes arise in a trade union organization, they should be resolved by the persons concerned (for example, by a vote), by appointing an independent mediator with the agreement of the parties concerned, or by intervention of the judicial authorities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1122].*
1316. *Under these circumstances, and noting that this complaint has been referred to the judicial authority, the Committee requests the Government to inform it of any ruling handed down regarding the appeal lodged against the decision of the Ministry of Labour in favour of the Executive Committee of the Single Union of Public Service Drivers of Lima, which is contested by the complainant organization (CATP), and of the decision taken by the Court of First Instance in this regard.*

The Committee's recommendation

1317. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

The Committee requests the Government to inform it of any ruling handed down regarding the appeal lodged against the decision of the Ministry of Labour in favour of the Executive Committee of the Single Union of Public Service Drivers of Lima, which is contested by the complainant organization (CATP), and of the decision taken by the Court of First Instance in this regard.

CASE NO. 2832

REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS**Complaint against the Government of Peru
presented by
the Confederation of Workers of Peru (CTP)*****Allegations: Trial and sentencing of a trade union official and dismissal of several union officials for strike action***

- 1318.** The complaint is contained in a communication from the Confederation of Workers of Peru (CTP) dated 7 December 2010.
- 1319.** The Government sent its observations in a communication dated 3 May 2011.
- 1320.** 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

- 1321.** In its communication dated 7 December 2010, the CTP alleges that, on 29 January 2007, the Trade Union of Miners, Metal Workers and Allied Workers of the Contractors of Atacocha Mining Company, submitted a draft collective agreement for the period 2007–08 to the subdirector for collective bargaining of the city of Cerro de Pasco for the contractors of Atacocha Mining Company, in order to start direct bargaining with the union bargaining committee, led by union officials, Mr Tito Matos Galarza and Mr Jesús Gavino Ventura, among others. However, the enterprises' unwillingness to bargain prompted the workers, in a general assembly held on 18 April 2007, to adopt an agreement to hold an open-ended general strike starting on 30 April 2007.
- 1322.** Nevertheless, adds the complainant organization, the union officials travelled from their town to the capital, Lima, to request the National Directorate for Labour Relations of the Ministry of Labour and Employment Promotion to call meetings with the enterprise. Meetings were held on 18 March, 8 May, 8 June and 9 July 2007, at which the enterprise undertook, in the interests of industrial peace, to intercede with the contractors, asking them to hire the workers and to refrain from retaliatory action against them. Instead, however, the General Secretary of the union, Mr Tito Matos Galarza, was dismissed without citing objective grounds or serious misconduct and without observing statutory trade union immunity. In these circumstances, on 19 March 2008, the dismissed workers and officials (these are not mentioned by name, but the attachments to the complaint list the names of union officials, Epifanio Julián Villavicencio, Jesús Eugenio Gavino and Arturo Garpán Elescano) held a work stoppage in protest and a peaceful demonstration in order to denounce the dismissals publicly. In this context, the national Peruvian police intervened, and in their report accused the protestors of offences against public security in the form of attacks on means of public transport and offences against property in the form of damage to the detriment of the State and of the abovementioned enterprise. Based on the report, charges were brought by the Public Prosecutor's Office (Attorney General's Office), and the examining judge ordered the arrest of General Secretary Tito Alfredo Matos Galarza, who was immediately remanded in custody on 21 March 2008 with the aim of depriving the union of leadership and leaving its members defenceless.

1323. The complainant organization states that on 14 May 2008, 55 days after his arrest, the judge handling the case revoked the detention order issued when the investigation was opened against Mr Tito Alfredo Matos Galarza, replacing it with an order for house arrest [*comparecencia restringida*] requiring him to observe certain rules of conduct.
1324. According to the complainant organization, the criminalization of protest action is increasingly being used against workers who organize in trade unions to demand observance of fundamental principles at work, better wages and working conditions. The union official has thus now been subjected to a restriction on his freedom, and is at risk of being arrested again, as a ruling has not yet been handed down.
1325. As regards the judicial proceedings for nullity of the dismissal of the union officials, the complainant trade union states that these have been closed and that the workers are now on the street without a job, the State having failed to protect them.

B. The Government's reply

1326. In its communication dated 3 May 2011, referring to the criminal proceedings against Mr Tito Alfredo Matos Galarza, the Government states that according to the Public Prosecutor's Office (Office of the Attorney-General), in case No. 2008-142 against Tito Alfredo Matos Galarza, the First Specialized Penal Court of Pasco has handed down a ruling acquitting Mr Tito Alfredo Matos Galarza of the public prosecutor's charge of breach of the peace in the form of rioting detrimental to the State and the Atacocha Mining Company. However, he has been convicted of the offence against public security in the form of an attack on means of public transport to the detriment of the State and the Atacocha Mining Company, and given a sentence of four years' imprisonment and additional penalties provided for in the law, the sentence being suspended on condition that he observe certain minimum rules of conduct. The Government adds that in view of the above, the outcome of the criminal proceedings cannot be linked to anti-union practices on the part of the State, given the separation of powers, in which laws and regulations are observed.
1327. As regards the judicial actions brought by Mr Tito Alfredo Matos Galarza, the Government states that on 2 May 2007, the union official filed *amparo* (protection of constitutional rights) proceedings with the First Civil Chamber of the Superior Court of Justice of Lima, in Case No. 02755-2010-PA/TC, against Atacocha Mining Company and the contractor Opermin SAC, requesting that he and other union officials be reinstated and included on the payroll of the defendant enterprise, Atacocha Mining Company SA. On 30 September 2009, the First Specialized Constitutional Court of Lima declared the action to be unfounded on the grounds that the employment relationship had ended with the expiry of the term of the contract. Finally, in a ruling handed down on 27 September 2010, the Constitutional Court declared the *amparo* action to be irreceivable on the grounds that there was a specific procedural remedy which was equally satisfactory for the protection of the constitutional right that had been allegedly infringed, and which included an evidence phase necessary to clarify the matters in dispute between the parties.
1328. The Government points out that the complaint presented by the complainant does not mention the other union officials allegedly dismissed, although the attachments enclosed with the complaint include three judicial decisions handed down in proceedings instituted by Epifanio Julián Villavicencio (Case No. 183425-2007-00158 before the 25th Labour Court of Lima), Jesús Eugenio Gavino (Case No. 183429-2007-386 before the 29th Labour Court of Lima) and Arturo Gaspar Elescano (Case No. 183412-2007-152 before the Tenth Labour Court of Lima), all against the abovementioned enterprise, and all for nullity of dismissal. These decisions explain that the proceedings in question were closed for reasons

that were solely the responsibility of the plaintiffs, who had not rectified their complaints in due time.

- 1329.** The Government states further that, in line with the sectoral policy of bringing the parties closer to alternative means of settling labour disputes, the Ministry of Labour and Employment Promotion summoned the abovementioned enterprise and the contractors to meetings out of court to discuss, among other topics, the case of former employees Mr Epifanio Julián Villavicencio Ramírez, Mr Jesús Eugenio Gavino Ventura and Mr Arturo Gaspar Elescano (all trade union officials according to the official documentation sent with the complaint). An agreement was reached on 9 July 2007, in which the enterprise undertook to present these persons to the AESA enterprise. Accordingly, the relevant documents are being sent to the enterprise in question, to the AESA enterprise and to the Directorate-General for Labour requesting them for information on the agreement signed.
- 1330.** It is clear from the above, states the Government, that it is not true that the Peruvian State disregards workers' collective rights; on the contrary, through its action, it ensures unrestricted observance of freedom of association and workers' collective rights in general.

C. The Committee's conclusions

- 1331.** *The Committee observes that in the present case the complainant organization alleges, firstly, the dismissal of union officials Mr Tito Matos Galarza, Mr Epifanio Julián Villavicencio, Mr Jesús Eugenio Gavino Ventura and Mr Arturo Gaspar Elescano, on account of a strike held in April 2007, prompted by the unwillingness of the contractors of Atacocha Mining Company to engage in collective bargaining with the Trade Union of Miners, Metal Workers and Allied Workers of the Contractors of Atacocha Mining Company. According to the complainant organization, the judicial proceedings relating to these dismissals have been closed.*
- 1332.** *The Committee notes the Government's statements confirming that the judicial proceedings for nullity of dismissal filed by these union officials were closed for reasons that were solely the responsibility of the plaintiffs, who had not rectified their complaints in due time (it appears from the rulings sent by the Government that the Constitutional Court considered, in regard to the claim filed by the plaintiffs, that it was not that Court, but the ordinary jurisdiction, which should determine whether the complaint should be filed against Atacocha Mining Company or against one of its contractors). The Committee notes the information provided by the Government concerning the meetings held in July 2007 between the Ministry of Labour and Atacocha Mining Company SA in order to settle the collective dispute, at which it was agreed that Mr Villavicencio, Mr Gabino and Mr Elescano would be "presented" by the enterprise to the AESA enterprise (a decision handed down by the Constitutional Court on 15 December 2010, attached by the Government with its reply, states that the plaintiffs refer to an "agreement on their reinstatement"). The Committee notes that the Government states further that it has written to the abovementioned enterprises and to the Directorate-General for Labour concerning the implementation of the agreement that was signed. Accordingly, the Committee awaits this information. The Committee notes that it appears from the record of the agreement provided by the complainant organization and the decisions of the Constitutional Court that this agreement did not cover Mr Tito Alfredo Matos Galarza.*
- 1333.** *As regards the alleged detention (55 days in pre-trial detention) of, and criminal proceedings against, Mr Tito Alfredo Matos Galarza, General Secretary of the trade union, after allegedly holding a protest strike and a peaceful demonstration in March 2008 in protest against the dismissals in 2007 alleged in this case, the Committee notes that the Government states that Mr Tito Alfredo Matos Galarza was acquitted by the judicial*

authority of the charge of breach of the peace in the form of rioting detrimental to the State and the abovementioned enterprise, but was convicted of the offence against public security in the form of an attack on means of public transport, and that he was sentenced to four years' imprisonment and the penalties prescribed by the law, the sentence being suspended on condition that he observe minimum rules of conduct. The ruling handed down by the court of first instance, enclosed with the Government's reply cites, as evidence the verified fact that he had placed stones on an access road to the plant and had incited workers to take over the installations of the enterprise, so that they had continuously blocked access to the plant, using violence; it also lists the damage caused to property. With regards to the acts of violence and damage caused to property to which the Government refers, the Committee recalls that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike, and that in cases of strike movements, the authorities should resort to the use of force only in grave situations where law and order is seriously threatened [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 644 and 667]. While noting that the sentence was suspended, the Committee requests the Government to indicate whether this trade union official has lodged a judicial appeal against this ruling and, if so, requests the Government to keep it informed of the outcome. The Committee also requests the Government to indicate whether this union official has instituted judicial proceedings concerning his dismissal in 2007.

The Committee's recommendations

1334. 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 on the implementation of the agreement reached in July 2007 between the Ministry of Labour and the enterprise concerned in regard to the dismissal of three trade union officials, which would appear to refer to their reinstatement.**
- (b) The Committee requests the Government to indicate whether trade union official Mr Tito Alfredo Matos Galarza has lodged a judicial appeal against the ruling of the court of first instance convicting him of breach of the peace in the form of rioting. The Committee also requests the Government to indicate whether this union official instituted judicial proceedings concerning his dismissal in 2007.**

CASE NO. 2815

INTERIM REPORT

**Complaint against the Government of the Philippines
presented by
the Trade Federation 4, Trade Federation for Metals, Electronics,
Electrical and other Allied Industries – Federation
of Free Workers (TF–4FFW)**

***Allegations: The complainant organization
alleges anti-union dismissals and anti-union
discrimination at the Cirtek Electronics
Corporation and at Temic Automotive
Philippines***

1335. The complaint is contained in two communications from the Trade Federation for Metals, Electronics, Electrical and other Allied Industries – Federation of Free Workers (TF4-FFW) dated 25 August 2010.
1336. The Government forwarded partial observations to the allegations in a communication dated 15 November 2010. The Committee has been obliged to postpone its examination of the case on two occasions [see 358th and 359th Reports, paras 6 and 7, respectively]. At its meeting in May–June 2011 [see 360th 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. The Government submitted a partial response to the allegations in communications dated 1 June and 16 and 29 September 2011. To date, the Government's complete observations have still not been received.
1337. The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

1338. In its communications dated 25 August 2010, the complainant organization alleges, for the Cirtek Employees Labour Union – FFW and for the Temic Automotive Phils. Inc. Employees Union - FFW, anti-union dismissals and anti-union discrimination at the companies Cirtek Electronics Corporation and at Temic Automotive Philippines.

Cirtek Electronics Corporation

1339. The complainant organization alleges the dismissal by Cirtek Electronics Corporation of three sets of union officers of Cirtek Employees Labour Union – FFW (the union). Following a request, in 2009, to the Department of Labour and Employment (DOLE) and the then President of the Philippines, Ms Arroyo, to redress the situation, the union received a copy of a letter from the Office of the President of the Philippines urging the Secretary of the Department of Labour and Employment (SOLE) to take appropriate action

on the mass dismissals of union leaders. To date however, no action has been taken by the DOLE on the issue at hand.

