



## Governing Body

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### NINTH ITEM ON THE AGENDA

## Reports of the Committee on Freedom of Association

### 365th Report of the Committee on Freedom of Association

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Appendix. Mission report, Moscow, Russian Federation (10–15 October 2011)





## Introduction

1. The Committee on Freedom of Association set up by the Governing Body at its 117th Session (November 1951), met for its 316th Session at the International Labour Office, Geneva, on 1, 2 and 9 November 2012, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Colombian and Dutch nationality were not present during the examination of the cases relating to Argentina (Cases Nos 2861, 2870 and 2906), Colombia (Cases Nos 2830 and 2852) and Netherlands (Case No. 2905), respectively.

\* \* \*

3. Currently, there are 181 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 32 cases on the merits, reaching definitive conclusions in 21 cases and interim conclusions in 11 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2318 (Cambodia), 2516 (Ethiopia), 2664 (Peru), 2723 (Fiji) and 2906 (Argentina), because of the extreme seriousness and urgency of the matters dealt with therein.

### **Urgent appeals**

5. As regards Cases Nos 2655 (Cambodia), 2684 (Ecuador), 2708 (Guatemala), 2714 and 2715 (Democratic Republic of the Congo), 2740 (Iraq), 2753 (Djibouti), 2786 (Dominican Republic), 2811 (Guatemala), 2869 (Guatemala), 2909 (El Salvador), 2912 (Chile), 2913 (Guinea), 2914 (Gabon), 2919 and 2920 (Mexico), 2923 (El Salvador), 2924 (Colombia), 2925 (Democratic Republic of the Congo), 2928 (Ecuador), 2930 (El Salvador) and 2933 (Colombia), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

### **New cases**

6. The Committee adjourned until its next meeting the examination of the following cases: 2951 (Cameroon), 2954 (Colombia), 2955 (Bolivarian Republic of Venezuela), 2957 (El Salvador), 2958 (Colombia), 2959 (Guatemala), 2960 (Colombia), 2962 (India), 2963 (Chile), 2964 (Pakistan), 2967 (Guatemala), 2968 (Bolivarian Republic of Venezuela), 2969 (Mauritius), 2970 (Ecuador), 2971 (Canada), 2973 (Mexico), 2974 (Colombia), 2975 (Costa Rica), 2976 (Turkey), 2978 (Guatemala), 2979 (Argentina), 2980 (El Salvador), 2981 (Mexico), 2982 (Peru), 2983 (Canada), 2985 and 2986 (El Salvador), 2987

(Argentina), 2988 (Qatar), 2989 (Guatemala), 2990 (Honduras), 2991 (India), 2992 (Costa Rica), 2993 (Colombia) and 2994 (Tunisia) since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

### **Observations requested from governments**

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2177 and 2183 (Japan), 2203 (Guatemala), 2265 (Switzerland), 2508 (Islamic Republic of Iran), 2694 (Mexico), 2712 (Democratic Republic of the Congo), 2726 (Argentina), 2745 (Philippines), 2830 (Colombia), 2855 (Pakistan), 2921 (Panama), 2936 (Chile), 2937 (Paraguay), 2939 (Brazil), 2942 (Argentina), 2943 (Norway), 2945 (Lebanon), 2946 (Colombia), 2948 (Guatemala) and 2950 (Colombia).

### **Partial information received from governments**

8. In Cases Nos 2673 (Guatemala), 2749 (France), 2768 (Guatemala), 2806 (United Kingdom), 2824 (Colombia), 2880 (Colombia), 2889 (Pakistan), 2893 (El Salvador), 2897 (El Salvador), 2900 (Peru), 2922 (Panama), 2927 (Guatemala), 2932 (El Salvador), 2947 (Spain) and 2961 (Lebanon), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

### **Observations received from governments**

9. As regards Cases Nos 2254 (Bolivarian Republic of Venezuela), 2445 (Guatemala), 2609 (Guatemala), 2620 (Republic of Korea), 2702 (Argentina), 2706 (Panama), 2743 (Argentina), 2761 (Colombia), 2763 (Bolivarian Republic of Venezuela), 2778 (Costa Rica), 2796 (Colombia), 2813 (Peru), 2814 (Chile), 2816 (Peru), 2817 (Argentina), 2826 (Peru), 2827 (Bolivarian Republic of Venezuela), 2853 (Colombia), 2860 (Sri Lanka), 2874 (Peru), 2877 (Colombia), 2882 (Bahrain), 2883 (Peru), 2885 (Chile), 2890 (Ukraine), 2892 (Turkey), 2894 (Canada), 2895 (Colombia), 2896 (El Salvador), 2904 (Chile), 2907 (Lithuania), 2908 (El Salvador), 2910 (Peru), 2911 (Peru), 2915 (Peru), 2916 (Nicaragua), 2917 (Bolivarian Republic of Venezuela), 2918 (Spain), 2926 (Ecuador), 2929 (Costa Rica), 2931 (France), 2935 (Colombia), 2938 (Benin), 2940 (Bosnia and Herzegovina), 2941 (Peru), 2944 (Algeria), 2949 (Swaziland), 2952 (Lebanon), 2953 (Italy), 2956 (Plurinational State of Bolivia), 2965 (Peru), 2966 (Peru), 2972 (Poland), 2977 (Jordan) and 2984 (The former Yugoslav Republic of Macedonia), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

### **Missions**

10. In Case No. 2723 (Fiji), the Committee observes that the Government of Fiji had accepted a direct contacts mission which visited the country in September 2012 but which was not allowed to continue its work. The examination of this case and the mission's report is set out in paragraphs 693–783. An ILO technical mission visited the Russian Federation within the framework of Case No. 2758 and its report is appended thereto (see paragraphs 1301–1401).

## Withdrawal of complaints

11. As regards Cases Nos 2801 and 2849 (Colombia), the Committee notes with satisfaction from the documents provided by the Government that, in the framework of the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT) and with ILO assistance, the parties have put an end to the disputes and have come to an agreement in this respect. Moreover, the said documents indicate that the complainant organizations have retracted the complaints. Taking into account this information, the Committee approved the withdrawal of these complaints.
12. With regard to Case No. 2790 (Colombia) – in which the Committee asked to be kept informed of the measures taken to give effect to its recommendation (see 360th Report, June 2011, paragraph 422) – the Committee notes with interest the agreement of 31 May 2012 through which, in the framework of the same activity of the CETCOIT, the parties committed themselves to guarantee and fully respect fundamental rights – in particular those related to freedom of association – to establish a bipartite dialogue authority, to initiate collective bargaining on 5 June 2012 and to inform the CETCOIT of the observance of the agreement.

## Transmission of cases to the Committee of Experts

13. The Committee draws the legislative aspect of the following Case No. 2723 (Fiji) to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

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

### *Case No. 2153 (Algeria)*

14. The Committee last examined this case at its November 2011 meeting [see 362nd Report, paras 13–16]. On that occasion, the Committee had requested the Government to continue to provide information on the situation of certain members and officials of SNAPAP. The Committee was awaiting information from the Government on the outcome of the inquiry carried out by the Ministry of Health, Population and Hospital Reform in February 2011 regarding the current situation of Mr Hadj Djilani Mohamed and Mr Houari Kaddour. The Committee was also awaiting information from the Government on the outcome of the appeal lodged as part of the case concerning Mr Mourad Tchikou. Lastly, the Committee had requested the Government to provide information on the current situation of Mr Sadou Saddek following his return from sick leave and, in particular, to indicate whether he had taken up his new post.
15. In a communication dated 25 May 2012, the Government indicates that the inquiry carried out by the Ministry of Health, Population and Hospital Reform has corroborated the information previously provided regarding the situation of Mr Hadj Djilani Mohamed and Mr Houari Kaddour. Regarding Mr Hadj Djilani Mohamed, the Government reiterates that he continues to occupy the post of head nurse and has lodged no complaints with the administration concerning the fine he received following an appeal lodged as part of a dispute with the leader of another trade union organization. Regarding Mr Houari Kaddour, the Government reiterates that he has made no statements since 2006 and that the administration has not been notified of any appeal against the decision to dismiss him for having abandoned his post in March 2006. As regards the case brought before the Supreme Court by Mr Mourad Tchikou, the Government indicates that the Court has yet to rule on

the appeal. Lastly, as regards the situation of Mr Sadou Saddek, the Government explains that a request for information from his employer has revealed that he was on sick leave until June 2012 and that he frequently and systematically renews that sick leave.

