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Reports of the Committee on Freedom of Association

355th 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 5, 6 and 13 November 2009, under the chairmanship of Professor Paul van der Heijden.

2. The members of Argentinean, Colombian, and Peruvian nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2647, 2651, 2659, 2666 and 2670), Colombia (Cases Nos 2355, 2356, 2522, 2600, 2617, 2643, 2644, 2657, 2658 and 2662), and Peru (Cases Nos 2596, 2639, 2640, 2661 and 2664), respectively.

* * *

3. Currently, there are 141 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 36 cases on the merits, reaching definitive conclusions in 21 cases and interim conclusions in 15 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 2602 (Republic of Korea), 2609 (Guatemala) and 2655 (Cambodia) because of the extreme seriousness and urgency of the matters dealt with therein.

New cases

5. The Committee adjourned until its next meeting the examination of the following cases: Nos 2720 (Colombia), 2721 (Colombia), 2722 (Botswana), 2723 (Fiji), 2724 (Peru), 2725 (Argentina), 2726 (Argentina), 2728 (Costa Rica), 2729 (Portugal), 2730 (Colombia), 2731 (Colombia), 2732 (Argentina), 2733 (Albania), 2734 (Mexico), 2736 (Bolivarian Republic of Venezuela), 2737 (Indonesia), 2738 (Russian Federation), 2739 (Brazil) and 2740 (Iraq), 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

6. The Committee has requested and is awaiting observations or information from the Governments concerned in the following cases: Nos 2177 and 2183 (Japan), 2508 (Islamic Republic of Iran), 2567 (Islamic Republic of Iran), 2698 (Australia), 2701 (Algeria), 2702 (Argentina), 2703 (Peru), 2707 (Republic of Korea), 2708 (Guatemala), 2709 (Guatemala), 2710 (Colombia), 2712 (Democratic Republic of the Congo), 2713 (Democratic Republic of the Congo), 2714 (Democratic Republic of the Congo), 2715 (Democratic Republic of the Congo), 2716 (Philippines) and 2719 (Colombia).

Partial information received from governments

7. In Cases Nos 2265 (Switzerland), 2318 (Cambodia), 2361 (Guatemala), 2362 (Colombia), 2516 (Ethiopia), 2576 (Panama), 2594 (Peru), 2630 (El Salvador), 2638 (Peru), 2667 (Peru), 2671 (Peru), 2678 (Georgia), 2706 (Panama), 2711 (Bolivarian Republic of Venezuela) and 2735 (Indonesia), 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

8. As regards Cases Nos 1787 (Colombia), 2254 (Bolivarian Republic of Venezuela), 2422 (Bolivarian Republic of Venezuela), 2478 (Mexico), 2518 (Costa Rica), 2533 (Peru), 2557 (El Salvador), 2565 (Colombia), 2571 (El Salvador), 2601 (Nicaragua), 2612 (Colombia), 2614 (Argentina), 2626 (Chile), 2654 (Canada), 2660 (Argentina), 2663 (Georgia), 2672 (Tunisia), 2674 (Bolivarian Republic of Venezuela), 2681 (Paraguay), 2683 (United States), 2684 (Ecuador), 2691 (Argentina), 2692 (Chile), 2693 (Paraguay), 2695 (Peru), 2696 (Bulgaria), 2704 (Canada), 2717 (Malaysia), 2718 (Argentina) and 2727 (Bolivarian Republic of Venezuela), the Committee has received the Governments' observations and intends to examine the substance of these cases at its next meeting.

Urgent appeals

9. As regards Cases Nos 2203 (Guatemala), 2445 (Guatemala), 2450 (Djibouti), 2528 (Philippines), 2652 (Philippines), 2665 (Mexico), 2669 (Philippines), 2673 (Guatemala), 2675 (Peru), 2676 (Colombia), 2679 (Mexico), 2687 (Peru), 2688 (Peru), 2689 (Peru), 2690 (Peru), 2694 (Mexico), 2697 (Peru), 2699 (Uruguay) and 2700 (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.

Admissibility of a complaint

10. The Committee decided that a complaint transmitted by the Argentine Federation of Consortia (FAC) against the Government of Argentina in communications dated 27 December 2007, and 14 February and 15 July 2008 was not admissible.

Article 26 complaints

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

12. As regards the article 26 complaint against the Government of the Bolivarian Republic of Venezuela, the Committee recalls its recommendation for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation.

Transmission of cases to the Committee of Experts

13. The Committee draws the legislative aspects of the following case to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Brazil (Case No. 2646) and Colombia (Case No. 2662).

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

Case No. 2153 (Algeria)

14. The case involves allegations of obstacles to the establishment of trade union organizations and a trade union confederation, anti-union dismissals, anti-union harassment by the public authorities, and the arbitrary arrest and detention of union members, dating back to 2003 [see 353rd Report, paras 16–31, March 2009].

15. In its responses, received by the ILO on 10 March and 27 May 2009, the Government states that on 3 December 2008 the Social Law Chamber of the Supreme Court upheld the rulings issued by previous courts recognizing Mr Belkacem Felfoul, as the legitimate Secretary-General of the National Autonomous Union of Public Administration Staff (SNAPAP), Mr Felfoul having been democratically elected to his post during the organization's congress (held in Algiers on 25 and 26 May 2004).

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

17. With regard to the Committee's recommendations on the clear and unequivocal measures to be taken by the Government in respect of those authorities that continue to require the list of names of an organization's members and copies of their membership cards in order to determine the organization's representativeness, the Government reiterates the information it provided in March 2007 at which time it indicated that Act No. 90-14 of 2 June 1990, in its amended form, states that in the framework of a single employer, those trade unions shall be considered as representative that group together at least 20 per cent of all employees covered by the statutes of the said trade union organizations or provide at least 20 per cent of the elected officials on the participation committee, should such a body exist within the framework of the employer, while requiring that said trade union organizations inform the Ministry of Labour and Social Security of the size of their membership and the amount of their trade union dues on 31 March of each year. The Act does not require trade union organizations to present lists of the names of their members in order to prove their representativeness.

18. The Government reiterates that trade union organizations are in no way required to provide lists of the names of their members or copies of their membership cards in order to determine an organization's representativeness and that, in any case, the complainant organization is quite free to present documentation supporting requests for lists of the names of trade union members or copies of their membership cards made by those authorities which continue to insist on such information being provided.

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

20. *The Committee notes the Government's assurance that it will keep the Committee informed of any definitive rulings issued concerning Mr Hadj Djilani Mohamed, Mr Houari Kaddour and Mr Sadou Sadek. The Committee again recalls the importance it attaches to the protection of trade unionists and trade union leaders against anti-union reprisals. The Committee is bound to emphasize that justice delayed is justice denied, and expresses the*

firm hope that the Government will keep it informed of any measures taken by the employers to implement judicial decisions.

21. *The Committee further requests the Government and the complainant organization to communicate the rulings handed down concerning Mr Mourad Tchikou and Mr Rabah Mebardki, SNAPAP delegates, who were subjected to anti-union harassment, and to indicate whether such judicial decisions are still pending.*

Case No. 2500 (Botswana)

22. The Committee last examined this case – which concerns allegations of the dismissal of 461 employees and union members for having engaged in strike action, the dismissal of four union officials, interference by the employer in the union's internal affairs, and the failure of the Government to provide adequate dispute resolution procedures and intervene in the dispute between the Botswana Mine Workers' Union (BMWU) and the Debswana Mining Company – at its March 2009 meeting. On that occasion the Committee, noting the decision of the Industrial Court denying the BMWU's application for condonation of the late filing of its statement of the case and that a case concerning the dismissal of four BMWU officials was still pending before the Industrial Court, reiterated its expectation that the Industrial Court will bear in mind the principles of freedom of association cited in its previous conclusions when considering the appeal of the four union officials [see 353rd Report, para. 65].

23. In a communication of 15 May 2009, the Government transmits a copy of a decision of the Court of Appeal, dated 15 April 2009, in which the Court upheld the Industrial Court's denial of the BMWU's application for condonation of the late filing of its statement of the case regarding the dismissal of 461 of its members.

24. *The Committee takes due note of the Court of Appeal decision of 15 April 2009. It notes in particular that, in upholding the decision of the Industrial Court, the Court of Appeal held that the Industrial Court had properly exercised its discretion in deciding that the BMWU had failed to submit its application within a reasonable time period and that the Industrial Court had considered all relevant facts in its determination that the BMWU had failed to demonstrate any prospect of success of the underlying claim concerning the dismissal of 461 of its members. The Committee also takes note of the statement of the Court of Appeals that the workers had only lost the possibility of a claim before the Industrial Court but that they could still pursue the merits of their underlying claim in the High Court and requests the Government to indicate whether any further actions have been taken in this regard. Noting that a case concerning the dismissal of four BMWU officials is still pending before the Industrial Court, the Committee once again expresses the expectation that the Industrial Court will bear in mind the principles of freedom of association cited in its previous conclusions when considering the appeal of the four union officials [see 346th Report, para. 331] and requests the Government to transmit the judgement as soon as it is rendered.*

Case No. 2439 (Cameroon)

25. In its previous examination of the case at its March 2008 session [see paras 37–46], the Committee had asked to be kept informed on the issue of the certificate of registration of the SNI-ENERGIE trade union and the proceedings initiated by Mr Ndzana Olongo before the courts.

26. In its replies of 10 July 2008 and 12 January 2009 the Government refers to court rulings handed down by the Court of Appeal sitting in interim relief proceedings in favour of

Mr Ndzana Olongo in the dispute opposing him to the current President of the Confederation of Independent Trade Unions of Cameroon (CSIC), Mr Oumarou Mougoue. The Government reiterates its dedication to the principle of non-interference in the internal affairs of trade unions. The Government invites the party concerned to notify the opposing party of the court decision and to comply with the conditions stipulated in article 8 of the Labour Code, whereby at least 20 signatures are required for the registration of the SNI-ENERGIE trade union.

27. In communications of 2 October 2008 and 6 March 2009, Mr Ndzana Olongo indicates that, in a decision of the District Court of Yaoundé (social judgement No. 108 of 15 December 2008), registered on 2 March 2009, he was partially justified in his request, in his capacity as candidate for the election of staff delegate at the time of his dismissal by the enterprise AES Sonel, which was ordered to pay him his salary from April 2005 to April 2007 and to reinstate him in the enterprise or, failing that, to grant him compensation for moral damages.

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

Case No. 2257 (Canada/Quebec)

29. The Committee examined the substance of this case at its November 2004 meeting. It concerns the exclusion of managerial staff from Quebec's Labour Code, which prevents them from forming unions and enjoying all the associated rights and prerogatives, in particular: a real right to collective bargaining; the right to a disputed settlement procedure in the absence of the right to strike; and the right to legal protection against acts of employer interference. The Committee requested the Government to amend the Labour Code in order to resolve all these problems, in accordance with the principles of freedom of association, and to keep it informed of the development of the situation in that regard [see 335th Report, paras 412–470 and 342nd Report, paras 31–34].

30. In a communication of 18 December 2006, one of the complainant associations, the Association of Senior Managerial Staff of Health and Social Services (ACSSSS), informs the Freedom of Association Committee that it has withdrawn the complaint presented against the Government of Quebec. In fact, together with other associations of managerial staff not party to the present case, the ACSSSS entered into serious discussions with the Ministry of Labour of Quebec. The ACSSSS states that, although it has withdrawn its complaint, the other associations involved remain plaintiffs in the case.

31. In a communication of 2 December 2008, the Association of Managerial Staff of the Société des Casinos du Québec (ACSCQ) submitted a formal request for formal blame to be assigned to the Government of Quebec. In fact, the ACSCQ does not consider that any progress has been made as a result of the discussions held with the representatives of the Government of Quebec since spring 2006. Moreover, it states that the discussions with its employer are at a standstill.

32. In a communication of 18 March 2009, in response to ACSCQ's communication of 2 December 2008, the Direction des organisations internationales (International Organizations Directorate) recalled the creation in 2005 of the Inter-Ministerial Committee, the Government's representative in any negotiations with the Interassociation des cadres du Québec (Inter-Association of Managerial Staff of Quebec), and stressed that certain associations of managerial staff made significant progress following this discussion process. The Direction des organisations internationales stated that it had sent the Interassociation des cadres du Québec a draft guide on good governance and was still awaiting a response.

33. *The Committee notes this information. While noting the serious discussions held in 2006 between the Ministry of Labour of Quebec and various managerial associations, the Committee recalls with regret that the issues underlying this complaint date back to the beginning of the 1980s (see annex to the decision, 335th Report, November 2004). The Committee expects that the Inter-Ministerial Committee will have made considerable progress by now. The Committee expects that the Inter-Ministerial Committee's follow-up proposals will fully take into account the Committee's previous recommendations while respecting the principles of freedom of association in the matter and urges the Government to describe any progress made and provide any reports prepared in this regard.*

Case No. 2046 (Colombia)

34. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 69–77]. On that occasion, the Committee requested the Government to keep it informed on the matter of the dismissal of Luis Alberto Acevedo, Orlando Martínez Cuervo and William de Jesús Puerta Cano, trade union officials of the Colombian Union of Beverage Industry Workers (SINALTRAINBEC), Itagüí section, who, according to the allegations, were dismissed by the enterprise CERVECERIA UNION SA with the aim of destroying the trade union organization.

35. In a communication of 22 May 2009, SINALTRAINBEC comments on the Committee's previous conclusions and affirms once again the anti-union nature of the alleged events.

36. In a communication dated 27 April 2009, the Government states that with regard to the dismissal of Luis Alberto Ruiz Acevedo, the Labour Chamber of the High Court of Medellín revoked the ruling of the first instance court and ordered the worker's reinstatement. As a result of this, the enterprise CERVECERIA UNION SA reinstated Mr Ruiz Acevedo as of 17 July 2006, paying his wages and statutory and non-statutory benefits as ordered by the said ruling. The Government adds that, according to information provided by the enterprise, Mr Ruiz Acevedo voluntarily resigned from his post and that the employment relationship was terminated by mutual consent on 23 February 2008. The parties ratified this decision by signing a conciliation agreement on 28 February 2008 before the Antoquia Territorial Directorate of the Ministry of Social Protection. As to the dismissal of Orlando Martínez Cuervo, the Government states that, according to the information provided by CERVECERIA UNION SA, the judicial order reinstating the worker was executed as of 15 March 2005 and his wages and statutory and non-statutory benefits were paid as ordered by the ruling issued by the First Labour Judge of Itagüí. As regards the situation of Mr Puerta Cano, the Government states that, in accordance with the special trade immunity procedure, a ruling was issued in the first instance ordering his reinstatement. That ruling was revoked in the second instance, thus releasing the enterprise from its obligation to reinstate Mr Puerta Cano. Mr Puerta Cano then lodged an *amparo* (protection of constitutional rights) action with the aim of quashing the ruling in the second instance, but to no avail.

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

Case No. 2434 (Colombia)

38. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 522–543]. On that occasion the Committee: (a) requested the Government to keep it informed of any developments in relation to the adoption of Legislative Act No. 01 of 22 July 2005, which amends article 48 of the Political Constitution relating to social security, limiting the right to collective bargaining on pension benefits; and (b) with regard to the alleged persecution, through successive disciplinary measures, of Mr Franco

Cuartas, a founding member and officer of SINTRAPROAN, requested the Government to both inform it of the result of the application for a declaration of nullity (disciplinary proceedings 030-123975/2005) and the circumstances of these disciplinary proceedings which, according to the complainant, led to the resignation of Mr Franco Cuartas, and, if the allegations were found to be true, to take measures to ensure his reinstatement.

39. The Committee notes that the National Association of Telephone and Communications Engineers (ATELCA) in its communications of 1 and 4 June 2009 refers to Legislative Act No. 01 of 2005 and its implications for the possibility of bargaining collectively on pensions and for collective agreements containing clauses on pensions, questions that have already been examined by the Committee.

40. In a communication dated 27 April 2009, the Government states that it will keep the Committee informed of any developments in relation to Legislative Act No. 01, but that any amendments to that Act are a matter for the constitutional bodies competent to amend the Political Constitution of Colombia. The Committee takes note of this information, and refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.

41. In a communication dated 29 May 2009, the Government forwards the information supplied by the Office of the Attorney-General according to which the various disciplinary proceedings against Mr Franco Cuartas have been concluded, and with regard specifically to case file 030-123975/2005 states that the charge against Mr Franco Cuartas was declared without merit. *The Committee notes this information.*

42. As regards the alleged resignation of Mr Franco Cuartas following these disciplinary proceedings, the chief of the Human Resources Management Division stated that he has no knowledge of any such resignation by Mr Franco Cuartas, who is currently employed in a graduate-level post (grade 18) in the Valle de Aburrá provincial prosecutor's office. *The Committee notes this information.*

Case No. 2481 (Colombia)

43. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 83–85]. On that occasion, the Committee: (1) requested the Government to take the necessary measures to guarantee the right of ACOLFUTPRO to collective bargaining, in accordance with the ruling handed down by the Attorney-General, which was noted in the previous examination of this case; and (2) requested the complainant organization, without delay, to supply information on the allegations of pressure, threats of dismissal and other acts of discrimination directed at workers because of their decision to resort to strike action, in order to allow the Government to launch the corresponding investigations.

44. The Committee notes that in a communication dated 7 May 2009, ACOLFUTPRO states that despite the Government's recommendations, it has still not been able to bargain collectively with the football clubs, and the national football federation and league.

45. In communications dated 29 April and 9 July 2009, the Government states that in accordance with national legislation and international labour standards, it arranged a consultation hearing on 7 July of this year, in which ACOLFUTPRO, DIMAYOR, and 32 clubs participated. The hearing included a discussion of the matter of collective negotiations. The clubs expressed the willingness to begin talks provided that it conformed to legislation in force. Each club would negotiate individually on the basis of the particular list of demands put forward, given that the economic condition of each club varied. ACOLFUTPRO, however, reiterated its insistence that bargaining should be conducted on a joint, rather than individual, basis. In the light of this, the Deputy Minister of Labour

Relations proposed that a series of exploratory meetings be held with each of the parties in order to bring them closer together. According to the Government, this shows its willingness to resolve collective disputes, because although the Government is obliged to create the conditions for reaching an agreement, it is not supposed to apply pressure on the parties. *The Committee notes the efforts of the Government to promote collective bargaining, recalls that the degree of collective bargaining depends essentially on the willingness of the parties concerned, and expects that the process of dialogue or other legal means of resolving disputes will enable this dispute to be resolved in the near future.*

46. *As regards the allegations of pressure, threats of dismissal and other acts of discrimination directed at workers because of their decision to resort to strike action, the Committee observes that despite its invitations, the complainant organization has not provided sufficient information to enable the Government to carry out the corresponding investigation. The Committee will accordingly not pursue its examination of this situation.*

Case No. 2497 (Colombia)

47. The Committee last examined this case at its November 2008 meeting [see 351st Report, paras 31 and 32]. The Committee recalls that the allegations concern the suspension, from 1998 onwards, by Pereira Waste Management SA, Pereira Telecommunications SA, Pereira Electricity SA (ESP) and Pereira Water and Sanitation SA, successor companies to Pereira Public Enterprises, of the payment of a pension benefit established in the collective agreement concluded in 1963 and confirmed in subsequent collective agreements. The complainants launched legal action to obtain payment of the pension benefit, but the judicial authority rejected the claim on the grounds that after the benefit in question had been established, Law No. 4 of 1976 was approved, providing for the payment of one additional month, which was confirmed by section 50 of Law No. 100 of 1993. According to the judicial authority, under the terms of section 16, clause 2, of the Labour Code, where a law provides for a benefit already recognized in an agreement or arbitration award, the benefit that is more favourable for the worker is paid. The Committee recalls that when it examined the substance of this case, it requested the Government to take the necessary measures to ensure that the workers in question would receive the pension benefits established in the collective agreements concluded after the approval of the new legislation, for the period during which those agreements were in force, while ensuring that the same benefit was not paid twice.

48. In communications dated 24 June, from the Association of Pensioners of Pereira Public Enterprises, and 20 September, from the Single Confederation of Workers, the complainants reiterate the allegations examined in relation to the suspension of payment of the pension benefit established in successive collective agreements, a benefit which in their view is still payable in addition to the benefit established subsequently through the adoption of Law No. 100 of 1993.

49. In a communication dated 15 May 2009, the Government indicates that the companies apply the relevant laws and regulations in force (Law No. 4 of 1976, Law No. 100 of 1993, and section 49 of Law No. 6 of 1945) and that, in accordance with the principle that the more favourable benefit is payable, they are not required to recognize both the benefits payable under the terms of agreements and that provided for by legislation. The Government states that the additional benefits which were approved on a six-month basis by the Public Enterprises of Pereira and which continued to be paid by the public service companies are equivalent to those due to the retired workers in June and December under the terms of sections 50 and 142 of Law No. 142 of 1993. In this regard the Government states that according to the ruling of the Second Labour Court of Pereira district of 14 February 2002, “there are no grounds for accumulating benefits payable under agreements and legislation in the same context, and this chamber takes the view that the

aim of claiming additional monthly benefits paid to retired workers following the entry into force of Law No. 100 of 1993 is simply to claim, for this group of individuals, payment of the Christmas and six-monthly benefits no longer paid to those still working".

50. *The Committee takes note of this information, and observes that the new communications presented by the complainant organizations contain no new factual information and does not refer to the initiation of any new judicial action. Under these circumstances, the Committee draws attention to the fact that it has already formulated definitive conclusions on these questions, and those conclusions remain valid.*

Case No. 2498 (Colombia)

51. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 544–561]. On that occasion, the Committee requested the Government to keep it informed regarding the registration of the National Union of Workers in Non-Governmental and Social Organizations (SINTRAONG'S). The Committee also examined the allegations presented by the Union of Employees of the University of Medellín with respect to anti-union interference in the form of: insistence on the trade union providing a list of candidates for the steering committee; the dismissal of Ms Dorelly Salazar for reporting this interference; pressure and threats of dismissal which led to 29 workers leaving the trade union; forbidding teaching staff to join a union; the dismissal without cause of Norella Jaramillo, Ulda Mery Castro, Carlos Mario Restrepo and Julieta Ríos in March 2001, as well as the later dismissal of two more workers (Wilman Alberto Ospina and Jesús Alberto Munera Betancur) after they became trade union members; and the repeated violation of the collective agreement signed in 2004. The Committee urged the Government to keep it informed of any action taken, or change in the proceedings initiated by the dismissed employees of the University of Medellín and, if the claims of the workers were found to have merit, to reinstate the dismissed workers and ensure that the teaching staff was guaranteed their trade union rights.

52. In a communication of 20 April 2009, SINTRAONG'S states it became registered with the Territorial Directorate of Antoquia of the Ministry of Social Protection on 6 March 2009, but emphasizes that its registration was made possible by recent rulings issued by the Constitutional Court removing the competence of the Ministry of Social Protection to refuse registration. However, the complainant organization states that the legislation blocking the registration of trade unions (resolution No. 625 of 2008) remains in force and, therefore, there remains a risk that the trade union organization will be dissolved by a judicial decision based on this restrictive legislation.

53. In communications of 27 April and 10 June 2009, the Government confirms the registration of SINTRAONG'S and states that, on 6 March 2009, registration documents were received relating to the founding of SINTRAONG'S since the trade union made the corresponding deposits. *The Committee notes this information with interest.*

54. As to the allegations relating to resolution No. 625 of February 2008, allowing registration to be refused in the case of a trade union organization on the grounds that it was established with aims other than the protection of freedom of association, the Committee observes that this issue, and more specifically the extensive interpretation in practice of this reason for refusal, has already been examined by the Committee of Experts.

55. With regard to the allegations presented by the Union of Employees in the University of Medellín, the Government transmits a communication of the Rector of the University who reiterates that: (1) the events that were reported did not actually take place; (2) no rulings have been handed down against the University for non-compliance with the collective agreement; and (3) no legal proceedings have been initiated against the University in this

regard. The Government states furthermore that, according to the Territorial Directorate of Antoquia, the trade union organization has to date not presented any complaint or launched any legal proceedings in connection with these allegations. The Government also refers to the need for information to be provided regarding both the case number and the court hearing the legal proceedings initiated by the dismissed workers. *The Committee notes this information and requests the complainant organization to provide information on the legal proceedings initiated concerning the alleged dismissals.*

Case No. 2554 (Colombia)

56. The Committee last examined this case at its March 2009 meeting [see 353rd Report, para. 86, approved by the Governing Body at its 304th Session]. On that occasion, with regard to the transfer without regard to the established process of a number of officials and members of the Trade Union Association of Teachers of Norte de Santander (ASINORT) (Nydia Rene Gafado Rojas, Jairo Pavón Capacho, Jairo Manuel Leal Parada, Rodolfo Bello Merchán (who received death threats for refusing to accept the transfer), Hermelina Jaimes de Guerrero, Ana Rosa Valencia Granados and Blanca Inés García (members)), the Committee requested the Government to carry out an investigation to determine whether the established transfer procedure had been respected or whether the measure was of an anti-union nature.

57. In a communication dated 18 May 2009, the Government refers to the information provided by the Territorial Directorate of Norte de Santander, according to which there has been no administrative labour investigation into the Ministry of Education of Norte de Santander for violations of freedom of association and the right to organize.

58. *The Committee regrets that the investigation requested has not been conducted, and again requests the Government to take the necessary steps to ensure that an investigation, to determine whether the established transfer procedure was respected for the trade union officials and members or whether the measure was of an anti-union nature, is conducted without delay. The Committee requests the Government to keep it informed in this regard.*

Case No. 2556 (Colombia)

59. The Committee last examined this case at its November 2008 meeting [see 351st Report, paras 33–34, approved by the Governing Body at its 303rd Session]. The Committee recalls that the case concerns the refusal of the administrative authority to enter the statutes and executive committee of the Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA) into the trade union register, because, among other reasons, its members included workers from the temporary agencies serving the sector’s industries.

60. In a communication dated 16 March 2009, the Government states that in accordance with rulings Nos C-465 of 14 May and C-695 of 9 July 2008, the Ministry of Social Protection can no longer refuse to enter trade union organizations in the trade union register and, moreover, the judicial authority has the competence to issue rulings on any irregularities that might exist. Consequently, the Government invites the trade union organization UNITRAQUIFA to present the documents before the Ministry of Social Protection again in order that registration may proceed.

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

Case No. 2560 (Colombia)

62. The Committee last examined this case at its March 2009 meeting [see 354th Report, paras 424–440]. On that occasion, the Committee requested the Government to keep it informed: (a) of any pending judicial decisions in relation to the dismissal, without respect to the disciplinary proceedings established in the collective agreement, of Liliana Robayo, Neisy Monroy Alfonso, Gloria Ximena Ramírez Alturo and Sandra Katalina Zambrano Mantilla; and (b) about the systematic use by the Bank to service enterprises. The Committee also requested the Government to guarantee that workers employed in or for the Bank may establish or join trade union organizations of their choosing. By a communication dated 22 October 2009, the Government sent information relating to these points.

63. By communication dated 28 October 2009, the National Union of Employees of BANCOLOMBIA (SINTRABANCOL) informs the Committee that the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT) has overcome the existing conflict between the parties which express satisfaction with their good working relations through a joint declaration dated 17 September 2009. The workers' organization stated that it is taking into account the benefits achieved by the new working relationship and has decided to withdraw this complaint. *The Committee notes this information with satisfaction.*

Case No. 2490 (Costa Rica)

64. At its November 2008 meeting, the Committee formulated the following recommendation on an issue still pending [see 351st Report, para. 671]: *the Committee deplores the criminal complaint made [against trade union leaders] by the member of parliament for submitting a complaint to the ILO and requests the Government to keep it informed of the outcome and to verify that no trade union leader is sanctioned for having submitted a complaint to the ILO.*

65. In its communication of 27 April 2009, the Government states that the member of parliament who had filed the criminal complaint stated in writing on 7 February 2009 that it was not in his interest to pursue the complaint, which was made several years earlier, and that he has requested the closure of the file on this case. *The Committee takes note of this information.*

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

Case No. 2511 (Costa Rica)

67. The Committee last examined this case at its November 2008 meeting [see 351st Report, paras 35–38] and on that occasion requested the Government: (1) as to the dismissal of the members of the executive committee of the Independent Union of Workers of the National Community Development Office of DINADECO (SINTRAINDECO) (Lucrecia Garita

Argüedas, Rafael Ayala Haüsermann and Giselle Vindas Jiménez) a few months after the trade union was established, to keep it informed of the outcome of the judicial or administrative proceedings relating to the dismissals of the trade union leaders in question, and should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they were reinstated in their posts or in similar posts corresponding to their abilities, with payment of wages due and appropriate compensation. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated; and (2) concerning the alleged dismissal of the leaders of SINTRAINDECO, Óscar Sánchez Vargas and Irving Rodríguez Vargas, to take measures to ensure that an independent investigation is carried out in this regard and, should it be found that they were dismissed on anti-union grounds, to take measures to ensure that they are reinstated in their posts, with payment of wages due and appropriate compensation. Moreover, if the competent judicial authority finds that reinstatement is not possible, the Committee requests that they be fully compensated.

68. In a communication of 27 April 2009, the Government refers to information provided by DINADECO, according to which all the civil servants referred to were appointed on a temporary basis to posts in the public sector, and therefore enjoy "*estabilidad impropia*" (when the interim worker may only be removed from his post if he is to be replaced by a permanent candidate, or if he was standing in for another worker who then returns to work) in accordance with the terms of judgement 867-91 of 3 May 1991, issued by the Constitutional Chamber. This means that they can be dismissed from their posts provided that they are replaced by workers who have passed the corresponding exams. These interim workers are then added to the list of those eligible for appointment to permanent posts maintained by the General Directorate of the Civil Service.

69. As to Ms Lucrecia Garita Argüedas, in accordance with official letter RSDA-02-891-RH, she took up post No. 005739 on a temporary basis at DINADECO on 11 June 2002, remaining in that position until 16 February 2004, on which date she was informed that her interim appointment had been terminated. She was again hired on a temporary basis from 1 March 2005, in post No. 97237. On 10 July 2006, through official letter No. 264-2006-DRH, she was informed that, in accordance with Civil Service list No. 122806, a candidate had been selected for post No. 97237. Ms Garita Argüedas lodged an appeal for the selection decision to be revoked. The General Directorate of the Civil Service, through official letter No. ARSP-463-06, of 28 September 2006, informed the human resources department of DINADECO that Ms Garita Argüedas had been an eligible candidate for a clerk 3 class position since 2005. This means that at any time she could be included by the General Directorate of the Civil Service on a list of three candidates or a personnel list from which she might be chosen for appointment to a permanent post.

70. With regard to Giselle Vindas Jiménez, who was appointed on an interim basis by DINADECO as of 16 February 2004, she was later appointed, again on a temporary basis, to another post as an information systems analyst, as of 1 January 2005. On 30 June 2006, Ms Vindas Jiménez was made redundant owing to the fact that her post had been reclassified as a graduate class social promotion position within DINADECO, as approved by the Decentralized Office of the Civil Service of the Ministry of Public Security. Ms Vindas Jiménez lodged an *amparo* (protection of constitutional rights) appeal with the Constitutional Chamber of the Supreme Court of Justice against the decision to make her redundant. The Constitutional Chamber ruled in her favour and DINADECO proceeded to reinstate Ms Vindas Jiménez in her post (which she occupies to this day), on a temporary basis.

71. With regard to Mr Rafael Ayala Haüsermann, who was appointed on a temporary basis to the post of social promoter within DINADECO, on secondment from the Ministry of Public Security, as of June 2003. Later on, from 1 January 2005, he was appointed on a

temporary basis to post No. 97257 (mobile equipment operator). On 7 July 2006, DINADECO informed him that the post had been altered to security and surveillance class 1, approved by the Decentralized Office of the Civil Service of the Ministry of Public Security, his contract being terminated as a result. Mr Ayala Haüsermann lodged an *amparo* appeal with the Constitutional Chamber, with the Chamber ruling that the appeal was groundless on 17 June 2006 and stating that "In the case of the interim appointment and in those cases in which a replacement must be found for a permanent civil servant for a fixed period, in order to ensure consistent interpretation of our legislation the dismissal of the interim worker be carried out on the grounds that the post is to be permanently occupied by a civil servant ...".

72. Óscar Sánchez Vargas was appointed on a temporary basis to a post within DINADECO from 16 January 2001, to 4 December 2006. On 9 November 2005, he lodged a formal request for an invalidity pension with the Costa Rican Social Security Fund. On 20 October 2006, he was informed that the Directorate for the Classification of Invalidity Status had granted him invalid status. Once a worker has been informed that his request for an invalidity pension has been granted, he must resign from his state post in order to enjoy the benefit granted. In view of Mr Sánchez Vargas' invalid status, it can be concluded, looking at his personal file, that he accepted the invalidity pension, and, therefore, he was not made redundant as a result of anti-union discrimination.

73. As to Mr Irving Rodríguez Vargas, he was employed on a temporary basis as of 1 July 2005. On 15 August 2006, he was made redundant because a candidate was appointed to the post on a permanent basis.

74. *The Committee takes note of this information, in particular, the reinstatement of Ms Vindas Jiménez and the fact that Mr Sánchez Vargas made a successful application for an invalidity pension, as a result of which his contract was terminated. As to the other dismissals, the Committee notes that the Government denies that they were carried out on anti-union grounds and emphasizes that the staff affected were on interim contracts. The Committee notes that the Constitutional Court refused Mr Ayala Haüsermann's request to be reinstated and that the other workers dismissed lodged unsuccessful administrative appeals. The Committee observes that from the Government's statements it can be deduced that there are no legal appeals pending regarding these trade union officials.*

Case No. 2604 (Costa Rica)

75. At its November 2008 meeting, the Committee formulated the following recommendations on the issues that were still pending [see 351st Report, para. 774]:

(a) the Committee requests the Government to make further efforts to bring the parties together with a view to re-examining the extent of the hours of Dr Román's trade union leave, taking into account both the needs of the union and of a sustainable enterprise.

(b) With regard to UPINS, the Committee appreciates the Government's efforts since the beginning of 2007 to convene meetings and create room for dialogue between the parties to find an appropriate solution. The Committee requests the Government to continue promoting dialogue between the parties and to inform it of the result of the appeal for *amparo* filed by the General Secretary of UPINS against his dismissal in order to be able to examine this question with all the elements.

76. In its communication of 10 June 2008 (received at ILO headquarters in April 2009), the National Medical Union (UMN) states that, by a decision of 21 February 2008, the National Director and Inspector-General of Labour decided to lodge a complaint of unfair practices against the National Insurance Institute for refusing to grant trade union leave to the trade union official, Dr Sonia Román on the same terms that she had been granted for

11 years and, on 29 February 2008, it submitted a formal complaint to the judicial authority.

77. In its communications of 27 April and 21 June 2009, the Government states that it will provide information on the result of the judicial process against the National Insurance Institute relating to Dr Sonia Román's trade union leave, and indicated that Dr Román is no longer a member of the UMN's executive, therefore, in the Government's opinion, the allegations are not of current interest.

78. With regard to the dismissal of Mr Luis Alberto Salas Sarkís, General Secretary of the National Insurance Institute Staff Union (UPINS), the Government states that measures have been arranged with the aim of promoting dialogue between the parties in order to reach a solution that is satisfactory for all involved, including a meeting between the trade union officials concerned and the authorities, and another with the President of the Republic. The Government adds that the Constitutional Chamber of the Supreme Court of Justice refused the appeal for protection *(amparo)* filed by Mr Salas Sarkís against his dismissal. The Government sends the ruling which states the following with regard to the substance of the case:

> The appellant (Mr Salas Sarkís) claims that due process was violated in three ways. Firstly, management is trying to dismiss him although he has not committed any wrongdoing in the exercise of his post, as the actions attributed to him were carried out in his role as a trade unionist. According to the final report of the panel that conducted the disciplinary proceedings, the Institute, in its dealings with the defendant, granted several instances of trade union leave with pay so that Alicia Vargas Obando could participate in trade union activities, although in reality the leave was used for other activities. This Chamber considers that determining if this was committed in the role of a trade union member or in another capacity is a matter outside the authority of a constitutional court. This was in fact at the very core of the discussion during the administrative proceeding. Consequently, the appellant's opposition to decisions arising from the administrative proceeding must be channelled through existing administrative appeals. Secondly, in the factual report above, it was proven that the transfer of charges was done in a valid way, given that Mr Sarkís knew about the charges against him, the legislation that was infringed and his rights in the administrative proceeding initiated against him. Lastly, the defendant may exercise his right to defence by giving notice of the appeals provided for by the legal system. He took part in the private oral hearing, where he had the opportunity to question the witnesses more than once and actively defend his rights. Once again, the grounds and proportionality between the offence and the penalty are set out as part of the disciplinary proceeding itself, or possibly as part of industrial proceedings. Contrary to what the appellant appears to assume, there is no constitutional right to a less serious penalty. For these reasons, the appellant's reservations cannot be considered as having any grounds, which is why the appeal is dismissed.

79. *The Committee takes note of the information from the Government. The Committee looks forward to hearing the ruling that is handed down on Dr Sonia Román's trade union leave. The Committee requests the Government to indicate whether, following the Constitutional Chamber's ruling on the dismissal of the trade union official Mr. Salas Sarkís, Mr Sarkís has filed new administrative or judicial appeals.*

Case No. 2396 (El Salvador)

80. The Committee last examined this case, which concerns the murder of trade union official Mr José Gilberto Soto, at its March 2008 meeting. On that occasion, the Committee noted the Government's information that the Usulután Court issued a judgement convicting Mr Herbert Joel Ramírez Gómez of the acts against Mr José Gilberto Soto that he had been charged with, which were deemed by the court to have constituted aggravated homicide, a crime punishable under sections 128 and 129(3) of the Penal Code. The Government also indicated that, as the judgement indicates, the killing of Mr José Gilberto Soto was

unconnected with any trade union activity; that is, it was not motivated by labour-related issues. In this respect, the Committee requested the Government to send a copy of the judgement in question [see 349th Report, paras 94–96].

81. In a communication of 17 July 2009, the Government sent the text of the judgement requested.

82. *The Committee notes the judgement and, in particular, that the perpetrator of the murder of trade union official Mr José Gilberto Soto has been sentenced to 25 years in prison. The Committee observes, however, that the judgement does not allow a clear determination to be made as to the motive of the murder (personal or trade union).*

Case No. 2572 (El Salvador)

83. The Committee last examined this case, which concerns allegations of violations of the collective agreement in force in the Social Fund for Housing, at its March 2008 meeting. On that occasion, the Committee noted that the complainant trade union and the Social Fund for Housing were endeavouring to resolve the problems relating to the implementation of the terms of the collective agreement in force, requested the Government to keep it informed in this respect, and encouraged the parties to resolve their differences in the very near future [see 349th Report, paras 782–793].

84. In communications dated 11 March and 15 and 17 July 2009, the Government states that the situation regarding the present case has not significantly changed in the time that has elapsed since attempts were made to promote direct social dialogue between the parties concerning problems arising from the implementation of the collective agreement. The Government therefore considers that the parties are attempting to resolve those problems directly.

85. *The Committee takes note of this information. When it last examined this case, the Committee emphasized the principle that "(collective) agreements should be binding on the parties", and that "mutual respect for the commitment undertaken is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 939 and 940]. Under these circumstances, taking into account the time that has elapsed since the submission of the complaint (in June 2007), the Committee firmly expects that the parties will reach an agreement relating to the implementation of the collective agreement in force in the near future, but also suggests that it may be necessary to resort to alternative legal mechanisms for settling disputes or submit this matter to the judicial authority.*

Case No. 2629 (El Salvador)

86. The Committee last examined this case, regarding allegations concerning the refusal to grant legal personality to the Union of Salvadorian Judiciary Employees (SINEJUS), at its March 2009 meeting, and made the following recommendations on that occasion [see 353rd Report, paras 873–898]:

(a) Considering that the refusal to grant legal personality to the SINEJUS constitutes a violation of freedom of association, the Committee expects that the SINEJUS will obtain legal personality soon and that, in the meantime, it will be able to carry out its representation activities until the constitutional issues have been resolved.

(b) The Committee expects that the current Legislative Assembly will soon ratify the reform to article 47 of the Constitution agreed by the previous Legislative Assembly, in order to

ensure that all judiciary employees enjoy the right of freedom of association. The Committee requests the Government to keep it informed in this regard and to take all the necessary steps to ensure that, in accordance with Convention No. 87, the constitutional reform may allow exclusions from the right to organize only in the case of the armed forces and police.

87. In a communication of 13 October 2009, the Government indicates that legal personality has been granted to SINEJUS, by a resolution of 17 September 2009. The same also applies to unions of workers in the education sector, administrative employees and municipal employees.

88. *The Committee notes this information with satisfaction. The Committee notes specifically that the amended Constitution was published in the Official Journal in June 2009, and article 47 of the Constitution as amended establishes that: "private employers and workers, regardless of nationality, gender, race, creed or political beliefs and regardless of the activities or the nature of the work they carry out, have the right to organize freely in defence of their respective interests, founding industrial associations or trade unions. The workers of official autonomous institutions, civil servants and public and municipal employees shall also enjoy the same right. The following shall enjoy the right set out in the previous section, ... members of the judiciary ..."*

Case No. 2506 (Greece)

89. The Committee last examined this case, which concerns a "civil mobilization order" (requisition of workers' services) of indefinite duration which put an end to a legal strike of seafarers on passenger ships and cargo vessels, at its March 2009 meeting [see 353rd Report, paras 96–103].

90. On that occasion, the Committee noted from the Government's reply 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. The Committee requested to be kept informed of developments in that regard, and recommended setting up an independent authority to review whether the preconditions for the application of the provisions of section 41 of Act No. 3536/2007 are met.

91. In a communication dated 2 June 2009, the Government reiterates its concern to maintain industrial peace, especially in the maritime sector. It recalls that, as regards minimum services, the Committee's recommendations and their application (regarding the number of crossings per day), it is worth emphasizing that the particular shipping lines that link the mainland and the islands use only one route. As a result there are many reservations regarding the application of the recommendations in practice and the manageability of problems if they arise.

92. The Government also highlights that the Minister of the Merchant Fleet (as well as the country's general Aegean and island policy) takes the Committee's recommendations into account and seeks to attain and preserve industrial peace in the maritime transport sector, collaborating closely with the different social partners in order to do so. This is borne out by the current state of industrial peace. The Government of Greece once again declares its willingness to resolve the problems that exist through cooperation and consultation with the social partners in the maritime transport sector. These problems can thus be resolved in a manner consistent with the country's capacities and obligations.

93. *The Committee takes due note of the Government's reply, and expects that it will persist in its efforts to seek solutions consistent with the principles of freedom of association to the social conflicts in the maritime transport sector.*

Case No. 2295 (Guatemala)

94. The Committee last examined the substance of this case at its November 2008 meeting and, on that occasion, asked the Government to keep it informed regarding the case against three former representatives of the enterprise Golán SA concerning non-compliance with judicial reinstatement orders. The Committee observes that, independently of this process, there is an obligation on the part of the company to reinstate the dismissed workers in order to comply with repeated judicial orders [see 351st Report, paras 861–872].

95. In a communication dated 10 March 2009, the Government states that, on 10 February 2009, the International Affairs Directorate of the Ministry of Labour and Social Security asked the Justice of the Peace of the municipality of Villa Canales for information on the status of the case. The following day, the honourable judge stated that one of the defendants, Mr Marco Antonio Ramos Pontaza, had been acquitted. The other individuals who disregarded reinstatement orders and failed to reinstate workers, no longer work for the enterprise Golán SA, and it has not been possible to locate them. Proceedings against them are ongoing. According to the Government, in the interest of an objective analysis, the Committee should take into consideration the fact that the competent judicial authority stated on 10 February 2009 that the workers who lodged the complaint have not issued a statement or appeared before that court. The Government states that it is clear from studying the case that the workers (former workers) are no longer interested in continuing with the action, possibly because they are working for themselves or for another enterprise, and given also that the events that gave rise to the complaint occurred more than eight years ago.

96. Taking into account the information provided by the judicial authority, it can be inferred that the State of Guatemala, through the judiciary, offered its full support for the continuation of the case but the complainants themselves ceased to follow it up, either through negligence, lack of interest or for reasons beyond the State's control.

97. *The Committee takes note of this information. In this regard, the Committee understands that, in the case against former representatives of the enterprise Golán SA concerning non-compliance with reinstatement orders, the former workers were not interested in pursuing the case and regrets the eight-year delay, recalling that justice delayed is justice denied. The Committee asks the Government to indicate the manner in which it intends to give effect to the application of the repeated judicial reinstatement orders.*

Case No. 2568 (Guatemala)

98. The Committee last examined the substance of this case (concerning allegations of dismissals and threats following the establishment of a committee to form a trade union and bargain collectively at the enterprise Agroindustrias Albay Arrocera de Guatemala SA) at its November 2008 meeting. On that occasion, taking account of the considerable time that had passed since the trade unionists were dismissed in May 2007, the Committee requested the Government to explain the basis for the reinstatement ruling and take any measures in its power to ensure that the company complied with the judicial decision in favour of the eight workers in question, pending a final ruling on the matter which should be consistent with the rights conferred by Conventions Nos 87 and 98. The Committee also requested the Government to ensure that the dismissed workers were paid wages due to them for days actually worked, and to inform it of the actions taken in response to the

complaint brought before the Human Rights Ombudsman concerning alleged threats by the company against workers to force them to quit their jobs [see 351st Report of the Committee, paras 898–909].

99. In a communication dated 30 March 2009, the Government states, with regard to the request for an explanation of the basis of the reinstatement ruling, that the Labour Code in article 209 (Title 6) stipulates that: "Workers shall not be liable to dismissal for forming a trade union. They enjoy immunity from dismissal from the moment at which they give written notification to the General Labour Inspectorate or through the latter's representation of their intention to form a trade union, and shall enjoy such protection for a period of up to 60 days after registration of the union." The Government also states that the Second Labour and Social Security Judge, in a communication dated 18 February 2009, in response to the request for information from the Foreign Affairs Directorate (paragraph (c)), states that Graciela Elizabeth Pérez García, Mauricia Morales Ochoa, Marta Azucena Veliz García, Wendy Roxana Donis Folgar, Zaida Amapola Morataya Luna, Ángela Rosa de María Folgar Martínez, Everilda Yanes Lemus and Claudia Janeth Salguero Caballeros lodged a complaint of dismissal and claim for reinstatement against the company, which was settled in their favour within the statutory period.

100. The Government states, with regard to the Committee's recommendation that it take measures within its power to ensure that the company complies with the judicial decision in favour of the eight workers and pay the wages owed to them, that the Second Labour and Social Security Judge upheld the partial payment of the wage arrears and payment of benefits due to each worker under the terms of current legislation, in the amount of 127,823.85 quetzales. The company deposited that sum on 22 April 2008, and actually paid out to the workers concerned on the 30th of that month through appropriate judicial deposits.

101. The Government states with regard to this recommendation, that it informs the Committee of the action taken in response to the complaint brought before the Human Rights Ombudsman concerning alleged threats by the company owner against workers to force them to quit the enterprise, and that on 13 February 2009, the Foreign Affairs Directorate requested information from the Human Rights Ombudsman in accordance with the Committee's request and the Government is still waiting for that information.

102. *The Committee takes note of this information. In particular it notes with interest that the arrears of wages have been paid in accordance with the ruling of the judicial authority. Under these circumstances, the Committee requests the Government to confirm that the dismissed trade unionists have been reinstated in their posts. The Committee also requests the Government to keep it informed of the outcome of the complaint before the Human Rights Ombudsman concerning threats by the company owner against workers to force them to quit.*

Case No. 2096 (Pakistan)

103. The Committee last examined this case at its March 2009 meeting [see 353rd Report, paras 165–169]. On that occasion, it requested the Government to provide a copy of the High Court judgement which held that section 27-B of the Banking Companies Act had precedence over the provisions of the 2002 Industrial Relations Ordinance (IRO). With regard to the allegations of anti-union dismissals at the United Bank Limited (UBL), the Committee noted the Government's indication that an independent inquiry revealed that none of the ex-employees had been dismissed for anti-union motives and requested the Government to provide a copy of the report of the inquiry, as well as to specify the members of the inquiry and whether the trade union (UBL employees' trade union), the members of which have been dismissed, was appropriately consulted. Finally, the

Committee noted that the State Bank of Pakistan was still working on the draft Banking Law and expressed the expectation that this process would be soon finalized, and that the new legislation would ensure that trade unions can carry out their activities in full freedom as well as the right to collective bargaining, and drew the legislative aspect of this case to the Committee of Experts on the Application of Conventions and Recommendations.

104. In a communication of 16 April 2009, the Government indicates that a bill to repeal section 27-B of the Banking Companies Act had been moved to the Senate.

105. *While noting with interest the Government's statement concerning the amendment of the Banking Companies Act, the Committee regrets that the Government has failed to submit its comments with respect to the other outstanding issues. It once again requests the Government to provide a copy of the report of the inquiry which revealed that none of the ex-employees of the UBL had been dismissed for anti-union motives, as well as to specify the members of the inquiry and indicate whether the UBL employees' trade union, whose members had been dismissed, was appropriately consulted.*

Case No. 2273 (Pakistan)

106. The Committee last examined this case, which concerns the refusal to register the Army Welfare Sugar Mills Workers' Union (AWSMWU), at its March 2009 meeting [see 353rd Report, paras 179–181]. On that occasion the Committee, regretting that the case concerning the AWSMWU's registration remained pending before the Supreme Court, once again expressed its expectation that the Supreme Court would make a final ruling on this matter in the near future, bearing in mind that civilians working in the services of the army should have the right to form trade unions, and once again requested the Government to provide a copy of the Supreme Court judgement as soon as it was handed down. The Committee also requested the Government to confirm whether the AWSMWU could operate and perform its activities, as previously indicated by the Government, and expressed the expectation that the union would be registered without further delay.

107. In a communication of 16 April 2009, the Government states that the Supreme Court has decided the AWSMWU's case in favour of the union. The Government further states that the Registrar of Trade Unions has notified the union's office bearers, and that the union has started operating.

108. *The Committee notes the Government's indications with satisfaction.*

Case No. 2520 (Pakistan)

109. The Committee last examined this case, which concerns allegations of the cancellation of the registration of the Karachi Shipyard Labour Union (KSLU) and of obstacles to collective bargaining faced by the union concerned, at its March 2009 meeting [see 353rd Report, paras 186–189]. On that occasion the Committee expressed its deep regret that the Government, apart from reiterating that several trade unions had filed constitutional petitions before the Sindh High Court in Karachi challenging the Sindh Registrar's cancellation order, had once again failed to indicate any steps taken to implement its previous recommendations. Recalling once again that civilian workers in the manufacturing establishments of the armed forces should have the right to establish organizations of their own choosing without previous authorization, in conformity with Convention No. 87, the Committee once again requested the Government to take the necessary measures to revoke the Sindh Registrar's order, so as to reinstate the registration of the KSLU and of any other unions that may have been dissolved due to the administrative control of the enterprise concerned by the Ministry of Defence Production.

Additionally, the Committee once again requested the Government to initiate an investigation into the obstacles to collective bargaining encountered by the KSLU during the period 2003–06 and to promote future collective bargaining with the union, if it was still found to be representative of the workers at the Karachi Shipyard and Engg Works Ltd. Finally, as concerned the bill to amend the Industrial Relations Ordinance (IRO) 2002, the Committee reminded the Government that the ILO's technical assistance was at its disposal, if it so wished, and requested it to continue to inform the Committee of Experts on the Application of Conventions and Recommendations, to which it had referred the legislative aspects of the case, of the measures taken or envisaged to amend section 12(3) of the IRO 2002 so that the failure to seek or obtain collective bargaining agent status did not constitute grounds for the cancellation of a trade union's registration.

110. In a communication of 16 April 2009, the Government states that under the Industrial Relations Act (IRA) 2008, which is intended to repeal the IRO 2002, the registration of a union can be cancelled by the Registrar of Unions only if the Registrar, after holding an inquiry, determines that the said union has dissolved itself or ceased to exist. The Government also indicates that the constitutional petitions brought by several trade unions challenging the Sindh Registrar's cancellation order remained pending before the Sindh High Court in Karachi.

111. *The Committee, while noting with interest the amendment made in the 2008 IRA to restrict the powers of cancellation of the Registrar of Unions, deeply regrets that the Government once again confines itself in this specific case to reiterating that several trade unions have filed constitutional petitions before the Sindh High Court in Karachi challenging the Sindh Registrar's cancellation order, while again providing no indication that it has taken steps to implement its request to ensure the renewed registration of the KSLU and the other unions. The Committee observes in this regard that the request for revocation of the cancellation order has been pending since 2006, and recalls that justice delayed is justice denied. Recalling once again that civilian workers in the manufacturing establishments of the armed forces should have the right to establish organizations of their own choosing without previous authorization, in conformity with Convention No. 87 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 227], the Committee urges the Government to take immediate steps for the revocation of the Registrar's order, so as to reinstate the registration of the KSLU and of any other unions that may have been dissolved due to the administrative control of the enterprise concerned by the Ministry of Defence Production. Furthermore, it once again requests the Government to initiate an investigation into the obstacles to collective bargaining encountered by the KSLU during the period 2003–06 and to promote future collective bargaining with the union, if it was still found to be representative of the workers at the Karachi Shipyard and Engg Works Ltd.*

Case No. 2539 (Peru)

112. The Committee last examined the substance of this case at its March 2009 meeting and on that occasion made the following recommendations [see 353rd Report, paras 1091–1110]:

(a) With regard to the allegations concerning the anti-union dismissal of seven trade union leaders of the Union of Workers of Owens-Illinois Perú SA and the pending legal proceedings initiated by the workers affected, the Committee, taking into account the judicial authority's ruling declaring the dismissals null and void, although that ruling is the subject of a pending appeal, requests the Government to take the necessary steps to have the dismissed leaders reinstated in their posts without delay, while awaiting the final ruling to be handed down by the court of appeal. The Committee requests the Government to keep it informed of any developments in this regard, including the final outcome of the appeal.

(b) With regard to the allegations made by the National Federation of Mining Metallurgy and Steel Workers of Peru (FEDMINEROS) concerning the illegal suspension without pay for 30 days of the General Secretary (Mr Eduardo Manrique Alvarez) and the Defence Secretary (Mr Jaime Luján Garrido) of the Union of Workers of the SIDERPERU Plant, for denouncing the conduct of a company representative who allegedly put the workers' health at risk, the Committee, observing that these are serious allegations which have been pending since its last examination of this case, requests the Government to take the necessary steps to ensure that an investigation is carried out without delay to determine whether there were anti-union motives behind the sanction imposed and if the allegations are found to be true, to take the necessary steps to compensate the trade union leaders affected and their organization. The Committee requests the Government to keep it informed in this regard.

113. In its communication of 23 February 2009, the Government states that through a communication dated 19 February 2008 the enterprise Owens-Illinois Perú SA reported on the complaint in question (based on the alleged violation of the freedom of association of seven former workers of said enterprise), the enterprise being taken to court by the workers (through a request to have the dismissals declared null and void) and the proceedings (file No. 1628-2005) being heard by the Third Labour Court of Callao. In this respect, the Government states that through a communication dated 19 February 2009, the enterprise Owens-Illinois Perú SA informed it regarding the outcome of the said procedure that the parties concerned have signed private, out-of-court settlements following various meetings with the workers involved in this case. Thus, the legal procedure was discontinued definitively (the Government encloses a copy of the out-of-court settlements signed by the parties concerned in its response, all with a copy of resolution No. 31 of 7 October 2008, in which the Second Mixed Interim Labour – Family Division of Callao declares the procedure concluded). The out-of-court settlements were signed on 25 September 2008 with the following individuals: (1) Máximo Velarde Díaz; (2) Ruperto Sánchez Gutiérrez; (3) Juan Manayay Contreras; (4) Gaspar Armando Palacios More; (5) Eddy Magno Córdoba Chian; and (6) Sebastián Suclupe Yauce. The Government adds that the ILO was duly informed of former worker Jorge Luis Martínez Guevara's intention to abandon the legal proceedings under way, Mr Martínez Guevara having reached an out-of-court settlement with the abovementioned enterprise.

114. In its communication of 25 February 2009, the Government refers to allegations that, for anti-union motives, the enterprise Siderúgica SAA suspended union officials Eduardo Manrique Álvarez and Jaime Luján Garrido, the Secretary-General and the Secretary for Defence of the Union of Workers of the SIDERPERU plant respectively, from work for 30 days for having called on the enterprise to comply with measures concerning worker safety and halt the abuses of power committed by one of its supervisors since the union officials affected view this as an attempt to create a social climate in which the workers would be unable to defend their list of claims for the 2007–08 period with the necessary guarantees. The Government states that the administrative labour authority participated in an attempt to resolve the issue raised by the workers through the Regional Directorate of Labour and Employment Promotion of Ancash, this department initiating an out-of-court meeting attended by both parties, although no conciliatory agreement was reached. The enterprise announced its intention to maintain the sanction imposed. It is not indicated however if, following the meeting, investigations were carried out to unearth new evidence or evidence regarding the events which gave rise to the sanctions. Nevertheless, it should be pointed out that by order of the National Directorate for Labour Relations, the enterprise Siderúgica del Perú SAA, the Union of Workers of the SIDERPERU plant and FEDMINEROS were invited to an out-of-court meeting on 19 July 2007 at 10 a.m. in order to discuss the abovementioned labour issue. No agreement was reached and the enterprise confirmed its decision to impose the sanction on the trade union officials.

115. The Government adds that through official letter No. 451-2008-MTPE/9.1 dated 21 May 2008, the National Directorate of Labour Relations was requested to take the necessary measures to ensure that the Regional Directorate of Labour and Employment Promotion of Ancash report whether, following the out-of-court-meeting called by said directorate, an investigation was carried regarding the sanctions imposed by the enterprise on the union officials (a report will be transmitted in due course). The abovementioned official letter No. 451-2008-MTPE/9.1 was sent by the National Directorate of Labour Relations to the Regional Directorate of Labour and Employment Promotion of Ancash along with official letter No. 1033-2008-MTPE/2/11.1, dated 27 May 2008.

116. The Government states that in official letter No. 105-2008-MTPE/9.1, dated 11 November 2008, taking into account the allegations presented by FEDMINEROS, and lacking some of the evidence necessary in the formulation of the corresponding observations on this case, the enterprise SIDERPERU SAA was requested to provide any information it had on the case, in particular with regard to the events of 4 June 2007 at the time of a clean-up operation in the Elken furnace sector of the SIDERPERU plant (events which led to the suspension from work for 30 days without pay of the union leaders Eduardo Manrique Álvarez and Jaime Luján Garrido, the Secretary-General and the Secretary for Defence of the Union of Workers of the SIDERPERU plant respectively). In letter GL-1404-2008, dated 17 December 2008, the enterprise provides the corresponding information, stating, among other things, that the disciplinary measure was imposed upon Eduardo Manrique Álvarez and Jaime Luján Garrido because, in their roles as trade union leaders, on 13 June 2007 the two men sent official letter No. STPS-460-07, of 12 June 2007, to the SIDERPERU management. In that letter they made a demand regarding the relocation and remodelling of the work environment ordered by the foreman of the blast furnace, employing a series of pejorative and offensive terms when referring to said foreman and to the managers of the plant, insulting them and undermining the principles of authority, mutual respect and harmony in the workplace necessary to the smooth running of the enterprise.

117. Furthermore, it is pointed out that the serious nature of the labour offence committed by the said union leaders meant that it was a just cause for dismissal pursuant to article 25(f) of the Labour Productivity and Competitiveness Act, given that through official letter No. STPS-460-07 said union leaders had insulted and defamed in writing managerial staff of their employer in the workplace. However, the enterprise merely imposed a 30-day suspension from work, without pay, a measure which lasted from 2 July to 31 July 2007. The enterprise also claims that, in light of the labour violations committed by the abovementioned union officials, and under the labour legislation currently in force, it was decided, uniquely, on that occasion that a sanction consisting of a 30-day suspension from work without pay would be applied. According to the enterprise, the sanctioned former union leaders themselves corroborated the need for this measure when, on 6 July 2007 they sent the head of administration of the enterprise communication No. STPS-484-07 of 5 July 2007, in which, among other things, they explicitly recognized that they had used offensive and insulting terms that gave rise to the imposition of disciplinary sanctions.

118. Furthermore, it is pointed out that in the light of the application for review of the disciplinary sanction imposed, which led to the issuing of the summons to out-of-court meetings at the offices of the Ministry of Labour in Chimbote and Lima, with which the enterprise complied, the enterprise decided that the sanction should be complied with to the letter given the serious nature of the misconduct. Finally, it is stated that the former union leaders Eduardo Manrique Álvarez and Jaime Luján Garrido no longer work at the enterprise, having both signed agreements with the enterprise terminating their employment by mutual consent, in the framework of a structured programme of financial redundancy packages within SIDERPERU. This claim is supported by copies of the payment receipts for social benefits paid to the said workers and must be taken into

account in the examination of the case. The Government reports that both the Union of Workers of the Chimbote Iron and Steel Plant and the Union of Workers of the SIDERPERU plant have concluded their respective collective agreements for the period 2007–10 which were duly registered with the administrative labour authority on 7 February 2008.

119. Finally, with regard to the allegation made by FEDMINEROS that such measures were applied to the workers with the aim of obstructing negotiations concerning the list of claims for the period 2007–08, it should be pointed out in this regard that, as a result of a collective bargaining process, collective agreements have been concluded between the Union of Workers of the Chimbote Iron and Steel Plant, the Union of Workers of the SIDERPERU plant and the enterprise Siderúrgica del Perú SAA and are duly registered with the administrative labour authority. Consequently, the allegation made should be considered to be unfounded, given that the parties have reached a peaceful solution regarding the list of claims.

120. *The Committee takes note of this information. In particular, the Committee notes that the workers and the enterprises concerned reached agreements concerning the allegations presented.*

Case No. 2553 (Peru)

121. The Committee last examined the substance of this case at its March 2009 meeting and on that occasion made the following recommendations [see 353rd Report, para. 1142]:

(a) As regards the allegations concerning the challenge filed against the registration of the Single Trade Union of Workers of Mar y Tierra de IMI del Perú SAC and the enterprise's refusal to bargain collectively on the grounds that the union did not meet the legal requirements for establishment, in view of the fact that the judicial authority of first instance rejected the motion to cancel the union's registration, the Committee urges the Government to ensure that, pending a final decision by the judicial authority, the trade union is able to carry out all its activities, including collective bargaining. The Committee urges the Government to pursue its efforts to bring the parties together through out-of-court conciliation hearings and to keep it informed of any developments in this regard, and of the final outcome of the pending judicial proceedings.

(b) Concerning the allegations concerning dismissals and coercion of workers and the enterprise's reply in that regard, in view of the discrepancy between them, and given that the Government has not expressed an opinion on these matters, and in order to determine conclusively whether or not the acts referred to constituted anti-union discrimination, the Committee urges the Government to take the necessary steps without delay to ensure that a thorough and independent investigation is carried out into the following:

  (i) The alleged dismissal of four workers who were close relatives of union leaders and members working in the same group as the IMI enterprise.

  (ii) Alleged coercion by the enterprise of workers into leaving the union, using threats of dismissal, in particular in the case of Mr Julio Morales Ortega, who resigned from union office.

  (iii) The dismissal of Mr Pedro Pablo Ayala, press and propaganda secretary of the trade union, while on annual leave.

(c) The Committee requests the Government, should the investigation called for find that the acts referred to were motivated by anti-union considerations, to take the necessary steps to ensure that they are revoked, that the dismissed workers are reinstated and fully compensated, and that the prescribed penalties constituting sufficiently dissuasive sanctions are applied where appropriate. The Committee requests the Government to keep it informed in this regard.

122. In its communication of 27 February 2009, the Government states with respect to the challenge filed against the registration of the Single Trade Union of Workers of Mar y Tierra de IMI del Perú SAC, that the case is currently being examined by the judiciary (Case No. 4672-2006 – First Civil Division of the Supreme Court of Justice of Piura), and is currently pending a decision on appeal proceedings lodged by the plaintiff IMI del Perú SAC. In this instance, it is necessary to reiterate the statement in the previous report, namely that while the matters covered by this complaint are currently being examined by the courts, and according to the provisions of the Single Text of the Organic Law on the Judiciary, when proceedings are pending before the judicial authorities, the Government will refrain from issuing an opinion on the matter, as to do otherwise would result in liability for any officials who did not comply with this provision.

123. Furthermore, with respect to the alleged anti-union practices of which the employer is accused, the Government notes that the Piura Regional Directorate for Labour and Employment Promotion has been asked to undertake an inspection of the defendant as soon as possible, in order to ascertain the truth of the assertions made by the complainant organization. Lastly, the Government indicates that at the various administrative (Labour Authority) and jurisdictional (Judicial Power) levels the actions taken in the present case have complied with labour legislation, which demonstrates that the Government has not violated freedom of association or the rights to organize and bargain collectively of the Single Trade Union of Workers of Mar y Tierra de IMI del Perú SAC.

124. *The Committee notes this information. The Committee expects that the court will hand down a ruling in the near future regarding the challenge to the registration of the Single Trade Union of Workers of Mar y Tierra de IMI del Perú SAC and requests the Government to inform it of the final result of the judicial appeal. Moreover, the Committee requests the Government to keep it informed of the outcome of the inspection of the enterprise and expects it to cover all the pending allegations.*

Case No. 2597 (Peru)

125. The Committee last examined the substance of this case at its March 2009 meeting and on that occasion made the following recommendations [see 353rd Report, paras 1177–1231]:

- The Committee requests the Government to send its comments on the allegations concerning the four trade union officials and 11 members of the STCAMB mentioned by name in the complaint, who were allegedly dismissed or prevented from working (according to the mining company, the individuals concerned were employed by other enterprises).
- The Committee requests the Government: (1) to inform it if the fines proposed by the labour inspectorate for anti-union acts have been imposed on the three textile enterprises concerned; (2) to inform it if the union officials and members of the Trade Union of Workers of Topy Top SA, the Trade Union of Workers of Color Star SA and the Trade Union of Workers of Star Print SA have instigated reinstatement proceedings; (3) to take the necessary measures, in the light of the anti-union acts found by the administrative authority to have taken place, to apply its good offices to bring about the reinstatement of the union officials and members dismissed for anti-union reasons; and (4) to ensure that trade union rights are respected in the enterprises in question. The Committee requests the Government to keep it informed in this regard.

126. In a communication of 25 February 2009, the Government states that it is implementing a social and labour policy of respect for labour rights across the country and that consequently the Ministry of Labour and Employment Promotion has strengthened its inspection branch in order to verify compliance with labour rights within enterprises. Thus, in a follow-up to Case No. 2597, through official letter No. 129-2009-MTPE/9.1, the Regional Directorate for Labour and Employment Promotion of Lima-Callao was

requested to provide information relating to fines proposed by the labour inspectorate for anti-union acts in the enterprises Topy Top SA, Sur Color Star SA and Star Print SA. Furthermore, through official letter No. 151-2009-MTPE/9.1 the judicial authorities were requested to provide information on any requests for the reinstatement of the workers and trade union officials of the enterprises Topy Top SA, Sur Color Star SA and Star Print SA. The Government states that it will transmit the information requested to the ILO as soon as it has been received.

127. *The Committee takes note of this information. The Committee notes the efforts made by the Government to obtain the information requested relating to the allegations concerning the textile sector enterprises Topy Top SA, Sur Color Star SA and Star Print SA and hopes that the Government will be in a position to transmit that information in the near future. However, in the absence of information from the Government, the Committee urges the Government to send its comments on the allegations relating to the four trade union officials and 11 members of the Union of Workers of the Subcontractors and Agencies of the mining company Barrick Misquichilca SA (STCAMB) mentioned by name in the original complaint, who were allegedly dismissed or prevented from working (according to the mining company, the individuals concerned were employed by other enterprises).*

Case No. 2627 (Peru)

128. The Committee last examined the substance of this case at its March 2009 meeting and on that occasion made the following recommendations [see 353rd Report, paras 1244–1273]:

(a) Regretting the large number of dismissals of SIFUSE members, the Committee emphasizes that no one should be dismissed or suffer prejudice by reason of trade union membership or activities, and hopes that the court will give a ruling soon on the applications presented by the trade unionists in question. The Committee regrets the delay in these proceedings and requests the Government to keep it informed in this regard and, if the anti-union nature of the dismissals is confirmed, to take appropriate steps with a view to reinstating the trade unionists in question. The Committee requests the Government to respond to the allegation regarding the change in the duties of Mr Juan Herrera Liendo within the company.

(b) The Committee requests the Government to communicate any ruling handed down by the court following the application made by the company regarding the administrative decisions concerning negotiation of the list of claims for 2006 presented by SIFUSE.

(c) The Committee requests the Government to carry out an inquiry into the various types of promotion which the company is alleged to have given to SUTESAL members in a way that discriminates against SIFUSE members, and into the allegation that renewal of temporary contracts has been made conditional on resignation from SIFUSE. The Committee requests the Government to keep it informed of the outcome.

129. In its communication of 25 February 2009, the Government states in relation to the allegations presented by the General Confederation of Workers of Peru (CGTP) on behalf of the Union of Officials, Professional Employees and Technicians of the Lima Drinking Water and Sewerage Service–SEDAPAL (SIFUSE), according to which anti-union practices were carried out (such as the dismissal of trade union officials and members, as well as harassment of unionized workers), including the unjustified refusal by the employer to bargain collectively with said trade union, that SEDAPAL was requested through official letter No. 138-2009-MTPE/9.1 to comment on the alleged practice of solely awarding promotions and incentives to workers belonging to the Single Union of Drinking Water and Sewerage Service Workers (SUTESAL) while denying SIFUSE members the same treatment, these allegations constituting discriminatory and anti-union acts within the said enterprise should they prove to be true. Furthermore, the Government states that the judiciary is the state body responsible for definitively resolving the judicial

proceedings concerning the alleged dismissals of SIFUSE officials and/or members, in accordance with the national legislation in force, and that to date no definitive ruling has been issued. Moreover, it is for the courts to rule on the judicial request lodged by the enterprise SEDAPAL for the annulment of the administrative rulings adopted by the administrative labour authority regarding the negotiation of the 2006 list of claims put forward by SIFUSE.

130. The Government adds that, through official letter No. 137-2009-MTPE/9.1, the judicial authorities have again been requested to provide information on the current situation of the proceedings relating to the complaint (which will be transmitted to the ILO in due course) in order to ensure that the State, in its legal action, is scrupulously in compliance with the labour provisions that are in force at the national and international levels with the objective of preventing any act that is in violation of and/or detrimental to the exercise of any of the rights set out in collective labour legislation or the Conventions of the International Labour Organization respecting those rights.

131. *The Committee takes note of this information. The Committee expects that the Government will send, in the near future, the information requested of the judicial authorities and the enterprise.*

Case No. 2592 (Tunisia)

132. The Committee last examined this case at its March 2009 meeting. The case concerns the alleged refusal by the authorities to recognize the General Federation of Higher Education and Scientific Research (FGESRS), anti-union discrimination against union leaders because of their union activities, and violations of the right to collective bargaining [see 353rd Report, paras 1310 to 1336]. On that occasion the Committee made the following recommendations:

(a) The Committee requests the Government to provide all useful information to support its affirmation concerning a legal decision that quashed the dissolution of the general unions by the UGTT unifying congress of 15 July 2006, to provide the pertinent documents as necessary and to indicate further on the most recent information provided by the complainant organizations, any follow-up to the summary judgement handed down by the Court of First Instance of Tunis on 10 May 2008 and any judgement issued on case No. 71409/28 that it cited.

(b) The Committee trusts that the Government will be able very soon to submit a final court ruling concerning the legitimate representation of the SGESRS and that it will indicate any action taken following that ruling.

(c) The Committee requests the Government to indicate the objective and pre-established criteria which have been set for determining the representativeness of the social partners in accordance with section 39 of the Labour Code, particularly in the higher education and scientific research sector. If such criteria have not yet been established, the Committee hopes that the Government will take all the necessary steps to establish such criteria in consultation with the social partners and that it will keep the Committee informed.

(d) The Committee requests the Government or the complainant organizations to keep it informed of any court ruling handed down in the case of the assault on the trade unionist Mr Moez Ben Jabeur.

(e) The Committee requests the Government to provide any collective agreement concluded with the participation of the FGESRS.

133. In a communication dated 6 May 2009, the Government supplies the following observations regarding the Committee’s recommendations: with regard to the request to quash the dissolution of the general unions by the Tunisian General Labour Union (UGTT)

unifying congress of 15 July 2006, Case No. 71409/28 is still under consideration before the Tunis Court of First Instance; as regards the legitimate representation of the General Trade Union of Higher Education and Scientific Research (SGESRS), the Government states that it is sparing no effort to encourage either an out of court or judicial solution to the dispute, and will inform the Committee when one is found. As regards the assault of which the trade unionist Moez Ben Jabeur is said to have been the victim, the Government reiterates that it was unconnected with his trade union activities and that the Committee will be informed of any judicial ruling on the matter. As regards the criteria for determining the representativeness of the social partners, the Government is drawing up a draft text which will be submitted to the social partners.

134. With regard to the participation of the FGESRS in collective talks, the Government states that the Federation was part of the delegation of the UGTT, which negotiated with the Government authorities in 2008 in the context of the seventh round of collective bargaining. Those talks resulted in the conclusion on 3 April 2009, of three agreements concerning the general increase in public employees' salaries for the period 2008–10, increases in certain allowances for specific groups of public sector employees including those in higher education, and measures to enhance the exercise of trade union rights in the public service. The Government supplies with its communication, copies of the signed agreements and the attendance sheets showing that the FGESRS participated in the work of the various committees that were set up.

135. *While noting that, following talks between the Government and the social partners including the FGESRS, three collective agreements were signed in 2009 concerning the general increase in public employees' salaries for the period 2008–10, increases in certain allowances for specific groups of public sector employees including those in higher education, and measures to enhance the exercise of trade union rights in the public service, the Committee notes with regret that no final judicial ruling has been handed down concerning the different issues that remain pending in this case. The Committee recalls that it has expressed its concern at the length of proceedings to determine the legitimate representation of the SGESRS, which began in 2003 and have, in its view, contributed to create a climate of uncertainty with regard to trade union representation in the sector in question. The Committee recalls once again that justice delayed is justice denied, and trusts that final court rulings will be handed down very soon on the following questions: (1) the decision to quash the dissolution of the general unions by the UGTT unifying congress of 15 July 2006 (Case No. 71409/28 before the Court of First Instance of Tunis); (2) the legitimate representation of the SGESRS; and (3) the assault against the trade unionist Moez Ben Jabeur. The Committee requests the Government to keep it informed of the follow-up to these questions.*

136. *The Committee notes the Government's statement to the effect that a text concerning the criteria to be used to determine the representativeness of the social partners is being drawn up and will be submitted to them. The Committee requests the Government to keep it informed of any new development in this regard and to communicate a copy of the final text.*

Case 2605 (Ukraine)

137. The Committee last examined this case at its November 2008 meeting [see 351st Report, paras 1359–1373] and made the following recommendations:

> (a) The Committee expects that the Government and its judicial authorities will give full effect to its obligations under ratified Convention No. 87 to ensure the freedom of association of workers' and employers' organizations.

(b) The Committee expects that the Supreme Administrative Court of Ukraine will confirm the decisions of the lower courts ordering the registration of the amendments to the statutes of the Federation of Employers of Ukraine (FEU) to avoid any further impediment to the functioning of the FEU. The Committee requests the Government to keep it informed in this respect and to transmit a copy of the decision taken by the Court.

138. In a communication dated 23 March 2009, the Government reiterates the information it had previously provided and indicates that the Ministry of Justice, by its order of 30 May 2008, registered the amendments to the FEU's statutes approved at the FEU Fourth Congress on 18 April 2008 and took note of the changes in the composition of its executive bodies. The Government further indicates that it has no information on proceedings before the Supreme Administrative Court of Ukraine challenging registration of amendments to the FEU's statutes approved at its Third Congress on 7 June 2007.

139. *The Committee notes the information provided by the Government. While noting with interest that further amendments approved at the Fourth Congress of the FEU of 18 April 2008 were registered on 30 May 2008, the Committee notes that it is unclear whether proceedings with regard to the registration of amendments approved by the FEU Third Congress on 7 June 2007 are still pending before the Supreme Administrative Court of Ukraine and requests the Government to keep it informed in this respect. In the affirmative, it reiterates its expectation that the Supreme Administrative Court will confirm the decisions of the lower courts ordering the registration of the amendments to the statutes of the FEU to avoid any further impediment to the functioning of the FEU and requests that the Government transmit a copy of the decision taken by the Court.*

Case No. 2160 (Bolivarian Republic of Venezuela)

140. In its previous examination of this case, in March 2009, the Committee reiterated its request to the Government to send the text of the rulings relating to the dismissal of three trade union members who had initiated legal proceedings (Mr Otiel Montero, Mr Guido Siviria and Mr Orlando Acuña). The Committee deeply regretted that, despite the fact that the allegations dated from 2001, it still did not know whether or not rulings on those dismissals had been handed down, and once again drew the Government's attention to the fact that justice delayed is justice denied [see 353rd Report, para. 293].

141. In its communication dated 18 May 2009, the Government states that the complaint presented by a group of workers from Corporación INLACA enterprise, who were promoting the establishment of the Trade Union of Revolutionary Workers of the New Millennium, refers to alleged violations of freedom of association by the State. With regard to Mr Otiel Montero, the Government states that it indicated in a communication dated 5 November 2004 that he did not provide services for Corporación INLACA enterprise and does not play an active part in any document or in the legal proceedings that have been launched in this case. The appeal lodged by Mr Guido Siviria and Mr Orlando Acuña against administrative decision No. 39-2001 is being examined. The Government states that the progress and results of this appeal will be communicated to the Committee on Freedom of Association.

142. *The Committee takes note of this information. The Committee once again notes with deep regret the delayed justice, given that the allegations date from 2001. The Committee draws the Government's attention to the principle that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be truly effective; excessive delays 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].*

143. *The Committee awaits communication from the Government of the rulings relating to the dismissal of the trade union members Mr Guido Siviria and Mr Orlando Acuña, and expects that they will be handed down without delay.*

Case No. 2579 (Bolivarian Republic of Venezuela)

144. The Committee examined this case at its March 2009 meeting [see 353rd Report of the Committee, approved by the Governing Body at its 304th Session, paras 294–298]. On that occasion, the Committee urged the Government to take initiatives without delay to facilitate collective negotiation of the Fifth Collective Labour Agreement between the authorities of the Ministry of Education and Sport, and the eight national federations in the sector.

145. In a communication dated 12 May 2009, the Government states that the collective labour agreement signed by the Venezuelan Federation of Teachers (FVM) and other organizations was officially approved on 11 May 2009. *The Committee notes this information with interest.*

* * *

146. 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
1865 (Republic of Korea)	March 2009	–
1914 (Philippines)	May–June 1998	March 2009
1991 (Japan)	November 2000	March 2009
2006 (Pakistan)	November 2000	March 2009
2171 (Sweden)	March 2003	March 2009
2173 (Canada)	March 2003	June 2009
2228 (India)	November 2004	June 2009
2229 (Pakistan)	March 2003	June 2009
2236 (Indonesia)	November 2004	March 2009
2286 (Peru)	May–June 2005	March 2009
2292 (United States)	November 2006	November 2008
2302 (Argentina)	November 2005	March 2009
2304 (Japan)	November 2004	November 2008
2323 (Islamic Republic of Iran)	June 2009	–
2336 (Indonesia)	March 2005	March 2009
2373 (Argentina)	March 2007	March 2009
2380 (Sri Lanka)	March 2006	March 2009
2382 (Cameroon)	November 2005	June 2009
2384 (Colombia)	June 2008	June 2009
2386 (Peru)	November 2005	March 2009
2394 (Nicaragua)	March 2006	March 2009

Case	Last examination on the merits	Last follow-up examination
2399 (Pakistan)	November 2005	March 2009
2413 (Guatemala)	November 2006	June 2009
2441 (Indonesia)	June 2006	March 2009
2455 (Morocco)	June 2007	June 2009
2459 (Argentina)	June 2007	–
2462 (Chile)	June 2008	June 2009
2483 (Dominican Republic)	March 2007	June 2009
2488 (Philippines)	June 2007	March 2009
2512 (India)	November 2007	June 2009
2532 (Peru)	March 2008	November 2008
2537 (Turkey)	June 2007	March 2009
2546 (Philippines)	March 2008	March 2009
2550 (Guatemala)	June 2008	June 2009
2581 (Chad)	June 2009	–
2583 (Colombia)	June 2008	–
2589 (Indonesia)	June 2008	March 2009
2619 (Comoros)	March 2009	–
2622 (Cape Verde)	November 2008	–
2624 (Peru)	March 2009	–
2625 (Ecuador)	March 2009	–
2633 (Côte d'Ivoire)	June 2009	–
2636 (Brazil)	March 2009	–
2653 (Chile)	June 2009	–
2677 (Panama)	June 2009	–

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

148. In addition, the Committee has just received information concerning the follow-up of Cases Nos 2086 (Paraguay), 2222 (Cambodia), 2227 (United States), 2249 (Bolivarian Republic of Venezuela), 2268 (Myanmar), 2275 (Nicaragua), 2291 (Poland), 2297 (Colombia), 2301 (Malaysia), 2317 (Republic of Moldova), 2371 (Bangladesh), 2383 (United Kingdom), 2395 (Poland), 2400 (Peru), 2423 (El Salvador), 2428 (Bolivarian Republic of Venezuela), 2430 (Canada), 2433 (Bahrain), 2460 (United States), 2466 (Thailand), 2470 (Brazil), 2474 (Poland), 2476 (Cameroon), 2480 (Colombia), 2524 (United States), 2527 (Peru), 2547 (United States), 2552 (Bahrain), 2575 (Mauritius), 2587 (Peru), 2590 (Nicaragua), 2591 (Myanmar), 2595 (Colombia), 2611 (Romania), 2634 (Thailand), 2637 (Malaysia), 2656 (Brazil) and 2668 (Colombia) which it will examine at its next meeting.

CASE NO. 2647

DEFINITIVE REPORT

Complaint against the Government of Argentina presented by the Association of Staff of Supervisory Bodies (APOC)

Allegations: The complainant organization alleges the suspension of the deduction of union dues, as well as acts of anti-union persecution and discrimination

149. The complaint is contained in a communication from the Association of Staff of Supervisory Bodies (APOC) dated 5 June 2008.

150. The Government sent its observations in a communication dated 28 August 2009.

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

A. The complainant's allegations

152. In its communication of 5 June 2008, APOC states that it is presenting the complaint on grounds of violations of Conventions Nos 87, 98 and 151 in the National Cinema and Audiovisual Arts Institute, the National Electricity Regulatory Agency (ENRE), the Court of Audit of Tucumán Province and the Court of Audit of Córdoba Province.

National Cinema and Audiovisual Arts Institute

153. APOC states that it is a first-level trade union which has been granted official trade union status by the Ministry of Labour, Employment and Social Security, and is thus authorized to represent all staff of supervisory systems and bodies and all internal audit units of organizations, companies and institutes under the executive branch of government of the Argentine Republic. By virtue of the legal effects of the granting of such status to APOC, and under the provisions of Act No. 23551, the trade union has the right to require the employers of its members to act as withholding agents for the purposes of deducting trade union dues.

154. Section 38 of the Act, which governs trade union rights and obligations and is thus an implementing law under the national Constitution, provides that: "Employers have the obligation to act as withholding agents for purposes of the deduction of the amounts which workers are required to pay as membership dues or other contributions to workers' trade unions with official trade union status. For this obligation to be enforceable, a decision must be issued by the Ministry of Labour, Employment and Social Security ordering the withholding. This decision shall be taken upon application by the union concerned. The Ministry shall issue its decision within 30 days of receiving the application, failing which the withholding shall be deemed to have been tacitly ordered. An employer who fails to discharge his or her obligation to act as withholding agent or, as the case may be, to pay

the sums withheld on time, shall become the direct debtor. In this case, default shall arise by operation of law."

155. In this case, the ministerial decision giving rise to the obligation of the National Cinema and Audiovisual Arts Institute to act as withholding agent is Decision No. 26, dated 21 October 2004, of the Ministry of Labour, Employment and Social Security ordering that the deductions be withheld on behalf of APOC as follows: "Section 1. Employers of staff who are members of APOC shall withhold for the staff who are members union dues amounting to 1 per cent of the remuneration on which dues or contributions are payable for members who are in a dependent employment relationship."

156. APOC points out that, as may be seen from the above, neither the Trade Unions Act nor a decision by the administrative authority lay down a requirement as to categories of persons or geographical area covered for the withholding of dues to be carried out by state bodies. So much so that the employer itself had been meeting its legal obligation to act as withholding agent until the adoption of the administrative decision to suspend the withholding of dues for APOC, which is being challenged by the complainant. However, since the issuance of the arbitrary memorandum by the general management of the Institute giving notice of the measure at issue (stopping the deductions), this decision appears to be based on an opinion issued ex parte, without giving APOC the right to a defence, in violation of article 18 of the national Constitution. This opinion arose in response to a request for clarification by another trade union operating in the Institute, the National Civil Servants' Union (UPCN), and an opinion dated 9 April 2008 by the National Directorate of Trade Unions, signed by the Assistant Director for Trade Unions, which maintained that the Institute did not have any members of APOC among its workers.

157. APOC reiterates that there is no constitutional, legislative, regulatory or administrative provision laying down a requirement as to categories of persons or geographical area covered for the withholding of union dues, and that Decision No. 26 was issued by a higher ranking official, the National Director for Trade Unions. By way of explanation, it is pointed out that if a trade union has official trade union status in any sphere, an employer cannot refuse to act as withholding agent if this has been authorized by the labour administration authority. In the case of APOC, it is clear that Ministerial Decision No. 26 orders the employer to withhold union dues, subject to the sole requirement that the workers for whom the deductions are made must be members of the union. Hence the Institute's decision is absolutely unlawful, as it incorrectly maintains that the employees of that organization are not included in the scope of representation set forth in its official trade union status, which is completely erroneous.

158. APOC points out that it was maintained, without going into the matter in depth, that the Institute had no staff who could be represented by the union, which is not true, since Decision No. 1037/05 awarding official trade union status specifies that the union, as a first-level union, represents all the staff of oversight systems and bodies and all internal audit units. The complainant states that the tasks of the Institute include promoting and regulating cinematographic activity nationwide. It also awards grants, provides loans, is funded by taxes and receives 40 per cent of the revenues collected by the Federal Broadcasting Committee (CONFER), as well as the proceeds from ticket sales in three movie theatres. Its organizational structure includes an internal audit office, and it has a duty to review property purchases and recruitment, as well as monitoring grants and credits awarded by the Institute to ensure compliance with their stated objectives. In fact, all state bodies, and especially state companies and institutes, have auditing and supervisory tasks, which are carried out by all the employees and their managers, as they both supervise and are supervised, and thus come within APOC's scope of representation.

159. The decision of the Institute to suspend the withholding of deductions from members' remuneration as union dues for APOC, which it had been carrying out as the employer, is absolutely arbitrary in the light of the provisions of Act No. 23551 and the abovementioned ILO standards. Clearly, the decision at issue, in the light of Convention No. 151, subjects the freedom of association of unionized workers to conditions and unlawfully prevents APOC from carrying out its representative function. The arbitrary decision to stop acting as withholding agent, which is an inalienable right of any trade union with official trade union status with regard to its members' dues and an irrevocable right of the employer, is a measure that undermines the independence which public employees' organizations should enjoy vis-à-vis the administrative authority. Under Article 5(2) of Convention No. 151 the decision at issue constitutes obvious interference by the employer in the functioning of this trade union. APOC states that it is obvious that the decision to stop withholding the deductions from its members was intended to favour another trade union operating in the Institute. This constitutes an unfair labour practice and a violation of freedom of association.

Court of Audit of Tucumán Province

160. The complainant states that two unions had been established in the Court of Audit of Tucumán Province without having official trade union status under Act No. 23551, and this had been used as a pretext to disregard the legitimate demands put forward by these unions. APOC, Tucumán branch, was thus established, and elected its current executive committee, presided over by Mr Oscar Armando Suárez, in legitimate elections held on 1 November 2007. This prompted the president of the Court of Audit of Tucumán to launch an active campaign of abuse of authority and anti-union persecution against APOC officers and members.

161. APOC reports that complaints were filed at the time with the competent state bodies against the discrimination, obstruction, political and anti-union persecution and workplace violence against its officers, for which it holds the President of the provincial Court of Audit responsible, but that to date no reply has been received that might put a stop to the enormous violence perpetrated against its members. The Court has refused to meet with APOC members and officers so that they might present their demands. It has not replied to any of the requests submitted, and has adopted measures obstructing trade union activities. APOC refers specifically to the following:

A. Instructions containing the rules for opting into the retirement scheme posted by APOC where all the employees could see them were virtually destroyed and removed from the glass display cases used for the purpose, denying the workforce access to information on benefits under the option.

B. The President of the Court refuses to provide a space to keep members informed of trade union issues, although this is provided for in the relevant legislation itself.

C. The Court has not responded to the union's need to have access to the current wage regulations, in particular those relating to evening overtime.