- 1340.** The complainant specifies that Cirtek Electronics Corporation is a company engaged in independent subcontracting for semiconductor assembly, testing and packaging services and located in the Special Export Processing Zone in Laguna Technopark, Biñan, Laguna, Philippines.
- 1341.** According to the complainant, the first dismissal occurred in 2003, when a collective bargaining agreement (CBA) negotiation took place between the company and Cirtek Employees Labour Union – FFW to re-negotiate the last two years of the current CBA (specifically 2004 and 2005). No agreement was reached and hence a bargaining deadlock ensued. A notice of strike was subsequently filed by the union against the company before the National Conciliation and Mediation Board – Calamba, Laguna (NCMB). Despite due notices, the company did not attend the several scheduled conciliations at the NCMB. At the same time, the management accused the union, specifically its officers, of slowing down and persuading the members to boycott overtime work. The union officers were required to explain their side and thereafter, the management decided to terminate Nonita Maliksi, the President of the union, and five other officers, namely: Lolita Salonga, Rosita Demetrio, Rosenda Dolor, Imelda de Silva and Elizabeth Verona. Only Mildred Acuin, Vice-President of the union, and two other board members were not terminated. Following the dismissals, the union officers filed a notice of strike on 26 April 2004 as advised by the FFW. However, after a series of conciliations at the NCMB, Ms Maliksi, the President of the union, decided to convert the strike notice into voluntary arbitration and pursue the illegal dismissal and unfair labour practice complaint against the company through voluntary arbitration. Finally, it was ruled that the dismissals were justified.
- 1342.** The complainant further reports that the second dismissal occurred in June 2005, when the union went on strike due to a bargaining deadlock. After several days of strike, the DOLE assumed the deadlocked issues on 23 June and directed the workers to return to work and the management to accept the strikers. Ms Maliksi who had joined the strike insisted to be admitted back together with the other strikers but the company refused considering that the issue was dealt with by voluntary arbitration. After the resumption of the operation of the company, the union officers and the workers identified as active participants in the strike were approached one by one by the management and threatened with dismissal if they did not cooperate. They were also forced to conclude a Memorandum of Agreement (MOA) while the deadlocked issues were being reviewed by the SOLE. According to Mildred Acuin, the Vice-President of the union, and other officers, they agreed to sign the MOA because the management pledged to abide by the decision of the SOLE should the latter decide on higher benefits, in particular a higher wage increase. On 16 March 2006, the SOLE issued a decision resolving the deadlock by improving the wage increase as agreed in the memorandum of agreement and incorporating in the CBA the agreed items in the MOA. The management questioned the CBA awards of the SOLE before the Court of Appeals, which favourably granted the petition and reversed the decision of the SOLE due to alleged settlement agreement of some members. Hence, the union brought the matter before the Supreme Court, which, to date, has not yet handed down its decision. While the SOLE awards were favourable to the union, the newly elected officers appeared to be ambivalent as to this development for reasons incomprehensible to the general membership, which therefore decided to conduct a new election and elect a new set of officers who would represent them in the enforcement of the decision. Thus, in 2008, the members gathering themselves in the FFW headquarters elected Richie Lacsarum as President, Cleverose Literal and Mildred Fernandez as Vice-Presidents, and another set of officers. After the election, the FFW informed the company of the names of the new officers of Cirtek Electronics Employees Union – FFW. The management immediately dismissed the union officers from their employment. A notice of strike was filed before the

NCMB by Mr Lacsarum on the grounds of unfair labour practice. Several meetings were scheduled by the NCMB but the company never bothered to attend and, instead, directly negotiated with the dismissed officers by offering them separation packages. The offer was finally accepted by the workers who were under pressure for having been out of work and without money. However, this decision was not taken in consultation with FFW.

- 1343.** Lastly, the complainant indicates that the third dismissal occurred when the FFW appointed another set of ad hoc officers to replace the dismissed union officials. FFW again wrote to the company to convey their names namely: Vhir Grande, Rosalinda Guisihan, Aninia Santos, Clemencia Amparo, Russell Kadil, Amelia Ablema, Vilma Sepian, Erwin Bella, Florencia Matula, Alicia Espiritu, Olga Dermogenio and Adorable Unido. Upon receipt of the letter, the company unilaterally dismissed the new set of officers. The union filed another notice of strike for the mass termination of its officers on the ground of unfair labour practice. The company never appeared before the NCMB.
- 1344.** To date, the company has not recognized the local union of FFW. It has stopped deducting union dues in violation of the CBA. The union was replaced with the labour management council, the composition of which is questionable, since the worker representatives have been neither elected nor voted upon by the workers themselves. The complainant believes that freedom of association of the workers in Cirtek Electronics Corporation has been clearly trampled upon by the said company. Moreover, the DOLE had not taken action despite having been reminded by the Office of the President of the Philippines to do so. At present, there were several illegal dismissal and unfair labour practice cases pending before the arbitration branch and the National Labour Relations Commission (NLRC) on the matter. Workers in the company are currently deprived of their right to organize, and any initiatives to revive the union are squelched right away by threats of dismissal from employment. The complainant states that, despite having signed a quit and release claim, the dismissed workers prayed that they be reinstated to their former jobs for being illegally dismissed from their respective employment, and that they be allowed to freely exercise the right to organize and to collectively bargain.

Temic Automotive Philippines Inc.

- 1345.** The complainant denounces anti-union practices by Temic Automotive Philippines Inc. against the Temic Automotive Philippines Inc. Employees Union (“the union”). According to the complainant, Temic Automotive Philippines Inc. terminated all regular rank-and-file employees in its Warehouse and Facilities Departments under the guise of a “Voluntary Retirement Package” (VRP) which was compulsory in its real intent and purpose. There were 28 employees in the said departments who were affected by the outsourcing including four shop stewards. The two departments were part of the bargaining unit as stipulated under the CBA entered into by the company and the union. The dismissals of the 28 rank-and-file employees are considered by the complainant as an unfair labour practice because they were intended to weaken the bargaining edge of the union.
- 1346.** The complainant specifies that Temic Automotive Philippines Inc. is a duly organized company engaged in the business of manufacturing automotive electronics, especially electronic brake systems and comfort body electronics for automotive development, with the principal office located in the FTI Special Economic Zone, FTI Estate, Taguig City, Metro Manila, Philippines. By way of background, a strike was conducted, on 14 September 1995, by the union in the company, then the Telefunken Semiconductors, where the employees of the Warehouse and Facilities Departments played a vital role. In 1998, a spin-off was initiated by Telefunken Semiconductors thereby dividing the latter into four companies, the RF Microtune Technologies, TSPIC Atmel, VISHAY, and the Temic Automotive Philippines Inc. The employees that were assigned to each part of the company were accordingly absorbed as part of its workforce. In 1999, the employees in the

four spin-off companies formed their respective unions because they felt that there was no point in questioning the validity of the spin-off. The unions were recognized by the management and thus no certification election was conducted.

1347. The complainant indicates that, in February 2000, during discussions between the union and the management of Temic Automotive Philippines Inc., the company sought the consent of the union to exclude the Warehouse Department from the coverage of the bargaining unit. However, the union refused on the grounds that the Warehouse Department: (i) was composed of many regular positions occupied by rank-and-file employees; (ii) had always been an integral part of the bargaining unit even prior to the spin-off; (iii) performed functions that were necessary and desirable to the company; and (iv) being the heart of the operation of the company, had played a strategic role during the strike in 1995 in the sense that the joining of the union members from the Warehouse Department had entailed the slowing down if not stoppage of the company's operation. In 2004, during the collective negotiation for the period 2005–09, the exclusion of the Warehouse Department from the scope of the CBA was again raised by the company. The offer was again turned down by the union. Thus, under the CBA 2005–09 entered into by the union and the company, the said Departments are not excluded from the bargaining unit of the rank-and-file employees of the company and are thus covered by the agreement.
1348. The complainant states that, thereafter, a significant increase in the hired independent service provider workers became noticeable, in particular in regular positions such as clerks, material handlers, system encoders, and general clerks. The workers hired by the service providers had practically intruded into the functions of the regular employees in the two departments, working in the same area as the regular employees and using the same equipment, tools, and computers that were owned by the company instead of being provided by the service providers. This was contrary to section 106 of the Labour Code, according to which in cases where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment machineries, work premises, among others, and the workers recruited and placed by such persons are performing activities which are directly related to the principal business of such employer, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.
1349. Hence, on 25 October 2006, the union formally filed a grievance before the company questioning the encroachment of the service provider workers into the functions and positions reserved only for regular employees and asserting that the company violated section 1(1)–(3) of the 2005–2009 CBA. As no settlement was reached at the plant level, the union and the company elevated the matter before voluntary arbitration (Case AC-420-NCMB-NCR-62-01-11-06 handled by Voluntary Arbitrator Padilla). On 1 May 2007, the Voluntary Arbitrator rendered a decision according to which the functions of service provider workers were functions being performed by the regular rank-and-file employees covered by the bargaining unit and thus not valid, and all employees including those supplied by service providers presently designated and functioning as clerks, material handlers, system or data encoders were entitled to the rights and privileges of regular employees of the company. The decision was appealed by the company via a petition for certiorari before the Court of Appeals (CA-G.R. SP No. 99029), which denied the petition for lack of merit and affirmed the decision of the voluntary arbitrator.
1350. The company raised the case before the Supreme Court (G.R. No. 186965). On 23 December 2009, the Supreme Court rendered a decision nullifying the above decisions on the grounds of lack of evidence showing that: the forwarding arrangement (of the company) violates section 106 of the Labour Code; the company's basic objective was not that of achieving "greater economy and efficiency of operations"; there was bad faith; the

forwarding arrangement in place since 1998 has led to regular employees being dismissed or displaced by the forwarders' employees; the outsourcing has resulted in a reduction of work hours or the splitting of the bargaining unit; the forwarding activities violate the parties' CBA, specifically that it interfered with, restrained or coerced employees in the exercise of their rights to self-organization, the only exception being of course the non-recognition of service provider workers as regular company employees and its effect on the CBA scope of coverage.

- 1351.** The complainant further indicates that, in August 2008, while the above case was still pending before the Court of Appeals, the company, without consulting the union, talked to the regular rank- and-file employees assigned at the Warehouse and Facilities Departments to offer them a VRP in relation to its supposed plan to outsource the two departments. As soon as the union learnt of the scheme, it sought a meeting with the company on 9 September 2008 and 15 October 2008, during which the management admitted that there was a not yet final plan to outsource the aforesaid departments. The union believes that the company stalled the discussion during the grievance meeting, since at that time the company was still engaged in getting the confirmation of all the 28 regular rank-and-file employees, 19 of which were from the Warehouse and nine from the Facilities Department, relative to its VRP package. It was only on 21 October 2008 that the union received a letter confirming the outsourcing effective 1 January 2009. The union filed a grievance with the management on the same day, on the ground that this decision contravened the collective bargaining agreement, particularly as to the coverage of the bargaining unit.
- 1352.** The complainant reports that, without regard to the ongoing grievance, the company hired as early as 19 November 2008 at least 72 service provider workers for the Warehouse Department and 14 service provider workers for the Facilities Department to replace the regular rank-and-file employees. The above number of 86 service provider workers is far higher than the previous number of personnel which was composed of 19 regular employees and 26 service provider workers or a total of 45 employees. According to the complainant, from the number of workers alone, it cannot be said that the company was in dire need to save cost due to business exigencies as they spent more for 86 less experienced personnel. Cost comparison as to expenses would also show that the company spent per month around 1.1 million pesos for the 86 service provider workers as compared to approximately 1.07 million pesos for its regular rank-and-file employees.
- 1353.** Since no settlement was reached at the plant level, the grievance was raised to voluntary arbitration (Case NCR-12-03-07 handled by Voluntary Arbitrator Alensuela). While the case was still ongoing, the company enforced the VRP by separating the regular rank-and-file employees except for Mr Endrico Dumolong, a shop steward of the Warehouse Department who refused to avail himself of the VRP and was still dismissed on 14 January 2009, on the ground that his position had been deemed redundant because it had been outsourced already.
- 1354.** In light of the above, a Motion for Reconsideration was filed on 3 February 2010 concerning the aforementioned decision of the Supreme Court of 23 December 2009, in order to inform the Supreme Court of the supervening event and evidence of the illegality of the outsourcing arrangement, namely that the outsourcing of all the positions in the Warehouse and Facilities Departments had led to all the regular employees being displaced as they were forced to accept the purported "voluntary" retirement package, and one employee, Mr Endrico Dumolong, being dismissed as he did not avail himself of that program. However, the Supreme Court denied the motion with finality stating that no substantial argument had been adduced to warrant the reconsideration.