16. *The Committee takes note of the latest information provided by the Government on the present case. The Committee is awaiting information on the outcome of the appeal lodged as part of the case concerning Mr Mourad Tchikou, as well as on the situation of Mr Sadou Saddek, particularly on whether he has taken up his new post following his return from sick leave.*

### **Case No. 2701 (Algeria)**

17. The Committee examined this case at its March 2012 meeting [see 363rd Report, paras 14–17]. On that occasion, it firmly reiterated its recommendations for the Government to take all necessary measures to register, without delay, the National Union of Vocational Training Workers (SNTFP), which had submitted its initial application for registration back in August 2002.
18. In a communication dated 25 May 2012, the Government indicates that the SNTFP has been recognized and that it was issued with a receipt of registration on 21 May 2012 under No. 94 DRT/MTESS. *The Committee notes this information with satisfaction.*

### **Case No. 2603 (Argentina)**

19. The Committee last examined this case, in connection with the dismissal of the leader of the Association of Workers of the Provincial and Municipal Public Administration of Salta (ATAP), Ms Marina del Valle Guanca, and the transfer of three other ATAP leaders, at its November 2011 meeting. On that occasion, it was still awaiting the additional information which the Government had indicated that it intended to obtain concerning the alleged anti-union transfers of three ATAP leaders. The Committee also requested the Government to send without delay its observations concerning the ATAP's allegations relating to obstacles and delays in the handling of a penal complaint against the authorities of the province's Ministry of Labour and Social Welfare concerning the check-off code for the deduction of trade union dues [see 360th Report, paras 24–26].
20. In communications dated 12 January and 22 March 2012, the ATAP states that it has filed a penal complaint in this case and requested that the Governor of Salta province, the Ministry of Labour and Social Welfare, the Secretary-General for Governance, and the judges of the Salta Court of Justice be prosecuted for anti-trade union discrimination, failure to comply with international treaties, and abuse of authority and violation of the duties of public servants.
21. In a communication dated 19 July 2011, the Government forwarded a report, transmitted by the General Directorate for Revenues, in which it is stated that: (1) the decision ordering the reinstatement of the union leader, Ms Marina del Valle Guanca, was overturned by the Salta Court of Justice and Ms del Valle Guanca filed an extraordinary appeal before the Salta Supreme Court; that appeal is currently pending before the provincial Court of Justice, which will determine whether it will be allowed; (2) the alleged transfers of three trade union leaders are in fact not transfers but simply internal rotations within the agency (General Directorate for Revenues), with no change to either the employment status or the salaries of the agents concerned; and (3) the General Directorate for Revenues has no jurisdiction over the matter of union dues.

22. *The Committee notes this information. The Committee requests the Government: (1) to keep it informed of the progress made in the proceedings relating to the extraordinary appeal filed by the ATAP in connection with the dismissal of the union leader, Ms Marina del Valle Guanica; (2) to send its observations without delay on the ATAP's allegations concerning the obstacles and delays in the handling of the penal complaint against the provincial authorities of the Ministry of Labour and Social Welfare in connection with the check-off code for the deduction of trade union dues; and (3) to keep it informed of the progress made with regard to the criminal complaint filed by the ATAP against the Governor of Salta province, the Ministry of Labour and Social Welfare, the Secretary-General for Governance, and the judges of the Salta Court of Justice on the grounds of anti-trade union discrimination, failure to comply with international treaties, and abuse of authority and violation of the duties of public servants.*

### **Case No. 2725 (Argentina)**

23. The Committee last examined this case as to the merits in its March 2011 meeting, at which it made the following recommendations: (a) the Committee requests the Government to keep it informed of the judgment that is handed down in connection with the allegations concerning the possibility of a sanction being imposed on AMPROS for not complying with a call for compulsory conciliation; and (b) as regards the allegations by FESPROSA concerning sanctions against certain trade unionists (the suspension of 31 strikers in the province of Córdoba, as well as the suspension of the physician Vice-President of SIPARSE, the dismissal of nine trade unionists and the transfer of a trade union delegate in the province of Santiago del Estero), the Committee has not been informed whether the penalized workers have instituted judicial proceedings in connection with the sanctions imposed, or of the possible grounds for those sanctions. In these conditions, the Committee requests the Government to clarify whether these workers have lodged appeals before the courts and, if so, to keep it informed of the outcome. In addition, the Committee invites the complainant to provide any additional information it considers necessary in this regard [see 359th Report, paras 227–263].
24. In a communication of 16 May 2011, AMPROS sends further information on the case and reports in particular that on 11 January 2011 the Subsecretariat of Labour and Social Security of the Province of Mendoza issued resolution No. 210/11 penalizing AMPROS with a fine of 1,993,000 pesos (approximately US\$433,000) on grounds of violation of the second compulsory conciliation ordered by the abovementioned Subsecretariat. According to AMPROS: (1) the fine amounts to persecution and violates freedom of association and the right to strike, and is unfounded because it is based on facts that are alleged but that do not exist; (2) the Government's aim is to harass the association in an attempt to eliminate it and avoid protests by health professionals; and (3) this is clearly borne out by the fact that the penalty was applied 18 months after the event, in order to put pressure on and extort money from the organization in the face of the new wage claims and the planned strikes.
25. In a communication of July 2011 the Government encloses a communication from the Subsecretariat of Labour and Social Security of the Government of the Province of Mendoza stating, in connection with the fine for non-compliance with the compulsory conciliation ordered in 2009, that the matter is before the Fifth Labour Chamber, following an application for review of the administrative resolution imposing the fine, but that as yet there has been no ruling. Furthermore, in a communication of 6 February 2012, the Government reports that the Guarantees Commission, convened by resolution No. 1747 of the National Labour Secretariat, has intervened in the case in order to issue an opinion on minimum services in the dispute involving the Government of the Province of Mendoza and AMPROS (the Government encloses a copy of the commission's opinion).