D. Through its silence, it has tacitly denied their request for housing shares to be obtained for all employees in the Lomas de Tafí housing development.

E. By remaining silent, it tacitly denied APOC's request to help it apply to the Tucumán Tourism Autonomous Agency for a piece of land in El Cadillal for the construction of a housing complex similar to that in Huerta Grande-Córdoba, as included in the list of objectives approved by the assembly of APOC, Tucumán branch, in May 2007. APOC has some 8,000 members nationwide.

F. By remaining silent, it tacitly denied APOC's request to help it apply for inclusion in the 82 per cent flexible retirement scheme.

G. It has failed to comply with article 14bis of the national Constitution, by discriminating between union members and other court employees in the payment of remuneration, creating resentment among the entire workforce through its indifference.

H. The President of the Court disregards union proposals for a wage adjustment for all of its employees and had instead taken an approach over the years which undermines wages. In contrast, magistrates' salaries have been aligned with those of members of the judiciary, who currently receive over 15,000 pesos per month in gross remuneration.

I. Its pursuit of this destructive aim reached absurd proportions when it delayed by some five months the payment of the differential for the first annual salary supplement of 2007 granted by executive decree, merely because the record signed by the unions had also been signed by APOC.

J. An arbitrary and discriminatory decision was taken to exclude union members Mr Rodolfo Torasso and Ms Olga Villalva from the evening overtime granted to other court employees carrying out the same duties.

K. Ms Olga Villalva complained of persecution, with medically proven physical and psychological consequences. She received treatment based on a diagnosis of workplace harassment.

L. The President of the Court had Mr Oscar Juárez and Mr Miguel Shedadi transferred from their statutory duties as tax accountants to the task of carrying out social surveys in Trancas and Juan Bautista Alberdi, which resulted in their filing an action for physical and psychological injuries, having received treatment on the basis of a diagnosis of workplace harassment issued by a medical commission.

M. In an abuse of authority, the President of the Court denied all the requests submitted by APOC members and officers to work in the 2008 annual fair, favouring other workers who were not members of the union. The court authorities are promoting a staff association (APeTCRA) that does not have official trade union status, and recently met with its officers, while refusing to meet with APOC's officers.

N. As part of his persecution campaign, the President of the Court ordered a change in evening overtime without prior consultation.

O. The President of the Court has attacked the dignity of professional employees by ordering the use of magnetic cards for clocking in and out to replace the timekeeping forms.

P. In an abuse of authority, the President of the Court ordered discretionary wage increases, disregarding the wage pyramid. He ordered increases for professionals which were lower than those for the rest of the staff.

Q. Either explicitly or tacitly, the President of the Court has repeatedly denied trade union leave requested by the officers of the Tucumán branch, violating the provisions in force, not only of section 48 of Act No. 23551, but of section 1 of Act No. 6107, which provides that: "Staff of the centralized and decentralized provincial public administration and autonomous bodies who are members of executives or committees of trade unions with official trade union status shall be entitled to leave with pay

during their term of office, provided that they do not receive compensation from the organization concerned. One leave shall be granted for every 1,000 employees, up to a maximum of five per organization."

R. As regards the complaints of workplace harassment, the medical commission of the occupational risk insurer diagnosed the APOC members referred to above as suffering from symptoms of harassment.

S. In unquestionable acts of anti-union persecution and discrimination, the President of the Court granted some 40 promotions, which excluded all the members of APOC, whose circumstances were identical to those of the workers who received promotions. This was the case of the members of the branch executive committee, one of whom was told that she would have to withdraw from membership of APOC in exchange for her promotion, which she had no choice but to accept, driven by basic need. This was Ms Patricia Escudero, who withdrew from the organization and from her office as substitute member of the executive committee, and was promoted from administrative assistant, category 18, level II, to official, category 19, level II. This is described as an unfair employer practice in section 53(c) of Act No. 23551.

T. The provincial Ministry of Labour issued Decision No. 061 of 2008 rejecting the demands put forward by APOC and denying the official trade union status of the organization. This administrative act is not only a further instance of abuse of authority, but a blatant violation of the provisions in force, since it is the national Ministry of Labour which grants official trade union status and must issue the final decision in the matter.

162. APOC states that, for the above reasons, complaints were filed with the provincial Secretariat for Labour, the national Ministry of Labour, the provincial Secretariat for Human Rights, the Human Rights Commission of the Tucumán legislature, the Tucumán Office of the Public Defender, the national Secretariat for Human Rights and the Tucumán offices of the National Institute against Discrimination, Xenophobia and Racism (INADI). It adds that if all the acts of discrimination and workplace violence mentioned were not enough, the court authorities repeatedly changed the duties of Mr Héctor Vázquez Villada, Financial and Minutes Secretary of APOC–CPN. This reached absurd proportions when the Court amended its internal regulations to establish a tax and planning advice department with only one employee under his supervision, confining him to an office that used to contain a toilet, without light or ventilation; a complaint to that effect was filed with the occupational risk insurer, which intervened, recommending that the employer take measures to provide minimum sanitary conditions. Moreover, in strict compliance with his professional duties as head of the tax department, on 3 December 2007 the abovementioned trade union officer sent a note expressing his doubts as to the legality of the administrative acts carried out by the provincial Court of Audit in regard to exemption from income tax, and as a reprisal he was excluded from the "evening overtime" scheme enjoyed by all the other managers in the court. This entailed a 30 per cent reduction in his earnings, without grounds or justification, in blatant violation of the provisions of section 52 of Act No. 23551. This resulted in physical and psychological symptoms, requiring that Mr Héctor Vàzquez Villada undergo lengthy treatment for workplace harassment.

Court of Audit of Córdoba Province

163. APOC alleges that in an arbitrary and illegal decision, the Court of Audit of Córdoba Province has refused to withhold union dues from members of the trade union.

National Electricity Regulatory Agency (ENRE)

164. APOC states that it had been representing its members and the workers in general in the bargaining committee for the collective agreement in ENRE. It alleges that after an erroneous opinion was issued as to the official trade union status of APOC, the National Civil Servants' Union (UPCN) and the Association of State Workers (ATE), the Bureau for Trade Unions, without any competence or justification, maintained that APOC was not in a position to represent the workers in ENRE. Without going into the matter, it was maintained that ENRE did not have workers among its staff who could be represented by APOC. This is not correct, since Decision No. 1037/05 granting official trade union status to APOC specifies that it is a first-level trade union whose membership covers all employees of supervisory systems and bodies and all internal audit units. APOC points out that Act No. 24065 sets out the tasks and competence of ENRE as follows: ensure compliance with the law; prevent anti-competitive, monopolistic or discriminatory practices; publish the general principles to be applied by transmission companies; determine the criteria for granting concessions; hold public hearings; ensure environmental protection and regulate procedures for the application of penalties and apply penalties. The tasks of the board of directors of ENRE include reviewing legal provisions and preparing the budget; by the nature of the body, its financial management is self-regulated. The complainant emphasizes that it is clear from all the regulations that its objective is supervision and oversight, and therefore it falls within the scope of APOC's official trade union status. Lastly, APOC states that the National Directorate for Trade Unions has confined itself to reporting, and to date no decision has been forthcoming either from the Secretariat for Labour or from the Ministry of Labour, Employment and Social Security.

B. The Government's reply

165. In its communication of 28 August 2009, the Government states that an examination of the situations described by the complainant trade union shows that the latter did not have representative status based on categories of persons or geographical area covered, depending on the case, as there was another more representative trade union at the time which enjoyed certain rights under national legislation, such as the right to collective bargaining or the check-off facility. In these cases, therefore, although the complainant trade union may represent its members and receive their dues, it cannot exercise the rights it claims to have, as it lacks the necessary degree of legal capacity – being merely registered and not having official trade union status.

166. The scope of official trade union status No. 534 granted to APOC covers all staff of internal and external oversight and regulatory systems and bodies responsible for supervising the financial economic activity of the State, within the remit of the Office of the Auditor-General, the Office of the Comptroller-General and all the internal audit units operating in the city and Province of Buenos Aires and the Province of Santa Fe. Within the limits of this coverage, the complainant organization has full collective bargaining and check-off rights as the most representative organization.

167. The Government points out that the complainant organization does not call the national legislation on trade unions into question; rather, it has availed itself of the protection afforded by that legislation through its official trade union status, as has been seen. Neither does it question the decision referred to, with the scope indicated. The object of its complaint comes down to an administrative issue: if it believes itself to be the most representative organization, it should apply for extension of its trade union status as to both categories of persons and geographical area covered.

168. As regards each situation at issue in the complaint, the Government states the following. Concerning the complaint against the National Cinema and Audiovisual Arts Institute

(INCAA), the Government states that, as pointed out above, APOC's trade union status does not cover the employees of this Institute, as the latter is not a body charged with overseeing the financial economic activity of the State, within the remit of the Office of the Auditor-General, the Office of the Comptroller-General and all the internal audit units. Under the law, the requested check-off facility must correspond exactly to the category of persons and geographical area covered, as any deductions from workers' wages must be subject to restrictions aimed at protecting wages, and may only be made in the case of the most representative trade union. Accordingly, the Government considers that there cannot be said to have been any violation of freedom of association in applying this requirement as to category of persons and geographical area covered, in which the organization must be most representative. It is not true, as maintained in the allegation, that the ability to act as withholding agent is independent of the category of persons and activity covered according to the organization's by-laws.

169. The Government points out that to argue to the contrary would mean that any employer could be obliged to withhold dues regardless of the union membership giving rise to them, which could lead to a worker's wages being confiscated without the latter's consent, or without his or her being a trade union member, which does not bear analysis from the standpoint of freedom of association, irrespective of the stance taken on section 38 of Act No. 23551.

170. As regards the allegations concerning the Court of Audit of Tucumán Province, the Government points out that APOC, Tucumán branch, is merely registered and does not have official trade union status in this Province. Given that the Court of Audit is an autonomous provincial body, the Ministry of Labour, by virtue of the constitutional principles of division of powers and the federal system of government, informed the Court of the complaints made by the complainant organization and invited it to respond to the allegations as it deemed necessary. In a note dated 16 June 2009, the President of the Court of Audit of Tucumán responded to each of the accusations levelled by APOC, as follows.

171. The Court of Audit denies all of APOC's allegations and states that the complaint lacks substance or merit that might give it any semblance of seriousness, as it consists entirely of generic allegations relating to subjective situations. The Court states that APOC Tucumán does not have official trade union status, and is a local administrative office of the national APOC. It draws attention to the conduct of some members of APOC in Tucumán, as well as the national authorities of that organization, which it describes as malicious, contrary to good faith and deceptive, in that they misled and confused the authorities of the Court of Audit of Tucumán, firstly by claiming trade union status which they did not have for that Province and, secondly, by requesting trade union leave although they were fully aware that they were not entitled to such leave, as the Court later found out. In order to ascertain the legal status of these employees who were members of APOC, the Court requested information from the competent bodies, which indicates that APOC Tucumán does not have the necessary trade union status to operate in Tucumán Province.

172. The fact that APOC Tucumán does not have trade union status is incontestably reflected in the report, contained in file No. 1-236-631848-2008, prepared by the National Directorate of Trade Unions of the Ministry of Labour, Employment and Social Security, dated 18 April 2008, which states that: "(2) the organization – the Association of Staff of Supervisory Bodies – is neither registered nor has trade union status for the Province of Tucumán, and is thus not authorized to represent, individually and/or collectively, the workers employed by economic financial oversight bodies of the Province." From the information provided by the Ministry of Labour, which is the body responsible for applying the Act on trade unions, it is clear that APOC Tucumán lacks legal status for the geographical area of Tucumán Province, and although it does have national coverage according to its by-laws, this only allows it to have workers as members, but does not

mean that its members enjoy the immunities and privileges conferred by the Act on trade unions on the officers of trade unions with official trade union status. The report confirms that APOC Tucumán lacks official trade union status and hence its officers are not covered by the trade union immunity afforded by the Act on trade unions to officers of trade unions that do have such status.

173. According to the Court, the ministerial decision granting official trade union status to APOC clearly defines its scope as to categories of persons and geographical area covered, and it is precisely the latter which is lacking in the case of APOC Tucumán, as Decision No. 511 of the Ministry of Labour expressly states that official trade union status is granted to the organization "... which is composed exclusively of the employees of the National Court of Audit, with its area of operation in the Federal Capital" (section 1). The Court reports that after a number of administrative procedures, on 6 May 2008 the Ministry of Labour issued Decision No. 451, granting "... to the Association of Staff of Supervisory Bodies an extension of its scope, for purposes of registration, to all workers employed in a dependent relationship by: the Court of Audit of Jujuy Province; the Court of Audit of San Juan Province; and the Court of Audit of Tucumán Province, with its area of operation in Jujuy, San Juan and Tucumán Provinces" (section 1). The same decision provides that "this does not imply any modification of the scope as to categories of persons and geographical area covered that was recognized at the time for purposes of official trade union status by this implementing authority" (end of section 1). In this regard, it points out that if APOC Tucumán had official trade union status, it is not clear why on 6 May 2008 the Ministry of Labour granted an extension of its scope for purposes of trade union registration, expressly stating that "this does not imply any modification of the scope as to categories of persons and geographical area covered that was recognized at the time for purposes of official trade union status by this implementing authority". It also states that the Court of Audit of the Province was never informed of this decision, a task which is incumbent on the trade union under the Act on trade unions.

174. The Court adds that Decision No. 451 mentioned above grants "... to the Association of Staff of Supervisory Bodies an extension of its scope, for purposes of registration, to all workers employed in a dependent relationship by: the Court of Audit of Jujuy Province; the Court of Audit of San Juan Province; and the Court of Audit of Tucumán Province, with its area of operation in Jujuy, San Juan and Tucumán Provinces". It is clear from this provision that the requirement as to contributing members under APOC's by-laws must apply to the employees of the Court of Audit of Tucumán Province. On that basis, APOC's by-laws themselves (of which it cannot claim to be unaware) provide that at least 30 contributing members are required to form a branch union (section 93), and according to the Court records, APOC Tucumán has not had 30 members since 22 November 2007. Section 137 of APOC's by-laws therefore applies, as follows: "Where a branch union that has already been formed, for whatever reason, does not meet the minimum membership requirement laid down in section 93, it shall not lose its branch union status until 180 days have elapsed since the fact ...". Section 138 adds that "once the 180 days referred to in the previous section have elapsed, if the minimum number of members required under section 93 has not been met, the branch union will become an administrative office of APOC ..." Thus, now that the prescribed period has elapsed, APOC Tucumán has only 11 members (of which neither APOC Tucumán nor the national association can be unaware). It is clear from these provisions that APOC Tucumán is only an administrative office of the national organization APOC, and therefore its members cannot claim or hold trade union office or privileges to which they are not legally entitled. The Ministry of Labour was informed of this through file No. 1.247.751/07, but no reply has been received to date in regard to this situation.

175. The Court states that there is another organization in the Court of Audit which is more representative, but that freedom of association is fully observed and, as the complainant

itself admits, APeTCRA, a trade union that is merely registered, is operating in the Court, as well as a professional association. Neither association has faced obstacles of any kind in its relations with the Court, and their concerns have been heard and met to the extent permitted by the circumstances of the Court.

176. As regards the specific allegations, the Court states that there is no truth in the complainant's assertions that APOC members and/or officers were not received by the authorities of the Court of Audit, that there was no response to their requests and that measures were taken obstructing their trade union activity. In particular, it points out the following:

A. As regards the denial of access to information on the rules for opting into the retirement scheme, which according to APOC had been posted in the display cases used for such information but had then been destroyed, the Court, through the administrative secretariat, which is the office dealing with personnel issues, sent circulars to the departmental chiefs and their staff informing them of all the matters relating to the retirement scheme, without prejudice to the information provided by the different trade unions operating in the Court.

B. It is not true that the trade unions do not have a space in the Court to publicize and inform members of their activities. This space is provided in the personnel office, through which all the staff pass daily in order to clock in and out. This space has been used by APOC without any problem.

C. Concerning the current wage regulations, these may be found in the internal regulations and staff rules of the Court of Audit, both of which are public knowledge and accessible to all the staff. The same applies to the rules governing overtime, which is granted according to the operating requirements of the court, as will be explained below.

D/E. As regards the allegations on these points concerning the management of housing in the Lomas de Tafi housing development and the acquisition of a piece of land through the Tucumán Tourism Autonomous Agency for the construction of a housing complex: for purely ethical reasons (which guide the individual conduct of the members of the Court and the institutional conduct of the Court) we consider it absolutely unethical to manage housing or land through departments or bodies that are subject to our oversight. An oversight body should owe no debts to the organization it oversees. In this regard, it should be pointed out that the actions of the officials referred to is in flagrant violation of express provisions of the Court's staff rules, which, referring to the duties of staff, provides in section 37(p) that they shall "refrain from intervening in any matter which might give rise to the appearance of partiality or which involve incompatibility of any kind" and of the prohibitions laid down in section 41(i) and (f).

F. On this point, there is no record of the complainant having taken any steps to obtain the 82 per cent flexible retirement scheme for the staff of the Court of Audit; while this is a shared aspiration, it does not lie within the decision-making capacity of the members of the Court, since it comes under the sole remit of the President of the nation. Without prejudice to the above, and at the risk of stating the obvious, we must point out that the claims put forward by APOC in points D, E and F lie outside the specific remit of the Court of Audit and fall exclusively within the purview of trade union activities.

G. As regards this item, the complainants have built up a false denunciation around a partial truth, referring to article 14bis of the national Constitution, which provides for equal remuneration for equal work; the alleged wage levelling is not within our remit.

The explanation for this is as follows: a group of court employees have obtained recognition through judicial channels of a salary increase which applies only to the workers named in the court ruling and does not extend to the rest of the workforce, particularly since some workers have lost their suits, while others never filed actions. It should be pointed out that the group that did win did so on a procedural technicality. The court ruling recognizing their rights became final upon expiry of the time limit for appeal by the defendant, which was not the case of the other proceedings. The principle which applies here is that of equality, laid down in article 16 of the national Constitution, which provides for equality among equals in equal conditions. This invalidates the assertion made by the complainant.

H. On this item of the complaint it should be pointed out that the alignment of salaries of members of the Court of Audit on those of the provincial Supreme Court is stipulated in a constitutional provision (article 79 of the provincial Constitution) and is not at the discretion of the Court, as the complainants would have us believe. Moreover, as regards salaries of court staff, as agreed with the union (APeTCRA) and the professional association, these are adjusted to keep pace with those of the provincial judiciary. In other words, far from pursuing a policy that undermines the salaries of its staff, the Court protects these salaries, guaranteeing the same increases as those awarded in the judiciary.

I. Concerning the five-month delay in payment of the differential for the first annual salary supplement of 2007, it is pointed out that salary measures determined for the public administration in general do not apply to the Court of Audit, as an external body with functional and financial autonomy. The agreement signed by APOC thus could not be binding on the Court, which adopted the salary increase when its budgetary situation permitted. Regarding APOC's representation of other oversight bodies in the Province, we refer to what was said at the beginning of this statement, i.e. that it does not have legal personality with regard to Tucumán Province, and the fact that it is merely registered (Decision No. 451) limits its scope to the Court of Audit of the Province.

J. Concerning the allegation in this point of "an arbitrary and discriminatory decision ... to exclude ... from the evening overtime" the auditors Mr Torasso and Mr Villalva, we reject this description as it is far from the truth and the reality of the overtime system. The inclusion of staff in the scheme, as well as their exclusion from it, are based on three arguments, one of which relates to form and the others to substance: (1) As to form, it is the President of the Court of Audit who has the authority to allow and to terminate overtime through a presidential decision. This is voluntary, and is based on work-related considerations and the operational requirements of the institution, and is granted at the request of departmental chiefs. The system of payment for overtime was introduced in the Court of Audit through Agreement No. 111 HTC-1994, and its implementation falls solely and exclusively within the competence of the President of the Court, whose discretionary powers are governed by Chapter III, section 7(d), of the staff rules. The assessment of service requirements and the conditions, efficiency, etc. of those who shall perform the work is carried out on an extraordinary basis, and is reserved by law for the President of the Court, who bases his assessment on the prior opinion of the departmental chiefs. (2) As to substance: (a) in budgetary terms, overtime comes under sub-item 130 (extraordinary services), for which the legislator may or may not assign a budget allocation in the general budget. If such an allocation is assigned, it is not necessarily related to staff, as the reason for its inclusion is to meet extraordinary needs of the institution. Thus, overtime does not constitute salary and therefore does not give rise to any acquired rights, as the item on overtime is extraordinary by its very nature in budgetary terms; (b) As the needs of the service and available resources changed over time, successive presidents of the Court granted and terminated overtime, and even varied the

percentage of staff affected. For operational reasons, out of a total workforce of 266 employees, 55 are currently not covered by the overtime scheme, making up more than 20 per cent of staff. Thus, the exclusion of the employees mentioned from the overtime scheme cannot by any means be described as an arbitrary and/or discriminatory act; it is dictated solely by the operational requirements of the institution.

K. As regards the complaint of persecution made by Ms Olga Villalva, an administrative inquiry was instituted to investigate the allegations, culminating in Decision No. 436/2009 closing the case without any charges being brought, for lack of sufficient evidence.

L. On this point, the Court states that the assignment of tasks and/or duties lies within the sole competence of the departmental chiefs within whose remit the court auditors, including Mr Juárez and Mr Shehadi, are employed. They were performing the specific duties of auditors in every case, including carrying out audits and on-site analyses, advising rural communities, acting as Court auditor in the branches of the Court of Audit in the public administration and – under the terms of the agreement signed at the time with the Federal Public Oversight Network comprising all the courts of audit and public state oversight bodies and agencies of the Argentine Republic associated with the Permanent Secretariat of the Courts of Audit of the Argentine Republic and the Office of the Comptroller-General – supervising the effective receipt of social allowances granted by the State by beneficiaries, among other tasks. In addition, section 37, paragraph O, of the staff rules of the Court of Audit expressly provides that the duties of Court employees and officials include "occasionally performing tasks for which they have special training or skills, even if they are not included in those for the post which they hold, if so instructed by their supervisors or the competent authorities in the interests of the service". This function is one of the normal tasks carried out by auditors of the Court of Audit; what is more, it is currently being performed by other auditors, who do not regard it as a loss of status – as indeed it is not. Moreover, the assertion that this change in duties resulted in physical and psychological injuries is rejected as reckless and malicious, as the diagnosis of workplace harassment issued by an individual practitioner was invalidated by the medical commission of the occupational risk insurer (ART).

M. As regards the staff who worked in the 2008 annual fair, it should be pointed out that the list of staff working during fairs is drawn up by the departmental chiefs of the Court, based on needs and the areas of specialization of the staff who will perform the work; this is especially true if one considers that some 20 per cent of the staff normally take part in the annual fair.

N. As regards the evening shift or overtime, the fact that staff in the different audit offices were working a 2 p.m. to 5 p.m. schedule was due to the fact that this coincided with the evening shift in those departments; in the Court, some staff work a 2 p.m. to 5 p.m. schedule and others a 2 p.m. to 8 p.m. schedule, depending on operating requirements.

O. Concerning the use of magnetic cards for clocking in and out, this has been replaced by a fingerprint recognition system. However, it is not clear how the "dignity" of professional employees is affected by this system, which was in use not only in the provincial Court of Audit but also in a large number of departments of the public administration of the Province, as well as private enterprises, for the sole purpose of modernizing the system and making it more efficient. The choice of method of registering the exit and entry of court staff is one of the managerial powers assigned by law to the President of the Court, and thus only through tortuous and false arguments can it be claimed to involve persecution of the institution's employees.

P. Concerning the questioning of the grant of wage increases differing in percentage between higher and lower earners, this is not meant to disregard the wage pyramid, but is dictated purely by solidarity and equity. The infinitesimally higher raise given to staff with lower incomes (messengers, repairmen, drivers, etc.) was an equitable way of narrowing the gap between the two ends of the wage scale in the Court, in line with the decision taken in that regard by the judiciary. This was not merely the result of a decision by the Court, but was agreed with the other organizations representing the staff, which fully supported the measure.

Q. On this item, we would point out that it is not true that trade union leave was denied to APOC members. The authorities of the provincial Court of Audit, which respect the rule of law and freedom of association, never interfered in APOC's trade union activities. What is more, Mr Ricardo Véliz and other APOC members were granted trade union leave for 30 November 2007 to attend the day on "violence at work" organized by APOC. But it should be made clear in this regard that the good faith of the authorities of the Court of Audit – incontestably the very basis of labour relations – was betrayed when it discovered subsequently that APOC Tucumán, contrary to its members' claims, did not have official trade union status. This transpired from the procedure carried out under file No. 1095-270-APO-07, in which an auditor, Mr Óscar A. Juárez, requested trade union leave (after the event referred to) under Act No. 6107. In this procedure, the applicant was unable to prove that APOC Tucumán had official trade union status, and was therefore denied trade union leave. It was on that occasion, upon examining the supporting documentation provided by the applicant, that the Court learned that APOC did not have the necessary trade union status to operate in Tucumán Province, with all the attendant legal implications.

R. As regards the complaints of workplace harassment, this issue has been rendered moot by the findings of the medical commission issued on 11 December 2007 invalidating the diagnosis by a private practitioner attending the APOC members; the findings concluded that "... Mr Óscar Armando Juárez (national ID No. 12654356), auditor, suffers from arterial hypertension, hyperthyroidism and psychosomatic disorders, which are considered to be non-occupational diseases, according to the supporting documents and the results of the examinations carried out, as there is no direct cause and effect relationship between the specific work performed and the illnesses claimed to be occupational diseases ...". It is also worth mentioning that an administrative inquiry was ordered under file No. 1094-270-TC-07 in order to determine whether workplace harassment had taken place in the Court of Audit, in response to the complaints filed by APOC members. Among those who gave evidence, mention should be made of the statements of the auditors Ms Olga Villalva and Mr Miguel Shehadi, to the effect that they had not issued the diagnosis of workplace harassment; rather, the term had been used by the attending physician; and that they had not filed any complaint of harassment: this had been done by the trade union of which they were members. As stated above, this diagnosis was invalidated by the findings of the medical commission. The administrative inquiry concluded that it was merely a matter of disagreement with the change in the duties of the persons concerned by their immediate supervisor. On this point, the complainants refer to symptoms of workplace harassment, whereas according to modern medical practice, in order to prove the existence of mobbing, a number of factors have to be present, not isolated symptoms such as those described.

S. On this point, the allegation that APOC members were sidelined or discriminated against in regard to promotions is absolutely false and fanciful; in awarding promotions, account is taken of the opinion of each department chief, who assesses the official's performance and submits a request for promotion, which must correspond to a vacancy to which the official is to be promoted. This was the case of Ms Patricia Escudero, who was promoted not for having left APOC, but on the basis

of merit, at the request of her supervisor and in view of the existence of a vacant post to which she was promoted.

T. As regards the complaint under this point, the Court was not involved in the decision issued by the provincial Secretariat for Labour of the Province, and therefore any request for clarification on this point should be sent to those authorities.

177. Concerning the situation of Mr Héctor Vázquez Villada, the Court rejects the allegations made by the complainants, and states in regard to the changes in duties that during his years as an employee of the Court, first as auditor and later as supervisor, Mr Vázquez Villada went through many changes of department and duties without any record of objection on his part. All of these transfers were made for the simple reason that transfer or rotation is a sound practice of the Court, which enables no more and no less than the proper utilization of human resources, aimed at providing optimum oversight, which is the purpose of the Court's existence. Such rotations and changes in duties affected not only APOC members but all the employees of the institution, within the powers vested in the departmental chiefs and with the same aim of making most efficient use of the available human resources to ensure excellence in oversight. It is not true that the auditor Mr Vázquez Villada was assigned an office that used to contain a toilet to carry out his new duties. As regards the inspection of working conditions that was requested, the occupational risk insurer (ART) PopulArt issued its report and its recommendations were carried out by the Court. Moreover, since the appointment of the Court Mr Vázquez Villada has benefited from a number of promotions which have nothing to do with persecution. Quite the contrary.

178. Lastly, the Court states that it is clear from the information communicated that there has been no discriminatory treatment or persecution of any employee of the Court, and of the members of APOC in particular.

179. As regards the allegations concerning the Court of Audit of Córdoba Province, the Government states that APOC is merely registered in that Province and has not requested an extension of its official trade union status to that geographical area, and therefore it is not entitled to the check-off facility.

180. As regards the National Electricity Regulatory Agency (ENRE), the Government points out that APOC does not have the necessary status to represent its employees, given the status it has been granted, as there are more representative unions (ATE and UPCN) in the agency, which as such have exclusive bargaining rights, which does not in any way violate the principles of freedom of association according to the ILO supervisory bodies. The complainant organization thus does not have the right to be represented on a bargaining committee in this sector.

C. The Committee's conclusions

181. *The Committee observes that in this case APOC alleges that: (1) the authorities of the Cinema and Audiovisual Arts Institute and of the Court of Audit of Córdoba Province stopped withholding the union dues of its members; (2) the authorities of the Court of Audit of Tucumán Province adopted anti-union measures against its members; and (3) although it has official trade union status, the National Directorate of Trade Unions issued an erroneous opinion stating that APOC was not in a position to represent the workers of ENRE on the bargaining committee for the collective agreement in which it had been participating.*

182. *The Committee notes, firstly, that the Government states in general terms that an examination of the situations described by the complainant trade union shows that the*

latter did not have representative status based on categories of persons or geographical area covered, depending on the case, as there was another more representative trade union at the time which enjoyed certain rights under national legislation, such as the right to collective bargaining or the check-off facility. In these cases, therefore, although the complainant trade union may represent its members and receive their dues, it cannot exercise the rights it claims to have, as it lacks the necessary degree of legal capacity – being merely registered and not having official trade union status. The scope of official trade union status No. 534 granted to APOC covers all staff of internal and external oversight and regulatory systems and bodies responsible for supervising the financial economic activity of the State, within the remit of the Office of the Auditor-General, the Office of the Comptroller-General and all the internal audit units operating in the city and Province of Buenos Aires and the Province of Santa Fe. Within the limits of this coverage, the complainant organization has full collective bargaining and check-off rights as the most representative organization. The Government points out that the complainant organization does not call the national legislation on trade unions into question; rather, it has availed itself of the protection afforded by that legislation through its official trade union status, as has been seen. Neither does it question the decision referred to, with the scope indicated. The object of its complaint comes down to an administrative issue: if it believes itself to be the most representative organization, it should apply for extension of its trade union status as to both categories of persons and geographical area covered.

Cinema and Audiovisual Arts Institute and the Court of Audit of Córdoba Province

183. *As regards the allegation that the authorities of the Cinema and Audiovisual Arts Institute and of the Court of Audit of Córdoba province stopped withholding the union dues of APOC members, the Committee notes that the Government states that: (1) APOC's trade union status does not cover the employees of this Institute, as the latter is not a body charged with overseeing the financial economic activity of the State; and (2) as regards the Court of Audit of Córdoba Province, APOC is merely registered in that province and has not requested an extension of its official trade union status to that geographical area, and therefore is not entitled to the check-off facility.*

184. *As regards the Cinema and Audiovisual Arts Institute, in view of the contradiction between the allegations and the Government's reply, the Committee is unable to determine whether, as the complainant avers, the workers come within its scope. While it observes that according to the complainant, the union dues were being deducted, the Committee considers that this controversy should be resolved in the last instance by the national judicial authority.*

185. *As regards the Court of Audit of Córdoba Province, the Committee observes that the reason for the refusal to deduct union dues was that APOC was merely registered in that Province and did not have official trade union status. The Committee recalls that it has already had occasion to examine allegations of refusal to deduct union dues on the grounds that an organization was merely registered and did not have trade union status, and refers to its conclusions formulated on that occasion in which, having examined the legislation, the Committee requested the Government to take measures to ensure the deduction of trade union dues for organizations that are merely registered [see 320th Report, Case No. 2054, para. 142]. Accordingly, the Committee requests the Government in this case to take measures to ensure that union dues are withheld from the wages of APOC members in the Court of Audit of Córdoba Province.*

Court of Audit of Tucumán Province

186. *Concerning the allegation that the authorities of the Court of Audit of Tucumán Province took anti-union measures against APOC members (the complainant organization refers to acts of persecution against its members, transfer and change of duties of a union officer, pay discrimination, denial of union leave and other entitlements, etc.), the Committee notes that the Government has sent a detailed report from the Court of Audit expressly denying all of the allegations.*

National Electricity Regulatory Agency (ENRE)

187. *Concerning the allegation that the National Directorate of Trade Unions issued an erroneous opinion stating that APOC was not in a position to represent the workers of ENRE on the bargaining committee for the collective agreement (the complainant organization states that the authorities wrongly consider that ENRE does not have any staff that can be represented by APOC), the Committee notes that the Government states that APOC does not have the necessary status to represent the staff of ENRE, as there are more representative organizations (ATE and UPCN) in the agency, which as such have exclusive bargaining rights, and the complainant organization thus does not have the right to be represented on a bargaining committee. In this regard, in view of the contradictions between the allegations and the Government's reply, and observing that APOC has trade union status (recognition as one of the most representative organizations, which – among other entitlements – confers the right to collective bargaining) on an equal footing with the trade unions ATE and UPCN, and that it has been participating in the bargaining committee (which has not been denied), the Committee requests the Government to verify once more whether the union lacks significant representativeness in ENRE. Moreover, given that what is at issue is the real representativeness of APOC, the Committee recalls that it is ultimately for the judicial authorities to take a decision in the matter.*

The Committee's recommendations

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

(a) ***The Committee requests the Government to take measures to ensure that union dues are withheld from the wages of members of APOC in the Court of Audit of Córdoba Province.***

(b) ***As regards the allegation that the administrative authority considered that APOC was not in a position to represent the workers in the negotiation of the working conditions of its employees in ENRE, in view of the contradictions between the allegations and the Government's reply, and the fact that APOC has trade union status and has been participating in the bargaining committee, the Committee requests the Government to verify once more whether the union lacks significant representativeness in ENRE. Moreover, given that what is at issue is the real representativeness of APOC, the Committee recalls that it is ultimately for the judicial authorities to take a decision in the matter.***

CASE NO. 2651

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

Complaint against the Government of Argentina presented by
— the National Federation of University Teachers, Researchers and Creators (Historic Federation of Teachers) and
— the Riojan Association of University Teaching Staff (ARDU)

Allegations: The complainant organizations allege anti-union dismissals and changes to the conditions of employment of a number of trade union officials

189. This present complaint is contained in a communication from the National Federation of University Teachers, Researchers and Creators (Historic Federation of Teachers) and from the Riojan Association of University Teaching Staff (ARDU) dated May 2008.

190. The Government sent its observations in a communication dated 27 May 2009.

191. 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

192. In their communication of May 2008, the Historic Federation of Teachers and the ARDU state that they are presenting the complaint in order to put an end to the anti-union practices, trade union persecution and violation of national and international protective standards carried out by the National University of La Rioja (UNLaR), the National Inter-University Council – a professional association of employers that groups together each of the national universities of Argentina, including the UNLaR – and the Ministry of Education of the nation.

193. The UNLaR is a public legal entity (article 48 of Act No. 24521, regarding higher education), being an extension of the Provincial University of La Rioja. The national executive power – the Ministry of Culture and Education – in its capacity as authority for the application of Act No. 24521, approved the fundamental statute governing the operation of the UNLaR. Article 19 of the National Budget Act, No. 24447 established guidelines for the procedure of collective bargaining in national universities. This standard will subsequently be included by the National Congress in article 54 of the Permanent Supplementary Budget Act, No. 11672, establishing its permanence. These standards provide, in short, that in collective bargaining the employer side is assumed by the National Inter-University Council, a professional employers' association to which the UNLaR belongs. The complainants indicate that, having submitted the complaint to the three government bodies mentioned and having exhausted the national authorities, they now find themselves obliged to turn to the Committee on Freedom of Association.

194. The complainants recall that on 26 February 1999 the Council of Governors of the UNLaR ordered that academic proceedings be initiated against the lecturer Estela Cruz de García, in her capacity as trade union representative, and on the grounds of the exercise of her

trade union representation work and that the UNLaR had based this decision solely on an article that had appeared in the local daily newspaper *El Independiente* on 17 February 1999. The complainants state that this allegation was examined by the Committee on Freedom of Association, which accepted it and processed it as Case No. 2065, in its decision of 6 April 2001.

195. The complainants allege that the matter reported was just the beginning of the anti-union practices that culminated in the dismissal of almost all the members of the executive committee of the trade union organization, ARDU. More specifically, they allege the following:

– in April 2000, the Secretary-General of ARDU, Estela Cruz de García, the Deputy Secretary, María Alonso, and the Finance Secretary, Eduardo Berra, were dismissed. An appeal for the protection of constitutional rights and precautionary measures were brought in Case No. 20261/00 at the Federal Court of La Rioja, which ordered the reinstatement of the dismissed workers;

– in February 2002, on the occasion of a protest by lecturers, parents and students of University College, the UNLaR made a criminal accusation against the members of ARDU for "violation of the constitutional democratic system" in Case No. 2397/02, which was dismissed by the Federal Court of La Rioja;

– in August 2005, the UNLaR dismissed three lecturers from University College, all trade union delegates of ARDU, violating their trade union protection; this case is still before the Federal Court of Córdoba;

– lastly, in July 2007, the UNLaR reduced the hours of work, affecting the working conditions of three members of the executive committee of ARDU, which was appealed against (with no response) before the National Ministry of Labour; appeals for the protection of constitutional rights were lodged with the Federal Court of La Rioja, which were favourable, but the UNLaR appealed against them;

– in August 2007, the Finance Secretary of ARDU, Professor J.C. Ruiz, was dismissed. On 22 February 2008, the Appeal Court of Córdoba, in Case No. 108-P-1007, allowed the appeal, declaring "the omission of the university arbitrary and illegitimate" for leaving the lecturer without appointment and ordering the payment of the income lost over the 2007 period, severely questioning the attitude of the university and its officials;

– in August 2007, four members of the executive committee and union auditors had their hours of work reduced. Appeals for the protection of constitutional rights were lodged with the Federal Court of La Rioja, which when appealed against by the UNLaR, were upheld for the lecturers, with trade union protection being recognized;

– in December 2007, seven members of the executive committee and union auditors were dismissed, including the Secretary-General of ARDU and a member of the executive committee of the Historic Federation of Teachers;

– in January 2008, the trade union secretary of ARDU was dismissed (two months before reaching retirement age) and also one auditor, both researchers with more than 24 years of service, and appeals for the protection of constitutional rights have been lodged with the Federal Court.

196. The complainants state that in Argentina no activities are subject to such a high level of labour precariousness as those in the private sphere, where employers, while subject to certain conditions, can freely dismiss workers. One of the limits they are bound by is,

specifically, the rules for the protection of trade union activities: even in the case of contracts concluded "for a trial period", the ultimate in labour precariousness, which initially last for three months, it is not possible, by law, to deprive workers of the right to join a trade union or to establish one. The trade union protection provided in article 14bis of the Constitution of Argentina – "trade union representatives shall enjoy the guarantees necessary for the management of the union and the stability of their employment" – is embodied in Act No. 23551 regarding trade unions.

197. The application of the legal framework relevant to trade union protection in the sphere of labour relations within universities occurs on the basis and within the limits established by law, and this guarantee is only lifted when there is a general cessation of activities in the establishment or when all duties in the establishment are suspended.

198. In general terms, the specific case of universities as regards the relative stability of appointments, does not constitute an obstacle to the application of the general protective principle of Act No. 23551, as whether the appointment is carried out through a competition or is on an interim basis, there is not, as in the case before the Committee, a general cessation or suspension of duties at the university or academic unit in question.

199. The labour courts have even analysed cases of work in the construction and maritime sectors, and have found that the trade union officials must be granted protection even if they were elected whilst on a specific job that was completed. In such cases, the protection is strengthened when successive contracts are concluded for the same duties and by the same employer, as in the case in hand. To agree to the dismissals mentioned in this case means that the trade union organization endorses an ongoing policy of fait accompli, contrary to the most basic legal, trade union and academic principles.

200. The protection of trade union activities in the legal system of Argentina is not contrary to the principles governing university activities, neither does it affect the university community's entitlement to its rights, particularly the rights of candidates for teaching posts and the rights of students to have access to an excellent level of university education. "Labour stability" would not even be obtained "by obtaining a trade union post" because trade union posts are not "stable", neither are they permanent. On the contrary, the refusal to grant trade union protection in university labour relations affects the very existence of trade union activity, guaranteed under the Constitution. Further to the nature of university labour relations, Act No. 23551 establishes a specific procedure that employers must adhere to in order to exclude workers from trade union protection, a procedure – for exclusion from protection – that the employer has not complied with. On the contrary, the rector of the National University of La Rioja, through the insistent, unjustified and illegitimate dismissal of trade union officials, is trying, without any consultation whatsoever, to cause the collapse of the whole system of trade union protection, ordering in a single action the dismissal of the worker in question, that of several members of the executive committee, and the suspension and/or elimination – in fact – of the activities of the local trade union, the ARDU.

B. The Government's reply

201. In its communication of 27 May 2009, the Government maintains that it appears from the complaint that a number of members of ARDU, university lecturers with interim appointments, although with various years of service at the National University of La Rioja (UNLaR), on the one hand had their hours of work reduced before the end of their appointments and, on the other, did not have their appointments renewed once they had finished. The complainant organizations allege that this equates to anti-union action and that the trade union privileges applicable to a number of the affected lecturers were not respected. The Government indicates that its observations are preliminary in nature and

that it will later expand on them. It indicates that the acts in question relate to a national university of a provincial state that is autonomous and sovereign in its government and in the documents it issues. By virtue of the principles of autonomy and sovereignty of national universities, the Ministry of Labour, Employment and Social Security sent a copy of the complaint to the National University of La Rioja to enable it to defend itself as appropriate, which the board of governors did in administrative decision No. 2415 dated 15 August 2008, a copy of which was attached to the complaint as a statement by the accused university.

202. The Government adds that the acts in question were appealed before the judicial authorities through *amparo* proceedings, a legally established summary procedure providing protection against acts or omissions that affect constitutional rights, in some cases the courts have issued rulings and, in others, appeals are still under examination. In cases like the present one, where the trade union organization lacks official trade union status, legal protection against anti-union acts is established in article 47 of the Argentine Trade Union Act, No. 23551.

203. To that effect, the Federal Appeal Court of Córdoba, in the case "Alonso María E. (one of the dismissed trade union officials) and others versus the National University of La Rioja", in a second instance ruling, found in favour of the validity of the legal protection of the lecturers with trade union responsibilities. In respect of the relevant issues the decision states that:

> ... The case in hand is unusual in that despite the plaintiffs being interim lecturers, and consequently their employment status being precarious, transitory and unstable, they have trade union responsibilities and are thus protected in their claim by the trade union protection to which they are entitled under article 52 and concordant articles of the Act concerning professional associations, No. 23551. Therefore, the question to be resolved is to establish whether or not that protection specific to collective labour law should prevail over a public employment relationship (as is that of university lecturers), which is an interim one in this case. For this analysis, it is emphasized that particular note should be taken of the fact that in this specific case the time the plaintiffs have been working in interim positions has created in them a legitimate expectation of permanence in their employment status, which cannot be ignored by this court when it comes to judging the legitimacy of the extent of the trade union protection they cite as the basis of their claim.
>
> While aimed at a different area, the Professional Associations Act, by establishing so-called trade union privileges, gives expression to a guarantee granted to certain employees, on the basis of their trade union representative status, to protect them from being dismissed, removed or having their conditions of employment modified without just cause. It is a worker's right, whereby the employer or business may not, during the time specified by law or while the guarantee of protection remains, freely dismiss the worker or modify his conditions of employment without having the corresponding authorization in the manner determined by law (according to Cabanellas, Guillermo, *Tratado de Derecho Laboral*, Editorial Heliasta SRL, Buenos Aires, 1989, Volume. III, p. 555).
>
> In this regard, article 47 of Act. No. 23551 expressly provides that "Any trade union worker or association that is prevented or hindered in the regular exercise of the rights to freedom of association guaranteed by this Act, may seek the protection of these rights before the competent court ..." and in turn article 52 also states that "workers covered ... may not be dismissed or suspended, neither can their conditions of work be modified, without a prior judicial decision to exclude them from the guarantee, in accordance with the procedure laid down in article 47 ...".
>
> As can be seen, the legal text is categorical and there is nothing to suggest that public employees should be excluded from its scope of application and legal effects, nor, within this category, interim lecturers who, although within a context of precariousness, often distorted by its excessive duration, have a legitimate expectation of permanence, in the absence of certain conditions, such as the post being filled by competition or proven poor performance in their duties.

Furthermore, let us also recall that trade union stability has a constitutional hierarchy embodied in article 14bis of the National Constitution, which stipulates that "... Trade union representatives shall enjoy the guarantees necessary for the management of their union and the stability of their employment ....". Commenting on this rule it has been said that this is a guarantee given to the employee, not on a personal basis, but owing to the trade union duties he performs, and that its purpose is to avoid retaliatory measures or measures that might arbitrarily infringe the rights of the worker during the period of his trade union representation or, once his mandate has been fulfilled, as a consequence of it (according to Badeni, Gregorio *Tratado de Derecho Constitucional*, La Ley, Buenos Aires, 2004, Volume. I, p. 656).

Although in the case in hand there is no conclusive evidence that the reduction in the plaintiffs' hours of work was due to anti-union pressure or practices carried out by the university authorities, and therefore, even if we were in the presence hypothetically of the exercise of *ius variandi* understood as a contractual prerogative of public law contracts, in the case of personnel granted trade union stability, any change to conditions of work should initially be dealt with using article 52 of Act No. 23551, that is to say one needs to obtain a judicial ruling for the exclusion of trade union protection, which did not happen in the case in hand, rendering unlawful the actions of the defendant.

It was thus held that "... any attempt to modify the contract by the employer must be channelled in the manner referred to in article 52 of Act No. 23551 ... and the intended modification must not contain any subjective or unlawful element in violation of freedom of association ..." (Court of Appeal in Labour Matters, Division IV, "*Palmer, Alfredo Mateo* versus *Kraft Suchard Argentina* concerning appeal for the protection of constitutional rights", interlocutory judgement No. 32938, cited by the Supreme Court of Justice in decisions 326:2325, dated 4 July 2003). The above does not mean to imply that the employer cannot modify the relationship, exercise the power of organization and leadership, nor provide criteria for the conduct of the employee, but simply means that the employer's initiative should be channelled in accordance with the terms of article No. 52 of Act No. 23551.

This being the case, and for the reasons given, as the defendant did not respect the trade union protection of the plaintiffs by modifying their conditions of work without respecting the legal procedures, the appeal lodged by the National University of La Rioja should be dismissed and, consequently, the appealed decision should be upheld, which stipulates the payment to the plaintiffs of the difference in outstanding salary in respect of their assigned hours of work up until 12 August 2007.

204. The Government indicates that, as can be observed, the decision is clear in ordering the employer to respect the working conditions of the lecturers in question. The matter at the heart of the allegations has been and is being debated in the courts as can be seen in the annotated decision handed down by the Federal Appeal Court of Córdoba, and there was consequently, as we have seen, a judicial review of the disputed actions.

205. The National University of La Rioja states in its report that before anything else is considered, it must be borne in mind that the individual and collegiate authorities of the National University of La Rioja were elected democratically and unanimously in the elections held on 18 May 2007 and that no judicial or administrative objections were raised about the elections. Consequently, the decisions adopted in this university and those of its internal bodies not only have legal backing, but also the legitimacy conferred by full and complete democratic support. In accordance with the provisions in force, national universities are entitled to appoint "interim" lecturers for fixed periods of time and without employment stability. It should also be considered here that the position and status of trade union representative indicated by the complainants to no extent prevails over or decreases the strict temporary nature of the interim teaching appointment, nor affects the lack of employment stability. The country's doctrine and jurisprudence have peaceably supported this position.

206. The university indicates, for example, that this is reflected in the decision of the Federal Appeal Court of Córdoba in Case No. 153 – C2007 – entitled "*Chade Juan and others* versus *the National University of La Rioja*, concerning protection of constitutional rights",

which states that: "... The above is in no way altered by the fact that the plaintiffs are covered by trade union protection, as this cannot generate in those it covers – interim lecturers – rights comparable to those of lecturers appointed by competition ...". It then remarks that "... the basis of trade union protection is to ensure that the persons covered can exercise their trade union rights, that they can freely exercise their trade union function, without reprisals or pressure from their employer. But in the case of interim lecturers, it does not imply elevating their employment status to that of lecturers who joined the faculty by way of competition, and for whom neither the duration nor the conditions of exercise of the post filled by competition can be altered ...".

207. The UNLaR notes that minimal reflection and a degree of reasonableness cannot contradict these premises, as it would be sufficient for a handful of interim university lecturers to set up a trade union and to do away with the compulsory academic status. It states that in carrying out a concrete and preliminary summary of the issue raised it must be borne in mind that: (a) the "interim" lecturers are appointed "on a fixed-term basis" and "without employment stability", and (b) such "precariousness" in the employment relationship of "interim" lecturers is not subject to the alleged trade union protection, which applies solely and exclusively during the period of their teaching appointments. This circumstance was rigorously respected by the university. Once the specific term of appointment as an "interim" lecturer has finished, the mere fact of being a "trade unionist" does not entitle the worker in any way to demand – as they are trying to do – another appointment in the same circumstances as the completed one. This is because interim positions – in accordance with abovementioned article 51 of the Higher Education Act, No. 24521 – do not have employment stability. That very clear legal position means that the university has the authority, from the point of view of both internal and external regulation, to decide whether or not to reappoint its lecturers. In all public universities, job stability is acquired only by competition, not by mere trade union membership.

208. As to the methodology for appointing lecturers at the university, and according to express provisions in its statutes, the latest revision of which was approved by the Ministry of Education and published in *Boletín Oficial de la Nación* (Official Gazette of the Nation), No. 29838 of 14 February 2002, the institution's lecturers are appointed by the councils of each academic department – "proposal by the dean". Bearing in mind that the former lecturers, supposedly dismissed, belonged, according to verified certification and records, to three different academic departments (social sciences; law and economics; sciences of health and education and humanities), means that in order to carry out the alleged persecution, 39 honourable and democratically and unanimously elected people would have had to be involved in a conspiracy. In turn, the complainants having taken the matter to the courts, and closely linked to what has already been said, the local Federal Court, in its ruling No. 94/08 dated 9 April 2008, taken up in Case No. 24872/08, entitled "*Olmedo Orello María Cecilia and others* versus *the National University of La Rioja*, concerning an appeal for the protection of constitutional rights – precautionary measures", at the time of refusing the measure sought for the reappointment of the person mentioned and of Aníbal Magno and Estela Cruz de García as interim lecturers, paragraph 6(1) of the decision stated: "... For these reasons, it is necessary to clarify the situation of lecturers who, beyond their status as interim lecturers, remained in a dependent employment relationship for considerable periods of time. It is imperative for the university against which the legal action has been brought, in order to demonstrate its legitimate conduct in the event it does not further contract the lecturers who form or have recently formed part of its faculty, to issue the relevant administrative act, duly justified, putting forward the academic grounds for its decision ...".

209. The university indicates that at no time did the judicial authorities order the university to reappoint the interim lecturers, now the complainants. The legal decision was fully executed by the academic departments of the university, through the issuance of the

corresponding decisions. In these administrative documents it was specifically stated that the complainants flagrantly failed to fulfil their academic responsibilities. Coinciding with this, particularly in the fact that it is the objectively evaluated personal performances that determine whether or not interim lecturers are reappointed, documents were issued by the academic Departments of the Sciences of Health and Education (decision No. 381/08 not to reappoint Estela Cruz de García; No. 382/08 for Cecilia Olmedo Orello; No. 383/03 the decision not to reappoint Aníbal Magno, all dated 29 April 2008), and the academic Department of Humanities (decision No. 290/08 not to appoint Elena del Carmen Camisassa, and decision No. 291/08 for Eduardo José Berra).

210. The university states that the alleged dismissals did not occur. Moreover, it should be stressed that the rector of the university has not – nor could – interfere in the appointments in any way, nor in the decisions not to appoint and/or the dismissals of the teaching staff, as he has neither the jurisdiction nor the competence to do so. It goes without saying that quality and academic excellence must be inherent to the performance of the lecturers of any university, and consequently also to those of the UNLaR.

211. The UNLaR indicates that the former lecturers in question never joined any of the alternatives legally stipulated in the institutional plan for the increase of activities of excellence in teaching and research. All this also makes it necessary to point out that the complainants (at one time interim lecturers, as has been indicated) performed their work for several years while systematically opposing any attempt to fill their posts by competition and without producing any research, taking part in any refresher courses or being involved in any human resource training. However, they appear before the ILO falsely claiming immaculate teaching careers and saying that they are the victims of persecution for their trade union work. This is far from being the truth. Mere ongoing presence in university lecture halls without the proper credentials cannot be protected by any law. The UNLaR also indicates that ARDU only represents 3.64 per cent of all the teaching staff in the university, which numbers 1,118 academics. The university maintains without hesitation or question of any sort the most absolute respect for the guarantee of free and democratic trade union organization, as stipulated in article 14bis of the Constitution. It has never carried out nor decided anything which could obstruct it in the slightest. There is, moreover, another trade union of lecturers, called the Trade Union of Teaching and Research Staff of the National University of La Rioja (SIDIUNLAR) which has 962 members – in other words 86 per cent of the academics at the university. In addition, it should be recalled, as noted by the honourable council in decision No. 2208/08, that the SIDIUNLAR trade union has been registered at the Ministry of Labour, Employment and Social Security, in accordance with the provisions of decision No. 137/08, dated 26 February 2008.

212. The university states that the trade union organization, ARDU, lacks real representative status among the staff of the university owing to its negligible number of members, and although this does not in itself infringe upon the constitutional guarantee of freedom of association, this circumstance must necessarily be compared with the existence of the other trade union of lecturers, SIDIUNLAR. According to the university, this also contradicts in its scope the supposed “persecution” of the complainants in respect of the alleged violations of freedom of association. Likewise, the trade union organization SIDIUNLAR, which is the most representative one, has never expressed any concern in respect of this issue.

C. The Committee’s conclusions

213. *The Committee observes that in this case the complainant organizations allege various acts of anti-union discrimination by the National University of La Rioja (UNLaR) since 1999 when it initiated academic proceedings against the lecturer, Estela Cruz de García,*

Secretary-General of ARDU (an allegation that was examined by the Committee in Case No. 2065). The complainant organizations specifically allege the following anti-union acts: (1) the anti-union dismissals in April 2000 of the Secretary-General of ARDU, Estela Cruz de García, the Deputy Secretary, María Alonso, and the Finance Secretary, Eduardo Berra (according to the complainants an appeal for the protection of constitutional rights and precautionary measures have been brought and the reinstatement of the dismissed workers has been ordered); (2) in August 2005 three lecturers were dismissed from University College, all trade union delegates of ARDU (according to the complainants judicial proceedings are under way in respect of these dismissals); (3) in August 2007, the finance secretary, J.C. Ruiz, was dismissed (according to the complainants in the context of the judicial proceedings the university was severely questioned and was ordered to pay the lost income for the 2007 period for the financial damages suffered; (4) in December 2007, seven members of the executive committee and union auditors were dismissed, including the Secretary-General of ARDU and a member of the executive committee of the Historic Federation of Teachers; (5) in January 2008, the trade union secretary of ARDU and one auditor were dismissed (according to the complainants an appeal for the protection of constitutional rights has been lodged); (6) in February 2002, following a protest by lecturers, parents and students, the UNLaR made a criminal accusation against the members of ARDU for violation of the constitutional democratic system, which was dismissed by the judicial authority; and (7) in July 2007, the working conditions of three members of the executive committee of ARDU were changed (reduction in the number of hours of paid work), and the same happened in August 2007 to another four members of the committee (according to the complainants judicial proceedings were initiated in respect of these issues and the decisions in favour of the workers were appealed against by the UNLaR). The Committee observes, lastly, that the complainant organizations allege that the dismissals were carried out without respecting the rules for the protection of trade union activities and that the labour courts have found in some cases that the trade union official must be granted protection even if he was elected whilst in a specific job that was completed.

214. *The Committee notes that the Government indicates that: (1) the acts in question relate to a national university of a provincial state that is autonomous and sovereign in its government and in the documents it issues; (2) by virtue of the principles of autonomy and sovereignty the Ministry of Labour, Employment and Social Security sent a copy of the complaint to the University to enable it to defend itself as appropriate; (3) the acts questioned by the complainant organizations have been appealed against before the judicial authorities – in some cases the courts have issued rulings and others are still under examination; (4) in the present case, where the trade union organization lacks official trade union status (which is granted to the most representative organization), legal protection against anti-union acts is established in article 47 of Act No. 23551; (5) in one of the cases brought by a number of trade union officials the Federal Appeal Court of Córdoba – in second instance proceedings – found in favour of the validity of the legal protection of the lecturers with trade union responsibilities and, for example, considered that "in the case of personnel granted trade union stability any change to conditions of work should initially be dealt with using article 52 of Act No. 23551, that is to say a judicial ruling for the exclusion of trade union protection should be obtained, which did not happen in the case in hand, rendering unlawful the actions of the defendant" and that "this being the case, and for the reasons given, as the defendant did not respect the trade union protection of the plaintiffs by modifying their conditions of work without respecting the legal procedures, the appeal lodged by the University should be dismissed and, consequently, the appealed decision should be upheld, which stipulates the payment to the plaintiffs of the difference in salary outstanding in respect of their assigned hours of work up until 12 August 2007"; (6) the decision is clear in ordering the employer to respect the conditions of work of the lecturers in question; and (7) the matters at the heart of the allegations have been and are being debated in the courts.*

215. *The Committee also notes that the University states in the report forwarded by the Government that: (1) the national universities are entitled to appoint interim lecturers for a fixed period of time and without employment stability (the employment relationship of interim lecturers is not subject to trade union protection, which applies solely and exclusively during the period of their teaching appointments); (2) the position and status of trade union representative of the officials in question to no extent prevails over or decreases the strict temporary nature of the interim teaching appointment (according to the university this was confirmed by the judicial authority); (3) once the term of appointment as an interim lecturer has finished the mere fact of being a trade unionist does not entitle the worker in any way to demand another appointment in the same circumstances; (4) in all public universities employment stability is acquired through competition and not through trade union membership; (5) the supposedly dismissed lecturers belonged to three separate academic departments, which implies that to carry out the alleged persecution 39 democratically elected people would have had to be involved in a conspiracy; (6) at no time did the judicial authorities order the university to appoint the interim lecturers in question; (7) the lecturers in question flagrantly failed to fulfil their academic responsibilities; (8) the university respects the constitutional guarantee of free and democratic trade union organization; and (9) the ARDU organization represents 3.64 per cent of the 1,118 lecturers and 86 per cent of the academics at the university belong to another trade union organization.*

216. *While noting the argument of the University pointing out the "interim" status of the trade union officials subject to detrimental measures and the fact that the complainant organization ARDU has a very small membership, the Committee notes that it appears from the judgement transcribed by the Government, that by virtue of the officials' legally stipulated trade union protection – even if these are interim and not permanent lecturers – the university should have requested exclusion from that protection from the courts before carrying out dismissals or changes to working conditions. In this context, the Committee expresses its concern about the fact that according to the judgement transcribed by the Government, the University has not respected the procedures that protect trade union officials and that require judicial authorization for them to be dismissed or for their conditions of employment to be changed. The Committee expresses its concern, observing in particular that between April 2000 and January 2008 a number of trade union officials from the ARDU organization have been dismissed and/or have suffered changes to their conditions of employment, which has given rise to various judicial proceedings, some of which are still pending.*

217. *This being the case, observing that the legal system of protection against violations of trade union rights has been used by the complainants in the various cases indicated since 2000, the Committee requests the Government to keep it informed of the results of all the judicial proceedings under way relating to the allegations. Likewise, the Committee requests the Government to take measures to ensure that, in the future, if the University envisages dismissing or changing the conditions of employment of trade union officials, it is done in conformity with the trade union protection provided for under national legislation.*

The Committee's recommendations

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

(a) The Committee requests the Government to keep it informed of the results of all the judicial proceedings under way relating to the allegations presented by the complainants against the National University of La Rioja.

(b) ***The Committee requests the Government to take measures to ensure that, in the future, if the University envisages dismissing or changing the conditions of employment of trade union officials who are entitled to trade union protection, it is done in conformity with the trade union protection provided for under national legislation.***

CASE NO. 2659

DEFINITIVE REPORT

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

Allegation: The complainant alleges that the authorities of the Ministry of Health of the Province of Mendoza unilaterally set at 100 per cent the minimum services to be provided during a strike being held in the health sector

219. The present complaint is contained in a communication from the Association of State Workers (ATE) of July 2008.

220. The Government sent its observations in a communication dated May 2009.

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

A. The complainant's allegations

222. In its communication of July 2008, the ATE states that it is making its present complaint against the Government on account of the excessive restriction placed on, and prohibition of, the strike by the Ministry of Health of the Province of Mendoza and by the Fourth Family Court of that province. The complainant points out that: the Argentine State ratified Convention No. 87 in 1960; the Constitution in its article 14bis guarantees the right to strike as a fundamental right of trade unions; the second paragraph of article 75, subsection 22, accords constitutional status to a series of international human rights treaties, including the 1966 United Nations Covenants, thereby granting the same status to Convention No. 87; and the Covenant on Economic, Social and Cultural rights further specifies that States parties undertake to ensure the right to strike. Despite this, according to the complainant, measures were taken in systematic violation of freedom of association.

223. The ATE states that the complaint concerns the following violations: (a) within the context of the strikes being carried out in the province's hospitals and health centres, the Ministry of Health of the Province of Mendoza, by resolution No. 1452/2008 of 25 June 2008, unilaterally and without being competent to do so, ordered the establishment of minimum services in violation of the maximum established under the corresponding legislation in force and relevant ILO principles, setting the level of service provision at 100 per cent, thereby effectively prohibiting the right to strike; and (b) the Fourth Family Court of the First Judicial District of the Province of Mendoza issued an injunction ordering the ATE to

comply with the minimum duty levels stipulated in the aforementioned resolution No. 1452/2008, under penalty of application of article 239 of the Penal Code. The ATE considers this to be a veritable assault on freedom of association by the government of the Province of Mendoza and hence a violation of Convention No. 87, inasmuch as the exercise of the right to strike is being restricted and prohibited.

224. The complainant states that, within the framework of the ongoing collective bargaining process between the union entities representing state employees of the Province of Mendoza and the province's government authorities, the ATE, being unable to agree to the proposed pay increase and in response to a series of violations of the principle of bargaining in good faith, decided on various forms of direct action within the provincial hospitals' sector and other health centres. On 3 June 2008, the Subsecretariat of Labour of the Province of Mendoza convened the parties in dispute in an attempt, in its own words, to maintain social calm; however, no agreement was reached on account of the absence of any proposals on the government side.

225. In view of the ongoing collective dispute, and the lack of proposals or convocations on the part of the provincial government, on 20 June 2008, the General Secretary of the ATE provincial council in Mendoza sent a registered letter to the Governor of the Province of Mendoza, stating that:

> As the trade union with the highest level of representativity in the province in the field of health, having the highest number of paid-up affiliated workers, and given that you and your subordinate officials have refused to engage in collective bargaining with the Association of State Workers (ATE), the union organization empowered under Act 23551 to engage in collective bargaining, thereby causing delays which hamper the negotiation process aimed at resolving the current conflict in the health sector ... I hereby call upon you to take, within five days, the necessary measures to rectify such conduct and convene a meeting with the most representative organization for the purpose of resolving the conflict in accordance with the corresponding legislation, under penalty of initiation of the proceeding for unfair practices (article 53, Act No. 23551), a complaint to the International Labour Organization (ILO) and appropriate legal proceedings.

In the absence of any response or specific action by the provincial government to resolve the conflict, forceful measure were maintained and stepped up until, on 5 June 2008, the Ministry of Health of the Province of Mendoza issued resolution No. 1452/2008 setting the minimum levels of service.

226. The ATE states that Ministry of Health resolution No. 1452/2008 sets the minimum levels of service, this in itself being illegal, emanating as it does from the employer itself. Yet more serious, however, is the fact that it sets a coverage level of 100 per cent for the majority of services, and 50 per cent for administrative services. The ATE reports that this administrative resolution was appealed against on the day following its announcement, on account of the violations of freedom of association described below. Despite this, the government of the Province of Mendoza applied to the local family court for an injunction *(medida cautelar)* and a ruling ordering those concerned to comply with resolution No. 1452/2008. In its presentation of the case, the government does not indicate that there is any current or imminent risk, but invokes children's right to health.

227. According to the ATE, the judge analysed the situation in terms of "right", without considering the facts of the case. In other words, her understanding is that the need to give effect to children's right to health requires a 100 per cent level of service, leading her to order compliance with resolution No. 1452/2008, thus effectively prohibiting the right to strike. The ATE draws attention to what it considers the absurdity of a situation in which it is not the labour court that is ruling on a labour dispute but the family court. It asserts that at no time in any union dispute throughout its 83 years of existence has it put anyone's

health or health care at risk. Furthermore, it is health workers, not governments, who ensure, every day of the year and not only at times of dispute, the provision of adequate health care. The present case is no different, as there has been no complaint of lack of care. In the absence of any agreement as to minimum service levels, it is the ATE that is guaranteeing compliance with the ILO provisions and relevant legislation in force, not the employer.

228. The ATE wishes to emphasize that by issuing resolution No. 1452/2008, the Ministry of Health of the Province of Mendoza, together with the local court that ordered compliance with the resolution, is engaged in conduct which violates the principles of international labour law, and more specifically the principles of freedom of association enshrined in Conventions Nos 87 and 98. In concrete terms, the resolution contains the following irregularities: (a) the employer cannot set the minimum service levels; (b) abusive curtailment of the right to strike by setting the minimum service level at 100 per cent; and (c) prohibition of the right to strike.

229. According to the ATE, it has first to be pointed out that the Ministry of Health of the Province of Mendoza is the direct employer, since the issue concerns a dispute and a strike in the hospitals for which it is responsible. The State is thus acting as both judge and party in this collective dispute within the public sector, although this is prohibited under the local legislation in force and has been repeatedly criticized by the Committee. The ATE points out in this regard that, under the relevant local legislation, it is section 24 of Act No. 25877 which governs collective disputes in essential services. That provision establishes a reference to the guidelines and international case law developed by the Committee on Freedom of Association, incorporating the labour principles pertaining to essential services. This being the case, and in accordance with that supervisory body’s case law, the unilateral setting of minimum service levels by the provincial Ministry of Health, through resolution No. 1452/2008, is contrary to the principles of freedom of association.

230. The ATE reiterates that the local administrative labour authority, the Subsecretariat of Labour of the Province of Mendoza, did not convene nor at any time seek to bring about a negotiated settlement between the parties, as is required under the law. Although it is not competent to do so itself, since, under the terms of article 24 of Act No. 25877, such competence lies with the national Ministry of Labour, Employment and Social Security, the local authority nevertheless failed to request the intervention of the national Ministry. Under the terms of article 24 of Act No. 25877, the responsibility for guaranteeing the provision of minimum services lies with “the party” that has decided to take action.

231. The ATE points out that, in accordance with the case law of the Committee on Freedom of Association, there are certain services in which prohibiting the right to strike may be deemed acceptable, without this amounting to a violation of freedom of association. Where such activities are concerned, it is essential that expeditious negotiation and dispute resolution mechanisms be in place as a counterbalance for workers who are deprived of such a fundamental right. However, this is not the case in Argentina, whose legislation does not provide for the prohibition of strikes in any activity – an approach which, given the progressive nature of its social human rights environment, could no longer be implemented in this country. The necessary consequence of this is that prohibition of the right to strike does not – and cannot – exist in Argentina, even though the ILO has provided for such a possibility in other contexts which do not apply here.

232. The judicial ruling ordering compliance with the Ministry of Health’s resolution No. 1452/2008, on the grounds that article 24 of Act No. 25877 authorizes prohibition of the right to strike, is therefore incorrect. Setting a minimum service level of 100 per cent is no more than an expression of the administration’s desire to prohibit strike action. A contrast cannot be made, as the judicial ruling does, between the right of children to health

care and the right to strike, first of all because no one's life is being put at risk, which is why the abovementioned injunction was not issued on those grounds; second, because it is for this very reason that there is a minimum service, which is not the normal level of service; and third, because the Family Court is mistaken in its identification of the legal guarantor of the right to which it refers, since guaranteeing the protection of children is the responsibility not of the workers but of the State, and it is in any case the State that is failing to provide the necessary resources to protect children's rights in the present health case, concerning specifically health workers' wages. The Family Court is thus placing an obligation on a party which is not a legal guarantor.

233. The ruling itself fails to go into the substance of the dispute, confining itself to ordering compliance with resolution No. 1452/2008. In other words, while on the one hand the Ministry of Health is setting the minimum level of service at 100 per cent of normal services, the family court – which has no competence in this area – is for its part ordering compliance with the resolution on penalty of application of the Penal Code, which provides for imprisonment. This entails another extremely serious violation of freedom of association, since the penalty established by the judge is imprisonment, this being tantamount to categorizing the exercise of the right to strike as a crime punishable by a period of between 15 days to one year in prison. Furthermore, one of the arguments put forward was that no appeal had been lodged against resolution No. 1452/2008, whereas in reality an appeal was lodged in good time, and that the ruling was not definitive or agreed upon. According to the ATE, all this is just a manoeuvre aimed at prohibiting the right to strike, which is not counterbalanced by any exceptional assurance of negotiation.

B. The Government's reply

234. In its communication of May 2009, the Government states that in the first place, it has to be understood that in the present case there were no excessive restrictions on the right to strike, and still less any legal prohibition. The Government points out that within the framework of the collective bargaining on wages for 2008, the ATE union had arranged for various forms of action, the provincial government for its part having guaranteed that the right to strike could be exercised in full. According to the Government, the union, contrary to what it states in its complaint, guaranteed only minimum service levels, equivalent to a Sunday level of service, thereby for the most part completely paralysing the work of the province's health-care providers.

235. The Government states that in accordance with the principles governing strike action in essential services, and given that the guiding principle therein is negotiated settlement of the dispute by the parties concerned, or else agreement and establishment by the parties of minimum services, a conciliation hearing was organized at the headquarters of the Subsecretariat of Labour and Social Security. During the hearing, it was impressed upon the parties that, in the event of the announcement of direct action by the ATE, ATSA and AMPROS, the participating trade unions should agree with the provincial Ministry of Health on the minimum services to be guaranteed during the strike. In a procedure similar to the one established by Decree No. 272/2006, the parties were urged to reach agreement on the minimum services to be provided during the period of the action. The ATE, totally disregarding the body of doctrine which guides and informs Decree No. 272/2006, insisted on pursuing a position against the public rights and interest, maintaining only a minimum service equivalent to a Sunday service.

236. The Government points out that this position is without any legal foundation, implies the abusive exercise of the right to strike, and ignores the likely consequences of paralysing the health services. The Government maintains that the failure to agree on minimum services did not stem from any negligence on the part of the provincial government, but rather from the obstinate position on the part of the union in not wishing to reach such

agreement. In response to this situation, the Ministry of Health issued resolution No. 1452/2008 whereby the province's health authority establishes the percentages of service to be maintained in each health service during the period of the direct action. It is clear from the foregoing that at no time was direct action prohibited, but that a number of services were earmarked as critical and hence as requiring guaranteed 100 per cent coverage. The Ministry of Health issued the resolution in question solely in respect of the critical services and only after having made every possible attempt to reach agreement with the union on the provision of an adequate minimum service.

237. As regards the ruling by the Fourth Family and Juvenile Court, the Government states that, here again, this does not imply prohibition of the right to strike, since the action was left totally unrestricted in so far as most people were concerned, compliance with resolution No. 1452/2008 having been required solely in regard to minors up to age 18, in accordance with article 3 of Act No. 26061, which provides that: "… where there is a conflict between the rights and interests of children and adolescents with respect to other, equally legitimate, rights or interests, the former shall prevail". In other words, the ruling ordered that protection be assured for the rights of children and young persons below the age of 18, in the light of the failure to reach an agreement on minimum services between the union and the health authority at the meeting held for that purpose.

C. The Committee's conclusions

238. *The Committee notes that in this case, the complainant organization alleges that, in the context of the strikes being carried out in the province's hospitals and health centres, the Ministry of Health of the Province of Mendoza, by resolution No. 1452/2008, and in violation of the principles of freedom of association, unilaterally ordered that minimum services be provided at the level of 100 per cent, and that the judicial authority (with competence in the area of family law, rather than labour law, to which the complainant objects) issued an injunction ordering compliance with the minimum duty levels stipulated in the aforementioned resolution (on penalty of penal sanction).*

239. *In this respect, the Committee notes the Government's information that: (1) within the framework of the collective bargaining held to discuss wages, the ATE arranged for various forms of direct action and the provincial government guaranteed that the right to strike could be exercised in full; (2) the complainant organization guaranteed minimum services equivalent only to a Sunday service; (3) in accordance with the principles governing strike action in essential services, a conciliation hearing was organized at the headquarters of the Subsecretariat of Labour and Social Security, it being impressed upon the parties that they should agree on the minimum services to be guaranteed during the strike; (4) the ATE insisted on maintaining only minimum level of service equivalent to a Sunday service; (5) that position is without any legal foundation, entails the abusive exercise of the right to strike and ignores the likely consequences of paralysing the health services; (6) the failure to agree on the minimum services did not stem from any negligence on the part of the provincial government, but rather from the obstinate position of the union in not wishing to reach such agreement, in response to which attitude the Ministry of Health issued the resolution in question establishing the percentages of workers required to be on duty in each health service during the period of the strike; (7) at no time was direct action prohibited, but a number of services were earmarked as critical and hence as requiring guaranteed 100 per cent coverage; (8) resolution No. 1452/2008 was issued after every possible effort had been made to reach agreement with the union on the provision of an adequate minimum service.*

240. *The Committee recalls, first, that the health/hospital sector is an essential service in which the right to strike may be restricted or prohibited [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, paras 576 and*

585]. The Committee observes in this respect that Argentina's national legislation permits the exercise of the right to strike in this sector, while stipulating the need to maintain minimum services.

241. *In this context, the Committee observes that in the present case, according to the documentation communicated by the complainant organization, a meeting was held between the parties, presided over by the administrative labour authority of the Province, "for the purposes of determining the percentage of services to be maintained during the holding of the direct action", but that the parties failed to reach agreement. The Committee further observes that in response to the absence of agreement, the province's Ministry of Health issued resolution No. 1452/2008 providing that in certain health sectors (intensive care units, emergency services, cardiovascular recovery, neonatal therapy, etc.) a 100 per cent level of service should be guaranteed, while in other services (laboratory, imaging, haemotherapy, etc.) a 50 per cent level should be maintained. In this respect, the Committee recalls that employees deprived of the right to strike because they perform essential services must have appropriate guarantees to safeguard their interests, for example, provision of joint conciliation procedures, and, where conciliation fails, the provision of joint arbitration machinery [see* ***Digest****, op. cit., para. 600]. In the case of workers not engaged in essential services in the strict sense of the term, but who carry out tasks in which a minimum service may be imposed, the Committee emphasizes that on numerous occasions it has indicated that where there is any disagreement as to the number and duties of the workers concerned in the minimum services to be maintained, provision should be made for such disagreement to be settled by an independent body and not by the Ministry of Labour or the ministry or public enterprise concerned [see* ***Digest****, op. cit., para. 613]. In these circumstances, the Committee trusts that the Government will ensure respect for these principles.*

242. *As regards the allegation that it was a family court, rather than a labour court, which required that the full range of health services be guaranteed in the case of children and adolescents aged from 0 to 18 years, on penalty of penal sanctions, the Committee considers that the specific remits of courts should be determined by national legislation and that the Committee's role is confined to ensuring that any decisions taken are in line with the principles of freedom of association. As regards the alleged possibility of penal sanctions against strikers who fail to abide by the judicial ruling, the Committee emphasizes that any penalty in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed, and that the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike [see* ***Digest****, op. cit., para. 668].*

The Committee's recommendation

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

> ***The Committee trusts that the Government will guarantee that employees deprived of the right to strike because they perform essential services have appropriate guarantees to safeguard their interests, for example, provision of joint conciliation procedures, and, where conciliation fails, the provision of joint arbitration machinery; and that where there is any disagreement as to the minimum number of workers and minimum services to be maintained in the case of a strike in non-essential services, but in which a minimum service may be imposed, such disagreement is settled by a body independent of the parties involved.***

CASE NO. 2666

DEFINITIVE REPORT

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

Allegations: The complainant organization alleges that, in a discriminatory way and in disregard of the law, it was not provided with premises for carrying out its activities and that acts of anti-union harassment were carried out against a trade union official

244. The present complaint is contained in a communication from the Association of State Workers (ATE) dated September 2008.

245. The Government sent its observations in a communication dated April 2009.

246. 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 Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

247. In its communication of September 2008, the ATE states that it is presenting a complaint against the Government of Argentina for the violation of Conventions Nos 87 and 98 through discrimination and reprisals carried out against both workers and the trade union by the management of the Dr Juan A. Fernández General Hospital for Acute Medicine, which operates under the aegis of the Department of Health of the Government of the City of Buenos Aires, Argentina. The ATE indicates that the present complaint concerns the following violations: (a) the management of the Dr Juan A. Fernández General Hospital for Acute Medicine systematically violated the principle of good faith and in a discriminatory way violated the rights of the trade union by failing to provide a physical space for the development of trade union activities; and (b) there has been a tendency to harass and take reprisals against a representative of the workers of the ATE.

248. The ATE has official trade union status (No. 2) and is authorized to operate in the hospital in question, where it has been carrying out trade union activities for a long time. Nevertheless, it is prevented from fully carrying out its union activities in the hospital as it does not have union premises. This denial of rights has been compounded in recent months by the harassment suffered by one of the representatives of the ATE, in relation to which an order was issued to modify her working conditions.

249. The ATE indicates that, first of all, it can be demonstrated among other things that the hospital management has systematically refused to make a physical space available for the performance of trade union activities, even though this is required by law. In fact, the ATE has been requesting a space and a bulletin board, as provided for in section 44 of Act No. 23551, since 2005, in other words, for more than three years, and its demands have not yet met with a favourable response. The ATE has provided a copy of its latest communication to the hospital, in which it also calls upon the employer to stop its anti-union campaign against Ms Viviana Claudia Tarragona, ATE's general representative in

the hospital and assistant administrative secretary of the ATE's executive board for the City of Buenos Aires. The communication states that:

> Buenos Aires, May 2008. On behalf of the national executive board of the Association of State Workers (ATE), we demand that you desist immediately from this attitude of discrimination and harassment against our organization and our representatives, on pain of the appropriate legal action. The current administration has carried out a series of acts of harassment and discrimination against our general delegate and colleague Viviana Tarragona (wage deductions for days actually worked, wage deductions for days taken as union leave, etc.), constituting an attitude that is prohibited by law insofar as it concerns a member of this association's executive board for the Federal Capital and the issue of trade union immunity (cf., sections 14bis and 75, paragraph 22, of the National Constitution, section 48 et seq. of Act No. 23551 and ILO Conventions Nos 87, 98 and 135), as well as acts of discrimination that are prohibited by law (section 1 of Act No. 23551). This attitude has been compounded by the lack of recognition shown to the organization, as you have not complied with the provisions of section 44 of Act No. 23551 by neglecting to grant a physical space for the union premises of ATE's internal board in the hospital and by failing to put back the ATE's bulletin board following its removal by the management, despite being duly requested to do so. In fact, both requests have been systematically ignored, despite being an obligation on your part (section 44 of Act No. 23551), and as premises have been granted to another trade union this has become a discriminatory and anti-union issue. For these reasons, we ask that, within 72 hours, you desist from your anti-union and discriminatory attitude, kindly refund the amounts unduly withheld from our colleague Viviana Tarragona, and provide a physical space and a bulletin board for union activities of this organization, on pain of legal action (section 47, Act No. 23551), a complaint of unfair practice (section 53, Act No. 23551), a complaint to the ILO's Committee on Freedom of Association and criminal action for discrimination (Act No. 23592).

250. Secondly, the ATE states that this lack of recognition is compounded by the harassment against general representative and executive board member, Ms Viviana Tarragona. For over two years, she has suffered a series of acts that, when viewed and interpreted as a whole, are evidence of the abovementioned harassment. The worker in question has suffered undue deductions for workdays on which she duly applied for union leave, has been deprived of colleagues during her nursing shift, meaning that she was overworked and prevented from carrying out her union activities, and, lastly and most seriously, has been reclassified without the corresponding proceedings to lift the trade union immunity provided under Argentinean law. Ms Viviana Tarragona was elected as the general representative in the hospital on 24 September 2007, and the hospital was notified on 26 September 2007. Similarly, on 30 May 2007, she was elected assistant administrative secretary of the executive board for the autonomous City of Buenos Aires, taking office on 6 November 2007, and the hospital was notified on 4 September 2007.

251. Irregardless of her immunity, by Order No. 298/DGARH/2008 and without the corresponding proceedings to lift her immunity, Ms Tarragona was demoted to a lower grade, causing her serious financial damage. Upon learning of this violation, the ATE sent a letter to the government of the City of Buenos Aires on 27 August 2008, calling for the annulment of Order No. 298/DGARH/2008 on the grounds that it was illegal and inappropriate.

252. The attitudes adopted by the government of the City of Buenos Aires and the Dr Juan A. Fernández Hospital for Acute Medicine may be considered from different perspectives, but overall they constitute anti-union activity because the employer is the same in all cases. With regard to the reprisals against a union representative, there is a clear impairment of the rights of a workers' representative to perform her union duties in the hospital. In fact, the general representative of the ATE's internal board, Ms Viviana Claudia Tarragona, suffered as a result of her union activities – her salary was cut on several occasions because of false accusations and her grade was changed even though she had trade union immunity. It is worth mentioning that undue deductions were taken from the pay of the

representative in question for days worked and days taken off as union leave. Both the ATE and Ms Tarragona have sent telegrams and requests in response to these violations, but they have received no reply to date and the harassment has not stopped. This situation was further compounded by the fact that, by Order No. 298/DGARH/2008, Ms Tarragona's working conditions were modified, even though she had trade union immunity in accordance with the provisions of Act No. 23551.

253. With respect to discrimination and the failure to make union premises available, the management of the hospital has systematically refused to provide a physical space for the ATE. Since 2005, the ATE has called for the provision of union premises and for compliance with Act No. 23551, and to date it has neither been granted the premises nor given a response. Consequently, there is only one set of trade union premises in the hospital in question, which was granted to another union, even though such a physical space, as is provided for by law, has been denied to this organization. This attitude runs counter to freedom of association as provided for in Act No. 23551, section 44 of which states that: "Without prejudice to the provisions of collective labour agreements, employers shall: (a) provide a place where staff representatives may carry out their activities, to the extent made necessary by the nature of the establishment, taking into account the number of workers involved and the mode of service delivery ...". It is the understanding of the ATE that the refusal of the administration to provide it with a physical space shows a clear attitude of discrimination which is contrary to the spirit of the domestic and international legislation mentioned above.

B. The Government's reply

254. In its communication of April 2009, the Government states that, having gathered the relevant information, the management of the Dr Juan A. Fernández General Hospital for Acute Medicine indicates that, before a reply is given to specific allegations, it should be emphasized that several trade union associations (SUTECBA, the UPCN, the ATE, the Association of Municipal Physicians, the Association of Professionals, etc.) operate in the institution, along with ordinary associations of psychologists, biochemists, nurses, pharmacists, etc. This broad and non-exhaustive list of social partners within the scope of the Ministry of Health led to the signature in 2006 of Decision No. 5 in the Joint Sectoral Committee for the Ministry of Health. The Government also draws attention to the full implementation of Article 2 of Convention No. 87, with respect to trade union plurality, as set out in the *Digest of decisions and principles of the Freedom of Association Committee*.

255. The hospital indicates that, in the abovementioned Decision No. 5, it is agreed that: "… representation must meet objective requirements with regard to membership …", "… that representation to that effect may be exercised when proof is provided that it has as a minimum the support of at least 10 per cent of hospital employees ..." (section 25 of Act No. 23551 on trade union associations). The hospital management notes in this regard that the ATE must prove that it has the support of that 10 per cent, which it has never done. Nevertheless, the authority in question has never questioned the nature of minority representation in the institution and has always endeavoured to work with the union.

256. As for the alleged discrimination against and failure to recognize the ATE by not providing it with union premises, as is required by law, it is emphasized that, given the particular characteristics of the institution (it is a public hospital where priority is given to patient care and ongoing staff training), and given that it is located in a building that cannot be extended, it does not currently have any free spaces that could be used for the requested purposes. Nevertheless, studies are currently being carried out into possible architectural modifications that would make it possible to provide a physical space for the development of trade union activities. With regard to the alleged rejection of a request for permission to put up a bulletin board, the institution categorically denies this allegation, as on various

occasions it has authorized the placement of a bulletin board on the fifth floor in the main staff entrance hall, which is a area that the entire hospital staff has to pass through, on the condition that the cost of the bulletin board should be covered by the ATE. To date, no bulletin board has been put up in the space agreed upon with the representatives of that association, a situation that is certainly not attributable to the hospital, which in its reply stresses that the space in question is available. The institution states that, when agreement was reached with regard to the space in question, the union agreed that it would stop posting fliers on walls throughout the building.

257. As for the alleged reprisals against the union official, Ms Tarragona, the Government indicates that she is a nurse and works on Saturdays, Sundays and holidays in the out-of-hours medical unit. This unit provides a public service and deals with a high number of patients, especially on weekends, as the institution has an emergency medicine and trauma centre and so receives many accident victims; it should also be noted that the hospital is located near to several high-speed roads. Furthermore, the Government indicates that the hospital is located close to several recreation and dance establishments, which means that a significant number of patients receive medical attention for alcohol-related conditions and for injuries caused in accidents, especially during weekends. There are also the normal patient demands, for the treatment of various conditions. In the report, the director of the institution indicates that it is common knowledge that there is a lack of trained nursing staff, in both the public and the private sectors. However, efforts have continued to be made to make more nurses available in all of the hospital's departments, including the out-of-hours medical unit. Accordingly, in recent months there has been a significant increase in the nursing staff, especially in the out-of-hours medical unit, which has had a new intake of six nurses. In the light of the above, the Government rejects the allegation that nurses were withdrawn from the out-of-hours medical unit intentionally to do a disservice to Ms Tarragona.

258. With regard to Order No. 298/DGARH/2008, under which, according to the ATE, Ms Tarragona was demoted to a lower grade, it is reported that on 13 February 2008 there was a meeting of the Administrative Technical Advisory Committee (CATA), a body comprising the department heads of the hospital's administrative and professional technical services, union representatives of the Association of Municipal Physicians, SUTECBA and representatives of the hospital management and deputy management. At the meeting, the SUTECBA representative reported that some members of the nursing staff were classified as registered nurses but did not have the necessary qualifications, and requested the hospital management to investigate the alleged irregularity.

259. An assessment was made by human resources, which found that four staff members were on a pay scale that was applicable to registered nurses, while they were qualified as licensed practical nurses. These nurses included Ms Tarragona and three other people (who were named). This information was sent to the Ministry of Finance, which issued the order that is now being challenged (No. 298/DGARH/2008) to adjust the grades of the staff members accordingly. This is a matter that falls within the Ministry of Finance's area of competence, given that it concerns the classification of staff in accordance with the effective verification of the qualifications of Ms Viviana Tarragona, Ms Ester Pelozo, Ms Rosa Pérez and Ms María Cristina Vázquez. In other words, far from being harassment, their grades were adjusted to reflect their actual qualifications. No other aspects of the reviewed situation or work situation of Ms Tarragona or her reclassified colleagues were changed in any way.

260. With regard to the days deducted for having applied for union leave, the institution indicates that the deductions were made in April and May 2008 and were repaid in accordance with Note No. 2323 HGAJAF of 5 June 2008. The deductions from September 2008 were also repaid, following the proper and timely submission of the relevant

documentation. It is stressed in conclusion that it is the spirit and policy of the hospital management (the current director has been working for the institution for 30 years) to work in partnership with the different trade unions and associations, never losing sight of the fact that better working conditions for all will lead directly to the better delivery of health services to patients and setting out the shortcomings and difficulties faced by the institution, which are discussed with the union representatives of the bodies concerned.

261. The Government adds that the Director General for Administration in the Human Resources Management Unit of the Ministry of Finance of the government of the City of Buenos Aires sent a note that supports the observations made by the hospital management, to the effect that Ms Tarragona's reclassification was the result of an assessment of staff duties under the new system governing the administrative careers of city government officials, which has nothing whatsoever to do with her union activities; furthermore, the union official did not duly raise an objection to the measure challenged in this complaint in accordance with the procedural remedies at her disposal (Administrative Procedure Act).