- 1355.** Prior to engaging the services of the independent service provider employees, the latter were required to sign employment contracts, which stipulate the following: “During the period of your employment you could be dismissed by the company any time if it was proven that you violated the following clauses: ...; if you join any labour union which is strictly prohibited by the client.” In the complainant’s view, the above stipulation is a classic proof of the company’s ill intent: there was only one client the service providers referred to in the contract that prohibited its employees from joining the union, and it was none other than the company.
- 1356.** The complainant recalls the various events and, in its opinion, manifestations of bad faith of the company against the union. In the CBA negotiations following the industrial action in 1995, the management had sought in vain the exclusion from the bargaining unit of the Warehouse and Facilities Departments, the regular employees of which had played an important role during the strike. According to the complainant, the financial crisis in 2008 was the excuse the company had been waiting for to finally get rid of them by outsourcing all the regular functions in the two departments in clear violation of the existing CBA and replacing them with service provider workers. The complainant strongly believes that the outsourcing of the two departments was in reality designed to eliminate a strong portion of the membership of the union with the ill intent to weaken its stance and bargaining power. In the complainant’s view, this is strengthened by the evidence of the contractual prohibition to join the union that the workers, hired through independent service providers to replace the regular employees, were required to sign as a condition for employment. It is also confirmed by the lack of genuine voluntariness in the VRP offer of the company since the regular employees had no choice but to sign it or be dismissed as Mr Dumolong, one of the shop stewards, on the grounds of redundancy.
- 1357.** In this context, the complainant indicates that Mr Endrico Dumolong (union shop steward) filed a case of illegal dismissal (Case NLRC No. NCR-03-03885-09 handled by Labour Arbiter Demaisip). The management argued that: “... the Company’s decision to contract out services and dismiss the affected employees is separate and independent from the implementation of the VRP. Separation of the affected employees was not optional, but was an inevitable consequence of the contracting out of their services. Thus, an affected employee’s non-availment of the VRP will not prevent his separation from Temic. Stated differently, the affected employee will still be dismissed on account of redundancy, regardless if he or she opts to avail of the VRP. Availment of the VRP only affects the benefits the affected employee receives upon separation.” With the assistance of the union and the FFW Legal Center, Endrico Dumolong won before the Labour Arbiter.
- 1358.** The complainant adds, however, that the company appealed the case before the first Division of the NLRC, and the decision was reversed on the ground of “redundancy” with the following reckless reasoning: “In contracting the services of reputable service providers as part of the company’s cost saving program, the services of the employees of the Warehouse and Facilities Departments, including that of complainant, became redundant and superfluous and, therefore, properly terminable. ... And in the absence of any proof that the management abused its discretion or acted in a malicious or arbitrary manner, this Commission will not interfere with the exercise of such prerogative”. In the complainant’s view, this decision poses a serious threat to the right of workers to employment security enshrined in the Labour Code and the Constitution (Article XIII(3)), and is also dangerous for those members of unions whom the management would want to get rid of as in this case. The complainant believes that this scheme, contrary to the findings of the NLRC, is clearly illegal, since it validated the compulsory nature of the supposed “voluntary” retirement package of the company and belittled the principle of employment security. A simple offer of some sort of package and the employees lost their employment. If an employee refused to accept the VRP, he/she would still be dismissed on the ground of “Redundancy”. The employee is left with no choice but to accept the offer,

hence there was no genuine voluntariness. The complainant indicates that a Motion for Reconsideration is pending before the first Division of the NLRC but that, while hoping that the NLRC would reconsider its harmful decision, the union was not confident given the one-sided decision of the NLRC and the loss of their case containing similar issues before the Supreme Court despite presentation of new evidence.

- 1359.** As regards the case before Voluntary Arbitrator Alensuela, a decision was rendered on 7 August 2009 declaring that the company validly contracted out the functions of the Warehouse and Facilities Departments and did not violate the CBA provisions nor commit unfair labour practice. According to the complainant, no account was taken of the fact that all regular employees in the said departments were displaced and that another one who did not avail himself of the VRP was dismissed in violation section 106 of the Labour Code and section 6(a) of Department Order No. 18, series of 2002, which prohibits the contracting out of a job, work or service when not done in good faith, not justified by the circumstances and resulting in the termination of regular employees. The VRP clearly resulted in the dismissal of the employee who refused to accept the package. Also, in the complainant's view, the pretext of economic necessity and exigencies could not deny the fact that there was malice in the enforcement of the VRP, the offer being in reality of a compulsory and not voluntary nature, as refusal to accept the offer would still lead to dismissal. The complainant further denounces that there was malice in the enforcement of the outsourcing since the independent service provider workers who were hired to replace the regular employees in the two departments were required to sign a contract stipulating that they would be dismissed from employment if they joined the union.
- 1360.** Finally, the complainant states that, since the union felt ambivalent that the Supreme Court could render a balanced perspective given the fact that it had dismissed the prior case brought before it and had denied the subsequent Motion for Reconsideration despite the supervening events and new evidence, it had considered that it had no other recourse but to submit this case before the Committee on Freedom of Association. The union prayed that those who were forcibly compelled to accept the VRP be declared to have been illegally dismissed for they were left with no other choice but to accept the offer, that the dismissal of Endrico Dumolong be considered illegal and that he and all those who accepted the VRP be granted relief and be allowed to return to their former jobs.

B. The Government's reply

- 1361.** As regards Cirtek Electronics Corporation, the Government states, in its communication dated 15 November 2010, that this case will be processed pursuant to the Tripartite Industrial Peace Council (TIPC)-Monitoring Body Operational Guidelines and will be discussed at an upcoming meeting of the TIPC. In its communication dated 1 June 2011, the Government indicates that the complainant and the management of Cirtek were requested to provide information or comments, and that the submissions received required further validation. Hence, the TIPC-Monitoring Body recommended for Cirtek, in its Resolution No. 4 (Series of 2011), the creation of an impartial Tripartite Team from among the members of the TIPC-Monitoring Body, with a clear mandate and timeline. In its communication dated 16 September 2011, the Government refers to Administrative Order No. 225, Series of 2011, issued by the Secretary of Labor and Employment, which created the Tripartite Team for Cirtek Electronics Corporation (TTCEC). Accordingly, the mandate of the TTCEC is: (i) to immediately conduct plant level validation/verification of the issues between the local union and the management with a view to arriving at a sound and practicable recommendation or proposed action to the TIPC-Monitoring Body by end of June 2011; (ii) to work out a mutually acceptable action plan to progressively and substantially move the issues to a settlement before November 2011; and (iii) to conciliate-mediate a solution for the immediate resolution of the pending ILO Case No. 2815.

- 1362.** The Government reports that the TTCEC has conducted five meetings. At the first meeting on 15 June 2011, it was agreed that the FFW will conduct an election of a new set of officers of the union (the management did not agree nor disagree), with the DOLE supervising the election if the union so requests. The election took place peacefully on 5 July 2011 with DOLE and FFW staff acting as observers; out of the 470 rank-and-file employees of the company, 297 casted their vote. The Government states that, according to the TTCEC, another union, the Cirtek Electronics Corporation-Independent Labor Union (CEC-ILU), was registered on 4 July 2011. FFW maintained that, in the absence of a challenge to its representative status, the union remained the exclusive bargaining agent at the company, and the meeting addressed the issue of conducting a certification election to determine the choice of the workers.
- 1363.** The Government further indicates that, during the third meeting on 12 July 2011, the CEC-ILU raised the issue on the disaffiliation it filed before the Bureau of Labor Relations (BLR), accompanied by 430 signatures, and questioned the basis for conducting a certification election maintaining that the union was no longer existing at the company as a result of the disaffiliation of the workers. On 3 August 2011, the BLR, recalling that the disaffiliation from the mother federation, as a right of the local union, is only verified against the federation's by-laws and the support by an overwhelming majority of workers, considered that, absent an overwhelming majority support and in view of the continued existence of the local union, the claimed disaffiliation operates as a mere withdrawal of membership, the local union's representative status shall continue to be respected and the new union cannot claim to be the exclusive bargaining agent without going through the process of certification election. At the fourth meeting on 5 August 2011, while the union was amenable to the conduct of an election, the CEC-ILU requested ample time to further enquire on the disaffiliation issue. At the fifth meeting on 9 August, the management recommended that the two unions should explore an agreement and inform the TTCEC of the result.
- 1364.** According to the Government, as of 6 September 2011, no dialogue has occurred. Following two more meetings to be held in September 2011, the TTCEC will submit its findings and recommendations to the TIPC-Monitoring Body.
- 1365.** As regards Temic Automotive Philippines, the Government supplies information concerning the outcome of judicial and arbitration proceedings relating to the complaint and encloses the relevant decision of the voluntary arbitrator and the decision of the Supreme Court dated 23 December 2009.

C. The Committee's conclusions

- 1366.** *The Committee deeply regrets that, despite the time that has elapsed since the presentation of the complaint, it has not received the Government's complete observations, particularly as regards the allegations of freedom of association violations of Temic Automotive Philippines, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case.*
- 1367.** *Under these circumstances and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had expected to receive from the Government in respect of all the pending matters.*
- 1368.** *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.

Cirtek Electronics Corporation

1369. The Committee notes from the allegations that Cirtek Electronics Corporation has dismissed three sets of union officers of the Cirtek Employees Labour Union – FFW. In particular, the Committee notes that, according to the complainant: (i) in 2003, during a bargaining deadlock with strike notice, the company did not attend the scheduled conciliations at the NCMB but rather accused the union of slowing down and persuading its members to boycott overtime work; after the union officers were required to explain their side, the management decided to terminate Nonita Maliksi, the President of the union, and union officers Lolita Salonga, Rosita Demetrio, Rosenda Dolor, Imelda de Silva and Elizabeth Verona; the union officers pursued the illegal dismissal and unfair labour practice complaint against the company through voluntary arbitration, and the arbitrator ruled that the dismissals were justified; (ii) in June 2005, after several days of strike due to a bargaining deadlock, the DOLE assumed the deadlocked issues and directed the workers to return to work; after resumption of operation, the union officers and workers identified as active participants in the strike were threatened by the management with dismissal if they did not cooperate and were forced to conclude a Memorandum of Agreement (MOA) pending review of the deadlocked issues by the SOLE; according to Mildred Acuin, the Vice-President of the union, and other officers, they agreed to sign the MOA because the management pledged to abide by the decision of the SOLE should the latter be more favourable. On 16 March 2006, the SOLE resolved the deadlock by improving the wage increase agreed in the MOA and incorporating in the CBA the agreed clauses of the MOA. The management questioned the SOLE decision before the Court of Appeals, which reversed it due to alleged settlement agreement of some members. Hence, the union brought the matter before the Supreme Court, which, to date, has not yet handed down its decision. Since the union officers appeared to be ambivalent as to the favourable SOLE awards for reasons incomprehensible to the general membership, a new set of officers was elected in 2008, including Richie Lacsarum as President, Cleverose Literal and Mildred Fernandez as Vice-Presidents. Immediately after being informed of the names of the new union officers, the company dismissed them from their employment. Following the strike notice filed before the NCMB on the grounds of unfair labour practice, the company never attended the meetings and, instead, directly negotiated with the dismissed officers offering them separation packages. The offer was finally accepted by the workers who were under financial pressure; and (iii) the third collective dismissal occurred when, in order to replace the dismissed union officials, the FFW appointed another set of ad hoc officers namely: Vhir Grande, Rosalinda Guisihan, Aninia Santos, Clemencia Amparo, Russell Kadir, Amelia Ablema, Vilma Sepian, Erwin Bella, Florencia Matula, Alicia Espiritu, Olga Dermogenio and Adorable Unido. Upon receipt of the letter conveying their names, the company unilaterally dismissed the new set of officers. The union filed another notice of strike for the mass termination of its officers on the grounds of unfair labour practice but the company never appeared before the NCMB. In the complainant's view, freedom of association has been clearly trampled upon by the company. Finally, the Committee notes from the complainant's indications that at present, there were several illegal dismissal and unfair labour practice cases pending on the matter before the arbitration branch and the NLRC, and that, to date, the company has not recognized the union and has stopped deducting union dues in violation of the CBA. The union was replaced with the labour management council, composed of worker representatives that have not been elected by the workers. Any initiatives to revive the union were allegedly squelched right away by threats of dismissal from employment.

1370. As regards the alleged first set of dismissals of trade union officials following strike notice in 2003 (Nonita Maliksi – President of the union, Lolita Salonga, Rosita Demetrio, Rosenda Dolor, Imelda de Silva and Elizabeth Verona), it is recalled that, when trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against. Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or to penalize the exercise of the right to strike. Regarding various types of strike action denied to workers (wild-cat strikes, tools-down, go-slow, working to rule and sit-down strikes), the Committee considers that these restrictions may be justified only if the strike ceases to be peaceful [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 545, 662 and 663].
1371. Further, as regards the alleged second and third sets of dismissals in 2008 of trade union officials immediately after their election (Richie Lacsarum – President, Cleverose Literal – Vice-President, Mildred Fernandez – Vice-President and another set of officers) or, respectively, after their ad hoc appointment (Vhir Grande, Rosalinda Guisihan, Aninia Santos, Clemencia Amparo, Russell Kadil, Amelia Ablema, Vilma Sepian, Erwin Bella, Florencia Matula, Alicia Espiritu, Olga Dermogenio and Adorable Unido), the Committee emphasizes once again 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 pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [see **Digest**, op. cit., paras 799 and 804].
1372. In view of the large number of dismissed union leaders (21 named and several unnamed), and given that, as of 2003, the company almost systematically terminated trade union officials that were preparing a strike or were taking up office, the Committee notes with interest from the Government's reply the creation of an impartial Tripartite Team from among the members of the TIPC-Monitoring Body with the mandate to conduct a plant-level verification of the parties' claims, make recommendations to the TIPC-Monitoring Body by the end of June 2011, work out an action plan to move the issues towards settlement by the end of November 2011 and conciliate-mediate a solution for the immediate resolution of the present Case. The Committee notes the tight timeline of the works of the TTCEC and the detailed information provided by the Government in this regard, referring in particular to the creation of a new union and the ensuing competition concerning certification for bargaining purposes handled by the BLR. The Committee expects that the TTCEC will review the initial allegations of the complainant relating to the dismissals of three sets of union officials and requests the Government to provide detailed information with regard to the results of the conducted inquiry. Should it be found in the course of that inquiry that the abovementioned trade union officials were dismissed due to their exercise of legitimate trade union activities, the Committee requests the Government to take the necessary steps to ensure that they are fully reinstated without loss of pay. The Committee requests to be kept informed of any developments in this respect.