26. *The Committee notes this information. With regard to recommendation (a) on the fine applied to AMPROS for non-compliance with the call to compulsory conciliation, the Committee requests the Government to keep it informed of the ruling handed down. With regard to recommendation (b) the Committee requests the Government to send its observations on these matters without delay. The Committee further recalls, in connection with this recommendation, that it invited the complainant organization FESPROSA to provide information in this regard.*

### **Case No. 2356 (Colombia)**

27. The Committee last examined this case, which concerns allegations of anti-union dismissals at Cali Municipal Enterprises (EMCALI), at its March 2012 meeting [see 363rd Report, paras 38–41]. On that occasion, the Committee noted with interest the *tutela* ruling by the court of second instance ordering EMCALI to reinstate the SINTRAEMCALI union leaders and members, in compliance with the Committee's recommendations. The Committee observed that the enterprise had brought further judicial proceedings against the second instance court order. Given these circumstances, and underlining that these workers were dismissed in 2004, the Committee expressed the firm hope that the Constitutional Court would hand down a decision without delay on the second instance *tutela* ruling. The Committee recalled its previous recommendations concerning the reinstatement of these trade unionists and requested the Government to ensure their implementation and to keep the Committee informed in this respect.
28. In a communication of 23 July 2012, the Government reports that the Constitutional Court issued *tutela* ruling No. T-261, in which it decided to afford protection to the SINTRAEMCALI workers and ordered the reinstatement of the 51 workers concerned, and that the latter were reinstated by resolution No. 001273 of 13 June 2012 issued by the enterprise EMCALI EICE ESP.
29. *The Committee notes this information with satisfaction.*

### **Case No. 2362 (Colombia)**

30. The Committee last examined this case at its March 2010 meeting [see 356th Report, paras 572–599]. On that occasion, the Committee made the following recommendations:
- (a) As regards the allegations concerning the replacement of dismissed workers with the members of cooperatives or employees of companies that do not enjoy freedom of association within AVIANCA SA, observing that the Committee of Experts on the Application of Conventions and Recommendations, when examining this matter, asked the Government to consider the possibility of an independent expert conducting a national survey on the application of the Associated Labour Cooperatives Act and the use thereof in the sphere of labour relations in order to determine whether or not workers in cooperatives can join trade unions, the Committee requests the Government to keep it informed of any measures taken in this respect.
  - (b) With respect to the allegations concerning pressure on trade union organizations in the same enterprise, resulting in many workers relinquishing their union membership, the drafting of a voluntary benefit plan outside the current collective agreement which particularly benefits non-unionized employees; the pressure on newly hired pilots to join the plan (with the result that they cannot join the trade union); and the adoption by the Ministry for Social Protection of internal labour regulations that were drafted without the participation of the trade unions, the Committee requests the Government to ensure that the voluntary benefit plan is not applied in such a way as to undermine the position of the trade unions and their bargaining capacity, in accordance with Article 4 of Convention No. 98, and that no pressure is placed on workers to join the plan. The Committee also requests the Government to keep it informed of the final outcome of the

direct revocation proceedings brought against the decision approving the internal work regulations. The Committee invites the enterprise and the complainant organization to bring these issues to the attention of the CETCOIT and expresses the hope that the parties will be able to reach a negotiated solution.

- (c) As regards the allegations concerning HELICOL's refusal to update salaries owing to the union's refusal to negotiate a new collective agreement, the existence of a collective accord that offers higher salaries to non-unionized workers than those paid to unionized employees and HELICOL's unilateral imposition of one day per week for the pursuit of union activities by Captain Cantillo, while noting the Government's invitation to the parties to bring these issues to the attention of the CETCOIT, the Committee hopes that the parties will be able to reach a negotiated solution to the dispute in order to develop harmonious working relations. The Committee requests the Government to keep it informed in this respect.
- (d) Concerning the penalties of dismissal imposed on AEROREPUBLICA union officials Mr Héctor Vargas and Mr David Restrepo Montoya for asserting their right of expression and for claiming the exercise of their rights, the Committee expects that the judicial proceedings instituted by the union officials against their dismissal will be concluded in the near future. Should it be established that the dismissals occurred on anti union grounds, the Committee requests the Government to take the necessary measures to ensure that the dismissed trade union leaders will be reinstated without loss of pay. In the event that the reinstatement of the dismissed workers concerned is not possible for objective and compelling reasons, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would constitute a sufficiently dissuasive sanction against anti-union dismissals. The Committee requests the Government to keep it informed in this respect.
- (e) The Committee requests the Government to keep it informed of the final outcome of the administrative investigations against Vertical de Aviación Ltda which are being conducted by Inspectorates Nos 12 and 4 of the Territorial Directorate of Cundinamarca into alleged violations of the right to organize.

**31.** The complainant organizations provided additional information in their communications dated 25 June 2009 (received on 2 March 2010), 31 May 2010, 10 May 2011, and 8 and 27 March 2012. The Government sent its observations in its communications dated 21 December 2010 and 21 January 2011, together with communications from the enterprises concerned dated 1 June, 15 December and 28 December 2010.

#### Additional information provided by the trade unions

**32.** In its communication dated 31 May 2010, the Colombian Association of Civil Aviators (ACDAC) states the following:

- Recommendation (a). It is not aware that the Government has appointed an independent expert to conduct the national survey on the application of the Associated Labour Cooperatives Act and the use thereof in the sphere of labour relations.
- Recommendation (b). The Government has conducted no investigation into the pressure exerted on workers, despite the ILO's requests that the workers' right to organize be guaranteed. In addition, the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT) has not met and the Council of State confirmed the penalties imposed on the companies for having given preference to non-unionized workers. In a communication dated 25 June 2009 (received on 2 March 2010), the Colombian Association of Flight Attendants (ACAV) alleges that AVIANCA continues to offer workers a collective accord (called the voluntary benefit plan) in order to foster resignations from the various unions. Under the accord, non-unionized workers are granted non-statutory benefits that are the same or better than those obtained by the unions under the collective agreement.

- Recommendation (c). The ACDAC has not refused to bargain. Should no agreement be reached, the collective agreement remains in force until the collective dispute is resolved and is renewed every six months. As concerns salary increases, the enterprise has ignored a protection decision ordering the increase and the Government has taken no action to ensure respect for the rights of unionized workers. In addition, as stated earlier, the CETCOIT has not met.
- Recommendation (d). The proceedings instituted by Captains Vargas and Restrepo have been delayed, especially those of Captain Restrepo, which have been referred to a backlog chamber. Captain Restrepo subsequently filed an appeal in which he requested that the evidence of certain witnesses be annulled because it had not been notified. The appeal is pending before the High Court of Medellín.

### The Government's response to the Committee's recommendations

- 33.** In its communication dated 21 December 2010, the Government states, regarding recommendation (b) on events at AVIANCA, that the enterprise and the National Union of Employees of AVIANCA (SINTRAVA) concluded an agreement on 12 August 2010 whereby the union withdrew its complaints in the case. For its part, the enterprise states that it does not have collective accords with workers, but that it does have a voluntary benefit plan which regulates the working conditions of workers who, in the exercise of their independence and on the basis of deeply held convictions, decide not to become members of a trade union organization. The plan was developed at the request of several flight attendants who did not want to become union members but wanted to obtain the same working conditions as workers benefiting from the collective agreement. The enterprise points out that the plan was drawn up with due regard for the provisions of the law and that it constitutes an alternative for those who voluntarily do not want to exercise the right to freedom of association. The Sixth Labour Backlog Court of the Bogotá Circuit, in a decision handed down on 30 September 2009 defining an industrial action requested by the ACDAC against the enterprise on the grounds that the voluntary benefit plan was unlawful, dismissed all the union's claims. In addition, the enterprise underscores that none of the trade unions operating in it constitutes a majority union.
- 34.** Regarding recommendation (c), on events at HELICOL SA, the Government states that the enterprise wished to meet with the members of the mission that visited the country in July 2010 but that the meeting could not take place. The Government states that, according to the enterprise, it is difficult to make progress in the collective bargaining process because since 2004 the ACDAC has not facilitated that process. The Government repeats that it stands ready to consolidate the CETCOIT as a valid tripartite mechanism for improving industrial relations.
- 35.** Regarding recommendation (d), on the penalties of dismissal imposed on the AEROREPUBLICA union officials, the Government states that: (1) with regard to the dismissal of Mr Héctor Vargas, the Sixth Backlog Labour Court of the Bogotá Circuit found in the enterprise's favour, on 31 August 2009, in respect of each and every one of the plaintiff's claims; the case is pending a second-instance decision; (2) with regard to the dismissal of Mr David Restrepo Montoya, the enterprise was asked for information on the appeal proceedings and information has been provided to the effect that action has been taken in those proceedings; and (3) the ACDAC sent the Deputy Minister of Labour Relations a list of the complaints submitted, the administrative and judicial decisions handed down, and the Territorial Directorate of Cundinamarca reported that there are no ongoing or completed investigations into the ACDAC's complaint of anti-union persecution, in particular the allegations that workers are being encouraged to resign from the various trade unions.