C. The Committee's conclusions

262. *The Committee notes that, in this case, the complainant organization, the ATE, alleges that the authorities of the Dr Juan A. Fernández Hospital for Acute Medicine has, in a discriminatory way, failed to provide it with union premises for carrying out its trade union activities, has not given it a place for a bulletin board and that acts of anti-union harassment have been taken against one of its officials.*

263. *With regard to the allegation concerning the refusal to provide the ATE with premises for carrying out its trade union activities (according to the ATE, it has been demanding such premises since 2005 and the hospital has made premises available to another trade union), the Committee notes that, according to the hospital in question: (1) several trade union associations (SUTECBA, the UPCN, the ATE, the Association of Municipal Physicians, the Association of Professionals, etc.) operate in the institution, as do ordinary associations of psychologists, biochemists, nurses, pharmacists, etc., and that the number of social partners led to the signature in 2006 of Decision No. 5 in the Joint Sectoral Committee within the Ministry of Health; (2) in Decision No. 5, it was agreed that representation must meet objective requirements with regard to membership and that representation to that effect may be exercised when proof is provided that it has as a minimum the support of at least 10 per cent of hospital employees; (3) the ATE never provided proof of such support, but nevertheless the authority in question has never questioned the nature of minority representation in the institution and has always endeavoured to work with the trade union; (4) given the particular characteristics of the institution (it is a public hospital where priority is given to patient care and ongoing staff training) and, given that it is located in a building that cannot be extended, it does not currently have any free spaces that could be used for the purposes requested by the ATE; (5) nevertheless, studies are currently being carried out into possible architectural modifications that would make it possible to provide a physical space for the development of trade union activities.*

264. *In this respect, while noting the difficulties in the hospital with regard to making union premises available to trade unions, the Committee notes with interest that studies are being carried out to find a solution to this issue. The Committee recalls that Convention No. 151 provides in its Article 6 that: (a) facilities shall be afforded to the representatives of recognized public employees' organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work; (b) the granting of such facilities shall not impair the efficient operation of the administration or service concerned; and (c) the nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means. In these circumstances, the Committee*

expresses the hope that, taking into account the provisions of the abovementioned Convention, the ATE and the hospital authorities will be able to reach a satisfactory agreement in this respect.

265. *With regard to the refusal by the hospital authorities to provide a space for an ATE bulletin board, the Committee notes that, according to the Government: (1) on various occasions, it gave the ATE permission to put up a bulletin board on the fifth floor in the main staff entrance hall, which is an area that the entire hospital staff has to pass through, on the condition that the cost of the bulletin board would be covered by the ATE; (2) to date, no bulletin board has been put up in the space agreed upon with the representatives of that trade union, a situation that is not attributable to the hospital, which has stressed that the space is available; and (3) when a space was provided for the bulletin board, the union agreed that it would not post fliers on walls throughout the building. In the light of this information, the Committee will not pursue its examination of these allegations.*

266. *With regard to the allegation that acts of anti-union harassment have been taken against one of its officials, Ms Viviana Claudia Tarragona (according to the complainant, these include undue deductions of workdays – including those on which she applied for union leave – work overload during her shift as a result of a decision to withdraw staff and modification of her professional grade – and therefore her employment conditions – causing her material damage), the Committee notes that, according to the Government: (1) the trade union official in question is a nurse and works on Saturdays, Sundays and holidays in the out-of-hours medical unit, which provides a public service and deals with a high number of patients, especially during weekends, as the institution has an emergency medicine and trauma centre and receives many accident victims; (2) according to the director of the institution, it is common knowledge that there is a lack of trained nursing staff, in both the public and the private sectors, but there have nevertheless been ongoing efforts to make more nurses available in all of the hospital's departments, including the out-of-hours medical unit. Accordingly, in recent months there has been a significant increase in the nursing staff, especially in the out-of-hours medical unit, which has had a new addition of six nurses and, in the light of this, the allegation that nurses were withdrawn from the out-of-hours medical unit intentionally to do a disservice to Ms Tarragona cannot be sustained; (3) with regard to Order No. 298/DGARH/2008, under which, according to the ATE, Ms Tarragona was demoted to a lower grade; on 13 February 2008 there was a meeting of the CATA, a body comprising the department heads of the hospital's administrative and professional technical services, union representatives of the Association of Municipal Physicians and SUTECBA, and representatives of hospital management and, at the meeting, the SUTECBA representative reported that some members of the nursing staff were classified as being registered nurses but did not have the necessary qualifications and requested the hospital management to investigate the alleged irregularity; (4) an assessment was made of staff duties under the new system governing the administrative careers of city government officials, which found that four staff members were on a pay scale that was applicable to registered nurses, when they were qualified as licensed practical nurses; (5) Ms Tarragona and three other nurses were found to be in this situation. This information was sent to the Ministry of Finance, which issued the order that is now being challenged (No. 298/DGARH/22008) to adjust the grades of the staff members accordingly (this is a matter that falls within its area of competence, given that it concerns the classification of staff in accordance with the effective verification of their qualifications); (6) far from being a form of harassment, the grades were adjusted to reflect their actual qualifications. No other aspects of the reviewed situation or work situation of Ms Tarragona or her reclassified colleagues were changed in any way; (7) with regard to the days deducted for having applied for union leave, the deductions were made in April and May 2008 but were repaid in accordance with Note No. 2323 HGAJAF of 5 June 2008, and the deductions of September 2008 were also repaid, following the proper and timely submission of the relevant documentation;*

and (8) it is the spirit and policy of the hospital management to work in partnership with the different trade unions and associations, not losing sight of the fact that better working conditions for all will lead directly to the better delivery of health services to patients and setting out the shortcomings and difficulties faced by the institution, which are discussed with the union representatives of the bodies concerned. In the light of this information, the Committee will not pursue its examination of these allegations.

The Committee's recommendation

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

> ***The Committee expresses the hope that, taking into account the provisions of Convention No. 151, the ATE and the authorities of the Dr Juan A. Fernández General Hospital for Acute Medicine will be able to reach a satisfactory agreement with regard to granting premises so that the trade union can carry out its activities.***

CASE NO. 2670

DEFINITIVE REPORT

Complaint against the Government of Argentina presented by the Confederation of Education Workers of Argentina (CTERA)

Allegations: The complainant organization objects to a circular from the Ministry of Education of the Province of Tierra del Fuego, deeming that it violates the trade union right of teachers to participate in assemblies, and to a circular from the Department of Communication of the same province that restricts the possibility of issuing announcements

268. This complaint is contained in a communication from the Confederation of Education Workers of Argentina (CTERA) dated 29 September 2008.

269. The Government sent its observations in communications dated April and 26 May 2009.

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

A. The complainant's allegations

271. In its communication of 29 September 2009, the (CTERA) states that it considers that a legally detrimental situation has arisen that is prejudicial to education workers in the state of the Province of Tierra del Fuego, Antarctica and the Islands of the South Atlantic who

belong to the Unified Trade Union of Fuegian Education Workers (SUTEF), a first-level trade union body belonging to the CTERA, and that constitutes a flagrant disregard of internationally accepted principles which, in as much as they have been incorporated into Argentina's own legislation, guarantee freedom of association and freedom of expression.

272. On the basis of the above, the CTERA refers to the issuance of Circular No. 18/08 of 12 June 2008 by the Ministry of Education subordinate to the authorities of the province mentioned in the previous paragraph, referring to the open curtailment of the exercise of the right to trade union participation, in which the directors of educational establishments are instructed in an intimidating manner to give the names of teachers who have held assemblies between 1 April 2008 and the date of issuance of the said administrative act to the General Directorate of Staff of the Ministry of Education.

273. The CTERA indicates that Circular No. 18/08 provides that the information must be submitted on a daily basis and must contain the following details: (1) the teacher's name and surname; (2) personnel file number; (3) date on which the teacher first attended an assembly; (4) the extent of the teacher's teaching commitments; and (5) the amount of time involved. The CTERA also refers to Circular No. 02/08 of 1 September 2008 from the Department of Institutional Communication of the state of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic, addressed to the directors of educational establishments, which establishes that, as from 1 September 2008, "no official notices by any department or under any circumstances may be issued without prior authorization from the Department of Institutional Communication. As stated in the previous circular, the only exceptions are communiqués of population alerts, tenders, missing person's' notices, announcements of teaching posts and anything that must, by law, be broadcast. All others, irrespective of the urgency expressed by those concerned, must without exception be properly authorized".

274. According to Circular No. 02/08, the directors of educational establishments in the province are prevented from communicating, as had always previously been done, the condition of school buildings, meaning that in cases when establishments are not in a position to give classes appropriately, parents cannot be informed of this fact through the corresponding communiqués so that they do not send their children to school, bearing in mind the disruption that the inability to give lessons involves when parents do not receive prior notification. One example of this is where, for example, a school experiences a lack of gas supply. In the past this has been swiftly announced by the directors in public communiqués to parents aired on the province's state television Channel 11, in view of the very low temperatures, sometimes below zero, recorded in the world`s southernmost territory. Circular No. 02/08 now prohibits the directors of educational establishments from taking such action.

275. As can be seen, a blatant violation of freedom of association and expression is occurring, particularly as a result of the actions of the authorities of the province of Tierra del Fuego, through the Ministry of Education, Culture, Science and Technology, which is trying to exercise functions that are expressly outside its remit. The same thing applies to the actions of the Department of Institutional Communication.

276. With respect to the Ministry of Education Circular No. 18/08, the situation described is certainly due to a transgression of the Constitution and to certain legislative loopholes to which the State of Argentina as a whole must respond. Indeed, there is clear evidence that the problem relates to the State of Argentina, given the existence of other complaints made by the CTERA involving several of the nation's states, including the state of the Province of La Rioja, the state of the province of Nuequen and the state of the Province of Buenos Aires.

277. The CTERA considers that the employer's action transgresses the prevailing rules in that it alters and restricts the system established under Act No. 25551 by contravening the principle of legality (articles 28, 75, para 22, of the Constitution); by violating the principle of freedom of association through restrictions in violation of the principle of legality (article 75, para 22, of the Constitution; articles 16 and 30 of the Pact of San José de Costa Rica; Articles 5 and 8 of the International Covenant on Economic, Social and Cultural Rights; and article 8 of ILO Convention No. 87); by being highly discriminatory (article 75, para 22 of the Constitution; Articles 1, 2 and 7 of the Universal Declaration of Human Rights; article 1 of the Pact of San José de Costa Rica; and article 1 of Act No. 23592); by thwarting the guarantee of protection of trade union business established under article 14bis of the Constitution and interfering with the normal running of trade union activities. The CTERA adds that the Committee on Freedom of Association has had occasion to rule on similar allegations in its examination of Case No. 2223.

278. According to the CTERA, Circular No. 18/08 issued by the Ministry of Education of the province of Tierra del Fuego can be considered to be null and void, for it regulates issues over which it has no jurisdiction. More specifically, the monitoring of employment attendance that it regulates is already covered by provincial legislation, and there is no reason to require any further checks when an assembly is held. The purpose of Circular No. 18/08 is to require the directors of educational establishments to compile "lists" of education workers who attend assemblies convened by the trade union. The measure lacks several essential elements that administrative acts must contain. Firstly, it lacks a purpose, because attendance is already monitored and, secondly, it lacks a motive or else the motive (if it is to monitor assembly attendees rather than absentees) violates the Constitution.

279. Clearly, underlying the content of Circular No. 18/08 is the wish to present educational activities as "an essential service", as apparent in other regulations established by the state of the Province of Tierra del Fuego. It cannot be alleged, as inferred from the content of Circular No. 18/08 of the state of the Province of Tierra del Fuego, that all matters pertaining to the staff of the provincial authorities are always, and in all circumstances, the sole responsibility of the provinces; here, as in the matter of stability of employment or work, the abovementioned constitutional requirements are binding for the provinces in respect of their workforce. It is even acknowledged in international treaties "that enjoy constitutional status" that one of the highest general interests of the state is specifically to respect and uphold the rights derived from freedom of association.

B. The Government's reply

280. In its communications of April and 26 May 2009, the Government says that the legal basis of Circular No. 18/08 is Provincial Decree No. 2441 dated 1 December 2008, which approves the "methodology of relations between trade union associations and the provincial state". The Government considers it useful to quote two of the provisions contained in this decree, without prejudice to the consideration of the whole text:

> Article 1 stipulates: The "Methodology of relations between trade union associations and the provincial state" is approved in accordance with the guidelines set forth in Annex 1, which forms an integral part of this document, "without prejudice to the validity of what has been agreed through collective agreements or officially approved agreements in respect of aspects where this methodology contradicts them".
>
> In turn, Article 5 of Annex 1 stipulates: "When trade union associations convene staff to assemblies in the workplace, these may only be held at the end of the working day, and in the place assigned to that effect by the highest authority of the body or entity with jurisdiction over the building in which it is to be held".
>
> In the event of an extraordinary situation for which the trade union association requires an assembly to be held at the workplace and during the working day, it must request the

> corresponding authorization 12 hours in advance from the same authority as that shown in the previous paragraph.
>
> If the reasons given are valid, and in a period of more than six hours, the authority will issue the relevant administrative act authorizing the assembly to be held, taking the proper precautions to ensure the normal running of the workplace and due attention to the public.
>
> The administrative act will contain details of the physical location where the assembly is to be held. The assembly must display the proper decorum and the attendees shall not be authorized to move to other parts of the building.

In other words, this last article governs where and when assemblies are to be held, and the communications and authorizations required in this respect. This complies with Recommendation No. 143, as the administrative measure does not affect the work of the teaching staff in any way.

281. The Government also refers to the Supplementary Agreement Act of 10 November 2003, signed by the complainant organization and the provincial government, regulating the method of granting trade union leave for delegates and members of the trade union's staff committee, which fully complies with the previous regulation, most specifically article 3 of the Annex to Decree No. 2441/98 of 1 December 1998, which ensures compliance with the provisions of Convention No. 151. In other words, the complainant organization was fully aware of the existence of this decree and, in full exercise of the powers accorded to it in article 1 quoted above, that is to say "officially approved agreements", it signed an agreement setting forth the modalities governing trade union leave recognized for the members of the committee and the trade union leaders under Act No. 23.551, article 44. If these facts are being linked to Circular No. 18/08 now being challenged as requiring lists to be drawn up, there has been a failure to cite the regulation mentioned.

282. It is this failure by the union that was behind the decision of the Ministry of Education of the province to regulate the provisions of the decree in question. Priority has been given to the need to reconcile the rights of the workers with the objectives of the State, thereby avoiding disrupting their functions or harming the rights granted to the community as a whole in respect of the benefits the State is obliged to provide them with, without seeking in any way to infringe or violate any trade union rights. Furthermore, and although it is an obvious statement, educational institutions provide a service for a vulnerable sector of the population – children – and consequently the service should be ensured at all times.

283. The Government says that it is this fact that dictates the need to determine the number of teachers in attendance and the number of teachers absent attending assemblies or briefings in educational establishments throughout the province. In other words, it is necessary to monitor whether the number of teachers who are performing their tasks is sufficient to comply with the stipulated annual schedule and will not hinder the normal performance of educational tasks. This has nothing to do with the violation of trade union rights, and the disputed circular in no way violates the provisions of ILO Convention No. 87. Trade union rights, as has already been shown, are protected and regulated by rules not observed in this case by the complainant organization.

284. The Ministry of Education of the province, the agency which issued the measure in question, mentions, in concluding, the judicial decision of the National Civil Chamber, Division B, dated 22 December 1976, handed down in the case of *Manuel Blanco et al.* v. *the National Council of Education*, which stipulates that: "While a minor is at school, as the material custody of the child is transferred from the parents by circumstance, the vigilance and care of the child are the responsibility of the class teacher, and if the child comes to any harm the lack of vigilance must be questioned, in the very place where parents send their children to be watched over and monitored", to summarize the principal objective of its actions.

285. Regarding the reference to Case No. 2223 made by the complainant organization, the Government states that the right of assembly has not been violated as the possibility exists of establishing by common accord how to exercise this right (article 1, Decree No. 2441 of 1998), which does not imply its prohibition in any way. For the same reasons Article 6 of Convention No. 151 has not been violated either. Also, the possibility of negotiating exists and is absolutely viable, as demonstrated by the Agreement Act mentioned. According to the Government, it is wrong to draw any comparison with Case No. 2223.

286. With regard to Circulars Nos 001/08 and 002/08, having obtained the relevant information on Circular No. 002/08 of 1 September 2008, the Government states that the Department of Institutional Information of the Ministry of the Interior is responsible for the three public media sources in the province, namely Ushuaia Channel 11, Río Grande Channel 13 and radio station Radio Fundación Austral, headquartered in the capital of Tierra del Fuego. The public Fuegian channels are the only available broadcast television channels in the province, and as such, cater to a fundamental audience, both in terms of being an official source of public information as well as a source of entertainment for people who have neither cable nor satellite television.

287. Given their role of public and mass media and their strategic location in view of population distribution in the province (two urban centres 220 kilometres apart), the channels are also in considerable demand for the broadcasting of institutional information. This means that many of the province's public institutions, plus those associated with the State by way of circumstance, plus non-profit-making NGOs, exert considerable pressure on the channels to broadcast a wide variety of advertising. Most of the time this so-called institutional advertising is free of charge for public media broadcasters. We would mention, by way of example, that in April 2008, on Ushuaia Channel 11 alone, 100 institutional notices were being broadcast simultaneously.

288. The broadcaster's management felt that at that level of demand it was impossible to programme reasonable slots into the programme schedule, something that was exacerbated by other problems. In other words, any institution that needed to broadcast a message went to the channel through a representative. With the sole purpose of putting an end to this situation and to manage it more reasonably, the above department issued Circular No. 001/08 on 22 May 2008. This first regulation did no more than explain what has been stated in the previous paragraph, establishing that "all state bodies (including autonomous entities) and social organizations interested in broadcasting free institutional advertising on state channels" must adhere to a set of guidelines.

289. The circular stipulates that for the broadcasting of official notices, authorization will be required from the Department of Institutional Communication in order to coordinate the quantity of broadcasts and the urgency of the announcement. It should be noted that the circular refers to "free-of-charge institutional advertising", which in itself invalidates any other interpretation that could be made. In turn, in the second paragraph of the section entitled "for your approval" it says "exceptions to this rule are notices containing emergency information (population alerts, school closures, etc.), tenders, missing persons' notices, announcements of teaching posts and anything that must by law be broadcast, which can be submitted to the director of the broadcasting station". It is also expressly stated that notices containing urgent information are not included and, furthermore, specific mention is made of the fact that notices of school closures and even announcements of teaching posts are not covered by this rule.

290. It also establishes a series of requirements for the preparation (maximum duration 30 seconds, inclusion of the official logo in the closing credits) and editing (idea outline, texts to be presented orally or as stills, images) of the notices, in addition to other considerations. This confirms that the only purpose of the circular is to establish rules

governing free-of-charge institutional advertising. The requirements concerning maximum duration, closing credits, submission of images, etc. would be meaningless if the circular applied to regulating communiqués of school closures which, as the circular makes abundantly clear (perhaps anticipating complaints such as the ones that have been made) "can be submitted to the director of the broadcasting station". In the Government's view the complaint does not correspond to the actual facts or to the purpose of the object in question.

291. The Government adds that, following this sequence of events, in August 2008 the abovementioned department issued Circular No. 002/08, establishing 1 September of that year as the date of the entry into force of the order governing official advertising on the province's television channels. This circular establishes the procedure for authorizing official notices for the city of Río Grande and makes the directors of the channels and the editors-in-chief responsible for failure to comply with it. The circular also expressly exempts communiqués of population alerts which, in the previous circular, had been referred to as "school closures" and "emergency information", also in keeping with the original meaning of the first circular, in other words putting order into free-of-charge institutional advertising. This is entirely borne out in reality: there are no cases of complaints from any school directors who have been asked to request prior authorization to broadcast a communiqué of a school closure. There is no other way to interpret this text, unless the intention is to distort it.

292. By way of additional information, at the same time the circular was issued, a major dispute was under way between SUTEF and the provincial government concerning the application for a wage increase of 24 per cent that the trade union body considered had been granted at national level. The conflict included several work stoppages and assemblies, plus countless media exchanges, giving the views of officials and union leaders. During this conflict, the department in question played a vital role in guaranteeing the sectors' freedom of expression, with the three daily news bulletins giving the teachers' work stoppage broad coverage, taking special care to give each of the trade union leaders time to give their views, and covering each press conference and public statement made by the trade union.

293. The Government states that it could be thought that this is the role of the Department of Institutional Communication, but this is not the case: on 4 June 2008, there was a live televised broadcast of a meeting between the members of the executive committee of SUTEF and officials from the province's Ministry of Education. On that occasion the trade unionists challenged the Government officials to publicly debate the budget at a joint meeting. The following day, June 5, and in an unprecedented event in the country, Tierra del Fuego public television broadcast live throughout the province, for over ten hours, the public budget debate between trade unionists and Government members. During that period, the union, without any qualms, contracted advertising space on Ushuaia Channel 11 on which it ran spots about the conflict, and the director of Río Grande Channel 13 agreed to receive a large group of teachers who asked for space to make statements live, and minutes later a news flash of their claims was broadcast. All this was happening while a group of teachers were putting up a protest tent on the corner of the Governor's residence, and yet, this is the same television channel that SUTEF is now accusing of refusing to broadcast communiqués of school closures due to burst boilers.

294. The Government considers that the circulars in question have been issued with the sole aim of regulating the broadcasting of free institutional advertising on the public television channels of Tierra del Fuego, as can be seen from the wording of both regulations, with express clarifications made with respect to other types of official notices, such as those indicated by SUTEF in the complaint.

C. The Committee's conclusions

295. *The Committee observes that in this case the Confederation of Education Workers of Argentina (CTERA) is objecting to Circular No. 18/08 of 12 June 2008 issued by the Ministry of Education of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic, as it considers it in violation of the exercise of trade union participation; according to the CTERA, this circular requires the directors of educational establishments to provide the General Directorate of Personnel of the Ministry of Education with the names of teachers (the information must contain the name and surname; personnel file number; date on which the teacher first attended a trade union assembly; the extent of the teacher's teaching commitments; and the amount of time involved) who held assemblies between 1 April 2008 and the date of issue of the circular. The CTERA also objects to Circular No. 002/08 of 1 September 2008, issued by the Department of Institutional Communication of the state of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic, which affects the directors of educational establishments, who cannot currently use communiqués to provide information, in view of the provision that, as from 1 September 2008, no official notices by any department or under any circumstances may be issued without prior authorization from the Department of Institutional Communication; for example, directors cannot circulate information to warn that the establishment is not in a position to open. According to the complainant organization, these circulars violate freedom of association and are damaging to the province's education workers affiliated to SUTEF.*

296. *With respect to Circular No. 18/08 of 12 June 2008, issued by the Ministry of Education of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic, the Committee notes the Government's statement that: (1) the legal basis of the circular is Provincial Decree No. 2441 of 1 December 2008, which approves the methodology of relations between trade union associations and the provincial state and regulates, inter alia, when and where assemblies are to be held, and the communications and authorizations required in this respect; (2) likewise, a Supplementary Agreement Act, dated 10 November 2003, was signed by SUTEF and the provincial government, regulating the method of granting trade union leave for delegates and members of the trade union's staff committee; (3) SUTEF was fully aware of the existence of Decree No 2441 of 1998 and, in full exercise of the powers it accords, signed the Agreement Act setting forth the modalities governing trade union leave; (4) the Ministry of Education was obliged to regulate the provisions in Decree No. 2441, giving priority to the need to reconcile the rights of workers with the objectives of the state, avoiding disrupting their functions or adversely affecting the rights of the community; (5) educational institutions provide a service for a vulnerable sector of the population and the provision of that service should be ensured at all times – this fact dictates the need to determine the number of teachers in attendance and the number of teachers absent attending assemblies or briefings in educational establishments throughout the province; (6) it is necessary to monitor whether the number of teachers who are performing their tasks is sufficient to comply with the stipulated annual schedule and will not hinder the normal performance of educational tasks; this has nothing to do with the violation of trade union rights; and (7) the Ministry of Education of the province referred to a judicial decision of the National Civil Chamber, which provides that while a minor is at school, as the material custody of the child is transferred from the parents by circumstance, the vigilance and care of the child are the responsibility of the class teacher and if the child comes to any harm, the lack of vigilance must be questioned in the very place where parents send their children to be watched over and monitored.*

297. *In this regard, the Committee notes that while the Supplementary Agreement Act of 2003 aims to establish what is meant by union leave and the working time that can be used for such leave, Circular No. 18/08 of 12 June 2008, requires that information be provided*

on the teachers who participated in assemblies between April and June 2008. In these circumstances, considering that the aim of the circular being objected to is unclear, the Committee requests the Government to take the necessary measures to ensure that the competent authority of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic revokes or amends Circular No. 18/08 of 12 June 2008 in consultation with the workers' organization concerned.

298. *With regard to disputed Circular No. 002/08 dated 1 September 2008, issued by the Department of Institutional Communication of the state of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic which, according to the complainant organization, is targeted at the directors of educational establishments who can currently not use communiqués to provide information, for example to warn that the establishment is not in a position to open, establishing that, as from 1 September 2008, no official notices by any department, or under any circumstances, may be issued without prior authorization from the Department of Institutional Communication, the Committee notes the Government's statement that: (1) the Department of Institutional Information of the Ministry of the Interior is responsible for the three public media sources in the province (Ushuaia Channel 11, Rio Grande Channel 13 and radio station Radio Fundación Austral); (2) these public channels are the only available broadcast television channels in the Province and, as such, cater to a fundamental audience both in terms of being an official source of public information as well as a source of entertainment; (3) given their role of public and mass media and their strategic position in view of population distribution in the province, the channels are also in considerable demand for institutional information, which means that many public institutions, plus those associated with the state, plus non-profit-making NGOs, exert pressure on the channels to broadcast a wide variety of advertising; (4) in order to put an end to this situation and to manage it in a reasonable manner, Circular No. 001/08 was issued on 22 May 2008, and establishes that all state administrative bodies (including autonomous entities) and social organizations interested in broadcasting free institutional advertising on state channels must adhere to a set of guidelines (it is stipulated that for the broadcast of official notices authorization will be required from the Department of Institutional Communication, but official notices of emergency information such as population alerts or school closures are exceptions to this rule); (5) in August 2008, Circular No. 002/08 was issued, which specified 1 September 2008 as the date of the entry into force of the order governing official advertising on the Province's television channels, including the procedure for authorizing official notices for the city of Río Grande, making the directors of the channels responsible for failure to comply with this procedure (this circular expressly establishes communiqués of population alerts and school closures as exceptions to this rule); (6) there are no cases of complaints from any school directors who have been asked to request prior authorization to broadcast a communiqué of a school closure; (7) at the time the circular was issued there was a conflict between SUTEF and the provincial government concerning a request for a wage increase and during that dispute the freedom of expression of the sectors was guaranteed so that the trade union officials had time to appear on the news, and (8) the circulars in question have been issued with the sole aim of regulating the broadcasting of free institutional advertising on the public television channels.*

299. *Given this information and the fact that the complainant organization neither alleges that Circular No. 002/08 has been used in a discriminatory manner in respect of its members, nor highlights any obstacles in practice to the exercise of the right of expression by trade union officials, the Committee will not pursue its examination of these allegations.*

The Committee's recommendation

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

The Committee asks the Government to take the necessary measures to ensure that the competent authority of the Province of Tierra del Fuego, Antarctica and the islands of the South Atlantic revokes or amends Circular No. 18/08 of 12 June 2008, in consultation with the workers' organization concerned.

CASE NO. 2646

INTERIM REPORT

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

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

301. The complaint is contained in a communication of the National Federation of Metro System Transport Enterprise Workers (FENAMETRO) dated 9 May 2008.

302. The Government sent its observations in a communication dated 26 September 2008.

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

A. The complainant's allegations

304. In its communication of 9 May 2008 the complainant organization states that Compañia do Metropolitano de São Paulo is a public enterprise which forms an integral part of the administrative structure of the Government of the State of São Paulo. The complainant organization alleges that, as the sole holder of its capital stock, the enterprise has unduly interfered in the free organization and trade union activities of the metro workers by carrying out dismissals in reprisal for strike action. Moreover, the complainant organization alleges that the Government of the State of São Paulo publicly admitted that it intended to recruit workers on a permanent basis with the sole and deliberate aim of replacing any workers participating in strike action carried out by the Union of São Paulo Metro System Transport Enterprise Workers (Sindicato dos Trabalhadores em Empresas de Transporte Metroviários de São Paulo) in order to undermine such action. According to the complainant organization, the situation is all the more serious given that the federal bodies of the Federative Republic of Brazil, in particular the Ministry of Labour and Employment, the Labour Public Prosecutor's Office and the labour courts, which are responsible for supervising compliance with labour legislation and the prevention of such practices throughout the country, have failed to effectively combat and suppress the clearly discriminatory practices of the Government of the State of São Paulo and the Compañia do Metropolitano de São Paulo enterprise, to the detriment of the free organization and trade union activities of São Paulo metro workers.

305. The complainant organization states that on 23 April 2007 the São Paulo metro workers launched a work stoppage in protest at the possibility of the executive branch vetoing "Amendment No. 3", a draft bill under which federal inspectors would no longer have the authority to declare the existence of an employment relationship where an inspected enterprise is clearly found to be evading labour legislation. The complainant organization alleges that immediately following the work stoppage, on 24 April 2007, Compañia do Metropolitano de São Paulo dismissed five officials of the Union of São Paulo Metro System Transport Enterprise Workers (Paulo Roberto Pasín, Pedro Augustinelli Filho, Ronaldo de Oliveira Campos, Alex Fernándes Alcazar and Ciro Moraes), claiming that the trade union officials had sabotaged the operation of trains in the enterprise, as well as disconnecting the electricity in the vicinity of Sέc metro station. The complainant organization states that it is clear from the above information that the trade union officials were dismissed as a result of the work stoppage and that the enterprise then proceeded to carry out the dismissals without taking the appropriate measures in regard to the accusations levelled at the workers. This demonstrates that the trade union officials were dismissed because of their participation in trade union activities. According to the complainant organization, the dismissals are all the more discriminatory in the light of the fact that the enterprise dismissed the workers without having conducted an investigation into the acts of vandalism of which the workers and trade union officials were accused.

306. The complainant organization adds that, on 1, 2 and 3 August 2007, the São Paulo metro system workers held a work stoppage in protest at the policy of Compañia do Metropolitano de São Paulo concerning employee profit sharing. At the time the workers were demanding payment of a fixed amount, to be divided equally among the employees, as had been the practice in the enterprise for over ten years. According to the complainant organization, the enterprise submitted a proposal to alter this practice by establishing a system whereby employees would receive an amount in proportion to their wages. Once the work stoppage was over, in a clear act of reprisal, the Government of the State of São Paulo ordered Compañia do Metropolitano de São Paulo to dismiss 61 workers who had taken part in the stoppage.

307. The complainant organization alleges that the group of workers dismissed includes an official of FENAMETRO, six officials of the Union of São Paulo Metro System Transport Enterprise Workers and another three candidates for office in the latter organization, which was scheduled to hold elections between 10 and 14 September 2007. The complainant organization states that the Governor of the State of São Paulo himself not only publicly admitted the repressive and intimidatory nature of the dismissals, but also described the actions of the Union of São Paulo Metro System Transport Enterprise Workers as political and opportunistic. More specifically, he stated in the media that the dismissal of 61 employees of Compañia do Metropolitano de São Paulo was intended as a response from the Government and the metro itself to the working population of São Paulo and that the measures were aimed at preventing any future work stoppages either by the metro workers or by any other category of public servant or employee of the Government of the State of São Paulo.

308. The complainant organization considers that although the competent judicial authority ruled that the work stoppage was abusive, this alone does not justify the dismissal of trade union officials and workers for having participated in it. The only effect of that legal decision should be for the workers to resume their normal duties; to do otherwise would be to authorize government intimidation and reprisals, in violation of Convention No. 98.

309. FENAMETRO adds that in addition to the abovementioned violations of the principles of freedom of association, the Government of the State of São Paulo and Compañia do Metropolitano de São Paulo publicly announced that they planned to hire 100 workers on a permanent basis, with the sole aim of replacing any metro workers participating in future

work stoppages. According to the Secretary for Metropolitan Transport of the Government of the State of São Paulo, 60 of the 100 workers to be hired on a permanent basis will be supervisors, making it extremely difficult for them to join a union because they will be in positions of authority. The recruitment of these replacement workers on a permanent basis was announced on the *Universo OnLine* news portal, as well as in the *O Estado de São Paulo* newspaper. According to the complainant organization, the aim of Compañia do Metropolitano de São Paulo is to have sufficient replacement workers to keep all of its train services running, thus rendering any strikes held by the workers ineffective. According to FENAMETRO, if the plan to hire replacement workers on a permanent basis goes ahead, it will undermine any trade union action undertaken by the workers of the São Paulo metro system in order to organize independently, and more specifically, to achieve a balance of power between workers and employers in determining working conditions. It is precisely for this reason that Brazilian legislation governing strike action only authorizes the hiring of replacement workers in exceptional cases, for the duration of the strike and not, as the Government of the State of São Paulo intends, on a permanent basis.

310. FENAMETRO adds that in mid-1997 the Government of the State of Rio de Janeiro granted the Opportrans SA enterprise permission to operate metro lines and stations in the city of Rio de Janeiro. That enterprise began operations one year later, on 5 April 1998. Since then the Union of Metro System Transport Enterprise Workers of Rio de Janeiro (SIMERJ), an affiliate of FENAMETRO, has filed complaints with the competent authorities concerning various problems related to the precarious working and safety conditions experienced by the workers. Owing to the fact that the enterprise has failed to resolve the issues raised by SIMERJ, dialogue between the trade union and the enterprise has become difficult over the last few years.

311. Relations between SIMERJ and the enterprise reached an all-time low on the eve of a collective bargaining process scheduled for April 2007, when the enterprise dismissed two SIMERJ trade union officials, Joaz Paim Barbosa and Joao Fernándes Correa, in order to prevent them from participating in the negotiations concerning the agreement. The complainant organization adds that the enterprise also refused to recognize the members of the ordinary executive committee as trade union officials, and argued that under an earlier agreement the number of trade union officials was limited to seven.

312. The complainant organization adds that at the time of their dismissals, the trade union officials in the Opportrans SA enterprise were officers, as well as candidates to serve on the bargaining committee, the members of which were to be elected during the general assembly of 27 April 2007, that was to represent SIMERJ at the abovementioned meetings. The complainant organization considers that the trade union officials were dismissed in order to undermine and intimidate the SIMERJ delegation that planned to participate in the upcoming collective bargaining process. The Organization points out that in the wake of the election of trade union officials Barbosa and Correa, the management of Opportrans SA refused to initiate the bargaining process while the officials in question remained members of the SIMERJ delegation. The complainant organization stresses that the Government, as the body responsible for ensuring compliance with labour legislation, must take steps to ensure that the dismissed trade union officials are reinstated.

313. The complainant organization states that in the sphere of the public administration, the competent bodies (the Ministry of Transport, the Ministry of Labour and Employment, the regional labour offices and the Secretariat of Transport of the State of Rio de Janeiro) have failed to inspect the enterprise and prohibit it from engaging in discriminatory practices. Regarding legislation, Brazilian law does not expressly recognize the concept of anti-union acts, and there is no protective mechanism in place to prevent discrimination against workers on account of their membership of a trade union. The legal protection conferred on the officials of bodies representing workers has proved to be insufficient to ensure

freedom of association. The relevant legislation (article 8, paragraph VIII, of the Federal Constitution and sections 543(3) and 522 of the Consolidated Labour Laws) is currently interpreted by the courts in such a way as to limit job security to a specific number of trade union officials (20 members maximum), regardless of the size and structure of the trade union organization.

314. In the case of SIMERJ, this restrictive interpretation prevents the trade union organization from extending the right to job security to members of the financial board and shop stewards of SIMERJ who carry out their duties on the shop floor and are thus subject to interference and pressure on the part of the employer. Deprived of job security, the members of the financial board and shop stewards of SIMERJ are defenceless in the face of the discriminatory practices of the management of Opportrans SA. Consequently, their trade union activities are undermined, which in itself reflects an imbalance which constitutes a blatant violation of the principle of freedom of association. According to FENAMETRO, the Federative Republic of Brazil has clearly failed to implement measures to combat anti-union practices in the Rio de Janeiro metro system. The complainant organization states that it has presented this complaint so that the Government of Brazil will be made to take concrete steps to prohibit anti-union practices by the Government of the State of São Paulo, the Compañia do Metropolitano de São Paulo enterprise and the Opportrans SA enterprise.

B. The Government's reply

315. In its communication dated 26 September 2008, the Government states that, together with the Ministry of Labour and Employment, it is committed to prohibiting anti-union practices and to finding a legal solution to unjustified dismissals that occur in the labour market, as reflected in the allegations in this case. One example of the action already taken is the submission to the National Congress of a proposal for ratification of Convention No. 158. That Convention had previously been approved by the Congress of Brazil in September 1992, but was subsequently denounced and has not been in force since December 1996 as a result of a direct application for unconstitutionality lodged by the National Confederation of Industry (CNI). At the time it was argued that it would be extremely difficult to apply the Convention in the absence of any regulation of article 7, paragraph I, of the Federal Constitution, which provides for the protection of workers against arbitrary dismissal or dismissal without just cause. As a result of Constitutional Amendment No. 45, the trade unions requested that the ratification of the Convention be examined. This request was met by the Government in 2007 and the matter was referred for discussion by the Tripartite Committee on International Relations (CTRI), a tripartite advisory body of the Ministry of Labour and Employment.

316. In a meeting held on 24 October 2007, the CTRI issued an opinion on the matter and, against opposition from employers, decided to recommend to the Minister of State for Labour and Employment, in accordance with the provisions of its internal regulations, that Convention No. 158 be sent to the National Congress for consideration. The Government points out that the decision to send the Convention to the National Congress for consideration is supported by the most representative trade union confederations and by the National Association of Labour Magistrates, which groups together labour judges from all over the country.

317. The Government considers that ratification of the abovementioned Convention will make it possible to address one of the most important problems affecting Brazil's labour market today: high employee turnover, which is used as a means of reducing wage costs and labour's share in national income. This Convention is currently being examined by the Foreign Relations Committee of the Chamber of Deputies, and the Government is doing everything possible to ensure its approval by Congress and ratification of this important

instrument to combat unjustified dismissals such as those which occurred in this case in the State of São Paulo. The Government points out that the initiative concerning ratification of Convention No. 158 is part of a set of government measures aimed at democratizing labour relations so that the national legal system will include more comprehensive regulation of anti-union practices, which is currently lacking.

318. With regard to the allegations of anti-union acts in the city of Rio de Janeiro, the Government finds it unacceptable that trade union officials, in the exercise of the office entrusted to them by their co-workers, should have suffered such a gross violation of their rights, which are guaranteed by the Constitution of Brazil itself. In accordance with the provisions of Convention No. 98, the Constitution guarantees job security for all trade union officials and their substitutes who are elected by workers (article 8, paragraph VIII). The greatest difficulty faced by the Government in taking more decisive measures, such as reinstating workers in the enterprise, lies in the fact that, although freedom of association is guaranteed under the Constitution, and although the law provides protection from certain violations (as is the case of the Strike Act), there is no definition of anti-union conduct in the national legal system. This prevents the social partners and even the Ministry of Labour and Employment from taking effective preventive and repressive measures against conduct such as that which occurred in the city of Rio de Janeiro, referred to in the complaint.

319. The Government points out that, in order to resolve this issue, together with workers and employers within the National Labour Forum (FNT), it has prepared a proposal for trade union reform which includes a definition of anti-union acts and penalties which may be imposed on offenders by the Ministry of Labour and Employment. The draft Bill on trade union relations (No. 369/05), currently in the final stages before the National Congress, contains a list of situations which constitute anti-union conduct. Any act intended to prevent or obstruct trade union activity by employers or workers shall be deemed to be an anti-union act and the offender may be liable to penalties. Under this proposal, the following shall constitute anti-union conduct: making recruitment or continued employment subject to membership, non-membership or termination of membership of a trade union organization; dismissing or discriminating against a worker on the grounds of his or her membership or activities in a trade union organization, participation in a strike or representation of workers in the workplace; granting less favourable financial treatment in a discriminatory manner on the grounds of trade union membership or activity; inciting workers to request their exclusion from proceedings initiated by a trade union organization in defence of their individual rights; forcing a worker to return to work, obstruct or hinder the exercise of the right to strike; hiring workers outside the purview of the law with the aim of replacing workers on strike; and violating the duty of good faith in collective bargaining. Under the provisions of the draft Bill, the perpetrators of anti-union acts may also be workers. The Government emphasizes that any sound proposal to resolve this issue must reflect the provisions of Conventions Nos 98 and 135, which have been ratified by Brazil. The proposal must also establish effective mechanisms for the imposition of penalties on offenders, which is meeting with considerable resistance from Brazil's employers. The Government indicates that the proposal put forward by the FNT fills the legislative gap by defining the anti-union acts which may be committed by workers and employers, while at the same time imposing penalties which ensure the effectiveness of the legislation. The Government explains that it was not possible to reach a consensus in the FNT on the issue of penalties, in particular with regard to the amount of the fine to be imposed for anti-union conduct. The employers' opposition to stipulating the amount of the fines has effectively contributed to delaying the passage of the draft Bill in the National Congress, but has in no way diminished the Government's expectation that the draft will be approved as soon as possible. It is a battle of wills, which is typical in a democratic society, in which the different interests of society have to be taken into account.

320. Lastly, the Government denies that it fails to react to situations such as those described in this case. The Regional Labour and Employment Authority (formerly the Regional Labour Office) played an appropriate and important role in handling the case referred to in the City of Rio de Janeiro. The Labour Inspectorate recently recruited over 200 new officials, which demonstrate that the prevention of anti-union practices such as those alleged in this case is a constant concern. The Government is committed to taking measures on several fronts: on the one hand through amendments to legislation in order to put in place an appropriate national legal framework and, on the other, through labour inspection, which is first and foremost in the workers' own interest.

C. The Committee's conclusions

321. *The Committee observes that in the present case the complainant organization alleges that the Compañia do Metropolitano de São Paulo enterprise dismissed five trade union officials (referred to by name in the allegations) belonging to the Union of São Paulo Metro System Transport Enterprise Workers on 24 April 2007 and 61 workers (including a FENAMETRO official and six officials of the abovementioned trade union) in August 2007 for having participated in work stoppages and that the enterprise announced the recruitment of 100 workers to replace any workers participating in future strikes; furthermore, the complainant organization alleges that the Opportrans SA enterprise, which operates the metro lines and stations in the City of Rio de Janeiro, dismissed two officials (referred to by name) of the Union of Metro System Transport Enterprise Workers of Rio de Janeiro (SIMERJ) on the eve of a collective bargaining process scheduled for April 2007, with the aim of undermining and intimidating the SIMERJ delegation that was to participate in the upcoming collective bargaining process, and that the enterprise refuses to recognize the members of the executive committee as trade union officials.*

322. *The Committee notes that the Government reiterates its previous replies in Cases Nos 2635 and 2636, recently examined by the Committee [see 353rd Report, paras 435–468], to the effect that: (1) it is committed to finding a legal solution to the unjustified dismissals that occur in the labour market, as reflected in the allegations in this case. An example of this commitment is the submission to the National Congress of a proposal for ratification of Convention No. 158; (2) the initiative concerning ratification of that Convention is part of a set of measures aimed at democratizing labour relations so that the laws of Brazil will include more comprehensive regulation of anti-union practices, which is currently lacking in the legislation; (3) although freedom of association is protected under the Constitution, the national legislation does not define anti-union acts, and this prevents the Ministry of Labour and Employment from taking effective preventive and repressive measures against conduct such as that reported in this case; (4) in order to resolve this issue the Government, together with workers and employers within the National Labour Forum (FNT), has prepared a proposal for trade union reform (No. 369/05, currently in the final stages before the National Congress) which contains a more complete definition of anti-union acts and provides for penalties which may be imposed on offenders by the Ministry of Labour and Employment; (5) the draft Bill on trade union relations currently before the National Congress contains a list of situations which constitute anti-union conduct (making recruitment or continued employment subject to membership, non-membership or termination of membership of a trade union organization, dismissing or discriminating against a worker on the grounds of his or her membership or activities in a trade union organization, participation in a strike or representation in the workplace, etc.); (6) any sound proposal to resolve this issue must reflect the provisions of Conventions Nos 98 and 135 and establish effective mechanisms for the imposition of penalties on offenders, a point which raises differences of opinion between employers and workers as to the amount of the fines to be imposed for anti-union conduct; (7) the proposal put forward by the FNT fills the legislative gap by defining the anti-union acts which may be committed by employers and workers, while at the same time imposing penalties which ensure the effectiveness of*

the legislation; and (8) it was not possible to achieve a consensus in the FNT on the issue of penalties, in particular with regard to the amount of the fine to be imposed for anti-union conduct, but while this has delayed the passage of the draft Bill in the National Congress, it has in no way diminished the Government's expectation that the draft will be approved as soon as possible.

323. *In these circumstances, noting that the Government acknowledges the allegations and considers the events occurring in Rio de Janeiro to be a gross violation of the trade union rights guaranteed by the Constitution, describes the dismissals carried out in São Paulo as unjustified and adds that the absence of a complete definition of anti-union acts prevents the social partners and even the Ministry of Labour and Employment from taking effective preventive and repressive measures, the Committee requests the Government to take without delay all measures within its power to ensure as a matter of priority the reinstatement without loss of wages of the trade union officials and workers dismissed at the abovementioned company in the transportation sector of São Paulo enterprise for having participated in the work stoppages of 23 April and 1, 2 and 3 August 2007, as well as the reinstatement of those trade union officials dismissed from the abovementioned company in the transportation sector in Rio de Janiero on the eve of a collective bargaining process in April 2007; if the competent authorities determine that reinstatement of the trade union officials is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of any developments in this respect.*

324. *Furthermore, the Committee requests the Government to take all necessary measures to carry out an investigation into the allegations regarding: (1) the recruitment of workers in the abovementioned company in the transportation sector in São Paulo to replace any workers participating in future strikes; and (2) the refusal by the abovementioned company in the transportation sector in Rio de Janeiro to recognize the members of the executive committee of SIMERJ as trade union officials, and to keep it informed in this respect.*

325. *Lastly, while welcoming the steps taken to adopt a draft Bill for trade union reform that includes a more complete definition of anti-union acts and provides for penalties for offenders which may be imposed by the Ministry of Labour and Employment, the Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case in regard to the application of Convention No. 98.*

The Committee's recommendations

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

(a) The Committee requests the Government to take without delay all measures within its power to ensure as a matter of priority the reinstatement without loss of wages of the trade union officials and workers dismissed from the Compañia do Metropolitano de São Paulo enterprise for having participated in the work stoppages of 23 April and 1, 2 and 3 August 2007, as well as the reinstatement of those trade union officials dismissed from the Opportrans SA enterprise on the eve of a collective bargaining process in April 2007; if the competent authorities determine that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such

acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of any developments in this respect.

(b) The Committee requests the Government to take all necessary measures to carry out an investigation into the allegations regarding: (1) the recruitment of workers in the abovementioned company in the transportation sector in São Paulo enterprise to replace any workers participating in future strikes; and (2) the refusal by the abovementioned company in the transportation sector in Rio de Janeiro to recognize the members of the executive committee of the SIMERJ as trade union officials, and to keep it informed in this respect.

(c) While welcoming the steps taken to adopt a draft Bill for trade union reform that includes a definition of anti-union acts and provides for penalties for offenders which may be imposed by the Ministry of Labour and Employment, the Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case in regard to the application of Convention No. 98.

CASE NO. 2655

INTERIM REPORT

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

Allegations: Unfair dismissals, acts of anti-union discrimination, and the refusal to negotiate with the trade union concerned

327. The complaint is contained in a communication from the Building and Wood Workers' International (BWI) dated 16 June 2008.

328. As a consequence of the lack of a reply on the part of the Government, at its May–June 2009 meeting [see 354th Report, para. 9], the Committee launched an urgent appeal and drew the attention of the Government to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report (1972), approved by the Governing Body, it may present a report on the substance of this case even if the observations or information from the Government have not been received in due time.

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

A. The complainant's allegations

330. In its communication of 16 June 2008, the complainant states that its affiliate, the Cambodian Construction Workers Trade Union Federation (CCTUF), was established in 2002 and began to organize workers employed in the restoration projects at the Angkor

Wat temples, in the city of Siem Reap. Workers at these restoration sites are employed for two to three years, a greater period compared to other construction workers working in the construction of hotels and the building of roads in Siem Reap. Despite their more "stable" employment, these workers began to organize at a number of the restoration sites to increase their wages, ensure safety standards and improve their working conditions.

331. CCTUF member unions were formed in project sites operated under the Japanese Government Team for Safeguarding Angkor (JSA), Sophia University (SOPHIA), École française d'Extrême-Orient (EFEO), and other restoration sites. A trade union was also established to represent the workers hired to maintain the environment surrounding the Angkor Wat complexes by the Authority for the Protection and Management of Angkor and the Region of Siem Reap (APSARA). Additionally the CCTUF, which currently has approximately 3,500 members, had started to organize community-based workers and employees in hotel construction sites. The CCTUF unions have gained most representative status, as required by the Cambodian Labour Law, to represent their members in collective negotiations with their employers. At the same time, they were registered with the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY), based on the requirements set out in the Labour Law – which guarantees freedom of association and the right to strike, and provides for collective bargaining.

332. Despite repeated attempts to gain union recognition and the presentation of various collective bargaining proposals, the CCTUF has been recognized only by the EFEO, with which it finally signed a collective bargaining agreement on 15 December 2006. The union has otherwise faced continuous discrimination from the APSARA, the Japan–APSARA Safeguarding Angkor Authority (JASA) – formerly known as JSA – and Angkor Golf Resort, and had filed several complaints to the MOSALVY citing violations of Cambodian labour laws at these various sites. However, the Government has failed to either respond to the union or resolve the disputes in an adequate and equitable manner.

333. As concerns the APSARA, the complainant indicates that the latter is a for-profit, quasi-governmental agency whose mission is to build networks with the international community in order to protect, conserve, and increase the value of the Angkor Wat temple complexes. APSARA employs at least 250 workers to maintain the environment surrounding Angkor Wat. Its employees organized and established the Angkor Preservation Workers Trade Union in APSARA – a member of the CCTUF – on 27 May 2006. The union was registered and certified by the MOSALVY on 26 June 2006.

334. On 7 August 2006, the CCTUF, on behalf of its member union, submitted a letter to the APSARA requesting a discussion on the latter's practices that violated the Cambodian Labour Law, which included the intimidation of workers for joining the union and the failure to: provide workers with paid public holidays; establish a clear date for the payment of wages and pay wages in a timely fashion; provide 90-day maternity leave and benefits for all women workers; provide adequate working materials such as cleavers, plastic bags, rain-coats, sweepers, etc.; provide 18 days of paid annual leave for all workers who had been working for one year; cover the costs of work-related accidents; and provide paid special leave in case of the death of a family member.

335. The complainant adds that after the APSARA failed to respond to the union's request for discussion and negotiation, the union submitted another request for recognition and negotiations on 9 August 2006. Having again failed to receive a reply, the union submitted a complaint to the Siem Reap Provincial Labour Department on 5 September 2006, but received no response.

336. On 21 December 2006, Mr Borin, a supervisor in the APSARA's Department of Water and Tree Conservation, called all workers who had joined the union for a meeting, in which he

informed them that should they want to continue working at the APSARA, they must disaffiliate from the union and resubmit their employment application forms by 28 December 2006. Mr Borin later requested one of his colleagues, Mr Pav, to list the names of all workers who "wanted to resign from the union". On 22 December 2006, 14 union leaders and activists were unfairly dismissed by Mr Borin.

337. In response, the CCTUF submitted a complaint to the Siem Reap Provincial Labour Department on 25 December 2006, to intervene and mediate negotiations between the union and the APSARA. On 22 March 2007, the union and the APSARA met with the Siem Reap Provincial Labour Department, and the APSARA verbally agreed to rescind the dismissal of any worker absent for five days and claim responsibility for workers injured on the job. However, the APSARA refused to reinstate the 14 dismissed workers dismissed in December 2006 for their trade union activities; it also refused to provide for paid public holidays and paid maternity leave, in accordance with the provisions of the Labour Law. The Provincial Labour Department mediator subsequently promised to submit the unresolved issues to the Arbitration Council.

338. On 5 July 2007, the CCTUF submitted a complaint to MOSALVY seeking its intervention, as the case had not been sent to the Arbitration Council. However, MOSALVY decided to permit the Provincial Labour Department to continue seeking a resolution to the dispute. On 14 September 2007, the Provincial Labour Department held a conciliation meeting with the CCTUF and the APSARA, which failed to resolve the outstanding issues. The Provincial Labour Department contacted both the union and the APSARA for a mediation meeting on 25 October 2007. However, the APSARA failed to attend the meeting and has, to date, provided no response. Additionally, neither MOSALVY nor the Provincial Labour Department have pursued further measures in this respect, or forwarded the matter to the Arbitration Council. The complainant maintains that the failure by the authorities to forward the matter is a violation of both the Cambodian Labour Law and ILO Convention No. 87.

339. The complainant indicates that on 28 February 2005, JSA terminated all employment contracts with trade union leaders and activists and completely closed its restoration project site. It reopened operations on 27 March 2006 under its new name – JASA – at a different restoration site, from Souprat to Bayon temple, while maintaining the country office in the original location, and the same financial support and operating director. Close to 90 per cent of the workers previously employed at JSA were rehired at JASA, with the exception of 16 union leaders and activists who were deliberately not re-employed.

340. On 23 January 2007, the local union submitted a letter to JASA management, seeking re-employment for the 16 union leaders and activists who had formerly worked at JSA. On 8 February 2007 the CCTUF submitted another letter, and a third on 12 April 2007 to have the 16 union leaders and activists re-employed. The complainant states that as JASA's full name (the Japan–APSARA Safeguarding Angkor Authority) indicates, the APSARA has some responsibilities delegated to it within JASA, and that the JSA/JASA management had used to deflect any responsibility by maintaining that the APSARA was responsible for human resources management, while it was responsible for technical assistance with UNESCO. The complainant indicates that on 2 March 2007, the JSA union's certification expired. Even though the union wishes to renew its certification at JASA, holding new elections has proven difficult, as the leadership has not been rehired and members are unwilling to meet them as they recognize this would lead to the termination of their current employment contracts.

341. With no response from JASA, the union filed a complaint with MOSALVY on 25 April 2007, as well as with the Siem Reap Provincial Labour Department on 30 August 2007. The CCTUF submitted a reminder letter that included all of the union's pending cases –

involving the APSARA, JASA, and the Angkor Golf Resort – to MOSALVY on 5 July 2007. MOSALVY sent a letter to the Provincial Labour Department, requesting the latter to resolve all the pending issues, but to date the union has not seen any resolution to its cases. The complainant contends that the Government's failure to undertake measures in respect of the dismissed workers violates both the Cambodian Labour Law and ILO Convention No. 87.

342. As concerns the Angkor Golf Resort, the complainant states that a union was established at the latter on 13 January 2007, with 95 workers from the site electing its leadership. The union was named the Construction Workers Trade Union of Angkor Golf Resort (CWTU) and was certified by the Ministry of Labor and Vocational Training on 25 April 2007. On 12 February 2007, the CWTU and the CCTUF submitted a letter to the employer requesting negotiations over several issues, including: wages, working hours, injury compensation, holiday pay, and workplace safety and health standards. The complainant states that the Angkor Golf Resort had failed to comply with the minimum standards concerning the above areas – as laid down in national laws and regulations.

343. The complainant indicates that on 28 February 2007, the employer's representative met with the union to negotiate on the union's demands. The negotiations were unsuccessful, and on that same day Yun Sokha, the union's President, was informed by her supervisor that her employment was terminated – without sufficient explanation as to the reason for her dismissal. On 7 April 2007, the management suddenly announced that it would suspend its operations and resume on 25 April 2007. On 27 April 2007, the management called all the workers who had not joined the union and those members who had agreed to disaffiliate from the union – approximately 55 workers in all – to resume work. Yun Sokha, the President of the union and Thy Sothea, Vice-President of the union along with 40 other workers were not rehired as they had refused to resign from the union.

344. The complainant states that on 9 June 2007, the CCTUF filed a complaint to the Siem Reap Provincial Labour Department, seeking reinstatement for Yun Sokha, Thy Sothea and the 40 other trade unionists, but failed to receive a response. The CCTUF submitted a reminder letter on 5 July 2007, in which all the pending cases were mentioned, but all of those cases remain unresolved. The complainant concludes by contending that in all three cases – the APSARA, JASA and the Angkor Golf Resort – the Government has failed to adequately protect workers from violations of their freedom of association rights.

345. Finally, several documents are attached to the complaint, including excerpts from the Cambodian Labour Law and copies of three Notifications issued by MOSALVY concerning the internal rules of enterprises, the provision of toilets, and the most representative status of enterprise unions. The notification concerning most representative status of enterprise unions, *Prakas* No. 305 of 22 November 2001, stipulates in section 9, that "the union having most representative status has the right to request the employer to negotiate a collective agreement, which applies to all employees represented by that union. In this case, the employer has the obligation to negotiate with the union."

B. The Committee's conclusions

346. *The Committee deplores that, despite the time that has elapsed since the complaint was first received, the Government has not provided any information, 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 strongly urges the Government to be more cooperative in the future.*

347. *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.

348. *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.*

349. *The Committee further regrets that the failure of the Government to reply restricts the capacity of the Committee to examine any additional or other information relating to the enterprise which could have been brought forward by the relevant employers' organization in the country.*

350. *The Committee notes that the present case involves allegations of acts of anti-union discrimination, including unfair dismissals, at three workplaces. According to the complainant, on 21 December 2006, the APSARA, apparently after having ignored repeated requests from the union for negotiations, issued a statement demanding that its employees renounce membership in the union concerned, should they wish to retain their employment, and on 22 December 2006, dismissed 14 union leaders and activists. On 28 February 2005, JSA terminated its employment contracts with trade union leaders and activists and closed its restoration project site. It resumed operations on 27 March 2006, at a different restoration site under its new name, JASA, and retained 90 per cent of the workers previously employed at JSA – but did not re-employ 16 union leaders and activists. Finally, as concerns Angkor Golf Resort the complainant indicates that the President of the union concerned, Yun Sokha, was dismissed without sufficient reason on 28 February 2007 – the same day on which inconclusive negotiations with the union were held. The management also suspended its operations on 7 April 2007 and resumed operations approximately three weeks later, calling back only those workers who either had not joined the union or had agreed to renounce membership therein; Yun Sokha, union Vice-President Thy Sothea and 40 others who had refused to resign from the union were not rehired.*

351. *The Committee further notes the complainant's indications concerning the inadequacy of the relevant authorities' responses to the matters noted above. With respect to the APSARA, according to the allegations the Siem Reap Provincial Labour Department attempted conciliation on 22 March and 14 September 2007; in both instances the APSARA refused to reinstate the 14 dismissed trade union leaders and activists. The APSARA also allegedly failed to attend a conciliation meeting scheduled for 25 October 2007, and neither the Provincial Labour Department nor MOSALVY have since undertaken further measures to resolve the dispute, including by forwarding it to the Arbitration Council. In respect of JASA, the CCTUF had on 25 April and 5 July 2007, addressed communications to MOSALVY, which in turn requested the Siem Reap Provincial Labour Department to take measures to resolve the outstanding issues, but, to date, the union has not seen any resolution to its cases. Finally, the complainant indicates that on 9 June and 5 July 2007, the CCTUF had submitted complaints to the Siem Reap Provincial Labour Department seeking reinstatement of the trade union leaders and members at the Angkor Golf Resort, but the Labour Department failed to respond to the union and there has been no resolution to the outstanding issues.*

352. *The Committee observes that the present case depicts an insufficiency of laws and procedures to protect workers against acts of anti-union discrimination. As with other complaints against the Government, the present allegations repeat earlier and similar*

allegations in their depiction of an industrial relations climate characterized by acts of anti-union discrimination, often culminating in dismissals, and an apparent lack of effectiveness of the sanctions provided for in the law to protect workers against such acts [see Case No. 2468, 344th Report, para. 436]. The Committee further recalls that, in another complaint against the Government before it, it had noted with deep concern the lack of an independent and effective judiciary and consequently urged the Government to take the necessary steps to ensure the independence and effectiveness of the judicial system, including through capacity-building measures and the institution of safeguards against corruption [see Case No. 2318, 351st Report, para. 250].

353. *In these circumstances, the Committee is bound to recall that the Government is responsible for preventing all acts of anti-union discrimination and 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. Furthermore, legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 817 and 822]. In light of the above, the Committee considers the inadequacy of the authorities' response, in particular their failure to submit the complainant's cases to the Arbitration Council, to have been especially detrimental to the complainant's ability to secure an effective remedy for the alleged violations. The Committee urges the Government, as it has in previous cases, to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this regard.*

354. *Taking into account the specific circumstances of this case, and given that the Government has not provided its observations on the present allegations, the Committee urges the Government to immediately carry out a full and independent investigation into all the allegations in this case and, if they are proven to be true, to take the necessary steps to ensure that the trade unionists dismissed, or whose contracts have not been renewed, are fully reinstated without loss of pay. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. It requests the Government to inform it of the outcome of the investigation and of all measures of redress taken.*

355. *Noting the complainant's indication that the JASA union's certification expired on 2 March 2007, and that holding new elections has proven difficult due to the termination of its leaders' contracts and members' unwillingness to meet them for fear of dismissal, the Committee requests the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the JASA union may hold elections, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind. It requests to be kept informed of developments in this regard.*

356. *The Committee notes that according to the complainant the dismissals at the APSARA and the Angkor Golf Resort were precipitated by demands to engage in collective negotiations from the unions concerned – which were both certified as most representative by MOSALVY. The CCTUF submitted a demand to the APSARA requesting negotiations on 7 August 2006, approximately four months before the dismissal of 14 trade unionists. With regard to the Angkor Golf Resort, the latter held negotiations over conditions of work with*

the union concerned on 28 February 2007. The negotiations were unsuccessful and union President Yun Sokha was fired on that very day; approximately two months later the contracts of 41 other trade unionists, including the union's Vice-President, were not renewed when the Angkor Golf Resort resumed operation. In this respect, the Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see ***Digest****, op. cit., paras 934–935]. Noting furthermore that* Prakas *No. 305 of 22 November 2001, lays down the obligation of the employer to negotiate with the union possessing most representative status, the Committee requests the Government to take the necessary measures to ensure that both the APSARA and the Angkor Golf Resort engage in good-faith negotiations with their respective unions, and to keep it informed in this regard.*

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 deplores the lack of cooperation shown by the Government and strongly urges it to be more cooperative in the future.

(b) The Committee urges the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this regard.

(c) The Committee urges the Government to immediately carry out a full and independent investigation into all the allegations in this case and, if they are proven to be true, to take the necessary steps to ensure that the trade unionists dismissed, or whose contracts have not been renewed, are fully reinstated without loss of pay. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. It requests the Government to inform it of the outcome of the investigation and of all measures of redress taken.

(d) The Committee requests the Government to take the necessary measures, including the issuance of appropriate on-site instructions, to ensure that the JASA union may hold elections, and that the workers may participate in these elections free from fear of dismissal or reprisal of any kind. It requests to be kept informed of developments in this regard.

(e) The Committee requests the Government to take the necessary measures to ensure that both APSARA and the Angkor Golf Resort engage in good faith negotiations with their respective unions and to keep it informed in this regard.

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

CASE NO. 2355

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

Complaint against the Government of Colombia presented by
— the Single Confederation of Workers of Colombia (CUT)
— the General Confederation of Workers (CGT)
— the Confederation of Workers of Colombia (CTC)
— the Petroleum Industry Workers' Trade Union (USO)
— the Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO)
— the National Trade Union of Workers of Operating, Contracting and Subcontracting Companies Providing Services and Activities in Petroleum, Petrochemical and Similar Industries (SINDISPETROL)
— the National Trade Union of Workers of ECOPETROL (SINCOPETROL)
— the International Trade Union Confederation (ITUC) and
— the World Federation of Trade Unions (WFTU)

Allegations: The complainant organizations allege that after four months of collectively bargaining a list of claims with ECOPETROL SA, the administrative authority convened a compulsory arbitration tribunal; subsequently a strike was called which was declared illegal by the administrative authority; in this context, the company dismissed over 200 workers, including many trade union officials

358. The Committee last examined this case at its November 2008 meeting at which time it submitted a report to the Governing Body [see 351st Report, paras 295–380, approved by the Governing Body at its 303rd meeting].

359. The National Trade Union of Workers of ECOPETROL (SINCOPETROL) sent new allegations in a communication dated 18 May 2009. The Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO) sent new allegations in a communication dated 11 June 2009. By communication dated 10 October 2009, the Workers' Trade Union (USO) sent additional information.

360. The Government sent its observations in communications dated 16 March and 30 April 2009.

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

1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

362. In its previous examination of the case in November 2008, the Committee made the following recommendations [see 351st Report, para. 380]:

(a) Regarding the declaration as illegal of a strike called at ECOPETROL on 22 April 2004, the Committee once again urges the Government to take the necessary steps to amend the country's legislation without delay in consultation with the social partners, (in particular section 430(h) of the Substantive Labour Code) so as to allow the exercise of the right to strike in the petroleum sector, with the prospect of establishing a minimum service following negotiations with the trade union organizations, the employer and the public authorities concerned. It requests the Government to keep it informed in this regard.

(b) The Committee once again urges the Government to take steps to stop the effects of the decision to dismiss 104 employees at ECOPETROL SA for taking part in the 2004 strike and to keep it informed of the outcome of the action for protection of their constitutional rights *(tutela)* brought by the workers before the Council of the Judicature.

(c) With regard to the dismissal of Quijano Lozada, and bearing in mind that his dismissal for participating in a work stoppage that had been declared illegal was based on legislation that does not conform to the principles of freedom of association, the Committee once again calls on the Government to take steps to have him reinstated and, if this is no longer possible, to ensure that he is fully compensated. The Committee also requests the Government to keep it informed of the outcome of the judicial appeals under way that were lodged by the three other trade union officials who were dismissed (Mejía Salgado, Suárez Amaya and José Ibarguén) and, in the case of Mr Ibarguén, to take steps to have him reinstated on a temporary basis, as ordered by the judicial authority, until his appeal has been ruled upon.

(d) With regard to the allegations presented by SINCOPETROL concerning the dismissal of union officials Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán, Luís Alvarino, Sergio Luís Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía, in connection with the work stoppage of 22 April 2004, the Committee requests the Government to carry out an investigation into these allegations without delay and, if it is found that these officials were in fact dismissed without their trade union immunity having been lifted, to take steps for their immediate reinstatement. The Committee requests the Government to keep it informed in this regard.

(e) With regard to Edwin Palma, who the USO states has been held in custody since 11 June 2004 on charges of conspiracy to commit offences and terrorism and who the Government has reported is in custody in the city of Barrancabermeja, the Committee requests that, on the basis of that information, the Government take steps without delay to have the Attorney-General report on Mr Palma's whereabouts and legal status.

(f) With regard to the allegations presented by ADECO concerning ECOPETROL's refusal to enter into collective bargaining, the Committee requests the Government to keep it informed of developments in the appeal lodged by the company against the decision handed down on 2 October 2007 in connection with the list of demands submitted by ADECO in May 2006.

(g) With regard to ADECO's allegations that, by virtue of Decree No. 3164 of 2003, several categories of employees of ECOPETROL SA are excluded from the provisions of collective agreements, the Committee requests the Government to guarantee the right to collective bargaining of all ECOPETROL's workers who, by virtue of the said decree, are not covered by the collective agreements that are in force in the company.

(h) The Committee requests the Government to carry out as a matter of urgency an investigation into the new allegations presented by ADECO to determine, on the basis of full information, whether ECOPETROL employees who are not unionized are offered individually or otherwise benefits, better working conditions or bonuses to encourage them to resign from their trade union, and to keep it informed in this regard.

(i) With regard to the new allegations presented by ADECO concerning the refusal of Chevron Petroleum Company to bargain collectively with it, the appointment of a Compulsory Arbitration Tribunal and the appeal to have the arbitral award revoked that was lodged with the Supreme Court of Justice by both the company and the trade union organization, the Committee observes that the Government has not sent its observations on the subject and requests it to do so without delay, particularly with respect to the outcome of the appeal before the Supreme Court of Justice.

B. New allegations

363. In its communication of 18 May 2009, SINCOPETROL refers to the dismissal of the company workers who took part in a collective stoppage on 22 April 2004, confirms all the allegations presented to date and urges the Government to revoke the sanctions of destitution and general incapacity and the suspensions of the sanctioned workers and to respect the guarantee of trade union immunity.

364. In its communication of 11 July 2008, ADECO once again refers to questions which remain outstanding. It also indicates that, with regard to the dispute with ECOPETROL, in May 2009 it presented a new list of claims, which the company refused, to bargain collectively, again convening an Arbitration Tribunal. Meanwhile, the company continues to encourage desertion of the trade union by offering unilateral benefits to workers who are not trade union members.

365. As regards the arbitral award of 2007 based on the list of claims presented in 2006, the trade union alleges that the arbitration tribunal failed to mention several items included in the list of claims, and provided for trade union leave which is not sufficient for the performance of its tasks. Both the company and the trade union sought annulment of the award in the Supreme Court of Justice. In a judgement of 28 January 2008, the Court refused ADECO's appeal, holding it to be unfounded. ADECO also refers to the dismissal of the trade union official Raúl Fernández Safra of ECOPETROL and Henry Víctor O'Meara of the BJ Services Company after lifting their trade union immunity.

366. In a communication also signed by the enterprise, dated 1 October 2009, the USO sent a copy of the agreement signed by both parties dated 22 August 2009, relating to the reinstatement of 17 dismissed workers and the rehiring of 16 workers who had been dismissed in the context of the cessation of activity in 2004. The enterprise was also committed to making a financial contribution for the workers dismissed in 2004 and when there was the cessation of activity in 2002 who have not benefited from the reinstatement and rehiring.

C. The Government's reply

367. In its communications dated 16 March and 30 April 2009, the Government sends the following observations.

368. With regard to paragraph (a) of the recommendations relating to the exercise of the right to strike in essential public services, the Government reiterates its position expressed on previous occasions, bearing in mind that the basis of the concept of the essential nature of public services is of a constitutional character. Considering the particular conditions in the country, the legal body authorized to interpret the Constitution is the Constitutional Court,

which, after analysing what must be understood by essential public service, found that the public service provided by the state petrol company was an essential service, a decision which has *erga omnes* effects and are thus mandatory. The Government considers that the Committee on Freedom of Association, in defining essential public services, must take into account the spirit of the ILO Constitution concerning the particular conditions of countries. In this regard, it must be borne in mind that the arguments advanced whereby ECOPETROL is the only company which refines petrol in the country and that its paralysis could endanger security and even public health, due to the consequences that might arise if the country was deprived of fuel.

369. As regards paragraph (b) of the recommendations concerning the situation of the 104 workers dismissed in the context of the strike in ECOPETROL, the Government reiterates the position it expressed previously. Given that ECOPETROL's action was in accordance with domestic law, in particular Act No. 734 of 2002, that due process was respected in the case of each worker taking into account their status as public servants and not trade unionists, the Government considered on various occasions that there was no violation of Convention No. 87. In the present case, ECOPETROL was able to show that in the various disciplinary proceedings, the responsibility of each worker as a public servant was proved.

370. Moreover, if the workers dismissed as a result of the disciplinary proceedings do not agree, they may appeal to the administrative litigation body which is competent to review decisions made in those disciplinary proceedings. As to the final result of the action for protection *(tutela)* brought before the Council for the Judicature, the Government indicates that it would be very important for the complainant trade union to state the date and name of the judge hearing the case for the purpose of requesting the respective information.

371. As regards paragraph (c) of the recommendations concerning Mr Quijano, the Government states that according to the information provided by ECOPETROL, his contract of employment was terminated unilaterally on 29 November 2003, having exhausted the contractual procedure established for such matters, a decision which was separate from the collective stoppages on 22 and 27 May 2004, which were declared illegal by the Ministry of Social Protection. The Government adds that reinstatement or compensation requires a court order, in other words, a judicial process must have taken place in which a judgement which orders reinstatement or compensation has been handed down. In this respect, Mr Quijano exhausted all the judicial remedies. In this regard, both the Fifth Labour Court of the Cartagena Circuit in a judgement of 17 October 2003 and the Labour Chamber of the Cartagena District Court, in a judgement given on 10 February 2004, rejected Mr Quijano's claims. The same fate befell the protection *(tutela)* sought by Mr Quijano at first instance and on appeal. The Government recalls that in accordance with the provisions of article 113 of the Constitution, the organs of the judiciary are independent, for which reason the Government respects and accepts the judgements handed down by the court. The Government does not interfere in decisions of the court.

372. As regards the appeals of Mr Omar Mejía, Mr Germán Suárez and Mr José Ibarguén, the Government states the following:

– Omar Mejía Salgado. The Labour Chamber of the High Court of the Judicial District of Cartagena in a judgement of 29 August 2007 upheld the judgement of 10 December 2004 of the Eighth Labour Court of the Cartagena Circuit, finding that the grounds invoked for termination of the individual contract of employment were lawful. The Government attaches a copy of the judgement.

– Germán Suárez Amaya. The Fourth Labour Court of the Cartagena Circuit, in a judgement of 22 January 2008, decided to dismiss the plaintiff's claims against ECOPETROL. The Government attaches a copy of the judgement.

– José Franquis Ibarguén. The Labour Chamber of the High Court of the Judicial District of Cartagena in a judgement of 31 October 2007, overturned the judgement of 10 October 2005 of the Sixth Labour Court of the Cartagena Circuit, and in consequence dismissed all the plaintiff's claims against ECOPETROL SA. The Government attaches a copy of the judgement.

373. As regards paragraph (d) of the recommendations concerning dismissal of workers, the Government indicates that the Ministry of Social Protection is not competent to judge the dismissal of workers, as that is a matter for the jurisdiction of the courts, which are competent to declare rights and issue judgements on the merits, as occurs in this case. The Government indicates that it would be helpful if the complainants would state in which court the respective actions were filed in order to investigate the status of each judicial proceeding. Despite the foregoing, the Government reiterates what it stated in the previous paragraph, given that ECOPETROL, in compliance with the provisions of Act No. 734 of 2002, followed the relevant disciplinary procedures, in which each worker was guaranteed due process, in accordance with the Constitution (article 29), which includes the principles of the competent judge, full respect for due legal process and the right of appeal.

374. The Government once again reiterates that the conduct of the abovementioned disciplinary processes is a consequence of the decision in the arbitral award of 21 January 2005, issued by the ad hoc Voluntary Arbitration Tribunal constituted in accordance with the provisions of the National Government–ECOPETROL SA–USO Agreement signed on 26 May 2004, which in the "resolves" part, expressly in Nos 6 and 7, ordered the reinstatement of certain workers in order to apply the Single Disciplinary Code. Although in some cases the disciplinary proceedings resulted in the termination of individual contracts of employment, the disciplinary proceedings comply with the decision contained in the administrative act which decided on the respective disciplinary process by an impartial judge, on the basis of the evidence produced, a decision which must be respected by the company, thus it is not accepted that these cases constitute "dismissals".

375. The Act of 26 May, relating to the decision adopted by the ad hoc Arbitration Tribunal expressly stated: "it is clear that the decisions adopted by the ad hoc Arbitration Tribunal are binding and mandatory for the parties ...", and thus ECOPETROL proceeded accordingly in compliance with the decision of the Tribunal in the terms contained in the arbitral award issued on 21 January 2005.

376. With regard to paragraph (e) of the recommendations concerning the situation of Mr Edwin Palma, the Government states that an investigation was initiated into the alleged offence of terrorism and slander, Case No. 224870, in which an arrest warrant was issued on 29 June 2004, which was appealed by the defence. In a decision of 30 July 2004, the First Prosecutor's Office to the High Court of Bucaramanga held that according to the evidence in the case there were no grounds for alleging that the conduct of Mr Edwin Palma constituted the offence of terrorism and the custody order was revoked. The Government adds that according to the information provided by ECOPETROL, Mr Edwin Palma is currently employed by the company, as analyst grade D7, in the Quality Control Department of the Barrancabermeja Refinery.

377. With respect to paragraph (f) of the recommendations, as regards the final result of the appeal lodged by ECOPETROL against the arbitral award, the Government attaches a copy of the decision of 8 July 2008 in which the Supreme Court of Justice, Labour Division, decided:

ONE: TO ANNUL the following provisions in the "resolves" part:

Paragraph (a) of article 5.

The expression "paid" contained in paragraphs (d) and (e) of the same article 5 relating to leave of absence.

TWO: The award is declared binding with respect to the other contested matters.

THREE: The copies to which the "grounds" section refers should be transmitted by the secretary to the Sectional Council of the Judicature.

378. The Government also indicates that it had previously reported that ADECO had submitted a document indicating its withdrawal of the appeals lodged against Resolution No. 000056 of 10 March 2006 (whereby the Ministry of Social Protection abstained from taking an administrative action against ECOPETROL for refusal to bargain collectively), as it considered that the situation related to the alleged refusal to bargain collectively had been superseded. Likewise, it informed the Committee concerning the start of the bargaining process with a view to the submission of the ECOPETROL trade unions' list of claims, a process which ended with the signing of the collective agreement for a period of three years from 9 June 2006 until 8 June 2009. The Government adds that the ADECO annex forms part of the collective agreement to which the arbitral award of 2 October 2007 (annexed) refers. In consequence, there was no refusal by ECOPETROL to bargain collectively.

379. With regard to paragraph (g) of the recommendations concerning the guarantee of the right of collective bargaining, the Government states that the Colombian State guarantees this right through the mechanism of *amparo* (judicial protection) and the various administrative and legal remedies. The Government requests the trade union to clarify the alleged facts, indicating specifically those cases in which the right of collective bargaining was violated, giving the names of the workers affected and the place where the events occurred, in order to establish whether administrative labour investigations were in progress or failing to initiate them.

380. The Government adds that ECOPETROL SA does not have the authority to issue administrative acts such as those under Decree No. 3164 of 2003, and this act was issued by the President of the Republic and the Minister of Mines and Energy, who have the legal power, in accordance with article 187, paragraph 11, of the Constitution of Colombia and article 3 of Legislative Decree No. 284 of 1957.

381. In this regard, given the objection of the workers to the issue of that act, they may appeal to the administrative litigation body. In fact, the Government indicates that according to the provisions of Decree No. 3164 of 2003, activities which are not on the list of those defined as specific and essential to the petroleum industry must be subject to a wage system agreed between the parties, taking into account market conditions but not less than the legal minimum. In addition, social benefits are recognized as those established in the Substantive Labour Code as supplemented and amended, provided that they do not conflict with the constitutional and labour rights of the workers.

382. As regards paragraph (h) of the recommendations, the Government indicates that it would be most important to clarify the facts, indicating the specific cases so as to commence the respective administrative labour investigations. ECOPETROL, in its observations considers that its actions are within the constitutional and legal framework by which it is governed, which includes full respect for the exercise of the right of association, which is evident from the presence of four trade unions in the company, the Petroleum Industry Workers' Trade Union (USO), the National Trade Union of Workers of Operating, Contracting and Subcontracting Companies Providing Services and Activities in

Petroleum, Petrochemical and Similar Industries (SINDISPETROL), SINCOPETROL and ADECO.

383. According to the Government, at no time did ECOPETROL commit acts or offer inducements to encourage people to leave a trade union. The Government recalls that it is part of the exercise of the fundamental right of freedom of association, which allows not only joining a trade union, but also leaving it whenever the worker sees fit, as has been pointed out on many occasions by the high courts, the authorized interpreters of the Colombian legal system. In that respect, the Honourable Constitutional Court, in its judgement C-606 of 1992, indicated:

> ... the right of association, meaning the free and voluntary exercise by citizens to found or formally join permanent groups for specific purposes, also has a converse aspect: that no one may be forced, directly or indirectly to form part of a given association. If that were not the case, one could not speak of the right of association in a constitutional sense, since it is clearly a right of freedom, the guarantee of which is based on its voluntary nature.

384. In the same vein, the same Court, in judgement T-952 of 2003, indicated:

> ... The Court considers that freedom of association comprises: (i) the right of all workers, without any discrimination or distinction whatsoever, to gather together by forming permanent organizations which identify them as groups with common interests which they defend. This right implies freedom both to join and withdraw from such organizations … .

385. According to the observations sent by ECOPETROL, the company has always respected rights of association, representation and trade union independence, indicating that it is not the company's practice to prevent workers from forming associations or deciding freely to join or not join any of the existing trade unions, evidence of which is the existence of the complainant trade union and the guarantees granted to that organization, which are evidenced in the arbitral award of 2 October 2007, a copy of which is attached by the Government.

386. As regards paragraph (i) of the recommendations, relating to the refusal to bargain collectively, the Office of Cooperation and International Regulations will look into the administrative labour investigation in the Chevron Petroleum Company, and once it receives a reply, will send its observations on the matter. Notwithstanding the foregoing, the observations sent by the company indicate the date of commencement of the collective bargaining of the list of claims and its completion, and the convening of the Arbitration Tribunal. Once the Arbitration Tribunal had been convened, it issued the arbitral award of 4 October 2007, which was immediately the subject of an appeal for annulment. This was decided by the Supreme Court of Justice on 29 April 2008, which only annulled the award in the part relating to PETROCAJAS, as it considered that the fund was a separate legal entity and thus governed by its own statutes and the law, and the arbitrators could not make provisions concerning its general functioning.

D. The Committee's conclusions

387. *The Committee notes the communications of ADECO and SINCOPETROL and the Government's observations concerning the outstanding matters. The Committee also notes the most recent communication dated 10 October 2009 sent by the USO and signed by ECOPETROL.*

388. *With regard to point (a) of the Committee's recommendations concerning the declaration as illegal of the strike called at ECOPETROL on 22 April 2004, the Committee notes once again that in its observations the Government states that according to the Constitutional Court the service operated by ECOPETROL was an essential service, and the national circumstances which led the Court to adopt that position should be taken into account. In this respect, the Committee had indicated on several occasions in the present case that the petroleum sector could not be considered to be an essential service in the strict sense of the term (i.e. those whose interruption would endanger the life, personal safety or health of the whole or part of the population) and thus the right to strike could not be prohibited. However, bearing in mind that it was a service of public utility of fundamental importance, the Committee also indicated that it was possible to establish a negotiated minimum service with the participation of the trade unions and the employers concerned. The Committee must again reiterate these considerations and accordingly again urge the Government, in consultation with the representatives of workers' and employers' organizations, to take steps without delay to send a proposal to the legislative authority with a view to amending the legislation (article 430(h) of the Substantive Labour Code) in order to define the conditions for the exercise of the right to strike in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service involving the participation of the trade unions, the employers and the public authorities concerned. The Committee requests the Government to keep it informed of all the relevant developments in the legislation.*

389. *Under paragraph (b) of the recommendations concerning the dismissal of the 104 ECOPETROL workers for taking part in the stoppage, the Committee notes with satisfaction the agreement signed by the USO and ECOPETROL, sent jointly by both parties, whereby 17 workers were reinstated, 16 workers were rehired and the enterprise financially contributed with the trade union for the support of workers who were neither reinstated nor rehired.*

390. *As regards paragraph (c) of the recommendations relating to the dismissal of trade union officials in the context of a stoppage in 2002, the Committee notes with interest the recent agreement entered into between the USO and ECOPETROL providing for a financial contribution by the enterprise and the trade union to benefit the workers.*

391. *With respect to paragraph (d) of the recommendations which refers to the allegations made by SINCOPETROL concerning the dismissals of trade union officials, Messrs Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán Luis Alvarino, Sergio Luis Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía, also in the context of the stoppage of 22 April 2004, in disregard for trade union immunity, the Committee notes that in its communication of 18 May 2009 the trade union reaffirms the allegations made and requests the Government to set aside the dismissals and to respect the trade union immunity of the trade union officials, and the workers mentioned in the agreement signed by the USO and ECOPETROL to which reference is made. The Committee requests the Government and the trade union to indicate if these workers are indeed covered by the agreement.*

392. *With regard to paragraph (e) of the recommendations concerning the situation of Mr Edwin Palma, the Committee notes that the Government states that in the investigation initiated into the alleged offence of terrorism and slander, Case No. 224870, in a decision of 30 July 2004, the First Prosecutor's Office to the High Court of Bucaramanga held that according to the evidence in the case there were no grounds for alleging that the conduct of Mr Edwin Palma constituted the offence of terrorism and the custody order was revoked. The Committee further notes that according to the Government, Mr Edwin Palma is currently employed by ECOPETROL, as analyst grade D7, in the Quality Control Department of the Barrancabermeja Refinery.*

393. *With regard to paragraph (f) of the recommendations relating to the allegations presented by ADECO concerning ECOPETROL's refusal to bargain collectively and the appeal in the Supreme Court of Justice by the company for annulment of the arbitral award of 2 October 2007 concerning that matter, the Committee notes that the trade union indicates that it also appealed for annulment of the arbitral award in the Supreme Court of Justice, and that its appeal was refused. The trade union adds that the trade union leave granted to it was insufficient to carry out its activities and that it submitted a new list of claims in 2009, but the company again refuses to bargain collectively.*

394. *The Committee notes that, for its part, the Government states that under a decision of 8 July 2008, the Labour Chamber of the Supreme Court of Justice decided to declare the enforceability (applicability) of the award in all the contested matters except one point relating to paid leave of absence. In turn, the Committee notes that according to the Government, ADECO withdrew the appeals it had initiated against Resolution No. 000056 of 10 March 2006 in which the Ministry of Social Protection decided not to impose sanctions against ECOPETROL for refusing to bargain collectively, considering that the situation relating to the alleged refusal to bargain collectively had been superseded. The Committee also notes the commencement of the collective bargaining process with a view to presenting a list of claims of the ECOPETROL trade unions, a process which ended with the signing of a collective agreement effective for three years from 9 June 2006 to 8 June 2009. The Government adds that the ADECO annex forms part of the collective agreement to which the arbitral award of 2 October 2007 (annexed) refers. In consequence, there was no refusal by ECOPETROL to bargain collectively.*

395. *In this respect, the Committee notes, from a reading of the judgement of the Labour Chamber of the Supreme Court of Justice (attached by the Government) in which the appeal for annulment filed by the company against the arbitral award of 2 October 2007 is decided, that paragraph (a) of article 5 in the "resolves" part of the award "From 9 July 2007, it is understood that the trade union ADECO is party to the collective agreement 2006–09 in representation of its affiliated workers" was annulled. The Committee understands that as a consequence, the collective agreement does not apply to the trade union ADECO. In these circumstances, observing that according to the new allegations of ADECO, it presented a new list of claims in 2009, the Committee requests the Government to take the necessary steps to ensure that the company bargains collectively with the trade union in representation of its members, and expects that in the framework of that collective bargaining it will be possible to resolve the outstanding matters. The Committee requests the Government to keep it informed in this respect.*

396. *As regards paragraph (g) of the recommendations relating to ADECO's allegations that under Decree No. 3164 of 2003 several categories of ECOPETROL workers are excluded from the scope of the collective agreements, the Committee notes that under Decree No. 3164 of 2003, the wage scheme agreed by the parties must be applied to all activities which are not listed among those qualified as specific and essential to the petroleum industry, taking into account market conditions which must not be less than the legal minimum. In addition, the social benefits established in the Substantive Labour Code as amended and supplemented are recognized, provided that they do not conflict with the labour and constitutional rights of the workers.*

397. *As regards paragraph (h) of the recommendations that, in ECOPETROL, benefits, better working conditions or bonuses are granted individually to non-unionized workers, encouraging them to give up trade union membership, the Committee notes that the Government states that: the company fully respects the exercise of the right to organize, which is evidenced precisely in the presence of four trade unions in the company; that this right allows not only membership of a trade union, but also leaving it when a worker sees fit; and that at no time has ECOPETROL committed acts or offered inducements to encourage workers to leave a trade union. The Committee notes that the Government requests the complainant organization to specify the facts and persons affected in order to carry out the relevant investigations. In this respect, the Committee invites the complainant organization to provide the Government with all the information in its possession concerning these allegations and requests the Government to take the necessary steps, as a matter of urgency, to carry out an independent investigation in order to determine on the basis of complete information whether the allegations are true. The Committee requests the Government to keep it informed in this respect.*

398. *As regards paragraph (i) of the recommendations relating to the refusal of Chevron Petroleum Company to bargain collectively with the trade union, the appointment of a Compulsory Arbitration Tribunal and the appeal for annulment of the arbitral award lodged by the company and the trade union in the Supreme Court of Justice, the Government states that: (1) the Office of Cooperation and International Relations will look into the administrative labour investigation against the company and will send the pertinent observations; and (2) according to the observations sent by the company, the appeal for annulment of the arbitral award was decided on 29 April 2008 by the Supreme Court of Justice, Labour Chamber, which only annulled the award in the part relating to the pension fund because it considered that the arbitrators did not have the authority to establish provisions on its general functioning. The Committee notes this information and requests the Government to keep it informed of the administrative investigation into the company.*

399. *The Committee notes the new allegations presented by ADECO relating to the dismissal of the trade union official Raúl Fernández Safra of ECOPETROL and Henry Víctor O'Meara of BJ Services Company after the court had lifted their trade union immunity. The Committee observes that the information provided by the trade union was not sufficient to be able to examine whether there was a violation of freedom of association and thus it will not continue examination of these allegations.*

The Committee's recommendations

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

(a) As regards the declaration as illegal of a strike called at ECOPETROL on 22 April 2004, the Committee, while reiterating its considerations expressed

on many occasions, must again urge the Government, in consultation with the representatives of workers' and employers' organizations, to take steps without delay to send a proposal to the legislative authority with a view to amending the legislation (section 430(h) of the Substantive Labour Code) in order to define the conditions for the exercise of the right to strike in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service involving the participation of the trade unions, the employer and the public authorities concerned. The Committee requests the Government to keep it informed of all the relevant developments in the legislation.