1373. *The Committee further requests the Government to ensure that the above inquiry also deals with the allegations that the company has stopped deducting union dues, refuses to recognize the union and has replaced it by a council composed of non-elected worker representatives, and to keep it informed in this regard.*
1374. *Finally, the Committee urges the Government to keep it informed of the final outcome of any relevant judicial or other proceedings, including those pending before the Supreme Court, the NLRC and the arbitration branch, and of all measures of redress taken. It also requests the complainant organization or the Government to supply a copy of the arbitration decision rendered with regard to the first collective dismissal of union officers.*

Temic Automotive Philippines

1375. *The Committee notes the complainant's allegations that Temic Automotive Philippines Inc. has engaged in anti-union practices against the Temic Automotive Philippines Inc. Employees Union.*
1376. *In particular, the Committee notes that, according to the complainant, as of 2004, a significant increase in hired independent service provider workers became noticeable, in particular in regular positions in the Warehouse and Facilities Departments. On 25 October 2006, the union filed a grievance asserting that the company violated the CBA and section 106 of the Labour Code. In the absence of a settlement at the plant level, the union and the company elevated the matter before voluntary arbitration. On 1 May 2007, the Voluntary Arbitrator rendered a decision according to which workers supplied by service providers enjoyed the same rights as regular employees of the company. The decision was appealed by the company but affirmed by the Court of Appeals. The company raised the case before the Supreme Court, which, on 23 December 2009, rendered a decision nullifying the above decisions on the grounds of lack of evidence that there was a violation of the CBA or section 106 of the Labour Code or that the forwarding arrangement had led to regular employees being dismissed.*
1377. *The Committee further notes from the complainant's allegations that, in August 2008, the company, without consulting the union, talked to the 28 regular employees assigned at the Warehouse Department (19) and Facilities Department (9) to offer them a VRP in relation to its plan to outsource the two departments. On 21 October 2008 the union filed a grievance on the ground that the outsourcing decision effective 1 January 2009 contravened the CBA because the two departments were part of the bargaining unit. Since no settlement was reached at the plant level, the grievance was raised to voluntary arbitration. The company hired as early as 19 November 2008 at least 72 service provider workers for the Warehouse Department and 14 service provider workers for the Facilities Department to replace the rank-and-file employees. While the case was still ongoing, the company enforced the VRP by terminating all 28 regular employees (including four shop stewards) except for Mr Endrico Dumolong, a shop steward who refused to avail himself of the VRP and was dismissed on 14 January 2009, on the ground that his position was deemed redundant because it had been outsourced already. The Voluntary Arbitrator rendered a decision on 7 August 2009 declaring that the company validly contracted out the functions of the Warehouse and Facilities Departments and did not violate the CBA. A Motion for Reconsideration was filed on 3 February 2010 concerning the aforementioned decision of the Supreme Court of 23 December 2009, in order to inform the Supreme Court of the supervening event and evidence of the illegality of the outsourcing arrangement, namely that the outsourcing of the positions in the two departments had led to all the regular employees being displaced as they were forced to accept the purported "voluntary" retirement package, and one employee being dismissed as he did not avail himself of that program. However, the Supreme Court denied the motion with finality stating that no substantial argument had been adduced to warrant the reconsideration.*

1378. In this context, the Committee notes from the allegations that Mr Endrico Dumolong filed a case of illegal dismissal. The management argued that the decision to contract out services and dismiss the affected employees was separate and independent from the acceptance or refusal of the VRP. With the assistance of the union and the FFW Legal Center, Mr Dumolong won before the Labour Arbiter. The company appealed the case before the first Division of the NLRC, and the decision was reversed on the ground of “redundancy” stating that in the absence of proof that the management abused its discretion or acted in a malicious or arbitrary manner, the NLRC will not interfere in the exercise of this company prerogative. The complainant indicates that a Motion for Reconsideration is pending before the first Division of the NLRC but that the union is not confident given the one-sided decision of the NLRC and the loss of their case containing similar issues before the Supreme Court despite new evidence.
1379. The Committee also notes that the complainant strongly believes that the outsourcing of the two departments was in reality designed to eliminate a strong portion of the membership of the union with the ill intent to weaken its stance and bargaining power and provides details in this regard in its allegations.
1380. Given the alleged lack of consultations with the union prior to implementing the outsourcing plan and the VRP, the Committee emphasizes that it has always requested that, in the cases where new staff reduction programmes are undertaken, negotiations take place between the enterprise concerned and the trade union organizations, and that, when voluntary retirement programmes are carried out, the trade union organizations in the sector should be consulted [see **Digest**, op. cit., paras 1082–1083].
1381. The Committee deeply regrets that the Government has confined itself to describing the outcome of certain judicial and arbitration proceedings relating to the complaint but has provided no information in relation to the allegations concerning Temic Automotive Philippines, nor has it indicated whether this matter has been brought before the TIPC or whether the relevant employers’ organization has been consulted so as to bring to the Committee’s attention the views of the enterprise concerned and thus enable it to examine this matter in full knowledge of the facts. The Committee wishes to generally recall that the dismissal of workers on grounds of membership of an organization or trade union activities violates the principles of freedom of association, and that subcontracting accompanied by dismissals of union leaders can constitute a violation of the principle that no one should be prejudiced in his or her employment on the grounds of union membership or activities [see **Digest**, op. cit., paras 789–790].
1382. In this context, the Committee expresses great concern at the alleged hidden reason for outsourcing the two departments normally belonging to the bargaining unit, and the further allegation that the hired service provider workers who replaced the regular employees are prohibited by threat of dismissal to join any union and are excluded from the scope of the CBA. The Committee therefore emphasizes that acts of anti-trade union discrimination should not be authorized under the pretext of dismissals based on economic necessity, and that a corporate restructuring should not directly or indirectly threaten unionized workers and their organizations [see **Digest**, op. cit., paras 795 and 797].
1383. Recalling that the basic regulations that exist in the 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], the Committee expects that this principle will be taken into account in practice, in a manner so as to ensure that, in the remaining legal proceedings, the relevant bodies will effectively consider in their review the allegations put forward by the complainant that the outsourcing plan was actually aimed at eliminating any form of union in the departments concerned (e.g. previous attempts of the company to exclude those

departments from the bargaining unit, doubts as to the invoked reason of cost-saving for outsourcing the two departments, the compulsory nature of the purportedly voluntary compensation, the contractual prohibition of the service provider workers to join any union and their exclusion from the scope of the CBA).

- 1384.** Moreover, noting that, as regards the allegations concerning the first enterprise considered, the TIPC-Monitoring Body recommended the creation of an impartial Tripartite Team from among its members with the mandate to conduct a plant-level verification of the parties' claims, the Committee invites the Government to follow a similar approach in the context of this enterprise and to provide detailed information with regard to the conduct and outcome of such an inquiry. Should it be found in the course of the inquiry that the 28 terminations were anti-union in nature and aimed at eliminating any union representation for the departments concerned, the Committee requests the Government to take the necessary steps to ensure that the union members and officials concerned are fully reinstated without loss of pay and to keep it informed of any developments in this respect.

The Committee's recommendations

- 1385.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

(a) With respect to Cirtek Electronics Corporation, the Committee:

- (i) *noting with interest from the Government's reply the creation of an impartial Tripartite Team (TTCEC) from among the members of the TIPC-Monitoring Body with the mandate to conduct a plant-level verification of the parties' claims and propose recommendations with a view to achieving a settlement by the end of November 2011, and further noting the detailed information concerning the works of the TTCEC, expects that the TTCEC will review the initial allegations of the complainant relating to the dismissals of three sets of trade union officials and requests the Government to provide detailed information with regard to the results of the conducted inquiry;***
- (ii) *requests that, should it be found in the course of the inquiry that the abovementioned trade union officials were dismissed due to their exercise of legitimate trade union activities, the Government take the necessary steps to ensure that they are fully reinstated without loss of pay and keep it informed of any developments in this respect;***
- (iii) *requests the Government to ensure that the above inquiry also deals with the allegations that the company has stopped deducting union dues, refuses to recognize the union and has replaced it by a council composed of non-elected worker representatives, and to keep it informed in this regard;***
- (iv) *urges the Government to keep it informed of the final outcome of any relevant judicial or other proceedings, including those pending before the Supreme Court, the NLRC and the arbitration branch, and of all measures of redress taken; and***

- (v) *invites the complainant organization or the Government to supply a copy of the arbitration decision rendered with regard to the first collective dismissal of union officers.*
- (b) *With respect to Temic Automotive Philippines, the Committee:*
- (i) *deeply regretting that the Government has provided no information in relation to these allegations nor indicated whether this matter has been brought before the TIPC or whether the relevant employers' organization has been consulted, expresses great concern at the alleged hidden reason for outsourcing the two departments normally belonging to the bargaining unit;*
 - (ii) *expects that the principles enounced in its conclusions will be taken into account in practice, in a manner so as to ensure that, in the remaining legal proceedings, the relevant bodies will effectively consider in their review the allegations put forward by the complainant that the outsourcing plan was actually aimed at eliminating any form of union in the departments concerned;*
 - (iii) *invites the Government to propose the creation of an impartial Tripartite Team from among the TIPC-Monitoring Body members with the mandate to conduct a plant-level verification of the parties' claims, and to provide detailed information with regard to the conduct and outcome of such an inquiry; and*
 - (iv) *requests that, should it be found in the course of the inquiry that the 28 terminations were anti-union in nature and aimed at eliminating any union representation for the departments concerned, the Government take the necessary steps to ensure that the union members and officials concerned are fully reinstated without loss of pay and keep it informed of any developments in this respect.*

CASE NO. 2729

DEFINITIVE REPORT

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

Allegations: Restrictions on the right to bargain collectively and other trade union rights in a postal and telecommunications company

1386. The Committee examined this case at its November 2010 meeting and presented an interim report to the Governing Body [see 358th Report, paras 868–892, approved by the Governing Body at its 309th Session (November 2010)].

1387. The Government sent its observations in a communication dated 11 March 2011.

1388. Portugal has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1389. At its meeting in November 2010, the Committee made the following recommendation with regard to the pending issues [see 358th Report, para. 892]:

The Committee urges the Government to send its observations without delay on the alleged infringement of the right to bargain collectively and the adoption by the CTT Correios de Portugal, SA, and the authorities of anti-union practices that are prejudicial to the SNTCT, and also to send it the administrative and judicial rulings handed down (including those handed down by the Criminal Investigation and Action Department), together with information on any developments in the dispute since the complaint was presented in July 2009, so that the Committee can reach an opinion on the allegations in full possession of the facts.

B. The Government's reply

1390. In its communication of 11 March 2011, the Government states that, upon the expiry of the 2006 collective agreement between the CTT-Correios de Portugal, SA, enterprise and the signatory trade unions, including the Postal and Communications Workers' Trade Union (SNTCT), the SNTCT argued that the collective agreement was still valid and it referred the matter to the judicial authority. In this context, the 13 trade unions negotiated a new collective agreement in 2008, applicable not only to workers belonging to these unions, but also to other workers wishing to be covered who gave their written consent to that effect.

1391. The SNTCT brought legal proceedings before the Labour Court of Lisbon against the enterprise in order to request the court to issue a judicial injunction to the effect that union's members would continue to be covered by the enterprise agreement. The complaint by the CGTP is dated 17 July 2009.

1392. However, three days before the CGTP filed its complaint, at the final stage of proceedings at the Labour Court of Lisbon, the SNTCT and the enterprise concluded an agreement in which:

- (i) the parties undertook to enter into negotiations in order to reach a new enterprise agreement, which were to be concluded by 30 November 2009 at the latest;
- (ii) in the absence of an agreement, the parties undertook to refer the matter to voluntary arbitration and they agreed on the rules to be applied in that regard;
- (iii) the SNTCT undertook to withdraw the applications for the abovementioned judicial injunction against the enterprise; and
- (iv) the SNTCT undertook to drop the complaint that it had filed with the Lisbon Circuit Administrative Tribunal against the Ministry of Labour and Social Solidarity, in which it called for the suspension of the publication of the notice of expiry of the enterprise agreement.