36. Regarding recommendation (e), on the administrative investigations against Vertical de Aviación Ltda, the Government states that Resolution No. 012 of 19 January 2009 penalized the enterprise for having violated the right to freedom of association. An appeal is pending.
37. *Regarding recommendation (a), the Committee notes that the complainant organization states that no independent expert has been appointed to conduct the national survey of the application of the Associated Labour Cooperatives Act and the use thereof in the sphere of labour relations. In this respect, the Committee observes that the Committee of Experts on the Application of Conventions and Recommendations, in its most recent observation (November 2011), noted with satisfaction the adoption of Decree No. 2025 of 8 June 2011, further to the conclusions of the high-level tripartite mission of 2011. The Decree establishes, among other provisions, that no worker may be recruited without the labour rights and guarantees established in the Political Constitution and the law, including workers who are members of cooperatives.*
38. *Regarding recommendations (b) and (c), the Committee notes the agreement between SINTRAVAL and the enterprise. Noting the explanation of the company according to which the voluntary benefit plan is an option for the workers who, without joining a trade union, wanted to obtain the same working conditions as workers benefitting from the collective agreement, the Committee requests the Government to respond to the allegation that the voluntary benefit plan does not represent an extension of the collective agreement but rather contains more favourable conditions, thus weakening the union.*
39. *Regarding recommendation (d), the Committee notes the Government's statement that: (1) with regard to the dismissal of Mr Héctor Vargas, the Sixth Backlog Labour Court of the Bogotá Circuit found in the enterprise's favour, on 31 August 2009, in respect of each and every one of the plaintiff's claims and the case is pending a second-instance decision; and (2) with regard to the dismissal of Mr David Restrepo Montoya, the enterprise was asked for information on the appeal proceedings and information has been provided to the effect that action has been taken in those proceedings. The Committee requests the Government to keep it informed of developments in the proceedings.*
40. *Regarding recommendation (e), the Committee notes the Government's statement that Resolution No. 012 of 19 January 2009 penalized the enterprise for having violated the right to freedom of association and that an appeal is pending. The Committee requests the Government to keep it informed of the outcome of the appeal proceedings.*

**New allegations by the complainant organization and partial response by the employer organization**

41. *Decrease in the number of ACAV members.* The complainant organization states that, in 2007, when it sent the complaint, the ACAV had 388 members in the enterprise, but that now, following the dismissals and the workers' switch to the voluntary benefit plan, it has only 299. The complainant organization further indicates that there has not been a single new member among the enterprise's workers.
42. For its part, the enterprise states that it does not know the total number of members, given the trade union nature of the ACAV. It nevertheless asserts that the right to freedom of association is free and voluntary in nature and that it is up to the worker alone to decide, independently, whether or not to join one or several trade union associations. Notwithstanding the foregoing, the enterprise states that the ACAV's claim that there has not been a single new member among AVIANCA's workers does not correspond to reality. The enterprise gives the example of nine new memberships in 2010.

43. *Refusal to grant visas to members.* The complainant organization adds that for two years the enterprise has refused to grant crew member visas to flight attendants who are members of the union, and that the enterprise sent a letter stating that the flight attendants were using the visas to engage in illegal activities. Thirty-six people, all long-standing employees of the enterprise and ACAV members, were refused the work visa and asked to produce a police record to check whether they were in any way involved with the courts; the reply was negative in every case. An investigation was launched, and it was established that the enterprise had an agreement with one of the country's public prosecution services to deny the visas in order to prevent drug trafficking. On the basis of this agreement, a list was sent to the embassy naming a group of flight attendants who were alleged drug traffickers. The complainant organization states that the principal indication pointing to this conclusion is that the enterprise changed its internal regulations in 2004 to include the obligation for workers to have their papers and visas in order if they wanted to be employed by it; denial of the visa is a fair reason for cancelling the employment contract. The complainant organization concludes that the enterprise presumably provides the embassy with untrue information so that the embassy will not grant the visas and the enterprise will be able to dismiss the flight attendants on the basis of the internal regulations.
44. In this respect, the enterprise states that it respects migration laws and does not interfere in the freedom of the authorities of other countries to issue visas. The enterprise states that, as the trade union has been repeatedly informed, it has sent no official communication whatsoever to the embassy in question in an effort to have it deny visas to workers who are members of the trade union, and it is not aware that visas have been denied on the basis of the workers' membership of the union. *The Committee notes this information.*
45. *Anti-union dismissals.* The complainant organization also states that the enterprise continues to dismiss workers without just cause, subjecting them to disciplinary proceedings the result of which, even though it is proven that the workers in question are innocent of the charges against them, is the dismissal of union members, namely: María José Van Brackel, Camilo Barrera, Patricia Panqueva, Juan Carlos Altamar, Bibiana Salamanca and María Constanza Torres.
46. In this respect, the enterprise states the following:
- *María José Van Brackel:* the enterprise took disciplinary action when the worker did not report for duty on 3 February 2008 on flight 019 from Barcelona to Bogotá without providing a satisfactory explanation, in particular regarding the supposed difficulties encountered with the Barcelona airport authorities. The enterprise affirms that it is not true that the flight attendant was dismissed after having turned up on time for a flight because of a delay in a search carried out by the Barcelona police. The worker provided no information or explanation about the delay in the search by the Spanish authorities, and the enterprise states that it upheld due process and the right of defence during the disciplinary proceedings, notifying the union at each stage. The enterprise states that the matter is now before the Second Labour Court of the Bogotá Circuit.
  - *Camilo Barrera:* the enterprise took disciplinary action as a result of the worker's reluctance and repeated delays in legalizing the incapacity for work from which he presumably benefited, without providing a satisfactory explanation for the situation. During the month of August 2008 the worker benefited from a total of 11 days of incapacity that were not legalized. The case was heard by the Circuit Court of Bogotá, which found in the enterprise's favour.
  - *Patricia Panqueva:* the enterprise took disciplinary action as a result of what happened on 19 July 2008 at Miami airport, where the worker was found by the United States authorities with a total of US\$8,524. This clearly exceeded the prohibitions set out in the enterprise's Flight Attendants' Handbook (Manual de Auxiliares de Vuelo de la

Compañía) with regard to permitted objects. The enterprise has initiated the process for removing union immunity; that process is currently ongoing.

- *Juan Carlos Altamar, Bibiana Salamanca and María Constanza Torres*: in these three cases, the enterprise took disciplinary action as a result of what happened on 9 January 2009, on the flight to Lima, when the workers were found to be in possession of 24 boxes of L-Carnitina solution, which cannot be brought into Peruvian territory. The boxes were confiscated by the Peruvian authorities, as they clearly exceeded the prohibitions set out in the enterprise's Flight Attendants' Handbook with regard to permitted objects. The matter is before the ordinary labour courts (Labour Courts 14, 22 and 27 of the Bogotá Circuit).