(b) As regards the allegations presented by SINCOPETROL relating to the dismissal of the trade union officials Messrs Ariel Corzo Díaz, Moisés Barón Cárdenas, Alexander Domínguez Vargas, Héctor Rojas Aguilar, Wilson Ferrer Díaz, Fredys Jesús Rueda Uribe, Fredys Elpidio Nieves Acevedo, Genincer Parada Torres, Braulio Mosquera Uribe, Jimmy Alexander Patiño Reyes, Jair Ricardo Chávez, Ramón Mantuano Urrutia, Germán Luis Alvarino, Sergio Luis Peinado Barranco, Olga Lucía Amaya and Jaime Pachón Mejía, also in the context of the stoppage of 22 April 2004, in disregard of trade union immunity, the Committee requests the Government and the trade union to indicate if these workers are covered by the agreement signed between the USO and ECOPETROL on 22 August 2009.

(c) As regards the allegations presented by ADECO on ECOPETROL's refusal to bargain collectively, observing that the trade union has submitted a new list of claims in 2009, the Committee requests the Government to take the necessary steps to ensure that the company bargains collectively with the trade union in representation of its members and expects that in the framework of that collective bargaining it will be possible to resolve the outstanding matters. The Committee requests the Government to keep it informed in this respect.

(d) The Committee invites the complainant organization to provide the Government with all the information in its possession concerning the allegations that ECOPETROL grants benefits, better working conditions or bonuses individually to non-unionized workers, encouraging them to give up trade union membership, and requests the Government to take the necessary steps, as a matter of urgency, to carry out an independent investigation in order to determine on the basis of complete information whether the allegations are true. The Committee requests the Government to keep it informed in this respect.

(e) As regards the allegations relating to the refusal of Chevron Petroleum Company to bargain collectively with the trade union, the appointment of a Compulsory Arbitration Tribunal and the appeal for annulment of the arbitral award lodged by the company and the trade union in the Supreme Court of Justice, the Committee requests the Government to keep it informed of the pending administrative investigation into the company.

CASE NO. 2356

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

Complaint against the Government of Colombia presented by
- **the National Union of Public Employees of the National Service for Training SENA (SINDESENA)**
- **the Union of Employees and Workers of SENA (SINDETRASENA)**
- **the Single Confederation of Workers of Colombia (CUT)**
- **the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-UPTC) and**
- **the Cali Municipal Enterprises Union (SINTRAEMCALI)**

Allegations: The National Union of Public Employees of the National Service for Training SENA (SINDESENA) and the Single Confederation of Workers of Colombia (CUT) allege that trade union members and trade union leaders were collectively dismissed as part of a restructuring process, and that the National Service for Training (SENA) refused to negotiate with the trade union organizations; the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-UPTC) alleges that threats were made against the President of the trade union; and the Cali Municipal Enterprises Union (SINTRAEMCALI) alleges that the administrative authority declared a permanent assembly staged within Cali Municipal Enterprises (EMCALI) to be illegal and that this decision led to the dismissal of 51 trade union members and leaders. The decision was declared null and void by the Council of State

401. The Committee last examined this case at its November 2008 session and submitted a report to the Governing Body [see 351st Report, paras 381–425, approved by the Governing Body at its 303rd Session]. The Cali Municipal Enterprises Union (SINTRAEMCALI) sent new allegations in communications dated 10 December 2008 and 22 January, 12 February, 19 and 24 March, and 12 June 2009.

402. The Government sent its observations in communications of 24 November and 16 December 2008 and 20 January, 16 March and 21 and 23 July 2009.

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

A. Previous examination of the case

404. In its previous examination of the case, the Committee made the following recommendations [see 351st Report, para. 425]:

(a) With regard to the cases concerning the lifting of the trade union immunity of trade union leaders as part of the restructuring process of the National Service for Training, the Committee requests the Government to keep it informed of the final outcome of the proceeding involving Pedro Sánchez Romero.

(b) With regard to the refusal of SENA to bargain collectively, the Committee, recalling that, even though collective bargaining in the public service can be subject to specific modalities, the right to bargain collectively has been recognized in general for all public employees on the basis of the ratification of Conventions Nos 151 and 154, requests the Government to keep it informed of developments regarding the decree to promote the collective bargaining of public employees.

(c) With regard to the new allegations regarding the refusal to grant trade union leave and other facilities that had been agreed on, such as plane tickets to attend trade union meetings, trade union premises and notice boards, the Committee, recalling the importance of providing facilities for the proper conduct of trade union activities, requests the Government to take the necessary measures to guarantee that the trade union can carry out its activities properly with the necessary facilities, as it has been doing until recently.

(d) The Committee requests the Government to keep it informed of the disciplinary proceedings under way in respect of six trade union leaders of SINDESENA.

(e) As to the declaration of illegality by the administrative authority concerning a permanent assembly (a work stoppage), held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six leaders for their alleged participation in the work stoppage (Decision No. 1696), the Committee requests the Government to keep it informed of the final outcome of the appeal for clarification which is pending.

(f) With regard to the investigation launched before the Office of the Attorney-General into the violent events that took place during the permanent assembly, the Committee expresses serious concern regarding the fact that the Government has not provided specific information on the investigation into the violent events that took place in EMCALI in May 2004, recalls the importance of conducting the investigations without delay and urges that the investigation be concluded in the near future and that it will as a result be possible to identify and punish those responsible.

(g) With regard to the launch of 462 disciplinary proceedings and the pressure put on workers not to discuss trade union issues under threat of dismissal, the Committee once again requests the Government to take the necessary measures to guarantee that the workers of EMCALI can exercise their trade union rights freely and without fear of reprisals, to carry out an independent investigation that has the confidence of the parties involved (such an investigation could be carried out by the judicial authority) into the pressure, threats and disciplinary proceedings against the workers and to keep it informed in this regard.

(h) With regard to the latest communication of the ASOPROFE-UPTC concerning threats against the President of the trade union, the Committee requests the Government to take the necessary measures so that an investigation is carried out in this respect and that adequate protection is provided to Mr Luis Diaz Samboa. The Committee requests the Government to keep it informed in this respect.

B. New allegations

405. In its communications of 10 December 2008 and 22 January, 12 February, 19 and 24 March, and 12 June 2009, SINTRAEMCALI alleges that, on 19 March 2009, paid union leave was suspended. Furthermore, the enterprise supports another executive board, disregarding the democratic elections that had been carried out in compliance with the legal requirements. In addition, there is a risk that its resources may be judicially assigned, thereby depriving it of its means of survival. The complainant further confirms that the allegations remain pending. It indicates that the enterprise has no intention of settling the existing dispute or of reinstating the dismissed workers. Nevertheless, SINTRAEMCALI makes it clear that it is prepared to settle the matter through conciliation and tripartite negotiation with the Government.

406. The complainant organization adds that no investigation has been launched to date into the violent events that took place in May 2004. Only administrative proceedings were initiated, leading to the dismissal of 51 workers by Decision No. 1696 of 2 June 2004, which was declared null and void by the Council of State in Decision No. 3536 of September 2008. The enterprise filed an appeal for clarification against that decision, which was rejected on 23 October 2008.

C. The Government's reply

407. In its communications of 24 November and 16 December 2008 and 20 January, 16 March and 21 and 23 July 2009, the Government sent the following observations.

408. With respect to subparagraph (a) of the recommendations, with regard to the case concerning the lifting of the trade union immunity of Mr Pedro Sánchez, the Government indicates that the proceedings are under way in the Fourth Labour Court of the Cartagena Circuit, pending a decision, and that the discussion of the evidence concluded on 14 August 2008. On 15 December 2008, the Fourth Labour Court of the Cartagena Circuit issued a decision upholding the waiver of the time bar, which was appealed before the Labour Tribunal of the High Court of Cartagena Judicial District. When information is received regarding the final outcome of this appeal, it will be sent to the Office.

409. With regard to subparagraph (b) of the recommendations, the Government indicates that Decree No. 535 of 24 February 2009, concerning section 416 of the Labour Code, sets out the procedure to be followed with regard to collective bargaining in the public sector. The Government supplies a copy of the decree in question.

410. With regard to subparagraph (c) of the recommendations on the allegations concerning the refusal to grant trade union leave, the Government states that, according to information provided by the National Service for Training (SENA), union leave has been granted. The Government recalls that, in its communication of 10 October 2008, it included a table containing information on the trade union leave granted to the National Union of Public Employees of the National Service for Training (SINDESENA) leaders. With regard to the airline tickets, the amount has been repaid in full to the union's executive board and supporting documentation has been provided. Furthermore, the Government indicates that the administrative authority paid for the members of SINDESENA to travel by air to the 11th Educational Congress as proposed by SINDESENA and the Educational Studies and Vocational Training Circle (CEPF). The Government has attached SENA's response. Accordingly, the Government considers that the present allegations do not merit further examination, given that SENA has provided documentation to prove that leave was granted and that the airline tickets of SINDESENA members were approved. The Government also reports that, according to information provided by the administrative authority, no investigation is being carried out against SENA for refusing to grant trade union leave.

411. As for subparagraph (d) of the recommendations relating to the disciplinary proceedings under way, the Government reports, with regard to the proceedings initiated against Mr Aleyda Murillo, that, according to the information provided by the Domestic Disciplinary Monitoring Board, the disciplinary proceedings were shelved in August 2006 and September 2007. The Government adds that the proceedings concerning Ms María Inés Amézquita, Mr Jesús Horacio Sánchez, Mr Carlos Arturo Rubio and Mr Gustavo Gallego, public servants of the Quindío region, are under way. These are being conducted independently from the administration; in other words, there is no interference by the administration in the decision-making.

412. With regard to subparagraph (e) of the recommendations on the appeal for clarification, which is pending against the Council of State's decision to annul Decision No. 1696, which declared the work stoppage within Cali Municipal Enterprises (EMCALI) to be illegal, the Government indicates that it will send the corresponding observations when it receives information on the final outcome of this appeal. As regards the declaration of illegality, the Government indicates that the sentence announced by the Council of State is still not definitive given that appeals for annulment and rights of petition have been made.

413. The Government states that the Council of State's decision, which declared the illegality of Decision No. 1696 of 2 June 2004, rejected the other claims made by the claimants, including the request for the reinstatement of the workers dismissed by EMCALI. Indeed, when reaching this decision, the Council of State considered the following:

(a) The legal objection against the act declaring the illegality of a collective work stoppage does not give the judge who issued the act direct competency concerning the action initiated by the employer once an administrative decision has been taken by the labour authority. Indeed, the direct effect of the declaration of illegality is that the employer can decide whether or not to continue with administrative and legal actions that affect the employment relationship of those workers involved in the illegal work stoppage. Therefore, given that the legal personality of the trade union was not suspended, workers dismissed or trade union immunity lifted as a result of the declaration of illegality, the annulment of this administrative act does not, per se, affect the legal implications of a situation not related to the act in question, given that, as highlighted, the direct effect of this declaration is that the employer can decide whether or not to continue with procedures that would affect the employment relationship of workers.

It is evident that, as a result of the annulment of the act decreeing the illegality of a work stoppage, the employer may terminate an employment contract with just cause, or the legal personality of the trade union may be affected if it promoted the illegal work stoppage. However, these matters are resolved through legal and administrative channels, and, in such discussions, the competency of each authority includes the possibility of evaluating facts surrounding the events. Accordingly, the annulment of the administrative act that declared the illegality of the stoppage does not necessarily annul the other effects on the employment relationship inasmuch as these will also depend on the material conditions of each case, in such a manner that the petitions filed by the trade union bringing this lawsuit imply unjustified interference in the matters of other legal and administrative authorities.

(b) The application for the annulment of administrative acts, as described in section 85 of the Administrative Disputes Code, in addition to implying the possibility of invalidating the opposed act, gives the petitioner the opportunity to request the restoration of rights and compensation for any damages that may have been caused by the annulled administrative act. These three elements are part of the action and, owing to their nature, keep their independence, while interacting according to the evidence furnished during the proceedings, of course in full knowledge of the fact that the restoration of rights and granting of damages are legally viable only when the act is declared null and void. This definition aims to highlight the fact that the annulment of the administrative act does not necessarily lead to the restoration of rights or to damages insofar as these latter two components depend on the circumstances that come to light during the case (...).

414. The Government indicates that it can be deduced from the above that the annulment of the administrative act does not, ipso facto, lead to the restoration of the rights at issue in the labour proceedings currently under way. The trade union's statement that the restoration of rights is automatic is incorrect, given that this was rejected by the Council of State and, accordingly, the matter should be the subject of legal debate in each case. The restoration of rights was unsuccessful because the Council of State considered that acts of vandalism had occurred and damage sustained at EMCALI. In its opinion, such issues should be examined by the labour courts that are dealing with the proceedings initiated by the former workers who participated in the work stoppage.

415. Given that the sentence handed down by the Council of State is not definitive, it is not possible to refer to a lack of substance, a situation that can occur, although not always, when a legal text is declared null and void. However, when the declaration of illegality refers to a specific administrative text, even if it is annulled on grounds of form and substance and does not lead to the restoration of rights in labour proceedings filed in parallel, the presiding judge must analyse facts and rights on a case-by-case basis.

416. The Government sent the reply from the EMCALI representative, along with a communication containing an account of events, a DVD and a USB memory stick.

417. With regard to subparagraph (f) of the recommendations on the investigation under way before the Office of the Attorney-General into the violent events that took place during the permanent assembly in EMCALI in May 2004, the Government sent a copy of Decision No. 234 of the Office of the Public Prosecutor No. 58 of the Cali City Economic Resources Unit No. 1, which decided not to initiate criminal proceedings for such events, given the impossibility of identifying those responsible.

418. With regard to subparagraph (g) of the recommendations on the launch of 462 disciplinary proceedings as a result of the work stoppage and the pressure placed on workers not to discuss trade union issues under threat of dismissal, the Government indicates that the Government of Colombia guarantees the free exercise of trade union rights and freedom of association. A range of actions (both administrative and legal) can be filed by Colombian workers within the terms prescribed by law. Furthermore, justice in Colombia has to be sought, which means that the party claiming to be affected has to file a complaint before a court. The Government also sent the statement of the enterprise's representative, according to which the Political Constitution of Colombia establishes that the Office of the Attorney-General is the highest decision-making body of the Public Prosecutor's Office and is an independent procedural body of the executive, legislative and judicial branch of the public authorities. One of its constitutional duties is to "intervene in proceedings, and before judicial or administrative authorities, whenever necessary to protect the legal order, public resources or fundamental rights and guarantees" (section 277, paragraph 7). On this basis, EMCALI requested the provincial prosecutor of Cauca Valley to take note of the ILO recommendation and to conduct inspections at EMCALI. The Office of the Attorney-General carried out an independent investigation and determined that the 462 disciplinary proceedings denounced by SINTRAEMCALI, relating to the events that occurred between 27 and 30 May 2004, were not initiated and that the enterprise gives its workers and their union officials complete freedom to carry out their union activities.

419. With regard to subparagraph (h) of the recommendations regarding the threats against the President of the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-UPTC), the Government reports that it has referred the allegations to the Office for the Defence of Human Rights to launch the necessary inquiries. The Government requests that these allegations be transferred to Case No. 1787.

D. The Committee's conclusions

420. *The Committee takes note of the new allegations presented by SINTRAEMCALI and of the Government's observations regarding the matters that are pending.*

Restructuring of SENA

421. *With respect to subparagraph (a) of the recommendations with regard to the case concerning the lifting of the trade union immunity of Mr Pedro Sánchez Romero as part of the process of restructuring SENA, the Committee takes note of the Government's information, according to which the case has been brought before the Fourth Labour Court of the Cartagena Circuit, which decided to uphold the time bar, a decision which was appealed before the High Court of the District of Cartagena. The Committee requests the Government to keep it informed of the final outcome of this case.*

422. *With regard to subparagraph (b) of the recommendations concerning the refusal of SENA to bargain collectively with SINDESENA, the Committee notes with interest the adoption, on 24 February 2009, of Decree No. 535 concerning section 416 of the Labour Code, which sets out the procedure to be followed with regard to collective bargaining in the public sector, and requests the Government to take the necessary measures to ensure that the trade union organization is able to negotiate collectively within SENA.*

423. *As for subparagraph (c) of the recommendations concerning the allegations regarding the refusal to grant trade union leave and other facilities that had previously been granted to the trade union leaders, the Committee notes that, according to the Government, trade union leave has been granted by SENA and, with regard to the facilities, the cost of airline tickets for the entire executive board has been covered for various meetings and training sessions and that the Government has attached the corresponding documentation. For this reason, the Committee will not pursue its examination of these allegations.*

424. *With regard to subparagraph (d) of the recommendations relating to the allegations that many disciplinary proceedings have been initiated in various regional offices against trade union leaders and members for their participation in activities planned by the trade union, the Committee notes that, according to the Government, the disciplinary proceedings concerning Mr Aleyda Murillo and Mr Wilson Arias Castillo have been shelved. With regard to the proceedings concerning Ms María Inés Amézquita, Mr Jesús Horacio Sánchez, Mr Carlos Arturo Rubio and Mr Gustavo Gallego, the Committee notes that these are still under way. The Committee expects that the trade union rights of the leaders will be fully respected and that these proceedings will be concluded rapidly. The Committee requests the Government to keep it informed in this regard.*

EMCALI

425. *As to subparagraph (e) of the recommendations regarding the declaration of illegality by the administrative authority concerning a permanent assembly held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six union leaders, the Committee recalls that this declaration (contained in Decision No. 1696 of 2004) was the subject of an appeal before the Council of State which was upheld, and that a decision was made in favour of its annulment which was, in turn, the subject of an appeal for clarification by the enterprise. The Committee notes that, according to SINTRAEMCALI, this appeal for clarification was rejected by the Council of State on 23 October 2008 and that SINTRAEMCALI has supplied a copy of this decision.*

426. *The Committee notes that according to the Government, the declaration of illegality of Decision No. 1696 does not lead to the automatic reinstatement of the dismissed workers, a request rejected by the Council of State, but rather implies that this matter should be resolved for each legal proceeding initiated by the dismissed workers and that, on the other hand, the sentence of nullity is still not definitive, given that the enterprise EMCALI filed an appeal for annulment and rights of petition against the declaration of illegality, which is still pending.*

427. *In such circumstances, taking into account that: (1) Decision No. 1696 of 2004, which declared the permanent assembly illegal, and under which the 45 trade union members and six union leaders were dismissed, was declared null and void by the Council of State; (2) the appeal for clarification against this Council decision was rejected (even though the appeal filed by the enterprise is still pending); (3) there are no criminal charges of any kind against the trade unionists for violent acts; and (4) more than five years have elapsed since the events occurred, the Committee requests the Government to consider taking the necessary measures to ensure the reinstatement of the 45 trade union members and six union leaders who were dismissed, until the ordinary judicial authority pronounces definitive rulings. The Committee requests the Government to keep it informed in this regard.*

428. *With regard to subparagraph (f) of the recommendations on the investigation launched before the Office of the Attorney-General into the violent events that took place during the permanent assembly in EMCALI in May 2004, the Committee notes that, according to the complainant organization, an investigation involving its members has not yet been launched into these events. The Committee also notes that, for its part, the Government indicates that the Office of the Public Prosecutor No. 58 of the Cali City Economic Resources Unit No. 1 decided, through Decision No. 234 of 27 October 2004, not to initiate criminal proceedings relating to such events, given the impossibility of identifying those responsible.*

429. *With regard to subparagraph (g) of the recommendations relating to the launch of 462 disciplinary proceedings as a result of the permanent assembly and the pressure placed on workers not to discuss trade union issues under threat of dismissal, the Committee recalls that it requested the Government to carry out an independent investigation, which could be carried out by the judicial authority, into the pressure, threats and disciplinary proceedings against the workers of EMCALI. The Committee notes that, according to the information from the enterprise's representative sent by the Government, in accordance with the report of the Attorney-General, the proceedings in question were not initiated and the enterprise allows the trade union's officials and members to fully exercise their trade union rights. The Committee requests the Government to send a copy of the Attorney-General's report, which was not enclosed.*

430. *Furthermore, recalling that according to the Government, since 5 September 2007, the matters raised in this case are also being examined by the Special Committee on the Handling of Cases referred to the ILO (CETCOIT) [see 351st Report, para. 409], and taking note of the fact that the trade union organization has indicated its willingness for, and openness to, conciliation, the Committee invites the parties to examine ways to give effect to its present recommendations within the framework of the Special Committee.*

UPTC

431. *With regard to subparagraph (h) of the recommendations on the threats against the President of ASOPROFE-UPTC, the Committee takes note of the Government's information, according to which the allegations have been referred to the Office for the Defence of Human Rights to conduct the necessary inquiries. For its part, the Government requests that these allegations be transferred to Case No. 1787. The Committee urges the Government to take the necessary measures without delay to ensure that the safety of Mr Luis Díaz Gamboa, the President of ASOPROFE, is guaranteed and to ensure that an investigation is carried out in this respect. The Committee requests the Government to keep it informed in this regard within the context of Case No. 1787.*

The Committee's recommendations

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

(a) With regard to the case concerning the lifting of the trade union immunity of Mr Pedro Sánchez Romero as part of the process of restructuring SENA, the Committee requests the Government to inform it of the final outcome of the appeal against the declaration of the time bar brought before the High Court of Cartagena District.

(b) With regard to the allegations concerning SENA's refusal to bargain collectively with SINDESENA, the Committee notes with interest that Decree No. 535 concerning section 416 of the Labour Code was adopted on 24 February 2009, setting out the procedure to be followed with regard to collective bargaining in the public sector and requests the Government to take the necessary measures to ensure that the trade union organization is able to bargain collectively within SENA.

(c) With regard to the allegations relating to the disciplinary proceedings under way, initiated by SENA with regard to Ms María Inés Amézquita, Mr Jesús Horacio Sánchez, Mr Carlos Arturo Rubio and Mr Gustavo Gallego, the Committee expects that the trade union rights of those concerned will be fully respected, and that these proceedings will be concluded rapidly. The Committee requests the Government to keep it informed in this regard.

(d) With regard to the declaration of illegality by the administrative authority concerning a permanent assembly held by SINTRAEMCALI within EMCALI, which led to the dismissal of 45 trade union members and six trade union leaders, and taking into account that: (1) Decision No. 1696 of 2004, which declared the permanent assembly illegal, and under which the 45 trade union members and six union leaders were dismissed, was declared null and void by the Council of State; (2) the appeal for clarification against the Council's decision was rejected (even though the appeal filed by the enterprise is still pending); (3) there are no criminal charges of any kind against the trade unionists for violent acts; and (4) more than five years have passed since the events occurred, the Committee requests the Government to consider taking the necessary measures to ensure the reinstatement of the 45 trade union members and six union leaders who were dismissed, until the ordinary judicial authority pronounces definitive

rulings. The Committee requests the Government to keep it informed in this regard.

(e) *With regard to the launch of 462 disciplinary proceedings against EMCALI workers as a result of the declaration of illegality concerning the permanent assembly of 2004, and the pressure placed on workers not to discuss trade union issues under threat of dismissal, the Committee recalls that the declaration of illegality concerning the permanent assembly (Decision No. 1696) was declared null and void by the Council of State and requests the Government to send a copy of the Attorney-General's report, according to which the proceedings in question were not initiated and the enterprise allows the trade union's officials and members to fully exercise their trade union rights.*

(f) *Furthermore, recalling that according to the Government, since 5 September 2007, the matters raised in this case are also being examined by CETCOIT [see 351st Report, para. 409] and taking into account that the trade union organization has indicated its willingness for, and openness to, conciliation, the Committee invites the parties to examine ways to give effect to its present recommendations within the framework of the Special Committee.*

(g) *With regard to the allegations concerning the threats against the President of ASOPROFE-UPTC, the Committee urges the Government to take the necessary measures without delay to ensure that the safety of Mr Luis Díaz Gamboa, the President of ASOPROFE-UPTC, is guaranteed and to ensure that an investigation is carried out in this respect. The Committee requests the Government to keep it informed in this regard, within the context of Case No. 1787.*

CASE NO. 2522

INTERIM REPORT

Complaint against the Government of Colombia presented by
— the National Union of State Employees of Colombia (UTRADEC, formerly UNETE)
— the Joint Union of Workers in Decentralized Institutions of the Municipality of Buenaventura (SINTEDMUNICIPIO)
— the Union of Workers of the Municipality of Buenaventura
— the General Confederation of Labour (CGT)
— the Union of Labour Inspectors and Public Employees of the Ministry of Social Protection (SINFUMIPROS) and
— 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: Restructuring of public institutions, mass dismissals without lifting trade union immunity, refusal to register and refusal to engage in collective bargaining with public employees

433. The Committee last examined this case at its meeting in May 2008 and presented an interim report to the Governing Body [see 350th Report, paras 450–486, approved by the Governing Body at its 302nd Session].

434. In a communication dated 2 June 2009, the National Union of State Employees of Colombia (UTRADEC, formerly UNETE) sent new allegations.

435. The Government sent its observations in communications dated 15 and 23 September 2008 and 9 March 2009.

436. 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. Previous examination of the case

437. On its previous examination of the case in May 2008, the Committee made the following recommendations [see 350th Report, para. 486]:

(a) In relation to the allegations made by the Joint Union of Workers in Decentralized Institutions of the Municipality of Buenaventura (SINTEDMUNICIPIO) and UNETE concerning the process of restructuring in the municipality of Buenaventura, in the context of which various union leaders were dismissed without their trade union immunity being lifted, observing that the Government has not specifically indicated whether Fermín González, Vinicio Eduardo Góngora Fuenmayor, Luis Enrique Rodallegas and María Eufemia Bravo Hurtado have taken the corresponding legal action and have been reinstated, the Committee requests the Government to provide

information in this regard, and particularly to provide copies of rulings ordering or refusing reinstatement.

(b) With reference to the allegations made by the CGT and SINFUMIPROS relating to the refusal of the administrative authority to register SINFUMIPROS, the Committee, recalling that, in accordance with Article 2 of Convention No. 87, all workers without distinction whatsoever shall have the right to establish organizations of their own choosing, invites the union to appeal to the administrative disputes mechanism against the decision to refuse registration and requests the Government, taking into account the *amparo* (protection of constitutional rights) ruling protecting the right to organize and until the judicial authorities rule on the matter, to take the necessary measures for the immediate registration of the union. The Committee requests the Government to keep it informed in this respect.

(c) The Committee requests the Government to furnish its observations without delay in relation to the alleged transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the suspension of the check-off of union dues, the offering of benefits to workers to give up union membership and the refusal to engage in collective bargaining alleged by the UNETE.

(d) With regard to the allegations of ASEMIL on the refusal to bargain collectively with public employees, recalling that collective bargaining in the public sector allows for special modalities of application, the Committee requests the Government to take the necessary measures to ensure respect for the right of public servants to collective bargaining in conformity with the provisions of the Conventions ratified by Colombia and to keep it informed of any development in this respect.

(e) With regard to the allegations relative to the anti-union persecution and harassment of trade union leaders and members, the Committee requests the complainant organization to specify the identity of the trade union leaders and members affected by the disciplinary proceedings so that the Government can confirm whether the proceedings in question were unrelated to anti-union grounds.

(f) With regard to the allegations relative to the refusal of the Ministry of Social Protection to register the executive board and the amendments to the statute of ASEMIL, the Committee requests the Government to indicate the reasons given by the administrative authority in order to refuse the registration of the executive board and the amendments to the statute of ASEMIL in the trade union registry. The Committee requests the Government to amend the legislation so as to bring it into conformity with Conventions Nos 87 and 98.

B. New allegations

438. In its communication dated 2 June 2009, UTRADEC sent new allegations which detailed that in March 2009 it undertook a work stoppage for non-payment of wages and health and pension contributions in the enterprise CAJANAL EICE. On 19 March the work stoppage was lifted prior to the signing of a document in which the enterprise CAJANAL EICE undertook to abstain from initiating or proceeding further with any actions, sanctions or reprisals against official workers or employees of subcontractors while respecting the terms of the latter group's contracts, both with regard to the duration of those contracts and their agreed object, with work tasks to be allocated in the usual manner. The enterprise CAJANAL EICE also undertook to pay the value of the pensions, medical insurance and wages between 25 and 26 March 2009. Finally, it undertook to pay the sums owed to the federations and confederations and in the future to comply fully and strictly with the collective labour agreement in force.

439. The complainant organization states that the enterprise CAJANAL EICE has failed to comply with any of the undertakings obtained. On the contrary, the enterprise launched a smear campaign targeting the workers.

440. The complainant organization adds that the enterprise CAJANAL EICE has not complied with the obligations contained in the collective agreement consisting of overtime payments and granting of other contractual benefits.

441. The complainant organization also alleges that the enterprise seized and removed both the trade union's archive and the computer owned by the president of the trade union organization. In addition, the enterprise required the president to take leave, thus being prevented from representing her members.

C. The Government's response

442. In its communications dated 15 and 23 September 2008 and 9 March 2009, the Government sent the following observations.

443. With regard to clause (a) of the recommendations, the Government states that:

- the Fifth Labour Court of the Buenaventura Circuit ordered the reinstatement of Vinicio Eduardo Góngora Fuenmayor in a ruling dated 26 June 2002. In the second instance the High Court of the Judicial District of Guadalajara de Buga issued a ruling annulling the decision of the Fifth Labour Court but held that it was not competent to rule on the grounds of the case;

- with regard to Fermín González, the Third Labour Court of the Buenaventura Circuit ordered the reinstatement of Mr González through a ruling dated 3 October 2002. In the second instance, the High Court of the Judicial District of Guadalajara de Buga held that it had no competence to rule on the grounds of the case. Mr González therefore decided to make use of the *amparo* mechanism, but to no avail;

- as to Mr Luis Enrique Rodallegas, in a ruling of 13 December 2002, the Second Labour Court of the Buenaventura Circuit declared that the trade union immunity action was prescribed. This ruling was upheld by the High Court of the Judicial District of Guadalajara de Buga. Mr Rodallegas lodged a *tutela* (protection of constitutional rights) action with the Supreme Court of Justice, but to no avail;

- Mr Rafael Cuero, Mr Luis Emilio Chávez and Mr Miguel Satiesteban, directors of SINTEDMUNICIPIO, managed to obtain their reinstatement together with compensation through the use of an *amparo* action;

- with regard to Ms Ana Alegría Valencia, a SINTEDMUNICIPIO director, the *amparo* appeal was not granted. Documents relating to Ms Valencia's case are attached;

- the Government attaches copies of rulings issued by the Third Labour Court of the Buenaventura Circuit relating to Mr Fermín González, as well as the ruling issued by the High Court of the Judicial District of Guadalajara de Buga and those issued by the Second Labour Court of the Buenaventura Circuit and the High Court of the Judicial District of Guadalajara de Buga regarding Mr Luis Enrique Rodallegas.

444. As to clause (b) of the recommendations, the Government reiterates that it abides by the decision handed down by the administrative disputes mechanism.

445. The Government refers to the decision contained in the ruling of 2 March 2007, issued by the Supreme Court of Justice, which ruled on the *amparo* action lodged by the trade union organization. The abovementioned ruling stated the following:

… based on the foregoing information it is possible to establish that the circumstances surrounding the establishment of the trade union entail a risk to employment stability which is of interest in this case because it affects a number of the founding members and undermines any possibility of starting a trade union organization. As a result, the court of appeal judge is obliged to take steps to protect the right to organize, currently in its early stages, that is to say, at the registration stage.

However, this should be carried out while respecting the subsidiary nature of the *tutela* which cannot override the decisions of the general jurisdictional courts (the competent bodies with regard to ruling definitively on the administrative act).

In order to avoid irreparable harm, the *tutela* ruling issued by the court of appeal judge will stand, but only temporarily, in order to allow the trade union organization to lodge the corresponding administrative appeal against the rulings issued by the Ministry of Social Protection refusing registration.

Consequently, the *tutela* decision regarding the right to organize will be confirmed, with the abovementioned clarification, and will remain in effect until the judicial authority has ruled on the refusal by the Ministry of Social Protection to register the trade union organization.

446. According to the Government, it can be inferred from the above information that the Supreme Court of Justice upheld the right to organize in the second instance, while respecting the competence attributed to the judicial authority, the competent body in terms of checking the legality of the decisions taken by the administration (in this particular case the rulings issued by the Ministry of Social Protection). The Government considers that as a consequence no more action should be taken until the judicial authority has issued a ruling. Thus, it states that it is extremely important that the trade union organization reveal the identity of the court with which it lodged the corresponding action, so that inquiries may be made concerning the state of the proceedings.

447. As to clause (c) of the recommendations, regarding the observations on the transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the Government states that, in accordance with the information provided by the general manager of CAJANAL EICE, the transfers were undertaken for administrative reasons, the main aim being to reorganize the enterprise in order to render procedures more streamlined, uniform and coordinated. According to the general manager, at no time have the trade union directors been adversely affected by the transfers, with the only step taken being a move to different premises. Previously CAJANAL EICE had several offices but, in the interests of streamlining procedures, as previously stated, all the sections were relocated to a single office.

448. The Government states that, furthermore, the Office for Cooperation and International Relations will request information regarding the administrative labour investigation conducted regarding CAJANAL EICE for violations of the right to organize and freedom of association, and as soon as a response has been obtained it will be sent.

449. With regard to the check-off of union dues, in accordance with the information provided by the general manager of CAJANAL EICE, the check-off is currently being undertaken.

450. Finally, the general manager stated that the refusal to negotiate with the minority trade union was because, at the time when talks began, the majority trade union was SINTRAOFICAJANAL and the minority trade union was SINTRASS. In the light of this status, before beginning any negotiations, the Legal Office of the Ministry of Social Protection was consulted and issued the following opinion: “should there exist or come into existence various trade unions, the trade union representing at least half of the workers in the enterprise shall represent all of the workers for the purposes of collective bargaining, in so far as clause 2 of section 357 of the Substantive Labour Code, subrogated by

section 26 of Decree Law No. 2351 of 1965, is currently in force, a situation that will have to be determined either by CAJANAL EICE or by the Ministry of Social Protection through the Territorial Directorate in order that the corresponding bargaining process may proceed". Thus, the majority trade union within an enterprise enjoys the power to denounce collective agreements and present lists of demands in order to give rise to a labour dispute on behalf of the workers of the enterprise and it is only under these circumstances that an employer is obliged to come to the negotiating table. The general manager states that the administration respected the regulations in force at the time of the collective bargaining process, signing the collective agreement currently in force within the enterprise.

451. The Government states that, in accordance with the communication sent by the Coordinator of the Prevention, Inspection, Monitoring and Control Group of the Cundinamarca Territorial Directorate regarding CAJANAL EICE, an administrative labour inquiry was initiated into the refusal to negotiate regarding a list of demands. Resolution No. 002627 of 25 August 2008 was consequently issued abstaining from taking any administrative measures against the abovementioned enterprise. This decision was based on CAJANAL EICE's compliance with domestic legislation. The Government states that the decision does not yet stand, given that legal appeals have been lodged.

452. As to clause (d) of the recommendations regarding the refusal to bargain collectively in the public sector, the Government took careful note and states that steps are being taken in this regard.

453. As to section (e), the Government hopes to receive the corresponding information so that it may proceed accordingly.

454. As to clause (f), the Government states that the Cundinamarca Territorial Directorate of the Ministry of Social Protection ordered the registration of the new Executive Board of ASEMIL through resolution No. 001890 of 10 June 2008 and the deposit of the amendments to the statute of ASEMIL on 21 June 2007.

D. The Committee's conclusions

455. *The Committee notes the new allegations and the Government's observations regarding the issues pending.*

456. *With regard to clause (a) of the recommendations pending regarding the allegations presented by SINTEDMUNICIPIO and UTRADEC (formerly UNETE) concerning the restructuring process in the municipality of Buenaventura, within the framework of which various trade union leaders (Fermín González, Vinicio Eduardo Góngora Fuenmayor, Luis Enrique Rodallegas and María Eufemia Bravo Hurtado) were dismissed without the corresponding lifting of trade union immunity, the Committee notes that:*

– *in the case of Fermín González, according to the Government's response and the copies of the rulings attached, the Third Labour Court of the Buenaventura Circuit ordered his reinstatement on 3 October 2002. However, not being fully satisfied with the ruling, Mr González appealed but the High Court of the Judicial District of Guadalajara de Buga held that it had no competence to rule on the grounds of the case. Mr González initiated an amparo action, but to no avail. In this regard, taking into account the fact that the District High Court did not issue a ruling regarding the appeal lodged, the Committee requests the Government to ensure compliance without delay with the ruling ordering the reinstatement of Mr Fermín González should it still be in force;*

– *in the case of Mr Vinicio Eduardo Góngora Fuenmayor, according to the attached court rulings, the Labour Chamber of the High Court of Buga revoked the ruling in the first instance ordering his reinstatement. The revocation ruling was upheld by the Penal Chamber of Cassation of the Supreme Court of Justice;*

– *in the case of Mr Luis Enrique Rodallegas, according to the Government and the copies attached, the judicial authority held that the trade union immunity action was prescribed in the first and second instances, with Mr Rodallegas lodging a tutela action to no avail;*

– *in the case of Ms María Eufemia Bravo Hurtado, according to the documents provided, the Second Labour Court of the Circuit ordered her reinstatement, a ruling that was subsequently revoked by the Labour Decision Chamber of the High Court of the Judicial District. Ms Bravo Hurtado lodged a tutela action with the Labour Appeals Chamber of the Supreme Court of Justice, which was dismissed as unfounded. This ruling was in turn upheld by the Penal Chamber of Cassation of the Supreme Court of Justice.*

457. *With regard to clause (b) of the recommendations regarding the allegations presented by the CGT and SINFUMIPROS regarding the administrative authority's refusal to register SINFUMIPROS, the Committee notes that the Government states that, in light of the* tutela *ruling issued by the Supreme Court of Justice, the trade union organization cannot be registered until the judicial authority has issued a ruling, and requests the complainant organization to reveal the identity of the court with which it lodged the corresponding action. In this regard, the Committee recalls that upon last examining the case it noted a Supreme Court of Justice ruling of 2 March 2007 issued by upholding the* tutela *granted by the judge in the first instance who ordered that the trade union organization be registered temporarily in order to allow the trade union organization to lodge an administrative appeal against the rulings issued by the Ministry of Social Protection refusing registration. The Committee observes in this regard that in similar cases the Constitutional Court (in rulings Nos 465/08 and 695/08) considered that registration with the Ministry of Social Protection of the establishment of trade union organizations "is purely for information purposes, not authorizing the abovementioned Ministry to carry out prior checks on the contents of the founding document". In these circumstances, the Committee requests the Government, taking into account this recent case law, to take the necessary measures to ensure the immediate registration of SINFUMIPROS. The Committee requests the Government to keep it informed in this regard.*

458. *As to clause (c) of the recommendations regarding the transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the suspension of the check-off of union dues, the offering of benefits to workers to give up union membership and the refusal on the part of CAJANAL EICE to engage in collective bargaining alleged by UTRADEC (formerly UNETE), the Committee notes that, according to the Government, in accordance with the information provided by the manager general of the enterprise, Mauricio Lobo Rodríguez and Gustavo Vargas Burbano were transferred for administrative reasons as part of a process aimed at bringing all CAJANAL's different sections together in one office and that trade union leaders were not adversely affected by this move. The Committee notes that according to the enterprise, the check-off of union dues is being undertaken. The Committee further notes that the Government states that it will request information regarding the administrative labour investigation conducted into CAJANAL EICE for violations of the right to organize. The Committee requests the Government to keep it informed in this regard.*

459. *With regard to the alleged refusal by the enterprise to bargain collectively, the Committee notes that the Government states that an administrative labour inquiry was initiated as a result of which resolution No. 2627 of 25 August 2008 was issued absolving the enterprise, and adds that, in accordance with the law, the enterprise signed a collective agreement which is currently in force.*

460. *With regard to the new allegations presented by UTRADEC (formerly UNETE) regarding non-compliance with the collective agreement and accords signed by CAJANAL EICE, including the failure to pay overtime and the refusal to grant other contractual benefits referred to in the collective agreement, the seizure and removal of the trade union archive and the computer of the president of the trade union organization, along with pressuring the president to take leave, thus preventing her from representing her members, the Committee observes that the Government has not sent its observations in this regard and requests it to do so without delay.*

461. *As to clause (d) of the recommendations regarding the allegations presented by ASEMIL on the refusal to bargain collectively with public employees, the Committee notes that the Government states that it is taking steps in this regard. Observing the recent adoption of Decree No. 535 of 24 February 2009 governing section 416 of the Substantive Labour Code (in light of Acts Nos 411 and 524 approving Conventions Nos 151 and 154 at national level) and establishing the bodies within which negotiation between trade union organizations of public employees and public sector bodies will be advanced, the Committee requests the Government to keep it informed of developments in the wake of the adoption of the abovementioned Decree and as to whether ASEMIL has been able to participate in the negotiation processes.*

462. *With regard to clause (e) of the recommendations regarding the anti-union persecution and harassment of trade union leaders and members, the Committee notes that the Government states that it has not as yet received the information from ASEMIL on the identity of the trade union leaders and members affected by the disciplinary proceedings which would allow the Government to confirm that the proceedings in question are unrelated to anti-union grounds. In these circumstances, unless the complainant organization presents additional information in this respect, the Committee will not pursue its examination of these allegations.*

463. *With regard to clause (f) of the recommendations regarding the refusal of the Ministry of Social Protection to register the Executive Board and the amendments to the statute of ASEMIL, the Committee notes with interest that the Government states that the Ministry of Social Protection ordered the deposit of the amendments to the statute of ASEMIL on 21 June 2007 and the registration of the new Executive Board of ASEMIL on 10 June 2008.*

The Committee's recommendations

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

(a) As to the dismissal of union leader Fermín González without his trade union immunity being lifted within the framework of the process of restructuring in the municipality of Buenaventura, taking into account the ruling issued by the Third Labour Court of the Buenaventura Circuit ordering the reinstatement of Mr Fermín González and that the District High Court held that it had no competence to rule on the appeal lodged against the ruling issued in the first instance, the Committee requests the Government to ensure compliance without delay with the ruling ordering the reinstatement of Mr Fermín González should it still be in force.

(b) With regard to clause (b) of the recommendations regarding the allegations presented by the CGT and the SINFUMIPROS, the Committee requests the Government, taking into account the recent case law of the Constitutional Court (rulings Nos 465/08 and 695/08), to take the necessary measures to ensure the immediate registration of SINFUMIPROS. The Committee requests the Government to keep it informed in this regard.

(c) As to clause (c) of the recommendations regarding the transfer of Mauricio Lobo Rodríguez and Gustavo Vargas Burbano, members of the Executive Board of SINTRAOFICAJANAL, the suspension of the check-off of union dues and the offering of benefits to workers to give up union membership, the Committee requests the Government to keep it informed as to whether administrative inquiries have been launched regarding the enterprise.

(d) With regard to the new allegations presented by UTRADEC (formerly UNETE) regarding non-compliance with the collective agreement and accords signed by CAJANAL EICE, including the failure to pay overtime and the refusal to grant other contractual benefits referred to in the collective agreement, the seizure and removal of the trade union archive and the computer of the president of the trade union organization, along with pressuring the president to take leave in order to separate her from her members, the Committee requests the Government to send its observations without delay.

(e) As to clause (d) of the recommendations regarding the allegations presented by ASEMIL on the refusal to bargain collectively with public employees, noting the recent adoption of Decree No. 535 of 24 February 2009 governing section 416 of the Substantive Labour Code (in light of Acts Nos 411 and 524 approving Conventions Nos 151 and 154 at national level) and establishment of the bodies within which negotiation between trade union organizations of public employees and public sector bodies will be advanced, the Committee requests the Government to keep it informed of developments and as to whether ASEMIL has been able to participate in the negotiation processes.

CASE NO. 2600

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

Complaint against the Government of Colombia presented by
— the National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-Metals and Related Industries (SINTRAIME)
— the Single Confederation of Workers of Colombia (CUT) and
— the World Federation of Trade Unions (WFTU)

Allegations: The National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-Metals and Related Industries (SINTRAIME), the Single Confederation of Workers of Colombia (CUT) and the World Federation of Trade Unions (WFTU) allege the dismissal, on 28 July 2007, of two trade union leaders of SINTRAIME, by a metallurgical enterprise, and the use by that enterprise, to carry out regular production activities, of temporary workers who neither enjoy the right to unionize nor are covered by the collective agreement. It is also alleged that: pressure was put upon the workers of another enterprise which resulted in the non-renewal of the contracts of 18 workers; a wage increase provided for under the collective agreement was withheld in the case of those workers who had joined the trade union after 1 June 2007; two trade union leaders were dismissed and the enterprise used temporary workers to carry out regular production activities

465. The Committee last examined this case at its November 2008 meeting, and on that occasion presented a report to the Governing Body [see 351st Report, approved by the Governing Body at its 303rd Session].

466. The Government sent its observations in a communication dated 16 March 2009.

467. 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

468. In its previous examination of the case in November 2008, the Committee made the following recommendations [see 351st Report, para. 574]:

(a) As regards the allegations relating to the dismissal, on 28 July 2007, of two SINTRAIME trade union leaders, Mr Efrey Garay Escobar and Mr Hernando Huertas Hernández, the Committee requests the Government to keep it informed of the outcome of the pending judicial proceedings.

(b) As regards the allegations relating to the use of temporary workers, provided through a labour contractor to carry on the normal production activities of the enterprise, who do not enjoy the right of association and are not covered by the existing collective agreement, the Committee requests the Government to take the necessary steps to guarantee the right to associate and to bargain collectively of the temporary workers and to keep it informed as to the final outcome of the ongoing administrative inquiry.

(c) As regards the allegations relating to the enterprise CMA regarding pressure put on fixed-term workers belonging to SINTRAIME which resulted in the non-renewal of the contracts of 18 workers, the withholding of a wage increase provided for under the collective agreement in the case of workers who had joined the trade union after 1 June 2007, the dismissal of the trade union leaders Mr Pedro Jamel Ávila and Mr Eduardo Cuéllar for demanding the same increase, and the use of temporary workers provided through a labour contractor to carry on the regular production activities of the enterprise, the Committee urges the Government to send its observations in this regard without delay.

B. The Government's reply

469. In its communication of 16 March 2009, the Government sent the following observations.

470. As regards recommendation (a), regarding the dismissal of Mr Luis Hernando Huertas, the Government states that the Fifth Labour Court of the Bogotá Circuit has heard testimony from witnesses.

471. As regards the dismissal of Mr Efrey Garay Escobar, the Twelfth Labour Court of the Bogotá Circuit gave a ruling vindicating the enterprise Munal. According to the ruling, Mr Garay did not have the status of union official, and the allegation that rights pertaining to freedom of association were violated is therefore without foundation.

472. As regards recommendation (b), concerning the use of temporary workers who are supplied through a labour contractor to carry on the normal production activities of the enterprise and do not enjoy the right of association, the Government indicates that under the terms of article 70 and following sections of Act No. 50 of 1990, the use of such temporary employment agencies is allowed. It is these companies that directly contract with the workers concerned; thus, there is no relationship between the worker and the main contractor (in this case the Munal enterprise), and the workers can exercise their right to freedom of association in relation to their employer (the temporary recruitment agency). Lastly, the Government states that, in view of the trade union's decision to abandon its legal action, the inquiry launched by the Cundinamarca Territorial Directorate has been shelved.

473. With regard to recommendation (c), concerning allegations of pressure put on fixed-term workers belonging to SINTRAIME, which resulted in the non-renewal of the contracts of 18 workers, the withholding of a wage increase provided for under a collective agreement, and the use of temporary workers, the Government states that the Caldas Territorial Directorate launched an administrative inquiry resulting in Resolution No. 6 of 2008, which fined the enterprise Compañía Manufacturera ANDINA SA. An appeal was lodged against that ruling, and the Territorial Directorate of Caldas modified the fine. The Government provides a copy of the decisions of the Directorate.

474. The company in question was also fined for refusing to engage in negotiations, and the Government supplies a copy of the decision in question.

475. As regards the judicial proceedings initiated by Messrs Pedro Jamel Ávila and Eduardo Cuéllar, the Government requests the trade unions concerned to provide more information with a view to ascertaining the current status of the proceedings, given that the Ministry of Social Protection is not competent to decide whether or not dismissals of workers are justified, this being a matter for the judicial authority.

C. The Committee's conclusions

476. *With regard to recommendation (a) concerning the dismissal, on 28 July 2007, of two SINTRAIME trade union leaders, Mr Efrey Garay Escobar and Mr Hernando Huertas Hernández, the Committee takes note of the Government's information according to which in the case of Mr Efrey Garay Escobar, the 12th Labour Court of the Circuit vindicated the company Munal on the grounds that Mr Efrey Garay Escobar was not a trade union official. As regards the dismissal of Mr Hernando Huertas Hernández, the Committee notes that, according to the Government, the proceedings are still at the stage of receiving evidence, and requests the Government to keep it informed in this regard.*

477. *As regards recommendation (b) concerning the use of temporary workers who do not enjoy freedom of association and are not covered by the collective agreement in force, the Committee notes the Government's information according to which: under the terms of article 70 and following sections of Act No. 50 of 1990, hiring workers through temporary employment agencies is legal; it is these agencies that directly hire the workers, who have no relationship with the main contractor company; and the workers can assert their rights of freedom of association with regard to their employer (the agency). The Committee also notes that according to the Government, the trade union organization withdrew from the administrative inquiry initiated by the Cundinamarca Territorial Directorate. In this respect, the Committee requests the Government to ensure compliance with the principles in Article 2 of Convention No. 87, according to which all workers without distinction whatsoever shall have the right to establish and join organizations of their choosing, including SINTRAIME, whether they are employed on a permanent basis, for a fixed-term or temporary workers, and should have the right to negotiate collectively.*

478. *As regards recommendation (c) concerning the allegations of pressure put on fixed-term workers belonging to SINTRAIME at the enterprise Compañía Manufacturera ANDINA SA, which resulted in the non-renewal of the contracts of 18 workers, the withholding of a wage increase provided for under a collective agreement from workers who had joined after 1 June 2007, the dismissal of trade union officials Pedro Jamel Ávila and Eduardo Cuéllar for demanding the same increase, and the use of temporary agency-supplied workers to carry on the normal production activities of the company, the Committee notes the Government's information that the Caldas Territorial Directorate launched an administrative inquiry that led to Resolution No. 6 of 2008, fining the company the sum of 30 times the monthly minimum wage for violation of labour and social rights, plus an additional sum of 40 times the legal minimum wage, the fines being subsequently reduced by the Territorial Director to a single fine of 60 times the minimum wage. The Committee also notes that the company was fined for refusal to negotiate, and the Government supplies a copy of this ruling.*

479. *As regards the allegations concerning the judicial proceedings initiated in response to the dismissal of trade union leaders Pedro Jamel Ávila and Eduardo Cuéllar for demanding the same pay increase, the Committee notes that the Government has requested more information from the trade union organizations in order to be able ascertain the current status of these proceedings, given that the Ministry of Social Protection is not competent to decide whether or not the dismissals were justified, this being a matter for the courts. The Committee requests the complainant organizations to provide the information sought by the Government, and requests the Government to keep it informed of the outcome of these proceedings.*

The Committee's recommendations

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

(a) The Committee requests the Government to keep it informed of the final outcome of the judicial proceedings still pending regarding the dismissal, on 28 July 2007, of Mr Hernando Huertas Hernández.

(b) The Committee requests the complainant organizations to provide the Government with the additional information sought in relation to the judicial proceedings regarding the dismissal of Mr Pedro Jamel Ávila and Mr Eduardo Cuéllar, for demanding that the pay increase be applied to them, to enable the Government to carry out the necessary investigations, and requests the Government to keep it informed of the outcome of these proceedings.

CASE NO. 2617

INTERIM REPORT

Complaints against the Government of Colombia presented by
– the General Confederation of Labour (CGT)
– the Association of Employees of the National Prison Services (ASEINPEC) and
– the Union of Guards of the National Prison Services (SIGGINPEC)

Allegations: The Union of Guards of the National Prison Service (SIGGINPEC) alleges that union members were branded as members of subversive organizations, that three union officials were dismissed while covered by trade union immunity; that disciplinary proceedings were instituted against the chairperson and the secretary of the national executive committee for holding information meetings; that union leave was denied, as was the provision of a union office and telephone line; and, lastly, that the National Prison Service (INPEC) drafted legislation aimed at changing the status of staff working in the prison guards and security service in such a way as to prevent trade union membership. For their part, the General Confederation of Labour (CGT) and the Association of Employees of the National Prison Service (ASEINPEC) also refer to the drafting of the legislative bill mentioned above and allege that a dismissal took place

481. The complaints are contained in communications dated 24 September and 5 December 2007 and 27 May 2008 from the Union of Guards of the National Prison Service (SIGGINPEC), communications dated 31 May and 25 October 2008 and 28 May 2009 from the Association of Employees of the National Prison Service (ASEINPEC) and a communication dated 3 June 2008 from the General Confederation of Labour (CGT).

482. The Government sent its observations in communications dated 27 August 2008 and 20 March 2009.

483. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

484. In their communications dated 24 September and 5 December 2007 and 27 May 2008, SIGGINPEC alleges that the National Prison Service (INPEC) authorities, through communication No. 7100-01-1893 of 3 October 2006 to the Ministry of Justice, named members of the trade union as possible guerrillas, which put the personal safety of union members at risk and resulted in the death of Mr Daniel Ruiz Bedoya and threats against trade union officials Messrs Arias Ramírez, de la Rosa Grimaldos, Rivera Sogamoso, Oviedo Mogollón and Barrera by paramilitary groups, leading to the internal transfer of these officials. This branding of officials as "guerrillas" was reported to the Attorney-General's Office, which has not shed any light on the matter. Furthermore, proceedings were instituted before the Ministry of Social Welfare against INPEC (file No. 059808 of 23 March 2007 with Inspectorate No. 13), with a hearing held on 24 July 2007 in which the INPEC authorities did not attend. The Ministry of Interior and Justice granted Mr de la Rosa Grimaldos and Mr Arias Ramírez protection.

485. The complainant also alleges the following: (1) that Carlos Cordero Velandia, José Joaquín Vecino Calderón and Jorge James López Castillo were dismissed while covered by trade union immunity. With regard to the latter case, an appeal for protection was lodged but rejected by the Supreme Court of Justice (Labour Appeal Chamber); (2) that disciplinary proceedings were instituted (file No. 0125 of 2007) against the Chairperson and the Secretary of the national executive committee for holding informational meetings; (3) that the INPEC authorities refuse to grant trade union leave or provide a union office and telephone line, benefits enjoyed by the institution's other trade union; and (4) that the INPEC authorities are working on a bill aimed at changing the status of prison guards and security service staff working for INPEC in order to give their duties police status, thereby precluding union membership.

486. In the communications dated 31 May, 31 July and 25 October 2008 and 28 May 2009 from ASEINPEC and 3 June 2008 from the CGT, the complainants allege that the Government is attempting to deny prison workers the right to freedom of association by reforming the Penitentiary and Prison Code to place INPEC under the authority of the Ministry of Defence, as the security service, and that the INPEC Director intends to give police status to the duties performed by INPEC guards and security officers, thereby precluding trade union membership. Lastly, ASEINPEC alleges that Mr Mario Salamanca Guiller was dismissed in 1995. The complainants also refer to various allegations examined by the Committee under Case No. 2068.

B. The Government's reply

487. In its communications dated 27 August 2008 and 20 March 2009, the Government sent the following observations.

488. With regard to the allegations made by SIGGINPEC concerning the denial of union leave, the refusal to provide an office, the institution of disciplinary proceedings against members of the trade union and the violation of trade union immunity, the Government states that, according to the Director-General of INPEC, that body respects the right to freedom of association, provides guarantees for its exercise and, according to the INPEC database, SIGGINPEC was granted 659 days of union leave in 2007.

489. Concerning the refusal to provide SIGGINPEC with an office, the Director admitted that ASEINPEC, another union, had been given an office for its current administration, since ASEINPEC had previously been the only trade union, and, owing to limited space, it had not been possible to provide the SIGGINPEC with an office.

490. The Government adds that there are no legal provisions requiring employers to provide trade unions with an office, given that there are no regulations in the Substantive Labour Code that require employers to provide trade unions with an area on their premises. Although Convention No. 87 recognizes the fundamental right of workers and employers to establish occupational organizations, none of its provisions requires employers to provide office space for trade unions to carry out their work. The Government adds that, contrary to what SIGGINPEC has claimed, section 354 of the Substantive Labour Code does not consider the failure to provide office space in the workplace to be a violation of freedom of association.

491. With regard to the disciplinary proceedings, the Government states that, according to the INPEC Director, these proceedings are unconnected to these workers' status as union officials and simply relate to complaints made against employees who are allegedly guilty of misconduct, as defined in current legislation. INPEC states that disciplinary investigations are currently under way regarding to employees Wilson Hugo Ayala Pérez, Diego Alonso Arias Ramírez and Nelson Enrique Barrera Morales, for allegedly planning a one-day work stoppage and informational meetings, apparently led by members of one of INPEC's unions, requested by guards and security service staff at the High and Medium Security Penitentiary and High Security Prison of Bogotá.

492. With regard to events surrounding the death of a union official and threats made against other union officials, the Government considers that these should be examined under Case No. 1787. As regards the administrative labour investigation referred to by SIGGINPEC, the Government states that the Office for International Cooperation and Relations has renewed its request for information from the Cundinamarca Regional Directorate, with the aim of obtaining information on the outcome of this investigation.

493. As regards the allegations made by SIGGINPEC, the CGT and ASEINPEC concerning legislation changing the status of prison guards and security officers, the Government points out that this matter has no connection whatsoever with Conventions Nos 87, 98 and 151. Public bodies in Colombia can submit bills with the aim of improving and guaranteeing public service, the main purpose of which is to meet the essential objectives of the State. INPEC's goal in this instance is to improve security in various prisons. The Government adds that this bill would not in any way affect the right to freedom of association, and that the trade unions have misinterpreted the regulation. National legislation confers extraordinary powers to the executive to issue legislative regulations when requirements and public convenience so dictate, as is the case in this instance. The bill is not intended to undermine the trade union, but to improve the effectiveness and efficiency of service provisions. The bill contains administrative provisions, none of which refer to any restrictions on the right to freedom of association. According to its articles, the bill's aim is to introduce provisions that establish within the prison system a culture of respect for the rights of inmates and a more dynamic approach to human resources management at INPEC.

494. As for the case of Mr Mario Salamanca Guiller, the trade union should send the relevant observations and provide more information so that the matter can be investigated.

C. The Committee's conclusions

495. *The Committee notes that this case relates to the allegations made by SIGGINPEC concerning the labelling of its members as members of subversive organizations; the dismissal of officials Carlos Cordero Velandia, José Joaquín Vecino Calderón and Jorge James López Castillo while they were covered by trade union immunity; the institution of disciplinary proceedings against the chairperson and the secretary of the national executive committee for holding informational meetings; the denial of trade union leave and refusal to provide a union office and telephone line; and the drafting by the INPEC authorities of a bill aimed at changing the status of staff working as prison guards and in the security service so as to prevent their trade union membership. The Committee notes that, for their part, the CGT and ASEINPEC also refer to the drafting of the legislative bill mentioned above and also allege that Mr Mario Salamanca Guiller was dismissed in 1995.*

496. *With regard to SIGGINPEC's allegations that the INPEC authorities named members of the trade union as possible members of a subversive organization (communication No. 7100-01-1893 of 3 October 2006, addressed to the Ministry of Justice), the Committee notes that, according to the trade union, this accusation put the safety of union members at serious risk and led to the killing of Daniel Ruiz Bedoya and threats against officials Arias Ramírez, de la Rosa Grimaldos, Rivera Sogamoso, Oviedo Mogollón and Barrera by paramilitary groups, resulting in the transfer of these officials. The Committee notes that these events were reported to the Attorney-General's Office and that proceedings were instituted before the Ministry of Social Welfare against INPEC (file No. 059808 of 23 March 2007 with Inspectorate No. 13), without any concrete outcomes to date, with the sole exception of the protection granted by the Ministry of Interior and Justice to Mr de la Rosa Grimaldos and Mr Arias Ramírez.*

497. *The Committee notes that, for its part, the Government states that it has requested the Ministry of Social Welfare to provide information on the current investigation.*

498. *In this regard, the Committee notes that these are serious allegations, according to which there were threats to the lives and safety of both union officials and trade unionists and one official, Mr Ruiz Bedoya, was murdered. The Committee notes that, in relation to this latter allegation concerning Mr Bedoya, the matter is being examined under Case No. 1787 [see 348th Report, para. 234]. The Committee notes that the Government did not send any information on the complaint made by the INPEC authorities to the Ministry of Justice on the possible membership of SIGGINPEC members to a subversive movement, the resulting investigations, or the outcome of the complaint made by the trade union to the Attorney-General's Office concerning this matter. The Committee considers that when the Government carries out investigations, they should be based on duly founded accusations and kept strictly confidential, in order to prevent trade unions, their officials and members from being stigmatized, a situation that could pose a threat to their lives or safety. Under these circumstances, the Committee requests the Government to provide information on ongoing investigations by the Attorney-General's Office and the Ministry of Social Welfare regarding these allegations, including the substance of the complaint, and that the Government take the necessary measures, without delay to guarantee the safety of all officials and members of the trade union who were threatened, including those under investigation. The Committee will continue to examine these allegations under Case No. 1787.*

499. *With regard to the allegations concerning the dismissal of officials Carlos Cordero Velandia, José Joaquín Vecino Calderón and Jorge James López Castillo while they were covered by trade union immunity, the Committee notes that the Government did not send its observations in this regard, and requests it to do so without delay.*

500. *Concerning the allegations on the institution of disciplinary proceedings against the chairperson and the secretary of the national executive committee for holding informational meetings, the Committee notes the Government's statements that, according to the INPEC Director, a disciplinary investigation is currently being conducted against officials Wilson Hugo Ayala Pérez, Diego Alonso Arias Ramírez and Nelson Enrique Barrera Morales, and that these proceedings were not instituted because of their status as union officials, but rather because they allegedly planned a one-day work stoppage and informational meetings requested by guards and security service staff of the High and Medium Security Penitentiary and High Security Prison of Bogotá. However, taking into account the specific circumstances of the tasks undertaken by prison guards and the divergence between the allegations and the Government's reply, the Committee requests the Government and the complainant organization to provide additional information on these allegations so that the Committee may examine them in full knowledge of the facts.*

501. *With regard to the allegations concerning the denial of trade union leave and the refusal to provide a union office and telephone line, the Committee notes the Government's statements that, according to the Director-General of INPEC, the right to freedom of association is respected and that in 2007 SIGGINPEC was granted 659 days of union leave. As regards the refusal to provide SIGGINPEC with an office and telephone line, the Committee notes that, according to the INPEC Director, ASEINPEC, which had previously been the only trade union at that location, received an office for its current administration and that, owing to limited space, SIGGINPEC had not been provided with an office. The Committee notes that the Government, for its part, states that there are no legal provisions requiring employers to provide trade unions with offices, given that neither the Substantive Labour Code nor Convention No. 87 requires employers to provide trade unions with office space on their premises. The Committee recalls that Convention No. 151, Article 6, stipulates that: (a) such facilities shall be afforded to the representatives of recognized public employees' organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work; (b) the granting of such facilities shall not impair the efficient operation of the administration or service concerned; and (c) the nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means. In these circumstances, the Committee requests the Government to take the necessary measures to promote an agreement between INPEC and SIGGINPEC concerning the facilities to be provided to the trade union, in accordance with this Convention that has been ratified by Colombia.*

502. *Concerning the allegations made by the SIGGINPEC, the CGT and the ASEINPEC with regard to the drafting of legislation to change the status of prison guards and security service staff working for the INPEC in order to give them police status, thereby precluding union membership, the Committee notes that, according to the Government: (1) this matter has no connection whatsoever with the requirements of Conventions Nos 87, 98 and 151; (2) public bodies can submit bills aimed at improving and guaranteeing public service, the main purpose of which is to meet the essential objectives of the State. INPEC's goal in this instance is to improve security in various prisons; and (3) this bill would not in any way affect the right to freedom of association, and the trade unions have misinterpreted the regulation, given that its provisions are administrative and none of them refer to restrictions on the right to freedom of association.*

503. *In this regard, the Committee notes that the documentation provided by ASEINPEC includes a communication from INPEC, according to which objective No. 2.2 of the bill is: "to give police status to the duties performed by the current guards and security officers of the INPEC, thereby precluding trade unions". The Committee notes, on the other hand, that Bill No. 18, a copy of which was also sent, does not appear to refer, either directly or indirectly, to freedom of association. The Committee recalls that, in accordance with Article 2 of Convention No. 87, all workers, without distinction, including prison staff, should enjoy the right to establish or join organizations of their own choosing [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *fifth edition, 2006, para. 232]. The Committee requests the Government to ensure that the bill in its final form fully respects this provision. The Committee requests the Government to keep it informed of any developments in this regard.*

504. *With regard to the allegations made by the CGT and ASEINPEC concerning the dismissal of Mr Salamanca Guiller, the Committee, while noting that these allegations date back to 1995, which could make it difficult to shed light on the matter, notes that the Government requires more information to carry out the necessary investigations. In such circumstances, the Committee requests the trade unions to send more details on the circumstances surrounding the dismissal and the worker's trade union position.*

The Committee's recommendations

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

(a) With regard to the allegations made by SIGGINPEC that the INPEC authorities named union members as possible members of a subversive organization (communication No. 7100-01-1893 of 3 October 2006 addressed to the Ministry of Justice), the Committee requests the Government to provide it with information on the ongoing investigations by the Attorney-General's Office and the Ministry of Social Welfare, including the substance of the complaint, and that the Government take the necessary measures without delay to guarantee the safety of all the trade union officials and members who were threatened, including those presently under investigation. The Committee will continue to examine these allegations under Case No. 1787.

(b) As regards the allegations concerning the dismissal of union officials Carlos Cordero Velandia, José Joaquín Vecino Calderón and Jorge James López Castillo while they were covered by trade union immunity, the Committee requests the Government to send its observations without delay.

(c) Concerning the allegations about the institution of disciplinary proceedings against the chairperson and the secretary of the SIGGINPEC national executive committee as a result of the alleged planning of a one-day work stoppage and informational meetings and taking into account the specific circumstances of the tasks undertaken by prison guards and the divergence between the allegations and the Government's reply, the Committee requests the Government and the complainant organization to provide additional information on these allegations so that the Committee may examine them in full knowledge of the facts.

(d) ***With regard to the allegations concerning the denial of trade union leave and refusal to provide a union office and telephone line, the Committee requests the Government to take the necessary measures to promote an agreement between INPEC and SIGGINPEC concerning the facilities to be provided to the union, in accordance with Convention No. 151, which has been ratified by Colombia.***

(e) ***As regards the allegations presented by SIGGINPEC, the CGT and ASEINPEC concerning the drafting of a legislative bill attempting to change the status of the duties of prison guards and security service staff working for INPEC so as to give them police status and prevent union membership, the Committee requests the Government to ensure that the bill eventually passed fully respects Article 2 of Convention No. 87, which has been ratified by Colombia. The Committee requests the Government to keep it informed in this regard.***

(f) ***Concerning the allegations made by the CGT and ASEINPEC surrounding the dismissal of Mr Salamanca Guiller, the Committee, noting that the Government requires more information to carry out the necessary investigations, requests the trade unions to send more details on the circumstances surrounding the dismissal and the worker's union duties.***

CASE NO. 2643

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

Complaint against the Government of Colombia presented by the National Union of Bank Employees (UNEB)

Allegations: Refusal by an insurance company to bargain collectively and numerous acts of discrimination against unionized workers, with the aim of pressuring them to leave the trade union

506. This complaint is contained in a communication dated 7 September 2007 (received by the Office on 6 May 2008) from the National Union of Bank Employees (UNEB).

507. The Government sent its observations in a communication dated 4 December 2008.

508. 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

509. In its communication of 7 September 2007 (received by the Office on 6 May 2008), the UNEB indicates that, in 2000, workers of the Seguros Cóndor SA and Seguros Aurora SA insurance companies established the Union of Workers of Seguros Aurora Cóndor (SINTRAUROCONDOR). The union presented lists of demands to the enterprise Seguros Cóndor SA, which persistently evaded its legal obligations, so that a compulsory arbitration tribunal had to be set up. The collective labour disputes ended with the issuance of arbitration awards. The complainant organization encloses a copy of the decision handed down on 3 February 2005 by the Supreme Court of Justice rejecting Appeal No. 25584 asking for an annulment of the award (Decision No. 12).

510. The complainant organization adds that Seguros Cóndor SA has always pursued a policy of repression against union members, even when lists of demands were being negotiated. The complainant organization indicates that the labour court ordered the reinstatement of the workers María Doralice Sánchez, Nilsa Marlene Neira González, Blanca Isabel Pineda, Andrea Martínez Zárate and others on grounds of wrongful dismissal during the bargaining process.

511. In addition, Seguros Cóndor SA implemented "voluntary" retirement plans for union members, using pressure and other measures to eliminate union members. For example, after leaving the union, several former union members, who in June 2005 had been earning a wage of 385,166 pesos, had their wages increased to 600,000 pesos in August that year; another member, who in June 2005 had been earning 1,810,204 pesos, had her wages increased to 3,500,000 pesos that August, after leaving the union in June 2005. Union official Andrea Martínez Zárate did not accept the offer to leave the union and, despite being covered by trade union immunity as a member of the works council, was dismissed by the enterprise on 27 February 2006, along with Matilde Garzón Rincón, María Emilce López Supelano, Diego Fernando Orozco Ramos and María Judith Reina, who were dismissed for joining the union on 24 February 2006. Subsequently, following an appeal in the second instance for the protection of constitutional rights *(tutela)* (No. 2006-0210), they were all reinstated in the company. The complainant organization encloses a copy of the ruling, which prohibits the enterprise from using such illegal coercive measures. Nevertheless, the employer continues to use them. The complainant organization gives examples of cases of wage discrimination against unionized workers and other acts of anti-union discrimination and workplace harassment, exclusion from training programmes and intimidation of new members.

B. The Government's reply

512. In its communication of 4 December 2008, the Government states, with regard to the establishment of arbitration tribunals, that they are legal bodies provided for under domestic labour legislation with the main objective of settling labour disputes on legal or economic issues. Arbitration is a mechanism for dispensing justice, through which the State exercises its public function, and it is clearly enshrined in law.

513. Regarding the allegations concerning the dismissal and anti-union harassment of Andrea Martínez Zárate, the Government states that the enterprise Seguros Generales Cóndor SA provided the following information:

> The fourth point is incorrect, as there was neither any repression against the staff nor any manifestation of bias. It is worth mentioning that Seguros Aurora Generales SA was undergoing administrative restructuring at the time, as the enterprise was facing dissolution and bankruptcy, which led to restructuring not only with regard to staff but also with regard to other areas and sections of the company.

Accordingly, in order to ensure the survival of the abovementioned companies, there was no alternative but to merge with the general insurance company Cóndor SA, under Decision No. 050 of 1999.

As it stands, the point made is incorrect, and as proof of this we are enclosing a copy of the final decisions and conciliation agreements reached in the 16th Labour Court of the Bogotá Circuit in the case of Andrea Martínez Zárate; we would like to point out that, of those mentioned, Andrea Martínez Zárate and Blanca Isabel Penada are currently members of the UNEB, while the others continue to work without having decided to join any union. It is clear that all the issues discussed in this regard have been settled in one way or another, either by agreement between the parties involved (conciliation) or by a court decision to settle the respective disputes. All the workers mentioned are currently working for the general insurance company Cóndor SA.

514. The Government adds that, notwithstanding the above, the Territorial Directorate of Cundinamarca initiated an administrative labour investigation against the enterprise Seguros Cóndor SA, in accordance with the complaint filed by the UNEB for alleged violation of the right of association and that, as soon as it receives a reply with regard to the final outcome of this investigation, it will send its observations in this regard.

515. Concerning the allegations relating to the voluntary retirement plan, the company's legal representative denies the implementation of such a plan, as the staff members mentioned by the UNEB are currently employed by the company. As regards wages and different pay for unionized workers, the Government states that these facts are unrelated to the trade union and points out that no complaints or questions have been raised with regard to this matter.

C. The Committee's conclusions

516. *The Committee notes that, in the present case, the allegations of the UNEB concern the refusal by the enterprise Seguros Cóndor SA to bargain collectively, as well as acts of anti-union discrimination and interference against unionized workers, with the aim of pressuring them to leave the trade union. The Committee notes that, with regard to the refusal to bargain collectively and the establishment of the compulsory arbitration tribunal, the Government indicates that such tribunals may be convened in accordance with the provisions of national legislation as a means of settling collective disputes. The Committee considers that the systematic refusal by one of the parties to negotiate in good faith can give rise to the parties submitting in practice to an arbitration procedure in a manner which does not promote collective bargaining. The Committee therefore requests the Government to take the necessary measures to ensure that the enterprise will bargain in good faith with the trade union in the future.*

517. *With regard to the allegations concerning the use of pressure and incentives to get workers to leave the union, the Committee notes that, according to the complainant organization, such anti-union acts specifically include: (1) the dismissal of trade union officials following the presentation of a list of demands (subsequently reinstated by court order); (2) the implementation of voluntary retirement plans for unionized members using pressure and wage incentives to get them to leave the union (the complainant organization provides specific examples of substantial wage increases awarded to workers after they left the union); (3) the dismissal of a union official (Andrea Martínez Zárate) for refusing to leave the union and of other workers for joining the union (subsequently reinstated by court order, pursuant to a* tutela *ruling in which the court ordered the enterprise to refrain from violating freedom of association in the future); and (4) other allegations of workplace harassment and exclusion from training programmes.*

518. *With regard to the allegations concerning the implementation of a voluntary retirement plan, the Committee notes that, according to the Government, the enterprise indicates that it had to undergo a restructuring process in 2000 as it was facing bankruptcy and dissolution, which led to its merger with the general insurance company Seguros Aurora SA. The Committee notes that the enterprise denies, however, the existence of a voluntary retirement plan, and adds that the workers mentioned by the complainant organization in its allegations are still working for the enterprise. Regarding the alleged differences in wage increases, the Committee notes that the Government indicates that these are unrelated to the union membership of the workers and points out that no complaint of any kind has been filed to date in this regard. With respect to the allegations concerning the dismissal of UNEB union official Ms Martínez Zárate and other workers, the Committee notes that the Government refers to the information provided by the enterprise, according to which the various disputes were settled by the judicial authority and that all the workers mentioned are currently working for the enterprise.*

519. *The Committee notes that it appears from the allegations and from the Government's reply that, in the case of the dismissals, the judicial authority ordered the reinstatement of the dismissed workers, a decision which ordered the enterprise to refrain from taking such measures in the future and was implemented by the enterprise. The Committee also notes that, according to the Government, the Territorial Directorate of Cundinamarca initiated an administrative labour investigation on the basis of a complaint presented by the UNEB, which is currently ongoing. As for the allegation that Ms Martínez Zárate was excluded from training programmes, the Committee notes that the documentation provided by the Government shows that the educational assistance she applied for was not ultimately granted because she did not meet the requirements set out in the collective agreement. Accordingly, the Committee considers that, in these particular circumstances, the measures taken to date show that the mechanisms to protect freedom of association appear to have worked at the national level. In these circumstances, bearing in mind that an investigation is being carried out by the Territorial Directorate of Cundinamarca into these matters, the Committee requests the Government to ensure that this investigation covers all the matters raised and to keep it informed of the outcome.*

The Committee's recommendations

520. ***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 encourage Seguros Cóndor SA to bargain in good faith with the trade union in the future.***

(b) ***With regard to the allegations concerning the dismissal of officials following the presentation of a list of demands, the implementation of voluntary retirement plans for unionized workers using pressure and wage incentives to get them to leave the union and the dismissal of a union official for not bowing to pressure and of other workers for joining the union, the Committee requests the Government to ensure that the investigation under way in the Territorial Directorate of Cundinamarca covers all the matters raised and to keep it informed of the outcome.***

CASE NO. 2644

INTERIM REPORT

Complaints against the Government of Colombia presented by
— the National Union of Food Workers (SINALTRAINAL) and
— the General Confederation of Workers (CGT)

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

521. The complaints are contained in a communication dated 10 April 2008 presented by the National Union of Food Workers (SINALTRAINAL) and two communications dated 2 May and 23 July 2008 from the General Confederation of Workers (CGT).

522. The Government sent its observations in communications dated 21 October and 3 December 2008.

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

A. Allegations of the complainant organizations

524. In its communication of 10 April 2008, the National Union of Food Workers (SINALTRAINAL) alleges the anti-union dismissal by the company Lechesan SA of Mr Raúl Hernández Salamanca (member of the Claims Committee), Mr Ernesto Harol Solano Weber, Mr Eder Santa Silva and Mr Gabriel Fajardo Rueda, between August 2005 and January 2006, despite their being protected by trade union immunity. In all cases, except that of Mr Fajardo Rueda, a lower court ordered reinstatement, but that ruling was overturned by a higher court. In the case of Mr Fajardo Rueda, a decision is still pending.

525. SINALTRAINAL also alleges the suspension of the employment contract of Mr Jorge Contreras Ochoa for organizing a protest demonstration, refusal on a number of occasions to allow trade union leave, refusal to negotiate a list of terms and conditions presented on 21 November 2005, despite being invited to do so on more than one occasion by the Ministry of Social Protection and, lastly, failure to apply the collective agreement in force, section 4 of which stipulates that contracts must be without limit of time, despite which more than 80 per cent of the company's workforce is subcontracted, a state of affairs

which prompted the union to initiate judicial proceedings before the Fourth Labour Court of Bucaramanga Circuit on 23 June 2004.

526. In its communication of 2 May 2008, the General Confederation of Workers (CGT) alleges failure to comply with the arbitration award of 31 January 2008, which ended the collective dispute between the union organization and Caldas University.

527. According to the union, the university unilaterally embarked on restructuring, eliminating a number of posts and turning instead to outsourcing arrangements; this, according to the complainant organization, is a covert attempt to destroy the Trade Union of Employees and Workers of Caldas University. As part of this anti-union policy, a voluntary redundancy plan has been put forward. The previous situation resulted in the adoption of Accords 06, 07 and 08 of 9 March 2008, which restructured the university, eliminating permanent staff posts and creating a new structure in its place in which the trade union more or less disappeared because its membership base had been lost.

528. On 30 April 2008, the Special Labour Inspection, Surveillance and Monitoring Unit of the Ministry of Social Protection invited the university's rector to attend a meeting but he declined to do so.

529. In its communication of 23 July 2008, the CGT alleges the dismissal, on 29 November 2001, of 31 official workers with "without limit of time" contracts who were members of the Trade Union of Official Workers of Armenia Quindío Municipality and had been employed for between three and 18 years. This was claimed to be a flagrant violation of section 46 of the collective agreement, according to which "the Municipality of Armenia guarantees the employment stability of unionized official employees. If an official employee is guilty of misconduct under the terms of the law, the disciplinary regulations in force shall be applied". The dismissed workers applied to the labour authority, which rejected their claims, a decision that was upheld by the higher level authority.

B. The Government's reply

530. In its communications of 21 October and 3 December 2008, the Government made the following observations.

Allegations concerning the enterprise Lechesan SA

531. As regards the allegations presented by SINALTRAINAL concerning the dismissals of Raúl Hernández Salamanca, Ernesto Harol Solano Weber, Eder Santa Silva and Gabriel Fajardo Rueda, the Government states that the Enterprise Lechesan SA in its observations makes the following points.

– *Raúl Hernández Salamanca.* On 31 August 2005, the employer terminated the employment contract and paid the appropriate compensation for unilateral termination as provided for in section 64 of the Substantive Labour Code; the decision did not require any judicial process. According to Law No. 50 of 1990, which came into force on 1 January 1991, the claims committees corresponding to municipal sections or committees of national or department-level trade unions do not enjoy trade union immunity and therefore, once the means of judicial recourse at the second instance had been exhausted (Labour Chamber of the Higher Court of Bucaramanga Judicial District), the protection sought was not granted, in accordance with the jurisprudence that has been applicable at the national level for more than 25 years. Mr Hernández Salamanca had worked as a peripherals salesperson, a post which disappeared with the restructuring.

– *Ernesto Harol Solano Weber and Eder Santa Silva.* On 2 January 2006, their employment contracts were terminated and they were paid the appropriate compensation for loss of wages and damages arising from termination of contract, as required under section 64 of the Substantive Labour Code; no judicial authorization for this is required. The case is identical to the previous one, and the complainants are not protected by trade union immunity for the reasons stated above, that is, the law does not provide for such protection. Mr Solano Weber had worked as a peripherals salesperson, a post that disappeared with the restructuring, so his situation was similar to that of Mr Hernández Salamanca. Mr Santa Silva's employment contract was terminated under the terms of section 64 of the Substantive Labour Code, and severance pay provisions were not applicable.

– *Gabriel Fajardo Rueda.* The former worker was not protected by "circumstantial immunity" because the list of demands had not been presented at the appropriate time. Mr Fajardo Rueda was dismissed for errors in production which led to losses for the company. Other workers who were not members of the trade union were dismissed for the same reason (Álvaro Manuel Lizcano, establishment coordinator, and Edwin Muñoz Amariz, establishment supervisor). The ordinary labour procedure is under way in the lower court and the parties to these proceedings will be obliged to submit to the ruling it hands down. A judgement was expected from the lower court on 19 March 2009 at 3 p.m.

532. The Government adds that the Office for International Relations and Cooperation will inquire whether or not there is any current investigation before the Santander Territorial Directorate into possible trade union persecution by the company. It emphasizes, however, that in all these cases except that of Mr Fajardo Rueda, existing judicial remedies have been exhausted.

533. As regards the allegations concerning sanctions against trade union official Jorge Contreras Ochoa for his trade union activities, the Government states that the worker in question was suspended for two days for insulting the head of administration, following due procedure in which he had been assisted by two colleagues. The decision was not challenged through any administrative or judicial proceedings, and the time allowed for such action is deemed to have lapsed.

534. As regards the alleged violation of the right to collective bargaining, the company in its reply indicates that the list of demands submitted came at an inappropriate time because the previous collective agreement had been extended automatically and was therefore still in force. The Government also states that the Santander Territorial Directorate also reported the action taken on the investigation in relation to the company in question, which led to Resolution No. 0156 of 13 February 2007; this left it to the parties concerned to seek recourse before the ordinary labour courts.

535. As regards the allegations of violation of the collective agreement by relying on outside contract workers for 80 per cent of the workforce, the Government states that the union has petitioned the ordinary labour court and a ruling from that body is awaited.

536. Lastly the Government has issued an invitation to the union with a view to having the allegations examined by the Special Committee on the Handling of Cases referred to the ILO (CETCOIT).

Allegations concerning Caldas University

537. With regard to the allegations concerning failure to implement an arbitration award that put an end to the collective dispute at the university, the Government states, first, that the University of Caldas is an autonomous public institution under the terms of article 69 of the Political Constitution, and is consequently able to establish its own executive bodies and apply its own statutes in accordance with the law. Act No. 30 of 1992 deals with different aspects of the university's autonomous status.

538. Section 57(3) of Act No. 30 of 1992 refers to the organization of teaching and administrative staff, and also provides that autonomous institutions have the following characteristics: legal personality; academic, administrative and financial autonomy; and independently owned assets. They are accordingly able to draw up and apply their own budgets in accordance with their mandated functions. In accordance with that autonomy, the University of Caldas promulgated its General Statutes (Accord 064 of 1997), article 18 of which stipulates among other things that the functions of the Higher Council are as follows:

– to define university policy and planning;

– to determine the institution's academic, administrative and financial organization;

– to ensure that the institution operates in accordance with the law, its own General Statutes and institutional policy;

– to determine the establishment staff at the request of the rector, in the light of the structure, budget and laws in force.

539. The Government points out that while the issue of the autonomy and governance of public institutions does not come within the remit of the Committee on Freedom of Association, some clarification of the scope of Law No. 489 of 1998 can shed some light on its observations in this case. The law in question, which governs Colombia's public administration, is the basic legal framework for the activities of the public administration and provides the main guidelines for modernization. It provides for a system of administrative development defined as "a set of policies, strategies, methodologies, techniques and mechanisms for the management and development of the human, technical, material, physical and financial resources of public administration institutions" and directed towards strengthening administrative capacity and institutional performance, which will be reflected in improved institutional management.

540. Under the terms of section 17 of the law in question, policies for administrative development formulated by the administrative department of the public service must cover the following aspects:

– institutional diagnostics;

– rationalization of working procedures and methods;

– adjustments to the internal organization of institutions relating to the distribution of skills and competencies or to the elimination, merger or creation of administrative units based on simplification of procedures and rationalization of working methods;

– programmes for continuous improvement in management, especially with regard to human, financial, material, physical and technological resources, as well as in planning, organization, direction and control;

– adaptation of new approaches to improve the quality of goods and services, methodologies to measure work productivity and indicators of efficiency and effectiveness;

– identification of obsolete methods and functions that conflict with any other bodies with responsibilities in this area at the national and regional levels, or which are at variance with the legally established objective of the institutions in question;

– identification of the administrative support needed to improve attention to users and resolve complaints and claims effectively and promptly.

541. In the light of the above, and in accordance with article 20 of its Administrative Statutes, the University of Caldas concluded an agreement with the Higher School of Public Administration (ESAP) and the Higher Education Development Fund (FODESEP) with a view to developing a technical study of the organic structure and permanent staff. That study, according to information supplied by the university, was delivered in July 2007 and circulated among the entire university community, and was also published on the university's Internet site in August of that year. The study contains a number of conclusions regarding costs and benefits of maintaining the permanent staff posts, and recommends certain technical, administrative and financial improvements in the university's support services in the interests of reducing costs and simplifying administration. In this regard, given that the 44 staff cleaning and catering workers employed in five premises are not central to the institution's activities, the study recommended the elimination of the posts in question, which would lead to significant savings by relieving the institution of the costs of materials, financial inefficiency, loss of time through sickness and holidays, and payment of overtime and other benefits. According to the study, these maintenance services can be provided by private companies, which would generate significant savings in terms of reduced labour costs and benefits, materials, time and staff movement, and would have a direct incidence on the service. That would be in addition to the recurrent costs.

542. According to legislation in force, the Higher Council of the University of Caldas examined the study at a number of meetings, including one on 9 March, and after taking into consideration the views expressed by union representatives and their legal adviser, the Higher Council issued Accord 06 (changing the university's organizational structure), Accord 07 (amending Accord 024 of 1996, which established the permanent staff list of the university and contained other provisions), and Accord 08 (incorporating some public service staff in the university permanent staff list).

543. The Government highlights the fact that the university took the union's views into account when taking its decisions. The Caldas Territorial Directorate initiated two inquiries concerning the university, namely: one instigated by another trade union organization on 8 September 2008 for alleged trade union persecution and violation of the collective agreement in force (the conciliation hearing convened by the Territorial Directorate was attended by the university's representative, but not by the union); and an inquiry following a complaint presented by a third-party union alleging refusal by the University to negotiate a list of demands. During that inquiry, two conciliation hearings were held but the parties did not reach an agreement, and the university was fined, through Resolution No. 427, in accordance with section 433 of the Substantive Labour Code (initiation of talks).

C. The Committee's conclusions

544. *The Committee notes that this case concerns: (1) allegations presented by SINALTRAINAL concerning the dismissal by Lechesan SA of three workers protected by trade union immunity (Raúl Hernández Salamanca, Ernesto Harol Solano Weber and Gabriel Fajardo*

Rueda), between August 2005 and January 2006, the suspension of the employment contract of a trade union official (Jorge Contreras Ochoa) for organizing a demonstration, refusal to bargain collectively, and failure to implement the collective agreement in force; and (2) allegations presented by the CGT concerning the collective dismissal, on grounds of restructuring, of workers at the University of Caldas (involving the offer of voluntary redundancy) which would mean the disappearance of the union through loss of its membership base, and the dismissal of 31 workers of the Trade Union of Official Workers of the Armenia Quindío Municipality in November 2001, disregarding the collective agreement guaranteeing job security.