- 1393.** In the light of this agreement, the proceedings at the Labour Court of Lisbon were declared closed. Subsequently, on 16 July 2009, the SNTCT presented in the proceedings before the Lisbon Circuit Administrative Tribunal an application to cancel the request for the suspension of the publication of the notice of expiry of the 2006 enterprise agreement, and the proceedings were declared closed.
- 1394.** Subsequently, the SNTCT and the enterprise negotiated and concluded in a short amount of time a new enterprise agreement, which was published in the *Boletim do Trabalho e Emprego* (Labour and Employment Bulletin) No. 1, of 8 January 2010, and which may be consulted at http://bte.gep.mtss.gov.pt/completos/2010btel_2010.pdf.
- 1395.** The Government indicates that the CGTP states that the question of individuals signing up to the collective agreement led the Criminal Investigation and Action Department (DIAP) to intervene, allegedly because the behaviour of the enterprise constituted a crime. Criminal investigations are carried out independently of the Government, which is informed about them only through information provided by the jurisdictional authorities. In preparing this reply, the Government requested information from the Attorney-General's Office, of which DIAP is a part, which clarified that the CGTP's complaint concerning alleged anti-union practices was pending a decision by the Labour Court of Lisbon on the judicial injunction filed by the SNTCT against the enterprise.
- 1396.** Of the 15 unions that concluded the 2006 enterprise agreement, only two, including the SNTCT, did not go on to sign the 2008 enterprise agreement or associate themselves with it. Furthermore, the 2008 enterprise agreement covered nearly 71 per cent of workers, including the union members who concluded the agreement and the workers who signed up to it individually.
- 1397.** Even before the first clear indications that the enterprise and the SNTCT were about to resume negotiations and normal relations, and before the union resolved certain contentious legal issues that had been raised previously, and in view of the conclusion of a new enterprise agreement, compulsory arbitration became totally unnecessary. The formal decision rejecting compulsory arbitration was adopted on 12 November 2010 and was communicated to the parties.
- 1398.** The complainant organization alleges that the 2008 enterprise agreement contains a "significant reduction of rights" and this opinion is what led the SNTCT to refuse to sign it. However, according to the Government, none of the CGTP's critical allegations are based on the differences between the two enterprise agreements.
- 1399.** In this regard, it is true that, before the expiry of the enterprise agreement, some 50 SNTCT trade union officials and workers of the CTT-Correios de Portugal, SA, enterprise had, in accordance with the provisions of the agreement, been released from work in the enterprise for the whole year. However, after the expiry of the enterprise agreement, the enterprise started to apply the provisions of the law. In accordance with the law (section 400 of Act No. 35/2004 of 29 July, section 468 of the current version of the Labour Code), the number of SNTCT officials and workers of the enterprise entitled to take four days off per month to perform trade union duties was adjusted to ten. However, only five officials took this leave, because the union decided to allow the quota of four days per month for each of ten officials to be enjoyed by only five of them, as is permitted by law (paragraph 4 of section 400).
- 1400.** In addition, officials were entitled to take time off work to carry out trade union activities. Those who had monthly leave entitlements could take unlimited days off, while others could take up to 33 days off per year (section 402 of Act No. 35/2004 and section 468, paragraphs 1 and 5, of the current version of the Labour Code).

- 1401.** As the SNTCT represents workers in other enterprises in the communications sector, several of its officials were and are employees of other enterprises and also enjoy monthly leave entitlements and are allowed to take time off for union activity in their respective enterprises.
- 1402.** The claim by the CGTP that the leave entitlements awarded to trade union officials under Portuguese law are “derisory” is false and unacceptable.
- 1403.** Trade union activity in the enterprise, in the different workplaces, is carried out by trade union representatives (Labour Code, section 496 of the old version and section 460 of the current version), of which the SNTCT has more than 400. Some of the union representatives are also entitled to a monthly allocation of hours for the exercise of trade union duties in an amount proportional to the number of unionized workers (Labour Code, sections 500 and 504 of the previous version and sections 463 and 467 of the current version). The CGTP totally omits to make any reference to trade union representatives.
- 1404.** The Government notes that the CGTP refers to all workplaces and all the workers of the enterprise, as if industrial action in this regard was the exclusive remit of the SNTCT, and fails to mention that several other unions represent workers at the enterprise, and that their officials and representatives are also entitled to take time off for union activities.
- 1405.** The Government states that the allegation that the enterprise banned workers’ meetings (that were going to be held at the workplace, a detail that is omitted by the CGTP) convened by the SNTCT, should be considered in the light of Portuguese legislation, under which the only bodies allowed to convene workers’ meetings at the workplace are workers’ committees (that are independent of trade unions) (Labour Code, section 497 of the old version and section 419 of the current version) or union or inter-union committees comprising trade union representatives, unless there is a minimum number of workers (Labour Code, section 497 of the previous version or section 461 of the current version). Legislation does not allow trade unions to convene workers’ meetings that are to be held at the workplace. When the SNTCT convened the meetings, the enterprise informed the workers that they were illegal (annexes 11–13 of the CGTP’s complaint refer to this matter, in connection with the disciplinary measures).

C. The Committee’s conclusions

- 1406.** *In its previous examination of the case, the Committee observed that, in its complaint, the complainant organization alleges that the CTT-Correios de Portugal, SA, enterprise has engaged in practices that are contrary to the principle of collective bargaining and designed to weaken the SNTCT by negotiating a collective agreement with minority unions and excluding the SNTCT (which represents 65 per cent of the workforce) and by inviting or pressuring its members to opt for the agreement concluded in 2008 with minority trade unions. The 2008 agreement curtails the benefits covered by the previous agreement (of 2006), which was concluded by all the trade unions, inasmuch as it declares the latter to have expired, drastically reduces full-time leave for carrying out trade union activities and effectively restricts other rights, such as the right to hold union meetings which has allegedly given rise to disciplinary measures. The Committee therefore urged the Government to send its observations without delay on the alleged infringement of the right to bargain collectively and the adoption by the enterprise and the authorities of anti-union practices that are prejudicial to the SNTCT, and also to send it the administrative and judicial rulings handed down (including those handed down by the Criminal Investigation and Action Department), together with information on any developments in the dispute since the complaint was presented in July 2009, so that the Committee could reach an opinion on the allegations in full possession of the facts [see 358th Report, paras 890 and 891].*

- 1407.** *The Committee notes that, according to the information in the complaint and in the Government's reply, the source of the dispute between the enterprise and the SNTCT is a legal controversy, in other words it is a dispute over the interpretation of legislation and of the 2006 collective agreement with regard to whether this collective agreement continued to be applicable after the agreed expiry date, a dispute that led to the legal action by the union (which was seeking a declaration to the effect that the 2006 collective agreement continued to be applicable), which was subsequently dropped and which, in the meantime, gave rise to a collective bargaining process between the enterprise and other unions.*
- 1408.** *With regard to the allegation that the enterprise engaged in practices that are contrary to the principle of collective bargaining and designed to weaken the SNTCT by negotiating a collective agreement in 2008 with minority unions and excluding the SNTCT (which, according to the allegations, represents 65 per cent of the workforce) and by pressuring its members to opt for the agreement concluded in 2008, the Committee notes that, according to the Government, the enterprise denies the allegations that it exerted pressure and gives another explanation, indicating that, in accordance with the legislation, workers on secondment may only perform their functions if so provided for in the collective agreement. The Committee also notes that, according to the Government, the SNTCT reached an agreement with the enterprise in July 2009, three days before the complaint was presented to the Committee, to sign a new enterprise collective agreement, which was concluded in a short period of time and was published in January 2010. The Committee notes this information with interest. The Committee notes that, during the abovementioned negotiations, the SNTCT withdrew the request it had submitted to the judicial authority to suspend the notice of expiry of the 2006 collective agreement issued by the enterprise, which led to the closure of the proceedings in the Labour Court of Lisbon, before which the SNTCT had brought legal proceedings against the enterprise, in order to request the court to issue a judicial injunction to the effect that the union's members would continue to be covered by the 2006 enterprise collective agreement. The Committee understands that the negotiation of the 2008 collective agreement with other unions (according to the complainant organization) took place as a result of the SNTCT being strongly in favour of the 2006 collective agreement continuing to be applicable. According to the Government, of the 15 unions that had concluded the agreement, only the SNTCT and one other union did not sign the 2008 collective agreement or associate themselves with it; the 2008 collective agreement covered nearly 71 per cent of workers, including the union members who concluded the agreement and the workers who signed up to it individually in writing.*
- 1409.** *With regard to the allegation that there has been a drastic reduction in full-time trade union leave and that restrictions had effectively been placed on the rights relating to union meetings set out in the 2006 collective agreement, the Committee notes that, according to the Government, the complaint is not based on the differences between the 2006 and 2008 collective agreements. According to the Government, the allegation by the complainant organization concerning union meetings should be considered in the light of legislation, which provides that workers' meetings may be convened at the workplace only by union or inter-union committees or workers' committees, unless there is a minimum number of workers. The Committee also notes that, in relation to the allegations concerning the enjoyment of trade union leave, the Government states that: (1) it is true that, before the expiry of the enterprise agreement, some 50 SNTCT trade union officials and workers of the enterprise had, in accordance with the provisions of the agreement, been released from work in the enterprise for the whole year; however, after the expiry of the enterprise agreement, the enterprise started to apply the provisions of the law; (2) in accordance with the law (section 400 of Act No. 35/2004 of 29 July, section 468 of the current version of the Labour Code), the number of SNTCT officials and workers of the enterprise entitled to take four days off per month to perform trade union duties was adjusted to ten; however, only five officials took this leave, because the union decided to allow the quota of four days per month for each of ten officials to be enjoyed by only five of them, as is permitted by law*

(paragraph 4 of section 400); (3) in addition, officials were entitled to take time off work to carry out trade union activities; those who had monthly leave entitlements could take unlimited days off, while others could take up to 33 days off per year (section 402 of Act No. 35/2004 and section 468, paragraphs 1 and 5, of the current version of the Labour Code); (4) as the SNTCT represents workers in other enterprises in the communications sector, several of its officials were and are employees of other enterprises and also enjoy monthly leave entitlements and are allowed to take time off for union activity in their respective enterprises; and (5) the SNTCT has more than 400 trade union representatives; some of these are also entitled to a monthly allocation of hours for the exercise of trade union duties in an amount proportional to the number of unionized workers (Labour Code, sections 500 and 504 of the previous version and sections 463 and 467 of the current version).

1410. *With regard to the Committee's request during its previous examination of the case concerning the judicial decisions handed down, the Committee notes that, according to the information provided by the Government, the legal proceedings brought by the SNTCT before the Lisbon Labour Court and the Lisbon Circuit Administrative Tribunal were dropped further to the commencement of negotiations which led to the signing of a collective agreement between the SNTCT and the enterprise. With regard to the complaint filed by the complainant organization with the DIAP to the effect that the behaviour of the enterprise with regard to individuals signing up to the 2008 collective agreement constituted a crime, the Government states that the Office of the Attorney-General reported that the complaint was pending a decision by the Labour Court of Lisbon (according to the Government, the SNTCT had dropped its action before this court).*

1411. *In these circumstances, given that the enterprise and the SNTCT concluded a collective agreement that puts an end to the dispute between them, the Committee considers that this case does not call for further examination.*

The Committee's recommendation

1412. *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. 2713

INTERIM REPORT

Complaint against the Government of the Democratic Republic of the Congo presented by the National Union of Teachers in Registered Schools (SYNECAT)

***Allegations: Various acts of harassment against
the General Secretary of the union and the
interruption of the union's national congress by
the police***

1413. The Committee last examined this case at its meeting in June 2010, when it presented an interim report to the Governing Body [see 357th Report, approved by the Governing Body at its 308th Session (2010), paras 1088–1103].

- 1414.** The complainant submitted additional comments in a communication dated 10 March 2011.
- 1415.** At its meeting in June 2011 [see 360th 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 its next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.
- 1416.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

- 1417.** In its previous examination of the case in June 2010, deploring the fact that despite the time that had elapsed, the Government had not provided any information on the allegations, the Committee made the following recommendations [see 357th Report, para. 1103]:
- (a) The Committee regrets that the Government has not replied to the complainant's allegations, despite having been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in the future.
 - (b) The Committee, recalling the principle of the inviolability of trade union premises and property, and in the absence of any reply from the Government, requests the latter to provide its observations on the allegations relating to the forcible entry by the police of SYNECAT premises, and to indicate whether the action taken by the police was based on a judicial warrant.
 - (c) The Committee urges the Government to investigate without delay the allegations concerning the suspension of the SYNECAT General Secretary from his teaching functions following a strike and the retention of his salary for a period of 12 months, to communicate the outcome of the investigations and, if it is found that the union official in question was suspended for having carried out his legitimate trade union activities, to ensure that the salary arrears owed to him are paid.
 - (d) The Committee requests the Government to provide its observations on the allegations of harassment of the SYNECAT General Secretary without delay, to report on the current situation and on the action taken on the matter referred to the Gombe higher court in connection with which he received a summons.

B. New allegations from the complainant organization

- 1418.** Regarding allegations of the suspension of the General Secretary of the National Union of Teachers in registered Schools (SYNECAT), from his teaching functions following a strike, and the retention of his salary for a period of 12 months, in its communication dated 10 March 2011, the complainant organization states that, despite an intervention made by the President of the National Assembly in October 2010, a copy of which was submitted by the complainant for reference, the salary of the General Secretary of SYNECAT is still being withheld 36 months later.

C. The Committee's conclusions

- 1419.** *The Committee deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through three urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 360th Report and 359th Report and 356th Report, para. 5].*
- 1420.** *Hence, in accordance with the applicable procedure rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present another substantive report on the case without being able to take into account the information it had hoped to receive from the Government.*
- 1421.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for trade union rights in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning the allegations brought against them [see First Report of the Committee, para 31].*
- 1422.** *The Committee notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints submitted since 2009, which have already been examined in the absence of a Government's response, and which allege grave violations of freedom of association. The Committee notes with regret that the Government continues to fail to comply, despite assurances given to the Chairperson of the Committee at a meeting held in June 2011, and expects the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.*
- 1423.** *Regarding allegations of the suspension of the General Secretary of SYNECAT from his teaching functions following a strike, and the retention of his salary for a period of 12 months, the Committee notes that, in its communication dated 10 March 2011, the complainant organization states that, despite an intervention made by the President of the National Assembly in October 2010, a copy of which was submitted by the complainant for reference, the salary of the General Secretary of SYNECAT is still being withheld 36 months later.*
- 1424.** *The Committee considers itself obliged to reiterate its previous recommendations, and fully expects the Government to provide information without delay, given the gravity of the allegations in this case.*

The Committee's recommendations

- 1425.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through three urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the*

case [see 360th Report, 359th Report and 356th Report para. 5]. The Committee notes with regret that the Government continues to fail to comply, despite assurances given to the President of the Committee at a meeting held in June 2011, and expects the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.