- 47.** *The Committee notes the information provided by the Government to the effect that: (1) the dismissals cited by the complainant organizations were the outcome of serious misconduct and not related to union activities; and (2) proceedings are currently ongoing in five of the six cases. The Committee requests the Government to keep it informed of the ongoing court proceedings relating to the dismissals of María José Van Brackel, Patricia Panqueva, Juan Carlos Altamar, Bibiana Salamanca and María Constanza Torres.*
- 48.** *Lifting of the union immunity of Mr Daniel Barragán.* Lastly, the complainant organization alleges persecution by AIRES SA against Mr Daniel Barragán, ACAV union leader since November 2008.
- 49.** In its communication dated 21 January 2011, the Government states that the following decisions have been handed down: (1) the Ninth Labour Court of the Bogotá Circuit lifted Mr Barragán's union immunity in a decision of 5 February 2010; (2) the Bogotá District High Court confirmed the decision of the judge at first instance in its ruling of 23 July 2010; and (3) Criminal District Court 33, which supervises compliance (protection), rejected the claims as inadmissible because of ongoing court proceedings and annulled the conflict of interests presented in the protection petition. The Government encloses the copy of the decision and the reply of AIRES SA.
- 50.** In its communication dated 15 December 2010, the enterprise states that, given the existence of grave acts constituting serious misconduct, it brought proceedings before the Regular Labour Court of Bogotá District in order to obtain authorization to dismiss Mr Barragán with just cause. The proceedings started with a petition for authorization presented by the enterprise on 13 February 2009 and, after having ascertained the serious misconduct incurred by Mr Barragán, which is unrelated to his union activities, the Ninth Labour Court of Bogotá Circuit ordered that his union immunity be lifted and authorized his dismissal in a decision of 5 February 2010. The decision was appealed and subsequently confirmed in a Bogotá District High Court ruling of 23 July 2010. *The Committee notes this information.*
- 51.** In its communications dated 31 May 2010 and 8 and 27 March 2012, the ACDAC also refers to new acts that occurred in various enterprises, namely: (1) continuous violations of the collective agreement between the ACDAC and AVIANCA, resulting in the opening of an administrative police complaint against the enterprise, file 8877 of 12 March 2010, that is currently before the seventh Inspection Office of the Territorial Directorate of Cundinamarca; (2) failure to respect the standing union immunity and systematic persecution of Captain Orlando Cantillo, a member of the ACDAC board, by HELICOL SA; (3) the dismissal without just cause of Captains Juan Pablo Rodríguez Gil, Richard Eduard Cuellar Moreno, Helbert Alexander Riveros Díaz and Juan Carlos Cabrera Navarro, whose reinstatement was ordered by the courts; (4) the enterprise's refusal to negotiate a list of demands; the union's subsequent request for mandatory arbitration was appealed and is currently being reviewed by the Supreme Court; (5) the pressure exerted on workers to give up their membership; (6) unlawful deductions from Captain Roberto Ballen Bautista's salary by AEROREPUBLICA; (7) the violation of arbitration awards;

(8) the anti-union dismissal of Captain Juan Manuel Vega León; and (9) the anti-union dismissal by AIRES SA of three captains who joined the ACDAC and attempted to negotiate a collective agreement. *The Committee awaits the Supreme Court decision mentioned under point 4. The Committee considers the other allegations below.*

- 52.** *Failure to respect the standing union immunity and systematic persecution of Captain Orlando Cantillo, member of the ACDAC board, by HELICOL SA.* In its communication dated 10 May 2011, the complainant organization states that, in its resolution of 19 January 2011, the Ministry for Social Protection fined the enterprise 40 legal minimum monthly wages. The enterprise submitted a request for reconsideration and appeal on which the Ministry has yet to hand down a decision. The ACDAC goes on to state that, in the disciplinary procedure, the enterprise decided to terminate the captain's employment contract before his union immunity was lifted in a case being heard by Labour Court 24 of the Bogotá Circuit. The enterprise suspended the captain's work assignments; a new petition was filed against it and is currently being heard by the Ninth Labour Court of the Bogotá Circuit. The Ministry of Labour was asked to intervene, but to date no protection has been obtained for the persecuted trade unionist. In addition, in its communication dated 8 March 2012, the ACDAC alleges systematic acts of persecution, stating that the enterprise refused to give the captain union leave, professional training or the salary to which he is entitled and which, for some reason, it attached during the investigation of the captain in respect of a defective helicopter, offering him a preliminary agreement admitting guilt. The captain and union leader admitted no guilt whatsoever.
- 53.** *The Committee notes this information and requests the Government to keep it informed of the outcome of the appeal proceedings. The Committee also requests the Government to send its observations on the fresh allegations of systematic persecution of the ACDAC union leader made in the communication of 8 March 2012.*
- 54.** *Unlawful deductions from salaries.* Regarding the unlawful deductions made from Captain Roberto Ballen Bautista's salary by AEROREPUBLICA, the Government states that the following judicial decisions have been handed down: (1) the Fourth Labour Court of Bogotá Circuit denied the petition for reinstatement in its decision of 21 September 2007; (2) Labour Court 19 of Bogotá Circuit found in the enterprise's favour in respect of each and every claim made by Captain Ballen in its decision of 23 October 2009; and (3) the Labour Division of the Bogotá District High Court confirmed the decision in its ruling of 21 April 2010. The Government also forwards the enterprise's reply in that respect.
- 55.** In its communication dated 28 December 2010, the enterprise stresses that: (1) Captain Ballen Bautista is the only crew member of the enterprise sitting on the ACDAC board, and (2) the captain twice failed to attend the half-yearly trials on a flight simulator. The captain made two requests for union immunity with a view to obtaining the restoration of the additional salaries that are due only when pilots complete their flight duties; the captain did not perform those duties since he refused to complete his training programme; the additional salary was therefore suspended as of February 2005. The courts determined that the enterprise acted in accordance with the law, and the Ministry for Social Protection imposed no successive fines on it.
- 56.** In its communication dated 10 May 2011, the ACDAC states that the Medellín High Court overturned the decision of the Sixth Labour Court of Medellín Circuit and withdrew the authorization to dismiss Captain Roberto Ballen Bautista. Since the enterprise refused to execute the court decision, an action for protection was filed which was denied by Municipal Criminal Court 33 but granted in second instance by the Ninth Criminal Court of Medellín Circuit. *The Committee notes the information and requests the Government to*

*take the necessary measures to ensure that the enterprise executes the court decisions and to keep it informed in this respect.*

- 57. Violation of arbitration awards.** Regarding the alleged violation of arbitration awards, the Government states that, first, in compliance with administrative labour decisions, it wishes to reach an agreement with the ACDAC, and secondly, the Ministry for Social Protection has opened an administrative investigation into two complaints for violation of arbitration awards. Five visits were made to verify the points of the complaint, and a decision is pending. In its communication of 28 December 2010, the enterprise confirms that it complied with every summons it received from the Ministry for Social Protection and submitted all the documents requested by the ACDAC in order for the Ministry to be able to resolve the complaints. *The Committee notes this information and requests the Government to take the necessary measures to implement the suggested agreement and to keep it informed of the outcome.*
- 58. Anti-union dismissal of Captain Juan Manuel Vega León.** In this regard, the Government states that, in application of the decision of the Ninth Labour Court of Bogotá, the respective standards were ascertained, with the result that the captain did not meet the requirements for flight activities. Also, in its communication of 28 December 2010, the enterprise states that it complied with the court's decisions and reinstated the worker and paid the financial penalties ordered. *The Committee notes this information.*
- 59. Anti-union dismissals by AIRES SA.** In its communication dated 10 May 2011, the ACDAC states that the rights of Captains Paola Natalia Hoyos and Francisco Hurtado have been protected by the courts following various appeals, but that the labour proceedings and the administrative complaints remain pending without having been resolved by the lower court. In addition, in its communication dated 27 March 2012, the ACDAC repeats that various pilots have been dismissed because they joined the union. *The Committee requests the Government to send its observations in this respect.*

### **Case No. 2730 (Colombia)**

- 60.** The Committee last examined this case at its November 2010 meeting, and on that occasion it made the following recommendations [see 358th Report, para. 446]:

As regards the allegations that, in the context of the liquidation of the company [Cali Public Sanitation Services Company], the collective agreement in force was not observed with respect to the compensation and pension benefits linked to the dismissals, the Committee requests the Government to keep it informed on the views expressed in the allegations and of the final outcome of the abovementioned judicial proceedings. The Committee further expects that freedom of association and collective bargaining rights are respected in the labour cooperative currently carrying out the work previously carried out by the company.