545. *As regards the allegations concerning the dismissal of Hernández Salamanca, Solano Weber and Fajardo Rueda, by Lechesan SA, the Committee notes that according to the Government, Hernández Salamanca and Solano Weber were dismissed as a result of internal administrative restructuring which resulted in the elimination of their posts, and that the higher level court refused to reinstate them because it considered that they did not have trade union immunity. As regards Fajardo Rueda, he was dismissed together with other non-union workers for mistakes in the production process and legal proceedings are under way. The Committee requests the Government to keep it informed with regard to this proceeding.*

546. *As regards the allegations made in connection with the suspension of the employment contract of trade union official Jorge Contreras Ochoa for organizing a demonstration, the Committee notes the Government's statements to the effect that according to the company, Mr Contreras Ochoa was in fact suspended for two days for insulting the company's head of administration. That suspension was imposed in a disciplinary procedure in which the worker was assisted by two colleagues. No administrative or judicial appeal was lodged against the penalty, and the time allowed for proceedings is now deemed to have lapsed. Consequently, the Committee will not pursue its examination of these allegations.*

547. *As regards the allegations relating to the company's refusal to engage in collective bargaining in 2005, despite having been invited to do so by the Ministry of Labour, and the violation of the collective agreement in force, according to which contacts were to be without limit of time, despite which the company outsources for more than 80 per cent of its staffing, the Committee notes the Government's statements to the effect that according to the company, the refusal to negotiate was due to the fact that the list of demands had not been presented at the appropriate time and the original collective agreement was still in force, having been renewed automatically, and that the administrative inquiry concerning the company left the parties free to seek recourse before the courts. As regards the violation of the collective agreement in force, the Committee notes that according to the Government, the complainant organization initiated legal proceedings which are still in progress. The Committee requests the Government to keep it informed of the outcome of these proceedings.*

548. *Lastly, the Committee notes the invitation by the Government to the trade union to attempt to resolve the issues raised in CETCOIT. The Committee requests the Government to keep it informed of developments in this regard.*

549. *As regards the allegations made by the CGT concerning the dismissal of workers at the University of Caldas as part of a restructuring process which in practice entailed the disappearance of the Trade Union of Employees and Workers of Caldas University because its members were affected by that process, the Committee notes the Government's information according to which: the university in question is a public and autonomous institution with the authority to adopt its own statutes; in accordance with that authority, the university concluded an agreement with the Higher School of Public Administration (ESAP) and the Higher Education Development Fund (FODESEP) to carry out a technical*

study on the staffing structure and payroll; the study concluded that 44 cleaning and catering posts needed to be eliminated and replaced with a private company in order to reduce costs; these conclusions resulted in Accords 06, 07 and 08, which according to the Government took account of the views of the trade union, and the workers concerned were offered a voluntary redundancy plan. The Committee notes that there are no current proceedings against the university in connection with this issue.

550. *In this regard, the Committee recalls that it is only able to give an opinion on allegations concerning programmes and processes of restructuring or economic rationalization, whether or not they entail staff reductions or the transfer of companies or services from the public to the private sector, if they give rise to acts of discrimination or anti-union interference. The Committee emphasizes the importance, in such circumstances, of consulting the trade unions involved, and notes that, according to the Government, that requirement was met. Nevertheless, taking into account the disappearance of a trade union (in this case the Trade Union of Employees and Workers of Caldas University), the Committee requests the Government to indicate whether the trade union rights of workers were respected during the restructuring process.*

551. *As regards the allegations made by the CGT concerning the collective dismissal of 31 workers of the Trade Union of Official Workers of Armenia Quindío Municipality in November 2001, disregarding the collective agreement that guarantees the workers' job security, the Committee notes that the Government has not sent its observations and requests it to do so without delay.*

The Committee's recommendations

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

(a) As regards the allegations made by SINALTRAINAL concerning the dismissal of Fajardo Rueda and the company's refusal to bargain collectively, the Committee requests the Government to keep it informed of the judicial proceedings still under way and any developments with regard to the Government's invitation to refer these pending issues to the CETCOIT.

(b) As regards the allegations concerning the dismissal of the workers at the University of Caldas as part of a restructuring process, which resulted in the disappearance of the Trade Union of Employees and Workers of Caldas University, the Committee requests the Government to indicate whether the workers' trade union rights were respected during the process of restructuring.

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

CASE NO. 2657

DEFINITIVE REPORT

Complaint against the Government of Colombia presented by the Colombian Teachers' Federation (FECODE)

Allegations: Salary deduction for days of strike action and non-payment for days worked in place of days of work stoppage; institution of disciplinary proceedings

553. The complaint is contained in a communication from the Colombian Teachers' Federation (FECODE) dated 22 May 2008.

554. The Government sent its observations in a communication dated 5 August 2009.

555. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

556. In its communication dated 22 May 2008, FECODE states that it called on teachers employed by the State to hold a work stoppage, which lasted from 15 May to 21 June 2001. The purpose of the strike was to express the organization's rejection of the Government's neoliberal policies and measures such as labour flexibility and labour reform, increased economic openness, privatization of public education and the reduction in transfers of resources to local authorities (departments, districts and municipalities), among other issues. Another reason for the work stoppage was the fact that the Government had not involved the trade unions – and in fact had prevented their involvement – in the national policy decision-making process, including the amendment of articles 356 and 357 of the Political Constitution through Legislative Act No. 01 of 2001.

557. The complainant organization states that the work stoppage held by the state teachers was not declared illegal at any time by the Ministry of Social Protection, which was the competent authority at the time. However, in retaliation, the Ministry of Education, by means of Circulars Nos 17, 30, 31, 33 and 38 of 21 March, 8, 14 and 23 May and 22 June 2001, respectively, ordered the governors and mayors of the local authorities (departments, districts and municipalities) responsible for education not to pay the teachers who had taken part in the work stoppage for the days on which it had taken place, and to institute disciplinary proceedings against them. Specifically, by means of Circular No. 17 of 21 March 2001, the Ministry of Education issued the following order to governors, mayors, the departmental, district, and municipal secretaries for education and the educational community: "In view of the announcement of a work stoppage planned for tomorrow and possible changes to teachers' work schedule, the Ministry of Education would like to remind human resources and financial officers that section 1 of Decree No. 1647 of 1967 stipulates that the payment of salaries or any other form of remuneration to public servants at the national, departmental, district and municipal levels shall correspond to the services performed … ."

558. The order to make salary deductions left the teachers no alternative but to return to work and abandon the protest that was in defence of their rights as workers employed by the Colombian State. If they continued the protest they would have endured not only salary deductions, but also possible penal and disciplinary consequences for dereliction of duty, leading to removal from their posts and dismissal from service.

559. The complainant organization adds that, once the work stoppage ended, FECODE recommended that the schools adjust the calendar for the 2001 academic year in order to complete their curricular and extra-curricular activities that had been planned at the beginning of the academic year, citing the legal concepts of the autonomy of schools and flexibility of the academic calendar, laid down in the General Education Act (Act No. 115 of 1994). Based on these legislative provisions, the governing bodies – the highest authority for the schools – gave their consent for the teachers to make up the time not worked owing to the work stoppage on days other than those initially planned on the academic calendar.

560. According to the complainant organization, the local authorities did not oppose the above initiative at any time. The Ministry of Education and the education secretariats of the departments, municipalities and districts were aware that the teachers employed by them were making up the time they had not worked and that the governing bodies of the schools authorized the replacement of the days not worked. The Ministry had no objection to this plan or to the work performed by the teachers in order to complete the planned activities for 2001, nor did it prevent teachers from entering their classrooms to give lessons and generally carry out their duties. This response gave the teachers legal confidence, and they strictly adhered to what the school governing bodies agreed upon: making up the unworked time from the work stoppage and providing 22 additional days of teaching. Consequently, the workplan for the 2001 academic year was fulfilled in all the schools and students moved up to the next grade. Despite this, in the months following the work stoppage, the local authorities deducted the days not worked from the teachers' pay, disregarding the fact that they had made up this time, which, as stated above, was authorized by the governing bodies, who, under the national legislation, have the authority to make changes to the academic calendar.

561. In view of the above, the teachers, specifically those employed in the Antioquia department, who at the time numbered approximately 3,600, asked the local authority to recognize and pay for the days that were worked in order to make up the unworked time. However, the Antioquia department refused to pay any of the salaries and social benefits requested by the teachers. Proceedings were then instituted against the Antioquia department to have the decision revoked and the salary restored, requesting the competent administrative tribunal to declare invalid the administrative act through which the department refused to recognize and pay the salaries requested by the teachers employed by the local authority.

562. The court of first instance handed down a ruling rejecting the claim. Some teachers filed an action for constitutional protection *(tutela)* of their fundamental rights to due process, effective access to the administration of justice, and equality, which were violated by the administrative courts of the Medellín Circuit in their rulings.

B. The Government's reply

563. In its communication of 5 August 2009, the Government sent its observations on FECODE's allegations that, owing to a work stoppage in protest at economic measures and policies (such as labour flexibility and labour reform, increasing economic openness, the privatization of public education and the reduction in transfers of resources to local authorities, departments, districts and municipalities), among other issues, the Ministry of

Education took deductions from the salaries of the participating teachers for the days on which the work stoppage took place. According to the Government, the teachers, who objected to the deductions, decided to request that the administrative disputes court declare the decision ordering the deduction illegal. The court rejected this request, as the administrative judges did not consider that a violation of domestic law had occurred. The teachers also exhausted the remedy of constitutional protection.

564. The Government considers that the social and legal implications of the stoppage planned by the teachers should be taken into account, since it was deemed to be a violation of children's fundamental right to education. Domestic legislation expressly prohibits "promoting any work stoppages or protests, except for strikes that are declared in accordance with the law". The trade union incited all of Colombia's state teachers to stop teaching the children for reasons that were unspecified and vague, as can be observed in the allegations. This stoppage is a violation of the Political Constitution, in particular article 44, which states that education is a fundamental right of children and that "the rights of children take precedence over the rights of others". This basic principle is in accordance with the various international treaties aimed at protecting the rights of children.

565. The Government adds that the grounds cited by the trade union for carrying out the work stoppage, its exclusion by the Government from discussing the amendments to the Political Constitution (articles 356 and 357 of the Political Constitution, Legislative Act No. 01 of 2001) are political in nature. The Government emphasizes, however, that amendments of the Political Constitution, such as those mentioned by FECODE, must be approved by a qualified majority in Congress in two ordinary and consecutive legislative periods, and may be submitted by any Colombian citizen for constitutional review by the Constitutional Court.

566. The Government emphasizes that the exercise of trade union activity and the right to freedom of association entails a strong social responsibility. Any protest must be undertaken with a sense of responsibility, taking account of the highest interests of the community. The Government states that the right to strike is not absolute, and its exercise is subject to certain minimum requirements, which are stated in countries' domestic legislation and recognized by international law and the International Labour Organization. The trade union did not comply with the requirements laid down by the law for the exercise of the right to strike; instead it abused this right and called a work stoppage that was prohibited under domestic legislation. Colombian legislation provides for a declaration of illegality in the case of strikes that exhaust the procedure provided for in that legislation, but this does not apply to situations which are, de facto, outside the purview of the law, such as this one, in which some state teachers, acting irresponsibly and without declaring a strike, suspended their work in alleged protest against the Government's economic policies. This act seriously affected the provision of the public service of education, and infringed the fundamental right of Colombian children to education.

567. The Government adds, however, that, in accordance with article 189, paragraph 21, of the Political Constitution of Colombia, the authority to inspect and supervise teaching in Colombia lies with the President of the Republic, who expressly delegated it to the Ministry of Education. In the exercise of its duties pursuant to this authority, the Ministry of Education reminded the local authorities at the time of the applicable rules concerning salary deductions when a public service is not provided.

568. Although, the trade union refers to retaliation by the Ministry of Education, the Ministry's actions were in conformity with the law and the Constitution, since it has a legal and constitutional duty to ensure adequate public education, which is linked to the fundamental right of children to education. The trade union incited a work stoppage without observing the law regulating the right to strike. Decree No. 1647 of 1967 provides for salary

deductions corresponding to the days of strike action in cases where public employees do not provide their service. It is a universally accepted principle that employers are not obliged to pay their employees or workers if they have stopped working as a result of the exercise of the right to strike. In no way does this violate the principle of freedom of association, as the employment contract is suspended. This is all the more true of this case, in which public servants suddenly interrupted their work. This is not a case of legal exercise of the right to strike; it was a work stoppage in which the legal procedures were not followed. The Ministry of Education was thus constitutionally and legally obliged, by virtue of the competencies and functions assigned to it by law, to remind the heads of local authorities and other government officials responsible for certifying the services provided by their public employees of the rules on salary deductions when a service is not provided, in order to avoid incurring disciplinary or fiscal penalties. The Government emphasizes that, in this case, the teachers suspended an essential public service and that is why salaries were not paid for the days not worked.

569. According to the Government, the trade union violated the Political Constitution and domestic legislation, first by calling a work stoppage for purely political purposes, thereby infringing the fundamental rights of Colombian children, and second by "recommending" adjustments to the academic calendar, as has clearly been stated. The trade union does not have the authority to take these actions. Determining the academic calendar is a duty of the education service, which is a functionary of the State and subject to criteria focusing on the satisfactory provision of education services and the well-being of the children. This action by the complainant trade union lies outside the exercise of the right of freedom of association. It is a clear abuse of this right, in which the trade union went beyond what that right allows by attempting to exert direct influence on the administrative decisions of state bodies.

570. In accordance with domestic legislation, educational institutions do not have the authority to change the students' academic calendar. The calendar is obligatory and may only be changed by an administrative act issued by the competent local authority, with the approval of the Ministry of Education, in accordance with section 86 of Act No. 115 of 1994 and Decision No. 144 of 2001, in force at the time. It is illegal for a trade union to attempt to determine the policies for public education; this is a function of state bodies. It should be pointed out that the minimum classroom hours established in Colombian legislation must be met by Colombia's schools in order for the pupils to move up to the next grade.

C. The Committee's conclusions

571. *The Committee observes that, in this case, FECODE alleges that, between 15 May and 21 June 2001, a work stoppage was held to express rejection of measures adopted by the Government without consulting trade unions; as a result of this stoppage, the administrative authority responsible for education issued several circulars before and after the stoppage, requiring the local authorities to make salary deductions for days not worked and to institute disciplinary proceedings. Faced with these measures, the teachers decided to resume work, and the trade union recommended that the school governing bodies (which, according to the complainant organization, are the highest authority in education) adjust the 2001 academic calendar so that the teachers could make up the time not worked owing to the work stoppage. Thus, according to the complainant organization, the workplan was fulfilled in all the schools. The Committee notes that, according to the complainant organization, although the Ministry of Education was aware that the teachers were making up their classroom days, at no time did it object to that action or prevent them from teaching on those days, which gave the teachers confidence that they were in strict compliance with what had been agreed with the governing bodies. The Committee notes further that, according to FECODE, despite having made up the days, the*

educational authorities made deductions from the teachers' salaries for the days on which the work stoppage had taken place, and instituted disciplinary proceedings. The teachers then asked the administrative authority to pay them for the days worked in place of those on which the work stoppage had been held, but the Antioquia department refused in all cases to pay the salaries and social benefits in question. This decision was upheld by the courts in ordinary and tutela *proceedings.*

572. *The Committee notes that the Government states that: (1) because of the work stoppage, which was carried out for political reasons, the Ministry of Education deducted pay for the days not worked; (2) the work stoppage was illegal, as it infringed the fundamental right of children to education and, as it did not meet the legal requirements to be considered as a "strike"; (3) regarding the recommendation to adjust the academic calendar in order to make up the days of the stoppage, neither the trade union nor the schools and their governing bodies had the authority to make such changes, as this authority resided with the local authorities, with the approval of the Ministry of Education; for this reason, payment could not be made for the days worked in place of the days of the stoppage; and (4) the courts upheld the administrative authorities' decisions with respect to the pay deductions.*

573. *Firstly, the Committee recalls that education is not an essential service in the strict sense of the term (those whose interruption could endanger the lives, safety or health of all or part of the population) in which the right to strike may be prohibited. However, the Committee also recalls that it has considered 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 edition, 2006, para. 572]. The Committee observes, however, that in this case, after the work stoppage, the organization requested adjustments to the academic calendar in order to make up the days affected by the stoppage, and the governing bodies of the schools agreed to this proposal, without the Ministry objecting to this substitution or stating that the school governing bodies did not have the authority to change the academic calendar and that, as a result, it would not take into account the days worked in place of the days of the stoppage. The Committee considers that this lack of response convinced the teachers of the validity of what had been agreed between the school governing bodies and the trade union, which was why they worked for 22 days in place of the days of the stoppage. The Committee observes, however, that the court did not overturn the administrative decision not to make payment for the days worked because it considered that the governing bodies did not have the authority to change the academic calendar.*

574. *Nonetheless, the Committee considers that the Ministry of Education's non-payment for the days worked in place of these days of work stoppage, in particular, as a result of an agreement with the governing bodies of the schools, could constitute an excessive sanction that is not conducive to the development of harmonious labour relations. Under these circumstances, the Committee requests the Government to take the measures necessary to promote consultations between the Ministry of Education and the trade union in order to reach a solution with regard to payment for the days worked in place of the days of the work stoppage and to the disciplinary proceedings that were instituted against the teachers.*

The Committee's recommendation

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

As regards the refusal by the Ministry of Education to pay for the days worked in place of the days of the work stoppage and the institution of disciplinary proceedings, the Committee requests the Government to take the measures necessary to promote consultations between the Ministry of Education and the trade union in order to reach a solution in that respect.

CASE NO. 2658

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

Complaint against the Government of Colombia presented by the National Association of Telephone and Communications Engineers (ATELCA)

Allegations: Non-compliance by the company with certain clauses in the collective agreement in force and the negotiation by it with another trade union of clauses affecting ATELCA, without the latter having any opportunity to participate in the negotiations or delegating authority to do so

576. The present complaint is contained in a communication from the National Association of Telephone and Communications Engineers (ATELCA) dated 4 June 2008. The complainant organization sent additional information in a communication dated 19 June 2009.

577. The Government sent its observations in a communication dated 29 April 2009.

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

A. The complainants' allegations

579. In its communications of 4 June 2008 and 19 June 2009, ATELCA states that it is a trade union which currently represents the technical staff of the Bogotá Telecommunications Enterprise (ETB) in accordance with the current legislation of the Republic of Colombia and the Ministry of Social Protection. It also has a collective labour agreement with the ETB, known as the "ATELCA Chapter". This chapter forms part of the collective agreement of the primary trade union, which represents the ETB's other workers. On 26 May 2006, the ETB signed a collective agreement with the primary union, without the participation of ATELCA. That agreement called into question the wage increase of ATELCA's members and disregarded their acquired rights, as the collective labour agreement signed between the ETB and ATELCA is in force in so far as its normative and obligatory clauses are concerned. According to the complainant, the ETB, in clause 19(c) of the 2006 collective agreement, disregards ATELCA's autonomy by unlawfully

interfering with the special chapter dealing with the craft union (ATELCA), and agrees to the following terms with the primary union: "For the purposes of the provisions of clause 46 on extension of the agreement to include the special chapter on ATELCA of 31 December 1997, it is decided that, for the members of that association, the wage increase applied during each year in which the present collective agreement is in force shall correspond to the national or district consumer price index (CPI), whichever is the higher, taken between 1 January and 31 December of the preceding year, as certified by DANE or the entity acting in its place, calculated in respect of the basic wages as at 31 December of the preceding year."

580. This amounts to an infringement by the ETB and the primary trade union of ATELCA's right to engage in collective bargaining, since those entities did not have any approval or representative authority from ATELCA to commit it to such wage increase arrangements, ATELCA being the legal representative of the ETB's technical workers.

581. According to ATELCA, under the terms of article 3(5) of Act No. 48 of 1968, any trade union comprising 75 per cent or more of the employees in a given occupation, trade or specialized field (as is the case of ATELCA) has the right to present a list of demands and to have the company discuss it directly with the craft union concerned. In other words, despite the existence within the same company of a majority primary trade union, the law accords the minority union the right to present lists of demands and to appoint negotiators from among its membership to discuss those demands during the subsequent phase. Article 3(5) of Act No. 48 states that: "The list of demands which the latter (the craft union) presents to the company shall be discussed directly with that union, and the resulting agreement shall constitute a special chapter in the respective collective labour agreement. The craft union thus has the right to devote part of the negotiations to discussions on its own issues and working out arrangements with the corresponding employers."

582. Within the framework of the collective labour agreement of 1984, ATELCA concluded with the ETB a special chapter on ATELCA, clause 5 of which states that: "The Company shall extend to the Association's members those provisions of the collective agreement concluded with the primary trade union that are not covered in the chapter on ATELCA and are favourable to the technical workers, including with regard to wage increases and the legal effect of the present agreement." It follows that the arrangements concluded with regard to wage increases in the agreement of 26 May 2006 between the ETB and SINTRATELEFONOS – clause 19(a) of which states that: In all cases, wage increases shall be distributed among the said staff as follows: (a) For workers occupying posts in categories I to XIV of the unified occupational wage schedule, the ETB shall increase wages from 31 December of the preceding year by an amount equivalent to the increase in the national consumer price index (CPI) over the period 1 January to 31 December of the preceding year and certified by DANE or the entity acting in its place, plus 3.15 per cent – which is not provided for in the chapter on ATELCA, and be accorded in full to the association's members pursuant to clause 5, since they are favourable to the technical workers. It is therefore incumbent upon the company to comply with the agreement and honour the commitment to its workers that it assumed with this provision.

583. Since the disputed provision concerns the association's right to collective bargaining, which is guaranteed under article 55 of the national Constitution, which further provides that the State has a duty to foster negotiation and all other means of achieving the peaceful resolution of collective labour disputes, the Ministry of Social Protection is competent to enforce compliance with provisions agreed on through collective bargaining.

584. Under the law, workers' unions are fully empowered, in disputes of a legal or economic nature, to represent the interests of their members vis-à-vis employers and administrative authorities, in accordance with articles 373 and 374 of the Substantive Labour Code (SLC). Under the terms of clause 9 of the collective labour agreement of 1982 (ATELCA Chapter), in the event of conflicting provisions, the one most favourable to the worker must be applied. The same applies in article 21 of the SLC, which states that: "In the event of a dispute or uncertainty as to the application of labour provisions in force, the provision(s) most favourable to the worker prevail. The provision that is adopted shall be applied in full."

585. On 14 June 2006, ATELCA, exercising its right to present demands, requested the legal representative of the ETB to agree to pay every one of ATELCA's members the wage increase corresponding to the agreement with ATELCA, in order to give effect to the clause extending the collective agreement concluded between the ETB and ATELCA. The request was rejected by the company's management, disregarding the agreement.

586. ATELCA states that it appealed to the Ministry of Social Protection on 6 September 2006 but that the administrative authority has not yet given a ruling.

B. The Government's reply

587. As regards ATELCA's complaint concerning disregard of acquired rights, to the effect that the ETB and the primary trade union failed to take account of ATELCA when concluding the collective labour agreement, the Government states the following.

588. ATELCA considers that its autonomy is disregarded with the inclusion in the agreement of the following clause:

> For the purposes of clause 46 on the extension of the agreement to include the special chapter on ATELCA of 31 December 1997, it is decided that, for the members of that association, the wage increase during each year during which the present collective agreement is in force shall correspond to the national or district consumer price index (CPI), whichever is the higher, taken between 1 January and 31 December of the preceding year, as certified by DANE or the entity acting in its place, calculated in respect of basic wages as of 31 December of the preceding year.

589. In the light of the foregoing, the union considers its right to collective bargaining to have been infringed, on the grounds that those who participated in the negotiations did not have ATELCA's approval to include them in the wage increase provisions. Finally, the union refers to article 3(5) of Act No. 48 and to the initiation of an administrative inquiry into the allegations made against the ETB.

590. With respect to the present allegations, the Government states that, according to the Head of the ETB's Disputes Department: (1) there are two union organizations within the company, a primary union and a craft union known as ATELCA; (2) the collective agreement concluded with the primary trade union provides for a wage increase for workers covered by the unified occupational wage schedule equivalent to the national CPI from 1 January to 31 December of the preceding year, as certified by DANE or the entity acting in its place, plus 1.25 per cent. It was agreed to distribute the increase among the workforce in the following manner:

– for workers in categories I to XVI of the unified occupational wage schedule, the CPI plus 3.15 per cent;

– for workers in categories XV to XVIII, the CPI plus 0.5 per cent;

– for workers in categories XIX and XX, 3 per cent.

591. In short, the overall agreed increase was distributed by the primary union in weighted form, the lower-income workers receiving a higher increase than the higher income workers.

592. The head of the Disputes Department has also pointed out that: "In addition, the parties agreed that they would not touch the wage increase which had been agreed by ATELCA and the company and applied since 1998, whereby it was agreed with the union that as from 1998 the company would implement an increase, starting that year and then each year thereafter, in line with the CPI for the preceding year for the city of Bogotá, as certified by DANE or the entity acting in its place."

593. The Government states that clause 2 of the collective agreement with ATELCA for the period 1997–2000 reads as follows:

> 2. *Wage increases*
>
> Clause 16 of the Special Chapter concerning ATELCA, signed on the thirtieth day of October 1996, shall be worded as follows:
>
> "As from 1998 and with effect from the first (1st) of January each year, the Company shall effect a wage adjustment in respect of the basic wage of each technical worker as at the thirty-first (31st) of December of the preceding year, equivalent to the weighted consumer price index from 1 January to 31 December of the preceding year and for the city of Santa fe de Bogotá, as certified by DANE or entity acting in its place."
>
> "Paragraph: The wage schedules thus increased shall form an integral part of the collective agreement and the workers' wages shall be governed thereby."

594. For its part, the clause in the agreement which the complainant refers to as being infringed (clause 5 of the collective agreement signed in 1984) reads as follows:

> The Company shall extend to the Association's members any provisions of the collective agreement concluded with the primary trade union that are not covered in the chapter on ATELCA and are favourable to the technical workers, including in regard to wage increases and the legal effect of the present agreement.

595. The Government concludes from this that, in order to give effect to the benefits for ATELCA members, as provided for in the basic collective agreement, those benefits do not need to be provided for in the chapter concerning ATELCA. This gives rise to two possible situations:

– The benefits concluded with the primary union are not granted (to ATELCA members) if the collective agreement with ATELCA makes express provision in that regard.

– Where wages are concerned, the collective agreement with ATELCA provides for them in clause 2, as cited verbatim above, and, as is stipulated, the company began implementing the agreed increase as from January 2006.

596. In conclusion, it is clear that the benefits would apply with regard to the increases even if they were not already provided for in the special chapter concerning ATELCA.

597. In the present case, according to the Government, ATELCA's complaint is founded on its interpretation of clause 5 of the annex to the collective agreement (special chapter) which, in its view, the company has failed to implement. According to the Government, the organization is being contradictory when it states that, on 26 May 2006, the ETB and the

primary union signed a collective agreement "without the participation of ATELCA, and that the special chapter concerning ATELCA is in force in so far as its normative and obligatory clauses are concerned", and claims that its members' wage increases had been called into question and their acquired rights disregarded because the agreement with the primary union stated that, for the beneficiaries within that union (ATELCA), the wage increase in each year during which the collective agreement remained in force would correspond to either the national or district CPI, whichever is higher.

598. The Government emphasizes that the agreement with the primary union in no way compromises the agreement concluded with ATELCA in 1997, since that union agreed to a clause on wage increases which automatically comes into effect once the period stipulated in the collective agreement (special chapter concerning ATELCA) has lapsed, since that special chapter has not been renegotiated inasmuch as the union has not denounced it, and has been extended in accordance with the law. The ETB, far from having infringed the provision in question, complied with the agreement between ATELCA and the company.

599. The Government states that ATELCA lodged a complaint against the ETB with the Territorial Directorate of Cundinamarca for alleged infringement of the collective labour agreement, and that the Directorate's Coordinator of Inspection and Monitoring is currently studying the file before taking its decision. Once a reply has been received from the Directorate, a copy of the decision will be sent.

C. The Committee's conclusions

600. *The Committee notes that in this case ATELCA alleges the failure by the ETB to implement certain clauses of the collective agreement in force, and the negotiation between it and another trade union of clauses affecting ATELCA, without the latter having any opportunity to participate in the negotiations or delegating authority to represent it.*

601. *The Committee notes that ATELCA states that it is a union organization representing the technical workers of the ETB. Within that company there is another, primary, trade union. The company has negotiated the collective agreement with that primary union, but within the agreement there is a chapter, entitled "Chapter on ATELCA", that has been negotiated between the company and ATELCA in accordance with article 3(5) of Act No. 48 of 1968. Under that provision, any trade union representing 75 per cent or more of the employees in a given occupation, trade or specialized field (as is the case of ATELCA) has the right to present a list of demands and to have the company discuss it directly with the craft unions.*

602. *The Committee notes that according to the complainant, the aforementioned chapter stipulated, in 1984, that "the company shall extend to the Association's (ATELCA's) members the provisions of the collective agreement concluded with the primary trade union that are not covered in the chapter on ATELCA and which are favourable to the technical workers, including in regard to wage increases and the legal effect of the present agreement".*

603. *The complainant adds that on 26 May 2006, the ETB signed a collective agreement with the primary trade union without the participation of ATELCA. That agreement includes the following two clauses:*

– *In one clause (clause 19(a)), it was established that: "In all cases, wage increases shall be distributed among the said staff as follows: (a) for workers occupying posts in categories I to XIV of the unified occupational wage schedule, the ETB shall increase wages as at 31 December of the preceding year by an amount equivalent to the increase in the national consumer price index (CPI) over the period 1 January to*

31 December of the preceding year, as certified by DANE or other entity acting in its place, plus 3.15 per cent."

– *Another additional clause provides as follows: "For the purposes of clause 46 on the extension of the agreement to include the special chapter on ATELCA of 31 December 1997, it is decided that for the members of that union the wage increase during each year during which the present collective agreement is in force shall correspond to the national or district consumer price index (CPI), whichever is the higher, taken between 1 January and 31 December of the preceding year, as certified by DANE or other entity acting in its place, calculated in respect of the basic wages as of 31 December of the preceding year."*

604. *The Committee notes that according to the complainant, neither the ETB nor the primary union had the approval of ATELCA, or any representative authority delegated to it, to negotiate on its behalf. The Committee notes that, consequently, on 14 June 2006, the complainant organization requested the ETB to extend to it the wage increase negotiated between the ETB and the primary union (clause 19(a)), as stipulated in the chapter on ATELCA; this was refused, and in response ATELCA applied to the administrative authority on 6 September 2006. No ruling has yet been forthcoming.*

605. *The Committee notes in this respect the Government's statements to the effect that according to the head of the ETB's Disputes Department: (1) within the company there are two union organizations; (2) the company in 2006 negotiated a wage increase with the primary union which it was agreed should be distributed among the staff on a weighted basis, workers in categories I to XIV being granted an increase corresponding to the CPI plus 3.15 per cent, with reduced increases for the higher categories; (3) the ETB and the primary union agreed that they would not touch the wage increase on which the ATELCA union had an agreement with the company since 1997. In this respect, the Committee notes that the Government refers to a collective agreement concluded between ATELCA and the ETB for the period 1997–2000 (to which the complainant does not refer), clause 2 of which, on wage increases, provides that: "As from 1998 and effective as at the first (1st) of January each year, the Company shall effect a wage adjustment in respect of the basic wage of each technical worker as at the thirty-first (31st) of December of the preceding year, equivalent to the weighted consumer price index (CPI) from 1 January to 31 December of the preceding year and for the city of Santa fe de Bogotá, as certified by DANE or entity acting in its place" and that "The wage schedules thus increased shall form an integral part of the collective agreement and the workers' wages shall be governed thereby".*

606. *The Committee notes that, according to the Government, it follows from the foregoing that the company is honouring its agreement with ATELCA, since if one takes into account, on the one hand, the provisions of clause 5 of the collective agreement of 1984 extending to ATELCA's members those provisions of the collective agreement concluded with the primary trade union that are not included in the chapter on ATELCA, and, on the other hand, the fact that in 1997 ATELCA and the ETB agreed in clause 2 on the increase in favour of ATELCA, it is not appropriate to accord the extension claimed by ATELCA, since there is a provision which expressly provides for the salary increases in favour of ATELCA. Finally, the Committee notes that according to the Government, administrative proceedings are under way before the Coordinator of Inspection and Monitoring of the Territorial Directorate of Cundinamarca.*

607. *Noting in this respect that, according to the company's statements, there is an agreement, signed in 1997 between ATELCA and the ETB for the period 1997–2000, which foresees specific guidelines for wage increases and which, according to the company, remains in force, the Committee considers that the extension to ATELCA's members of the wage*

clauses of the 2006 agreement between the company and the primary union is a matter for interpretation which has to be settled in accordance with the rules and criteria of national legislation. The Committee recalls, moreover, that the complainant has the right under national legislation to denounce the agreement signed in 1997 if it considers it to be prejudicial. Bearing in mind that the matter is under consideration by the Coordinator of Inspection and Monitoring of the Territorial Directorate of Cundinamarca, the Committee requests the Government to keep it informed of the final outcome of the ongoing administrative proceedings.

The Committee's recommendation

608. ***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 administrative proceedings currently under way before the Coordinator of Inspection and Monitoring of the Territorial Directorate of Cundinamarca concerning the applicability to ATELCA of the clauses concluded between the company and the primary union.

CASE NO. 2662

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

Complaint against the Government of Colombia presented by the Single Confederation of Workers of Colombia (CUT)

Allegations: Denial of public servants' right to engage in collective bargaining

609. The present complaint is contained in a communication from the Single Confederation of Workers of Colombia (CUT), dated 14 July 2008.

610. The Government sent its observations in a communication dated 19 August 2009.

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

A. The complainant's allegations

612. In its communication dated 14 July 2008, the CUT alleges, on behalf of the National Union of Public Servants and Officials of the Municipalities of Colombia (SINALSERPUB), that the State refused to engage in collective bargaining with public sector workers. According to the CUT, since the Constitution of the Republic entered into force in 1991, and in accordance with articles 39, 55 and 56 of the Constitution, workers employed by the Colombian State are subjects of collective labour law. The CUT adds that articles 53 (last paragraph) and 93 of the Constitution provide for the application, at the national level, of

international treaties on the collective rights of workers, in particular ILO Conventions Nos 87, 98, 151 and 154, which Colombia has ratified.

613. The complainant organization alleges that, despite the above, the right of public sector workers to engage in collective bargaining is still not guaranteed, pursuant to the provisions of section 416 of the Substantive Labour Code, which prohibits collective bargaining in the public sector. When Convention No. 154 was ratified, SINALSERPUB filed a petition of unconstitutionality on the grounds that section 416 of the Labour Code was contrary to the provisions of the Convention. The Public Prosecutor, in Opinion No. 3898, issued on 11 August 2005, requested that section 416 be ruled unenforceable (unconstitutional), as it is contrary to Conventions Nos 151 and 154. Nevertheless, the Constitutional Court, in Ruling No. C-1234/2005, found this provision enforceable.

B. The Government's reply

614. In its communication dated 19 August 2009, the Government states that, by means of Decree No. 535 of 24 February 2009, special bodies have been set up for consultations between trade union organizations representing public sector workers and public sector entities. It adds that this legislation has opened a new chapter in regard to the right to collective bargaining in the public sector. Referring to discussions that took place at the International Labour Conference, the Government points out that the Decree has already produced tangible and satisfactory results, as consultations have been launched in the Bogotá district, as well as in the Ministry of Social Protection and the Ministry of Education, in which an agreement has been signed with the federation of teachers working in the public sector in Colombia.

615. The Government considers that, in issuing Decree No. 535 in 2009, it has ensured compliance with Act No. 411, which guarantees the application of ILO Convention No. 151 and article 55 of the Constitution.

C. The Committee's conclusions

616. *The Committee observes that this case concerns allegations presented by the CUT, on behalf of SINALSERPUB, relating to the Government's refusal to guarantee public sector workers the right to collective bargaining, pursuant to section 416 of the Substantive Labour Code which provides that trade unions of public employees cannot present lists of demands or conclude collective agreements. The Committee notes that, according to the allegations, after Colombia ratified Convention No. 154, SINALSERPUB filed a petition arguing that section 416 of the Substantive Labour Code was unconstitutional and that the Public Prosecutor agreed (in Opinion No. 3898) that that legal provision should be ruled unenforceable (unconstitutional) by the Constitutional Court. The Committee notes that the complainant organization states that the Constitutional Court, in Ruling No. C-1234/2005, nonetheless declared that legal provision enforceable.*

617. *The Committee observes that the Constitutional Court stated in this ruling that:*

> *... the provision at issue shall be declared enforceable on the understanding that, in order to give effect to the right to collective bargaining laid down in ILO Conventions Nos 151 and 154, which are part of Colombia's national legislation, trade unions of public employees may have access to other modalities for concertation on conditions of work, on the basis of a request to that effect by these trade unions, pending regulation on a procedure for that purpose by the Congress of the Republic ...*

... Lastly, the Court is not unaware that the problem of public sector trade unions' ability to exercise their right to engage in collective bargaining stems from the absence of suitable legal mechanisms to give effect to this right. Furthermore, the legislator has not put procedures in place to allow trade unions to initiate the concertation process, or to ensure that their demands or complaints are received and handled by the public authorities. Neither has it been established which public authority is competent to issue a decision in the event of unsubstantiated denial of the right to engage in collective bargaining. There are no legal mechanisms in place to ensure that, once the concertation stage has been concluded, the demands submitted by public sector trade unions are reflected in budgetary bills or legislation concerning the public administration.

Thus, the Court agrees with the Public Prosecutor's request to the effect that the legislator shall regulate the procedure, in due time and in dialogue, in so far as possible, with the trade union organizations of public employees, governing the right of such employees to engage in collective bargaining, in accordance with article 55 of the Constitution and ILO Conventions Nos 151 and 154, duly ratified by the country and which form part of domestic law under the provisions of Acts Nos 411 of 1998 and 524 of 1999, respectively.

618. *In this regard, the Committee notes with interest the adoption of Decree No. 535 of 24 February 2009, which regulates section 416 of the Substantive Labour Code (pursuant to Acts Nos 411 and 524 implementing, at the national level, ILO Conventions Nos 151 and 154) and establishes special bodies for collaboration between public service trade unions and public sector entities. Furthermore, noting that certain agreements have already been signed in the Bogotá district, the Ministry of Social Protection and the Ministry of Education, the Committee requests the Government to keep it informed of developments since the adoption of the abovementioned Decree, the agreements signed between public sector entities and public sector trade unions, and whether SINALSERPUB has been able to participate in collective bargaining.*

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

The Committee's recommendations

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

(a) ***The Committee requests the Government to keep it informed of developments since the adoption of Decree No. 535 on 24 February 2009, the agreements signed between public sector entities and public sector trade unions, and whether SINALSERPUB has been able to participate in collective bargaining.***

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

CASE NO. 2602

INTERIM REPORT

Complaints against the Government of the Republic of Korea presented by
— the Korean Metalworkers' Federation (KMWF)
— the Korean Confederation of Trade Unions (KCTU) and
— the International Metalworkers' Federation (IMF)

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

621. The Committee last examined this case at its May 2008 meeting and on that occasion presented an interim report to the Governing Body [see 350th Report, paras 627–703, approved by the Governing Body at its 302nd Session].

622. The International Metalworkers' Federation (IMF) sent new allegations in communications dated 21 November 2008 and 23 July 2009. The Korean Confederation of Trade Unions (KCTU) sent additional information in a communication dated 11 June 2009.

623. The Government sent new observations in communications dated 22 May and 5 October 2009.

624. The Republic of Korea has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

625. At its previous examination of the case in May 2008, the Committee made the following recommendations [see 350th Report, para. 703]:

(a) The Committee requests the Government to keep it informed of the decision of the Supreme Court with regard to the proceedings for unfair dismissal lodged by the union of subcontracted workers in Kiryung Electronics.

(b) The Committee requests the Government to institute an independent investigation into the alleged acts of anti-union discrimination and interference in Hynix/Magnachip and HMC, through the termination of contracts with subcontractors in case of establishment of trade unions of subcontracted workers and, if the allegations are confirmed, to take all the necessary measures to reinstate the dismissed trade union leaders and members as primary remedy; if the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests to be kept informed in this respect.

(c) The Committee urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers in the metal sector, in particular in HMC, Kiryung Electronics, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that subcontracted workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.

(d) The Committee requests the Government to institute an independent investigation into the dismissals of the subcontracted workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed only on the ground that they staged industrial action against a "third party", i.e. the subcontracting company, to ensure that they are reinstated in their posts without loss of pay as primary remedy; if the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests to be kept informed in this respect. The Committee also requests the Government to keep it informed of the Supreme Court decision on the unfair dismissal proceedings filed by three workers from the HMC Asan plant and trusts that, in rendering its decision, the Supreme Court will ensure that sanctions for strike action are imposed only where the prohibitions in question are in conformity with the principles of freedom of association.

(e) The Committee requests the Government to take all necessary measures without delay so as to bring section 314 of the Penal Code (obstruction of business) into line with freedom of association principles. The Committee requests to be kept informed in this respect.

(f) The Committee requests the Government to provide information on the specific acts for which Kaon, Sujeong; Oh, Ji Hwan; and Kim, Jun-Gyu, from HMC Asan; Choi, Byeong-Seung, from HMC Ulsan; and Park Jeong-Hun; Jo, Dae-lk; and Jeong, Gyeong-Jin, from HMC HYSCO were convicted to imprisonment for "obstruction of business" and to indicate whether in the meantime the sentences have been served or are still in force.

(g) The Committee requests the Government to institute an independent investigation into allegations that Hynix/Magnachip, Kiryung Electronics and HMC use compensation suits for exorbitant amounts of money, based on "obstruction of business" provisions, as a threat to make trade unionists renounce their claims and rights (e.g. withdraw unfair dismissal claims, withdraw from unions representing subcontracted workers or drop their refusal to work overtime) and, if the allegations are confirmed, to take all the necessary measures to reinstate the dismissed trade union leaders and members as primary remedy;

if the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests to be kept informed in this respect.

(h) The Committee requests the Government to keep it informed of the decisions handed down in three cases pending before the courts with regard to compensation claims filed by Kiryung Electronics on the basis of "obstruction of business" provisions. The Committee trusts that in rendering their judgements, the courts will take due account of the industrial relations context, the need to build a constructive industrial relations climate and the allegations that these suits are used as a means to intimidate trade unionists into renouncing their rights and claims.

(i) The Committee expects that, in the future, when faced with requests for injunctions preventing dismissed trade union officials from entering the workplace, the courts will take duly into account the need for these workers' representatives to enjoy the facilities necessary for the proper exercise of their functions without impairing the efficient operation of the undertaking concerned.

(j) The Committee requests the Government to ensure that an independent investigation is carried out into the allegations of violence by private security guards against trade unionists during rallies at HMC Ulsan and Asan and Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered. The Committee requests to be kept informed in this respect.

(k) The Committee considers that violence, criminal sanctions or disproportionately heavy pecuniary penalties are not conducive to a constructive industrial relations climate, especially in the absence of affirmative measures to promote dialogue and collective bargaining. It urges the Government to promote in the future social dialogue and collective bargaining as preventive measures aimed at restoring confidence and a peaceful industrial relations climate, rather than the application of "obstruction of business" provisions with respect to non-violent acts.

(l) The Committee requests the Government to develop appropriate mechanisms in consultation with the social partners concerned, aimed at strengthening the protection of dispatch workers' rights to freedom of association and collective bargaining, guaranteed to all workers under TULRAA, and preventing any abuse of subcontracting as a way to evade in practice the exercise of the freedom of association and collective bargaining rights of these workers. Such mechanisms should include an agreed process for dialogue determined in advance.

(m) The Committee invites the Government to have recourse to ILO technical assistance if it so wishes.

B. New allegations by the complainant organizations

626. In a communication dated 21 November 2008, the IMF states that despite the Committee's recommendations, the situation of Korean workers, especially those expressly cited in this case, has deteriorated sharply. The Government continues to deny precarious workers their fundamental trade union rights, while more than 70 trade union officials have been arrested or targeted by police inquiries and questioning.

627. With regard to the legal proceedings in response to unfair dismissals instigated by the trade union representing subcontracted workers at Kiryung Electronics, the complainant organization states that the Supreme Court did not uphold the case of the subcontracted workers, not because the Court considered the dismissals justified but simply because it considered that Kiryung Electronics had no obligations as an employer to the subcontracted workers. The complainant organization also recalls, however, that according

to a previous court decision, the enterprise already had been convicted for using several forms of employment considered to be illegally precarious. The complainant organization adds that, in jurisprudence, termination of precarious workers' contracts because of union membership was considered unfair, especially when a worker had already been employed for two years.

628. As regards the request for an independent investigation into the allegations of anti-union discrimination and interference at Hynix/Magnachip and at Hyundai Motors' Corporation (HMC), through the termination of contracts with subcontractors when workers employed by the latter formed unions, the complainant organization states that the Government has still not instituted such an investigation five months after the Committee made its recommendations.

629. As regards the recommendations to take all necessary measures to promote collective bargaining on terms and conditions of employment of workers hired by subcontracting enterprises in the metalworking sector, in particular at HMC, Kiryung Electronics, KM&I and Hynix/Magnachip, the complainant organization states that the precarious workers at Kiryung Electronics have been obliged to resort to extreme measures such as a 94-day hunger strike to force the enterprise to promote collective bargaining.

630. With regard to the Committee's request for an independent investigation into the dismissals of subcontracted workers at the HMC plants in Ulsan and Jeonju, the complainant organization states that the Government has still not taken any such measure five months after the Committee made it recommendations.

631. As regards the Committee's recommendations to bring section 314 of the Penal Code ("obstruction of business") into conformity with the principles of freedom of association, the complainant organization states that the public prosecution authority has used "obstruction of business" as a pretext for breaking the strikes declared by the KMWU on 2, 8, and 10 July 2008. The complainant organization emphasizes that a number of officials of the KMWU (the president Jung Gab-deuk; the first vice-president Nam Taek-gyu; the president of the Hyundai Motors branch of the KMWU, Kim Tae-gon; and possibly the president of the Kia branch of the KMWU, Kim Sang-gu) face criminal prosecution for obstruction of business. According to the complainant organization, the public prosecutor considers that the objectives of the strike are illegal since they target employers that do not participate in sectoral negotiations at the national level, or because certain strikes concerned issues of public health, in particular the renegotiation of the terms of beef trade agreements with the United States, which have no bearing on terms and conditions of employment.

632. The complainant organization states further that, with regard to the three pending court cases involving proceedings instigated by Kiryung Electronics against the trade unionists for obstruction of business, the courts concluded that the demand for compensation for damages made by the enterprise was exaggerated. The complainant organization maintains that the enterprise has nevertheless been able to obtain an undertaking from the workers to give up their union membership in return for withdrawing their complaints.

633. Lastly, the complainant organization refers to the Committee's recommendation addressed to the Government to develop appropriate mechanisms in consultation with the social partners concerned, aimed at strengthening the protection of "dispatch" workers' rights to freedom of association and collective bargaining, guaranteed to all workers under the Trade Union and Labour Relations Adjustment (TULRAA), and preventing any abuse of subcontracting as a way of evading in practice the exercise of freedom of association and collective bargaining rights of these workers. In this regard, the complainant organization emphasizes that the cornerstone of the KMWU's strategy is the protection of the rights of

precarious workers through collective bargaining and the establishment of a national union for the industry, and by negotiating collectively at the sectoral level in order to establish standards in the metalworking sector. Nevertheless, according to the complainant organization, the KMWU leaders are currently being prosecuted on the grounds that the strike action instigated by them in order to force the employers to take part in national collective negotiations has no bearing on terms and conditions of employment and is therefore illegal. The complainant organization recalls that the law does not require employers to engage in collective talks with unions above the enterprise level. However, the law is used to deny and criminalize the exercise of the right to take collective action, thus undermining the unions' strategy of using strike action to bring about national talks in order to protect vulnerable workers.

634. The complainant organization urges the Committee to recommend an ILO fact-finding mission to the Republic of Korea to examine the violations of workers' rights revealed in this case.

635. Furthermore, in a communication dated 23 July 2009, the IMF provides a copy of the report of an international trade union mission which visited the Republic of Korea in February 2009. The report states that, despite the ILO's recommendations for labour law reform, and in particular the recommendations made by the Committee during its previous examination of this case, the situation of trade unionists had deteriorated and the violations of trade union rights had worsened.

636. In a communication dated 11 June 2009, the KCTU denounces the failure of the Government to implement the Committee's recommendations and provides new allegations concerning cases of anti-union repression against drivers of Remicon vehicles used to transport ready-to-use cement and of tipper trucks and other heavy vehicles. These drivers cannot, in the Government's view, be regarded as workers under the terms of the TULRAA owing to their "self-employed" status. They are thus considered not to be entitled to join a union. The KCTU maintains that, since the beginning of 2009, the Government has issued a number of official directives calling on the unions to voluntarily exclude drivers of Remicon vehicles, tipper trucks and other heavy vehicles, or face deregistration.

C. The Government's reply

637. In a communication dated 22 May 2009, the Government provides information on the Committee's recommendations, including a number of judicial decisions in Korean, and replies to some of the new allegations made by the IMF.

638. As regards the proceedings in connection with the allegedly unfair dismissals, initiated by the trade union representing workers hired by Kiryung Electronics subcontractors, the Government states that in four decisions handed down between January and June 2008, the Supreme Court rejected all the complaints filed in relation to the dismissals of the 34 workers in question, including both the contract workers directly employed by the enterprise and the subcontracted workers. The Court took the view that Kiryung Electronics, as principal contractor, had no obligation as employer towards the subcontracted workers. In the case of workers employed directly by the enterprise, the Court considered that their employment was terminated by the expiry of their contracts.

639. The Government adds that it has no knowledge of the jurisprudence cited by the complainant organization, according to which the dismissal of precarious workers for forming a trade union is illegal if the workers have already been employed for at least two years. The Government explains that, in any case, an interruption in employment intended to obstruct trade union activities is an unfair work practice.

640. As regards the Committee's recommendations to hold an independent investigation into the allegations of acts of discrimination and interference at Hynix/Magnachip and at HMC, the Government refers to a decision by the High Court of Seoul, which concluded in April 2007 that the actions of Hyundai Heavy Industries to reduce or undermine trade union activities by exercising its overall control and inciting the subcontractor to close when its workers formed a union, were considered interference and unfair practice.

641. As regards the Committee's request to hold an independent investigation into the dismissals of workers hired by subcontractors at HMC Ulsan and Jeonju, the Government refers to section 81 of the TULRAA according to which discriminatory treatment such as dismissal for participating in trade union activities constitutes unfair labour practice. The Government adds that the workers can seek compensation through the Labour Relations Commission and can instigate legal action against an employer who in their view has infringed their rights.

642. The Government further states that the legal actions for unfair dismissal initiated by the three workers of the HMC plant in Asan are still under way in the Supreme Court.

643. As regards the recommendations made by the Committee to promote collective bargaining on the terms and conditions of employment of subcontracted workers in the metalworking sector, the Government draws attention to the advice given by some local authorities to the employers concerned:

– The Ulsan Labour Office of the Ministry of Labour advised HMC subcontractors to engage in negotiations in good faith with the trade unions under the terms of the TULRAA. However, given that they were unable to raise wages at their own initiative, the Ulsan Labour Office advised the HMC to intervene to resolve problems of work management in its subcontracting enterprises in a "win-win" cooperation between the principal employer and its suppliers. As a result of this, collective negotiations were concluded satisfactorily in 2008.

– The Director of the Industrial Relations Support Division and the labour inspectors of the Cheonan District Labour Office provided advice for the operation and management of the HMC plant in Asan and for the subcontractors, with a view to ensuring rational and cooperative labour relations.

– In 2008, the Gwanak District Labour Office and the Chief of the Seoul Regional Labour Office undertook mediation between the workers and management of Kiryung Electronics. However, although the workers and management succeeded in narrowing their differences, no final agreement has been concluded owing to a marked difference in views regarding the union's development fund.

644. Lastly, the Government indicates that the extreme means of action, such as the hunger strike referred to in the complainant organization's allegations, were means of applying pressure that responded more to the union's own internal requirements.

645. As regards the Committee's recommendation to amend section 314 of the Penal Code, the Government recalls that the question has already been considered in recommendations made by the Committee in its examination of Case No. 1865. As regards the issue raised by the complainant organizations concerning the excessive reliance on "obstruction of business" provisions as a motive for the court cases involving five KMWU officials, the Government indicates that, in the view of the public prosecutor, the strikes called by the KMWU leadership were illegal because they were motivated by a call to renegotiate the existing agreements on trade in beef products with the United States, which has nothing to do with improving terms and conditions of employment. Furthermore, according to the

public prosecutor, the strike organized by the KMWU to bring about collective talks at the national and sectoral levels was unfair in that its aim was to force employers to conduct such talks, even though they are not actually required to do so. The Government confirms that the KMWU leaders Jung Gab-deuk, Nam Taek-gyu, Kim Tae-gon and Yun Hae-mo were found guilty by the lower courts of obstructing business.

646. With regard to the information requested by the Committee on the offences for which Kaon Su-jeong, Oh Ji-hwan et Kim Jun-gyu, of HMC Asan; Choi Byeong-seung, of HMC Ulsan; and Park Jeong-hun, Jo Dae-ik, and Jeong Gyeong-jin, of HMC HYSCO, were sentenced to periods of imprisonment for "obstruction of economic activity", the Government has provided the following clarification:

– Kaon Su-jeong, Oh Ji-hwan and Kim Jun-gyu used excessive violence towards HMC staff and guards who blocked their passage, injuring a number of them. In addition, they destroyed vehicles and roadblocks and issued threats in order to disrupt the activities of HMC and of Dong Seo Dynasty, for which acts they were sentenced to imprisonment. The Government states that none of them has served the sentence imposed.

– Choi Seung-byeong injured five guards between May and September 2004. He also damaged the main gate of HMC and disrupted production by issuing threats. He was sentenced to imprisonment but has not served the sentence.

– Park Jeong-hun wounded police officers and damaged HMC HYSCO property at a sit-in on 25 October 2005. He was found guilty of premeditated criminal action and sentenced to a term of imprisonment, which he served until May 2007.

– Jo Dae-ik and Jeong Gyeong-jin entered HMC premises on 1 May 2006 and wounded guards with an iron bar. They also obstructed the building of an extension over a period of ten days. Jo Dae-ik also took part in a violent demonstration that led to 105 cases of injury among the police and damage to 30 police cars. Jeong Gyeong-jin entered company premises, damaged property and disrupted operations. Both were sentenced to terms of imprisonment, which they have not served.

647. As regards the decisions of the courts with regard to the three cases in which compensation is sought by Kiryung Electronics, the Government indicates that two of the complaints, one against 16 union members including Kim So-yeon, the other against 14 union members including Kang Sun-yeol, were settled through conciliation based on the recommendations of the High Court in May 2008. The third complaint, against Jeon Jae-hwan, was settled through conciliation in July 2008.

648. As regards the Committee's recommendation concerning the development of appropriate mechanisms in consultation with the social partners concerned, aimed at strengthening the protection of dispatch workers' rights to freedom of association and collective bargaining, the Government takes the view that it cannot impose a particular method of negotiation, as this should be determined independently by workers and management in order to promote their mutual interests.

649. Referring also to the allegations of the complainant organizations questioning the assumption that the employers are not legally required to carry on collective talks with unions other than those at enterprise level, the Government recalls that there is no restriction regarding the level at which unions may be formed and negotiate. Any union, whether at the enterprise or the sectoral level, may independently choose its method of negotiating with management, in the light of their mutual interests. The Government notes that in no country is a particular method of negotiation imposed by law.

650. In its communications dated 5 October 2009, the Government contends that the allegations set forth in the most recent communications of the KCTU concerns the right to organize of special types of employment not related to subcontracted workers in the metal sector, as in this case. It adds that the IMF communications concerns issues already addressed in Case No. 1865.

D. The Committee's conclusions

651. *The Committee recalls, firstly, that in its previous examination of the case, it noted that the allegations concerned specific obstacles to the exercise by subcontracted workers of their rights to freedom of association and collective bargaining, which should be guaranteed for them as for any other workers under the terms of the TULRAA. In its conclusions, the Committee considered that no meaningful information had been provided on the steps taken to ensure the fundamental rights of the workers in question, in respect of: (i) acts of anti-union discrimination disguised as termination of contracts with subcontractors immediately after the establishment of trade unions, which leads to the de facto dismissal of all subcontracted workers if they attempted to exercise their freedom of association and collective bargaining rights; (ii) a "catch-22" situation where the principal employer/subcontracting company refuses to negotiate with subcontracted workers, claiming that it has no employment relationship with them, while the subcontractors also refuse to negotiate, claiming that they do not control the terms and conditions of employment in the plant; (iii) the fact that industrial action can only take place at the principal employer's/subcontracting company's factory while, at the same time, the staging of industrial action against a "third party", that is the principal employer/subcontracting company, is treated as an illegal act; (iv) absence of positive measures to promote constructive dialogue and negotiated resolutions to disputes in the face of mounting tensions; (v) use of "obstruction of business" provisions with respect to non-violent acts, and compensation suits for exorbitant amounts of money as a threat to make trade unionists renounce their claims and rights.*

652. *The Committee notes that the allegations pending in this case concern the situation of subcontracted workers in the metalworking sector, in particular in the Hyundai Motors Corporation plants in Ulsan, Asan and Jeonju, at Hynix/Magnachip, Kiryung Electronics and at KM&I, who in practice have no legal protection under the terms of TULRAA and are left unprotected as regards: (1) recurrent acts of anti-union discrimination, including dismissals, which are intended to thwart their attempts to form a union; (2) the employer's refusal to negotiate, with the result that none of the representative unions has succeeded in negotiating a collective agreement; (3) cases of dismissal, imprisonment, and demands for compensation involving exorbitant sums for "obstruction of business" in strikes; (4) physical assault, court injunctions and imprisonment of workers for "obstruction of business", all with the aim of preventing dismissed union officials from returning to company premises to organize meetings or carry on their representative functions.*

Right to organize without discrimination

653. *As regards recommendation (a) concerning the decision of the Supreme Court in the proceedings for unfair dismissal lodged by the union representing subcontracted workers at Kiryung Electronics, the Committee recalls that, according to the complainant organizations, following the establishment of the union in July 2005, union resignation forms had been distributed to employees some days afterwards, and interviews had subsequently been organized with individual workers who had remained in the union in order to persuade them to resign from the union; unionized workers had had their contracts cancelled or not renewed. Nevertheless, the Government in its reply had indicated that the investigations by the Regional Labour Office had not confirmed that*

such acts had taken place. Furthermore, between January and August 2006, the administrative tribunal and the High Court had rejected an appeal against unfair dismissal by the union that had brought the case before the Supreme Court. The Committee notes the information supplied by the complainant organization, according to which the Supreme Court in its decision did not in the end uphold the subcontracted workers' case. The Committee takes note of the Government's confirmation that, in four decisions handed down between January and June 2008, the Supreme Court rejected all appeals against unfair dismissal presented by the 34 workers, including both those directly employed by the enterprise and subcontracted workers. The Court considered that Kiryung Electronics as the principal employer was under no obligation towards the subcontracted workers. As regards the workers directly employed by Kiryung Electronics, the Supreme Court considered that their employment with the enterprise ceased when their contracts of employment expired.

654. *While noting the decisions handed down by the Supreme Court, the Committee is bound to recall the principles according to which all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing, and the non-renewal of a contract for anti-union reasons constitutes a prejudicial act within the meaning of Article 1 of Convention No. 98 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 255 and 785]. The Committee considers that protection against acts of anti-union discrimination would appear to be inadequate if an employer can resort to subcontracting as a means of evading in practice the rights of freedom of association and collective bargaining. The Committee considers in this regard that, in order to guarantee effective protection against anti-union discrimination, it would be necessary to try to establish the truth of the allegations made by the complainant organizations concerning pressure to encourage workers to resign from their union and, if those allegations are found to be true, to take appropriate corrective measures. In these circumstances, the Committee requests the Government to hold an independent investigation into the allegations of pressure put on subcontracted workers at Kiryung Electronics to persuade them to leave the union, as they appear regrettably not to have been taken into consideration by the Court in its decision, and, if they are confirmed, to take any necessary measures to provide compensation for the trade unionists concerned and to prevent any recurrences of such anti-union discrimination in future.*

655. *As regards recommendation (b) concerning an independent investigation into the alleged acts of anti-union discrimination and interference at Hynix/Magnachip and HMC, through the termination of contracts with subcontractors in the case of establishment of trade unions of subcontracted workers, the Committee notes that according to the complainant organization the Government has still not yet carried out any independent investigation five months after the Committee made its recommendations. The Committee notes that the Government refers to a decision of the Seoul High Court in April 2007 according to which the actions of Hyundai Heavy Industries to reduce or undermine trade union activities by exercising its overall control and inciting the subcontractor to close when its workers formed a union constitute interference and thus unfair labour practice.*

656. *While noting the Government's information that certain measures relating to the use of subcontracting were deemed by the courts to constitute unfair practice, the Committee once again requests the Government, to take the necessary measures to reinstate the dismissed union officials and members as a primary remedy. If the judicial authorities find that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded for any damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of*

anti-union discrimination. The Committee requests the Government to keep it informed of any new developments in this respect.

Right to collective bargaining

657. *The Committee requested the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers in the metal sector, in particular in HMC, Kiryung Electronics, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that subcontracted workers in these companies might effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith (recommendation (c)). The Committee notes that, according to the complainant organization, the precarious workers at Kiryung Electronics were obliged to resort to extreme forms of action such as a 94-day hunger strike, to force the enterprise to promote collective bargaining.*

658. *Furthermore, the Committee notes the information supplied by the Government concerning advice provided by local offices of the Ministry of Labour for employers, including principal employers and subcontractors, and for unions on negotiation in good faith in the metalworking sector. The Committee notes that the Ulsan Labour Office of the Ministry of Labour advised HMC and the subcontractors to negotiate in good faith with the unions, in accordance with the TULRAA. The Government indicates that collective negotiations were concluded successfully in 2008. The Committee also notes the statements to the effect that the Industrial Relations Support Division and the Cheonan district labour inspectors supported the HMC plant in Asan and the subcontractors in the same way. Lastly, the Government states that the Gwanak District Labour Office and the chief of the Seoul Regional Labour Office mediated between the workers and management of Kiryung Electronics, but did not reach a definitive agreement. According to the Government, the extreme forms of action such as the hunger strike mentioned by the complainant organization are just further means of exerting pressure which respond more to the union's own internal requirements, than to a wish to initiate collective talks.*

659. *While noting the information supplied by the Government on the specific measures to promote collective talks on terms and conditions of employment of subcontracted workers at certain enterprises in the metalworking sector, the Committee notes the contradictory nature of the information supplied by the complainant organizations and the Government.*

660. *The Committee requests the Government to continue to take all necessary measures, at all levels, to promote collective bargaining on terms and conditions of employment of subcontracted workers in all metalworking sector enterprises, and in particular at HMC, Kiryung Electronics, KM&I and Hynix/Magnachip, by building negotiating capacity so that unions representing subcontracted workers in these enterprises can effectively exercise their legitimate right to seek improvements in their living and working conditions through negotiations conducted in good faith. The Committee takes the view that such measures should enable the Government to ensure that the use of subcontracting arrangements is not motivated by the wish to circumvent the collective bargaining provisions contained in the TULRAA, and that the trade unions representing subcontracted workers can carry on their activities in the interests of their members.*

Right to exercise industrial action including strikes

661. *With regard to the request for an independent investigation into the dismissals of the subcontracted workers in HMC Ulsan and Jeonju (recommendation (d)), the Committee notes the complainant organization's statement to the effect that the Government has still*

not taken any action despite the time that has passed. The Committee furthermore notes with regret that the Government confines itself to referring to section 81 of the TULRAA, according to which dismissal for participation in trade union activities constitutes unfair labour practice, and to indicating the means of redress available to any worker wishing to take action against an employer that has infringed his or her rights.

662. *The Committee regrets the absence of specific information on the dismissals of subcontracted workers at the HMC plants in Ulsan and Jeonju, or on any judicial proceedings currently under way. It reiterates once again 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 fact that a strike is called for recognition of a union is a legitimate interest which may be defended by workers and their organization; [**Digest**, op. cit., paras 521 and 535]. The Committee recalls that a claim for recognition for collective bargaining purposes addressed to the subcontracting company does not render a strike illegal, and recalls furthermore 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 [**Digest**, op. cit., para. 661]. Lastly, the Committee considers that the trade unions must act responsibly and respect the principle that the right of assembly should be exercised peacefully.*

663. *Consequently, the Committee again requests the Government to hold an independent investigation without delay into the dismissal of HMC subcontracted workers in Ulsan and Jeonju, and, if it is shown that these workers were dismissed solely for staging industrial action against a "third party", namely the principal employer (subcontracting enterprise), to ensure that they are reinstated without loss of wages as a primary remedy. If the judicial authority finds that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of any developments in this regard.*

664. *The Committee also notes the Government's statement to the effect that the legal proceedings for unfair dismissal initiated by three workers at the HMC plant in Asan are still under way in the Supreme Court. The Committee again trusts that, in rendering its decision, the Supreme Court will ensure that sanctions for strike action are imposed only where the prohibitions in question are in conformity with the principles of freedom of association.*

Application of "obstruction of business" provisions

665. *The Committee recalls that, in its previous examination of the case, it noted that, according to the allegations, "obstruction of business" provisions are systematically applied to victimize and intimidate "illegal dispatch" workers who resort to strikes, and workers are thus punished under section 314 of the Penal Code, without having carried out any acts of violence, simply for having exercised a right to which they claim entitlement as regular workers. The relevant sanctions include imprisonment, provisional seizure of assets and compensation claims for exorbitant amounts, in retaliation for the attempt to stage industrial action. Recalling that the detention of trade union leaders and members for reasons linked with their activities in the defence of workers' interests constitutes a serious violation of civil liberties in general, and of trade union rights in particular, the Committee had requested the Government to provide information on the specific acts for which Kaon Sujeong, Oh Ji Hwan, and Kim Jun-Gyu, from HMC Asan; Choi Byeong-Seung, from HMC Ulsan; and Park Jeong-Hun, Jo Dae-ik, and Jeong Gyeong-Jin, from HMC HYSCO, were sentenced to imprisonment for "obstruction of*

business" (recommendation (f)). The Committee takes note of the information provided by the Government concerning the convictions and the sentences handed down:

– *Kaon Sujeong, Oh Ji Hwan, and Kim Jun-Gyu used excessive force against staff and guards of HMC who impeded their passage, and inflicted injuries on them. In addition, they destroyed vehicles and roadblocks and issued threats to obstruct the activities of HMC and Dong Seo Dynasty. They were sentenced to two years' imprisonment and three years suspended for such acts. According to the Government none of the workers in question has served the sentence.*

– *Choi Byeong-Seung wounded five guards between May and September 2004. He also damaged the main gate of HMC and disrupted production by issuing threats. He was sentenced to one year in prison (suspended), and has not served the sentence.*

– *Park Jeong-hun wounded police officers and damaged property of HMC HYSCO at a protest sit-in on 25 October 2005. He was found guilty of premeditated commission of a crime and sentenced to one year in prison, which he served until May 2007.*

– *Jo Dae-ik and Jeong Gyeong-jin entered HMC headquarters on 1 May 2006 and wounded a number of guards with an iron bar. Daek-ik took part in a violent demonstration which led to 105 police officers being injured and damage to 30 police cars, while Jeong Gyeong-jin entered the enterprise, damaged property and obstructed operations. Both were sentenced to two-and-a-half years' imprisonment (suspended) and have not served the sentence.*

666. *The Committee notes that the workers referred to above have been sentenced in connection with acts of violence, destruction and obstruction. Under these circumstances, the Committee recalls that taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work. The Committee takes the view that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising their right to strike [**Digest**, op. cit., paras 651 and 667].*

667. *As regards recommendation (e) concerning the need to take all necessary measures without delay so as to bring section 314 of the Penal Code (obstruction of business) into line with freedom of association principles, the Committee recalls that the question of the application of obstruction of business provisions in an occupational context has been the subject of recurring comment by the Committee in relation to its examination of Case No. 1865 involving the Republic of Korea. The Committee noted then that the legal definition of "obstruction of business" was so wide as to encompass practically all activities related to strikes, and that the charge of obstruction of business carried extremely heavy penalties (maximum sentence of five years' imprisonment, and/or a fine of 15 million won) and had actually given rise to heavy terms of imprisonment and fines. The Committee concluded that the application of this provision was not conducive to a stable and harmonious industrial relations system and accordingly requested the Government to bring section 314 of the Penal Code into line with the more restrictive interpretation given by the Supreme Court and with freedom of association principles [see Case No. 1865, 320th Report, paras 524–526]. The Committee notes with deep concern that, in its examination of this case, it must once again call into question the application of section 314 of the Penal Code, and must in particular note that the Government has not taken any measure to revise the provision in question in such a way as to bring its application into conformity with the principles of freedom of association.*

668. *As regards the exercise of the right to strike, the Committee reminds the Government that, in general, the occupational and economic interests which workers defend through the*

*exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. 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. Lastly, while purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticizing a government's economic and social policies, and 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 [**Digest**, op. cit., paras 526, 527, 529 and 531].*

669. *As regards more specifically the application of section 314 of the Penal Code in relation to strike action, the Committee once again expresses its deep concern at the allegations that it was used to punish a range of collective actions, even non-violent ones, with imprisonment and fines. The Committee 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 [**Digest**, op. cit., para. 671]. Furthermore, while emphasizing the importance of legitimate trade union activity being carried out peacefully, the Committee reiterates its previous statement that the criminalization of industrial relations is in no way conducive to harmonious and peaceful industrial relations [Case No. 1865, 346th Report, para. 774]. A possible first step, in the Committee's view, would be for the Government to plan the adoption of the necessary measures, in consultation with the social partners concerned, to establish a general practice of investigation, rather than arresting strikers, and that arrests should be limited, even in the case of an illegal strike, to situations in which acts of violence have occurred. Noting also with deep concern that the Government confines itself to stating only that the question was raised in Case No. 1865, without indicating any progress or specific measures to give effect to the recommendations that have been made since 2000, the Committee reiterates its recommendation that the Government should adopt without delay all necessary measures to bring the application of section 314 of the Penal Code (concerning "obstruction of business") into conformity with the principles of freedom of association, and to keep it informed of developments.*

670. *The Committee had also noted, from the complainant organization's allegations, that the "obstruction of business" provisions are used to intimidate workers by seeking from them exorbitant amounts in compensation for damages. The Committee had also noted the allegations that the employer used compensation claims to intimidate trade unionists and to force them to abandon legal challenges to unfair dismissal or to resign from their union. The Committee had requested the Government to keep it informed of any decisions concerning the three court cases relating to claims for compensation lodged by Kiryung Electronics based on "obstruction of business" provisions (recommendation (h)). The Committee notes that, according to the Government, two complaints, one against 16 union members including Kim So-yeon, the other against 14 union members including Kang Sun-yeol, have been settled by conciliation procedures on the basis of the recommendations made by the High Court in May 2008. The third complaint, against Jeon Jae-hwan, was also settled through conciliation proceedings in July 2008. The Committee notes this information, requests the Government to indicate whether any of these settlements resulted in withdrawals from the union, and expects that the Government and the judicial authorities will establish adequate safeguards to avoid the possible risk of abuse of judicial proceeding for "obstruction of business" in order to intimidate workers and trade unionists, and that the courts will hand down decisions that fully take account of the need to establish a constructive industrial relations climate in the sector.*

671. *The Committee had expressed its concern over the acts of violence perpetrated by private security guards against trade unionists during rallies at HMC plants in Asan and Ulsan and at Kiryung Electronics, and in particular at the abductions of An Ghi-ho of HMC Ulsan, and of Kwon Soo-jeon at HMC Asan, and at the violence perpetrated against workers at Kiryung Electronics. It had requested the Government to ensure that an independent investigation was held into these allegations (recommendation (j)). The Committee notes with regret that the Government provides no information on the measures taken to hold such an investigation. Recalling that a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty [**Digest**, op. cit., para. 45], the Committee once again requests the Government to carry out an investigation into the acts of violence perpetrated by private security guards against trade unionists during rallies at HMC plants in Asan and Ulsan and at Kiryung Electronics and, if the allegations are confirmed, to take all necessary measures to punish those responsible and to compensate the victims for the damages suffered. The Committee requests the Government to keep it informed in this regard.*

672. *As regards its recommendation concerning the establishment of appropriate mechanisms, in consultation with the social partners concerned, aimed at strengthening the protection of subcontracted workers' rights to freedom of association and collective bargaining, the Committee takes note of the Government's view that it should not impose any particular method of negotiation, that being a matter that should be determined independently by the workers and management to promote their mutual interests. The Committee takes the view that, in the light of the questions raised in this case, the Government is not being asked to undermine the principle of the autonomy of the social partners by imposing a particular form of collective bargaining but rather to adopt the measures needed to ensure above all adequate protection for subcontracted ("dispatch") workers and their representatives in exercising the right to freedom of association and collective bargaining, and to establish mechanisms that will promote their collective bargaining capacity, in particular by taking appropriate steps to rectify the legal difficulties that have been identified. The Committee recalls that, when a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association, and that the ultimate responsibility for ensuring respect for the principles of freedom of association therefore lies with the Government [**Digest**, op. cit., paras 15 and 17].*

673. *The Committee takes note of the most recent communication of the IMF dated 23 July 2009, with which it communicates the report of an international trade union mission in February 2009 in the Republic of Korea which draws attention to the deterioration in the situation of trade unionists and of violations of trade union rights, despite the recommendations made by the ILO for labour law reforms and the Committee's most recent recommendations on this case. Furthermore, while noting the Government's reply, the Committee also notes that, in a communication dated 17 June 2009, the KCTU also complains of the Government's failure to take any steps to implement the Committee's recommendations. Moreover, the Committee notes that the KCTU has submitted new allegations concerning instances of anti-union measures against a number of categories of heavy goods vehicle drivers who, according to the Government, cannot be regarded as employed workers covered by the terms of the TULRAA owing to their "self-employed" status. The KCTU maintains that, since the beginning of 2009, the Government issued a number of notices calling on the unions voluntarily to exclude all these categories of worker or face deregistration, on the grounds that they are not entitled to form unions. While observing the Government's statement that these allegations concern the right to organize of those in special types of employment not relevant to the case at hand, the Committee observes with concern that these new allegations refer to further restrictions on trade union rights which, albeit concerning the construction sector, touch yet again upon impediments in law and in practice to the full exercise of the rights to organize on the basis*

of the nature of the employment relationship. In its previous examination of this case, the Committee had recalled its request to the Government to undertake further efforts for the promotion of free and voluntary collective bargaining on terms and conditions of employment in the construction sector covering, in particular, the vulnerable "daily" workers, including through building negotiating capacities of the employers and workers in that sector [see 350th Report, para. 661]. Deeply concerned by the serious nature of these new allegations, the Committee requests the Government to provide its observations thereon so that it may proceed to their examination in full knowledge of the facts.

674. *Despite the information provided by the Government on the development of the judicial proceedings, and on certain measures taken to promote collective bargaining and on the settlement of disputes, the Committee is bound to express its deep concern at the limited progress with regard to the substantive issues raised by this case, some of which have been the subject of specific recommendations by the Committee in relation to previous cases involving the Republic of Korea, without any action by the Government to implement them.*

675. *Thus the Committee notes that no significant measure has been taken to remove the obstacles to the exercise by subcontracted workers of their rights to freedom of association and collective bargaining, even though those rights are guaranteed by law. The Committee notes with regret that such workers could still suffer acts of anti-union discrimination by termination of their contracts with subcontractors following the establishment of trade unions; that no law or other measure has been adopted to enable the principal employer to engage in collective talks on subcontracted workers; that organizing a strike against a "third party", namely the principal employer, is still considered by the prosecution authorities to be an illegal act; and that no measure has been adopted to prevent the use of "obstruction of business" provisions to punish non-violent collective action, or the use of legal claims for exorbitant sums in compensation as a way of intimidating trade unionists into renouncing their demand and union membership.*

676. *Under these circumstances, the Committee remains of the opinion that the overall climate in which subcontracted workers exercise their rights to freedom of association and collective bargaining in the Republic of Korea is unsatisfactory and needs to be improved and developed. In particular, efforts should be made to adopt mechanisms that can prevent subcontracting from being used as a way of preventing the workers concerned from exercising their trade union and collective bargaining rights. In the absence of any progress, the Committee requests the Government once again to develop appropriate mechanisms in consultation with the social partners concerned, aimed at strengthening the protection of subcontracted workers' rights to freedom of association and collective bargaining, guaranteed to all workers under the TULRAA, and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. Such mechanisms should include an agreed process for dialogue determined in advance.*

677. *The Committee recommends that the Government have recourse to ILO technical assistance.*

The Committee's recommendations

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

(a) ***The Committee requests the Government to hold an independent investigation into allegations of pressure placed on subcontracted workers at Kiryung Electronics to make them resign from their union, as they appear regrettably not to have been taken into consideration by the Court, and, if the allegations are confirmed, to take all necessary measures to compensate the trade union members concerned and to prevent any recurrence of such acts of anti-union discrimination in future.***

(b) ***As regards the allegations of acts of anti-union discrimination and interference at Hynix/Magnachip and at HMC, the Committee once again requests the Government to take the necessary measures to reinstate the dismissed trade union leaders and members as a primary remedy; if the judicial authority determines that reinstatement is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and to prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests to be kept informed in this respect.***

(c) ***The Committee urges the Government to take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted workers in the metal sector, in particular in HMC, Kiryung Electronics, KM&I and Hynix/Magnachip, including through building negotiating capacities, so that subcontracted workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.***

(d) ***The Committee requests the Government to institute an independent investigation without delay into the dismissals of the subcontracted workers in HMC Ulsan and Jeonju and, if these workers are found to have been dismissed solely on the grounds that they staged industrial action against a "third party, i.e. the principal employer (subcontracting company), to ensure that they are reinstated in their posts without loss of pay as a primary remedy. If the judicial authority determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination. The Committee requests the Government to keep it informed of developments in this regard.***

(e) ***Noting further with deep concern that the Government confines itself to stating that the question was already dealt with in Case No. 1865, without indicating any progress made or any specific measures taken to give effect to the recommendations made by the Committee since 2000, the Committee reiterates its recommendation that the Government should take all necessary measures without delay so as to bring section 314 of the Penal Code***

("obstruction of business") into line with freedom of association principles, and to keep it informed in this regard. While emphasizing the importance of legitimate trade union activity being carried out peacefully, the Committee reiterated that the criminalization of industrial relations is in no way conducive to harmonious and peaceful industrial relations.

(f) *The Committee requests the Government to indicate whether any of the settlement proceedings it refers to resulted in members' withdrawals from the union. Moreover, the Committee expects that the Government and the judicial authorities will put in place adequate safeguards so as to avert in future the possible risks of abuse of judicial procedure on grounds of "obstruction of business" with the aim of intimidating workers and trade unionists, and that the courts in their rulings will take due account of the need to build a constructive industrial relations climate in the sector in the context of individual industrial relations.*

(g) *The Committee once again requests the Government to institute an independent investigation into the alleged acts of violence perpetrated by private security guards against trade unionists during rallies at HMC Asan and Ulsan and at Kiryung Electronics and, if they are confirmed, to take all necessary measures to punish those responsible and compensate the victims for any damages suffered. The Committee requests to be kept informed in this respect.*

(h) *The Committee notes with concern the new allegations concerning restrictions on the exercise of trade union rights based on an interpretation of the legislation, which concern a sector with regard to which the Committee has already expressed its concern regarding the denial of certain trade unions rights through the use of precarious workers. The Committee requests the Government to provide its observations to the new allegations by the IMF and KCTU so that it may examine this matter in full knowledge of the facts.*

(i) *In the absence of any progress, the Committee again requests the Government to develop appropriate mechanisms, in consultation with the social partners concerned, aimed at strengthening the protection of subcontracted ("dispatch") workers' rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. Such mechanisms should include an agreed process for dialogue determined in advance.*

(j) *The Committee recommends that the Government have recourse to ILO technical assistance.*

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

CASE NO. 2620

INTERIM REPORT

Complaint against the Government of the Republic of Korea presented by
— the Korean Confederation of Trade Unions (KCTU) and
— the International Trade Union Confederation (ITUC)

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

679. The Committee examined this case on its merits at its March 2009 session, where it issued an interim report, approved by the Governing Body at its 304th Session [see 353rd Report, paras 750–795].

680. The Korean Confederation of Trade Unions (KCTU) submitted additional information in support of its allegations in a communication dated 21 July 2009.

681. The Government transmitted its observations in a communication dated 5 October 2009.

682. 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

683. In its previous examination of the case, the Committee made the following recommendations [see 353rd Report, para. 795]:

(a) As regards the refusal of the authorities to acknowledge the establishment of the MTU and grant it trade union status, the Committee notes that this aspect of the case is pending before the Supreme Court and requests the Government to communicate this judgement as soon as it is rendered so that the Committee may examine this aspect of the case in full knowledge of the facts. The Committee intends to examine this issue in any event at its November 2009 meeting.

(b) The Committee requests the Government to avoid in the future measures which involve a risk of serious interference with trade union activities such as the arrest and deportation

of trade union leaders shortly after their election to trade union office and while legal appeals are pending.

B. The complainant's new allegations

684. In its communication of 21 July 2009, the complainant KCTU states that, on 25 September 2008, the South Korean "Committee on Strengthening National Competitiveness", a committee initiated and overseen by President Lee Myeong-bak, issued a report entitled "Plan for Improving Policy on the Unspecialized Foreign Labor Force". This report outlined several policy reforms, to be implemented in 2009, which are aimed at cutting the costs incurred by employers who employ legal migrant workers and strengthening the crackdown against undocumented migrant workers. The report made specific reference to the Migrants' Trade Union (MTU) and characterized "the establishment of a union by illegal foreigners" as part of a "tendency towards disregard for the law". It announced the Government's intention to "strengthen the crackdown against those who participate in and support [the MTU's] illegal union activities and protests", and cited the past arrest and deportation of MTU leaders as examples of the types of measures used for strengthening this crackdown against the union.

685. The complainant indicates that the Government's past targeting of MTU leaders and its clear intention to continue this attack has had a significant impact on union activities. The MTU has had to go without an official leadership, operating with an emergency structure in which decisions are made by an emergency leadership committee, but without publicly visible representatives. Thus, while there have been no further targeted arrests of leaders, this is because there has been no one to target. At the same time, the antagonistic position of the Government continues to impede the union's daily activities due to widespread fear among the membership and potential membership that active participation in the union would lead to arrest and deportation. This sense of intimidation is true not only among undocumented migrant workers, but also among documented migrant workers who recognize that their legal status does not render them immune to government targeting and harassment. Moreover, the Government has called the MTU's activities in opposition to government policy "illegal", and has used this as part of its justification for continued repression against the union while failing to acknowledge that the opposition to such measures as the crackdown and restrictions on free employment for documented workers under the Employment Permit System (EPS) arises from the MTU's objective of improving migrant workers' working conditions.

686. According to the complainant, the position taken by the Government is a further deterrent to potential members, documented and undocumented, whose right to join the MTU and use it as a vehicle to voice legitimate criticisms of policies that lead to exploitation and discrimination is being infringed upon. The continued denial of the MTU's legal status has also greatly obstructed union activities. The case concerning the MTU's status has been pending before the Supreme Court for over two years; during this time the MTU has been unable to carry out collective bargaining and related activities, which has obviously impacted upon its ability to work for the improvement of its members' labour conditions. The MTU's lawyers believe the process is being delayed in order to avoid having to either provide union recognition or risk stimulating negative public opinion with a ruling against the MTU. In the meantime, the MTU's members continue to be denied the full exercise of their labour rights due to the union's ambiguous status.

687. The complainant indicates that the MTU has, since its founding, been open to all migrant workers in the Seoul-Gyeonggi-Incheon area, documented and undocumented. According to article 2 of its rules and regulations, the MTU aims to "oppose crackdowns (against undocumented migrant workers), improve migrant workers' working conditions and rights and gain legalization for the freedom of migrant workers to work". The MTU's opposition

to immigration crackdowns comes from concern over the violations of rights that occur in raids and detention; its support for a programme of legalization stems from recognition that undocumented workers are particularly vulnerable to exploitation and that this, in turn, has an effect on the entire labour force. This is a position shared by unions in countries with large undocumented migrant populations who naturally organize undocumented migrant workers as members. For example, members of the American labour movement such as the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and Change to Win Federation recently released a "Framework for Comprehensive Immigration Reform" which recognizes that "rounding up and deporting" the millions of undocumented migrant workers in the US labour force is "not a realistic solution" and calls for an amnesty programme as a means to prevent employers from using the exploitation of undocumented labour to drive down wages overall. The framework also calls for a system that prevents employers from using immigration status to deny labour rights. The MTU's goal of "improving migrant workers' working conditions" of course applies to documented, as well as undocumented, workers and has lead it to take a critical stance with regards to the EPS.

688. The complainant indicates that, despite the challenges it faces due to government repression, the MTU has continued to carry out daily operations including counselling and assistance to members and non-members concerning workplace-related problems (unpaid wages and overtime, industrial accidents, etc.), labour rights education for members and non-members and recruitment of new members. The MTU is also cultivating new leadership and union officers. Since the MTU was founded it has sought to represent the interests of both documented and undocumented migrants. However, the short-term (three-year) visas granted under the EPS has meant that until recently most documented migrant workers had not been in the Republic of Korea long enough to gain the experience working in South Korean society necessary to be able to play a union leadership role. Thus few documented migrant workers participated in the MTU's founding and early stages. As more documented workers get to the latter part of their visa terms or renew their visas for a second three-year term, more and more have joined and taken leadership positions in the union. Many of MTU's newer members are documented and documented migrant workers are now serving as union officers.

689. The complainant adds that the deportation of MTU President Kajiman Khapung, Vice-President Raju Kumar Gurung (Raju) and General Secretary Maniruzzaman (Masum) took place on 13 December 2007, and not 11 December 2007 as indicated in the complainant's communication of 18 December 2007. Finally, the complainant requests the Committee to issue conclusions on the present case in as timely a manner as possible, given that a Supreme Court decision on the official union status of the MTU is pending.

C. The Government's reply

690. In its communication of 5 October 2009, the Government states that the report referred to by the KCTU, the "Improvement Plan for Unskilled Foreign Labor Force Management", was not intended to target and attack the MTU's leaders, but was prepared rather with the aim of efficiently supplying foreign workers to areas suffering from labour shortages, given the supply and demand of domestic labour, and to minimize social costs. The report includes the following plans: a plan to receive foreign workers according to a mid- and long-term vision, and control the number of overseas Koreans employed and the industries they are employed in so as to fill job vacancies in the Republic of Korea; a plan to bring in the necessary workforce volume, simplify the employment procedure, and provide more stable employment conditions for foreign workers in order to meet companies' demands; and a plan to expand public services relating to the employment and travel of foreign workers, strengthen post-employment services reflecting the characteristics of each industry, and create a comfortable and hospitable environment to stay so as to provide

demand-oriented support for the employment and travel of foreign workers. It also includes measures to reduce illegal foreigners by putting in place a government-wide system of managing illegal foreign residents, preventing the illegal stay of foreigners, and cracking down on illegal foreigners.

691. The Government states that the MTU's questioning of its foreign workforce policy could be construed as excessive meddling in a sovereign country's immigration policy, and reiterates that the MTU leaders were deported not because they were union leaders but because they were illegally staying in South Korea.

692. The Government indicates that the MTU was denied trade union status for the following reasons. First, the MTU refused to accept the Government's request for further information to determine whether it comprised multiple unions or not. Second, it was not possible for the MTU to establish legitimate labour relationships and engage in collective bargaining in the future as its members were illegally staying in the Republic of Korea. Third, by opposing crackdowns on illegal foreign residents, the MTU claimed to be pursuing purposes running counter to law and order in a sovereign country and beyond the scope of the purposes of a trade union recognized as legitimate under the TULRAA.

693. As concerns the restrictions on changing workplaces in the EPS, the Government maintains that such restrictions are generally used by countries which have adopted an employment permit system. The intent of the EPS is not to give work permits which allow migrant workers to be free to find jobs in the Republic of Korea but to give employment permits which allow migrant workers to work in workplaces where workers are needed. Nevertheless, a migrant worker is allowed to move to another workplace up to four times if the conditions for a change of workplace, which take into account the human rights of migrant workers, are satisfied. More than 90 per cent of migrant workers applying to move to another workplace have been permitted to do so; in 2008, such permission was granted in 26,164 cases.

694. As concerns crackdowns on foreigners illegally staying in the Republic of Korea, the Government indicates that such crackdowns are conducted to establish order in immigration control. Arresting illegal foreigners according to the immigration control law and deporting them to their home countries is a country's right and thus has nothing to do with the rights of foreign workers to engage in union activities. Even a union leader can legitimately be arrested and deported if he or she has violated the immigration control law, and opposing this kind of arrest and deportation amounts to opposing a country's border control measures.

695. The Government states, in respect of the pending Supreme Court decision, that the MTU defence lawyer's speculation that the Supreme Court might be delaying its ruling to avoid the risk of stirring up negative public opinion is inappropriate, and merely represents a personal opinion. The Government indicates that it too wishes the ruling to be handed down as soon as possible and stresses that, as the Supreme Court is a strictly independent body, speculation as to the reasons for delays in its rulings should be refrained from.