- (b) *The Committee, recalling the principle of the inviolability of trade union premises and property, and in the absence of any reply from the Government, requests the latter to provide its observations on the allegations relating to the forcible entry by the police of SYNECAT premises, and to indicate whether the action taken by the police was based on a judicial warrant.*
- (c) *The Committee urges the Government to investigate without delay the allegations concerning the suspension of the SYNECAT General Secretary from his teaching functions following a strike and the retention of his salary for a period of 36 months, to communicate the outcome of the investigations and, if it is found that the union official in question was suspended for having carried out his legitimate trade union activities, to ensure that the salary arrears owed to him are paid.*
- (d) *The Committee requests the Government to provide its observations on the allegations of harassment of the SYNECAT General Secretary without delay, to report on the current situation and on the action taken on the matter referred to the Gombe higher court in connection with which he received a summons.*

CASE NO. 2715

INTERIM REPORT

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

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

- 1426. The Committee last examined this case at its meeting in November 2010, when it presented an interim report to the Governing Body [see 358th Report, approved by the Governing Body at its 309th Session (2010), paras 893–910].
- 1427. At its meeting in June 2011 [see 360th 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 its next meeting, even if the requested

information or observations had not been received in time. To date, the Government has not sent any information.

- 1428.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

- 1429.** In its previous examination of the case in November 2010, the Committee made the following recommendations [see 358th Report, para. 910]:

- (a) The Committee regrets that the Government has not responded to the complainant's allegations even though it has been invited on several occasions to send its comments and observations on the case and has received an urgent appeal to do so. Noting furthermore that this is the fourth consecutive case on which the Government has failed to provide any information in response to the allegations presented, the Committee urges the Government to be more cooperative in the future.
- (b) Recalling that the responsibility for applying the principles of freedom of association rests ultimately with the Government, the Committee urges it without delay to take all the steps at its disposal to follow up the General Labour Inspectorate's decision to reinstate all the members of the OFIDA (now DGDA) union delegation, and to ensure that Mr Lubamba Kabeya is reinstated in his post and is paid the wages that are in arrears and all benefits due to him.
- (c) The Committee requests that the Government take all the necessary measures to implement the decision of the General Labour Inspector requesting to cancel the trade unions' elections held in the OFIDA in April 2005 and in the DGDA in March 2009, and ensure that any elections held in the DGDA in the future comply with the principles of non-interference referred to above.

B. New allegations from the complainant organization

- 1430.** In communications dated 12 July, 19 October, 15 November, and 9 December 2010, and 14, 24 and 31 January, 30 March, 24 May et 25 June 2011, the Congolese Labour Confederation (CCT) referred to the various steps taken before the different authorities in the country, including the President of the Republic, to ensure the implementation of the decisions of the General Labour Inspectorate to reinstate all members of the trade union delegation of the Customs and Excise Office (DGDA) – formerly OFIDA – and in particular to reinstate Mr Lubamba Kabeya to his position six years after his dismissal, as well as to invalidate the results of the trade union elections held in 2005 and 2009. The CCT once again denounces, the stalling administration of justice, as well as the impunity that appears to be enjoyed by the main culprit in the case, Mr Rugziwa Magera, Director-General of the DGDA, who is refusing to implement the decisions of the General Labour Inspectorate when even the Ministry of Justice has been requesting, since November 2010, the cooperation of the Prosecutor General of the Republic in the implementation of the Labour Inspectorate's decisions. The CCT also states that Mr Kabeya's situation has led him to undertake a hunger strike in protest against the status quo.

C. The Committee's conclusions

- 1431.** *The Committee deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the*

complainant's allegations, even though it has been requested several times, including through two urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 357th Report and 360th Report, para. 5].

- 1432.** *Hence, in accordance with the applicable procedure rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present another substantive report on the case without being able to take into account the information it had expected to receive from the Government.*
- 1433.** *The Committee once again reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for trade union rights in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning the allegations brought against them [see First Report of the Committee, para. 31].*
- 1434.** *The Committee notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints submitted since 2009, which have already been examined in the absence of a Government's response, and which allege grave violations of freedom of association. The Committee notes with regret that the Government continues to fail to comply, despite assurances given to the Chairperson of the Committee at a meeting held in June 2011, and expects the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.*
- 1435.** *The Committee notes the steps taken by the CCT before the various different authorities in the country, including the President of the Republic, to ensure the implementation of the decisions of the General Labour Inspectorate to reinstate all members of the trade union delegation of the DGDA and, in particular, to reinstate Mr Lubamba Kabeya to his position six years after his dismissal, as well as to invalidate the trade union elections held in 2005 and 2009. The Committee also observes that the CCT once again denounces not only the stalling administration of justice, but also the impunity that appears to be enjoyed by the main culprit in the case, Mr Rugziwa Magera, Director-General of the DGDA, who is refusing to implement the decisions of the General Labour Inspectorate. The Committee further notes with concern the information that the status quo in this case has led Mr Lubamba Kabeya to undertake a hunger strike.*
- 1436.** *In view of the fact that the situation remains unchanged despite the length of time that has elapsed since the complaint was filed, the Committee considers itself obliged to reiterate its previous recommendations, and fully expects the Government to provide information without delay.*

The Committee's recommendations

- 1437.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
 - (a)** *The Committee deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through two urgent appeals, to present its comments and observations on the allegations and its response to the recommendations*

made by the Committee in its previous examination of the case. The Committee notes with regret that the Government continues to fail to comply, despite assurances given to the President of the Committee at a meeting held in June 2011, and expects the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.

- (b) Recalling that the responsibility for applying the principles of freedom of association rest ultimately with the Government, the Committee urges the Government to take all the steps at its disposal, without delay, to follow up the decision of the General Labour Inspectorate to reinstate all members of the trade union delegation of OFIDA (now the DGDA), and to ensure Mr Lubamba Kabeya is reinstated in his post and is paid the wages that are in arrears and all benefits due to him.*
- (c) The Committee requests that the Government provide its comments on the allegations of DGDA interference in the trade union elections held in 2009, and to ensure that all future DGDA electoral processes comply with the principles of non-interference referred to above.*

CASE NO. 2797

INTERIM REPORT

Complaint against the Government of the Democratic Republic of the Congo

presented by

the following trade union organizations:

- the Trade Union Confederation of Congo (CSC),
- the Workers’ National Union of Congo (UNTC),
- the United Organization of Workers of Congo (OTUC),
- the Democratic Confederation of Workers (CDT),
- SOLIDARITÉ,
- the Conscience of Workers and Peasants (CTP),
- the Solidarity of Workers and Peasants (SOPA),
- ACTIONS,
- the Coalition of Workers of Congo (ATC),
- the New Union Dynamique (NDS) replaced by
- the General Confederation of Independent Unions (CGSA),
- the General Federation of Workers of Kongo (FGTK) and
- the Union Power of Congo (FOSYCO)

Allegations: The complainant organizations allege the mass dismissal of trade union officials, managers and employees of the financial authorities following a strike

- 1438.** The complaint is contained in a communication dated 22 April 2010 from the following trade union organizations: the Trade Union Confederation of Congo (CSC), the Workers' National Union of Congo (UNTC), the United Organization of Workers of Congo (OTUC), the Democratic Confederation of Workers (CDT), SOLIDARITÉ, the Conscience of Workers and Peasants (CTP), the Solidarity of Workers and Peasants (SOPA), ACTIONS, the Coalition of Workers of Congo (ATC), the New Union Dynamique (NDS) replaced by the General Federation of Workers of Kongo (FGTK) and the Union Power of Congo (FOSYCO).
- 1439.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case twice. At its May–June 2011 meeting [see the 360th 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 its next meeting, even if the requested observations or information had not been received in time. To date, the Government has not sent any information.
- 1440.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant organization's allegations

- 1441.** In a communication dated 22 April 2010, the complainant organizations (CSC, UNTC, OTUC, CDT, SOLIDARITÉ, CTP, SOPA, ACTIONS, ATC, NDS, FGTK and FOSYCO) allege the mass dismissal of trade union officials and of managers and employees of the fiscal authorities following a strike.
- 1442.** The complainant organizations state that on 7 October 2009, trade union delegates demanded payment from the Government, for the first three quarters of 2009, of a performance-related bonus owed to employees of the fiscal authorities, namely, the General Directorate for Administrative, Judicial, State and Contributory Revenues (DGRAD), the General Directorate for Taxes (DGI) and the General Directorate for Customs and Excise Duties (DGDA). According to the complainant organizations, faced with the Government's refusal to pay the bonus, a strike was called. Following the strike the Government agreed to pay the bonus and work was resumed.
- 1443.** The complainant organizations allege that in January 2010, Ordinance No. 10/001 of the President of the Republic and Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009 of the Minister of the Public Service were issued with the aim of revoking the grades and posts of many of the employees concerned, including around 30 union delegates.
- 1444.** The complainant organizations state that the individuals concerned have been accused of serious dereliction of honour, dignity and duty. They consider that the decision to revoke their grades was in fact motivated by their participation in a legal strike, and explain that on the date of the communication no individual notifications had been sent to the officials in question. Furthermore, according to the complainant organizations, the employees concerned either had clean administrative records or had already been subjected to sanctions following disciplinary proceedings.
- 1445.** The complainant organizations also report that approaches were made to the public authorities demanding the repeal of Presidential Ordinance No. 10/001 and Ministerial Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009. In the absence of any reply from the

authorities, the complainant organizations referred the matter to the Committee in order to bring about the reinstatement of the persons concerned.

B. The Committee's conclusions

- 1446.** *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainant organizations' allegations, even though it has been requested several times including through an urgent appeal, to present its comments and observations on this case. Noting furthermore that this case is the fifth successive case for which the Government has failed to provide information in reply to the allegations presented, the Committee firmly urges the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.*
- 1447.** *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.*
- 1448.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for trade union rights in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning allegations brought against them [see First Report of the Committee, para. 31].*
- 1449.** *The Committee notes that during the 100th Session of the International Labour Conference (June 2011), the Chairperson of the Committee met with the Government delegation of the Democratic Republic of the Congo to discuss the Government's defaults and to seek solutions.*
- 1450.** *The Committee notes that the present case concerns the mass dismissal of trade union officials and of managers and employees of the fiscal authorities, following a strike.*
- 1451.** *The Committee observes that on 7 October 2009, union delegates demanded payment from the Government, for the first three quarters of 2009, of a performance-related bonus owed to employees of the fiscal authorities, namely, the DGRAD, the DGI and the DGDA. It also notes that, in the light of the Government's refusal to pay the bonus, a strike was called, and that following the strike, the Government agreed to pay the bonus and work was resumed.*
- 1452.** *In January 2010, Ordinance No. 10/001 of the President of the Republic and Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009 were adopted, removing almost 200 managers and employees of the financial and budget ministries from their posts. The Committee notes that the complaints made against the officials in question, as specified in the Ordinance and the Order (copies are provided by the complainant organizations), concern misconduct constituting serious dereliction of honour, dignity and duty, leading to disciplinary action, or offences such as to have incurred, on at least one occasion, a term of penal servitude of more than three months.*
- 1453.** *The Committee notes that, according to the complainant organizations, the officials were dismissed for their participation in a legal strike. It also notes the statements of the complainant organizations to the effect that the employees in question had clean administrative records or had already been subjected to sanctions following the initiation*

of disciplinary proceedings. Furthermore, the officials were not notified individually of the decision to revoke their positions.

- 1454.** *The Committee recalls the principle that 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 of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 661]. Furthermore, when trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against [see **Digest**, op. cit., para. 662]. Moreover, imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association [see **Digest**, op. cit., para. 658].*
- 1455.** *The Committee is particularly concerned by the fact that this case concerns the dismissal of a large number of officials, including many trade union members and officials, and requests the Government to provide without delay its observations on the allegations made by the complainant organizations. If it is confirmed that the officials in question were dismissed because of their involvement in a legitimate and peaceful strike, the Committee urges the Government to take any steps that may be necessary to ensure their reinstatement with full payment of back wages. If that is not the case, the Committee requests the Government to provide any information on the reasons for the decision to remove the officials from office as set out in Presidential Ordinance No. 10/001 and Ministerial Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009.*
- 1456.** *In addition the Committee notes that according to a letter of 4 March 2010 from the Prime Minister to the Minister of the Public Service (provided by the complainant organizations as an attachment to the complaint), an appeal against Presidential Ordinance No. 10/001 was lodged with a review commission. The Committee requests the Government to keep it informed of any conclusions reached by this commission and of any follow-up thereto.*

The Committee's recommendations

- 1457.** *In the light of its foregoing interim conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) The Committee regrets that the Government has not replied to the complainant organizations' allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on the case. Noting furthermore that this case is the fifth successive case for which the Government has failed to provide information in reply to the allegations presented, the Committee firmly urges the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.*
 - (b) The Committee is particularly concerned by the fact that this case concerns the dismissal of a large number of officials, including many trade union members and officials, and requests the Government to provide without delay its observations on the allegations of the complainant organizations. If it is confirmed that the officials in question were dismissed because of their involvement in a legitimate and peaceful strike, the Committee urges the Government to take any steps that may be necessary to ensure their reinstatement with full payment of back wages. If that is not the case, the Committee requests the Government to provide any information on the*

reasons for the decision to remove the employees from office, as per Presidential Ordinance No. 10/001 and Ministerial Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009. It also requests the Government to keep it informed of any conclusions reached by the review commission which has examined the appeal against the Ordinance and of any follow-up thereto.