- 61.** In its communications of 27 May and September 2011, the Government forwarded the company's observations. With regard to the allegation of the Cali Public Sanitation Services Company Workers' Union (SINTRAEMSIRVA) that the company did not observe a 1996 unofficial accord under which workers opting for voluntary retirement were granted special benefits, the company states that the accord was valid for a specific time and process and that its official effects were limited to the process in question; the accord is therefore no longer part of the collective agreement that is the subject of the court proceedings undertaken by the trade union and its members.
- 62.** With regard to the allegation relating to the dismissal of workers and the corresponding compensation, the company states that the 1996 accord did not apply in this case either, given that it was no longer in force and was not part of the collective agreement. The

company further states that the collective agreement contains no provisions on compensation in the case of unilateral termination without just cause of the labour contract after two years of uninterrupted employment with the company. Article 17(c) of the collective agreement clearly establishes the situation of such workers; it provides that, in the event of termination, they will be reinstated in the same position as they previously held, in which case they “shall be paid in compensation a sum equal to the wages not earned during the time they were not working”. The company adds that, with regard to collective bargaining, the independence of the parties to the negotiations on the collective agreement in force did not result in a compensation table for the workers affected by the company’s liquidation. In this situation, the company’s only legal option was to apply the compensation table set out in the law, which is not in contravention of Conventions Nos 87 and 98. The matter has been examined by the courts, which have found in the company’s favour.

63. The company states that to date the courts have ruled, at both first and second instance, in the company’s favour. Some cases are starting to come before the Supreme Court, which is why there is no final outcome, except in connection with trade union immunity, over which the Supreme Court does not have jurisdiction. There have been a total of 260 court cases (ten relating to trade union immunity and 250 regular cases encompassing various matters such as compensation and pensions); the company provides details on the outcome of the proceedings. In the regular proceedings, there have so far been 33 decisions at first instance, three at second instance, and ten decisions relating to the lifting of trade union immunity, all in the company’s favour. The Government states that it always complies with court rulings.
64. Lastly, the company states that sanitation services are not being provided through labour cooperatives but rather through commercial companies (the Government confirms this information) that took part in a lawful tender process and which are subject to the national labour system; the workers therefore enjoy all guarantees and rights. Law No. 142 requires that waste be collected by joint-stock corporations.
65. *The Committee takes note of this information. The Committee takes note that the company states that the proceedings concluded to date are in its favour. The Committee requests the Government to provide information on ongoing proceedings and their outcome.*

### **Case No. 2241 (Guatemala)**

66. The Committee last examined this case at its March 2011 meeting. On that occasion, it made the following recommendation [359th Report, para. 544]:

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

67. In a communication dated 14 July 2011, the Government states that, according to the inspector in charge of the case, Messrs Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar were dismissed by previous administrations and had received the severance benefits to which they were entitled. The employer stated that the workers could avail themselves of their rights under the law and the collective agreement. The inspector also states that of the dismissed workers, only Mr Manuel de Jesús Dionisio Salazar is present, since neither the court nor the union has been able to locate Mr Alfredo Arriola

Pérez and that, in his various activities, the inspector observed that attempts to find him were in vain; the proceedings therefore remain ongoing.

68. According to the inspector, the director of human resources stated that the institution was willing to cooperate with a view to reaching a favourable outcome for Mr Salazar but that he would have to submit a written request for a permanent position with the Higher Electoral Court. The former worker submitted a formal request on 16 April 2010. On 5 June 2010, the director of human resources informed the inspector that the positions under budget line 011 had been filled, but that the worker's request had been sent to the plenary of the Higher Electoral Court, which was ready to consider the proposal in so far as there was a vacant position under the budget line requested. The worker was therefore asked to allow a reasonable time for receiving a positive or negative reply. On 4 October 2010, the inspector asked the worker to call on the Ministry of Labour to finalize the formalities but the worker failed to show up. The inspector states that the request could not be followed up because the complainant has not requested any measures to be taken. *The Committee notes the information.*

### **Case No. 2228 (India)**

69. The Committee last examined this case, which concerns alleged anti-union discrimination including dismissals, the suppression of a strike by the police and refusal to negotiate at the Worldwide Diamond Manufacturers Ltd (situated in the export processing zone (EPZ) of Visakhapatnam in Andhra Pradesh) and alleged dismissals and suspensions at the Synergies Dooray Automotive Ltd, at its November 2011 meeting [see 362nd Report, paras 75–80]. On that occasion, the Committee:
- (a) Requested the Government to send the judicial decision of 29 November 2006 in CC No. 421/02 relating to the alleged brutal suppression of a strike by workers at the Worldwide Diamonds Manufacturing Ltd in January and February of 2002.
  - (b) Underlined the excessive delay in the judicial resolution of the alleged cases of anti-union discrimination resulting in imposition of fines, dismissals and suspensions of trade unionists, given that the complaint was filed in 2002, and requested the Government to send the judicial decisions in the 20 cases that have been disposed of, and to keep it informed of any further developments in the 18 pending cases.
  - (c) As regards the question of restrictions on the right to collective bargaining of workers in the VEPZ and on the right of the Visakhapatnam Export Processing Workers' Union to take part in negotiations with the management of the Worldwide Diamonds Manufacturers Ltd, repeated its request that the Government provide a copy of the minutes of the joint meeting held on 3 September 2004 that led to the lifting of the employer's lockout, which, according to the Government's indication, had been forwarded to the Committee but which have not been received. The Committee also requested the Government to provide information on the evolution of collective bargaining and to send any agreement reached by the parties.
- ...
- (e) Repeated its request that the Government take all necessary measures, including amending the Industrial Disputes Act of 1947, so as to ensure that suspended workers as well as trade unions could approach the court directly, without being referred by the state government.
  - (f) Requested the Government to indicate whether the workers dismissed and suspended from the Synergies Dooray Automotive Ltd had initiated court proceedings.