696. The Government states that it has put into place various legal and institutional devices to eliminate discrimination against foreign workers and protect their rights and interests. Foreigners legally staying in the Republic of Korea can work legitimately pursuant to the Foreign Workers Employment Act, are subject to the Labour Standards Act and are granted basic labour rights. In addition, to prevent infringements on foreign workers' human rights, government officials visit workplaces with foreign workers to provide counselling and other necessary services to solve their difficulties. With a view to helping foreign workers to adapt smoothly to life in the Republic of Korea, the Government has set up foreign worker support centres that provide interpretation, opportunities to learn

Korean, counselling to address grievances, and other services. As of July 2009 such centres were operating in five cities, including Seoul, Ansan and Gimhae where foreign workers are concentrated. Both the number of support centres and the programmes they provide will be increased; additionally 100 shelters for foreign workers are operated, mainly by private organizations. Finally, the Government states that it recognizes cultural diversity among foreign workers and helps them to adapt well to life in the Republic of Korea by organizing such events as cultural festivals.

D. The Committee's conclusions

697. *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 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.*

698. *The Committee recalls, from its previous examination of this case, that the facts that emerged from the complainant's previous allegations and the Government's previous reply were the following: on 3 May 2005, the MTU sent a notification of its establishment to the Seoul Regional Labour Office. On 3 June 2005, the Seoul Regional Labour Office rejected the notification essentially on the following grounds: (i) the union failed to produce documents to prove that its establishment does not violate the provisions of the Trade Union and Labour Relations Adjustment Act (TULRAA) upholding trade union monopoly at the enterprise level; and (ii) the union was composed mainly of illegally employed foreigners "who do not have the right to join labour unions" and its officers are foreigners without legal right of residence and employment. On 14 June 2005, the MTU filed an administrative suit against the Seoul Regional Labour Office which was rejected by the courts essentially on the grounds that: (i) the union was under an obligation to produce documents proving that the provisions of the TULRAA on trade union monopoly are not violated; and (ii) since illegal residents are strictly banned from employment under the Immigration Control Act, they are not vested with the legal right to seek to improve and maintain their working conditions and to improve their status; such rights are given on the assumption that legitimate employment relations will continue; thus, illegal migrant workers are not eligible to establish a trade union. The MTU appealed against this decision and the Seoul High Court decided on 1 February 2007 in favour of the union on the following grounds: (i) there was no need to produce documents to ensure application of the provisions of the TULRAA upholding trade union monopoly, since these provisions apply in specific circumstances at the enterprise level while the MTU was established above that level; (ii) irregular migrant workers qualify as workers under the Constitution and the TULRAA and, therefore, they are vested with legally protected basic labour rights; they are workers allowed to set up trade unions as long as they actually provide labour services and live on wages, salaries or other equivalent income paid for their service; and (iii) the restrictions on the employment of illegal migrant workers under the Immigration Control Act are not intended to prohibit foreign workers from forming a workers' organization to improve their working conditions. As a result, the High Court found that it is against the law to request a list of union members with the only purpose of checking whether they hold legal residence status. The Government appealed against this decision and the case is pending before the Supreme Court. In the meantime, several leaders of the MTU have been arrested in successive crackdown operations and, in certain cases, deported.*

699. *As regards the refusal of the authorities to acknowledge the establishment of the MTU and grant it trade union status, the Committee recalls that this aspect of the case was pending*

before the Supreme Court and that it had requested the Government to communicate this judgement as soon as it was rendered. The Committee notes with regret that over two years have elapsed since the Seoul High Court's decision in favour of the union, without any judgement yet being handed down by the Supreme Court in respect of that decision's appeal and without the granting of injunctive relief for the MTU. In these circumstances, and as announced in its previous conclusions, the Committee will proceed with its examination of this aspect of the case.

700. *The Committee recalls the complainant's prior indications regarding the authorities' refusal to acknowledge the MTU and grant it trade union status, in particular the following: (i) that, as acknowledged by the High Court, the Seoul Regional Labour Office should not have rejected the notification of the MTU's establishment, as verification of the residence status of migrant workers is not a prerequisite for the establishment of a trade union under the Constitution and the TULRAA; and (ii) that there was no need to verify the observance of enterprise-level trade union monopoly in the circumstances of this case, since the MTU is established above the enterprise level.*

701. *The Committee further notes, in this respect, that the Government reiterates that the MTU leaders were deported not for their union activities, but for having illegally stayed in the country, and that it has no obligation to issue a report certificate and endow legal privileges to a trade union that: (1) had as its head an offender illegally staying in the Republic of Korea; (2) had declared in its by-laws its opposition to crackdowns on illegal foreign residents, a purpose that runs counter to the laws of the country; (3) could not establish legitimate labour relationships and engage in collective bargaining as its members were illegally staying in the Republic of Korea; and (4) had refused the Government's request for the submission of complementary documents.*

702. *As regards the Government's objections to the MTU's by-laws, the Committee recalls that, as it has found in the past, workers should have the right to establish the organizations that they consider necessary in a climate of complete security irrespective of whether or not they support the social and economic model of the Government, including the political model of the country [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 213] or, as in this case, the Government's migration policy. The Committee recalls that, to guarantee the right of workers' organizations to draw up their constitutions and rules in full freedom, national legislation should only lay down formal requirements as regards trade union constitutions, and the constitutions and rules should not be subject to prior approval by the public authorities [see* ***Digest****, op. cit., para. 371].*

703. *With regard to the failure to produce documents ensuring the application of provisions of the TULRAA on union monopoly, the Committee recalls that it has been calling for the legalization of trade union pluralism at the enterprise level ever since its first examination of Case No. 1865 and that it has urged the Government to speed up this process ever since the decision was taken in 2001 to delay the legalization of enterprise trade union pluralism. The Committee has therefore urged the Government on many occasions to take rapid steps for the legalization of trade union pluralism at the enterprise level, in full consultation with all social partners concerned, so as to guarantee at all levels the right of workers to establish and join the organization of their own choosing [335th Report, para. 821, and 346th Report, para. 806(c)(1)]. In any event, the Committee understands from the complainant's allegations that the MTU was established above enterprise level.*

704. *As regards the status of the MTU's officers, the Committee has considered that legislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit foreign workers access to trade union posts, at least after a reasonable period of residence in the host country [see* ***Digest****, op. cit., para. 420]. Thus,*

the concerns expressed by the Government in this regard would not appear to be contrary to the principles of freedom of association. The Committee further observes that it may be difficult in the current context to establish a reasonable residency requirement before migrant workers may run for trade union office, given the complainant's allegations that, while the MTU is cultivating new leadership and documented migrant workers are serving as union officers, the three-year limit on workers' legal residency both limits the union's capacity for long-term leadership and places pressure on relatively inexperienced migrant workers to assume leadership roles with little to no protection against dismissal or deportation. Additionally, the Committee notes with concern the complainant's allegation that the lack of a Supreme Court decision on the MTU's status has greatly obstructed the latter's activities and its ability to further the interests of its members.

705. *In respect of migrant workers, the Committee once again recalls, as it had in its previous examination of this case [see 353rd Report, para. 788], the general principle according to which all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing [see* ***Digest****, op. cit., para. 216]. The Committee further recalls that when examining legislation that denied the right to organize to migrant workers in an irregular situation – a situation maintained de facto in this case – it has emphasized that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87, and it therefore requested the Government to take the terms of Article 2 of Convention No. 87 into account in the legislation in question [see* ***Digest****, op. cit., para. 214]. The Committee also recalls the resolution concerning a fair deal for migrant workers in a global economy adopted by the ILO Conference at its 92nd Session (2004) according to which "[a]ll migrant workers also benefit from the protection offered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). In addition, the eight core ILO Conventions regarding freedom of association and the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labour and the elimination of child labour, cover all migrant workers, regardless of status" [para. 12]. In these circumstances, and in light of the recent information provided by the complainant as to the documented status of its officers and many of its members, the Committee requests the Government to proceed with the MTU's prompt registration and to ensure that national decisions concerning the MTU's application for registration recognize the principle that all workers may be guaranteed the full exercise of their freedom of association rights. It further requests the Government to ensure that the Committee's conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.*

706. *The Committee notes that the complainant reiterates its previous allegation of generalized discrimination against and repression of migrant workers. The Committee considers that it is precisely for this reason that all workers, regardless of their status, should be guaranteed their freedom of association rights so as to avoid the possibility of having their precarious situation taken advantage of. In light of the above, and emphasizing the importance of guaranteeing the right of migrant workers, both documented and undocumented, to organize, the Committee requests the Government to undertake an in-depth review of the situation concerning the status of migrant workers along with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned as a means to find negotiated solutions to the issues faced by these workers. The Committee requests the Government to keep it informed of the progress made in this regard.*

707. *The Committee recalls that it had previously expressed deep concern over the coincidental timing of the arrest and deportation of MTU leaders with the trade union activities of those long-standing workers [see 353rd Report, paras 790–793]. In this connection, the Committee notes the government report entitled the "Improvement Plan for Unskilled Foreign Labor Force Management", which according to the complainant makes specific reference to the MTU, characterizes "the establishment of a union by illegal foreigners" as part of a "tendency towards disregard for the law", and declares the Government's intention to "strengthen the crackdown against those who participate in and support [the MTU's] illegal union activities and protests" while citing the past arrest and deportation of MTU leaders as examples of the types of measures to be employed.*

708. *While noting the Government's statement that the report was not intended to target and attack the MTU's leaders, but was prepared rather with the aim of efficiently supplying foreign workers to areas suffering from labour shortages and minimizing social costs through the provision of services, the Committee observes that the Government confirms that the plan outlined in the report includes measures to reduce illegal foreigners by putting in place a government-wide system of managing illegal foreign residents, preventing the illegal stay of foreigners, and cracking down on illegal foreigners.*

709. *The Committee takes note, finally, of the complainant's allegation that following the arrest and deportation of several MTU leaders, the union has had to go without an official leadership and operates with an emergency structure in which decisions are made by an emergency leadership committee – but without publicly visible representatives. In view of these indications, the Committee once again requests the Government to refrain from taking measures which involve a risk of serious interference with trade union activities, such as the arrest and deportation of trade union leaders for reasons related to their election to trade union office and while legal appeals are pending.*

The Committee's recommendations

710. ***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 proceed with the MTU's prompt registration and to ensure that national decisions concerning the MTU's application for registration recognize the principle that all workers may be guaranteed the full exercise of their freedom of association rights. It further requests the Government to ensure that the Committee's conclusions, particularly those concerning the freedom of association rights of migrant workers, are submitted for the Supreme Court's consideration and to provide a copy of the Supreme Court's decision once it is handed down.

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

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

CASE NO. 2538

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

Complaint against the Government of Ecuador presented by the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL)

Allegations: The complainant organization alleges dismissals and anti-union acts by the authorities of the Foundation for Science and Technology (FUNDACYT)

711. The Committee last examined this case at its November 2008 meeting [see 352nd Report of the Committee, paras 836–848, approved by the Governing Body at its 303rd Session (November 2008)], and submitted an interim report to the Governing Body. The Government sent further observations in communications dated 26 January and 5 May 2009.

712. Ecuador 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

713. At its November 2008 session the Committee made the following recommendations on the matters that remained pending [see 352nd Report, para. 848]:

(a) The Committee requests the Government to keep it informed of the final outcome of the judicial proceedings under way relating to the FUNDACYT trade union official Ms María Isabel Cevallos Simancas.

(b) The Committee invites the complainant organization to communicate the full names of the eight workers who were dismissed after establishing a FUNDACYT trade union.

(c) The Committee requests the Government to take the necessary measures so that a further investigation is carried out in an effort to determine the reasons why all the officials and members of the FUNDACYT trade union gave up their membership, and to keep it informed of the outcome of that investigation.

B. The Government's reply

714. In its communication dated 26 January 2009, the Government said that it would proceed with the recommendations contained in the conclusions of the Committee on Freedom of Association on Case No. 2538.

715. In its communication dated 5 May 2009, the Government sent the ruling of the Second Labour Court of Pichincha, dated 22 April 2009, concerning Ms María Isabel Cevallos Simancas following the application she made against the Foundation for Science and Technology (FUNDACYT). In this ruling the Court provides that Ms Cevallos is to be paid $12,104 with interest, as stipulated in the Labour Code, by way of remuneration corresponding to September 2006 and 19 days of October 2006, the proportional amounts corresponding to the 13th and 14th salaries and holidays due for the time worked, and compensation due for unfair dismissal (unilateral dismissal by the employer).

716. Finally, the Government attached a memorandum from the Coordinator of the International Affairs Unit of the Ministry of Labour dated 26 January 2009 sent to the Ministry of Labour indicating that the Committee on Freedom of Association has urged the Government to take the necessary measures to determine the reasons why all the officials and members of the FUNDACYT trade union gave up their membership.

C. The Committee's conclusions

717. *The Committee observes that the pending issues relate to the dismissal of trade unionists who worked at the FUNDACYT and to the Committee's request to determine the reasons why all the members of the Foundation's trade union organization ("executive board" in legal terms) gave up their membership.*

718. *The Committee notes the ruling provided by the Government concerning the dismissal of the trade union official Ms María Isabel Cevallos in which the Foundation is ordered to pay $12,104, corresponding to compensation for unilateral dismissal by the employer and for failure to pay the remuneration corresponding to September 2006 and to 19 days of October 2006. The Committee observes that it is stated in the ruling that the official in question has not asked to be reinstated in her position and, consequently, as she received the compensation mentioned, the Committee will not proceed with the examination of this allegation.*

719. *The Committee notes that the Government attached a memorandum from the Coordinator of the International Affairs Unit of the Ministry of Labour dated 26 January 2009 sent to the Ministry of Labour indicating that the Committee on Freedom of Association has urged the Government to take the necessary measures to determine the reasons why all the officials and members of the FUNDACYT trade union gave up their membership. The Committee hopes that the Government has carried out an investigation into this matter or that one is currently under way and asks to be kept informed in this respect.*

720. *Lastly, the Committee observes that the complainant organization has not responded to its request to send the complete names of the eight workers who were dismissed after establishing a trade union organization at FUNDACYT, to allow the Government to respond to these allegations. The Committee is bound to point out to the complainant organization that, if it does not send the information requested, the Committee will not pursue its examination of this matter.*

The Committee's recommendations

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

(a) The Committee requests the Government to keep it informed about the completion of its earlier recommendation relating to the investigation to

determine the reasons why all the officials and members of the FUNDACYT trade union gave up their membership.

(b) ***The Committee again asks the complainant organization to send the names of the eight workers who were dismissed after establishing a trade union organization at FUNDACYT, to allow the Government to respond to these allegations. The Committee is bound to point out that if this information is not sent, the Committee will not pursue its examination of this matter.***

CASE NO. 2705

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

Complaint against the Government of Ecuador presented by the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL)

Allegation: Interference by the authorities in trade union elections

722. The complaint is contained in a communication from the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL) dated 16 March 2009. The Government sent its observations in communications dated 28 April and 26 May 2009.

723. Ecuador 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

724. In its communication dated 16 March 2009, the CEOSL claims that, at the third plenary sitting of its 16th Ordinary National Congress, which was held on 30 and 31 July 2007 in the stadium of the Eloy Alfaro secular university and at the premises of the Naval Dockers' Union in the city of Manta, in the province of Manabí, and attended by 334 delegates from the different organizations affiliated to the Confederation, the officers of its national executive committee, including Mr Jaime Arciniega Aguirre (President) and Mr Guillermo Touma González (Secretary-General), were elected.

725. The CEOSL explains that, at 8.45 a.m. on 30 July 2007, at the preparatory session of the abovementioned Congress, Mr José Chávez and other infiltrators burst violently into the stadium of the Eloy Alfaro secular university and demanded that Mr Jaime Arciniega Aguirre should open the meeting before it was scheduled to begin and should not require the participants to provide credentials, and when Mr Jaime Arciniega Aguirre refused to allow these unlawful acts, they caused an outbreak of violence leading to attacks with firearms and knives. This is why, at the request of the participants, the Congress was moved to the auditorium of the Naval Dockers' Union of the port of Manta, where, once the statutory quorum had been reached, it was possible to proceed with the Congress and the election of the national executive committee of the CEOSL. The formal opening session was attended by Ms Nancy Bravo de Ramsey, Undersecretary of the Ministry of Labour and Employment, on behalf of the Minister, and Mr Barón Hidrovo, Governor of

the province of Manabí; the Confederation of Workers of Ecuador (CTE) was represented by union official Mr Mariano Baque and the Ecuadorean Confederation of Unitary Class Organizations of Workers (CUT-CEDOC) was represented by union official Ms Fanny Poso; the international workers' organizations that are accredited in the country were also represented.

726. Mr Jaime Arciniega Aguirre filed an application with the Minister of Labour and Employment to register the national executive committee of the CEOSL, as elected, by official letter No. 686-UGL-07 dated 14 November 2007. The Regional Labour Director rejected the application, pointing out that there was a dispute over representation and noting that the CEOSL "should resolve its differences through its statutory bodies or by the decisions it deems appropriate", given that another, unlawful, application to register the committee had been filed by Mr Eduardo Valdez Cuñas.

727. According to the complainant organization, this was a breach of legislation, as the Regional Labour Director, by the power vested in him by law, should have assessed the documentation relating to the officers of both national executive committees and proceeded to register those which had been lawfully elected; however, he failed to fulfil his duty to resolve the matter as required by law and he therefore violated the right to organize, by allowing the CEOSL to remain leaderless.

728. In the light of this refusal to register the new officers of the executive committee of the CEOSL presided over by Mr Jaime Arciniega Aguirre, an extraordinary meeting of the national executive committee of the CEOSL was held on 8 December 2007 at the premises of the works council of the San Carlos sugar refinery in the canton of Marcelino Maridueña, in the province of Guayas, to resolve the dispute within the CEOSL and to start implementing the decision of the Regional Labour Directorate. The meeting decided:

– to accept the report of the CEOSL disciplinary board and, in accordance with the rules, dismiss and expel from the national executive committee Mr José Antonio Chávez, Mr José Eduardo Valdez Cuñas, Mr Rubén Darío Segarra Ruiz, Mr Luis Quishpe and Ms Rosa Angélica Argudo Coronel (who were responsible for the violence at the 16th Ordinary National Congress);

– unanimously to extend the term of the restructured national executive committee (following the expulsion of several of its members), until it was possible to convene an ordinary national congress to settle the question of the representation of the CEOSL; and

– to fill the vacant seats of the national executive committee members who were dismissed and expelled.

729. It should be noted that, according to the statutes of the CEOSL, the extraordinary meeting of the national executive committee, which is the highest authority in the period between two national congresses, has the power to dismiss members of the national executive committee and to fill the vacancies that arise.

730. The complainant organization states that, in an application filed on 28 December 2007 (No. 013582), Mr Jaime Arciniega Aguirre requested the Regional Labour Director to register the list of members of the restructured executive committee of the CEOSL and that the terms of office of these members were extended by the extraordinary session of the national executive committee for registration purposes, in accordance with the decision of the Regional Labour Directorate. However, the Regional Labour Director did not respond to the application within the 15-day period established by the State Modernization Act. Therefore, Mr Jaime Arciniega Aguirre filed another application on 28 January 2008, in

which he requested the Regional Labour Director, in accordance with section 28 of the State Modernization Act, to provide a certificate indicating that the deadline for settling the application filed on 28 December 2007 had passed, to prove that his application had been settled in his favour as a result of the administrative silence, as the period of time within which the public authority had to resolve his application expired on 22 January 2008.

731. On 29 January 2008, the Regional Labour Director, by official letter No. 117-DRTQ-2008, issued a decision according to which “no steps would be taken to register the executive committee of the organization in question until it resolved its internal problems, as had already been established in November 2007, to be applicable to future communications”. Thus, the Regional Labour Director unlawfully interfered, creating instability and turmoil in the largest trade union organization in Ecuador by depriving it of its legitimate right to legal representation and to organize; in other words, for several months, a trade union organization was allowed to remain leaderless.

732. In the light of the refusal to issue the certificate mentioned in the State Modernization Act, Mr Jaime Arciniega Aguirre initiated *amparo* proceedings against the Minister of Labour and Employment for the unlawful failure to issue the certificate which would make it possible to register the executive committee of the CEOSL. The case was brought before the first chamber of the Administrative Disputes Court and, after due process, a unanimous decision was reached at 8.48 a.m. on 1 July 2008 by the judges of that chamber “... to accept in part the *amparo* proceedings and to instruct the Minister of Labour and Employment to order the registration of the officers of the executive committee which has fulfilled the constitutional and legal requirements”. It should be noted that Mr Eduardo Valdez Cuñas appeared in the abovementioned *amparo* proceedings as a third party, with the same documentation and allegations that he presented at the public hearing, in order to prove that he was the acting president of the CEOSL; however, his arguments lacked any legal basis.

733. The Minister of Labour and Employment gave immediate effect to the decision and ordered the Regional Labour Directorate of Quito to proceed with the registration of the executive committee of the CEOSL presided over by Mr Jaime Arciniega Aguirre. This registration is recorded in official letter No. 178-UR-2008 of 8 July 2008 (a copy of which is provided).

734. However, without any legal justification and without explanation, the Regional Director of Labour and Employment Mediation of Quito informed Mr Eduardo Valdez Cuñas in official letter No. 1226-UR-2008 of 2 September 2008 that “pursuant to the arrangements made by the Minister of Labour and Employment and in compliance with the decision issued at 2.49 p.m. on 22 August 2008 by the deputy 13th judge of the Pichincha Civil Court, it would proceed to register the executive committee of the CEOSL comprising Mr Eduardo Valdez Cuñas ... ”; it was also indicated that “the registration of the executive committee led by Mr Jaime Arciniega Aguirre as recorded in official letter No. 178-UR-2008 of 8 July 2008 remained without effect”.

735. In order to render official letter No. 178-UR-2008 of 8 July 2008 invalid, steps should have been taken to initiate the procedure established by law to counter actions that are considered to be prejudicial (*lesividad* procedure), thereby enabling the party concerned, Mr Jaime Arciniega Aguirre, to exercise his legitimate right to defence, which was denied to him. There was also a violation of article 24, point 13, of the Political Constitution of Ecuador (article 76(1) of the current Constitution), because the administrative act contained no legal motivation, in other words, it did not set out the legal principles which applied to the facts that gave form and substance to the act, with regard to the registration of the executive committee of Mr Eduardo Valdez Cuñas.

736. The decision by the Ministry of Labour and Employment to register a new CEOSL executive committee was purely political, and to date the legal and moral reasons for which the Minister ordered the registration of the illegal committee on the basis of and following an illegal decision handed down by the deputy 13th judge of the Pichincha Civil Court on 22 August 2008 at 2.49 p.m. remain unknown (however, at the hearing in the Administrative Disputes Court, the representative of the Minister of Labour and the representative of the Attorney-General argued that the *amparo* proceedings initiated by Mr Eduardo Valdez Cuñas were illegal as they violated section 57 of the Constitutional Control Act, on the grounds that Mr Cuñas had been involved as a third party in the *amparo* proceedings initiated by Mr Jaime Arciniega Aguirre). The *amparo* proceedings initiated by Mr Eduardo Valdez Cuñas before the deputy 13th judge were unfair and unlawful, as he was aware of the decision of the First Chamber of the Administrative Disputes Court when he filed new *amparo* proceedings on 4 July 2008, on the same issue and with the same objective.

737. The most surprising thing of all, continues the complainant organization, is that the deputy 13th judge of the Pichincha Civil Court in the abovementioned decision takes the liberty of discrediting the decision of the judges of the First Chamber of the Quito District Administrative Disputes Court and ensuring that it is unenforceable. In this regard, the complainant organization indicates that neither the law nor any legal standard confers upon the judge in question the power to declare a decision unenforceable; the Constitutional Tribunal (now the Constitutional Court) can uphold or overturn a decision rendered during *amparo* proceedings through an appeal, but a deputy judge cannot.

B. The Government's reply

738. In its communication of 28 April 2009, the Government makes reference to the two applications to register two rival executive committees of the CEOSL, one of which was filed by Mr Eduardo Valdez Cuñas and the other by Mr Jaime Arciniega Aguirre, in official letters Nos 685-UGL-07 and 686-UGL-07 of 14 November 2007 to the Regional Labour Director of Quito, noting that the Regional Director in question had not processed either of the applications and had refused to register either of the rival committees until the CEOSL, through its statutory bodies or by decisions that it deemed appropriate, resolved its differences. In fact, it was public knowledge that a number of difficulties had arisen within this trade union organization in connection with its representation, which is why the Ministry of Labour and Employment, bearing in mind the mandates provided for in international conventions and other constitutional and legal standards, invoked the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which has been ratified by Ecuador.

739. The Government adds that, when his registration application was rejected, Mr Jaime Arciniega Aguirre filed an application for *amparo* with the First Chamber of the Quito District Administrative Disputes Court No. 1 against the abovementioned administrative act, which, by a decision made at 8.48 a.m. on 1 July 2008, under Case No. 17029-LE-2008, granted *amparo* and instructed the Minister of Labour and Employment to order the registration of the officers of the executive committee presided over by Mr Jaime Arciniega Aguirre; the Ministry of Labour lodged an appeal against this decision (a copy of which is attached).

740. Furthermore, Mr Eduardo Valdez Cuñas also initiated *amparo* proceedings and a decision was rendered at 2.49 p.m. on 22 August 2008 by the deputy 13th judge of the Pichincha Civil Court, under Case No. 715-2008-LJ, who accepted the application for *amparo* and likewise instructed the Minister of Labour and Employment to register Mr Eduardo Valdez Cuñas as president of the CEOSL and his entire executive committee; the Ministry also appealed against this decision (a copy of which is attached).

741. The Government notes that sections 442 and 443, first paragraph, of the Labour Code set out the legal requirements for the registration of executive committees, assigning this role to the Regional Labour Directorate, through the Legal Management Unit. In this regard, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ratified by Ecuador and published in *Official Gazette* No. 119 of 30 April 1957, provides in Article 3 that:

> (1) Workers' and employers' organizations shall have the right 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.
>
> (2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

742. Therefore, the Regional Labour Directorate of Quito has complied with the provisions of this international Convention, as it is prohibited to interfere in the internal affairs of a trade union organization; in other words, it has not violated the rights as mentioned by the complainant – on the contrary, there is evidence of faithful compliance with Convention No. 87.

743. The complaint by Mr Jaime Arciniega Aguirre must ultimately be settled by the highest authority within the CEOSL, in compliance with and adhering to its own rules, under Articles 2 and 3 of Convention No. 87.

744. The Government states that the Ministry of Labour and Employment appealed against the two sets of *amparo* proceedings initiated by Mr Jaime Arciniega Aguirre and by Mr Eduardo Valdez Cuñas, who had competing claims with regard to the executive committee of the CEOSL. These appeals were brought before the Third Chamber of the Constitutional Court, which ultimately had to uphold or overturn the decisions of the courts of first instance with regard to the two applications for *amparo*; therefore, in a letter dated 13 October 2008 (under the provisions of section 55 of the Rules of Procedure governing cases before the then Constitutional Tribunal), a request was made to consolidate the two sets of proceedings, as the appellants had both filed *amparo* proceedings against the Ministry of Labour and Employment for the same purpose, in other words for the purpose of registering the executive committee of the CEOSL which they presided over, and it was necessary for the Constitutional Court to decide what was applicable by law. The Government attaches a copy of the applications and the decisions rendered by the competent courts, as well as the arrangements made by this Ministerial Office.

745. In its communication of 26 May 2009, the Government states that the Constitutional Court (the highest court) issued Decision No. 1148-2008-RA on the dispute between the two executive committees of the CEOSL, which is attached hereto.

746. In that decision, noting the internal dispute within the CEOSL, the Constitutional Court ordered that elections should be called and held within 90 days to appoint the new executive committee of the CEOSL in accordance with the constitutional rules and the statutory provisions of that trade union confederation. It also called for the participation of officials from the Ministry of Labour to act as observers and the assistance of the National Electoral Board.

C. The Committee's conclusions

747. *The Committee notes that, in the present complaint, the complainant organization, whose Secretary-General is Mr Jaime Arciniega Aguirre, alleges that the Ministry of Labour, in violation of legal and constitutional standards, refused to register the national executive*

committee of the CEOSL which was elected on 30 and 31 July 2007 and the list of members of the executive committee which had been restructured by the extraordinary meeting of the national executive committee on 8 December 2007; furthermore, in June 2008, the Ministry of Labour registered the executive committee of Mr Jaime Arciniega Aguirre but in September 2008 it registered the other executive committee, undermining the decision rendered by the First Chamber of the Administrative Disputes Court on 1 July 2008 ordering the registration of the executive committee headed by Mr Jaime Arciniega Aguirre.

748. *The Committee takes note of the statements by the Government in which it indicates that, because of an internal dispute within the CEOSL, the registration of the two rival executive committees was refused until the trade union organization settled its differences through its statutory bodies or by decisions that it deemed appropriate, in view of the fact that Article 3 of Convention No. 87 provides that the authorities should refrain from any interference which would restrict the right to elect officials in full freedom or impede the lawful exercise thereof. The Government adds that it appealed against the decisions of the court that ordered the registration of the executive committee headed by Mr Jaime Arciniega Aguirre, as well as against the court order to register the executive committee headed by Mr Eduardo Valdez Cuñas. The Committee observes, however, that according to the documentation provided by the complainant organization, the Ministry of Labour registered the executive committee of Mr Jaime Arciniega Aguirre first and then subsequently registered the rival executive committee. Lastly, the Committee notes that, according to the Government, after having considered the applications for* amparo *(for violation of constitutional rights), on 6 May 2009 the Constitutional Court issued an order to call and hold new elections within a maximum period of 90 days to appoint the new executive committee of the CEOSL; it also ordered the presence of two officials from the Ministry of Labour to act as observers and the assistance of the National Electoral Board.*

749. *The Committee recalls that it is not competent to make recommendations on internal dissentions within a trade union organization, so long as the government does not intervene in a manner which might affect the exercise of trade union rights and the normal functioning of an organization. The Committee also 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, paras 1114 and 1122]. In this regard, the Committee notes that the internal dispute in the CEOSL has been brought before a judicial authority and that this authority has indicated the steps to be taken to resolve it, namely the holding of elections in the near future. The Committee requests the Government to keep it informed of the outcome of those union elections and expects to receive this information as soon as possible. The Committee regrets to note that these elections will be conducted almost two years after the internal conflict occurred and the damage that this has caused to the trade union organization and its members.*

The Committee's recommendation

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

> ***The Committee requests the Government to keep it informed of the outcome of the union elections of the CEOSL called by the judicial authority following the legal action taken by the two rival executive committees, and expects to receive this information as soon as possible.***

CASE NO. 2241

INTERIM REPORT

**Complaint against the Government of Guatemala
presented by
— the Trade Union of Workers of Guatemala (UNSITRAGUA) and
— the Guatemalan Union of Workers (UGT)
supported by
— the World Confederation of Labour (WCL) and
— the Latin American Central of Workers (CLAT)**

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

751. The Committee last examined this case at its May 2008 meeting, when it presented an interim report to the Governing Body [see 350th Report, approved by the Governing Body at its 302nd Session in May 2008, paras 842–857].

752. The Government sent its observations in communications dated 6 and 16 June, 29 September and 27 October 2008.

753. 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

754. At its May 2008 meeting, the Committee made the following recommendations [see 350th Report, para. 857]:

(a) The Committee requests the Government to provide a copy of the ruling rejecting the charges of verbal and physical abuse by the university authorities against the members of the Workers' Union of the Rafael Landívar University.

(b) With reference to the allegations relating to the Higher Electoral Court, the Committee requests the Government to provide a copy of the ruling by the Labour and Social Insurance Appeal Court concerning the dismissal of trade union member Mr Víctor Manuel Cano Granados, as the ruling of the Supreme Court does not indicate the facts which, according to the Court of Appeal, amounted to unjustified dismissal.

(c) Moreover, noting that the Government has not provided information concerning the other pending allegations relating to the Higher Electoral Court, the Committee therefore reiterates its previous conclusions and recommendations and requests the Government to provide copies of the rulings relating to the 15-day suspension of the wages of the union member Pedro Rudolp Menéndez Rodas and the dismissal of the union member Ulalio Jiménez Esteban. Also, in view of the lack of information from the Government, the Committee also once again requests it to take measures to review the decision of the employer (the Higher Electoral Court) to dismiss Messrs Alfredo Arriola Pérez and Mr Manuel de Jesús Dionisio Salazar after they sought membership of the union and, if it is

found that the dismissals were ordered for anti-trade union reasons, to take measures for their immediate reinstatement.

(d) The Committee requests UNSITRAGUA to provide the Government with a copy of the complaint lodged in relation to the threats of dismissal and the threats to the safety of trade union members in the context of the dispute that existed in the teaching sector between the union, on the one hand, and the Fundación Movimiento Fe y Alegría and the Fathers' and Mothers' Associations, on the other. Finally, the Committee regrets to note that the Government has not provided replies concerning the other pending allegations relating to these organizations. The Committee accordingly requests the Government to ensure that workers in these institutions are able to freely join, without intimidation of any type, the union, and that the report of the labour inspectorate on violations of trade union rights is furnished to the union and that labour relations are conducted in a climate free from intimidation and violence.

B. The Government's reply

755. In its communications of 6 and 16 June, 29 September and 27 October 2008, the Government sent a copy of the judicial ruling of 2002 on the complaint presented by the General Secretary of the Union of Workers at Rafael Landívar University alleging verbal and physical assaults by the university authorities. The ruling in question states that the complaint was rejected by the judicial authority at the request of the Department of the Public Ministry, in accordance with the legislation applicable in cases where it is "not possible to proceed".

756. As regards the allegation concerning the anti-union dismissal of Mr Víctor Manuel Cano Granados, the Government supplies a copy of the ruling given by the Supreme Court of Justice (Chamber for Constitutional Protection) and confirmation that Mr Víctor Manuel Cano Granados did not challenge that ruling. According to the ruling: (1) the dismissal was not considered to have been intended as a reprisal; (2) Mr Cano Granados had been fined, which in the view of the Higher Electoral Court constituted grounds for termination of employment according to the applicable legislation; and (3) in the public sector, there is no legislation for judicial authorization of dismissal except in cases of serious misconduct.

757. With regard to the cases of the drivers Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, the Government states that in order to seek a review of a decision by the public authority, it is important for those concerned to act through the legal channels available under the Constitution and laws of the country for seeking reinstatement, and in order to obtain reinstatement it is necessary to exhaust the judicial process provided for under national legislation and obtain a ruling for reinstatement, which must be duly enforceable and not subject to appeal. As regards the request by the Committee on Freedom of Association for a review of the Higher Electoral Court's decision to dismiss the two drivers, they must apply to the national courts and demonstrate that their rights at work were violated by their employer, and in order to overturn the original decision it is essential to obtain a judicial ruling for reinstatement which is definitive and not subject to appeal and instructs the Higher Electoral Court to reinstate them, because without the judicial ruling, reinstatement is not possible.

758. As regards the allegations concerning the Fundación Movimiento Fe y Alegría Fathers' and Mothers' Associations, the Government states that, with regard to the allegations of threats of dismissal and threats to the safety of trade unionists, the Public Prosecutor's Office for Human Rights has stated that it has received no complaint in relation to any such allegations. The Special Investigator for Crimes against Journalists and Trade Unionists of the Department of the Public Prosecutor requested more data in order to be in a position to provide the information requested, as the data provided so far are insufficient to identify the complaint, although the relevant files were examined. The Government

accordingly requests the complainant organizations to send more information on these allegations.

C. The Committee's conclusions

759. *The Committee notes that the pending allegations in the present case refer to verbal and physical assaults against members of the Trade Union of Workers of Rafael Landívar University by the university authorities, the dismissal of members of the Trade Union of Workers of the Higher Electoral Court, and the suspension of one of those members for 15 days, as well as threats of dismissal and threats to the safety of trade unionists working at the La Esperanza Centre.*

760. *As regards the allegations concerning Rafael Landívar University (according to the complainants, after the union had presented a draft collective agreement, union members were subjected to verbal and physical assaults and the General Secretary was attacked by armed men while on his way home) [see 337th Report, para. 917], the Committee takes note of the judicial ruling given in 2002, supplied by the Government, following a complaint made by the General Secretary of the Union of Workers of Rafael Landívar University alleging assaults committed by the university authorities. The Committee notes that the judicial ruling in question rejects the complaint (in response to a request by the Department of the Public Ministry) on the grounds that it was "not possible to proceed". The Committee also notes that the ruling does not refer in detail to the specific facts that are the subject of the complaint, nor were the victims called on to give evidence. Under these circumstances, the Committee does not have at its disposal sufficient information to enable it to formulate any conclusions on these allegations of assault from 2002 and will not pursue its examination of the case. The Committee once again emphasizes in general terms, as it has done in previous examinations of the case, that a free and independent trade union movement can only develop in a climate free of violence, threats and pressure, and that it is for the Government to guarantee that trade union rights can develop normally.*

761. *As regards the allegations concerning the Higher Electoral Court, the Committee takes note of the ruling of the Supreme Court of Justice (Chamber for Constitutional Protection) (supplied by the Government), which rejected the reinstatement of trade unionist Victor Manuel Cano Granados on the grounds that it had not been shown that the dismissal had been ordered as a retaliatory measure, and because Mr Cano Granados had been fined (no other details of this are given), a fact which, in the judgement of the Higher Electoral Court, constituted sufficient grounds for termination of employment under the terms of the applicable legislation. In this regard, according to the judicial authority, the fact that a collective dispute has been called in the public sector does not mean that judicial authorization is required for a dismissal in cases of serious misconduct. The Committee nevertheless reminds the Government that it had requested the ruling given by the second-level court (the Labour and Social Security Appeal Court) which gave details of the events leading to the dismissal. The Committee reiterates its request for prompt receipt of this information, with a view to being able to give an opinion on the allegations in full possession of the facts.*

762. *As regards the alleged dismissal of trade unionist Ulalio Jiménez Esteban, and the suspension by the Higher Electoral Court of 15 days' wages in the case of trade unionist Pedro Rudolp Menéndez Rodas, the Committee regrets that the Government has not communicated the rulings it had requested. The Committee therefore urges the Government to send copies of the rulings relating to these trade unionists without delay.*

763. *As regards the Committee's previous recommendation concerning the dismissal of Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, according to the*

allegations, after they had applied to join the trade union representing employees of the Higher Electoral Court, the Committee had requested the Government to review the employer's (the Court's) decision to dismiss the trade unionists and, if the dismissals were found to have been carried out for anti-union motives, to take steps to ensure their immediate reinstatement at their places of work. The Committee notes the Government's statements to the effect that, in order that the employer's decision to dismiss them may be reviewed, those who were dismissed must apply to the courts. The Committee emphasizes that the dismissals in question occurred some years ago, and that the Government's suggestion would probably mean that several more years would pass before a final judicial ruling were handed down. Taking into account the slowness of the judicial proceedings, the Committee requests the Government to ensure that the labour inspectorate carries out an investigation without delay, and, if the dismissals are shown to have been carried out for anti-union reasons, to take steps to ensure that the workers concerned are immediately reinstated in their places of work.

764. *As regards the allegations of threats of dismissal and threats to the safety of trade unionists in the course of a dispute in the teaching sector between the trade union and the Fe y Alegría movement of Fathers' and Mothers' Associations, at the La Esperanza Centre, the Committee notes the Government's statements to the effect that the competent authorities in criminal matters have not received any complaints, and accordingly invites the complainant organizations to lodge a formal complaint regarding the facts alleged and provide as much information as possible. The Committee also reiterates its recommendation that the Government should ensure that workers in these institutions are able to join the union freely and without any form of intimidation, that the report of the labour inspectorate on violations of trade union rights is made available to the union, and that labour relations are conducted in a climate free from intimidation and violence.*

The Committee's recommendations

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

(a) With regard to the allegations concerning the Higher Electoral Court, the Committee urges the Government to send without delay the following: (1) the text of the ruling of the Labour and Social Insurance Appeal Court concerning the dismissal of trade unionist Victor Manuel Cano Granados; (2) the rulings concerning the dismissal of trade unionist Ulalio Jiménez Esteban and the suspension of 15 days' wages of trade unionist Pedro Rudolp Menéndez Rodas.

(b) As regards the dismissals of Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, according to the allegations, after they had applied to join a union representing workers at the Higher Electoral Court, the Committee requests the Government to ensure that the labour inspectorate conducts an investigation into these dismissals without delay and, if it is shown that they were carried out for anti-union reasons, to take steps to ensure that the workers in question are reinstated immediately in their places of work.

(c) As regards the allegations of threats of dismissal and threats to the safety of trade union members in the context of the dispute in the teaching sector between the union and the Fundación Movimiento Fe y Alegría Fathers' and Mothers' Associations at the La Esperanza Centre, the Committee,

taking into consideration the Government's statements to the effect that the competent authorities in criminal matters have not received any complaints, invites the complainant organizations to lodge a formal complaint concerning the allegations with the competent authorities and to provide as much information as possible. The Committee also reiterates its recommendation that the Government should ensure that the workers in these institutions are able to join the union freely and without any form of intimidation, that the report of the labour inspectorate on violations of trade union rights is made available to the union, and that labour relations are conducted in a climate free from intimidation and violence.

CASE NO. 2341

INTERIM REPORT

Complaint against the Government of Guatemala presented by
– the Workers' Trade Union of Guatemala (UNSITRAGUA) and
– the International Confederation of Free Trade Unions (ICFTU)

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

766. The Committee last examined this case at its June 2008 meeting [see 350th Report of the Committee, paras 858–872, approved by the Governing Body at its 302nd Session].

767. The Government sent further observations in communications dated 27 October 2008, received in the Office on 3 December 2008.

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

A. Previous examination of the case

769. In its previous examination of the case, the Committee made the following recommendations [see 350th Report, para. 872]:

– Concerning the allegations relating to the enterprise Portuaria Quetzal and the municipality of Comintacillo, the Committee regrets that the Government has not sent the information requested and reiterates its previous recommendations, as follows:

  – With regard to the alleged interference by the Labour Inspectorate in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, the Committee requests the Government to send its observations without delay on any administrative or judicial decision taken, particularly with regard to the fact that the decisions of the trade union assembly were challenged by 113 of the 600 members.

  – The Committee once again requests the Government to inform it of the outcome of the appeal for trade union immunity that was lodged in connection with the dismissal of 18 employees of the municipality of Comitancillo, as soon as it learns of the decision handed down.

– The Committee requests the complainant organizations to send additional information on the alleged warrant for the arrest of Mr Jovial Acevedo, Secretary-General of the STEG (file number, court, etc.), to enable the Government to communicate its response.

– With respect to the new allegations by UNSITRAGUA dated 17 May 2007, the Committee regrets that the Government has not replied and urges it to send its observations without delay on the allegations relating to: (1) the non-recognition by Crédito Hipotecario Nacional Bank of the union officials chosen by the union’s general assembly on 15 December 2006, despite an administrative decision establishing that the employer was not legally entitled to challenge the trade union elections; (2) the provisional decision handed down by the Supreme Court of Justice on an appeal by the bank for the protection of constitutional rights, to suspend the abovementioned administrative decision on a provisional basis; and (3) the refusal to grant trade union leave to the union official Héctor Alfredo Orellana Aroche, on the basis of the provisional decision handed down by the Supreme Court of Justice. The Committee also requests the Government to send the text of the ruling handed down by this Court.

B. The Government’s reply

770. In its communication of 27 October 2008, received by the ILO on 3 December 2008, the Government states in respect of the 18 employees dismissed by the municipality of Comitancillo (San Marcos) that: (1) the Fourth Court of Labour and Social Welfare rejected the reinstatements and other legal entitlements claimed; (2) the employees in question lodged an appeal for the protection of their constitutional rights *(amparo)* to the Chamber of *Amparo* and *Antejuicios* (preliminary proceedings for judicial misconduct) of the Supreme Court of Justice, which overruled it; (3) the 18 employees lodged an appeal with the Constitutional Court and, on 14 November 2006, this Court ruled in favour of the employees and quashed the sentence of the Chamber of *Amparo* and *Antejuicios*; it also instructed the Fourth Court of Labour and Social Welfare to hand down the corresponding ruling (this has not yet been issued; when it is issued it will be sent to the Committee on Freedom of Association).

C. The Committee’s conclusions

771. *Firstly, the Committee must deplore the fact that despite the time that has elapsed since the last examination of the case (June 2008) the Government has only sent observations concerning one of the pending allegations. The Committee urges the Government to be more cooperative with the procedure in future, particularly given that this case was presented a number of years ago.*

772. *With regard to the dismissal of 18 employees from the municipality of Comitancillo (San Marcos), the Committee notes the information sent by the Government and, in particular,*

the Constitutional Court sentence in favour of these employees and that this Court has instructed the Fourth Court of Labour and Social Welfare to hand down the corresponding ruling. The Committee deplores the long delay that has occurred owing to the various procedures and appeals, and recalls that justice delayed is justice denied. It asks the Government to send the ruling handed down in this matter by the Fourth Court of Labour and Social Welfare.

773. *In respect of the remaining allegations, the Committee deeply deplores finding itself obliged for a second time, in view of the lack of response from the Government or the complainant organizations, to reiterate its earlier recommendations [see the following paragraph, clause (b)].*

The Committee's recommendations

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

(a) With respect to the dismissal of 18 employees from the municipality of Comitancillo (San Marcos), the Committee deplores the long delay that has occurred owing to the various procedures and appeals, recalls that justice delayed is justice denied and asks the Government to send the ruling handed down in this matter by the Fourth Court of Labour and Social Welfare.

(b) As to the remaining allegations, the Committee deeply deplores finding itself obliged for a second time, in view of the lack of response from the Government or the complainant organizations, to reiterate its earlier recommendations as follows:

- ***With regard to the alleged interference by the Portuaria Quetzal enterprise in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, the Committee requests the Government to send its observations without delay on any administrative or judicial decision taken, particularly with regard to the fact that the decisions of the trade union assembly were challenged by 113 of the 600 members.***

- ***The Committee requests the complainant organizations to send additional information on the alleged warrant for the arrest of Mr Jovial Acevedo, Secretary-General of the STEG (file number, court, etc.), to enable the Government to communicate its response.***

- ***With respect to the allegations by UNSITRAGUA dated 17 May 2007, the Committee regrets that the Government has not replied and urges it to send its observations without delay on the allegations relating to: (1) the non-recognition by Crédito Hipotecario Nacional Bank of the union officials chosen by the union's general assembly on 15 December 2006, despite an administrative decision establishing that the employer was not legally entitled to challenge the trade union elections; (2) the provisional decision handed down by the Supreme Court of Justice on an appeal by the bank for the protection of constitutional rights, to suspend the abovementioned administrative decision on a provisional***

basis; and (3) the refusal to grant trade union leave to the union official Héctor Alfredo Orellana Aroche, on the basis of the provisional decision handed down by the Supreme Court of Justice. The Committee also requests the Government to send the text of the ruling handed down by this Court.

(c) On a more general note, the Committee urges the Government to be more cooperative with the procedure in future, particularly given that this case was presented a number of years ago.

CASE NO. 2609

INTERIM REPORT

Complaint against the Government of Guatemala presented by the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG)

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

775. The complaint is contained in communications from the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala (MSICG) dated 4 November 2007. This organization presented new allegations in communications of 22 November 2007, 24, 29 and 30 October 2008, and 13 March, 20 April and 27 and 28 May 2009. The Government responded to a limited number of the allegations in communications of 26 November 2007, and 24 January, 15 April and 23 June 2008.

776. At its June 2009 meeting, the Committee observed that, despite the time which had elapsed since the submission of the complaint, it had not received the observations that the Government had been requested to provide. The Committee issued an urgent appeal to the Government drawing its attention to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it might present a report on the substance of this case at its next meeting, if the requested observations had not been received in full and in due time. Accordingly, it urged the Government to send its observations as a matter of urgency [see 354th Report, para. 9]. Since then, the observations of the Government concerning the complaint have not yet been received in full.

777. 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

778. The MSICG (representing the Highlands Committee of Agricultural Workers (CCDA), the General Confederation of Agricultural and Urban Workers (CTC), the General Confederation of Workers of Guatemala (CGTG), the Unified Trade Union Confederation of Guatemala (CUSG), the National Coordinating Body of Agricultural Workers' Organizations (CNOC), the National Trade Union and People's Coordinating Body (CNSP), the Trade Union Federation of Bank and Service Industry Employees (FESEBS), the Trade Union Federation of Agricultural Workers (FESOC), the Trade Union Federation of Food and Allied Industry Workers (FESTRAS), the National Front for the Defence of Public Services and Natural Resources (FNL), the National Union of Healthcare Workers of Guatemala (SNTSG), the Union of Workers of the Western Electricity Supply Company SA (SITRADEOCSA), the Guatemalan Union of Workers (UGT) and the Trade Union of Workers of Guatemala (UNSITRAGUA)), alleges in its communications of 4 and 22 November 2007, 23, 24, 29 and 30 October 2008, and 13 March, 20 April and 27 and 28 May 2009 that, under the current administration, there has been an increase in the number of murders and cases of harassment against trade unionists and union rights defenders, primarily affecting the MSICG, as well as an increased use of mechanisms to criminalize the exercise of freedom of association and collective bargaining and an increased repression of social protests. Furthermore, a climate of impunity is being fostered. The Ministry of Labour and Social Welfare has attempted to promote social dialogue in bad faith, rendering the role of workers' organizations in social partnership ineffective, and has failed to fulfil its legal duty to oversee the effective and full enforcement of labour legislation. Although the rights to freedom of association, collective bargaining and to strike are recognized in domestic legislation, there is an absence of effective compliance with these rights because of the ineffectiveness of the labour justice system, caused both by slowness and a lack of adherence in law to the decisions issued by the labour and social welfare courts, the chambers of the Labour and Social Welfare Appeals Court and the Supreme Court of Justice in protection of constitutional rights *(amparo)* cases relating to labour guarantees.

779. The complainant organization expresses its deep concern that the murders of union leaders that took place in 2007 and 2008 have affected mostly the constituent organizations of the MSICG. These crimes are committed as part of a policy of trade union repression by employers that is very often backed and enforced by the Government of Guatemala itself. This is reflected in the increased number of murders and other crimes against trade unionists and in the weakening by the Government of the penal system's capacity to identify and punish the perpetrators of these crimes. Although the Office of the Public Prosecutor for Offences against Journalists and Trade Unionists was created in 2001 as a result of pressure by the trade union movement, including at the international level, it has now has been closed down, pursuant to General Agreement No. 03-2005 of the Council of the Department of Public Prosecution dated 9 March 2005. Currently, only one unit in the Office of the Public Prosecutor for Human Rights is responsible for investigating and conducting criminal proceedings against those charged with committing criminal acts against journalists, trade unionists, administrators of justice or human rights activists. Consequently, less importance is attached to investigating crimes committed against trade unionists, a reduced budget is allocated to such investigations and there are fewer experts to carry out the investigations.

780. The complainant organization alleges that, on 23 September 2007, at 5.45 a.m., while making his way from his home to his workplace, both located on the Yuma estate in the municipality of Morales, in the department of Izabal, Marco Tulio Ramírez Portela, Secretary for Culture and Sport and General Secretary of the Yuma estate sub-branch of the Izabal Banana Workers' Union (SITRABI) was murdered in the presence of his wife and two daughters.

781. The crime was perpetrated by heavily armed men, whose faces were masked with balaclavas, on the premises of the Guatemala Banana Growers' Company SA, an enterprise that is commercially known as BANDEGUA and which is a subsidiary of the multinational fruit-producing company Del Monte Fresh; these premises were under the surveillance of BANDEGUA security guards.

782. What is remarkable is that, in order to get to the place where the crime was committed, it is necessary to pass two security posts, which are tasked with controlling both the entrance and exit. These posts are manned by employees of the private security firm known as SERPROP, which also patrols the premises and is contracted by BANDEGUA to provide its security services. It is, therefore, implausible that the killers could have gained access to the premises, carried out the murder and left without being detected or detained by the private security guards, given that the two entrances and exits are controlled by two security posts.

783. In previous months, relations between the trade union leader in question and the employer had deteriorated to the point where he had been threatened with dismissal because of his union activities, on the basis of an accusation that he had instigated measures to sabotage production at the estate (a reason often given by employers in the country to dismantle or undermine unions). The investigations into his murder have not progressed as would have been expected with regard to the identification, arrest and prosecution of the perpetrators and instigators.

784. The complainant organization also states that, on 28 September 2007, between 8 p.m. and 11 p.m., unidentified persons armed with AK-47 firearms rode through the Yuma estate on motorbikes, intimidating the inhabitants.

785. Since 1 October 2007, Noé Antonio Ramírez Portela, General Secretary of SITRABI and brother of the murdered union leader, has been harassed by a vehicle which frequently circles and observes his home.

786. Noé Antonio Ramírez Portela received phone calls at night from staff of the BANDEGUA enterprise requesting that the union sign a document absolving the enterprise of any liability for the murder of Marco Tulio Ramírez Portela, which took place on its premises, under the surveillance of its security guards.

787. The complainant organization alleges that, in Guatemala, circumstances do not allow the full exercise of freedom; rather, the conditions of violence have escalated to the point that, by 2008, the following trade unionists had been murdered:

– **Jaime Nery González**, former member of the executive committee (Deputy General Secretary and regular member) of the Union of Commercial Vendors of Jutiapa department was shot at 7.30 a.m. on 30 October 2008.

– **Lucy Martínez Zúñiga**, General coordinator of the Union of Penitentiary System Workers and member of the CGTG, died as a result of multiple gunshot wounds at around 10 a.m. on 18 October 2008.

– **Edmundo Noé Herrera Chávez**, member of the Union of Workers of the Rafael Landívar University (SINTRAURL) and of UNSITRAGUA, was shot dead at 4 a.m. on 18 October while he was on his way to work.

– **José Israel Romero Ixtacuy**, General Secretary of the union of the municipal electricity company, which is affiliated to UNSITRAGUA, was murdered at noon on 21 September 2008 while having lunch in the canton of San Luis, in zone No. 5 of

Retalhuleu, by two people who were driving a Passola motorcyle and who entered the premises with the sole purpose of murdering him.

– **Freddy Morales Villagrán**, a member of the Union of Workers of the Empresa Distribuidora del Petén (SITRAPETEN), was attacked by armed men on 8 June 2008. He was badly injured, had to be hospitalized. And died as a result of his injuries. The union was in the midst of a bitter dispute with the employer that had begun in February when SITRAPETEN had initiated proceedings to register the union in strict compliance with the procedure set out in the Labour Code and in international standards. The response of the enterprise and of the Ministry of Labour has given rise to an overt campaign involving harassment, repression and even death threats against SITRAPETEN members.

– **Marvin Leonel Arévalo Aguilar**, board member of the Heavy Goods Transport Workers' Union, was brutally murdered, in what is presumed to be an extrajudicial killing on 6 May 2008 in connection with a strike against the ban on heavy goods transport. The Government has been asked to provide an explanation for the possible extrajudicial killing, as members of the army and the national police force were deployed in the place where the strike took place.

– **Sergio Miguel García**, member of the SNTSG and secretary responsible for the organization and records of the vector-borne diseases branch in the municipality of Puerto Barrios, was murdered on 13 May 2008 by identified assailants, who shot him while he was riding his motorcycle to work.

– **Mario Caal** (leader of the Committee of United Agricultural Workers), was extrajudicially beaten to death by the joint forces of the army and the national civil police in Puntarenas, Río Dulce, within the context of a military operation involving the deployment of more than 500 troops to the area. Despite the overwhelming evidence and the statement by the Human Rights Ombudsperson pointing to an extrajudicial execution, the Government still maintains that it knows nothing about the incident and had nothing to do with it.

– **Miguel Ángel Ramírez Enríquez**, co-founder of the Southern Banana Workers' Union (SITRABANSUR) (member of UNSITRAGUA), was murdered on 2 March 2008. Criminal proceedings have been carried out against the union's leaders in relation to his death further to communications by the enterprise Frutera del Atlántico SA, which indirectly blame the murder on the union leaders and suggest that criminal proceedings may be instigated against the leadership of UNSITRAGUA, as happened in the case of the Union of Workers of Corporación Bananera SA. More specifically, the complainant organization alleges that the employer urged the relatives of the murdered leader of SITRABANSUR, Miguel Ángel Ramírez, to inform the Department of Public Prosecution that the unionists Víctor Manuel Gómez Mendoza and Efraín López were responsible for the murder, in order to turn the dispute into a criminal case. Without further investigation, the court requested and ordered the arrest of the unionists in question. Under the circumstances, UNSITRAGUA is covering the cost of their criminal defence and, given the biased nature and the shortcomings of the investigation carried out by the Department of Public Prosecution, has initiated its own investigation, which enabled it to locate Roberto Dolores, who, on 20 August 2008, upon appearing as a witness with regard to Case No. MP059/2008/2060 before agency No. 2 of the Escuintla District Prosecutor's office, stated among other things: that he, together with his colleague Miguel Ángel Ramírez, had been hired by Otto Noac (the estate's head of security) and Luis Calderón (contractor at the Olga Maria estate) to monitor the union's members and kill its leaders, specifically Óscar Méndez, Víctor Manuel Gómez Mendoza and Efraín López; that they were initially on the payroll but were subsequently paid

directly by Otto Noac; that when Miguel Ángel Ramírez was murdered he began to fear for his life and took refuge at the house of Miguel Ángel Ramírez's widow, and that Otto Noac showed up there in a pick-up truck, but upon seeing him reversed and drove away; that this scared him so he fled to Guatemala City and, eight days after he had left, four men arrived in the same vehicle with the intention of killing him; and that, from then on, he began to receive threatening phone calls telling him that if he could not be found they would kill his children. He said that eight days after receiving the threats, his youngest daughter María Antonia Dolores López, aged 13, disappeared. According to witnesses, she was kidnapped by individuals in a black vehicle, a fact which was reported to the police, together with a statement that the contractor Luis Calderón and the estate's head of security, Otto Noac, are responsible for the murder of union leader Miguel Ángel Ramírez. To date, the Department of Public Prosecution has not issued an arrest warrant for Otto Noac and Luis Calderón and the whereabouts of the minor María Antonia Dolores López are still unknown. The MSICG is concerned about the safety and physical integrity of the witness Roberto Dolores and his family and asks the ILO to request the Government to provide adequate protection and to carry out a prompt and effective investigation into the whereabouts of María Antonia Dolores López, as it fears for her life and physical integrity, as she has been missing for over five months.

– **Israel Romero Estacuy**, general secretary of the union of the Retalhuleu municipal electricity company, who was murdered on 21 September 2008.

788. The current situation shows an escalation of violence against trade unionists and to date the Department of Public Prosecution has not been effective in shedding light on the causes of such murders or in identifying and punishing those responsible for the bloodshed.

789. Alarmingly, these murders have almost exclusively affected the constituent organizations of the MSICG. On 29 April 2008, between noon and 1 p.m., during his lunch break, Carlos Enrique Cruz Hernández was murdered at his workplace, plant No. 12 of the Chikasaw El Peligro estate, which is owned by the enterprise BANDEGUA, a subsidiary of the multinational Del Monte Fresh. Mr Cruz Hernandez worked for BANDEGUA and was a member of SITRABI. This is not the only action against SITRABI members; it also came to light that acts of intimidation have been carried out against Danilo Méndez, who is also a union member, by armed men wearing balaclavas who surrounded his home and that one of the sons of the Secretary General of SITRABI lives in the same area.

790. Furthermore, the trade unionist Bartolomé Mo Tax, membership secretary of the healthcare branch of the National Union of Healthcare Workers of Guatemala in the department of Alta Verapaz, was threatened and intimidated on 4 May 2009 by representatives of the employer, which in this case is the Government of Guatemala. The threats have been made because this worker is conducting a campaign to promote full respect for the workers' labour and trade union rights. At 12.30 a.m. on 21 May, unidentified men fired about 30 shots in front of the worker's home, which is located in Barrio San Jorge in Alta Verapaz. Since the threats were issued by the employer, vehicles with tinted windows and without licence plates have circled the house of this unionist late at night to the point that, as a security measure, it has been necessary for him and his family to move out of the house.

791. The complainant organization adds that, on 29 May 2008, César Orlando Jiménez Cárdenas, secretary of the Hermano Pedro de Betancourt Hospital branch, affiliated to the FNL, received a threatening text message on his mobile phone. On 6 May 2008, he received another written death threat. The relevant complaints were filed with the Department of Public Prosecution. The Government, whose response has been passive, has

failed to shed light on the matter and to identify those responsible; on the contrary, it has delayed the investigation procedures and played down their importance.

792. On 10 March 2009, Maritza Elosay Pérez Carrillo, the wife of union leader César Orlando Jiménez Cárdenas, was kidnapped and tortured by a group of men, with the following message for César: “Tell your husband to leave the union or your children will be next”.

793. Furthermore, at around 7.30 p.m. on Wednesday, 1 April 2009, the home of trade unionist Edgar Neftaly Aldana Valencia, secretary general of the San Benito District Hospital branch of the SNTSG, which is affiliated to the FNL, a member of the MSICG, was hit by nine bullets. The house, which was occupied at the time by the unionist’s whole family, was left with serious damage, including broken windows. The attack endangered the lives of the whole family, including a minor. Minutes after the attack, the unionist received a death threat (against himself and his family) by phone. This incident was reported to the authorities.

794. In the morning of 6 April 2009, approximately 50 officers of the municipal police and civil national police of the department of Coatepeque of Guatemala City evicted the informal sector workers of that locality using excessive force. It is worth mentioning that several of the officers wore balaclavas to cover their faces and carried high-calibre weapons. During the eviction, the state security forces injured 13 people with their firearms. The armed attack specifically targeted the unionists Diego Gustavo Chiti Pu and Sergio Alejandro Ramírez Huezo, who died as a result of the injuries caused by the state security forces. Both of the victims of this extrajudicial murder were members of the Coatepeque Workers’ Union, a union that is affiliated to the CGTG (which is a member of the MSICG) and they had worked in the sector for over eight years. These murders were reported to the authorities but the facts have not been clarified.

795. On 28 May 2009, Victoriano Zacarías Míndez, Deputy General Secretary of the CGTG, was kidnapped by armed men who made him get into a car. Fortunately, he managed to escape.

796. On 22 August 2008, the mayor of the municipality of Coatepeque, Quetzaltenango department, initiated the demolition of the central market, the Placita Barrios market, market No. 2 and the bus station, all of which were located in the municipality of Coatepeque. The demolition work was carried out without warning any of the informal sector workers at the markets or the Commercial Workers’ Union of Coatepeque.

797. At the same time as the demolition work, the mayor completed the construction of a new market within the jurisdiction of the Las Conchitas estate. The new market is located 300 metres away from the municipal dump, at which approximately 35 tonnes of rubbish is deposited every day, which is incinerated continuously without any environmental control; furthermore, about 100 metres away, there are two local cemeteries, an open septic tank and a channel of raw sewage.

798. When he found out that the informal sector workers continued to trade in the old market, and with the support of the departmental governor, the mayor mobilized about 5,000 officers from the civil national police, 5,000 soldiers from the Guatemalan army and some parallel groups including, among others, the so-called “neighbours in action”. The aim of the operation was to coerce the vendors to move to the new market, and the result was, among other things, several injured workers and a loss of merchandise.

799. Since the outset of this problem, the mayor has made use of the public forces to evict the vendors from the old market facilities.

800. The complainant organization provides a detailed description of the acts of intimidation that have been carried out since September 2008 against Lesbia Guadalupe Amézquita, regional coordinator of the trade union branch of the Friedrich Ebert Foundation simply because she provided technical support to trade unions, in particular with regard to setting up the complainant organization. Since 18 July 2008, Ms Amezquita has been followed repeatedly and intimidated by vehicles with tinted windows and motorcycles. Her car has been damaged and her personal belongings (mobile phone, keys, etc.) have been stolen. These incidents were reported but further damage was caused to her car, she was repeatedly and overtly harassed while she was driving and she received threatening telephone messages. Despite the seriousness of these events, the investigations carried out have not yielded any results. The complainant organization also alleges that repeated death threats were issued in 2009 against the UNSITRAGUA member Efrén Sandoval.

801. The complainant organization also alleges that trade union organizations such as the Union of Penitentiary System Workers, the Union of Workers of the Municipality of Rio Bravo and the Union of the Ministry of the Environment and Natural Resources were refused legal status. Sometimes such status is refused on the grounds of requirements that are not stipulated by law.

802. According to the complainant organization, the Ministry of Education has refused to allow the Union of Education Workers of Guatemala to hold its general assembly. Likewise, constraints have been imposed on the exercise of the right to bargain collectively in the municipalities, ministries, public agencies and state enterprises.

803. The Ministry of Labour has limited the duration of union leave in the Ministry of Public Health and Social Assistance, in violation of the collective agreement. Since 2004, the latter has withdrawn the check-off facility.

804. Furthermore, the labour rights situation in the *maquila* sector is extremely serious. There are only three active trade unions and two collective agreements. Several *maquilas* have closed down because of indications that a union is being set up. These are: Textiles del Mundo SA; Don Bang Industrial; Cambridge Industrial SA; H. I., SA; Chuckie, SA; Modas do Sool, SA; and You Won, SA.

805. In order to prevent the organization of trade unions and reduce labour costs, the Government of Guatemala has, for several years, been hiring workers and establishing a labour relationship with them based on contracts that disguise the nature of the working relationship. These contracts are referred to as professional services (delivery) contracts and for accounting purposes come under budget lines 029, 022 and 082, among others. Under these contracts, workers are hired to work for a year or for a period of months and then their contracts are renewed. This method of disguising the employment relationship has two objectives: first, it makes it impossible for workers to form or join a union, and it even makes them avoid union activities in order to keep their jobs and enjoy the possibility of contract renewal; and second, it deprives workers of any of the rights that are afforded to workers in an employment relationship.

806. The complainant organization alleges that threats were made against leaders of the Union of Workers of Actividades de Servicios e Instalaciones Cobra SA and DEOCSA and affiliated and related enterprises, which is a member of the Federation of Rural and Urban Workers (FETRACUR). In this regard, a complaint was filed with the Office of the Public Prosecutor for Offences against Journalists and Trade Unionists and to the Human Rights Ombudsperson because unidentified persons in vehicles with tinted windows were allegedly seeking the leaders out in the western part of the country.

807. Thirty-three of the founding members of the Union of Workers of Actividades de Servicios e Instalaciones Cobra SA and DEOCSA and affiliated and related enterprises have been dismissed; although the Quetzaltenango Labour Court has ordered their reinstatement, the employer has refused to comply with the court order.

808. The complainant organization notes that, in the National Institute of Forensic Sciences (INACIF), a public institution that operates autonomously, the authorities have resorted to disguising employment relationships by hiring the majority of the staff on a temporary basis, simply to avoid having to set money aside for labour liabilities and to keep workers in a constant state of job insecurity in order to prevent them from forming or joining a trade union or remaining a trade union member. For this reason, the workers decided to set up a union. On 15 April 2008, they notified the General Labour Inspectorate that they were in the process of establishing a union but, on the same day, the workers who were promoting the establishment of the union were prevented from entering their place of work, without being given any explanation whatsoever, and the private security guards told them that they had been ordered not to let them in; they were subsequently informed that they were dismissed.

809. Similarly, INACIF proceeded to dismiss 13 other workers who were involved in setting up the union. These were: Byron Estuardo Minera, Carlos Peña Rubio, Ellison Pedro Alvarado Barillas, Flavio Alexander de Jesús Montufar Díaz, Irma Dolores Álvarez Palma, Jorge Armando Loranca Hernández, Leonel Pérez Pérez, Lesly Johana Aragón Escobar, Lucrecia del Carmen Franco Solórzano, María de los Ángeles Leiva Girón, Mario Samuel Martínez Yaguas, Minor Daniel Gómez Ruano and Oscar Guillermo Reyes Velásquez. In response to their dismissal, the workers filed an application for reinstatement with the labour and social welfare courts, which ruled in their favour; nevertheless, the INACIF authorities have refused to comply with the reinstatement orders.

810. On 30 April 2008, Miriam Dolores Ovalle Gutiérrez de Monroy presented a petition to the Director General of Labour objecting to the establishment of the Union of Workers of INACIF (SITRAINACIF), an act that in itself constitutes a clear violation of freedom of association and of the principle of non-interference. From 17 to 19 April 2008, the interim General Secretary of SITRAINACIF was subjected to harassment and persecution by an unidentified person riding a motorbike and by individuals in a pick-up truck who followed him until his arrival at UNSITRAGUA headquarters and also when he left. A complaint was filed with the Department of Public Prosecution, but to date the union leader has not even been summoned to confirm the validity of his complaint.

811. In response to the fact that the workers are exercising freedom of association, the employer has undertaken to institute criminal proceedings against the workers Evelyn Jannette García Caal and María de los Ángeles Leiva Girón.

812. The complainant organization states that, for the purpose of reducing its operating costs by establishing a category of workers who are not afforded the benefits provided under the collective agreement on working conditions in the Quetzal Port Company and for the purpose of preventing workers from enjoying job stability and, consequently, from forming or joining a union and from proposing that the Quetzal Port Company engage in collective bargaining, the enterprise resorted to disguising the employment relationship by using third-party working relationships through a dozen enterprises that provide the necessary services; nevertheless, the Quetzal Port Company invoices a portion of the fees charged to vessels that require these services and it should be noted that the rates are set by the Quetzal Port Company itself.

813. Under these conditions, the dock workers are not covered by the benefits of collective bargaining with the Quetzal Port Company, are not protected by the Guatemalan Social

Security Institute and, in general, work in conditions that are insecure and that pose a threat to their lives and physical integrity.

814. On 27 January 2008, the Union of Dockers and Workers involved in Related Activities in Quetzal Port (SIGRETEACOPQ) was established and appropriate notice was given to the General Labour Inspectorate on 1 February 2008. The reaction of the various docking enterprises was to dismiss the workers who had participated in the establishment of the union and all those workers who had supported the process. Apart from dismissal, workers have been denied employment in each and every one of the enterprises providing a docking service at Quetzal Port, which suggests that a strategy is in place to prevent the emergence of union organization. To date, 167 of a total of 168 of the union's members have been dismissed and, although reinstatement orders have been handed down in most cases, the different docking companies have refused to enforce them.

815. In the municipality of Chiquimula, five unionized workers were dismissed and have not yet been reinstated; furthermore, workers have continued to be hired under budget line No. 029, with the consequences described above.

816. To date, the Department of Public Prosecution has carried out the dismissal of at least 50 workers who are protected by law against such action, even though the institution has been involved in a collective dispute of an economic and social nature, brought about by the workers in response to the refusal by the employer to negotiate with the union. Although reinstatements have been promoted and mandated by the courts of the first instance, the Department of Public Prosecution and the National Office of the Attorney-General have developed a joint strategy to delay the process.

817. Moreover, on 22 September 2007, a group of workers formed the Union of Workers of the Municipality of Chimaltenango, in the department of Chimaltenango. The workers took advantage of the immunity provided by law to those establishing a trade union to send the mayor of Chimaltenango a list of demands in order to negotiate with him directly (even though the then mayor expressed his willingness to negotiate with the workers, the negotiation did not take place). On 17 January 2008, the new mayor dismissed the members of the executive committee and the advisory board of the union (eight workers) and he refuses to comply with court orders to reinstate them. Subsequently, the mayor proceeded to dismiss on different dates and by various municipal agreements a further 70 unionized workers. However, without any legal justification, the court has so far refused to order the reinstatement of more than 40 workers, despite the fact that this should have been done in the 24 hours following the submission of the complaint concerning the dismissal.

818. In the Hotel Las Américas SA, three members of the workers' union were dismissed on grounds of reorganization following the signature of a collective agreement on working conditions.

819. Furthermore, at about 3.30 p.m. on 23 July 2008, Miguel Ángel Pedrosa Orellana, a member of the advisory board of the Union of Workers of the Eastern Electricity Supply Company SA (SITRADEORSA), received a phone call in which a death threat was issued against him and his family for defending workers.

820. The complainant organization also alleges that, as a means of preventing the free organization of workers, the Olga María estate has set up a system whereby it uses independent producers and has disguised the employment relationship through subcontracting, creating legal uncertainty as regards the identity of the employer and formally releasing itself from the employment relationship. When a union was established, the General Labour Directorate of the Ministry of Labour and Social Welfare hindered the

recognition of the union's legal status. It must be pointed out that the identity of the workers who formed the union was known only by the General Labour Directorate and the General Labour Inspectorate. Nevertheless, on 15 November 2007, representatives of the employer at the Olga María estate embarked on a campaign to harass and detain the interim leaders of the union, threatening them with the closure of the estate if they did not resign from the enterprise and abandon their plans to continue with the union. On 16 November 2007, several estate managers were dismissed, allegedly for not having detected or broken up the workers' movement before they formed the union.

821. On 17 November 2007, a collective dispute of a socio-economic nature was brought before the Labour and Social Welfare Court of the First Instance of the department of Escuintla, whereby a set of demands was addressed to the employer for collective bargaining.

822. In the days that followed, armed guards from the enterprise's private security company, with the intention of causing intimidation, started to circulate in the village of El Semillero, where the majority of the workers, who were involved in establishing the trade union live. The estate's owner called a meeting of all the workers of the estate to tell them that, because of the workers who were establishing the union, the estate would close and they would lose their jobs. Leaflets sending the same message began to circulate among the workers.

823. On 20 November 2007, the workers who were forming the union were taken by armed security guards of the enterprise to the administrative offices, where they were subjected to threats and intimidation to leave the enterprise and to drop the court proceedings (it should be noted that only the court and the Labour Inspectorate, to which the respective notices were given, knew about the proceedings).

824. In the face of such pressure, one group of workers was intimidated into signing the enterprise's document. Nevertheless, another group of workers stood by its decision, despite being detained on the estate; in view of the possibility that UNSITRAGUA might intervene in the workers' favour, they were released during the night.

825. On 21 November 2007, the workers who refused to drop the proceedings were informed of their dismissal and expelled from the estate. The relatives of the union members who worked on the estate were also dismissed.

826. Since his expulsion from the estate premises, the unionist Francisco del Rosario López, a founding member and member of the interim executive board of the union, has not been seen. In view of his unknown whereabouts, there are fears for his life and physical integrity. The Office of the Human Rights Ombudsperson in Escuintla has launched a missing person search in the hope of finding him. The authorities have indicated that he is alive, but to date there has been no evidence at all of his whereabouts.

827. In the light of the dismissals, and given that steps were being taken to establish a union, an application for reinstatement was filed with the First Labour and Social Welfare Court of the department of Escuintla. Although the court ruled favourably in this regard, the employer refuses to comply with the reinstatement orders.

828. Subsequently, the judicial authorities did not confirm the reinstatements and the workers had to file an application for *amparo* for the violation of their constitutional guarantees, which is currently before the Supreme Court of Justice.

829. Similarly, a contractor threatened the members of the union by saying: "If the estate is closed down, you will be found floating in the river", which is clearly a death threat against the workers. In addition, the UNSITRAGUA activists in the region are aware that

they are being followed by unidentified persons, and for this reason there are fears for both the safety and the lives of union members and UNSITRAGUA activists.

830. On 29 November 2007, the General Secretary of the union appeared before the Department of Public Prosecution to file a complaint concerning the threats to his life and physical integrity and to those of his colleagues and relatives. That same day, the Department of Public Prosecution sent an official letter to the chief of national civil police station No. 31 in the municipality of Tiquisate, in the department of Escuintla, seeking to appoint staff to provide security services for members of the executive committee of SITRABANSUR, who had received death threats for having formed the union. The response of the national civil police was that, because of staff shortages, it could not provide round-the-clock security, but that it would do everything in its power to help; however, it offered its services only once. No progress has been made in the investigation.

831. On 17 February 2008, a new complaint was filed with the Department of Public Prosecution concerning the rape of the General Secretary of the union’s stepdaughter by four men, who she recognized as being private security guards from the estate. The following day, she told her mother what had happened and they both agreed that they would not report the incident, to avoid putting Germán Aguilar Ábrego (the General Secretary) at risk. It was not until 11 March 2008 that they decided to report it. To date, the Department of Public Prosecution has not made any progress with the investigation.

832. Furthermore, on 8 March 2008, several men who arrived in a car and on several motorcycles burst violently into the home of unionist Alberto López Pérez (union leader), who found these individuals in his home and alerted his family. His small son overheard the intruders say to each other that their aim was to kill Mr López Pérez. The whole family managed to escape. They reported the incident to the police, noting that there was evidence of the attack at their home and that the barbed wire fence surrounding the house had been cut. Nevertheless, the Department of Public Prosecution has not conducted an investigation to date.

833. The Union of Workers of Productos Alimenticios René SCA, a Mexican-owned enterprise, is being reduced to its minimum trade union expression, due to the fact that the enterprise is breaking itself up into several internal satellite enterprises, each with a limited number of workers, below the minimum number required to form a union. In order to prevent the workers from joining the existing union, they are given different contracts. There is currently a collective dispute of a socio-economic nature that has been brought against 32 enterprises.

834. With regard to the Union of Workers of the Los Ángeles and Argentina estates, the enterprise has dismissed members from the Los Ángeles estate; the court has ruled in favour of the payment of employment benefits (dismissal) and this ruling was confirmed in the second instance by the Second Chamber of the Labour and Social Welfare Appeal Court of Mazatenango, Suchitepéquez. The case involves a new way of dissolving a union through legal channels, without calling it dissolution. The workers are only awaiting a ruling by the Supreme Court of Justice in *amparo* proceedings. The enterprise, which is dissatisfied with the court rulings in favour of the union, has applied to the Ministry of Labour and Social Welfare to dissolve the union through administrative channels.

835. Members of the Union of Agricultural Workers of the El Carmen estate in the municipality of Colomba in the department of Quetzaltenango have still not been reinstated, despite a court-issued reinstatement order, and the process of negotiating the collective agreement on working conditions has come to a standstill. The enterprise claims that it no longer owns the El Carmen estate. The members decided to change the name of the union, calling it the Union of Workers of the Agricultural Enterprises of the South West, which is now

carrying out trade union activities and which has a branch comprising the workers of the El Porvenir estate.

836. The members of the El Porvenir branch (Chicacao municipality) were dismissed for presenting to their employer a list of demands for negotiation. The enterprise refuses to negotiate the demands for better working conditions and has upheld its decision to dismiss the 12 union members. When they asked to be reinstated, the court refused on the grounds that, according to the business register, the enterprise against which the complaint had been lodged does not exist, despite the fact that the workers provided copies of social security certificates. The worst thing is that, on appeal, the Fourth Chamber of the Labour and Social Welfare Appeals Court and the Supreme Court handed down decisions that left the workers helpless.

837. As for the Union of Workers of the Olas de Moca and Carmen Metzabal estates, the 80 workers from the San Lázaro SA enterprise have not yet been reinstated. A proposed settlement has been put forward for the partial payment of unpaid wages and other benefits. The court approved it and the enterprise filed an appeal and adopted delaying tactics.

838. The worker Evelyn Mansilla, who was subject to anti-union dismissal, is a member of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic (SITRASEC). She was reinstated by her employer on the basis of a court order, but she has not received the employment benefits that were specified by the judicial authority.

839. In December 2007, a collective agreement on working conditions was signed with the Union of Workers of the Municipality of Chicaman, in the department of El Quiché. To date, the Ministry of Labour and Social Welfare has not approved the agreement, as it ordered the workers first to settle certain points, which they will not be able to do, for the following reasons: (a) it will not be possible to obtain the original documents issued by the Supreme Electoral Court concerning the appointment of municipal officials, because the terms of office of those who signed the agreement ended on 15 January 2008, and the new officials are not union members; (b) it will not be possible to obtain documentation certifying that the municipal council representatives were appointed, as the agreement was signed with the full council: In other words, no representatives were appointed for the case; and (c) all the union members were dismissed on 20 January 2008 and therefore the union was completely dissolved. The obstacles imposed by the Ministry of Labour and Social Welfare have contributed to the arbitrary actions of the municipal authorities.

840. The Union of Workers of the Ministry of the Environment and Natural Resources (SITRAMARN) was established on 6 July 2006 and its legal status was recognized on 3 August 2006. On 4 August 2006, the Ministry of the Environment and Natural Resources, as the appointing authority (employer), lodged an appeal to revoke the decision recognizing the union's legal status. It should be noted that the argument used in this appeal was that the Government of Guatemala engages the services of individuals who are contractually bound under budget line No. 029 (professional services) and that some of those who formed the union might have been hired under that budget line. The Ministry of Labour and Social Welfare had no choice but to reject the appeal lodged by the Ministry of the Environment and Natural Resources, represented by the National Office of the Attorney-General, by Decision No. 197-2006, dated 3 October 2006. On 19 October 2006, the Supreme Court of Justice, acting as an *amparo* court within the context of *amparo* case No. 1124-2006, decided to grant provisional *amparo* and to temporarily suspend Decision No. 197-2006 of the Ministry of Labour and Social Welfare, on the grounds that it was likely to cause irreparable harm. On the basis of that decision and of the opinion issued by the Supreme Court of Justice acting as an *amparo* court, the authorities of the Ministry of

the Environment and Natural Resources refused to recognize the union and, consequently, have prevented the union leaders from enjoying the trade union leave to which they are entitled under the Labour Code for the purposes of carrying out their union activities. To date, the *amparo* proceedings have not yet been concluded and, recently, as a further measure of anti-union repression, the Minister of the Environment and Natural Resources, taking advantage of the absence of Ana Josefina Velásquez Pérez, a member of the union's executive committee, for a surgical procedure, ordered her transfer to another workplace, thereby violating her immunity.

841. Furthermore, the 57 members of the Union of Workers of the Municipality of Zaragoza in the department of Chimaltenango have not yet been reinstated. The municipality's lawyer has taken legal action before the court to delay or prevent the court from issuing a reinstatement order, and has appealed to the Ministry of Labour and Social Welfare to request the dissolution of the union through administrative channels.

842. None of the members of the executive committee and the advisory council of the Union of Workers of the Municipality of San Antonio Huista, in Huehuetenango, have been reinstated. The mayor called a public meeting to force people to resign from the union and from the municipality, at which workers were almost lynched to death by mobs. Subsequently, the workers appeared before the Labour and Social Welfare Court of the First Instance of Huehuetenango to claim the invalidity of their resignations and to request their reinstatement, but the court decided to reject their case.

843. For several years, heavy goods transport workers have been subjected to multiple violations of their labour rights. Consequently, the Union of Heavy Goods Transport Drivers, which is affiliated to the CGTG, attempted on several occasions to enter into a dialogue with the municipal authorities of Guatemala City, who refused to cooperate. Under the circumstances, and given the closure of channels of dialogue, the general assembly of the union agreed to take peaceful action to ensure that the workers' labour rights and job security did not continue to be violated. The agreed action was essentially peaceful and consisted of parking vehicles at the side of the main roads and refusing to continue their journeys until a solution could be found to the problem, which had dragged on for years. The authorities, at both the municipal and central government levels, refused to reach any sort of settlement, and therefore the action continued for several days, until on 7 May 2008, the President of the Republic called for a dialogue with the union. However, when he arrived at the negotiating table, the President said that dialogue could take place only if the union suspended its action and then threatened the workers' representatives with the use of public force if they did not immediately end their action; they were even given a deadline in hours to comply with the President's demands. This situation was brought to the attention of the union's general assembly, which, faced with the heavy-handed attitude of the President and, given that the action was peaceful, agreed to continue with the action and called on the President for social dialogue in an atmosphere of good faith.

844. Upon the expiry of the ultimatum issued by the President to the union, the national channel announced the issuance of Governmental Agreement No. 1-2008 imposing preventive measures (known as a "state of prevention") with immediate effect, suspending certain fundamental civil guarantees such as the right to freedom of assembly, the right to demonstrate, the right to protection from arrest without a warrant from a competent court, the right to appear before a court within six hours, the right to protection from extrajudicial interrogation and the right to strike, among others. Minutes after the President, with some of his ministers, had announced the state of prevention on the radio and television, members of the police force and the army rounded up the workers on the various main roads, arresting a total of 49 workers, who were subjected to criminal proceedings.

845. With regard to SITRAPETEN, the bottling company for the brand of water known in Guatemala as Agua Pura Salvavidas, which is marketed and distributed by Empresa Distribuidora del Petén, given that they were unable to continue to hamper the efforts of the workers to form a union, on 2 May 2008, the employer's representatives ordered the workers to go in groups to different hotels to attend an activity on 3 May, at the same time. Upon arriving at these hotels, private security guards closed the doors of the function rooms, announcing that no one could leave or make phone calls. Shortly thereafter, representatives of Empresa Distribuidora del Petén, accompanied by heavily armed men, told the workers that they had to resign from the enterprise, as it had gone bankrupt, and that they would be transferred to other enterprises. It is currently not known whether any workers agreed to this, but those who did not returned to their jobs and were surprised to find that about 50 lorries had been taken to another enterprise that supplies Agua Pura Salvavidas, located in zone No. 18, at the 7.5 kilometre mark along the Atlantic highway. Soon afterwards, the workers left the hotels and decided to take over the enterprise's premises in three groups, with one group at each entrance and another inside. At 12.30 p.m., the workers who were demonstrating peacefully in front of the enterprise's premises were kidnapped and beaten by private security guards hired by the enterprise, who used metal pipes, guns, kicks and punches. The following workers were the most affected: Adrián Francisco Tale, Marco Antonio Franco, Freddy Valdemar Jerónimo and Juan Pablo González, as well as Edwin Álvarez, the interim General Secretary of the union being formed, affiliated to FESTRAS.

846. On 4 May 2008, 200 police officers privately hired by the enterprise and 200 members of the special (anti-riot) forces of the national civil police forcibly removed the workers who were inside. At 7 p.m. on 8 June 2008, in Colonia Las Ilusiones, in zone No. 18 of Guatemala City, barely one block away from his home, Freddy Morales Villagrán, a member of SITRAPETEN's advisory council, was shot. In carrying out this further attack against a trade union leader, the gunmen used 7.62 mm calibre military weapons. He was taken to a private clinic for security reasons, and despite receiving medical care, died as a result of his injuries.

847. According to the complainant organization, there is an enterprise in Guatemala called INFORNET which specializes in providing employers with a blacklist of workers, in return for financial compensation. This list contains general information relating to the identity of all the workers in the country who have been involved in forming a union, have exercised any trade union right or have simply filed a claim with the administrative or judicial authorities relating to their labour rights. The aim of employers who use this service is to ensure that they do not employ any workers who might try to organize a union, either by not hiring them or by dismissing them when they do realize. There are countless cases in which such selection criteria have been used for hiring or firing workers, including that of Albino Hernández García, who has applied for reinstatement in a complaint against the State of Guatemala for having been dismissed on the grounds of the blacklist, and who has repeatedly been denied employment on the basis of the background information provided about him by INFORNET. An extreme case is that of the wife of Dick Fletcher Alburez, a leader of the Union of Workers of the General Directorates of the Ministry of Public Health and Social Assistance and of the Federation of Unions of Workers of the Ministry of Public Health and Social Assistance (both of which are affiliated to UNSITRAGUA), who was refused credit in a banking institution because of an application for reinstatement filed by her husband against the Government.

848. Furthermore, the complainant organization alleges that, on 9 December 2005, without prior consultation with the Tripartite Committee on International Labour Affairs, as provided for in ILO Convention No. 144, the President of the Republic submitted to the Congress of the Republic of Guatemala an initiative for the ratification of the ILO Part-Time Work Convention, 1994 (No. 175).

849. Another important issue is the composition of the Tripartite Committee on International Labour Affairs. In what is an unprecedented event in national history, the two most important and representative union movements, namely the MSICG and the UGT, reached an agreement to make a joint proposal regarding the composition of the Tripartite Committee on International Labour Affairs. It is a fact that these organizations together are the most representative in the country with regard to industry, trade, services, the public sector, agriculture, the informal economy and rural workers engaged in temporary work. In this regard, the Ministry of Labour and Social Welfare received a joint proposal concerning the composition of the Tripartite Committee on International Labour Affairs. It was requested that, in view of the representativeness and legitimacy of the proposal, it be fully taken into account at the time of appointing the workers' representatives in the tripartite body in question. The proposal in that regard was to appoint the following officials: as titular members: Carlos Enrique Mancilla García, Victoriano Zacarías Míndez, Luis Ernesto Morales Gálvez and Miguel Ángel Lucas Gómez; as substitute members: Luis Alberto Lara Ballina, Leocadio Juracan Salomé and Adolfo Lacs Palomo. Despite the above, and despite the fact that the terms of office of the former members of the Tripartite Committee on International Labour Affairs has ended, the Ministry of Labour and Social Welfare has not to date announced the appointment of the new members of the tripartite body and has so far ignored the most representative proposal, which raises the concern that the membership will include trade union voices that echo that of the current government.

B. The Government's reply

850. In its communications dated 26 November 2007 and 15 April 2008, the Government states in relation to the alleged murder of trade union leader Marco Tulio Ramírez Portela that the municipal public prosecutor's office in Morales (Izabal) is conducting a murder investigation and that, according to this office, he was killed on political grounds and not because of his trade union activities. So far, no concrete element of conviction has been obtained which could lead to the conclusion that the suspects mentioned in the present case are the perpetrators of the murder. The general manager of BANDEGUA categorically denies that he and other persons from BANDEGUA have carried out acts of coercion, pointing out that, as they were concerned that the regrettable incident might affect the working atmosphere of the enterprise, they invited union leaders to a meeting to discuss a document which was apparently circulating among the staff, in which accusations were made against the enterprise, jeopardizing the good working atmosphere, but the union leaders did not attend. According to the investigations by the Department of Public Prosecution, there is no evidence of direct or indirect involvement by the enterprise in the death of Marco Tulio Ramírez Portela. The enterprise adds that the workers' wages have increased on average by some 13 per cent more than what was negotiated in the collective agreement and are around 60 per cent higher than the national minimum wage in agriculture. The employers were invited by the SITRABI leaders to a meeting with the First Secretary of the Embassy of the United States and the AFL–CIO representative for Central America, and the SITRABI leaders said that they had no suspicions of any involvement by the enterprise in the death of Marco Tulio Ramírez Portela. As proof of the good working atmosphere in the enterprise, the enterprise sent a document dated 27 August 2007, signed jointly with the top SITRABI leaders, who attended voluntarily to indicate their support.