CASE No. 2843

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

Complaint against the Government of Ukraine presented by

- **the Confederation of Free Trade Unions of Ukraine (KPVU) and**
- **the Federation of Trade Unions of Small and Medium Enterprises of Ukraine (FPPMSPU)**

Allegations: The complainant organizations allege that the newly adopted Law on Social Dialogue in Ukraine impedes the establishment of workers' organizations by setting high representativity criteria

- 1458.** The complaint is set out in communications by the Confederation of Free Trade Unions of Ukraine (KVPU) and the Federation of Trade Unions of Small and Medium Enterprises of Ukraine (FPPMSPU) dated 22 March and 21 April 2011, respectively. The KVPU sent additional information in communications dated 12 July and 8 September 2011.
- 1459.** The Government submitted its reply in communications dated 4 and 23 May, and 8 June 2011.
- 1460.** Ukraine has ratified both the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 1461.** In their communications dated 22 March, 21 April, 12 July and 8 September 2011, the complainants, the KVPU and FPPMSPU, explain that on 23 December 2010, Verkhovna Rada of Ukraine (Parliament) passed the Law on Social Dialogue in Ukraine. Despite the KVPU's request addressed to the President of Ukraine to veto the legislation, on 11 January 2011, the President signed the Law. Both trade union organizations consider that this legislation has harmful effects on the ability of trade unions to represent their members in social dialogue and collective bargaining.
- 1462.** The complainants explain that the Law sets out the representativity criteria for trade union organizations and their associations at different levels. Namely, section 6 of the Law stipulates that at the national level, trade union associations are deemed representative to participate in collective bargaining for the purpose of signing a general agreement, and to delegate representatives to the National Tripartite Social and Economic Council, the

managing bodies of state social insurance funds and other tripartite social dialogue bodies and participate in international events if they are: (1) legalized (registered) in accordance with the legislation; (2) all-Ukrainian trade union associations enlisting at least 150,000 members; (3) composed of at least three all-Ukrainian trade unions; and (4) located in the majority of administrative and territorial units of the country.

- 1463.** The KVPU and FPPMSPU further indicate that the criterion of representativity at the branch (industry) and territorial levels is also problematic. The representative trade union has to cover at least 3 per cent of workers of a certain industry. However, Ukrainian legislation does not provide for a definition of the term “industry”.
- 1464.** The complainants consider that for a country where the trade union movement is still under transformation and new independent unions are in the process of organizational growth, such criteria to determine representativity is absolutely unacceptable. They further consider that under the new legislation, independent trade unions will find themselves outside of the social dialogue and will not be able to represent the interests of workers both at the national and international levels.
- 1465.** The complainants further allege that the rights of independent trade unions are being violated. According to the KVPU, the Ministry of Justice blocks the legalization of its regional unions in the Khmelnytsky region and the Autonomous Republic of Crimea, as well as the legalization of the all-Ukrainian trade union *Ridna Zemlya*. According to the same organization, there are examples of pressure being put on activists and members of independent trade unions, including at mining enterprises *Frunze*, *Nikopol Plant of Ferroalloys* and *Kryvy Rih Iron Ore Complex*. The complainants further argue that when trade unions experience difficulties in registering new local unions, they face even greater challenges in meeting the burdensome representativity criteria under the new legislation.
- 1466.** The complainants believe that the mechanism established in the Law for determining representativity lacks independence and objectivity and is based on a “permissive” approach. In particular, they refer to section 7 of the Law, according to which “the procedure for assessment of conformity with the representativity criteria of trade unions and employers’ organizations shall be approved by the National Service of Mediation and Reconciliation (NSMR) (under the President of Ukraine) upon prior consultations with the parties to social dialogue”. For the complainants, this means that the trade union and employers’ organizations from the Soviet-era will have the power to influence a procedure that has yet to be determined and to decide which organizations will be accepted in the social dialogue and to bargain collectively.
- 1467.** The KVPU informs that upon its request, on 3 August 2009, the ILO issued its Memorandum on the draft Law on Social Dialogue of Ukraine, in which the Office indicated that the draft legislation’s provisions relating to the representativity criteria violated ILO core Conventions ratified by Ukraine. According to the trade union, since then, only cosmetic changes have been made to the legislation. The KVPU further claims that observations concerning the application of Conventions Nos 87 and 98 by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) were based on false information provided by the Government. The complainant stresses, in particular, that contrary to what the Government has indicated in its report to the CEACR, it had never organized any meetings to discuss the issue of the representativity criteria.
- 1468.** According to the complainants, their affiliates are already eliminated from the social dialogue, and the Ukrainian authorities seek to deal only with the old post-Soviet trade unions and their associations. In this respect, the KVPU indicates that it was not informed about the date and time of signing of the General Agreement for 2010–12. Moreover, none of its arguments on the inadmissibility of adoption of provisions which would worsen

workers' status in comparison to the previous General Agreement, presented to the joint representative trade union body, have been taken into account.

- 1469.** The KVPU also alleges that its affiliates are prevented from collective bargaining, signing and joining collective agreements. It refers to the case of the Free Trade Unions of Medical Workers of Ukraine (FTUMWU), which in 2010, intended to join the already signed branch agreement between branch union of medical workers of Ukraine affiliated to the Federation of Trade Unions of Ukraine (FPU) and the Ministry of Health Care. The FPU-affiliated union, turned down the FTUMWU's request, and all FTUMWU's requests to meet and develop common provisions remained without response. Instead, the FPU-affiliated union demanded the FTUMWU to submit personal data and information about its members. The KVPU indicates that the Ministry of Health Care itself has no objection as regards the FTUMWU's participation in collective bargaining and has indeed asked the union to develop amendments to the branch agreement for consideration and discussion.
- 1470.** According to the KVPU, a similar situation has occurred with respect to its affiliate, the Free Trade Union of Education and Science of Ukraine (VPONU). While before the beginning of collective bargaining, an agreement on creating a joint representative trade union body between the VPONU and the FPU-affiliated branch Union of Education and Science (STESU) of Ukraine had been signed, the collective bargaining was conducted and the agreement for 2011–12 signed without VPONU's participation. The latter succeeded, however, in suspending the registration process of the signed agreement.
- 1471.** Finally, at the local level in April 2011, a primary trade union of workers of the National Museum of Fold Architecture affiliated to the all-Ukrainian union "Defence of Justice" was also denied from joining a collective agreement. The museum management claimed that the museum labour collective, by a majority of votes, decided to refuse the free trade union to join the agreement. The KVPU claims, however, that this decision was made by the management and the FPU-affiliated primary trade union, as under the national legislation, the labour collective has no such powers.
- 1472.** In its communication dated 8 September 2011, the KVPU states that it began to feel the negative effects from the implementation of the Law on Social Dialogue. It claims to be totally excluded by the authorities from social dialogue and collective bargaining, managing social insurance funds, and participating in controlling health and safety activities. In this respect, it refers to the abovementioned examples and describes further instances where the officers of the Independent Union of Miners of Ukraine (NPGU), and/or its primary trade unions, were not included in a body of the State Inspectorate for Supervision of Observance of Health and Safety and special commissions established to investigate the accidents that had occurred in two mines in July and August 2011 and which have involved members of the NPGU primary trade unions. In addition, the KVPU alleges that employers and the authorities put pressure on the NPGU primary trade unions with the aim of decreasing their membership and thereby leading to their non-conformity with the representativity criteria.

B. The Government's reply

- 1473.** In its communications dated 4 and 23 May and 8 June 2011, the Government indicates that the Law on Social Dialogue in Ukraine defines social dialogue as a process for defining and bridging the gap between differing positions for reaching agreements and adopting agreed decisions by social partners who represent the interest of workers, employers, executive bodies and local administrative authorities, on issues pertaining to the formulation and implementation of state social and economic policy and regulation of labour, social and economic relations. Section 6(5) of the Law states that unions and their

federations and employers associations that do not meet the representativity criteria may, by a decision of their elected bodies, authorize representative organizations and associations at the appropriate level to represent their interests or put forward the proposals for consideration by the appropriate social dialogue bodies. Those proposals must be considered by the parties concerned when agreed positions are adopted and decisions taken.

- 1474.** The Government further indicates that the General Agreement for 2010–12 was signed in November 2010 by the chairperson of the KVPU, Mr Volynets, and all other all-Ukrainian unions and federations of trade unions. In view of the large number of signatories from the union side, the signing procedure was carried out in an order accepted by the parties.
- 1475.** With regard to the participation in the collective bargaining process, the Government indicates that pursuant to section 12 of the Labour Code, if more than one primary union is established at an enterprise or organization, the unions in question are required to set up a joint representative body on the basis of proportional representation. Thus, a primary trade union organization that refuses to participate in such a body forfeits the right to represent workers' interests when a collective agreement is concluded. Furthermore, under section 4 of the Law on Collective Agreements, if more than one trade union or trade union federation or other representative body are authorized by the workforce to operate at an enterprise or at the state, branch or territorial level, such organizations are required to form a joint representative body for the collective bargaining purpose.
- 1476.** The Government indicates that the Ministry of Labour and Social Policy has examined the representation dated 3 March 2011 by the Member of Parliament, Mr Volynets, requesting not to register the branch agreement between the Ministry of Education and Science, Youth and Sport and the Central Committee of Education of the Union of Science Workers of Ukraine and alleging that the latter had infringed the fundamental principle of equality of trade unions and the legislation on collective agreements. The Government points out that pursuant to the Regulations on the procedure for registration of branch and regional accords and collective agreements of 5 April 1994, the registration may be refused only if the texts and copies of the agreement submitted are not authentic. It further points out that in accordance with the national legislation, trade unions and their federations are independent from the state and local authorities, employers and political parties, and organize their work in an autonomous manner. Interference by employers and state bodies in trade union activities is prohibited (section 12 of the Law on Trade Unions). Similarly, section 6 of the Law on Collective Agreements prohibits any interference that might restrict the rights of workers and their representatives. In light of the above, and in view of the seriousness of the circumstances described in Mr Volynets' representation, the Ministry of Labour and Social Policy has asked the FPU and the Ministry of Education and Science, Youth and Sport for help in rectifying the situation that has arisen with the conclusion of the branch agreement. Mr Volynets has been informed of this in a letter dated 12 March 2011. Thus, the branch agreement has been revoked by the parties and is being revised.
- 1477.** With regard to the legalization of the KVPU-affiliated unions, the Government indicates that as of 29 April 2011, territorial justice departments had legalized such organizations in 11 provinces of Ukraine and in the city of Kiev. With regard to the unions in the Khmelnytsky province, the Government indicates that a notification from the Khmelnytsky province KVPU organization concerning its affiliation (as an organizational unit) to the KVPU was received by the Main Justice Department in Khmelnytsky province on 18 May 2009 and again on 31 December 2009. In the course of the examination of documents submitted, it was established that, the Khmelnytsky province KVPU did not comply with the requirements of section 8(4) of the Law on Trade Unions, according to which, the status of trade union associations is defined by the status of their affiliates. Therefore, in

accordance with section 16(6) of the Law on Trade Unions, the union was invited to rectify the situation and resubmit its request.

- 1478.** The Government further explains that on 7 July 2009, the Ministry of Justice received the by-laws and a notification of establishment of the KVPU of the Autonomous Republic of Crimea as a confederation with republic-level status and its affiliation to the KVPU as an organizational unit. As in the situation above, the applicant was informed that it did not comply with sections 8 and 11 of the Law on Trade Unions.
- 1479.** Finally, the Government indicates that the all-Ukraine trade union Ridna Zemlya was legalized by the Ministry of Justice of Ukraine on 27 August 2009 (certificate No. 3173) as a union with all-Ukraine status. As of 29 April 2011, the territorial justice department had legalized subsidiary organizations of Ridna Zemlya as corresponding to the claimed status in 14 provinces of Ukraine and in the Autonomous Republic of Crimea. All notifications concerning affiliation of such organizations to the all-Ukraine union Ridna Zemlya were duly legalized.
- 1480.** With regard to the criteria of representativeness set by the Law on Social Dialogue, the Government indicates that sections 5 and 6 of the Law define both general criteria of representativeness and criteria of representativeness at the national, branch, territorial and local levels. According to section 7 of the Law, the National Mediation and Conciliation Service (NSPP) at the national and branch levels, and the regional departments of that service at the territorial level is the body responsible for verifying that trade unions and their federations and employers' organizations and their associations comply with the established criteria of representativeness. The procedure for verifying and confirming that unions and employers' organizations meet the criteria in question is approved by the NSPP following consultations with the social partners at the national level. The NSPP is a standing public body set up by the President with the aim of promoting the settlement of collective labour disputes. The mandate of the NSPP, as defined by its own Regulations, includes action to ensure social dialogue and to verify, where necessary, the credentials of any parties to a labour dispute. Under the terms of the Law on Social Dialogue, the NSPP mandate also includes the following duties: (1) assessing the representativeness of workers' and employers' organizations in light of the established criteria; (2) formally confirming the representativeness of these organizations; and (3) maintaining a register of representative organizations and associations. Official confirmation of the representative status of unions and employers' organizations is given by the NSPP and its subordinate departments once every five years. Unions and their federations and employers' organizations, including newly established ones, are entitled to apply to the NSPP or its departments for assessment of their compliance with the established criteria where there are grounds for doing so, but not more frequently than once a year (section 7(2)). Currently the draft Procedure for assessing and confirming compliance with the criteria of representativeness is the subject of a broad public discussion in which all the social partners concerned can participate.
- 1481.** Under section 9(5) of the Law, trade unions and employers' organizations whose representative status has been confirmed, independently determine the procedures of election (appointing) their representatives to social dialogue bodies at meetings of accredited representatives of organizations authorized to participate in social dialogue at the corresponding level. Such a meeting may be convened at the request of any representative organization at a given level which duly notifies all other representative organizations not later than one month before the meeting is to be held. A meeting of accredited representatives is deemed to be "authorized" if representatives of more than half of the representative organizations at the corresponding level that have agreed to participate in the meeting attend. In order to participate in such a meeting, organizations that have received such notification are required to submit to the organizers, not later than

ten days before the meeting is due to be held, the confirmation of their representative status. Allocation of voting rights among different unions is proportionate to the number of workers employed at the enterprises affiliated to the employers' organizations in question, but ensuring at least one representative from each representative union and each employers' organization. In accordance with voting rights established at the meeting of accredited representatives, representative unions and employers' organizations appoint their delegates to represent them in social dialogue bodies on the basis of the corresponding members of those bodies. Any actions by the organizers of a meeting of accredited representatives that infringe the right of the social partners may be challenged in the court.