- 70.** In its communication dated 4 May 2012, the Government indicates that all cases of alleged anti-union discrimination (imposition of fines, dismissals and suspensions of trade unionists) filed by the workers before the industrial tribunal-cum-labour court, Visakhapatnam, were dismissed vide I.D. Nos: 219/2002; 220/2002; 222/2002; 223/2002; 224/2002; 25/2003; 26/2003; 34/2003; 108/203; 163/2003; 86/2004; 87/2004; 127/2004; 128/200; 8/2005; 146/2006; 147/2006; 148/2006; 149/2006; 150/2006; 151/2006; 1523/2006; 153/2006; 14/2006; 157/2006; 158/2006; and 159/2006.
- 71.** With regard to the question of restrictions on the right to collective bargaining of workers in the VEPZ and on the right of the Visakhapatnam Export Processing Workers' Union to take part in negotiations with the management of the Worldwide Diamonds Manufacturers Ltd, the Government indicates that the Development Commissioner APSEZ had informed it that the minutes of the meeting held on 3 September 2004 were not available at his office and that the Secretary to the Labour, Employment, Training and Factories Department of the Government of Andhra Pradesh, had been addressed in this regard. The Government is still awaiting an answer.
- 72.** With respect to the Committee's request to amend the Industrial Disputes Act of 1947, so as to ensure that suspended workers as well as trade unions could approach the court directly, without being referred by the state government, the Government indicates that the Development Commissioner APSEZ has informed it that the Industrial Disputes Act was already amended so as to include section 2(A). According to this provision, the removed/terminated workers can approach the labour court directly without reference by the conciliation officer. The dismissed workers can thus approach the industrial tribunal-cum-labour court directly.
- 73.** The Government provides a copy of the decision of 29 November 2006 in CC No. 421/02 concerning the complaints filed after the strike held by workers at the Worldwide Diamonds Manufacturing Ltd in January and February of 2002 by which all the accused strikers were acquitted.
- 74.** As regards the alleged dismissals and suspensions at the Synergies Dooray Automotive Ltd, the Government indicates that the dismissed workers approached the industrial tribunal-cum-labour court directly under the said amended provision of the Industrial Disputes Act.
- 75.** *The Committee notes the information provided by the Government. It notes, in particular, the decision of 29 November 2006 in CC No. 421/02 concerning the complaints filed after the strike held by workers at the Worldwide Diamonds Manufacturing Ltd in January and February of 2002, by which 23 strikers have been acquitted.*
- 76.** *With regard to recommendation (b), the Committee notes the reference to 27 cases, which, according to the Government, the industrial tribunal-cum-labour court, Visakhapatnam has dismissed. The Committee requests the Government to provide copies thereof. Recalling that there were about 38 cases in total, the Committee requests the Government to provide information on the resolution of the remaining cases.*
- 77.** *As regards the question of restrictions on the right to collective bargaining of workers in the VEPZ and on the right of the Visakhapatnam Export Processing Workers' Union to take part in negotiations with the management of the Worldwide Diamonds Manufacturers Ltd, the Committee repeats its request that the Government provide a copy of the minutes of the joint meeting held on 3 September 2004 that led to the lifting of the employer's lockout, which, according to the Government's previous indication, it had forwarded to the Committee, but which had not been received. The Committee also once*



again requests the Government to provide information on the evolution of collective bargaining and to send any agreement reached by the parties.

78. As regards the request that the Government take all necessary measures, including amending the Industrial Disputes Act of 1947, so as to ensure that suspended workers as well as trade unions could approach the court directly, without being referred by the state government, the Committee regrets that the Government has provided no new information in this regard. The Committee previously noted that a new subsection (2) was inserted to section 2(A) of the Industrial Disputes Act 1947, which provides that in disputes relating to discharge, dismissal, retrenchment or otherwise termination of services of an individual worker, such worker may make an application directly to the labour court for adjudication of the dispute. Recalling the principle that “workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 820], the Committee repeats its request concerning the need to amend the legislation so as to ensure that suspended workers as well as trade unions may approach the court directly. It requests the Government to keep it informed in this respect. The Committee further notes the Government’s indication that the workers dismissed from the Synergies Dooray Automotive Ltd. have approached the industrial tribunal-cum-labour court. The Committee requests the Government to provide a copy of the judgment once it has been handed down. It also requests the Centre of Indian Trade Unions (CITU) – the complainant in this case – to keep it informed in this respect.

### **Case No. 2512 (India)**

79. The Committee last examined this case, which concerns alleged acts of anti-union discrimination and interference in trade union affairs through the creation of a puppet union, dismissals, suspensions and transfers of trade union members, arbitrary reduction of wages, physical violence and lodging of false criminal charges against its members, at its March 2011 meeting [see 359th Report, paras 67–89]. On that occasion, the Committee noted with deep concern new allegations submitted by the complainant, which included assertions that the employer had entered into a settlement with the MRF Arakonam Workers’ Welfare Union (MRFAWWU) (which the complainant alleged is a puppet union); that the employer had threatened workers with dismissal in order to ensure compliance with the terms of the settlement; that police acting at the behest of the employer attacked and injured members of the complainant union while the members were peacefully protesting the settlement; that the employer initiated a lockout and frivolously filed criminal charges against union members in response to the strike; and that the High Court had mandated an inherently unfair verification procedure to determine whether the complainant or the MRFAWWU was the most representative union, and that this verification procedure did not include a secret ballot process. The Committee urged once again the Government to provide: information on the measures taken to ensure industrial peace at the undertaking; updated information on the status of all pending court cases concerning dismissed workers; detailed observations regarding all pending cases of allegedly false criminal charges brought against members and officers of the MRF United Workers’ Union (MRFUWU), including an explanation of the concrete facts that formed the basis of these charges; the updated information on the status of the cases concerning alleged transfers of trade union members because of their membership in union activities and regarding actions taken by the state government in this regard; and any new information concerning the steps taken by the Government to obtain the employer’s recognition of the MRFUWU for collective bargaining purposes. The Committee recalled that it had previously requested the Government to actively consider the adoption of legislative provisions in furtherance of trade union rights and therefore requested the Government to encourage the government of Tamil Nadu to address this matter urgently

and to provide information on all measures taken in order to bring legislation into conformity with freedom of association principles, and more specifically, to indicate whether consideration has been given to the adoption of legislative provisions that further the goal of preventing anti-union discrimination and the infringement of trade union rights, amend all relevant provisions of the Industrial Disputes Act, and establish objective rules for the designation of the most representative union for collective bargaining purposes.

- 80.** In its communication dated 11 January 2012, the Government reiterates the observations it had previously provided. In particular, it indicates that all cases of dismissals alleged in this case are still pending before the relevant courts. With regard to the alleged unfair labour practices (disciplinary actions and show cause notices), the Government considers that it is the right of the employer to take disciplinary action on any misconduct of a worker regardless of the worker's trade union affiliation and suggests that it was up to the complainant to address the competent authorities which could have looked into each issue in a proper manner.
- 81.** With regard to the settlement entered into by the management with the MRFAWWU, the Government indicates that the High Court of Madras has allowed the MRFAWWU and the management to sign a bipartite agreement. It was signed on 5 May 2009 and 1,113 out of 1,396 workers have accepted the wage increase benefits. The Government indicates that if the management is prepared to offer the same offer to members of the complainant union, the responsibility to accept the same wages belongs to them. The Government also indicates that, according to the enterprise management, workers are very happy with the salary and various welfare activities provided to them. The Government also indicates that no members of the complainant union were dismissed from service on account of their trade union activities. No workers were suspended pending the inquiry on account of their trade union activities. It is the policy of the management not to interfere in the internal affairs of trade unions and their activities. Any suspension or dismissal of workers is based on the gravity of the misconduct committed, irrespective of the trade union affiliation.
- 82.** With regard to the issue of determining representative status of trade unions, the Government considers that it is not its duty to conduct secret ballots to determine representative character of a union. The Government reiterates that, as regards the complainant's claim for representative status, according to the enterprise management, the union having a majority of workers as its members has been recognized and various settlements have been entered into with the said union. The management always recognizes the trade union which enjoys the majority membership and negotiates with that recognized union. The complainant being a minority union has no right to insist that the management negotiates with it. The state government of Tamil Nadu considers that the reply of the management seems to be reasonable and convincing and therefore may be agreed to.
- 83.** With regard to the recognition of the complainant union, the Government reiterates that the complainant organization has approached the High Court of Madras seeking recognition without going through the prescribed process before the State Evaluation Committee set out in the Code of Discipline. It further reiterates that there is no statutory provision on the recognition of trade unions and that it is up to the management to recognize the union or not. Finally, it reiterates that there is no state law for trade union recognition and hence this subject was placed before the State Labour Advisory Board (a non-statutory tripartite body) on 20 February 2010 for policy decision in this regard.
- 84.** The Government concludes by stating that the government of Tamil Nadu has examined in detail all the allegations in this case and has taken with due seriousness the recommendations of the Committee. The Government declares that India has a well-established conciliation machinery both at the state and national levels to redress the

grievances of the working community. The Government considers that it has acted fairly and within its ambit, thus industrial peace and harmony is maintained in the State.