851. In its communication of 24 January 2008, the Government states with regard to the allegations concerning the Olga María estate that, through the Ministry of Labour and Social Welfare, it took steps to settle the dispute at the estate. The inspectors in charge of the matter met the organized workers and the employers with the aim of examining labour–management relations. They also held meetings to clarify the events which had given rise to the complaint, but at one of the meetings the workers requested that the case opened by the Ministry of Labour and Social Welfare be referred to the Minister's office.

The employer stated that a collective dispute of a socio-economic nature had been brought against them in the Labour and Social Welfare Court of the First Instance of Escuintla. Due to the existence of the collective dispute and with a view to ensuring further progress in the matter, they argued a conflict of jurisdiction with regard to the administrative formalities undertaken in the present case by the Ministry of Labour and Social Welfare. In view of this legal action and according to the requirements of the law, the Ministry suspended its action in the present case until such time as the court rules on who has competence to continue it.

852. In its communication of 23 June 2008, the Government states in relation to the allegations concerning Guatemala's judiciary (the withdrawal of the trade union leave of four trade union leaders operating under the remit of the Supreme Court of Justice) that, by a Supreme Court ruling of 16 April 2008, the highest official in the section of the Supreme Court that deals with *amparo* cases stated that the *amparo* sought by the leaders in question and by the National Office of the Attorney-General, as the legal representative of the Government of Guatemala, was not granted. That ruling was duly notified to the parties. The National Office of the Attorney-General filed an appeal against this ruling, which is pending notification and referral to the Constitutional Court so that it can take cognizance of the appeal (the complainants argue that the Supreme Court was both judge and party to the case).

853. The Government also refers in a communication of 1 September 2008 to the allegation concerning the harassment of the General Secretary of SITRABI, Noé Antonio Ramírez Portela (the brother of the murdered union leader Marco Tulio Ramírez Portela), by a vehicle that frequently circled and observed his house, and the allegation that, on 20 July 2007, five soldiers from the Guatemalan army entered the SITRABI headquarters and illegally detained union members and questioned them extrajudicially about the names of the union leaders and members and their duties. The Government notes that, according to the municipal public prosecutor's office in Morales, in the department of Izabal, a complaint has been filed by the members of the central executive committee of SITRABI; in December 2007, the official statement of César Humberto Guerra López, Noé Antonio Ramírez Portela, Jesús Martínez Sosa, Selfa Sandoval Carranza and José Antonio Cartagena Amador, with Noé Antonio Ramírez Portela acting on behalf of the others, indicated that, on 28 September 2008, unidentified and heavily armed motorcyclists rode through the BANDEGUA estate without the security staff of this enterprise intervening in the matter, and that, as they recognized one of these people, they filed an application to the then Interior Minister, Adela Camacho de Torrebiarte, requesting personal security and permanent patrols around the perimeter of the property by the joint forces of the national civil police and the army. The Minister responded to that request by ordering the installation of a mobile substation on the property. The union leaders have stated that these measures have led to a reduction in acts of intimidation and in the number of threats, as a result of the presence of the national civil police.

854. With regard to the interrogation of workers, the Ministry of Defence of Guatemala has reported that the aim of the data requested from the Izabal Banana Workers' Union by the second lieutenant of infantry Fredy Antonio Moscoso Morales, was to gather information so that the workers could be provided with the necessary support in the event of an emergency, for security purposes.

C. The Committee's conclusions

855. *The Committee deeply regrets that, despite the time that has elapsed, the Government has not sent the requested observations, although it has been invited on several occasions, including by means of an urgent appeal, to present its observations on the case.*

856. *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 is bound 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.*

857. *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 practice. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments, on their side, must recognize the importance of reporting, so as to allow objective examination and detailed replies to the allegations brought against them.*

858. *The Committee notes with concern that the allegations presented in this case are extremely serious and include numerous murders of union leaders and members (16), one disappearance, acts of violence (sometimes also against the relatives of union members), threats, physical harassment, intimidation, the rape of a unionist's family member, obstacles to granting legal status to unions, the dissolution of a union, a significant number of anti-union dismissals, criminal proceedings for carrying out trade union activities, obstacles to collective bargaining and social dialogue, blacklists and major institutional failures with regard to labour inspection and the functioning of the judicial authorities creating a situation of impunity in labour matters (for example, excessive delays, a lack of independence, failures to comply with reinstatement orders issued by the court) and in criminal matters. The Committee firmly expects that the Government will be more cooperative in the future because it cannot accept the absence of detailed answers on these very serious allegations, which have been presented since the end of 2007. The Committee urges the Government to send in full and without delay its observations on each of these allegations.*

859. *The Committee notes the Government's statements on a limited number of allegations, which reveal that: (1) the investigations have not made it possible to identify the perpetrators of the murder of union leader Marco Tulio Ramírez Portela; (2) there is a conflict of jurisdiction (between the authorities of the Ministry of Labour and the Labour and Social Welfare Court of the First Instance of Escuintla) on the facts underlying the complaint concerning the Olga Maria estate, and a decision by the judicial authority as to which authority is competent in this case is pending; (3) the issue of the withdrawal of the union leave of union leaders operating under the remit of the Supreme Court of Justice has been referred to the Constitutional Court following the Supreme Court's decision to reject the union's claims; and (4) there is evidence that Noé Antonio Ramírez Portela was harassed by armed individuals on motorcycles, but the Minister of the Interior implemented the requested security measures which has led, for the time being, to a reduction in acts of intimidation and in the number of threats, given the presence of the national civil police; likewise, the data requested from trade unionists in the SITRABI by a second lieutenant of infantry were to offer them the necessary support in the event of an emergency.*

860. *The Committee regrets that very limited information was provided by the Government on a very small number of allegations, especially given that this information does not take into account the investigations that have made it possible to identify and punish those responsible for the murder of union leader Marco Tulio Ramírez Portela (the authorities maintain, however, that the motive was political rather than union related, without providing further details) and the fact that the two other allegations (relating to the Supreme Court and to the Olga Maria estate) are pending appeals or court decisions.*

861. *The Committee concludes that these replies from the Government do not allow definitive conclusions to be reached with regard to these allegations and illustrate the excessive slowness of the procedures outlined by the complainant organization and the resulting climate of impunity.*

862. *In these circumstances, the Committee urges the Government to send its observations in full, without delay, on these and the other pending allegations concerning acts of anti-union discrimination, and for this purpose to order that investigations be carried out into each of the many cases mentioned by the complainant organization. The Committee requests the Government to send the outcome of these investigations and any decisions or rulings by the authorities. The Committee urges the Government in the meantime to ensure the physical safety of trade unionists who are threatened or harassed and of protected witness Roberto Dolores and to confirm the whereabouts of the reportedly missing Francisco del Rosario López and the minor María Antonia Dolores López.*

863. *Observing that in recent years it has had to examine in other cases recurring allegations of violence against trade union leaders and members, the Committee deplores the murder of the trade unionists mentioned in the allegations, the other acts of violence and intimidation and the death threats, and once again draws the Government's attention to the principle whereby a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty; freedom of association can only be exercised in conditions in which fundamental rights and, in particular, those relating to human life and personal safety, are fully respected and guaranteed; the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, paras 43–45 and 52]. Similarly, the Committee recalls that the excessive delays in the proceedings and the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights.*

864. *With regard to the numerous allegations of anti-union discrimination, the Committee notes that the allegations relate to excessive delays in the procedures for protection against anti-union discrimination, non-compliance with court orders to reinstate trade unionists and institutional failures with regard to labour inspection and in judicial proceedings; reference is also made to obstacles to the exercise of the right to bargain collectively. The Committee notes that it has had to consider allegations of this nature on previous occasions and recalls the principle that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see* ***Digest****, op. cit., para. 771]. The Committee also emphasizes the principle that employers, including governmental authorities in the capacity of employers, should recognize for collective bargaining purposes the organizations' representative of the workers employed by them [see* ***Digest****, op. cit., para. 952]. The Committee highlights the importance of putting an end without delay to the numerous alleged acts of discrimination, should it be confirmed that they are of an anti-union nature, and the importance of effective and expeditious procedures.*

865. *The Committee reiterates the recommendation it made in Case No. 2445 in which, bearing in mind the high number of anti-union dismissals, the delays in proceedings and the failure to comply with judicial orders to reinstate trade unionists, it reminded the Government that the ILO's technical assistance is at its disposal and that the Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress,*

emphasizing reinstatement as an effective means of redress [see 348th Report, para. 786]. The Committee extends this invitation to issues relating to criminal matters.

The Committee's recommendations

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

(a) The Committee deeply regrets that the Government has only sent its observations on a limited number of the allegations in this case despite having been invited to do so on several occasions and despite an urgent appeal in that respect, in particular given the extreme gravity of the allegations. The Committee firmly expects that the Government will be more cooperative in the future.

(b) Noting the extremely high number of allegations concerning anti-union acts, a significant percentage of which relate to acts of extreme violence against union leaders and members (16 murders, death threats, a disappearance, acts of physical violence) and sometimes against their families, the Committee deplores these extremely serious allegations of violence against trade unionists and other anti-union acts that are incompatible with Conventions Nos 87 and 98 and urges the Government to send its observations in full, without delay, and for this purpose to order that investigations be carried out into each of the cases mentioned by the complainant organization. The Committee urges the Government to send the outcome of these investigations and any decisions or rulings by the authorities.

(c) The Committee urges the Government to ensure the physical safety of trade unionists who are threatened or harassed and of witness Roberto Dolores and to confirm the whereabouts of the allegedly missing Francisco del Rosario López and the minor María Antonia Dolores López.

(d) Bearing in mind the high number of anti-union dismissals, the delays in proceedings and the failure to comply with judicial orders to reinstate trade unionists, the Committee once again reminds the Government that the ILO's technical assistance is at its disposal and that the Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, emphasizing reinstatement as an effective means of redress. The Committee extends this invitation to issues relating to criminal matters.

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

CASE NO. 2680

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

Complaint against the Government of India presented by the Centre of Indian Trade Unions (CITU)

Allegations: The complainant alleges that the Office of the Accountant General of Kerala State victimized and sanctioned its employees for participating in peaceful demonstrations, sit-ins and marches protesting the decision to outsource a substantial part of the workers' jobs

867. The complaint is contained in a communication of the Centre of Indian Trade Unions (CITU) dated 25 November 2008.

868. The Government sent its observations in a communication dated 29 May 2009.

869. India has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

870. In its communication of 25 November 2008, the complainant states that the All India Audit and Accounts Association, Kerala (AIAAK) represents the overwhelming majority of the employees of the Audit and Accounts Department of the Office of the Accountant General, Kerala. The AIAAK is recognized by the Government.

871. The AIAAK undertook peaceful demonstrations, sit-ins and marches on several days in December 2006, January, April and May 2007, and March and April 2008. The actions were intended to protest the outsourcing of substantial portions of the workers' jobs to a private agency.

872. The complainant indicates that the management responded by issuing charge sheets to employees for having participated in actions during lunch and after office hours, and also undertook extensive disciplinary measures such as demotion, denial of promotion, and reduction in salary increments. These measures resulted in heavy financial losses for the employees concerned.

873. The complainant states that the penalties issued by the management include the following: 33 employees received the punishment of "break in service", losing all benefits accrued through their past service; 15 employees were denied due and legitimate promotions; eight employees were demoted; and 324 employees were given dies non (non-working, unremunerated days) on the days when actions took place. The complainant further indicates that many employees face criminal charges and most suffered salary deductions ranging from 8,000 to 10,000 rupees per month due to the various disciplinary measures. A copy of one of the charge sheets, listing the names of the employees and the respective penalties incurred is attached to the complaint.

874. Attached to the complainant's communication are copies of three orders issued by the Office of the Accountant General, dated 19 March, 7 April and 1 August 2008. The said orders bring charges against, and prescribe penalties for, AIAAK Executive Committee member Shri Santoshkumar, AIAAK President Shri N. N. Balachandran and Secretary-General Shri Vijayakumar, respectively, for their participation in protest actions. The penalty of the withholding of a salary increase for five years was issued to President Balachandran, the penalty of dies non was imposed on General Secretary Vijayakumar, and Executive Committee member Santhoshkumar was demoted to a lower post and denied salary increases for a period of three years. According to the complainant, the widespread punishments are clearly reprisals intended to dissuade employees from participating in trade union activities by creating fear.

875. The complainant states that the AIAAK is recognized by the Government as the official representative body of the employees concerned. It further indicates that the right to collectively protest, exercised within the country's constitutional framework, is an inalienable component of freedom of association and the right to collective bargaining. By declaring these constitutionally-protected rights illegal, and by the aforementioned reprisals, the Government has contravened Conventions Nos 87 and 98.

B. The Government's reply

876. In its communication of 29 May 2009, the Government indicates that it had examined the complaint in consultation with the Comptroller and Auditor General of India, who oversee the Accountant General of Kerala. The Government states that, as government employees, the AIAAK members' conduct and service conditions are governed by the Central Civil Services (Conduct) Rules, 1964. Further, section 6(k) of the Central Civil Services (Recognition of Service Associations) Rules, 1993 (the CCS (RSA) Rules) (attached to the Government's communication) states that service associations are required to abide by the Conduct Rules or the association will no longer be recognized by the Government. The Government further indicates that joint consultative machinery exists under its Department of Personnel and Training to provide redress for grievances.

877. The Government indicates that certain staff associations representing only section employees disturbed office decorum and discipline at the Office of the Accountant General, thus violating the applicable rules of conduct. Accordingly, the employees were subjected to disciplinary actions. The Government adds that the employees have avenues of appeal and review against action taken and that the principle of natural justice is enshrined in the rules concerning disciplinary action.

878. The Government states that trade union rights do not apply to service associations such as the AIAAK, and that the Trade Union Act does not apply to civil servants; bodies such as the CITU have no standing with regard to the Office of the Accountant General's internal functioning. The Government adds, finally, that there was no infringement of freedom of association rights at the Office of the Accountant General, Kerala, and provides a copy of the CCS (RSA) Rules, 1993.

C. The Committee's conclusions

879. *The Committee notes that this case concerns disciplinary action taken against union members for having participated in demonstrations, sit-ins and marches. According to the complainant, members of the AIAAK engaged in several peaceful demonstrations, sit-ins and marches – in December 2006; January, April and May 2007; and March and April 2008 – to protest the outsourcing of a substantial portion of jobs to a private agency. The complainant further alleges that the employer, the Office of the Accountant General,*

Kerala, responded by issuing the following sanctions: 33 employees received the sanction of "break in service", losing all benefits accrued through their past service; 15 employees were denied due and legitimate promotions; eight employees were demoted; and 324 employees were given dies non (non-working, unremunerated days) on the days when actions took place. The complainant further alleges that many employees face criminal charges and most suffered salary deductions ranging from 8,000 to 10,000 rupees per month due to the various disciplinary measures.

880. *The Committee also notes the Government's indication that, as government employees, the AIAAK members' conduct and service conditions are governed by the Central Civil Services (Conduct) Rules, 1964 (the CCS Conduct Rules). The Government further maintains that certain staff association members disturbed office decorum and discipline at the Office of the Accountant General, thus violating the applicable rules of conduct; the parties concerned were accordingly subjected to disciplinary action. In this regard, the Committee further observes that the order of the Office of the Accountant General, imposing disciplinary measures against AIAAK President Balachandran, refers to the following: (a) that he had participated in an "agitation programme" despite a prior warning against such participation by the Deputy Accountant General; (b) that his acts included shouting loud and defamatory slogans within the office buildings and corridors of the Accountant General and the Deputy Accountant General, and the blocking of free passage therein; (c) that he is on record as having been taken into police custody on 12 January 2007 after having blocked the passage leading to the Accountant General's chamber, and had admitted to the same in his 27 March 2007 reply to the 9 March 2007 memorandum of the Deputy Accountant General; and (d) that although admitting to having participated in the agitational activities as charged, Balachandran denied that they were disruptive of office decorum and discipline. Noting that in earlier proceedings Balachandran had failed to provide evidence that his acts were not disruptive, the Office of the Accountant General found his denial not credible and considered that holding a formal enquiry was not required to prove the charge of misconduct as the same had been proven beyond doubt by credible witnesses and video recordings. The Order further imposed the penalty of withholding salary increments for a period of five years.*

881. *In respect of AIAAK General Secretary Vijayakumar, he was found to have rushed behind the Accountant General and gesticulated and shouted at the latter, and was issued the penalty of dies non. As regards Executive Committee member Santhoshkumar, he was disciplined for raising his voice and speaking roughly to the Accountant General, and by refusing to obey the Accountant General's order that he leave the hall. Further, Santhoshkumar was placed on suspension for wilful and blatantly insubordinate behaviour the following day for violating the terms of a suspension order by entering the office premises without obtaining prior permission from the Deputy Accountant General.*

882. *The order respecting Mr Santhoshkumar further indicates that the latter had refuted all the charges against him, so that an accounts officer was appointed to conduct an inquiry into the matter. In a submission dated 29 August 2007, Mr Santhoshkumar challenged a number of procedural and substantive aspects of the inquiry and requested that the Disciplinary Authority not rely upon the report of the inquiry. The Disciplinary Authority nevertheless relied upon the report of the inquiry, concluded against Mr Santhoshkumar and, in view of his submission that he had no intention of questioning the authority of the Accountant General or disobeying his orders, was given a lenient sanction of demotion to a lower post for three years. The penalty also includes a loss of seniority in the higher post and a postponement of pay increments upon restoration to the higher post.*

883. *As concerns protests, the Committee recalls that workers should enjoy the right to peaceful demonstrations to defend their occupational interests [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 133].*

*Nevertheless, trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places [see **Digest**, op. cit., para. 144].*

884. *As concerns freedom of speech, moreover, the Committee recalls that the full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language [see **Digest**, op. cit., para. 154].*

885. *In respect of the matters contained in the present case, the Committee notes, firstly, that the complainant's allegations and the Government's observations are generally of a contradictory nature. The peaceful demonstrations alleged by the complainant are characterized, by the Government, as breaches of office decorum and discipline. The Committee further observes that the disciplinary orders respecting AIAAK President Balachandran and Executive Committee member Santhoshkumar refer to challenges made by the latter in the context of their respective inquiries and proceedings. In particular, the Disciplinary Authority had refused to conduct a formal inquiry regarding Balachandran's assertion that his acts were not disruptive in nature, and had concluded against Santhoshkumar in spite of his challenges to the report of the inquiry. Noting with concern, moreover, the severity of the sanctions handed down against trade union leaders Balachandran, Vijayakumar and Santhoshkumar and the serious dampening effect such action may have on trade union activity, the Committee requests the Government to ensure that the complainants have access to a review and appeal, consistent with freedom of association principles or, in the absence of such access, to undertake a full and independent investigation into the matter. If it is found that the three trade union leaders were sanctioned for having engaged in peaceful demonstrations, the Government should ensure that they are fully compensated for the penalties imposed upon them, including the reinstatement of their prior entitlements and posts. The Committee requests to be kept informed in this regard.*

886. *In addition, the Committee observes that the Government in its reply only refers to the specific acts of the three abovementioned leaders and does not indicate the basis for the numerous and severe sanctions imposed on the hundreds of other employees. The Committee requests the Government to ensure that these matters also be subject to a review and appeal consistent with freedom of association principles or, failing that, to undertake a full and independent investigation into all the allegations of anti-union discrimination and keep it informed of the outcome. If the review or investigation finds that the parties concerned were sanctioned for having carried out peaceful demonstrations, the Committee requests the Government to ensure that they are fully redressed for the penalties imposed upon them.*

887. *The Committee notes that the Order concerning General Secretary Vijayakumar contains an annexure referring to the latter's participation, along with 40 others, in a demonstration to protest, inter alia, the issuance of a 29 April 2008 Order imposing sanctions on Vijayakumar. The document further states that this act of protesting against a lawful order of the competent authority imposed violates section 6(b) of the CCS (RSA) Rules which states that the service association shall not espouse or support the cause of individual Government servants relating to service matters. The Committee recalls, in this respect, that the denial of the right of workers in the public sector to set up trade unions, where this right is enjoyed by workers in the private sector, with the result that their "associations" do not enjoy the same advantages and privileges as "trade unions", involves discrimination as regards government-employed workers and their organizations*

as compared with private-sector workers and their organizations. Such a situation gives rise to the question of compatibility of these distinctions with Article 2 of Convention No. 87, according to which workers "without distinction whatsoever" shall have the right to establish and join organizations of their own choosing without previous authorization, as well as with Articles 3 and 8, paragraph 2, of the Convention [see ***Digest****, op. cit., para. 222]. The Committee considers, in light of the above-cited principle, that section 6(b) of the CCS (RSA) Rules restricts the freedom of association rights of service associations. The Committee further notes that section 5(c) also restricts freedom of association principles, by restricting membership in a service association to "a distinct category of civil servant having [a] common interest".*

888. *The Committee also notes the Government's indication that service associations are required to abide by the Conduct Rules or the association will no longer be recognized by the Government. It observes in this regard that section 8 of the CCS (RSA) Rules provides that if, in the opinion of the Government, a service association recognised under the CCS (RSA) Rules has failed to comply with any of the conditions set out in sections 5, 6 and 7, the Government may, after giving an opportunity to the service association to present its case, withdraw the recognition accorded to the latter. It considers that section 8 of the CCS (RSA) Rules violates freedom of association, in that it provides for the possibility of withdrawal of recognition for failure to comply with rules that are themselves not in conformity with freedom of association principles, and apparently without a right of appeal. Accordingly, the Committee requests the Government to take the necessary measures to amend sections 5, 6 and 8 of the CCS (RSA) Rules, in order to ensure the freedom of association rights of civil servants.*

889. *Finally, the Committee invites the Government to seek the technical assistance of the Office with a view to considering the ratification of Conventions Nos 87, 98 and 151.*

The Committee's recommendations

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

(a) The Committee requests the Government to take the necessary measures to amend sections 5, 6 and 8 of the CCS (RSA) Rules, 1993, in order to ensure the freedom of association rights of civil servants.

(b) The Committee requests the Government to ensure that the complainants have access to a review and appeal, consistent with freedom of association principles, or, in the absence of such assess, to undertake a full and independent investigation into the sanctions imposed upon Messrs Balachandran, Vijayakumar, and Santhoshkumar. If it is found that the three trade union leaders were sanctioned for having engaged in peaceful demonstrations, the Government should ensure that they are fully compensated for the penalties imposed upon them, including the reinstatement of their prior entitlements and posts. The Committee requests to be kept informed in this regard.

(c) The Committee requests the Government to ensure that these matters also be subject to a review and appeal consistent with freedom of association principles or, failing that, to undertake a full and independent investigation into the allegations of numerous and severe sanctions imposed on hundreds of other employees and keep it informed of the outcome. If the investigation

finds that the parties concerned were sanctioned for having carried out peaceful demonstrations, the Committee requests the Government to ensure that they are fully redressed for the penalties imposed upon them.

(d) The Committee invites the Government to seek the technical assistance of the Office with a view to considering the ratification of Conventions Nos 87, 98, and 151.

CASE NO. 2685

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

Complaint against the Government of Mauritius presented by the Federation of United Workers (FTU)

Allegation: Anti-union discrimination and refusal to recognize a trade union by the Phil Alain Didier Co. Ltd

891. The complaint is contained in a communication from the Federation of United Workers (FTU) dated 31 October 2008. The Government submitted its observations in a communication dated 26 March 2009.

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

A. The complainant's allegation

893. In its communication of 31 October 2008, the FTU alleges that the construction company Phil Alain Didier Co. Ltd (PAD) has refused to recognize its affiliate, the Syndicat des Travailleurs des Etablissements Privés (STEP) and carried out anti-union acts against its members.

894. In October 2006 the manual grade workers of the PAD joined STEP, electing Jean Hensley Martinet (labourer) and Jean Claude Lagaillarde (lorry driver) as workplace representatives. Shortly after, when the procedure for recognition of the STEP by the company was set in motion before the Industrial Relations Commission (IRC), the management began to threaten the workers. The matter was reported to the Minister of Labour by a letter dated 1 November 2006 (copy attached to the complaint).

895. During the same period, the PAD instructed Mr Lagaillarde to remain idle from his position as a permanent lorry driver, a position he occupied for more than 13 years. The matter was again reported to the Minister of Labour in a letter dated 21 December 2006 (copy attached to the complaint). In addition, Mr Martinet was charged by the company of being in possession of company property without authorization. He was arrested, released on bail and shortly dismissed. The police initiated criminal proceedings against him.

896. The FTU furthermore states that, despite the fact that in July 2008 the IRC ruled that the company should recognize the STEP, the trade union's request for a first meeting has been categorically rejected by the PAD.

897. Mr Lagaillarde was subsequently suspended from duty on 25 September 2008 and dismissed on 2 October 2008. Mr Lagaillarde was charged by the company of having been seen by the security putting something like rock-sand or cement in the fuel tank of a company car. Police initiated a criminal case against him too. The complainant insists that in both cases the company security guards were used.

B. The Government's reply

898. In its communication dated 26 March 2009, the Government states that the STEP applied, as required under section 56(1) of the Industrial Relations Act (IRA) of 1973, to the IRC to be recognized by the PAD for collective bargaining purposes. The application was granted on 2 July 2008 but, following the company's refusal for a meeting, the union made an application to the Permanent Arbitration Tribunal (PAT), by virtue of section 59(1) of the IRA, for an order to enforce the IRC's recommendations. The case before the new Employment Relations Tribunal, that has been established under the new Employment Rights Act of 2008, has been scheduled for 9 April 2009.

899. The Ministry of Labour, Industrial Relations and Employment carried out investigations on the allegations reported by the STEP in letters dated 1 November 2006 and 21 December 2006. The PAD denied the allegations of intimidation and use of repressive language against several workers, as well as the allegations of harassment and intimidation of Mr Lagaillarde. According to the company, Mr Lagaillarde was at no time requested to remain idle, and from 1 to19 December 2006, performed several trips for the company, as per details attached to the Government's reply.

900. In a meeting held at the Ministry on 19 June 2007, the trade union's negotiator agreed to adduce evidence to support the allegation of use of repressive language, intimidation and harassment (the report of the meeting has been provided by the Government). Subsequently, the union informed an officer of the Ministry that two workers had volunteered to adduce evidence and that they would call at the Ministry during their holidays to give evidence. The workers, however, did not turn up. When contacted again by the Ministry, the union stated that no worker was interested in giving evidence in the matter. The Government concludes that, in the absence of evidence, it was not possible to proceed further with the case.

901. With regard to the dismissal of Mr Martinet, the Government states that according to the Police Commissioner, the security manager of the company reported that persons unknown had stolen a mobile phone he had forgotten on the bonnet of a van in the yard of the company on 10 January 2007. On 26 February 2007, the security manager made another statement to the police saying he received a phone call from the gate informing him that Mr Martinet was caught with a mobile phone identical to the one stolen and, on being questioned, could not give any explanation. The serial number of the mobile phone was checked and it was found to be the one reported stolen. Mr Martinet was arrested then released on bail. He is being prosecuted before the District Court for "Larceny by person in receipt of wages" and the trial has been scheduled on 6 June 2009. On 24 January 2007, Mr Martinet was dismissed on a charge of having been found on 15 January 2007 in possession of a cellular phone belonging to the company which was lost. He appeared before a disciplinary committee on 22 January 2007 and was duly assisted by counsel. On 29 January 2007, Mr Martinet lodged a complaint with the Ministry of Labour, Industrial Relations and Employment to claim compensation for unjustified dismissal. By virtue of section 15 of the Industrial Court Act, the Ministry referred the case to the Industrial Court

with a view to have it settled amicably in chambers between the parties. As the case was not settled, the Ministry is now awaiting the outcome of the criminal case before lodging a plaint before the Industrial Court. The Government emphasizes that, as a matter of principle, in cases of dismissal from theft and where the police is prosecuting the worker, the Government waits for the Court decision.

902. As regards the dismissal of Mr Lagaillarde, the Government states that he appeared before a disciplinary committee on 30 September 2008, and was duly assisted by his trade union representative. A case of "Interfering with motor vehicle" against Mr Lagaillarde was reported by the PAD to the police. An inquiry by the police has been completed and the matter has now been referred to the Director of Public Prosecution for decision. Mr Lagaillarde reported a complaint to the Ministry of Labour, Industrial Relations and Employment to claim compensation for unjustified dismissal. As the PAD management is not agreeable to make any statement, Mr Lagaillarde informed the Ministry of his intention to proceed with the case on his own.

903. The Government adds that in the course of inquiries carried out, the PAD management averred that STEP has never notified the appointment of Messrs Martinet and Lagaillarde as workplace representatives. The Mauritius Employers' Federation (MEF), to which the company is affiliated, did not submit its views on the allegations.

904. The Government points out that the matter cannot be deemed to be a complaint against the Government of Mauritius as the PAD is a private company and it is more a matter between a private company and two employees. Also, the Government indicates that there cannot be immunity as regards the application of the law of the land. Until the cases of Mr Martinet and Mr Lagaillarde are heard and adjudicated by the Court, the Government states it is premature for the union to conclude that there has been a violation of trade union rights. Finally, the Government concludes that further communication will be addressed once the matter is determined by the Court.

C. The Committee's conclusions

905. *The Committee observes that in this case the complainant organization alleges anti-union discrimination and the refusal on the part of the private construction company PAD to recognize STEP. In particular, the complainant alleges the dismissal of two elected STEP workplace representatives, one of which took place shortly after the union requested legal recognition before the Industrial Relations Commission.*

906. *The Committee notes the Government's statements to the effect that: (1) the case before the new Employment Relations Tribunal for an order to enforce the IRA's recommendations to have STEP recognized by the PAD company for collective bargaining purposes has been scheduled on 9 April 2009; (2) investigations were carried out by the Ministry of Labour, Industrial Relations and Employment into the allegations of intimidation and use of repressive language against several workers and allegations of harassment and intimidation against Mr Jean Claude Lagaillarde by the PAD management; (3) PAD denied all allegations and provided details on the several trips performed by Mr Lagaillarde for the company, whereas STEP did not provide evidence of the allegations; (4) the trial against Mr Martinet for "Larceny by person in receipt of wages" was scheduled for 6 June 2009 and the Ministry is awaiting the outcome of the criminal case before lodging a plaint before the Industrial Court; (5) the inquiry by the police against Mr Lagaillarde for alleged "Interfering with motor vehicle" has been completed, the matter has now been referred to the Director of Public Prosecution for decision and the Ministry is awaiting the outcome; and (6) according to the management of the PAD, STEP has never notified the appointment of Messrs Martinet and Lagaillarde as workplace representatives.*

907. *With regard to the alleged refusal by the PAD to recognize STEP, the Committee recalls the importance it attaches to the principle according to which recognition by an employer of the main unions represented in the undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 953] and requests the Government to keep it informed of the proceedings before the Employment Relations Tribunal and to provide it with a copy of the judgement.*

908. *The Committee notes more generally the Government's statement that the matter cannot be deemed to be a complaint against the Government of Mauritius as the PAD is a private company and it is more a matter between a private company and two employees. The Committee recalls in this regard that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [see* ***Digest****, op. cit, para. 17]. 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., paras 816 and 817]. The Committee notes the efforts made by the Government to resolve the question of the dismissal of Mr Martinet through an amicable settlement and that, as this was not possible, its indication that it was awaiting the judgement of the criminal case before putting the matter before the Industrial Court as the two matters were inextricably linked. Observing that the matters relating to the dismissals of Messrs Martinet and Lagaillarde are pending before the courts and the competent authorities, the Committee notes the Government's indication that it will keep it informed about the outcome of the criminal proceedings against them and expects that, should they be acquitted of the charges, steps will be taken to reinstate them in their posts and to pay wages due and other legal entitlements. It requests the Government to keep it informed in this regard.*

The Committee's recommendations

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

(a) With regard to the alleged refusal by the PAD company to recognize STEP, the Committee requests the Government to keep it informed of the proceedings before the Employment Relations Tribunal and to provide it with a copy of the judgement.

(b) With respect to the dismissals of Messrs Martinet and Lagaillarde, the Committee notes that the Government will keep it informed about the outcome of the criminal proceedings against them and expects that, should they be acquitted of the charges, steps will be taken to reinstate them and to pay wages due and other legal entitlements. It requests the Government to keep it informed in this regard.

CASE NO. 2613

INTERIM REPORT

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

Allegations: The complainant organization alleges numerous dismissals and transfers of trade union officials and members, and the exclusion of trade unions affiliated to the CTN from a collective bargaining process

910. The Committee last examined this case at its November 2008 meeting [see the Committee's 351st Report, paras 1051–1098, approved by the Governing Body at its 303rd Session].

911. The Government sent its observations in a communication dated 29 June 2009.

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

A. Previous examination of the case

913. At its meeting in November 2008, the Committee made the following recommendations [see 351st Report, para. 1098]:

(a) As regards the allegation concerning the dismissal of ten officials and 48 members of STEINSS, the Committee requests the Government to inform it: (1) whether the union was consulted about the restructuring which took place in the Institute and which prejudiced the trade union officials and members; and (2) the result of the ongoing legal appeals relating to the dismissals of the trade union officials and members who did not withdraw their legal actions.

(b) The Committee requests the Government to inform it of the result of the judicial process initiated by the trade union official, Mr Fidel Castillo Lago, Minutes Secretary of the "Genaro Lazo" Union of the Nicaraguan Aqueduct and Sewer Company of Estelí – ENACAL-Estelí and to send its observations relating to the alleged dismissal of 15 other members.

(c) With regard to the allegations relating to the dismissal of eight officials of the UTSO, nine officials of the Enacal Granada Workers' Departmental Democratic Union and five officials of the Enacal Carazo Workers' Departmental Democratic Union, the Committee requests the Government: (1) to take measures, including of a legislative character if necessary, so that in future a body independent of the parties and in which they have confidence is responsible for declaring a strike illegal; (2) to inform it more precisely concerning the legal requirements that the organizations did not respect and which led to the strike being declared illegal and the subsequent dismissal of the trade union officials in order to be able to pronounce itself in full knowledge of the facts; and (3) to inform it of the result of the legal claims filed by certain ENACAL-Granada and ENACAL-Carazo workers. The Committee further requests the Government to inform it whether the trade union officials mentioned by name by the complainant organization have initiated legal actions relating to their dismissal.

(d) As regards the allegations relating to the dismissal of five officials and 25 members of the ENACAL-DAR Democratic Trade Union, the Committee requests the Government to confirm that all the trade union officials and members concerned have not initiated legal actions.

(e) As regards the allegation relating to the dismissal of Mr Kester Giovanni Bermúdez, official of the Chontales Department Independent ENACAL Workers' Union and eight other workers of the Nicaraguan Aqueduct and Sewer Company of Jugalpa, the Committee requests the Government to indicate whether legal actions have been commenced in this respect.

(f) The Committee requests the Government to inform it whether by virtue of the decision of the Inspectorate General of Labour, reported by the Government, the trade union official Ms Maura de Jesús Vivas Ramos has been reinstated in her post in the DGI with payment of wages due.

B. The Government's reply

914. In its communication of 29 June 2009, the Government states the following with regard to the Committee's recommendations.

Recommendation (a)

915. On 14 February 2007, the Executive Board of the Nicaraguan Social Security Institute (INSS) met and, with administrative Act No. 202/2007, approved a new organizational structure, which involved the abolition of the "Technical Medical Evaluation Unit (UTEM)" and the creation of the "Quality Assurance Directorate (DGC)" as a body of the Health Services Provider Institutions (IPSS). The DGC is subordinate to the General Directorate for Health Services and is the authority responsible for monitoring implementation of existing regulations in the area of quality control and treatment and guidance for beneficiaries, with a view to maintaining the services provided by the IPSS in accordance with the General Health Law No. 423 adopted on 14 March 2002 and its implementing regulations in Decree No. 001-2003 approved on 9 January 2003, and with the Social Security Law and implementing regulation No. 49. The objective is to ensure the correct functioning of the IPSS through follow-up and monitoring of quality standards and indicators.

916. The main function of the DGC is to implement, organize and coordinate with the IPSS various procedures, strategies and standards to facilitate improved health care, health quality management, and guidance and care for patients, on the basis of the integrated health-care model. The studies that have been carried out show that in order to achieve the objectives put forward by the INSS, it is necessary to modify the current staff profile of Medical Supervisory Professionals to Social Work Professionals, which meant a radical change in this area. Before undertaking these changes, approval was obtained from the Public Service Directorate, a state authority which, in accordance with section 111 of the Civil Service and Administrative Career Law (No. 476), is the competent body to authorize restructuring in state institutions.

917. These organizational reforms and restructuring in the INSS had been approved by the INSS executive board which, under the terms of section 12 of the Social Security Law, is the highest executive body and has the following membership: (a) two representatives of the State, namely, an executive president and executive vice-president of the institution; (b) two workers' representatives with their substitutes, elected by the workers' organizations; and (c) two employers' representatives with their substitutes: one for the public sector enterprises and one for the private sector, elected by their respective organizations. It will be noted that the INSS, before terminating the employment contracts

of the persons mentioned in the complaint, had obtained the approval of its highest executive body.

918. As regards the results of the current legal proceedings concerning the dismissals of the trade union leaders and members who did not abandon legal action, including Mr Alvin Alaniz González and Mr Sergio Juan Quiroz, the case is still at the stage of receiving evidence and the judge has not yet given a ruling.

Recommendation (b)

919. The Government states in relation to the application for reinstatement filed by Mr Fidel Castillo Lago against the Nicaraguan Aqueduct and Sewer Company of Estelí (ENACAL-Estelí), that he was dismissed in accordance with section 45 of the Labour Code on 10 April 2007. He received final net severance pay of 100,664.62 córdobas. He filed an application for reinstatement with the local civil and industrial court on 2 October 2007, and the judge ordered his reinstatement in the same post, on the same terms and conditions as before. Among other reasons, the judge cited the fact that Mr Fidel Castillo Lago had trade union immunity at the time of his dismissal, which was therefore not in keeping with his position as a member of the trade union executive body. ENACAL appealed against the ruling.

920. On 18 December 2007, the civil and labour affairs division of the Estelí Appeals Court upheld the ruling of the local civil and labour judge. ENACAL decided to avail itself of its right under section 46, paragraph 2, of the Labour Code and pay the double compensation required by that provision. Since Mr Fidel Castillo Lago had already received the sum of 100,664.62 córdobas, he was awarded a further sum of 86,330.92 córdobas, a sum which included the compensation referred to in section 46 of the Labour Code. In February 2008, Mr Fidel Castillo Lago was informed that a cheque made out to him was available at the central pay office of ENACAL, for the aforementioned sum, but he has not to date collected the cheque. According to legislation and a considerable body of jurisprudence, when a worker receives the social benefits owed to him or her at the end of an employment contract, the only legal action that can be initiated is that of enforcing payment in the event that the employer fails to pay in full, or in cases where reinstatement proceedings are invalid because severance pay has already been received.

921. As regards the alleged dismissals of 15 other union members, the identity of the individuals concerned is not known because the complainant organization has failed to supply relevant details.

Recommendation (c)

922. The Government reiterates the information already provided. It also maintains that the compliant organization does not indicate which of the organization's members have initiated legal action in connection with this dispute at the Nicaraguan Aqueduct and Sewer Company (ENACAL-Granada-Carazo).

Recommendation (d)

923. The Government reports that it has no knowledge of any notice regarding any legal claim that might have been filed against ENACAL by officials and members of the democratic trade union of ENACAL.

Recommendation (e)

924. The Government states that it has no information concerning any legal action against the Nicaraguan Aqueduct and Sewer Company (ENACAL-Juigalpa) initiated by Mr Kester Giovanni Bermúdez, an official of the Independent ENACAL Workers' Union, Chontales Department, or by eight other workers employed by ENACAL-Juigalpa.

Recommendation (f)

925. As regards the case of Ms Maura de Jesús Vivas Ramos in her capacity as official of the Public Employees' Union in the Directorate-General of Revenues of Granada, the Government states that the Managua departmental labour inspectorate (services sector), on 10 January 2008, issued a resolution guaranteeing her constitutional rights and trade union immunity. Ms Vivas Ramos subsequently applied to the courts for reinstatement in her post and payment of wages owed to her, and a ruling on the case is due.

C. The Committee's conclusions

926. *The Committee recalls that the complainant organization in the present case had alleged numerous dismissals of trade union leaders and members, as well as the exclusion of trade unions from the collective bargaining process in a number of public institutions and state enterprises. At its meeting in November 2008, the Committee made a number of interim recommendations.*

Recommendation (a)

927. *At its meeting in November 2008, the Committee requested the Government to inform it whether the Workers' and Employees' Union of the Nicaraguan Social Security Institute (STEINSS) had been consulted about the restructuring which took place and which allegedly prejudiced ten trade union officials and 48 members. In this respect, the Committee notes that: (1) on 14 February 2007 the executive board of the INSS met and approved the new organizational structure; (2) the changes had been approved by the Public Service Directorate (the body responsible for authorizing restructuring in state institutions); (3) these organizational changes and restructuring in the Institute had been authorized in advance by the Institute's executive board, which includes two representatives of the State, two workers' representatives elected by workers' organizations, and two employers' representatives; and (4) before terminating the employment contracts of the workers named in the complaint, the Institute had obtained the approval of its highest executive body. Taking this information into account, and given that consultations did take place, the Committee will not pursue its examination of this allegation.*

928. *The Committee also requested the Government to inform it of the outcome of the judicial proceedings in connection with the dismissals of trade union officials and members who did not withdraw their legal actions. The Committee notes the Government's information according to which the legal proceedings involving, among others, Mr Alvin Alaniz González and Mr Sergio Juan Quiroz, are at the stage of receiving evidence. Under these circumstances, the Committee expects that the current legal proceedings will be concluded in the very near future, and requests the Government to keep it informed of the final outcome.*

Recommendation (b)

929. *The Committee requests the Government to inform it of the result of the judicial process under way in connection with the dismissal of the trade union official Mr Fidel Castillo Lago, Minutes Secretary of the Genaro Lazo Union of the Nicaraguan Aqueduct and Sewer Company of Estelí (ENACAL-Estelí). The Committee notes the Government's information that: (1) on 2 October 2007, the local civil and labour judge ordered the reinstatement of Mr Fidel Castillo Lago, citing among other reasons the fact that he enjoyed trade union immunity at the time of his dismissal, which was not, therefore, in keeping with his position as a member of the union's executive body; (2) the company appealed against that ruling and, on 18 December 2007, the civil and labour division of the Estelí appeals court upheld the local court's ruling; (3) the company decided to avail itself of its right under section 46, paragraph 2, of the Labour Code and implement the double compensation payment; and (4) in February 2008, Mr Fidel Castillo Lago was informed that a cheque had been made out in his name but he has, to date, not collected it.*

930. *The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures, and that this protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions, and that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can, in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 791 and 799]. Under these circumstances, the Committee, taking into account these principles, and noting that the judicial authority has ordered the reinstatement of the union official Mr Fidel Castillo Lagos, that his dismissal was not in keeping with his position as a union official, and also that according to the Government the union official in question has not collected the compensation, the Committee urges the Government to make every effort to bring about talks between the parties in order to obtain the reinstatement ordered by the judicial authority and that the indemnity already paid to Mr Lagos be taken into account in this regard.*

931. *In addition the Committee requested the Government to send its observations on the alleged dismissals of 15 other union members. The Committee notes the Government's statements to the effect that it does not know who these 15 members are, since no details have been provided. In these circumstances, and as the Government had requested in its previous reply, the Committee requests the complainant organization to communicate the names of the 15 allegedly dismissed members of the Genaro Lazo Union, so that the Government can send its own observations.*

Recommendation (c)

932. *As regards the allegations concerning the dismissal of eight officials of the Eastern Services Territorial Unit Workers' Union (UTSO), nine officials of the ENACAL-Granada Workers' Departmental Democratic Union, and five officials of the ENACAL-Carazo Workers' Departmental Democratic Union, the Committee requested the Government: (1) to take measures, including of a legislative character if necessary, so that, in future, a body independent of the parties, and in which they have confidence, would be responsible for declaring a strike illegal; (2) to inform it more precisely concerning the legal requirements that the organizations did not respect and which led to the strike being*

declared illegal and the subsequent dismissal of the trade union officials, in order to be able to pronounce itself in full knowledge of the facts; and (3) to inform it of the results of the legal claims filed by certain ENACAL-Granada and ENACAL-Carazo workers. In this regard, the Committee requested the Government to inform it whether the trade union officials mentioned by name by the complainant organization had initiated legal actions relating to their dismissal.

933. *In this regard, the Committee notes that the Government reiterates the observations sent at the time in relation to these allegations, and that the Government adds that the complainant organization does not indicate which of the union members have initiated legal actions in relation to the dispute at the Nicaraguan Aqueduct and Sewer Company (ENACAL). The Committee recalls that, when it examined these allegations at its meeting in November 2008, it noted that "on 7 June 2007, certain ENACAL-Granada workers filed a claim for reinstatement in the District Civil and Industrial Court in the department of Granada" and that "on 11 June 2007, ENACAL-Carazo workers filed a legal appeal in Jinotepe" [351st Report, para. 1090]. Under these circumstances, the Committee reiterates the recommendations it made at the time including those concerning the declaration of a strike to be illegal, and urges the Government to send the information requested without delay.*

Recommendation (d)

934. *The Committee requested the Government to confirm that all the five trade union officials and 25 members of the ENACAL-DAR Democratic Trade Union who had been dismissed had not initiated legal actions. In this regard, the Committee notes the Government's statements to the effect that it has no knowledge of any notice of legal action filed by the trade union officials or members in question against the Nicaraguan Aqueduct and Sewer Company (ENACAL).*

Recommendation (e)

935. *The Committee requested the Government to indicate whether legal actions had commenced in connection with the alleged dismissal of Mr Kester Giovanni Bermúdez, official of the Independent ENACAL Workers' Union, Chontales Department, and eight other workers of the Nicaraguan Aqueduct and Sewer Company of Juigalpa. The Committee notes that according to the Government, it has no information on any legal action in this regard. Taking this information into account, the Committee will not continue its examination of these allegations unless the complainant organization provides additional information on any legal actions that may have been initiated.*

Recommendation (f)

936. *The Committee requested the Government to inform it whether by virtue of the decision of the Inspectorate General of Labour, reported by the Government, the trade union official Ms Maura de Jesús Vivas Ramos had been reinstated in her post in the DGI with payment of wages due. In this regard, the Committee notes the Government's information that following the decision of the Inspectorate-General, Ms Maura de Jesús Vivas Ramos initiated legal action for reinstatement and a ruling in the case is due. Under these circumstances, the Committee expects that the judicial authority concerned will hand down a ruling in the near future, and requests the Government to keep it informed of the final outcome of these proceedings.*

The Committee's recommendations

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

(a) As regards the allegation concerning the dismissal of union officials and members of the Workers' and Employees' Union of the INSS, the Committee expects that the current legal actions initiated by some of these officials and members will be concluded in the near future, and requests the Government to keep it informed of the final outcome of these legal actions.

(b) The Committee urges the Government to make every effort to bring about talks between the parties with a view to the reinstatement, ordered by the judicial authority, of Mr Fidel Castillo Lagos, Minutes Secretary of the Genaro Lazo Union of the Nicaraguan Aqueduct and Sewer Company of Estelí (ENACAL–Estelí) and that the indemnity already paid to Mr Lagos be taken into account in this regard. The Committee also requests the complainant organization to send the names of the other 15 members allegedly dismissed, as requested by the Government in its previous reply, so that the Government can send its observations.

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

(d) The Committee expects that the judicial authority that examines the legal action for reinstatement initiated by the trade union official Ms Maura de Jesús Vivas Ramos, who was dismissed from the Directorate-General of Revenues, will give its ruling in the near future, and requests the Government to keep it informed of the final outcome of these proceedings.

CASE NO. 2682

DEFINITIVE REPORT

Complaint against the Government of Panama presented by the National Council of Organized Workers of Panama (CONATO)

Allegations: Delays in granting of legal personality to a trade union in the public healthcare sector

938. The complaint is contained in a communication sent by the National Council of Organized Workers of Panama (CONATO), dated 13 October 2008. The Government submitted its observations in a communication dated 26 March 2009.

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

A. The complainant's allegations

940. In its communication dated 13 October 2008, CONATO alleges that, in January 2007, the National Association of Occupational Health Workers (ANATSO) filed an application with the Ministry of Government and Justice for legal personality, which had not been granted at the time the complaint was presented.

941. CONATO states that on 21 May 2007, the Ministry of Government and Justice ordered the union to amend its statutes, drawn up in January 2007, which the applicants did. On 11 July 2007, the amendments were submitted to the Ministry of Government and Justice. On 24 September 2007, the same amendments had to be resubmitted, together with new amendments requested by the Ministry, because the Ministry of Government and Justice "had misplaced them". On 9 April 2008, the Ministry of Government and Justice once again requested amendments to the draft statutes. On 14 April 2008, these amendments were submitted to the Ministry. On 22 May 2008, however, the Ministry of Government and Justice requested further amendments to the draft statutes, to conform with the observations of the Social Insurance Fund (CSS), which the Ministry of Government and Justice had consulted regarding the content of the statutes, and which had submitted its observations on 2 April 2008 (in other words, on 9 April the Ministry of Government and Justice had been aware of the CSS's observations, but had not included them in the observations which it requested on that date).

942. According to CONATO, most of the observations and requests for amendments by the CSS, which the Ministry of Government and Justice asked the union to carry out in May 2008, had already been incorporated.

943. CONATO cites Article 2 of Convention No. 87 relating to the freedom to establish trade union organizations without interference from the public authorities, and highlights the constant requests for amendments and the negligence of the authorities which, in its opinion, resulted in a violation of freedom of association.

B. The Government's reply

944. In its communication dated 26 March 2009, the Government states that, in a decision dated 9 March 2009, the Ministry of Government and Justice granted legal personality to ANATSO. The Government encloses a copy of the decision, which states that the trade union had welcomed the observations and recommendations made in relation to its statutes, and that the documentation submitted was in compliance with the applicable legislation.

945. Lastly, the Government considers that the complaint presented by CONATO is now groundless.

C. The Committee's conclusions

946. *The Committee observes that in the present complaint, the complainant organization alleges a delay of more than two years in the granting of legal personality, due to successive requests for amendments to the union's statutes by the Ministry of Government and Justice (the complainant organization encloses the relevant documentation and stresses that some of the amendments concerned points on which no objections had previously been raised) and the negligence of the authorities, who even requested amendments that had already been made.*

947. *The Committee notes with interest the Government's statement that ANATSO was granted legal personality on 9 March 2009. However, the Committee regrets the excessive delay in processing the application, given that the request for legal personality was first submitted in January 2007.*

948. *The Committee also observes that this delay was partly due to the fact that the Ministry of Government and Justice sent the ANATSO statutes to the CSS, so that it could offer its observations, which the Committee considers to be contrary to the principle that employers or their organizations should not be involved in the procedure for granting legal personality to trade unions. The Committee requests the Government to refrain in the future from asking an employer to provide observations concerning the statutes of a trade union which the workers have decided to establish.*

949. *Lastly, the Committee requests the Government to ensure in the future that applications for legal personality are handled rapidly and without undue delays in regard to amendments which need to be made to statutes to ensure compliance with the applicable legislation.*

The Committee's recommendations

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

(a) Regretting the excessive delay in the granting of legal personality to ANATSO, the Committee requests the Government to ensure in future that applications for legal personality filed by trade unions are handled rapidly and without undue delays.

(b) The Committee requests the Government to ensure in future that, when trade unions apply to the authorities for legal personality, the latter do not ask employers or their organizations for their observations.

CASE NO. 2648

INTERIM REPORT

Complaint against the Government of Paraguay presented by
— the Trade Union of Workers and Employees of Cañas Paraguayas SA (SOECAPASA)
— the General Confederation of Workers (CGT)
— the Trade Union Confederation of Workers of Paraguay (CESITEP) and
— the Paraguayan Confederation of Workers (CPT)

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

951. The complaint is contained in a communication from the Trade Union of Workers and Employees of Cañas Paraguayas SA (SOECAPASA), the Trade Union Confederation of Workers of Paraguay (CESITEP), the General Confederation of Workers (CGT) and the Paraguayan Confederation of Workers (CPT) dated 28 May 2008.

952. The Government sent its observations in a communication dated 19 June 2009.

953. Paraguay has ratified the Freedom of Association and the 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

954. In their communication of 28 May 2008, SOECAPASA, CGT, CESITEP and CPT state that the enterprise Cañas Paraguayas SA (CAPASA) has committed serious infringements of freedom of association. According to the complainants, the alleged acts date from July 2007, when a number of union members were dismissed, including four who enjoyed security of employment by virtue of their trade union status. The General Secretary of the union, Mr Gustavo Acosta, was subsequently transferred.

955. The complainants add that although two of the union officials dismissed (Antolín Noguera and Erwin Alamada) obtained a court injunction ordering their reinstatement, the employer has high-handedly disregarded this in a manner that shows contempt for duly constituted authorities. The complainants also state that they have made their complaints known to all the competent authorities but have received no reply. The competent ministry convened a tripartite meeting which was attended by all the parties, but no agreement was reached because the employer had no wish whatsoever to resolve the problem.

956. The complainants also allege that in addition to the anti-union acts referred to, there have been instances of verbal and physical assault suffered by one woman member, Juana Erenio Penayo, at the hands of the manager of the operational recruitment department. The CAPASA is in a critical situation. It has some 400 employees, which makes its operating costs very high in relation to its production, and because of this there have been peaceful demonstrations during break periods aimed at drawing public attention to the company's situation. This is what has prompted the company to carry out mass transfers of workers including some who enjoy trade union protection.

B. The Government's reply

957. In its communication of June 2009, the Government states that CAPASA informed two workers, Antolín Noguera and Erwin Alamada, that they had been reinstated and an agreement to that effect had been signed. The company notes that in view of the company's critical economic and financial situation, which had been exacerbated by the hiring of new workers by the previous management, the new management was now obliged to carry out restructuring and lay off a number of employees who did not have a specific function. All of this was in accordance with current labour legislation. Lastly, the company indicates that since 9 July 2008, when the new management took over, no new hiring has taken place.

C. The Committee's conclusions

958. *The Committee notes that in the present case, the complainant organizations allege various acts of anti-union discrimination at the CAPASA. Specifically, they allege the dismissal of four trade union officials (in relation to which the judicial authority is said to have ordered reinstatement which was not implemented), the transfer of Mr Gustavo Acosta, General Secretary of SOECAPASA, and the mass transfer of workers following peaceful demonstrations held to inform the general public of the company's situation, as well as physical assaults against one woman worker, Ms Juana Erenio Penayo de Sanabria, by a company manager (the complainant organization supplies a copy of the complaint lodged with the national police).*

959. *The Committee notes that according to the Government, the company has reported that: (1) Antolín Noguera and Erwin Alamada have been reinstated and an agreement to that effect has been signed; (2) in the light of the company's critical economic and financial situation, which was exacerbated by the hiring of new staff by the previous management, the new management has been obliged to carry out restructuring, laying off employees without a specific function; all of this is consistent with current labour legislation and regulations; and (3) since 9 July 2008, when the new management took over, there has been no new hiring.*

960. *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 and that protection against anti-union discrimination should apply more particularly in respect of acts calculated to 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 employer's consent, during working hours [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, paras 771 and 780]. Under these circumstances, the Committee requests the Government to take the necessary steps to initiate an investigation without delay into the alleged dismissals of other trade union officials, the transfer of SOECAPASA General Secretary, Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations carried out in order to inform the general public of the company's situation and further requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention and sanctioning of anti-union discrimination.*

961. *The Committee also requests the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police regarding the physical assault against Juana Erenio Penayo.*

962. *Lastly, the Committee requests the Government to ensure respect for the principle that processes of rationalization and staff reduction should involve consultations or attempts to reach agreement with the trade union organizations concerned.*

The Committee's recommendations

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

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

(b) ***The Committee requests the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against Juana Erenio Penayo.***

CASE NO. 2596

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 that: (1) the Manuel Polo Jiménez FAP School applied for the dissolution of the Manuel Polo Jiménez FAP School Single Union of Workers (SINPOL); refuses to engage in collective bargaining with the union or operate the payroll check-off facility; and dismissed the union's general secretary, Ms Nelly Palomino Pacchioni; (2) the La Pampilla SA oil refinery (RELAPASA) dismissed Mr Pedro Germán Murgueytio Vásquez, former general secretary of the Refinería La Pampilla SA Single Union of Workers and current general secretary of the Single National Federation of Petroleum, Energy and Allied Workers of Peru (FENUPETROL); (3) the BBVA Continental Bank dismissed the external secretary of the BBVA Continental Bank Federated Union of Employees, Mr Luis Afocx Romo, and a union member, Mr Rafael Saavedra Marina; (4) the Agroindustrias San Jacinto SA company dismissed the social assistance secretary of the Agroindustrias San Jacinto SA Single Union of Workers

964. The Committee last examined this complaint at its March 2009 meeting [see 353rd Report, paras 1143–1176, approved by the Governing Body in its 304th Session].

965. The Government sent its observations in communications dated 25 February, 17 April and 11 May and 2 November 2009.

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

A. Previous examination of the case

967. At its meeting in March 2009, the Committee made the following recommendations [see 353rd Report, para. 1176]:

(a) The Committee requests the Government to launch an investigation without delay into the dismissal of Ms Nelly Palomino Pacchioni, general secretary of the SINPOL, and, if the dismissal proves to have been on anti-union grounds, to take steps to ensure that the union leader is reinstated in her post without delay and her outstanding wages are paid. The Committee requests the Government to keep it informed in this regard and to inform it of the final outcome of the judicial application for the dissolution of SINPOL in progress in Labour Court No. 18.

(b) The Committee requests the Government to send its observations without delay with regard to: (1) the dismissal of Mr Pedro Germán Murgueytio Vásquez, former general secretary of the Refinería La Pampilla SA Single Union of Workers and current general secretary of the FENUPETROL; (2) the dismissal of Mr Luis Afocx Romo, external secretary of the BBVA Continental Bank Federated Union of Employees, and Mr Rafael Saavedra Marina, a union member; (3) the dismissal of the social assistance secretary of the Agroindustrias San Jacinto SA Single Union of Workers in connection with which the judicial authority ordered the worker's reinstatement (Mr Pedro Gutiérrez Ramirez) but the order was not implemented because of an appeal lodged by the company.

B. The Government's reply

968. In its communication of 17 April 2009, the Government states that by a ruling of Labour Court 6 in the Case 2006-241, Mr Pedro Gutiérrez Ramírez was reinstated at the enterprise Agroindustrias San Jacinto SA on 27 May 2008, in the same post as before his dismissal. The Government adds that this information has been corroborated by the General Confederation of Workers of Peru (CGTP) in communication No. 150-2009-SD/CGTP dated 14 May 2009.

969. In its communications of 25 February and 11 May 2009, the Government reiterates the information transmitted previously, and indicates that: (1) concerning the situation of the general secretary of the Manuel Polo Jiménez FAP School Single Union of Workers (SINPOL), proceedings to overturn the dismissal have been initiated by Ms Nelly Palomino Pacchioni in the Sixth Labour Court of Lima under file 183406-2007-00476-0; and (2) with regard to the issue of the registration of SINPOL, it is advisable to await the ruling that will be handed down regarding the union's registration, as that will determine the legal basis, if any, of the claims that have been made; the case in question is being heard before Labour Court 18 (file 183418-2007-0235-0).

970. In its communication of 2 November 2009, the Government states that the process concerning the dismissal of trade union leader Ms Palomino Pacchioni is still pending and that three courts have dismissed: (1) actions brought by trade unionists Mr Murgueytio and Luis Afocx against their dismissal for the commission of serious offences against their enterprise; and (2) actions brought by trade unionist Rafael Saavedra for violation of due process (rejecting three actions brought by this trade unionist). The Government sent these cases.

C. The Committee's conclusions

971. *The Committee recalls that when it examined this case at its meeting in March 2009, it requested the Government to launch an investigation without delay into the dismissal of Ms Nelly Palomino Pacchioni, general secretary of SINPOL, and, if the dismissal proved to have been on anti-union grounds, to take steps to ensure that she was reinstated in her post without delay and her outstanding wages paid, to keep it informed in that regard and to inform it of the final outcome of the judicial application for the dissolution of SINPOL in progress in Labour Court 18. Furthermore, the Committee requested the Government to send its observations without delay with regard to (1) the dismissal of Mr Pedro Germán Murgueytio Vásquez, former general secretary of the Refinería La Pampilla SA Single*

Union of Workers and current general secretary of the Single National Federation of Petroleum, Energy and Allied Workers of Peru (FENUPETROL); (2) the dismissal of Mr Luis Afocx Romo, external secretary of the BBVA Continental Bank Federated Union of Employees and of Mr Rafael Saavedra Marina, a union member; (3) the dismissal of the social assistance secretary of the Agroindustrias San Jacinto SA Single Union of Workers, Mr Pedro Gutiérrez Ramírez, in connection with which the judicial authority ordered the worker's reinstatement but the order was not implemented because of an appeal lodged by the company.

972. *As regards the allegations concerning the dismissal on 26 October 2007 of the general secretary of SINPOL, Ms Nelly Palomino Pacchioni, the Committee notes the Government's statements to the effect that the union officer in question initiated proceedings to overturn the dismissal, which are in progress before Labour Court 6 of Lima. In this regard, the Committee hopes that the judicial authority will hand down a ruling in the near future, and again requests the Government, if the dismissal is shown to have been for anti-union reasons, to take the necessary steps to ensure that she is reinstated in her post. The Committee requests the Government to inform it of the outcome of the judicial proceedings currently under way.*

973. *As regards the allegation concerning the dissolution of SINPOL, in relation to which the Committee had noted that judicial proceedings were under way, the Committee notes the Government's statement to the effect that it is advisable to await the ruling that will be handed down in the proceedings currently under way in Labour Court 18. The Committee hopes that the judicial authority will give its ruling in the near future, and requests the Government to inform it of the final outcome of the proceedings.*

974. *As regards the allegation concerning the dismissal of the social assistance secretary of the Agroindustrias San Jacinto SA Single Union of Workers, Mr Pedro Gutiérrez Ramírez, with regard to which the judicial authority ordered his reinstatement, which was appealed by the company, the Committee takes due note of the Government's statements to the effect that, pursuant to the ruling of Labour Court 6, Mr Pedro Gutiérrez Ramírez was reinstated at the company on 27 May 2008, a fact that has been corroborated by the General Confederation of Workers of Peru.*

975. *Lastly, the Committee notes the observations of the Government concerning: (1) the dismissal of Mr Pedro Germán Murgueytio Vásquez, former general secretary of the Refinería La Pampilla SA Single Union of Workers and current general secretary of FENUPETROL; and (2) the dismissal of Mr Luis Afocx Romo, the external secretary of the BBVA Continental Bank Federated Union of Employees, and of Mr Rafael Saavedra Marina, a union member. The Committee notes that the judicial authority dismissed the three appeals filed.*

The Committee's recommendations

976. ***In view of the foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) ***The Committee requests the Government to inform it of the final outcome of the judicial proceedings to overturn the dismissal initiated by the general secretary of SINPOL, Ms Nelly Palomino Pacchioni, and, if her dismissal is found to have been for anti-union reasons, to take the necessary steps to ensure her reinstatement.***

(b) ***The Committee hopes that the judicial authority will hand down a ruling in the near future on the judicial proceedings in connection with the dissolution of SINPOL, and requests the Government to inform it of the outcome of those proceedings.***

CASE NO. 2639

INTERIM REPORT

Complaint against the Government of Peru presented by the Federation of Peruvian Light and Power Workers (FTLFP)

Allegation: Interference by the budgetary authorities in the collective bargaining process of state enterprises

977. The complaint is contained in a communication by the Federation of Peruvian Light and Power Workers (FTLFP) of 15 April 2008. This organization provided new allegations in a communication of 3 November 2008. The Government sent its observations in communications of 24 February and 30 October 2009.

978. 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

979. In its communication of 15 April 2008, the FTLFP explains that the collective bargaining carried out by its affiliated unions with the relevant state-owned electricity companies is covered by the private employment regime and is therefore governed by the principle of party autonomy, which means that negotiations should not be subject to any state interference or intervention. Nevertheless, since its establishment in 1999, the National Fund for Financing State Enterprise Activity (FONAFE) has been actively participating in collective bargaining processes. The complainant organization alleges in particular that FONAFE Circular No. 009 of 27 February 2008 sets out the following guidelines for collective bargaining in enterprises under the auspices of FONAFE:

– The board of directors or manager of the enterprise shall, by means of the relevant document, appoint the members of the bargaining committee representing the enterprise (hereinafter "the bargaining committee") and set out the parameters on the basis of which negotiations must be carried out with union representatives. These parameters must be in strict compliance with the legal framework currently in force.

– Prior to the conclusion of a collective agreement, the bargaining committee shall present a report to the general management of the enterprise, containing an assessment of the proposals made by the union representatives. On the basis of this report, the bargaining committee is required to make a final bargaining proposal, which has to be approved by the board of directors or general management of the enterprise for presentation to union representatives.

– Once the collective bargaining process has been completed, the bargaining committee shall, in a written report, substantiate and demonstrate compliance with the parameters that were set for it. This report must be submitted to the social body that set the parameters, which in turn must send a copy to FONAFE for reference.

980. Furthermore, as part of its regulatory activities, FONAFE has set up mechanisms that restrict the right of workers to bargain freely and also affect the content of negotiations. Thus, "remuneration policies" were introduced by Executive Board Decision No. 002-2003/DE-FONAFE of 22 January 2003, to be applied in some state-owned enterprises, including with regard to members of the FTLFP-affiliated unions in the enterprises EGESUR SA, EGEMSA, the South-West Electricity Company S.A. (Seal SA), Electro Sur Este SAA and Electrosur SA. Likewise, Executive Board Decisions Nos 047-2002/DE-FONAFE (with regard to the electricity-generating enterprise San Gabán SA) and 033-2002/DE-FONAFE (with regard to the enterprises EGECEN SA, Electro Ucayali SA, EGASA and Electro Oriente SA) were adopted and implemented for the same purpose. The regulations in question, which are supported by non-existent powers conferred upon FONAFE, set pay ceilings which are applicable to the workers from the enterprises that are involved in collective bargaining.

981. For example, the complainant organization adds that, in the negotiation and adoption of the collective agreements for the 2007 period, signed by its first-level trade unions and the enterprises Seal SA and Electro Sur SA, the pay ceilings imposed by FONAFE in Executive Board Decision No. 002-2003/DE-FONAFE were applied, which was a violation of the principle of collective autonomy, especially as these collective agreements provide that, for the period in question, the workers involved in this process would not receive a pay increase.

982. In its communication of 3 November 2008, the complainant organization refers to the case of the enterprise Electro Sur Medio SAA, in which two of its affiliated first-level trade unions, the Single Trade Union of Workers and Employees of Electro Sur Medio SAA of Ica and Nazca and Allied Workers and the Single Trade Union of Workers of Electricidad Regional Sur Medio SAA of Pisco and Chincha, operate and, at the time of the complaint, were negotiating the lists of demands for 2007–08 and 2008–09. The complainant organization states that, on 22 September 2008, the abovementioned unions contacted the enterprise Electro Sur Medio SAA and the Ica regional labour authorities about the decision by members to launch an indefinite nationwide strike, which had been agreed upon largely because of the refusal by the enterprise Electro Sur Medio SAA to settle the list of demands for the period 2007–08.

983. The unions reached the decision to go on strike on 9 and 11 September, at assemblies convened and organized by the relevant executive bodies, in accordance with the rules set out in the internal trade union regulations and in the Collective Labour Relations Act.

984. Nevertheless, in a letter of 23 September 2008, in response to the notice of strike action and in blatant disregard of the right to collective freedom of association, the enterprise Electro Sur Medio SAA stated: "We have taken note of your undated communication giving notice of your decision, demonstrated in your minutes of the assemblies of 9 and 11 September, to launch an indefinite general strike from midnight on 7 October 2008. During those assemblies, it would seem that your partners made their decision without knowing that, on 18 September, you were called to our head office in order to be informed that we have accepted your latest comprehensive pay proposal, with the sole proviso being agreement to the union leave limits set by law, which is reasonable in the light of this enterprise's needs in an extremely difficult economic situation".

985. The employer thus accuses the two unions of having held the general assemblies of workers and of having taken strike action without informing union members of the employer's proposal to increase pay so long as union officials involved in collective bargaining relinquished their ability to take union leave at any time, as is provided for in the collective agreements concluded with the enterprise; this clearly is a blatant interference in union activities, protection against which is provided under Article 2 of ILO Convention No. 98. This interference is especially grave considering, as is explained below, that the enterprise Electro Sur Medio SAA is seeking to make the relinquishment of union officials' right to take union leave at any time a condition for settling the list of demands relating to the collective bargaining for 2007–08, which is also a violation of freedom of association.

986. The complainant organization notes that, in another paragraph of the letter, the legal representative of Electro Sur Medio SAA stated that: "Apparently, taking into account that the agreements were reached at the assemblies of 9 and 11 September 2008, the workers were unaware that your latest demand for a pay rise was accepted by the enterprise on 18 September. We therefore find it particularly remarkable that the workers want to launch an indefinite strike simply for a trade union benefit that will in no way affect free trade union activity, which we have always respected".

987. It should be noted in this regard that, pursuant to section 32 of the Collective Labour Relations Act No. 25593, which is now part of the amended consolidated text approved by Supreme Decree No. 010-2003-TR, union leave over and above the legal minimum of 30 calendar days, as provided for by the Act, must be respected, unless, in this specific case, the parties in the enterprise Electro Sur Medio SAA agree to amend the collective agreement that gave rise to the trade union leave entitlements. In this regard, the refusal of the abovementioned unions to negotiate and surrender the right to take union leave at any time, which is recognized under the collective agreements reached with Electro Sur Medio SAA, cannot be used as a condition for and an obstacle to settling the list of demands for the period 2007–08. In particular, Electro Sur Medio SAA proposes, as a condition for increasing pay and settling the dispute, that recognized entitlements to take union leave at any time should be limited to the number of leave days set by law (30 days per year), as referenced in section 32 of the Collective Labour Relations Act.

B. The Government's reply

988. In its communication of 24 February 2009, the Government sends the observations of FONAFE with regard to the complaint, which are set out below.

989. First, the complainant federation indicates that state enterprises are covered by the private labour regime and should therefore not be subject to state intervention, even though these enterprises are predominantly funded by the State. In this regard, with respect to state enterprises, the State is not only the provider of capital, but it is also the employer, and as such enjoys the same privileges as any private employer that conducts its bargaining strategies autonomously and freely, within the limitations imposed by the general rules of public policy and the budget for its enterprise. It should also be noted that, in accordance with section 1 of the amended consolidated text of the Collective Labour Relations Act (Decree No. 010-2003-TR), the employees of state bodies and enterprises that fall within the scope of the State's business activities are subject to that body of regulations in so far as its provisions are not contrary to specific regulations that restrict the benefits the State provides for its employees. In other words, a supplementary application of the body of regulations in question is proposed for when there are specific regulations that could restrict some of the rights it contains, such as the right to collective bargaining. Accordingly, the National Fund for Financing State Enterprise Activity Act (Act No. 27170, hereinafter "the FONAFE Act") and the General National Budget System Act

(Act No. 28411) are special regulations that restrict the application of the amended consolidated text of the Collective Labour Relations Act, as is explained below.

990. Second, the Federation indicates that FONAFE's role is limited to aspects of state enterprise management, i.e. the approval of the budget and administrative regulations. It further indicates that FONAFE does not have the right to intervene in and oversee collective bargaining procedures in each of the enterprises. In this regard, FONAFE is not merely a holder of shares representing the social capital of state-owned enterprises; quite the contrary, FONAFE carries out a positive and key role with regard to the overall budgetary procedures of state enterprises by exercising the regulatory and supervisory powers recognized by law. In this respect, FONAFE regulates state enterprise activity, in accordance with Chapter VI of the General Act on the National Budget System (No. 28411), which states in its paragraph 52.4:

> 52.4. The National Fund for Financing State Enterprise Activity (FONAFE) and the enterprises under its auspices plan and formulate their budgets on the basis of the guidelines issued by this body, within the framework of rules of stability that are based on the macroeconomic projections set out in section 4 of the Fiscal Responsibility and Transparency Act.

991. Furthermore, the General Act on the National Budget System (No. 28411), in its fourth transitional provision, states:

> 3. The National Fund for Financing State Enterprise Activity (FONAFE), by agreement of its board, approves the pay scales of FONAFE and its enterprises and sets regulations, within its sphere of competence, on wages and other employment benefits. In enterprises that are involved in state enterprise activity but are not under the auspices of FONAFE, any decisions to increase, adjust or grant new benefits are approved by Supreme Decree endorsed by the Minister of Economy and Finance.

992. In this regard, in accordance with section 1 of the amended consolidated text of the Collective Labour Relations Act and the laws mentioned in this text, FONAFE may and must intervene in the remuneration policy of its enterprises by setting limits and guidelines, and there should be no perception that this intervention is interference in collective bargaining.

993. Additionally, it is important to note that the legally established responsibilities of FONAFE, as the governing body of the state enterprises' budgetary policy, and specifically the regulatory powers conferred upon it with regard to the scales and composition of pay received by the employees of these enterprises, do not reflect an intention to secure a more advantageous position for the State, but are based on the principle of state enterprise activity as follows:

> Unlike individuals who operate state or industrial enterprises for profit-making purposes, the Government does so in order to meet a public need. The resources that an enterprise has at its disposal are not owned by that enterprise; they are simply resources that form part of the assets "earmarked" for compliance with the objectives of the body, which is state-owned.

994. Accordingly, FONAFE's actions through its guidelines set a pay ceiling (which is aligned with the budget for state enterprises), with a view to achieving the country's development through a policy of austerity. Their aim is to establish reasonable salaries that are commensurate with the activity performed by each worker and clearly in line with the enterprise's budget (which is aligned with the operative and strategic plans of the enterprise).

995. Third, the complainant federation states that FONAFE's action constitutes illegal interference in collective bargaining as follows:

– In the membership of the employer’s negotiating committee. This is incorrect, because each of the enterprises appoints its own staff and it is with the enterprise and not with FONAFE that workers have their employment relationship. FONAFE is not involved in the appointment process.

– In the development of economic proposals, though FONAFE is not involved in the creation of these proposals. Given that FONAFE is only involved in approving the overall budget of the enterprises under its auspices, and in accordance with the guidelines that have been issued for this purpose (available at www.fonafe.gob.pe), the aim of this approval process is to draw up a budget with parameters that are comprehensive or general in scope, placing general pay ceilings on the total expenditure that can be disbursed by the enterprise, including on staff overheads (total staff costs), with each enterprise having full authority and discretion with regard to the implementation of its internal wage policy and labour contingency payments. Thus, it is the responsibility of the enterprise to set its own specific budget for each worker, covering any labour contingencies that it may have to address.

996. In this regard, FONAFE, as the governing body of state enterprise activity, acts in accordance with its legally conferred powers to provide non-specific but supplementary guidelines for negotiations between the enterprises under its auspices and their workers. As previously mentioned, the State, like any employer, is entitled to give instructions to the members of the bargaining committees on the enterprise side, through FONAFE guidelines or communications, on the parameters they should use to shape collective bargaining proposals. These proposals should also respect the budgetary constraints provided by law.

997. The complainant federation states that FONAFE interfered in collective bargaining through Circular No. 009-2008/DE-FONAFE and violated the right to negotiate freely – even affecting the bargaining content – through Executive Board Decision No. 002-2003/DE-FONAFE of 22 January 2003. In this regard, FONAFE categorically denies that it was interfering in the collective bargaining process through the abovementioned circular, as the circular makes reference only to the general regulations that are in force and to a general procedure relating to the organization of employer representatives, and at no time has there been any participation by FONAFE or any suggestion of its participation in the employment relationship or in the related collective bargaining. Ultimately, FONAFE requests only that it be informed of the outcome. In addition, it should be noted that in the same circular, FONAFE expressly stated that:

> ... it must be emphasized that under no circumstances shall FONAFE interfere or participate in the collective bargaining process held between the enterprises under its auspices and their respective unions.

998. In this regard, Article 2(2) of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), states:

> In particular, acts which are designed to promote the establishment of workers’ organisations under the domination of employers or employers’ organisations, or to support workers’ organisations by financial or other means, with the object of placing such organisations under the control of employers or employers’ organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

999. In this regard, FONAFE has at no time sought to promote the establishment of employers’ or workers’ organizations in order to control them; it has solely acted in accordance with the powers conferred upon it by law, with the objective of ensuring that, in the collective bargaining process, the budget constraints set with regard to workers’ pay are met, in order to ensure that public welfare takes precedence over individual welfare.

1000. According to the complainant, FONAFE sets pay ceilings and guidelines using a non-existent power and does not have the right to participate directly in collective bargaining. In this respect, as mandated by Act No. 27170 providing for its establishment, FONAFE directs, approves, regulates and supervises facets of both the budget and the efficient management of the enterprises under its auspices. Thus, it has the authority to issue guidelines and communications in this regard, which must be implemented by the enterprises, as well as communications that seek simply to align the enterprises to a budgetary point of view; these constraints are general and not specifically defined, and there are no references to the labour relations of each enterprise. Furthermore, it should be taken into account that the aim of the guidelines is to comply with the budgetary policy for state enterprises with regard to pay; as mentioned above, the objective is not to build up the State's assets, but rather to serve the public good, avoid excessive expenditure and reinvest the proceeds for the good of society.

1001. The Government also provides in its communication of 24 February 2009 a report by the Office of the Legal Adviser of the Ministry of Labour, endorsed by the Director-General of that Office, citing a distinguished Professor Neves, who explains that collective agreements have a regulatory status that is inferior to state regulations. He adds, however, that "as collective autonomy is guaranteed by the Constitution, the law cannot establish constraints that undermine it". Therefore, it must be ascertained in each case which limitations apply to collective bargaining, and which do not. Legal regulations of relative inviolability set upper limits that cannot be exceeded when exercising private autonomy, while inviolable legal regulations totally exclude the exercise of private autonomy. National and comparative experience shows that both types of regulations have been issued as part of the framework of the stabilization programmes designed to curb the inflationary effects of a situation of economic crisis. In such cases, there is a clash between two constitutional values: the quality of life of the population on the one hand, and collective autonomy on the other. Thus, neither value takes absolute precedence over the other. The report of the Office of the Legal Adviser of the Ministry of Labour then sets out the principles of the Committee on Freedom of Association with regard to collective bargaining and adds that the available doctrine (Dolorier) on the matter maintains that the Committee on Freedom of Association's position with regard to state intervention in collective bargaining distinguishes between two sets of circumstances:

– In normal situations, the social partners have full freedom to exercise the right to collective bargaining. However, for considerations of general interest, they may voluntarily limit their bargaining expectations. In such cases, the Committee recommends that the Government bring together the bargaining parties, set procedures for institutionalized discussions or even legally challenge collective agreements. These mechanisms constitute a preventive measure against any potential undesirable effects that the agreements might have on the national economy.

– In serious crisis situations that require quick and effective action, the Committee considers that States have an obligation to intervene in order to find a solution, even if this means a total restriction of the right to collective bargaining.

1002. For all these reasons, the Office of the Legal Adviser concludes that:

– In the case presented by the FTLFP, a restriction was placed on the pay-related content of the collective bargaining process, violating the essence of this constitutional right, as the restriction was allegedly imposed unilaterally and permanently, without prior consultations with the workers' representatives, and without the considerations of general interest being explained to the workers with a view to reaching some kind of agreement.

1003. Consequently, in its communication of 30 October 2009, the Government indicates that it has referred the allegations concerning FONAFE budget ceilings on wages in public enterprises and the new allegations made by the FTLFP on 3 November 2008, denouncing acts of employer interference with regard to the right enjoyed by some union officials to take union leave at any time, to FONAFE (so that it can defend its position as appropriate). In addition, the Government indicates that it has requested information concerning the labour inspection in relation to the issue of union leave.

C. The Committee's conclusions

1004. *The Committee notes that, in the present complaint, the complainant organization alleges that the FONAFE has interfered in the collective bargaining processes of state enterprises through FONAFE Circular No. 009-2008 of 27 February 2008 and Executive Decision No. 002-2003, which set pay ceilings applicable to the collective bargaining process for the 2007 period, furthermore providing, in the case in question, that the workers concerned would not receive a pay increase during that period. These requirements also provide that the bargaining committees appointed by the board of directors or management of the enterprise must submit a report containing an assessment of the trade union proposals and that the board of directors or general management of the enterprise must approve the final bargaining proposal presented by the bargaining committee (of the enterprise); likewise, once the collective bargaining process has been completed, the bargaining committee has to provide written evidence of compliance with the established parameters.*

1005. *The Committee takes note of FONAFE's position (attached to the Government's reply) categorically denying it issued requirements that interfere in the collective bargaining process or that it has the power to intervene in and oversee the collective bargaining process in each state enterprise; nevertheless, as the governing body of state enterprise activity, FONAFE has, through its guidelines, set a ceiling on pay in accordance with the budget for state enterprises and in line with the budget available to the enterprise, both of which are aligned with the operative and strategic plans of the enterprise. FONAFE does not participate in the development of economic proposals (of the representatives of the enterprise in the collective bargaining process) but rather approves the overall budget of state enterprises, with the aim of drawing up a budget with parameters that are comprehensive or general in scope and placing general pay ceilings on total expenditure (including with regard to staff overheads). State enterprises have full authority and discretion with regard to the implementation of its internal wage policy and labour contingency payments; i.e. the enterprise is entitled to give instructions to the members of its bargaining committee on the parameters that should be used to shape the collective bargaining proposals, which should respect the budgetary constraints provided by law with regard to workers' pay, in order to avoid excessive expenditure and reinvest the proceeds for the good of society, so as to meet a public need, since state enterprises do not have profit making as an objective.*

1006. *The Committee takes note of the Government's observations (contained in the report signed by the Director-General of the Office of the Legal Advisor) in which, after referring to the principles of the Committee on Freedom of Association, it concludes that, in the cases raised in the complaint, a restriction was placed on the pay-related content of the collective bargaining process, violating the essence of this constitutional right, as the restriction was imposed unilaterally and permanently, without prior consultations with the workers' representatives, and without the considerations of general interest being explained to the workers with a view to reaching some kind of agreement.*

1007. *The Committee notes that FONAFE Circular No. 009-2008 (guidelines for collective bargaining in enterprises under the auspices of FONAFE) provides, among other things, that:*

– *The board of directors or manager of the enterprise shall, by means of the relevant document, appoint the members of the bargaining committee representing the enterprise (hereinafter "the bargaining committee") and set out the parameters on the basis of which negotiations must be carried out with union representatives. These parameters must be in strict compliance with the legal framework currently in force.*

– *Prior to the conclusion of a collective agreement, the bargaining committee shall present a report to the general management of the enterprise, containing an assessment of the proposals made by the union representatives. On the basis of this report, the bargaining committee is required to issue a final bargaining proposal, which must be approved by the board of directors or general management of the enterprise for presentation to union representatives.*

– *Once the collective bargaining process is complete, the bargaining committee shall, in a written report, substantiate and demonstrate compliance with the parameters that were set for it. This report must be submitted to the social body that set the parameters, which in turn must send a copy to FONAFE for reference.*

1008. *The Committee considers that these guidelines refer in part to the appointment of employer representatives in cases involving collective bargaining in public enterprises and in part to the parameters for bargaining and monitoring compliance with these parameters. Taking into account that the overall budgets are previously adopted by other public bodies, the Committee considers that the requirement that the management of the enterprise must oversee the final bargaining proposals made by those negotiating on behalf of the enterprise does not violate the principles of collective bargaining.*

1009. *The Committee notes, nevertheless, that the same FONAFE Circular No. 009-2008 provides that: "It must be taken into consideration that, according to the guidelines on the budgetary process and administration of enterprises under the auspices of FONAFE, when increasing pay and/or increasing or improving social benefits, working conditions and allowances, etc., the pay-scale ceilings set in the remuneration policies currently in force must serve as the upper limit and the relevant budget previously approved by FONAFE must be available."*

1010. *In this respect, the Committee wishes to recall its principles with regard to wage restrictions in collective bargaining in the public sector. In particular, the Committee has indicated that, with regard to the requirement that draft collective agreements in the public sector must be accompanied by a preliminary opinion on their financial implications issued by the financial authorities, and not by the public body or enterprise concerned, the Committee noted that it was aware that collective bargaining in the public sector called for verification of the available resources in the various public bodies or undertakings, that such resources were dependent on state budgets and that the period of duration of collective agreements in the public sector did not always coincide with the duration of the State's budgetary law – a situation which could give rise to difficulties. The body issuing the above opinion could also formulate recommendations in line with government economic policy or seek to ensure that the collective bargaining process did not give rise to any discrimination in the working conditions of the employees in different public institutions or undertakings. Provision should therefore be made for a mechanism which ensures that, in the collective bargaining process in the public sector, both trade union organizations and the employers and their associations were consulted and could express their points of view to the authority responsible for assessing the financial consequences of*

draft collective agreements. Nevertheless, notwithstanding any opinion submitted by the financial authorities, the parties to collective bargaining should be able to conclude an agreement freely [see ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, para. 1037].*

1011. *Furthermore, given that according to the complainant organization there were no pay increases for the 2007 period in two state-owned electricity companies, which was not denied by the Government, the Committee recalls, in general, that if, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards [see* ***Digest****, op. cit., para. 1024].*

1012. *The Committee notes that, according to the observations received from the Government, in the various cases mentioned by the complainant organization, wage restrictions have been imposed unilaterally and permanently, without prior consultations with the trade union representatives, and without the considerations of general interest being explained with a view to reaching some kind of agreement.*

1013. *In these circumstances, taking into account the principles mentioned above and given that the Government has informed the FONAFE of the issues raised by the Committee, the Committee requests the Government to take the necessary measures to ensure that trade unions in the public enterprises are consulted when setting budget ceilings for public enterprises with regard to wages, so that the trade unions concerned may assess the situation, express their views and positions and discuss with the authorities the considerations of general interest that these authorities may deem it necessary to highlight.*

1014. *Lastly, the Committee awaits the observations announced by the Government on the allegations contained in the latest communication from the complainant organization, concerning attempts to make the trade unions relinquish the entitlement enjoyed in several public enterprises to take trade union leave at any time and particularly anticipates the information expected by the FONAFE and labour inspection on these issues.*

The Committee's recommendations

1015. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) Taking into account the principles outlined in the conclusions, the Committee requests the Government to take the necessary measures to ensure that trade unions in the public enterprises are consulted when setting budget ceilings for public enterprises with regard to wages, so that the trade unions concerned may assess the situation, express their views and position and discuss with the authorities the considerations of general interest that these authorities may deem it necessary to highlight.

(b) The Committee awaits the Government's specific observations on the allegations contained in the latest communication from the complainant organization, concerning attempts to make the trade unions relinquish the entitlement enjoyed in several public enterprises to take union leave at any time and particularly anticipates the information expected by the FONAFE and the labour inspection on these issues.

CASE NO. 2640

DEFINITIVE REPORT

Complaint against the Government of Peru presented by the Single Central Organization of Workers of Peru (CUT)

Allegations: Obstruction of collective bargaining by the enterprise and failure by the authorities in their duty to promote collective bargaining

1016. The complaint is contained in a communication from the Single Central Organization of Workers of Peru (CUT) dated 23 April 2008. The Government sent its observations in communications dated 3 March and 30 October 2009.

1017. 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

1018. In its communication of 23 April 2008, the CUT alleges that the Trade Union of Employees of Telefónica Publicidad e Información Perú SAC (now Yell Perú SAC) (SETPI), which has 30 members, presented a list of demands in September 2006 covering the period from 1 November 2006 to 31 October 2007.

1019. The bargaining committee was set up on 15 December 2006, and seven direct negotiation sessions were held. Finally, on 6 August 2007, the Directorate for Labour Relations was informed that the direct negotiation stage of collective bargaining had come to an end, as no settlement had been reached on the proposals put forward in the list of demands. On 18 October 2007, the Subdirectorate for Collective Bargaining declared the direct negotiation stage over and the conciliation phase open.

1020. Nine conciliation sessions were held between 27 November 2007 and 14 February 2008, at which agreement was reached in principle on some points in the presence of the labour administration authority, although the parties reneged on their agreement at subsequent meetings.

1021. On 5 December 2007, the trade union presented the general management of the enterprise with a second list of demands for the period 1 December 2007 to 30 November 2008.

1022. On 15 February 2008, the general management of the enterprise returned the list of demands to the trade union on the grounds that negotiations for the settlement of the demands for 2006–07 were still under way and that the trade union could not seek negotiations on the new list until that round had been concluded. On 22 February 2008, the trade union informed the Subdirectorate for Collective Bargaining of the enterprise's refusal.