- 1482.** With regard to the definition of the term “branch”, the Government points out that according to section 260 of the Economic Code of Ukraine, the totality of production units involved in predominantly identical or similar forms of productive activity comprise a “branch”. The general classification of branches of the national economy is an integral part of the system of classification and codification of technical-economic and statistical data used by economic entities and others involved in economic relations, and by the state authorities or local authorities in the process of economic management. Collection, processing, analysis and dissemination of statistical information is based on national statistical standard DK 009:2005 “Classification of types of economic activity”, which is harmonized with the EU Statistical Classification of Economic Activities and approved by Order No. 75 (as amended) of the State Committee of Ukraine on Technical Regulation and Consumer Policy of 26 December 2005. The classification covers all forms of economic activity of economic entities which at the highest hierarchical levels constitute branches. The more generalized groupings of forms of economic activity at the level of sections, subsections and divisions make it possible to differentiate the fundamental economic branches and take into account the requirements of the state statistical authorities for mapping/plotting statistical data.

C. The Committee's conclusions

- 1483.** *The Committee notes that in this case, the complainants allege that the newly adopted Law on Social Dialogue impedes the establishment of workers' organizations. They further allege refusal by the Government to legalize KVPU-affiliates and violation of the KVPU's collective bargaining rights.*
- 1484.** *With regard to the Law on Social Dialogue, the Committee notes that the new legislation was passed by the Parliament in December 2010. The Committee notes the complainants' allegation that contrary to what the Government has indicated in its report to the CEACR, it had never organized any meetings to discuss the issue of the representativity criteria. The Committee understands from the information available to the Office that the discussions at the national level of the representativity criteria involved unions with all-Ukrainian status, including the KVPU.*
- 1485.** *The Committee notes that with regard to this legislation, the complainants' allegations concern mainly the following: levels of social dialogue and, specifically “branch of industry” level (section 2 of the Law); representativity criteria (sections 5 and 6 of the Law) and the body responsible for confirming trade union representativity (sections 7 and 11–14 of the Law).*
- 1486.** *With regard to the branch level of social dialogue, the Committee notes the complainants' allegation that the Law does not define what constitutes a branch level. In this respect, the Committee notes the Government's explanation that the general classification of branches of the national economy is an integral part of a system of an official classification and*

codification. It further notes the list of the basic types of economic activities (branches) submitted by the Government.

- 1487.** With regard to the issue of representativity in general, the Committee has pointed out on several occasions, and particularly during discussion on the draft of the Right to Organize and Collective Bargaining Convention, that the International Labour Conference referred to the question of the representative character of trade unions, and, to a certain extent, it agreed to the distinction that is sometimes made between the various unions concerned according to how representative they are. article 3(5), of the Constitution of the ILO includes the concept of “most representative” organizations. Accordingly, the Committee feels that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the grounds of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 346]. In the present case, it appears from the legislation that the only distinction between representative and other trade unions is that the former can sign collective agreements, sit on joint committees and participate in international events. The Committee considers that such privileges granted to representative trade unions are not excessive. At the same time, the Committee would like to recall that the establishment of the notion of representativity presupposes that governments ensure an atmosphere in which trade union organizations are able to freely flourish in the country.
- 1488.** With regard to the criteria to determine representativity, the Committee recalls that the determination of the most representative trade union should always be based on pre-established, precise and objective criteria [see **Digest**, op.cit., para. 348]. The Committee notes that according to section 5, representativity criteria are based on the following: numerical thresholds, sectoral and territorial diversity and legalization (registration). The Committee understands that higher thresholds and additional criteria were proposed in the initial draft legislation and that these thresholds were lowered and additional criteria removed from the final version, following the Memorandum of 3 August 2009 referred to by the complainants.
- 1489.** With regard to the numerical thresholds, sectoral and territorial diversity, the Committee notes that according to section 6, at the national level, trade union association should be of all-Ukrainian status and should enlist at least 150,000 members, should be composed of trade unions and their organizations located in the majority of administrative and territorial units of Ukraine and include at least three all-Ukrainian trade unions. The Committee understands that several organizations meet this criteria at national level, including the KVPU. At the sectoral level, trade unions and their associations should be of all-Ukrainian status and affiliate at least 3 per cent of the labour force of the relevant sector. At the territorial level, trade unions and their associations should be of regional or local status, be established on a territorial basis and affiliate at least 2 per cent of the labour force of the relevant administrative and territorial unit. At the local level, workers interests are represented by primary trade unions and in their absence, by freely elected representatives. The Committee further notes that section 6(5) of the Law states that unions and their federations and employers’ associations that do not meet the representativity criteria may, by a decision of their elected bodies, authorize representative

organizations and associations at the appropriate level to represent their interests or put forward the proposals for consideration by the appropriate social dialogue bodies. Those proposals must be considered by the parties concerned when agreed positions are adopted and decisions taken. In these circumstances, the Committee considers that these thresholds are acceptable.

- 1490.** *With regard to the requirement of legalization (registration), the Committee has always considered that a registration system set up by law which grants exclusive negotiation rights to registered unions would not be incompatible with the principles of freedom of association provided that the registration is based on objective and predetermined criteria [see **Digest**, op. cit., para. 358]. The Committee notes, however, that the CEACR has raised concern at the contradiction that currently exists in Ukrainian national legislation with regard to the requirement of registration versus the requirement of legalization imposed on trade unions. In particular, the CEACR noted that at present, there was a contradiction between section 87 of the Civil Code (2003), according to which, an organization acquires its rights of legal personality from the moment of its registration, on the one hand, and section 16 of the Law on Trade Unions, as amended in June 2003, providing that a trade union acquires the rights of a legal person from the moment of the approval of its statute and that a legalizing authority confirms the status of a trade union and no longer has a discretionary power to refuse to legalize a trade union, on the other. In October 2006, the Law of Ukraine on the State Registration of Legal Persons and Physical Persons-entrepreneurs was amended so as to exclude trade unions from its scope and therefore from the requirement of registration. Recalling that it has already commented on this contradiction in its examination of a previous case against the Government of Ukraine (Case No. 2038, 336th Report), the Committee once again requests the Government to amend section 87 of the Civil Code so as to eliminate the contradiction within the national legislation and so as to fully guarantee the right of workers to establish their organizations without previous authorization.*
- 1491.** *The Committee notes the KVPU's allegations of refusal by the authorities to legalize (register) its affiliates in the Khmelnytsky region, the Autonomous Republic of Crimea, as well as of the Ridna Zemlya union. The Committee notes the Government's observations thereon and its indication that the latter union was in fact registered on 27 August 2009 followed by the registration of its subsidiary organizations in 14 provinces and the Autonomous Republic of Crimea. The Committee notes the explanation provided by the Government with regard to the reasons for the non-registration of the KVPU affiliates in the Khmelnytsky region and the Autonomous Republic of Crimea. It notes in particular, that according to the Government, the relevant organizations have been duly informed of the grounds for not considering their registration requests and were requested to rectify the omissions and resubmit the request. The Committee requests the Government and the KVPU to provide information as to the registration status of these organizations.*
- 1492.** *With regard to the body responsible for confirming trade union representativity, the Committee recalls that the determination to ascertain or verify the representative character of trade unions can best be ensured when strong guarantees of confidentiality and impartiality are offered. Thus, verification of the representative character of a union should a priori be carried out by an independent and impartial body [see **Digest**, op. cit., para. 351]. The Committee notes that in terms of the new legislation, the NSMR is a tripartite body and expects that this body will meet these criteria of confidentiality, independence and impartiality in practice. The Committee further expects that the powers of the NSMR under section 7 of the Law on the Social Dialogue will be limited to the examination of whether a given organization meets the established objective representativity criteria.*

1493. *The Committee notes the KVPU's allegations relating to violation of its collective bargaining rights. In particular, the KVPU alleges that it was not informed of the date and time of the signing of the General Agreement for 2010–12. In this respect, the Committee understands that on behalf of trade unions, this Agreement was negotiated by the joint representative body composed of representatives of all-Ukrainian trade unions and trade union associations. The Committee notes that according to Annex 2 to this Agreement, which lists all such organizations, parties to the Agreement, the KVPU is one of the organizations represented in the joint negotiation body.*
1494. *Noting that the branch agreement in the education sector has been revoked following Mr Volynets' (member of Parliament and the KVPU Chairperson) representation, the Committee requests the Government and the KVPU to indicate whether a new agreement has been reached and whether the KVPU has participated in the collective bargaining. The Committee also requests the Government and the KVPU to indicate whether amendments to the health sector agreement proposed by the KVPU have been considered and adopted.*
1495. *The Committee notes the Government's indication that pursuant to section 12 of the Labour Code, if more than one primary union is established at an enterprise or organization, the unions in question are required to set up a joint representative body on the basis of proportional representation and that under section 4 of the Law on Collective Agreements, if more than one trade union or trade union federation or other representative body authorized by the workforce to operate at an enterprise or at the state, branch or territorial level, such organizations are required to form a joint representative body for the purpose of collective bargaining.*
1496. *The Committee notes that some of the complainants' allegations are directed at the Federation of Trade Unions of Ukraine and its affiliates. The Committee notes, in particular, the allegation that the FPU-affiliated trade unions deny the KVPU or its affiliated trade unions the right to participate in collective bargaining and/or join a concluded collective agreement. The Committee notes the examples referred to by the complainant and observes the KVPU's statement that seems to imply that the Government is willing to negotiate with both unions and their affiliated organization when concluding relevant branch agreements. The Committee therefore understands that the issue raised, concerns inter-union relations and recalls that by virtue of Article 3 of Convention No. 87, the only obligation of the Government is to refrain from any interference which would restrict the right of the workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes, and to refrain from any interference which would impede the lawful exercise of that right. Article 2 of Convention No. 98 is designed to protect workers' organizations against employers' organizations or their agents or members and not against other workers' organizations or the agents or members thereof. Inter-union rivalry is outside the scope of the Convention [see **Digest**, op.cit., paras 1117–1118]. In the absence of information from the complainant on the manner in which the Government may have interfered in this regard, the Committee will not pursue the examination of this aspect of the complaint.*
1497. *The Committee notes the general allegations of pressure put on trade unions activists at certain mining enterprises (Frunze, Nikopol Plant of Ferroalloys and Kryvy Rih Iron Ore Complex) and mines mentioned in the KVPU communication dated 8 September 2011. It requests the Government to institute an independent investigation in respect of this matter and to keep it informed of the outcome.*

1498. *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

The Committee's recommendations

1499. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee once again requests the Government to amend section 87 of the Civil Code so as to eliminate the contradiction with regard to the requirement of registration versus the requirement of legalization imposed on trade unions by the national legislation and so as to fully guarantee the right of workers to establish their organizations without previous authorization.*
- (b) The Committee requests the Government and the KVPU to provide information on the registration status of the KVPU organizations in the Khmelnytsky region and the Autonomous Republic of Crimea.*
- (c) The Committee requests the Government and the KVPU to indicate whether a new branch agreement has been reached for the education sector and whether the KVPU has participated in the collective bargaining. It further requests the Government and the KVPU to indicate whether amendments to the health sector agreement proposed by the KVPU have been considered and adopted.*
- (d) The Committee requests the Government to institute an independent investigation into the allegations of pressure put on trade unions activists at mining enterprises (Frunze, Nikopol Plant of Ferroalloys and Kryvy Rih Iron Ore Complex) and mines mentioned in the KVPU communication of 8 September 2011 and to keep it informed of the outcome.*
- (e) The Committee expects that the powers of the NSMR under section 7 of the Law on the Social Dialogue will be limited to the examination of whether a given organization meets the established objective representativity criteria.*
- (f) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

Geneva, 11 November 2011

(Signed) Professor Paul van der Heijden
Chairperson

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