1023. The complainant organization points out in regard to both lists of demands that the underlying problem is the lack of willingness on the part of the Ministry of Labour to speed up the collective bargaining process, as well as the multiple ploys by the enterprise

to avoid reaching an agreement that would improve working conditions and supersede the injurious agreements signed by another trade union for a four-year term that covers the entire workforce.

1024. The complainant objects to two letters sent to the trade union on 13 and 15 February 2008, which clearly both displays the enterprise's interfering stance with regard to the exercise of freedom of association by its workers and reflects management's real opinion of collective bargaining and its perception of a trade union through the hostile tone of these letters.

1025. As regards the letter dated 13 February 2008, the complainant organization states that it was presented by the enterprise at the conciliation meeting for the negotiation of the 2006–07 list of demands, and describes it as offensive.

1026. The enterprise contradicts itself in the opening paragraphs of the letter, when it states that the proposal for a collective agreement is based on the "special characteristics" of the union members, only to point out further down that "there is no reason for our enterprise to grant your members benefits over and above those afforded to the other trade union". Thus, while the enterprise initially maintains that the special characteristics of the activity of trade union members create an assumption of different treatment, it then immediately points out that, which it recognizes such distinctions, there exists no reason to apply them in practice.

1027. In paragraph 1 of the letter, the enterprise describes the coverage of the two trade unions, using the term "small universe" to describe the membership of either of the unions. It should be pointed out, however, that the use of this term is pejorative and inaccurate, especially since one cannot refer to half of the workforce of an enterprise as a "small universe". It is even worse if one considers that the author of this assertion is directly responsible for the fact that the membership could not increase over the past months and years, as evidenced by the enterprise's insistence on concluding collective agreements for a term of not less than four years.

1028. The complainant organization points out that the enterprise asserts that although it had already signed two collective agreements with the Single Trade Union of Workers, the benefits under the agreements had been extended to the rest of the workforce; this reflects its discriminatory policy against unionization. This is a common anti-union practice which consists in extending the benefits obtained through collective bargaining to the rest of the workforce, with the aim of removing any incentive to unionization.

1029. The enterprise uses the term "market levels" in the letter to justify its signing of the list of demands recently signed by the Single Trade Union, as though this topic had been discussed among the members themselves. The complainant organization points out in this regard that this wording is biased, as it highlights the fact that an economic benefit was obtained for workers who "were below market levels … excluding those who were above market levels". It is also biased because the average reader is led to question the union's solidarity. There can additionally be no question of "market levels" when the company holds the monopoly in the sector in which it operates, since there is only one other recently established enterprise that can serve as a benchmark in the same market. Moreover, paragraph 1 states that it *does not seem ethical* to have established another trade union and to claim additional social benefits, *neither does it seem reasonable* to claim wage increases, through another list of demands, for the small group of workers who are allegedly privileged in regard to "market levels".

1030. Added to this is the lack of a trade union culture on the part of management, as well as its attempt to undermine the legitimacy of the list of demands, which of course is not merely

aimed at wage increases but also at claiming and recovering the rights lost in the collective agreement signed by the other union.

1031. Moreover, the letter directly accuses the union not only of having been established for the sole purpose of obtaining better financial benefits, displaying a lack of solidarity with the other unionized workers, but also of having encouraged co-workers to withdraw from membership of the other union, the Single Trade Union. These assertions are aimed at prejudicing the workers and members against the union. Lastly, given the wording used and its incriminating tone, the letter is prejudicial to the trade union and constitutes a blatant act of interference by the enterprise.

1032. Paragraph 3 of the letter contains the term “legal security”, stating that the establishment of the union affects the “legal security of the enterprise”. This phrase is also incorrect and biased, as the establishment of a trade union cannot affect the legal security of an enterprise, provided that it is done in the legitimate exercise of freedom of association enjoyed by all the workers. On the contrary, legal security, which is protected by the democratic State, is jeopardized by the existence of enterprises that distort the fundamental rights which their workers enjoy as human beings. Legal security can never be impaired by collective bargaining, as this is the most effective mechanism for redressing the imbalance of power between workers and employers.

1033. Moreover, in paragraph 3 of the letter, the enterprise asserts that benefits cannot be granted, as it would mean accepting effective collective bargaining and that would constitute a threat to the enterprise. In this regard, the trade union considers that this is an expression of the enterprise’s anti-union stance reflected in the last months of direct negotiations with the trade union and in the collective agreement, which is prejudicial to the workers, signed for a four-year term with the other trade union.

1034. In regard to this paragraph, it should be pointed out that the enterprise misinterprets the legislation applicable to collective agreements when it states that the trade union has not complied with the statutory minimum term for collective agreements, which is one year. Collective agreements and their term of validity are established by agreement between the parties, in the absence of which their term shall be one year, and the trade union has not claimed otherwise. The list of demands presented in 2006 covers one year; if the union has presented a list for 2007–08, it is because no collective agreement has been signed. The union has acted in full compliance with the law, but the enterprise claims that the union has devised “a scheme aimed at flouting the law” which undermines the stability and legal security of the enterprise.

1035. On 15 February 2008, the enterprise returned the list of demands for 2007–08 to the trade union on the same grounds, thus not only further obstructing the collective bargaining process, but also putting forward a number of arguments intended to confuse the trade union and undermine its reputation.

1036. Lastly, the complainant considers that the enterprise clearly reveals its hostile attitude to collective bargaining and the right to freedom of association when it states that to accept the union’s proposal would mean unleashing “an inflationary spiral of benefits that would be increasingly reckless and unmanageable, leading to the destruction of the enterprise”. The trade union expresses its discontent and uneasiness, given that a higher unionization rate would only point to democratization of the agreements and good labour practices. For the enterprise to say that an increase in the number of members or workers actively exercising freedom of association would mean the destruction of the enterprise reflects a medieval attitude and unwillingness to engage in dialogue.

1037. Another aspect raised in the complaint relates to the bargaining process and the role of the Ministry of Labour, as the labour authority, in furthering that process. In this regard, according to the complainant, the Ministry of Labour has failed in its duty to act effectively, rapidly and appropriately in these cases: firstly, because it has not played a more active role at the conciliation stage, and, secondly because it has allowed the conclusion of collective agreements prejudicial to the workers. Moreover, although the legislation provides for strikes as an option and a right in cases of collective bargaining, it requires compulsory arbitration where no agreement is reached between the bargaining parties if the trade union opts for arbitration. However, in recent years the Ministry has taken a different approach, despite the fact that the law has not changed, and has only accepted voluntary arbitration.

B. The Government's reply

1038. In its communication of 3 March 2009, the Government recalls that the subject of this complaint covers three main aspects: the list of demands of the SETPI for the period 2006–07, the list of demands for 2007–08 and the action taken by the labour inspectorate in the enterprise.

1039. On the first point, the Government states that under file No. 227072-2006-DRTPELC-DPSC-SDNC (list of demands for 2006–07), the procedure was opened on 2 November 2006, covering the workers who were members of that union and who had completed their probationary period on 1 November of that year. The Government adds that that procedure is currently pending legalization of the arbitration agreement signed between the parties on 18 April 2008.

1040. As regards the list of demands for 2007–08, the Government points out that under file No. 298201-2007-MTPE/2/12.210, the procedure was opened on 5 December 2007, covering the workers who were members of that union and who had completed their probationary period on 1 December of that year. The Government states further that that procedure is currently at the conciliation stage, and that the parties were summoned to the first conciliation meeting on 24 September 2008.

1041. By official letter No. 2920-2008-MTPE/2/12.3, the Directorate for Labour Inspection informed the Lima – Callao Regional Directorate for Labour and Employment Promotion that three inspection orders had been issued on the following points:

Order No.	Objects of inspection	Conclusions	Date of opening and closing of file	Status
1141-2007	Keeping of lists of members, anti-union and other discrimination	No violation of the right to organize and collective bargaining found	31 January 2007 20 March 2007	Closed
13747-2007	Privacy, dignity and harassment	The veracity of the allegations could not be checked; the complainants have the right to seek a remedy through the courts	9 August 2007 28 April 2008	Closed
7064-2008	Privacy, dignity and other harassment	No violation of labour legislation by the enterprise found	5 May 2008 13 August 2008	Closed

1042. In this regard, the Government points out that the labour administration authority of the State of Peru has respected the national and international labour law in force, and its role is aimed at preventing violations of the exercise of any right laid down in collective labour legislation or the Conventions of the International Labour Organization governing those rights.

1043. The Government states further that, in a letter dated 24 September 2008, the general manager of Yell Perú SAC makes the following points: (1) the complaint is based on unfounded assertions, as is clear from the fact that the enterprise management did not at any time interfere in the process of establishing the complainant trade union; (2) moreover, the employer states that there is no truth in the assertion that Yell Perú SAC has obstructed or prevented the exercise of the right to strike by the members of the SETPI; (3) the company emphatically denies that delaying tactics were used in the process of collective bargaining between the enterprise and the complainant trade union, stating that Yell Perú SAC has shown itself entirely willing to reach a mutually beneficial agreement, but it is the trade union that is holding up the process by not deeming the enterprise's proposals satisfactory; and (4) lastly, as regards the use of the term "small universe", it should be pointed out that Yell Perú SAC states that it did not intend to use those words in any pejorative sense, but that they reflect the real nature of the trade union, which is a minority union, and hence the agreements reached by it through collective bargaining are limited in scope (since they can only cover its members under the national labour legislation). In its communication dated 30 October 2009, the Government indicates that SETPI and the enterprise have concluded a collective agreement that extends from 1 November 2006 to 31 October 2009.

C. The Committee's conclusions

1044. *The Committee observes that in this complaint, the complainant organization alleges the lack of willingness on the part of the Ministry of Labour to speed up the collective bargaining process with the Yell Perú SAC enterprise concerning the lists of demands presented by the SETPI trade union (which has 30 members) for the periods 2006–07 and 2007–08, as well as the enterprise's reluctance to reach an agreement, reflected, inter alia, in unacceptable proposals for a collective agreement or in the letters sent to the SETPI. According to the complainant organization, this situation has been exacerbated by the fact that a previous collective agreement had been signed for a four-year term between the enterprise and another trade union, containing terms which the complainant organization believes to be prejudicial to the workers.*

1045. *The Committee notes the Government's statement concerning the list of demands for 2006–07 presented by the SETPI, to the effect that the process is currently pending implementation of the arbitration agreement signed between the parties on 18 April 2008. In these circumstances, given that the parties have jointly signed an arbitration agreement, the Committee will not pursue its examination of this allegation.*

1046. *As regards the list of demands for 2007–08, the Committee notes the Government's statement that the process is currently at the conciliation stage (the first meeting having been held on 24 September 2008). The Committee notes the statements of the Yell Perú SAC enterprise, denying that delaying tactics were used in the collective bargaining process; the enterprise states that it has shown itself entirely willing to reach a mutually beneficial agreement, but it is the SETPI trade union that is holding up the process by not deeming the enterprise's proposals satisfactory. The Committee further notes that the enterprise points out that when it used the term "small universe" in referring to the SETPI, it did not mean it in any pejorative sense, but that it reflects the minority nature of the trade union, which means that the agreements reached by it through collective bargaining are limited in scope, as they can only cover its members under the national legislation.*

1047. *The Committee notes the content of the letters from the enterprise dated 13 and 15 February 2008 (see appendices), which is deemed unacceptable by the complainant organization. After examining both letters, the Committee concludes that its content gives no reason to assert that the enterprise has refused to bargain collectively with the SETPI; as regards the list of demands for 2006–07, the letter of 13 February 2008 puts forward*

the enterprise's stance and views to the effect that it is unethical to claim additional benefits when there is already a collective agreement with the majority trade union, which was concluded for a term of four years (benefits applicable to the entire workforce of the enterprise, as the SETPI had not yet been established at the time); that the SETPI had been established "for the sole purpose of obtaining greater benefits, encouraging the members of the first trade union to withdraw from it"; and that the trade union's actions are "a scheme aimed at openly flouting the minimum term of one year applicable under the law to all collective agreements"; according to the letter, the position of the enterprise is to grant the same benefits through collective bargaining with SETPI as those afforded to the other trade union, in order to avoid undermining legal security.

1048. *The Committee recalls that the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 938]. The Committee considers that although the arguments, expressions and value judgements of the enterprise to which the complainant organization objects are clearly critical and at times aggressive, they are based on the existence of a previous collective agreement with a trade union that is more representative than the SETPI and do not go any further than the expressions commonly used in collective disputes. The Committee observes that, in any case, the allegations concerning the letter of 13 February 2008 are no longer relevant, as they refer to the list of demands for 2006–07 and the parties have since reached an arbitration agreement, as pointed out above.*

1049. *As regards the letter of 15 February 2008, concerning the SETPI's list of demands for 2007–08, in which the enterprise maintains its proposal for a collective agreement for a four-year term, the Committee observes that the tone of the letter is not disrespectful and that the allegations relating to this list are no longer relevant, since, according to the Government, the bargaining process entered the conciliation stage on 24 September 2008. The Committee observes that the authorities have held conciliation meetings between the parties since the first list of demands was presented by the SETPI, and draws the complainant's attention to the fact that since the legislation recognizes the right to strike of the workers represented by the SETPI, there are no grounds – contrary to its claim – for compulsory arbitration at the request of one of the parties. Therefore, in the light of the circumstances, although it notes the complainant's views that the Ministry of Labour has not played a sufficiently active role during the conciliation process, the Committee considers that the Ministry of Labour cannot be said to have maintained a passive stance or failed to have promoted collective bargaining.*

1050. *In addition, the Committee notes the enterprise's statement denying any obstruction of SETPI's right to strike, as well as the Government's information on the labour inspections carried out in the enterprise, which failed to find any acts of anti-union discrimination or violations of the right to collective bargaining or of labour legislation.*

1051. *Lastly, the Committee notes with interest the Government's indication that the enterprise and the trade union SETPI have concluded a collective agreement that extends from 1 November 2006 to 31 October 2009.*

The Committee's recommendation

1052. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the present case does not call for further examination.***

CASE NO. 2661

INTERIM REPORT

Complaint against the Government of Peru presented by
– the Union of Agricultural Public Sector Workers (SUTSA) and
– the Federation of Trade Union of Agricultural Public Sector Workers (FESUTSA)

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

1053. The complaints are contained in communications from the Union of Agricultural Public Sector Workers (SUTSA), dated 26 June 2008, and the Federation of Trade Unions of Agricultural Public Sector Workers (FESUTSA), dated 4 October 2008. The SUTSA submitted additional information in communications dated 16 July and 28 August 2008.

1054. The Government sent its observations in communications dated 25 February and 2 November 2009.

1055. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

1056. In their communications of 26 June, 16 July and 28 August 2008, the SUTSA states that, following a strike in 1988, a collective bargaining agreement was signed with the senior management of the Ministry of Agriculture and that, pursuant to this agreement, the Ministry issued Ministerial Resolution No. 393-88-AG on granting union leave to national executive committee officials and SUTSA departmental officials. The SUTSA indicates that, under the provisions of that Ministerial Resolution, the regional agricultural authorities, and particularly the Junín authority, granted union leave to Mr Offer Fernando Ñaupari Galarza, the general secretary of the SUTSA national executive committee, for the period 3 April 2005 to 2 April 2007. It adds that in accordance with the mandate of the National Plenary Assembly of February 2007, it was unanimously agreed upon to extend the mandate of the national executive committee for the period 3 April 2007 to 2 April 2008. However, when a request was submitted to the Regional Directorate of Agriculture in Junín to extend union leave for the official in question, the request was denied in Decision No. 089-2007-DRA/J-OAJ of 20 April 2007. An appeal was lodged against that decision. The SUTSA indicates that the decision against which the appeal was lodged referred to disciplinary measures imposed on the trade union official in question (in its view, incorrectly, as the incident had already been dealt with).

1057. The SUTSA alleges that the Regional Director of Agriculture in Junín continued his anti-union harassment. On 3 January 2008, he ordered the union official in question, who

performs his trade union duties in Junín, to report to his workplace at the Agricultural Office in San Martín de Pangoa in Satipo province. The SUTSA adds that, having failed to destabilize the trade union organization, the Regional Director ordered the withholding of Mr Ñaupari Galarza's wages for the months of May and June 2008 and accused him of a disciplinary offence for failing to report to work at the Agricultural Office in San Martín de Pangoa. The complainant alleges that, on 23 June 2008, the trade union official was informed of his dismissal through Resolution No. 185-2008-DRA-OAJ/J, issued by the Regional Directorate of Agriculture.

1058. In its communication of 4 October 2008, the FESUTSA alleges that the following items of legislation enacted by the current Government violate the principles of freedom of association: Legislative Decree No. 1023, which establishes the National Civil Service Authority and has, in the complainant's opinion, been used to justify non-recognition and exclusion of the trade union representatives from the board that is responsible for planning and formulating human resource policies; Legislative Decree No. 1024, which establishes and governs the terms of service of public service managers and, in the complainant's view, does not provide for the right to organize, take strike action or engage in collective bargaining; Legislative Decree No. 1025, which established without the participation of trade union representatives the rules for training and performance in the public sector; Legislative Decree No. 1026, which establishes a special optional system for regional and local governments and which, according to the complainant, attempts to destroy trade unionism by eliminating the right to job security; Directorial Resolution No. 1159-2005-MTC/11 (concerning attendance and working hours of staff at the Ministry of Transport and Communications) which, in the complainant's view, restricts union officials' freedom to carry out their trade union duties; Regional Executive Ruling No. 000480-2008-GR-JUNÍN (concerning attendance and working time of staff employed by the regional government in Junín) which, in the complainant's opinion, restricts trade union activity and prevents any union activity on official premises; and Legislative Decree No. 1067, which governs the State's recruitment system and, in the complainant's opinion, does not provide for the right to organize. The FESUTSA alleges that the Government is facilitating mass dismissals in the public sector resulting in the dismantling and demise of trade unions.

B. The Government's reply

1059. In its communication of 26 February 2009, concerning the allegation that Mr Offer Fernando Ñaupari Galarza, the General Secretary of the SUTSA national executive committee, was dismissed from his workplace despite the extension of his union mandate by the 18th SUTSA National Plenary Assembly, held in Lima on 28 and 29 May 2008, and that an appeal against the dismissal was subsequently lodged with the relevant judicial authority whose decision is still pending, the Government indicates that the case involves contested facts relating to the actions of the administrative authorities, namely the Regional Directorate of Agriculture in Junín and the Junín Regional Government. In view of the fact that the allegations are being examined by the judicial authorities, the Government refrains from commenting on the case.

1060. The Government indicates that it does not have sufficient information to allow it to express a definite opinion on the case. Furthermore, the Government does not have the observations which should be provided by the representatives of the organizations against which the allegations have been made, and who have received a copy of the relevant documents but have yet to examine them. As a result, the request has been reiterated and the outcome will be reported in due course. According to the Government, the various documents presented by the complainant to date purport to show that, although Mr Offer Fernando Ñaupari Galarza remained an official trade union representative between 2 April 2007 and the date of his dismissal under the terms of Regional Directorate of Agriculture

Resolution No. 185-2008-DRA-OAJ/ of 23 June 2008, his employer nonetheless refused to grant him the necessary facilities to perform his union duties, arguing that there was no valid legal basis for granting union leave. The issue which will clearly need to be resolved by a court.

1061. The Government maintains that trade union officials belonging to representative organizations, whether private or public, are supposed to enjoy adequate guarantees of freedom of association in the exercise of their representative duties, and those guarantees include the right to request and be granted union leave in accordance with the applicable legislation and regulations of the body responsible for granting such leave. Essentially, the complaint questions the actions of officials in the Regional Agricultural Directorate in Junín, against whom complaints have been filed as a result of their persistent harassment of and discrimination against the authorized representative and General Secretary of the SUTSA national executive committee. That Directorate both systematically denied the union leave required to carry out the duties of the union officials post to which he had been elected and management ultimately dismissed him under the terms of Agricultural Resolution No. 285-2008-DRA-OAJDRA/J of 23 July 2008 on the basis of incorrect information, even though the official was acting wholly within his trade union mandate and in a manner consistent with the terms of the Labour Authority registration certificate. The Government states that it does not currently possess information on the state of the proceedings to overturn the official's dismissal, and informs the Committee that it will request this information and send it in due course.

1062. Finally, the Government indicates that, in letter 1150-2008-P-CSJJU/PJ, the President of the Supreme Court in Junín provided information regarding the various legal proceedings initiated by Mr Offer Fernando Ñaupari Galarza against the Regional Director of Agriculture in Junín and the Junín Regional Government. The Government stresses that this information is insufficient to clarify certain key aspects of this case, namely whether Mr Offer Fernando Ñaupari Galarza continued to perform his lawful trade union duties on days when he was allegedly absent without leave, and whether the systematic refusal of the Junín Regional Directorate of Agriculture and the Regional Government to grant him the union leave, needed to carry out the trade union work he had been elected to do, actually constituted acts of hostility, harassment, and obstruction of trade union activity. The judicial authority will ultimately have to determine the issue when it hands down its ruling. The Government will inform the Committee of that ruling in due course. In its communication of 2 November 2009, the Government states that it is waiting for the requested information from the judicial authority about the dismissal process for Mr Offer Fernando Ñaupari Galarza and is waiting for the information requested from the National Civil Service Authority about the legal provisions raised in the complaint.

C. The Committee's conclusions

1063. *The Committee observes that the SUTSA alleges that the Regional Directorate of Agriculture in Junín has repeatedly refused to grant union leave to Mr Offer Fernando Ñaupari Galarza, the General Secretary of the SUTSA national executive committee, and ultimately dismissed him, even though the National Plenary Assembly of the SUTSA had approved the extension of his union mandate.*

1064. *In this regard, the Committee notes that according to the Government: (1) the allegations refer to certain disputed actions by both the Regional Directorate of Agriculture in Junín and the Junín Regional Government; (2) to date, the Government has received neither the information it requires to give a definitive opinion, nor the replies of the organizations against which allegations have been made, and to which the background documents have been sent; (3) an appeal against the dismissal has been lodged with the judicial authority and, at this time, the court's decision is still pending; and (4) the President of the Supreme*

Court of Justice in Junín has provided information on a number of legal proceedings initiated by Mr Offer Fernando Ñaupari Galarza against the Regional Directorate of Agriculture in Junín and the Junín Regional Government. However, this information is insufficient to clarify whether the allegations actually constituted acts of hostility, harassment, and obstruction of union activity, an issue which the judicial authorities must determine.

1065. *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 independently perform their trade union duties, they should have a guarantee that they will not be prejudiced due to the mandate which they hold from their trade unions. The Committee considers that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *fifth edition, 2006, para. 799]. Under these circumstances, and in view of the fact that the allegations date from July 2008, the Committee hopes that the judicial authority will give a ruling in the near future concerning the dismissal of Mr Offer Fernando Ñaupari Galarza, General Secretary of the national executive committee of the SUTSA, and requests the Government to keep it informed in this regard and to inform it of the outcome of any other legal proceedings relating to this allegation.*

1066. *Lastly, the Committee urges the Government to communicate without delay its observations on the allegations made by the FESUTSA, which has raised objections to a number of legislative provisions which, in its view, violate the principles of freedom of association and facilitate mass dismissals in the public sector resulting in the dismantling and demise of trade unions. The Committee notes that the Government, in its most recent communication, indicates that it is waiting for information from the National Civil Service Authority.*

The Committee's recommendations

1067. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee trusts that the judicial authority will give a ruling in the near future on the dismissal of Mr Offer Fernando Ñaupari Galarza, the General Secretary of the SUTSA national executive committee, and requests the Government to keep it informed in this regard, and to inform it of the outcome of any other legal proceedings relating to this allegation.

(b) The Committee urges the Government to communicate without delay its observations on the allegations made by the FESUTSA, which has raised objections to a number of legislative provisions which, in its view, violate the principles of freedom of association and facilitate mass dismissals in the public sector resulting in the dismantling and demise of trade unions.

CASE NO. 2664

INTERIM REPORT

Complaint against the Government of Peru presented by the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP)

Allegations: The complainant organization alleges that, as a result of the declaration by the administrative authority that a strike was illegal, numerous trade union leaders and members in the mining sector were dismissed; it also alleges that, against this backdrop, two trade union members were murdered

1068. The complaint is contained in a communication from the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP) dated 8 August 2008. The complainant organization submitted new allegations in a communication of 29 September 2009.

1069. In the absence of a reply from the Government, the Committee has twice had to postpone its examination of the case. At its June 2009 meeting [see 354th Report, para. 9], the Committee issued an urgent appeal to the Government and drew its attention to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report (1972), approved by the Governing Body, it might submit a report on the substance of the case at its next session, even if the requested information or observations had not been received in due time. To date, the Government has not sent its observations.

1070. 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

1071. In its communication of 8 August 2008, the FNTMMSP indicates that, on 30 April 2007, it was obliged to stage an indefinite strike, calling on the Government to amend labour legislation and ensure respect for the fundamental rights of miners, metalworkers and steelworkers, in accordance with demands which the federation had been making for over ten months when the strike began. Among its main demands, the FNTMMSP is seeking the approval by Congress of: Bill No. 1696/2007-CR on the subcontracting of workers, in view of the fact that over 85,000 miners have no protection; Bill No. 1670-2007-PE on work-related profits, amending Legislative Decree No. 892, which confiscates workers' profits; Bill No. 837/2006-CR, reintroducing the eight-hour working day, bearing in mind that in the mining, metalworking and steelworking sector, employers unilaterally imposed the atypical 12-hour day; Bill No. 1226/2006-CR requesting free withdrawal from the private pension system for all workers in the sector, as the system is damaging and jeopardizes their life and health; and Bill No. 847/2006-CR, demanding that the scope of the Miners' Retirement Act (Act No. 25009) be restored in full.

1072. The complainant organization indicates that the strike of 30 April 2007, which was held against this backdrop, was called off when an agreement was reached on 3 May 2007 with

the Ministry of Labour. The Government undertook certain commitments, but failed to honour them. In view of the Government's non-compliance, the FNTMMSP called an indefinite general strike on 5 November 2007. The strike was suspended on 8 November 2007, in view of the progress made with regard to Bill No. 1670-2007-PE on profit-sharing, and given that representatives in the National Congress had pledged to pass it as law; however, that objective was not achieved.

1073. The complainant organization adds that, in view of the failure of the Government and the National Congress to honour their commitments, an agreement was reached at its 61st National Assembly of Representatives to hold another strike, starting on 12 May 2008. In direct dialogue with the President of the Council of Ministers, who agreed to take the necessary action to achieve the remaining objectives, the FNTMMSP agreed to suspend the industrial action, also taking into account the imminent Fifth Latin America and Caribbean–European Union Summit, held in Lima. However, the Government has continued to disregard its commitments. An agreement was reached at the 62nd National Assembly of Representatives to begin an indefinite general strike, starting on 30 June 2008, calling on the Government to honour its commitments. On that occasion, the FNTMMSP demanded that Congress approve two bills that had been passed in the respective committees (Bill No. 1670-2007-PE on profit-sharing and Bill No. 847/2006-CR on miners' retirement). The strike began on 30 June 2008 and was suspended on 6 July 2008.

1074. The complainant organization alleges that the strikes which began on 30 April and 5 November 2007 and 30 June 2008 were declared illegal by the Ministry of Labour and Employment Promotion, which prompted the enterprises Southern Peru Copper Corporation (SPCC), Minera Los Quenuales SA and Minera Barrick Misquichilca SA to dismiss union leaders and members.

1075. The complainant organization also indicates that, as a result of the declaration by the Ministry of Labour and Employment Promotion that the strike of 30 June 2008 was illegal, a damaging campaign was launched, sponsored by the National Mining, Petroleum and Energy Society (SNMPE), to bring about the dismissal by the SNMPE of union leaders and members, on the basis of an interpretation of strike action as constituting unjustified absence or dereliction of duty.

1076. As a result, at SPCC Cuajone, steps were taken to dismiss union leader Mr Roman More Peña, General Secretary of the Unified Trade Union of Workers of SPCC Cuajone, who was issued with a letter giving notice of dismissal and then a letter of dismissal on 10 July 2008, four days after the end of the strike, on the grounds of dereliction of duties for more than three consecutive days, which the enterprise classified as serious misconduct. Disregarding the right to strike, the enterprise, on the same grounds, dismissed other workers belonging to the same union, namely: Mr Pelagio Espinoza Quiroga; Mr Alberto Salas Rivera; Mr Félix Octavio Marca Adueño; Mr Orlando Bailón Mamani; Mr Cesar Miguel Delgado Fuentes; Mr Adolfo Sosa Sairitupa; Mr Luis Alfredo Hostia Mendoza; Mr Juan Aníbal Chui Choque; and Mr Jaime Aranibar Aranibar.

1077. At SPCC–ILO, and in line with the enterprise's policy of not recognizing the right to strike, steps were taken to dismiss the following unionized workers: Mr Guillermo Cesar Palacios Castillo, former Secretary of the SPCC Metalworking Union; Mr Juan José Valdivia Herrera; Mr Jorge Carlos Manchego Alcazar; Mr Jorge Fernando Cavaglia Stapleton; Mr José Tiburcio Lozada Huaman; Mr Juan Flavio Pinto Quispe; and Mr Jacinto Yataco Rejas.

1078. At the enterprise Minera Los Quenuales SA, steps were taken to dismiss the leaders of the Single Trade Union of Miners of Specialized Enterprises, namely: Mr Vicente Ichpas

Lima, General Secretary; Mr Ángel Huaira Zevallos, Organization Secretary; Mr Danubio Merino Torres, Legal Secretary; and Mr Jorge Llantoy Mancilla, Documents and Archives Secretary. They were also accused of having deliberately failed to show up for work for three consecutive days. This enterprise thus also fails to recognize the procedural rules governing the right to strike, as it regard strike days as unjustified absences.

1079. In the enterprise Minera Barrick Misquichilca SA, the same approach was taken as in the other enterprises. On 25 July, letters giving notice of dismissal for "unjustified" absence were issued to trade union leader Mr Isaac Godofredo Cueto Lagos, Social Assistance Secretary, and to trade union members Mr Freddy Elías Calle Vilca; Mr Jorge Abel Cusipuma Ñañez; Mr Juan Cancia Condori Silloca; Mr Peter Richard Correa Álvarez; Mr Evaristo Chirapo Mamani; Mr Javier Miguel Mendoza Quispe; Mr Raúl Jaime Mescua Matos; Mr Alfredo Concepción Pachao Eyerbe; Mr Juan Sebastián Pérez Barreto; Mr Roberto Martín Romero Lucero; Mr Didhier Alberto Vilchez Torres; and Mr Juan Pio Zaconett Quequesana. The "legal" basis for these letters was unjustified absence from the workplace for more than three days, which undermined the procedural rules on the right to strike. On 1 August 2008, the enterprise dismissed the following nine workers: Mr Isaac Godofredo Cueto Lagos, Social Assistance Secretary of the union; Mr Jorge Abel Cusipuma Ñañez; Mr Evaristo Chirapo Mamani; Mr Javier Miguel Mendoza Quispe; Mr Alfredo Concepción Pachao Eyerbe; Mr Juan Sebastián Pérez Barreto; Mr Roberto Martín Romero Lucero; Mr Didhier Alberto Vilchez Torres; and Mr Juan Pio Zaconett Quequesana.

1080. The complainant organization highlights the fact that the Government and the enterprises in question are undermining the right to strike and the applicable rules of procedure in Peru by unilaterally classifying strike days as unjustified absence, in order to dismiss union leaders and unionized workers. It recalls that article 28 of Peru's Constitution provides that "the State recognizes the rights to freedom of association, collective bargaining and strike, and safeguards the democratic exercise of those rights: (1) it guarantees freedom of association; (2) promotes collective bargaining and peaceful forms of solving labour disputes. Collective agreements are binding; (3) regulates the right to strike which is to be exercised in keeping with the public interest, and sets out the corresponding exceptions and limitations".

1081. The enterprises have applied Supreme Decree No. 003-97-TR, the amended consolidated text of Legislative Decree No. 728 and its implementing regulations, to classify absences from work during strike days as unjustified leave; the complainant organization considers, however, that these legal provisions are not applicable because the right to strike is enshrined in Supreme Decree No. 010-2003-TR, which also expressly provides that a strike is a collective suspension of work and individual employment contracts which does not interrupt the employment relationship.

1082. The complainant organization points out that, to date, seven meetings have been held with the Ministry of Labour and no settlement has been reached with regard to the four union leaders who were dismissed from the Single Trade Union of Miners and Metalworkers of Specialized Enterprises of the enterprise Minera Los Quenuales SA. Likewise, after three meetings with the Ministry of Labour, no settlement has been reached in the cases concerning the Unified Trade Union of Workers of SPCC–ILO and the Unified Trade Union of Workers of SPCC Cuajone. The same applies with regard to the Single Trade Union of Employees of the enterprise Minera Barrick Misquichilca SA.

1083. Lastly, the complainant organization alleges that, against this anti-union backdrop, two workers, who were members of the Single Union of Miners of Specialized Enterprises of the enterprise Minera Aurífera Retamas SA (MARSA), were murdered. They are Mr Manuel Yupanqui Ramos, who was shot by the national police on 9 July 2008, at the

MARSA site, and Mr Jorge Huanaco Cutipa, who died on 22 July 2008 in the town of Trujillo. These two cases are under investigation by the Public Prosecutor of Tayabamba Province, in the Department of La Libertad.

B. The Committee's conclusions

1084. *The Committee regrets that, despite the time that has elapsed, the Government has not sent the requested observations, although it has been invited on several occasions, including by means of an urgent appeal, to present its observations on the case.*

1085. *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 is bound 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.*

1086. *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 practice. The Committee is confident that, if the procedure protects governments from unreasonable accusations, governments, on their side, must recognize the importance of formulating, so as to allow objective examination, detailed replies to the allegations brought against them.*

1087. *The Committee notes that, in the present case, the FNTMMSP alleges that the Ministry of Labour and Employment Promotion declared as illegal the strikes staged on 30 April and 5 November 2007 and 30 June 2008, calling for the amendment of national legislation and in response to the failure by the administrative authority to honour its commitments, and, as a result, several enterprises in the mining sector dismissed several union leaders and many trade union members, on the grounds of unjustified absence from work. The Committee also notes that the FNTMMSP also alleges that, against this backdrop, two members of a trade union in the sector were murdered. The Committee expresses its concern, noting that it has already had to examine several cases concerning violations of trade union rights in the mining sector in Peru.*

1088. *With regard to the alleged declaration by the Ministry of Labour and Employment Promotion that the strikes were illegal, the Committee emphasizes that, on many occasions, it has stated 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 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, para. 628]. In these circumstances, the Committee notes with concern the alleged serious consequences of the administrative authority's declaration that the strikes were illegal, and requests the Government to take steps to ensure respect for this principle in the future, and to indicate the basis upon which the Ministry of Labour declared the strike illegal.*

1089. *With regard to the alleged dismissal of several union leaders and many trade union members (named in the complaint) in the mining sector as a result of the declaration that the strikes in question were illegal on the grounds that the workers were absent from work without justification, the Committee recalls that no one should be penalized for carrying out or attempting to carry out a legitimate strike and 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 [see* ***Digest****, op. cit., paras 660 and 662]. In these circumstances, the Committee requests the Government to carry out an investigation without delay to determine the reasons for the dismissals, and, if it is found that they took place as a result*

of legitimate trade union activities, to take the necessary measures to reinstate the workers in their jobs. The Committee requests the Government to keep it informed in this regard.

1090. *With regard to the alleged murder of trade union members Mr Manuel Yupanqui and Mr Jorge Huanaco Cutipa on 9 and 22 July 2008, the Committee deplores these acts of violence and recalls that the right to life is a fundamental prerequisite for the exercise of the rights contained in Convention No. 87 [see* ***Digest****, op. cit., para. 42]. In these circumstances, the Committee notes that, according to the complainant organization, the Public Prosecutor of Tayabamba Province, in the Department of La Libertad, is conducting an investigation, and trusts that this investigation will make it possible to shed light, at the earliest possible date, on the facts and the circumstances in which the murders occurred and thereby determine where responsibilities lie, punish the guilty parties and prevent the recurrence of such acts. The Committee requests the Government to keep it informed in this regard.*

1091. *The Committee requests the Government to provide its observations on the complainant organization's new allegations of 29 September 2009.*

The Committee's recommendations

1092. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee requests the Government to take measures to ensure that, in the future, responsibility for declaring a strike illegal will not lie with the Government but with a body independent of the parties in which they have confidence, and to indicate the basis upon which the Ministry of Labour declared the strike illegal.

(b) With regard to the dismissal of several union leaders and many trade union members (named in the complaint) in the mining sector following their participation in strikes that were declared illegal by the administrative labour authority, the Committee requests the Government to carry out an investigation without delay to determine the reasons for the dismissals, and, if it is found that they took place as a result of legitimate trade union activities, to take the necessary measures to reinstate the workers in their jobs. The Committee requests the Government to keep it informed in this regard.

(c) With regard to the alleged murder of trade union members Mr Manuel Yupanqui and Mr Jorge Huanaco Cutipa on 9 and 22 July 2008, the Committee notes that, according to the complainant organization, the Public Prosecutor of Tayabamba Province, in the Department of La Libertad, is carrying out an investigation, and trusts that this investigation will make it possible to shed light, at the earliest date, on the facts and the circumstances in which such murders occurred and in this way determine where responsibilities lie, punish the guilty parties and prevent the recurrence of similar acts. The Committee requests the Government to keep it informed in this regard.

(d) The Committee requests the Government to provide its observations on the complainant organization's new allegations of 29 September 2009.

CASE NO. 2686

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

Complaint against the Government of the Democratic Republic of the Congo presented by the National Union of Medical Practitioners, Health Service Management and Personnel (SYNCASS) supported by UNI Global Union

Allegations: The complainant organization reports acts of interference in its activities, administrative suspension, arrest and detention of trade union leaders, and attempts to prevent the union from functioning, as well as a smear campaign against it by the public authorities. It also alleges that the public authorities support one trade union organization in preference to others in the health sector

1093. The complaint is contained in communications dated 18 October 2008 and 31 March 2009 sent by the National Union of Medical Practitioners, Health Service Management and Personnel (SYNCASS). In a communication dated 16 June 2009, UNI Global Union supports the complaint.

1094. The Government sent its observations in a communication dated 6 March 2009.

1095. The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant organization's allegations

1096. The complainant states that it represents managers and employees in service sectors throughout the country and, in particular, in the health sector. It reports, in this case, interference in the activities of the SYNCASS committee in the city of Bandundu ("SYNCASS BDD committee"), which is said to represent most categories of staff in the health sector, except doctors.

1097. In its communications of 18 October 2008 and 31 March 2009, SYNCASS complains of acts of interference in its activities by the authorities, in particular by the Secretary General of the Ministry of Health, the Government of Bandundu Province and provincial medical inspectors, all in contravention of section 235 of the Labour Code.

1098. SYNCASS indicates that the trade unions are responsible for handling the payments of risk insurance premiums of health service staff. Payments are effected by the national doctors' union (SYNAMED) for doctors and by SYNCASS for other categories of health service staff, except pharmacists and dentists. This arrangement dates from 2004, when the Ministry of Health, by agreement and at the initiative of SYNAMED, began signing and

forwarding monthly listings of risk insurance premium payments to the ministers responsible for the state budget and finances. The lists were drawn up by SYNAMED, on the one hand, and by the Interoccupational Health Commission and countersigned by SYNCASS, on the other. According to the complainant organization, it was partly the absence of any legislation governing these arrangements and the regular misappropriation of staff salaries, both at the central and provincial levels, that prompted the Government to agree to transfer responsibility for managing risk insurance premium payments to the unions.

1099. However, the complainant organization denounces the unilateral decision taken on 11 July 2008 by the Governor of Bandundu Province to set up a commission to supervise payments of the risk insurance premiums for occupational categories other than doctors, replacing the SYNCASS BDD committee which had hitherto been responsible for managing these payments. The decision in question is regarded by the complainant organization as interference in the union's activities. According to the complainant organization, the Governor of Bandundu Province decided to relieve the SYNCASS BDD committee of all responsibility for handling risk insurance premium payments on the pretext that there had been instances of misappropriation from the premiums for May and June 2008. The complainant maintains that neither the Governor nor the commission set up subsequently to deal with the payments have been able to offer irrefutable evidence in support of their accusations, and claims that these accusations are in fact no more than a roundabout way for the Governor to have a new SYNCASS BDD committee appointed so that he can work with individuals of his own choosing, thus depriving the legitimate SYNCASS BDD committee of the union dues to which it is entitled in return for the service it provides to members who benefit from the risk insurance premium.

1100. In this regard, the complainant organization denounces the creation of a puppet interim committee at an assembly held by the National Association of Nursing Staff (ANIC) on 10 July 2008. This violated the bylaws of SYNCASS. The complainant organization has supplied a copy of the minutes of the meeting in question, in which the reason for the liquidation of the original committee is said to be because it had not been given a mandate by a majority of all the staff categories involved. The complainant organization also supplied a copy of a letter from Mr Willy Tazi Puli Thienabe and Mr Théophile Tamukey Makuma, president and secretary, respectively, of the interim provincial SYNCASS BDD committee, indicating that the original SYNCASS BDD committee was no longer in operation and another interim committee had been elected to replace it.

1101. The complainant organization indicates that on 14 July 2008, the Governor suspended the three principal officers of the SYNCASS BDD committee (Mr Simon Mambu, provincial coordinator of nursing schools and provincial executive secretary; Mr Dieudonné Ilwa, X-ray technician at Bandundu General Hospital; and Mr Blanchard Sukami, nurse and provincial treasurer). Disciplinary action will be taken at a later date against these three officials. In addition, the Governor is said to have instructed the general prosecutor at the Bandundu court of appeal to arrest and detain the officials in question; it is claimed that they were detained from 14 to 25 July 2008 (11 days), a period well in excess of the 48 hours allowed under article 18 of the Constitution.

1102. The complainant organization denounces the fact that all the measures of suspension, arrest and detention, as well as disciplinary measures, were instigated before the commission set up to supervise payments of risk insurance premiums had submitted its report on 4 August 2008. In the view of SYNCASS, this shows that the measures in question are in fact covert attacks made with the aim of disrupting the union's work, since Mr Mambu, Mr Ilwa and Mr Sukami, in managing these payments, were acting in accordance with a union mandate. The general secretary of SYNCASS is also said to have been arrested by the police on 10 October 2008.

1103. SYNCASS alleges that the three union officers are unable to carry on their official union duties. It claims that the Governor and the medical inspector refuse to cooperate, and that they have seats on the commission currently responsible for handling the payment of risk insurance premiums, which is now supervised by the medical inspector instead of by the SYNCASS provincial official. The complainant organization further alleges that the three union officials in question have been banned from leaving the town of Bandundu.

1104. The complainant organization also states that on 8 August 2008, when Mr Mambu called on the manager of the "Sons of Bandundu" agency to collect some correspondence addressed to him and containing the list of risk insurance beneficiaries for July 2008, the agency employee was approached by two individuals acting on the instructions of the provincial medical inspector. The complainant organization has supplied in an annex to the main complaint a letter dated 11 August 2008 from Mr Mambu and Mr Ilwa relating the events that are alleged to have occurred, and stating that the two persons who intercepted the correspondence used force against the manager of the agency.

1105. The complainant organization also alleges that the commission set up to supervise payments of the risk insurance premium ordered the confiscation of the portable computer owned by the SYNCASS BDD committee on the instructions of the provincial Governor, in order to seek evidence in support of their accusations. According to the complainant organization, however, no such evidence has ever been found, and the computer has never been returned. It supplies in this connection copies of a mission report ordered by the Minister of Justice noting the confiscation of the computer on the Governor's instructions, and noting also that no evidence of the allegations was ever found and that despite this, the computer has still not been returned to the union, despite repeated requests.

1106. SYNCASS states that on 18 September 2008, the Governor asked the medical inspector of the province to allocate its (SYNCASS) share of dues to another union, the FNPS/UNTC, resulting in a new distribution of union dues. According to the complainant organization, the FNPS/UNTC is a union whose presence and action is not effective in the public health services.

1107. The complainant organization also denounces the media campaign waged by the authorities in order to discredit the union in the eyes of the workers. In addition, at a public meeting, the Governor is said to have suggested specifically to the health sector staff of Bandundu that they should collectively disaffiliate from SYNCASS.

1108. Furthermore, the complainant organization states that the request made by the Director of Health Care Institutions on 10 March 2009 to end the practice of having state accountants deduct dues at source when the risk insurance premiums were paid, and to set up in its place mechanisms by which the union members themselves could recover those dues, contravenes point 12 of the protocol of agreement of 14 November 2007 signed by the national inter-union body (SYNCASS and SOLCYO) and the Government, which had undertaken to allow the deduction of union dues at source. The complainant organization supplies in the annex a copy of a letter from the Ministry of Public Health, dated 10 March 2009, by which the request was made.

1109. The complainant organization alleges that its dispute with the Governor of Bandundu shows the discriminatory treatment by the authorities of health services staff other than doctors. As an example, it cites the attention given by the authorities to the demands of doctors' union representatives, which contrasts with the intimidation to which SYNCASS and its members are subjected.

1110. According to the complainant organization, this discriminatory treatment is a consequence of the political and administrative structure of the country's health sector, which helps to

preserve a corporatist attitude, to the detriment of most staff in the sector. The claims made by categories of staff other than those represented by the doctors' unions are said to be systematically ignored. Similarly, they are refused promotions and higher management appointments, which is not conducive to their participation in bodies that fix their terms and conditions of work. The complainant organization denounces this de facto differential treatment, which prevents any account being taken of the work-related demands of the majority of health sector staff, and requests the re-establishment of dialogue between the authorities and union representatives in the sector.

B. The Government's reply

1111. In a communication dated 6 March 2009, the Government states that, following the complaint filed by SYNCASS, a delegation was authorized to carry out an investigation in Bandundu into the allegations made by the complainant organization. The delegation comprised the councillor for industrial relations and labour inspection and the principal labour inspector (first class) attached to the general labour inspectorate.

1112. As part of the investigation, the delegation met with the Governor of Bandundu Province, the Procurator General of the Republic, the provincial medical inspector, the administrator of the Bandundu hospital, the executive committee of the National Union of Workers in Bandundu and a delegation from SYNCASS/Bandundu. In addition, it met with one of the individuals involved in the complaint, Mr Mambu. The Government states that, according to the conclusions of the inquiry, and following numerous complaints made by beneficiaries of the risk insurance to the provincial health division and SYNCASS, and noting the general climate of mistrust among those beneficiaries towards the SYNCASS BDD committee, the Governor decided to set up a provincial commission to inquire into the payment of the risk insurance premiums for health sector staff. The investigation is said to have shown that some 9,495,672 Congolese francs had been siphoned off by the SYNCASS BDD committee out of the total premiums collected for March 2008. That sum was returned later by the SYNCASS BDD officials. According to the Government, however, not only had the SYNCASS BDD committee been required to explain the monthly deficits seen between December 2007 and April 2008, but the Governor of the Province had instituted judicial proceedings for misappropriation of the premiums by state officials under the authority of the provincial government. The persons concerned are Mr Mambu and Mr Ilwa.

1113. The Government states that the inquiry conducted by the delegation proved that the SYNCASS BDD committee had regularly misappropriated state funds intended for the payment of risk insurance premiums for health-care and administrative staff. As a result of this, in accordance with the statutes governing state officials and Decree-Law No. 017/2002 of 3 October 2002, setting out the Code of conduct for state officials, the provincial authorities suspended Mr Mambu and Mr Ilwa as a preventive measure. In addition, they were asked to explain a deficit of 33,009,977 Congolese francs in the payment operations for which they were responsible.

1114. In the Government's view, this case is not about interference in the activities of SYNCASS but of measures to punish state officials who had misappropriated funds in contravention of Decree-Law No. 017/2002 of 3 October, in particular sections 29, 30 and 32. The Government furthermore is guided by the Committee's principle according to which in cases involving the arrest, detention or sentencing of a trade union official, the person accused must enjoy the presumption of innocence, and the Government must show that the measures it adopts are not motivated by the trade union activity of the person concerned.

C. The Committee's conclusions

1115. *The Committee notes that this case concerns allegations of interference by the authorities in the activities of a trade union, arrests and detentions of trade unionists, seizure of the union's correspondence and computer records, and a public smear campaign against the union.*

1116. *The Committee notes that the complainant organization denounces the unilateral decision by the Governor of Bandundu Province in July 2008 to set up a commission to supervise the payments of risk insurance premiums for categories of health service staff other than doctors, for the months of May and June 2008, which had formerly been the responsibility of the SYNCASS BDD committee, under the terms of a protocol of agreement concluded with the Ministry of Health. The Committee notes that according to the complainant organization, this decision, the pretext for which was unproven accusations of misappropriation of funds, constitutes interference in the union's activities. The Committee notes that according to the complainant organization, these accusations are just a roundabout way for the Governor to get a new SYNCASS BDD committee appointed, so that he can work with people of his own choosing and thereby deprive the legitimate SYNCASS BDD committee of the dues to which it was entitled in return for the service it provided to beneficiaries of the risk insurance.*

1117. *The Committee notes the Government's statements to the effect that it authorized a delegation to carry out an on the spot inquiry into the allegations made by the complainant organization. According to that inquiry, following numerous complaints by insured members to the provincial health division and the provincial section of SYNCASS, and in view of the growing mistrust among insured members towards the provincial SYNCASS committee, the Governor decided to set up a provincial commission to deal with payments of the risk insurance premiums for health-care and administrative staff. The Committee notes the Government's statements to the effect that the inquiry concluded that the SYNCASS BDD committee was regularly siphoning off state funds intended for paying the risk insurance premiums.*

1118. *The Committee notes the complainant organization's statements to the effect that on 14 July 2008, the Governor suspended the three principal officials of the SYNCASS BDD committee (Mr Simon Mambu, provincial executive secretary; Mr Dieudonné Ilwa; and Mr Blanchard Sukami, provincial treasurer) from their administrative posts. The Committee notes the statement to the effect that the Governor on the same day instructed the public prosecutor at the Bandundu court of appeal to order the arrest and detention of the three trade unionists, who were detained for a period of 11 days from 14 to 25 July 2008, which according to the complainant is well beyond the 48 hours allowed under the National Constitution. In addition, on 15 July 2008, disciplinary action was initiated against the three trade unionists in question. According to the complainant organization, these measures of suspension, arrest and detention, as well as the disciplinary measures, were taken well before the commission responsible for supervising the payments of risk insurance premiums submitted its report on 4 August 2008. This, it is claimed, shows that the measures in question are in fact disguised attacks aimed at disrupting the operation of the union.*

1119. *The Committee notes the Government's statement to the effect that in accordance with the statutes governing public officials and Decree-Law No. 017/2002 of 3 October 2002, regarding the Code of conduct for state officials, the provincial authority suspended Mr Mambu and Mr Ilwa on a preventive basis. The Committee also notes the Government's statement to the effect that the Governor filed an action with the Bandundu court of appeal alleging misappropriation of risk insurance premiums for health-care employees by state officials under the authority of the provincial government.*

1120. *The Committee notes the contradictory information supplied by the complainant organization and the Government in this case. It notes that the case centres on the accusations of misappropriation made against a number of provincial officials of SYNCASS. The Committee considers that it is not within its remit, in the light of the information available to it, to determine the responsibilities of those involved, that task being a matter for the national judicial authorities, of whose decisions it will take note as appropriate. The Committee further notes that both the complainant organization and the Government report the measures of arrest, detention and administrative sanction applied to the trade union officials Mr Mambu, Mr Ilwa and Mr Sukami from July 2008 onwards. The Committee also notes, however, the information that the commission set up to investigate the payment of risk insurance premiums, which found that funds were being misappropriated, submitted its report in August 2008. In this regard, the Committee recalls that measures designed to deprive trade union leaders and members of their freedom entail a serious risk of interference in trade union activities and, when such measures are taken on trade union grounds, they constitute an infringement of the principles of freedom of association [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, para. 65]. The Committee especially emphasizes the risks of those measures not being accompanied by appropriate judicial safeguards. With regard to the allegations of prolonged detention of trade unionists, the Committee recalls that the requirement that any detainee be brought without delay before the appropriate judge constitutes one of the fundamental rights of the individual and, in the case of trade unionists, freedom from arbitrary arrest and detention and the right to a fair and rapid trial are among the civil liberties which should be ensured by the authorities in order to guarantee the normal exercise of trade union rights [see* ***Digest****, op. cit., para. 98]. In these circumstances, the Committee requests the Government to carry out an independent inquiry into the conditions of arrest and detention of the SYNCASS trade unionists Mr Mambu, Mr Ilway and Mr Sukami and, if their arrest and detention are shown not to have been in accordance with these principles, to take appropriate measures to prevent any recurrence of such incidents.*

1121. *As regards the legal action before the courts and the disciplinary action under way, the Committee notes that neither the complainant organization nor the Government reports any decision. The Committee recalls that the absence of guarantees of due process of law may lead to abuses and result in trade union officials being penalized by decisions that are groundless. It may also create a climate of insecurity and fear which may affect the exercise of trade union rights [see* ***Digest****, op. cit., para. 106]. The Committee requests the Government to indicate the nature and the status of the judicial or administrative proceedings currently under way concerning the three SYNCASS BDD officials in connection with allegations of misappropriation of funds, the decisions handed down by the bodies involved and any follow-up.*

1122. *The Committee notes that in the view of the Government, the SYNCASS BDD committee officials concerned by this case should be considered to have been punished not because of their trade union functions but because of their capacity as agents of the State under the provincial authority. There are therefore no grounds for accusations of interference by the authorities in trade union affairs. The Committee notes that the complainant organization, by contrast, claims that there has been interference in its activities in the form of a disguised attack against a provincial union committee. In this regard, the Committee notes that both the Government and the complainant organization acknowledge the delegation of responsibility to the SYNCASS BDD committee until July 2008 for handling the payment of risk insurance premiums for health-care staff other than doctors in the province. The Committee recalls that while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists [see* ***Digest****, op. cit., para. 72].*

1123. *The Committee notes that according to the complainant organization, the three union officials in question are no longer able to carry on their official trade union duties and, furthermore, have been banned from leaving the town of Bandundu. The Committee notes that the Government provides no information on these points. It recalls that the imposition of sanctions, such as restricted movement, house arrest or banishment for trade union reasons, constitutes a violation of the principles of freedom of association. The Committee has considered it unacceptable that sanctions of this nature should be imposed by administrative action. The Committee also recalls that any procedure for placing an individual under house arrest must be accompanied by all the safeguards necessary to ensure that it is not used for the purpose of impairing the exercise of trade union rights. The Committee requests the Government to provide its observations on the matter of the allegations regarding the impossibility for SYNCASS BDD committee members to carry on their union duties and their confinement to the town of Bandundu.*

1124. *The Committee notes the complainant organization's statement to the effect that on 8 August 2008, correspondence containing a list of beneficiaries of the risk insurance for the month of July 2008, addressed to Mr Mambu, was intercepted by two individuals on the orders of the provincial medical inspector. The Committee notes in this regard a letter of 11 August 2008, signed by Mr Mambu and Mr Ilwa, relating to the allegations, according to which the two individuals in question used force against the manager of the "Fils de Bandundu" agency when intercepting the correspondence. The Committee notes that the Government supplies no information in this regard. It recalls that a climate of violence, in which attacks are made against trade union premises and property, constitutes serious interference with the exercise of trade union rights; such situations call for severe measures to be taken by the authorities and, in particular, the arraignment of those presumed to be responsible before an independent judicial authority [see* ***Digest****, op. cit., para. 191]. The Committee requests the Government to carry out an independent inquiry into the allegations regarding the interception by force of SYNCASS BDD correspondence on the orders of the provincial medical inspector and, if they are shown to be true, to take the necessary measures to punish those responsible in order to prevent a recurrence of such acts in the future.*

1125. *The Committee notes the allegations of the complainant organization that the commission responsible for supervising payment of risk insurance premiums ordered the confiscation of the portable computer owned by the SYNCASS BDD committee on the orders of the Governor of the province, in order to seek evidence in support of their accusations. The Committee notes that the computer has never been returned, although the evidence sought appears never to have been found. The Committee takes note of the report submitted by the mission ordered by the Ministry of Justice, which confirms the confiscation of the portable computer on the orders of the provincial governor and the information that the computer has not been returned to the union despite its repeated requests. The Committee notes that the Government supplies no information on this matter. The Committee recalls with concern that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights. It also recalls that searches of trade union premises should be made only following the issue of a warrant by the ordinary judicial authority where that authority is satisfied that there are reasonable grounds for supposing that evidence exists on the premises material to a prosecution for a penal offence, and on condition that the search be restricted to the purpose in respect of which the warrant was issued [see* ***Digest****, op. cit., paras 178 and 185]. Under these circumstances, the Committee requests the Government to indicate whether the portable computer of the SYNCASS BDD committee has been returned to the union and, if not, to take the measures necessary in the absence of a judicial order to the contrary, to have it returned to the union without delay, and to ensure strict adherence to the principles recalled here with regard to searches of trade union assets and premises.*

1126. *The Committee notes that according to the complainant organization, the authorities are engaged in a media smear campaign to tarnish the image of SYNCASS among the workers. Furthermore, access to the media has been made very difficult for the union. In this regard, the Committee recalls that the right to express opinions through the press or otherwise is an essential aspect of trade union rights. Similarly, 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 [see **Digest**, op. cit., paras 155 and 157].*

1127. *The Committee notes the complainant organization's statement to the effect that the request from the Director of Health Institutions on 10 March 2009 to end the practice of deducting trade union dues at source by state accountants when paying the risk insurance premiums and to set up in its place a mechanism for recovering these dues by the union members, contravenes point 12 of the Protocol of Agreement of 14 November 2007 between the national inter-union body for the public sector and the Government. The Committee notes that the Government supplies no information on this matter. The Committee wishes to recall that the withdrawal of the at-source deduction (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]. The Committee requests the Government to provide a copy of the Protocol of Agreement of 14 November 2007 by which SYNCASS is entrusted with sole responsibility for handling the risk insurance premium payments, and to offer some explanations as to the reasons for changing the previous practice of deducting union dues at source.*

The Committee's recommendations

1128. ***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 carry out an independent inquiry into the conditions of the arrest and detention of the SYNCASS officials Mr Mambu, Mr Ilwa and Mr Sukami and, if it is shown that their arrest and detention did not adhere to the principles recalled here with regard to the arrest and detention of trade unionists, to take appropriate measures to ensure that such situations cannot occur again in the future.

(b) The Committee requests the Government to indicate the nature and the status of the current legal or administrative proceedings against the SYNCASS BDD official accused of misappropriation of funds, and to inform it of any decisions handed down by the bodies concerned and any follow-up action.

(c) The Committee requests the Government to provide its observations on the allegations that the SYNCASS BDD officials have been unable to carry out their official duties and have been banned from leaving Bandundu.

(d) The Committee requests the Government to hold an independent inquiry into the allegations that SYNCASS correspondence was intercepted by force on the orders of the provincial medical inspector and, if they are shown to be true, to take the necessary measures to punish those responsible in order to prevent any recurrence of such acts in future.

(e) ***The Committee requests the Government to indicate whether the portable computer owned by the SYNCASS BDD committee has been returned to it and, if not, to take the necessary measures, in the absence of a judicial order to the contrary, to ensure that it is returned to the union without delay, and to ensure strict adherence in future to the principles recalled here with regard to searches of union assets and premises.***

(f) ***The Committee requests the Government to supply a copy of the Protocol of Agreement of 14 November 2007, in which it is claimed to give SYNCASS sole responsibility for managing payments of risk insurance premiums, and to provide an explanation regarding the change in practice of at-source deduction (check-off) of union membership dues.***

CASE NO. 2642

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

Complaint against the Government of the Russian Federation presented by the Russian Labour Confederation (KTR)

Allegations: The complainant alleges that the management of the Murmansk Commercial Sea Port systematically violated trade union rights of the primary trade union organization of the Russian Trade Union of Dockers. In particular, it denied access to the workplace to its representatives, failed to forward internal regulations of the enterprise and information on social and labour issues, evicted the primary trade union from its premises, withdrew check-off facility and evicted the union's chairperson from his room in the dormitory

1129. The complaint is contained in a communication from the Russian Labour Confederation (KTR) dated 8 May 2008.

1130. The Government sent a partial response in a communication dated 4 September 2008.

1131. The Russian Federation 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' Representative Convention, 1972 (No. 135).

A. The complainant's allegations

1132. In its communication dated 8 May 2008, the KTR, a national trade union association, submits a complaint against the Government of the Russian Federation for violation of

trade union rights of members of the primary trade union organization of the Russian Trade Union of Dockworkers (RPD) at the Murmansk Commercial Seaport (MMTP).

1133. The KTR explains that the RPD primary trade union has been operating at the MMTP since 2 July 1991. According to the complainant, from the beginning of 2004, the port management has repeatedly pressured the union, prevented it from doing its work and caused workers to leave the union.

1134. In particular, the complainant alleges that since June 2004, the RPD primary trade union representatives have been unable to exercise their duties and rights, per section 11 of the Law on Trade Unions, to oversee the observance of labour, health and safety legislation. In particular, from September 2004, the enterprise management has been denying access to the workplace to trade union officers Mr Zamyatin, the law inspector, and Mr Maximov, a member of the health and safety commission. It has also denied them access to the administrative building by installing a checkpoint and requiring visitors' passes. The complainant considers that in doing so, the enterprise management has violated sections 5 and 11 of the Law on Trade Unions, according to which, trade unions are independent from executive and local self-governance bodies and employers, and have the right to represent and protect employees' social and labour rights and interests.

1135. In September 2004, the RPD primary trade union filed a lawsuit with the Leninsky District Court of Murmansk. In June 2005, the court concluded that no violations of trade union rights had occurred: while Mr Zamyatin and Mr Maximov had been denied access, other trade union officers, its chairperson Mr Klyuev and accountant Ms Ageeva, had access to the administrative building. On the appeal, in September 2005, the Murmansk Oblast Court upheld this decision. Informally, the RPD primary trade union was advised to reapply for passes to the Administration of the Murmansk Sea Port (AMSP), a federal state office whose duties include setting up procedures for admittance to the port territory which houses the MMTP.

1136. The chairperson of the RPD primary trade union applied to the AMSP for permanent, 24-hour passes on 22 December 2005 but was refused, on 17 January 2006, on the grounds that Mr Klyuev, Mr Zamyatin, and Mr Maximov were not employees of the enterprise. The decision stated that pursuant to the Regulations on Security and Admittance at the MMTP, permanent passes are given to people permanently employed with the MMTP. The complainant alleges that for two months the RPD primary trade union negotiated with the AMSP, but to no avail. During that period, Mr Klyuev entered the port on passes paid for in cash out of his own money, but ultimately, the AMSP and the enterprise management issued an oral order to stop giving him passes.

1137. In March 2006, the RPD primary trade union filed a new lawsuit with the Leninsky District Court of Murmansk claiming that the denial of passes to the union's representatives violated trade union rights. In its 4 July 2006 decision, the court ruled against the union, stating that it had not provided all the documents required to obtain such passes. This is disputed by the complainant, which states that the RPD primary trade union provided all necessary documents. The Murmansk Oblast Court, on appeal, upheld this decision without examining the case its merits.

1138. The complainant alleges that in December 2006, the RPD primary trade union once again applied to the AMSP for passes for 2007, providing in advance all documents specified in the latest court decision. The AMSP did not reply. Having received no reply from the AMSP and having no access to its members' workplaces, in February 2007, the RPD primary trade union filed another lawsuit demanding passes. This case is pending.

1139. The KTR further alleges that as of May 2004, the management stopped sending the RPD primary trade union the enterprise internal regulations. In its 7 June 2005 decision, the Leninsky District Court found that trade union rights had been violated. The union consequently received copies of decrees and information on social and labour issues for the period preceding the court case. However, no subsequent information has been provided to the union.

1140. The KTR also alleges that in 2004, the company began a campaign to evict the RPD primary trade union from its office up until then provided by the enterprise. In August 2005, the union was denied access to its office space and property inside it. The union's office was transferred to the port's security service and in December 2005, its property was moved out.

1141. The complainant indicates that section 377 of the Labour Code requires an employer to provide premises for primary trade unions' elected bodies to hold meetings and store documents free of charge, as well as opportunities to post information in a place accessible to all employees. The Law on Trade Unions contains a similar provision (section 28). In accordance with this provision and the collective agreement, the enterprise management had provided the union with an office space. The agreement concluded to that effect on 15 December 2002 specified that the union could use the space until the expiration of the collective agreement signed on 18 June 2002 for three years. In addition, according to a memo of 24 July 2001, the enterprise management promised the union committee a free access to the office space at any time.

1142. The complainant alleges that on 20 July 2004, the enterprise management sent the RPD primary trade union a proposal to terminate the abovementioned agreement and to vacate the office space within five days claiming that it had been used after business hours. The union refused on the grounds that the Labour Code provided that a union could be evicted only if it was provided with another office space. In July 2004, the enterprise addressed the Arbitration Court of Murmansk Oblast with a request to terminate the agreement. On 15 December 2004, the Court decided in favour of the RPD primary trade union and the Thirteenth Arbitration Court of Appeals upheld this award on 3 May 2005.

1143. In August 2005, the enterprise applied to the Arbitration Court of Murmansk Oblast for the second time for permission to evict the union, claiming that the office space was needed for other purposes. On 24 October 2005, the Arbitration Court of Murmansk Oblast decided in favour of the enterprise, concluding that the employer had the right to evict the union without providing a replacement space. On 15 February 2006, the Thirteenth Arbitration Court of Appeals agreed with this award.

1144. The complainant alleges that even before the case was considered (for the second time), the enterprise management denied union officers access to the trade union office and to its property stored there. At the end of August, all union property and documents were inventoried by the management and transported to an unknown location, in the absence of trade union officers. In October 2005, the enterprise management offered an unsuitable office space, which the union refused. As a result of the 24 October 2005 arbitration award, the union, which had been evicted even before its issuance, remained without an office space.

1145. In July 2005, a collective agreement for 2005–08 was signed at the enterprise. The agreement required the employer to provide primary trade unions of the company with at least one equipped office space free of charge. The KTR alleges that the RPD primary trade union has repeatedly asked the employer to provide it with an office space in accordance with the law and the collective agreement. In 17 March 2006 and 4 April 2006 memos, the enterprise notified the union that it could have a space in the storage of the

port. The RPD primary trade union filed a lawsuit with the Leninsky District Court of Murmansk demanding an office space free of charge for an unlimited period of time. On 10 July 2006, the Court ruled in the union's favour and ordered the enterprise to comply within a month. When the enterprise failed to do so, the union appealed to the bailiff service for enforcement. In response, the enterprise rented a hotel room in another area of the city where it would be difficult for trade union members to come and where the union committee could not set up its operations. In addition, according to the complainant, the legislation on fire safety forbids setting up offices and operations in hotel buildings and rooms. To date, the RPD primary trade union has no office space.

1146. The complainant also alleges that the enterprise stopped withdrawing trade union member dues from the members' monthly wages, without any warning or explanation and despite employees' personal written requests to withdraw and transfer their dues to the union's account. The KTR explains that section 379 of the Labour Code requires the employer to calculate, withdraw from members' wages and transfer members' dues to the union's account. The enterprise collective agreement for 2005–08 determines this procedure.

1147. The RPD primary trade union addressed the Arbitration Court of Murmansk Oblast requesting a transfer of trade union dues for the period of January through April 2006 (485,586.74 rubles). On 18 July 2006, while the court agreed that trade union rights had been violated, it could not satisfy the union's claim because the employer had not even withdrawn the payments from the employees' wages. In August 2006, the union filed a lawsuit with the district court to oblige the enterprise to withdraw and transfer trade union dues. The case is pending. Consequently, for almost two years the RPD primary trade union has been collecting dues "by hand" in cash. Considering the lack of access to union members (because of the unavailability of passes) and of an office space, the process is very time and energy consuming, resulting in the collection of only 40 to 50 per cent of dues.

1148. In September 2007, the enterprise requested the Fiscal Crimes Department to check the legitimacy of trade union dues collection. The complainant alleges that this was a severe interference with its internal operations. The union chair and lawyers were summoned to the Fiscal Crimes Department to respond to the enterprise's allegations.

1149. The complainant alleges that as a result of all of the aforementioned systematic and purposeful illegal actions by the enterprise, as well as the courts' and state authorities' passivity, the union's operation has been extremely complicated for several years. It faces insurmountable obstacles in overseeing the implementation of members' rights and interests as regards labour and health and safety legislation. As it is essentially cut off from its members and their workplaces, it is unable to properly run its operations or organize and conduct events planned by trade union bodies and supported by members. The bulk of the union's work concentrates on protecting members' rights in courts, with hearings conducted almost daily. In sum, the union's operation is practically paralysed. As a result, and due to permanent pressure from the enterprise management, membership has decreased from 330 to 170 people. The complainant indicates that the RPD primary trade union and its members employ all available resources to cope but the current situation cannot be tolerated for long, and requires the intervention of international trade unions and other international structures. The complainant submits several documents, including copies of court judgements, pertaining to this case.

1150. In its communication, the complainant also alleges that the RPD primary trade union chairperson is under threat of eviction from his dormitory room where he has lived since 1984. The KTR explains that the dormitory room was provided to him because of his employment and because he does not own a house. Since 1994, the dormitory has been the private property of the enterprise. In 2004, the enterprise management decided to make

office spaces in the dormitory and launched a campaign to move out its residents. Most of the residents were moved out but Mr Klyuev refused on the grounds that it violated his constitutional rights. The enterprise filed a lawsuit with the Leninsky District Court of Murmansk to evict him and to move him to another dormitory; the court dismissed the case.

1151. In October 2004, the Prosecutor's Office of the Leninsky District of Murmansk filed a lawsuit on behalf of the dormitory residents challenging the leasing out of the dormitory premises. The Leninsky District Court ruled in favour of the residents. In response to the appeal by Mr Klyuev claiming ongoing violations pertaining to the dormitory leasing, the Prosecutor's Office wrote a memo urging the enterprise to cease the violations. The management took no action. A second suit filed by Mr Klyuev was dismissed by the Leninsky District Court of Murmansk. Subsequently, the enterprise filed a lawsuit with a Justice of the Peace to determine who had the right to use the property. The court granted Mr Klyuev the right to use one more room. The complainant alleges that despite this decision, Mr Klyuev began receiving written eviction notices and on several occasions, attempts have been made to break into his room. The complainant alleges that Mr Klyuev appealed to the Prosecutor's Office to open a criminal case. Currently, he must remain in his dormitory room at all times to ensure he is not evicted in his absence.

B. The Government's reply

1152. In its communication dated 4 September 2008, the Government indicates that it examined the complaint submitted by the KTR and the RPD to the ILO. The Government states that these trade union organizations have never addressed the federal executive bodies, responsible for supervision of application of labour law and further indicates that the dispute in question is now being dealt with by the relevant courts. The Government submits several documents, including copies of court judgements, pertaining to this case.

C. The Committee's conclusions

1153. *The Committee notes that this case concerns allegations of violations of trade union rights of the primary trade union organization of the RPD by the management of the MMTP. In particular, the complainant alleges that the enterprise management has denied access to the workplace to the representatives of the RPD primary trade union, failed to forward the internal regulations of the enterprise and information on social and labour issues, evicted the primary trade union from its premises, withdrew check-off facilities and evicted the union's chairperson from his room in the dormitory.*

1154. *The Committee regrets that the Government limited itself to sending partial observations although it was requested on several occasions to provide full information, including comments of the enterprise concerned, since the allegations refer to violations of trade union rights in a specific enterprise. The Committee has always considered that the replies of governments against which complaints are made should not be limited to general observations. Governments should recognize the importance of formulating detailed replies to the allegations brought by complainant organizations, so as to allow the Committee to undertake an objective examination [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 24 and 25]. The Committee urges the Government to be more cooperative in the future.*

1155. *The Committee notes the relevant decisions and arbitration awards, copies of which have been provided by the complainant and the Government.*

1156. *The Committee notes that this case concerns the issue of granting facilities to workers' representatives in order to enable them to carry out their functions, such as access to the workplace, access to information, material facilities, including office space, and check-off facilities.*

1157. *With regard to access to the workplace, the Committee notes that, according the complainant, the RPD primary trade union officers have been denied access passes to the enterprise, including workplaces and administrative building. The Committee further notes that this dispute was examined by the courts on several occasions in 2005, 2006 and 2007. The Committee notes, in particular, two judgements pronounced on 17 June 2005 and 11 October 2006 by the Leninsky District Court of Murmansk and its civil affairs chamber, respectively.*

1158. *In its June 2005 decision, the court, dealing with the question of whether the enterprise has violated section 11 of the Law on Trade Unions by refusing to grant access to the workplaces and administrative building to trade union employees, Mr Zamyatin and Mr Maximov, considered that pursuant to this provision, trade union representatives have the right to freely visit organizations and workplaces of their members in order to fulfill their statutory rights. The MMTP, as the owner of the building situated at Murmansk, Port Passage 34, is entitled, pursuant to section 209 of the Civil Code, to the rights of possession, use and disposal of his property. Pursuant to agreement No. 153 of 15 December 2002, the trade union organization is provided with an office space at the address above for a temporary use, free of charge. By virtue of their contracts of employment, Mr Zamyatin and Mr Maximov are staff members of the union. Between 8 September and 1 November 2004 and 29 November 2004 to 11 January 2005, Mr Zamyatin and Mr Maximov were denied access to the workplaces. However, other trade union officers, including its chairperson Mr Klyuev and accountant Ms Ageeva, were granted access to the administrative building. Therefore, in the court's opinion, the enterprise management did not violate the abovementioned section of the Law on Trade Unions, as only some, but not all, trade union representatives were denied access to the workplaces.*

1159. *The 11 October 2006 decision of the civil affairs chamber (which examined on appeal the Leninsky District Court of Murmansk dated 4 July 2006) established that the applications submitted by the trade union organization on 22 December 2005 and 3 March 2006 to the AMSP with a view of obtaining permanent passes for members of the trade union committee, Mr Klyuev, Mr Zamyatin and Mr Maximov did not bear the trade union seal, as per the requirements of the Regulations on Security and Admittance to the Murmansk Sea Commercial Port and that establishing documents of the union, as well as the documents confirming the authority of its chairperson, its executive bodies and representatives, and documents confirming trade union membership of the MMTP workers were not annexed to its application made on 25 March 2006. Without examining the purpose of the procedure of granting passes to the territory of the MMTP established by the said Regulations, the court considered that the failure to submit the abovementioned documents constituted sufficient grounds for refusals to grant passes. The trade union contends that these documents were provided.*

1160. *The Committee notes that in February 2007, the RPD primary trade union filed another case with regard to the same matters. This case is still pending.*

1161. *Without reviewing the merits of the decisions above, it appears to the Committee that these decisions only confirm that for a number of years, the representatives of the RPD primary trade union face difficulties with obtaining access to the workplaces and administrative building of the enterprise. The Committee draws the attention of the Government to the principle that workers' representatives should enjoy such facilities as may be necessary for*

the proper exercise of their functions, including access to workplaces. Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization and carry out their representation function. Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned [see ***Digest****, op. cit., paras 1102–1106].*

1162. *The Committee further notes from the complainant's allegations and the court decisions above that certain trade union representatives, i.e. its law inspector and a member of the health and safety commission, have specifically been denied access to the workplaces by the enterprise and the authorities (AMSP), whereas other trade union representatives have been allowed access. With regard to the question of who should be allowed access to the workplaces, the Committee considers that the term "trade union representatives" means representatives designated or elected by a trade union or by the members of such a union. The Committee recalls in this respect that freedom of association implies the right of workers to elect and designate their representatives in full freedom [see* ***Digest****, op. cit., para. 388]. It is essential that the public authorities and employers refrain from any intervention which might impair the exercise of this right and exercise great restraint in relation to intervention in the internal affairs of trade unions. The Committee therefore requests the Government to take the necessary measures to ensure that this principle is respected by bodies responsible for granting access to the workplaces to trade union representatives and to keep it informed in this regard.*

1163. *The Committee notes that section 11 of the Law on Trade Unions grants trade unions the right to represent and protect workers' social and labour rights and interests, through, inter alia, granting trade union representatives the right of access to the workplaces. The Committee therefore requests the Government to take the necessary measures in order to encourage the enterprise management and the RPD primary trade union to strive to reach an agreement on access to the workplaces, during and outside working hours, without impairing the efficient functioning of the enterprise. It further requests the Government to take the necessary measures in order to ensure that the trade union's occupational health and safety inspectors are granted access to the enterprise in order to exercise their rights to oversee the observance of labour, health and safety legislation, conferred to them by the Law on Trade Unions. The Committee requests the Government to keep it informed in this respect.*

1164. *With regard to the complainant's allegation that the enterprise management has failed to forward internal regulations and information on social and labour issues, the Committee notes the 7 June 2005 decision of the Leninsky District Court of Murmansk. In its decision, the court referred to sections 11 and 17 of the Law on Trade Unions, according to which, trade unions shall have the right to receive from employers and their associations, free of charge and without any obstruction, information on social and labour issues. The court further referred to the relevant sections of the Labour Code and the provisions of the collective agreement in force until 17 June 2005, which obliged the enterprise to provide copies of the management's orders concerning personnel of the enterprise. In view of the above, the court ordered the MMTP to provide the RPD primary trade union with copies of the management's orders concerning personnel of the enterprise for the period ending with the expiration of the collective agreement, as well as with any other information on social and labour issues.*

1165. *The Committee notes the complainant's allegation that while the enterprise complied with the abovementioned decision and provided the documents mentioned in the judgement, no subsequent information has been provided to the union. The Committee draws the*

Government's attention to the Workers' Representatives Recommendation, 1971 (No. 143), concerning protection and facility to be afforded to workers' representatives in the undertaking, which provides that the management should make available to workers' representatives such material facilities and information as may be necessary for the exercise of their functions. Noting that this principle has been translated into the national legislation, the Committee expects that the Government will take the necessary measures in order to ensure its application by the management of the MMTP. In particular, the Committee requests the Government to ensure that the RPD primary trade union receives all information on social and labour issues affecting its members it has the right to receive pursuant to the national legislation. The Committee requests the Government to keep it informed in this respect.

1166. *With regard to the allegation of eviction of the RPD primary trade union from its premises, the Committee notes the arbitration awards of 15 December 2004, 3 May and 24 October 2005 and 15 February 2006 establishing the following facts. On 30 July 2001, the enterprise and the RPD primary trade union concluded a contract on temporary use of an office situated at the enterprise premises free of charge. The contract did not provide for a validity period. On 18 June 2001, a collective agreement for 2002–05 was concluded at the enterprise with the participation of the RPD primary trade union. According to the agreement, the employer was to provide trade union committees, signatories of the agreement, with separate office spaces free of charge. To that end, a contract had to be concluded between the employer and the relevant trade union organization. The collective agreement further provided that all previously signed contracts and agreements would cease to have effect on the day of the signature of the 2002–05 collective agreement. On 15 December 2002, pursuant to this collective agreement, a contract was concluded between the employer and the RPD primary trade union organization providing the union with an office space. According to the contract, the office was provided free of charge until the expiration of the collective agreement. This collective agreement expired on 17 June 2005, with the adoption of a new collective agreement for 2005–08. Pursuant to the new collective agreement, the employer was required to provide trade union committees active at the enterprise with at least one office space free of charge. To that end, a contract should be concluded between the employer and the relevant trade union organization. The employer reserved the right to provide premises which are either his own or rented. The collective agreement did not specify where the offices were to be situated. The RPD primary trade union did not participate in the collective bargaining which led to the signing of this collective agreement.*

1167. *In relation to these cases, the Committee notes that in July 2004, the enterprise addressed the Arbitration Court seeking trade union eviction. Considering the abovementioned facts, by its 15 December 2004 decision, the Arbitration Court ruled in favour of the RPD primary trade union. This decision was upheld by the Thirteenth Arbitration Court of Appeals on 3 May 2005.*

1168. *The Committee further notes that once the 15 December 2002 contract between the enterprise and the union lapsed due to the expiration of the 2002–05 collective agreement on 17 June 2005, the enterprise applied to the Arbitration Court of Murmansk Oblast to evict the union, claiming the office space was needed for other purposes. On 24 October 2005, the Arbitration Court of Murmansk Oblast ruled in favour of the enterprise. The Committee notes that in its October 2005 decision, the court stressed that the union did not participate in the negotiation of the 2005–08 collective agreement and therefore did not contribute to the insertion of the clause concerning office spaces to be provided by the employer to trade unions; recalled section 209 of the Civil Code which entitled an owner to the rights of possession, use and disposal of his/her property at his/her discretion; and considered that the obligation imposed by the legislation and the collective agreement to provide trade union organizations with an office space should not be in conflict with the*

enterprise's rights to use and dispose of its own property. On 15 February 2006, the Thirteenth Arbitration Court of Appeals established that the 2005–08 collective agreement provided for the granting to the RPD primary trade union of an office space without specifying where it was to be situated, that the union refused to accept the office space offered by the employer and therefore upheld the ruling of the first instance.

1169. *The Committee notes that the RPD primary trade union filed a lawsuit with the Leninsky District Court of Murmansk requesting it to oblige the enterprise to grant to the union an office space situated on the territory of the enterprise. On 10 July 2006, the Court ordered the enterprise to comply with section 377 of the Labour Code and section 28 of the Law on Trade Unions providing for an obligation imposed on the employer to create conditions for the activities of elected trade union committees, through, among others, granting, free of charge premises, which can either belong to the employer or be rented by him. The court dismissed, however, the union's request for the premises to be situated on the territory of the enterprise.*

1170. *The Committee understands that the legislation of the Russian Federation obliges employers to create conditions for the activities of elected trade union committees, through, among others, granting premises free of charge. The Committee notes that according to the complainant, an office space, a hotel room in another distant area of the city, has been offered to it free of charge. The union turned this offer down as the legislation on fire safety forbids setting up offices and operations in hotel buildings and rooms and because these premises were situated in a distant and not easily accessible area of the city. The complainant indicates that it is still without an office space.*

1171. *The Committee recalls Article 9 of the Workers' Representatives Recommendation (No. 143), according to which:*

(1) Such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.

(2) In this connection, account should be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.

(3) The granting of such facilities should not impair the efficient operation of the undertaking concerned.

1172. *The Committee underlines the need to strike a balance between two elements: (i) facilities in the undertaking should be such as to enable trade unions to carry out their functions promptly and efficiently and (ii) the granting of such facilities should not impair the efficient operation of the undertaking. The Committee requests the Government to take the necessary measures in order to facilitate finding a mutually acceptable solution on the question of premises to be granted to the RPD primary trade union taking into account the principle above and pursuant to the legislative provisions in force. The Committee requests the Government to keep it informed in this respect.*

1173. *With regard to the allegation of eviction and moving out of trade union property undertaken by the enterprise while the case was still pending on appeal, the Committee draws the Government's attention to the importance of the principle that the property of trade unions should enjoy adequate protection [see* ***Digest****, op. cit., para. 189] and considers that such actions by the enterprise, without a court order, constitutes an infringement of the right of trade unions to own property and undue interference in trade union activities. With regard to the allegation that the management denied trade union*

officers the access to the office space even before the second lawsuit was considered, the Committee recalls that the access of trade union members to their union premises should not be restricted. The Committee requests the Government to ensure respect for these principles in the future.

1174. *With regard to the allegation of withdrawal of check-off facility, the Committee notes the decision of the Arbitration Court of Murmansk Oblast dated 18 July 2006. The Committee notes from this decision that the complainant claimed 457,957.65 rubles of trade union dues, which the enterprise failed to transfer to the union account in the period between January and April 2006. In the decision, reference is made to section 377 of the Labour Code and section 28 of the Law on Trade Unions, according to which, upon trade union members' written applications, an employer shall monthly and free of charge transfer onto the trade union's account trade union membership dues withdrawn from their wages, in conformity with the collective agreement. Such procedure was provided for by the 2005–08 collective agreement. The court established, however, that despite written applications to this effect, trade union dues were not withdrawn from workers' salaries and therefore were not transferred to the trade union account. In these circumstances, the court concluded that the trade union cannot claim the transfer of trade union dues which had not been withdrawn.*

1175. *The Committee notes that in 2006, the complainant filed a lawsuit with the district court requesting it to oblige the enterprise to withdraw and transfer trade union dues. The complainant indicates that this case is still pending and that for the last two years it has been obliged to collect trade union dues "by hand" in cash. Considering the lack of access to its members and of an office space, this has been very difficult and resulted in a loss of up to a half the amount of trade union dues.*

1176. *The Committee notes that national legislation provides for a possibility for workers to opt for deductions from their wages under the check-off system to be paid to their trade union organization. The Committee further notes that the enterprise, in violation of the legislation and the collective agreement in force, withdrew the check-off facility. The Committee considers 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]. Noting that due to withdrawal of the check-off facility, the RPD primary trade union has been facing serious financial difficulties, further noting that the case filed in 2006 before the district court is apparently still pending, and recalling that a considerable delay in the administration of justice is tantamount in practice to a denial of justice, the Committee requests the Government to take the necessary measures in order to ensure that the check-off system is restored without delay, pursuant to section 377 of the Labour Code and section 28 of the Law on Trade Unions. The Committee requests the Government to keep it informed in this respect.*

1177. *With regard to the allegations of eviction of the trade union chairperson from his dormitory room, the Committee notes that this measure concerned all residents of the dormitory. The Committee further notes that the complainant does not allege that the eviction is connected to Mr Klyuev's trade union activities. The Committee recalls that it has no competence to examine complaints related to housing rights. In these circumstances, it considers that this particular question calls for no further examination.*

1178. *The Committee expresses its concern at what appears to be systematic and repeated actions by the enterprise management aimed at effectively interfering with the union's work, functioning and exercising of its rights, thereby undermining its role of workers' representative. The Committee expects that the Government will take the necessary measures, including through the issuance of relevant instructions to the enterprise*

management, in order to ensure that the RPD primary trade union can organize its administration and activities for the furtherance and defence of its members without interference by the employer. The Committee requests the Government to keep it informed of the measures taken in this respect.

The Committee's recommendations

1179. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee regrets that the Government provided only partial information on the allegations made in this case and urges the Government to be more cooperative in the future.

(b) The Committee requests the Government to take the necessary measures in order to encourage the enterprise management and the RPD primary trade union to strive reaching an agreement on access to the workplaces, during and outside working hours, without impairing the efficient functioning of the enterprise. It further requests the Government to take the necessary measures in order to ensure that the trade union's occupational health and safety inspectors are granted access to the enterprise in order to exercise their rights to oversee the observance of labour, health and safety legislation, conferred on them by the Law on Trade Unions. The Committee requests the Government to keep it informed in this respect.

(c) The Committee requests the Government to take the necessary measures in order to ensure that the principle according to which authorities and employers should refrain from any undue interference in trade union internal affairs, including the right to freely elect its representatives, is respected by bodies responsible for granting access to the workplaces to trade union representatives. The Committee requests the Government to keep it informed in this respect.

(d) The Committee requests the Government to take the necessary measures in order to ensure that the MMTP management provides the RPD primary trade union with all information on social and labour issues affecting its members, pursuant to the national legislation in force. The Committee requests the Government to keep it informed in this respect.

(e) The Committee requests the Government to take the necessary measures to facilitate finding a mutually acceptable solution on the question of premises to be granted to the RPD primary trade union pursuant to the legislative provisions in force and the principles embodied in the Workers' Representative Recommendations (No. 143). It requests the Government to keep it informed in this respect.

(f) The Committee requests the Government to ensure respect for the principle of inviolability of trade union premises.

(g) Noting that due to withdrawal of the check-off facility, the RPD primary trade union has been facing serious financial difficulties, further noting that the case filed in 2006 before the district court is apparently still pending, and

recalling that a considerable delay in the administration of justice is tantamount in practice to a denial of justice, the Committee requests the Government to take the necessary measures in order to ensure that the check-off system is restored without delay, pursuant to section 377 of the Labour Code and section 28 of the Law on Trade Unions. The Committee requests the Government to keep it informed in this respect.

(h) The Committee expects that the Government will take the necessary measures, including through the issuance of relevant instructions to the enterprise management, in order to ensure that the RPD primary trade union can organize its administration and activities for the furtherance and defence of its members without interference by the employer. The Committee requests the Government to keep it informed of the measures taken in this respect.

Geneva, 13 November 2009.

(Signed) Professor Paul van der Heijden
Chairperson

Points for decision:

Paragraph 188;	Paragraph 710;
Paragraph 218;	Paragraph 721;
Paragraph 243;	Paragraph 750;
Paragraph 267;	Paragraph 765;
Paragraph 300;	Paragraph 774;
Paragraph 326;	Paragraph 866;
Paragraph 357;	Paragraph 890;
Paragraph 400;	Paragraph 909;
Paragraph 432;	Paragraph 937;
Paragraph 464;	Paragraph 950;
Paragraph 480;	Paragraph 963;
Paragraph 505;	Paragraph 976;
Paragraph 520;	Paragraph 1015;
Paragraph 552;	Paragraph 1052;
Paragraph 575;	Paragraph 1067;
Paragraph 608;	Paragraph 1092;
Paragraph 620;	Paragraph 1128;
Paragraph 678;	Paragraph 1179.