85. *The Committee notes the information provided by the Government. It notes with regret that to a large extent the Government reiterates its previous observations and deplores the general lack of progress in addressing the issues raised in this case. The Committee is particularly concerned at the fact that dismissal cases are still pending before the courts. The Committee recalls that cases concerning anti-union discrimination should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 826]. The Committee expects that the outstanding case will be concluded without delay and urges the Government to keep it informed of the outcome.*
86. *The Committee further notes the Government's indication that the union members who felt that they were subject to unfair labour practices should have approached the competent authorities to get a fair redress. Recalling that this case, involving numerous allegations of such practices, including cases of suspension, show cause notices and other disciplinary actions, as well as allegations of filing, by employer, of false criminal charges against trade unionists on the basis of which they have been subsequently dismissed, was lodged in 2006, further recalling that the Industrial Disputes Act of 1947 does not allow suspended workers or trade unions to approach the courts directly, without being referred by the state government [see Case No. 2228 concerning India], and in light of the apparently lengthy court procedures in dealing with cases of alleged anti-union discrimination, the Committee is of the opinion that the competent labour authorities should have begun inquiring into the allegations immediately after they had been brought to their attention, as had been requested by the Committee, so as to take suitable measures of redress should allegations of anti-union discrimination brought to their attention be proved. While regretting that no new information has been provided by the Government on the abovementioned allegations, the Committee requests the complainant to provide all relevant updated information in this regard.*
87. *With regard to the Committee's previous recommendations that the Government actively consider the adoption of legislative provisions in furtherance of trade union rights, the Committee notes that the Government reiterates that there is no state law for trade union recognition and hence this subject was placed before the State Labour Advisory Board (a non-statutory tripartite body) on 20 February 2010 for a policy decision. It requests the Government to provide relevant information on any decision taken by the Board. Furthermore, while noting the Government's position that India has a well-established conciliation machinery both at the state and national levels to deal with grievances of the working community and that the existing domestic laws are adequate, the Committee regrets that the absence of a clear objective and precise procedure for determining the most representative union has led to the lack of resolution of the matters raised in this case. The Committee therefore once again requests the Government to encourage the government of Tamil Nadu to address this matter urgently and to provide information on all measures taken in order to bring legislation into conformity with freedom of association principles, and more specifically, to indicate whether consideration has been given to the adoption of legislative provisions that further the goal of preventing anti-union discrimination and the infringement of trade union rights, amend all relevant provisions of the Industrial Disputes Act, and establish objective rules for the designation of the most representative union for collective bargaining purposes.*

**Case No. 2747 (Islamic Republic of Iran)**

**88.** This case concerns allegations from the International Trade Union Confederation (ITUC) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) that several officers of the Haft Tapeh Sugar Cane Workers' Union had been arrested, convicted and handed down prison sentences in connection with the organization of a strike in 2007 and the creation of a union in 2008. The officers concerned were also dismissed from the Haft Tapeh sugar plantation and refinery. The Committee examined this case at its June 2011 meeting [see 360th Report, paras 808–844] and on that occasion it formulated the following recommendations:

- (a) The Committee expects that the Government will deploy all efforts for the rapid amendment of the labour legislation in a manner so as to bring it into full conformity with the principles of freedom of association, by ensuring that workers may freely come together without government interference, and to form organizations of their own choosing, and requests the Government to indicate the measures taken or envisaged to amend article 131 of the Labour Law.
- (b) The Committee requests the Government to take the necessary measures to ensure that any workers who had been imprisoned in connection with the organizing and carrying out of an industrial action, and the creation of a trade union in June 2008, is paid adequate compensation for the damages suffered. It further urges the Government to take the necessary measures to ensure that the prohibition to engage in trade union activities imposed on Messrs Ali Nejati, Feridoun Nikoufard, Ghorban Alipour, Mohammed Heydari Mehr, Jalil Ahmadi, Rahim Beshag, Reza Rakhshan and any other person is immediately lifted and that the union is allowed to function. The Committee requests the Government to indicate the steps taken in this regard.
- (c) The Committee requests the Government to ensure the application of freedom of association principles with regard to the police intervention during the course of the strike and once again requests the Government to provide a copy of the instruction on the management and control of labour-related and trade union protests and demonstrations that it was elaborating.
- (d) The Committee requests the Government to confirm that Messrs Ali Nejati, Feridoun Nikoufard, Ghorban Alipour, Mohammed Heydari Mehr and Jalil Ahmadi have been reinstated in their posts without loss of pay and are paid compensation for the damages suffered. It requests the Government to keep it informed in this respect.
- (e) The Committee urges the Government to drop the charges against Messrs Reza Rakhshan and Mohammad Olyafard and to provide it with detailed information concerning their status.

**89.** In a communication dated 5 December 2011, the ITUC indicates that Ali Nejati, Feridoun Nikoufard, Ghorban Alipour, Mohammed Heydari Mehr and Reza Rakhshan have not been reinstated, some of them have been expelled from their homes and the compensation recommended by the Committee has not been offered or paid.

**90.** In a communication dated 15 March 2012, the Government indicates, in response to recommendation (a), that the Minister of Cooperatives, Labour and Social Welfare had called for a tripartite meeting to be held to discuss amendments to the Labour Code. Workers' and employers' most representative organizations had submitted a bill to the Government for submission to Parliament, after consulting, among others, other workers and employers' organizations, independent labour consultants and academics. The Government has been waiting since September 2011 for the final comments of the social partners on the proposed amendments, which includes amendments to Article 131 and a provision recognizing the principles of freedom of association and multiplicity of workers' organizations. The Government indicates that it hopes to receive final observations on this draft by June 2012. In the meantime, the Government suggested that the contending

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workers may wish, at their discretion, to proceed to establish a new provincial trade union or a union based on their industry orientation at the level of the province.

- 91.** In response to recommendation (b), the Government points to Article 18 of the Labour Law which states that if the detention of the worker has been due to a complaint of the employer and in the event that the Dispute Settlement Board finds the worker not guilty of the attributed charges, the employer is legally obliged, in addition to the damages and compensation ruled by the court, to also provide for the worker's wages, benefits, etc., due to him/her during the detention period. All the workers listed in recommendation (b) of the Committee brought their cases before the Board which ruled for their reinstatement to their work posts with a new contract of employment and for due compensation of the damages they had sustained. All, apart from Mr Feridon Nikoufard, appealed this decision as they insisted that their reinstatement should be in the form of the permanent contract that they used to have. The High Tribunal, which has the final say in these matters, agreed with the Board's decision.
- 92.** Concerning recommendation (c), the Government indicates that a Code of Practice on the Administration of Labour Demonstrations and Assemblies had been approved by the National Security Council on 14 November 2011 and has now come into force. According to the Government, its Article 2 requires police and disciplinary forces to ensure protection of workers' assemblies and demonstrations. In order to coordinate necessary arrangements with other relevant bodies however, organizers of an industrial action are required to submit a written request specifying the time, place and purpose of their action. This request should be submitted to the Office of the General Governor of the respective city at least seven days prior to the action. The Code also obliges the operating police forces to strictly abide by the rules and regulations stipulated in the Police Code of Conduct in respect of dealing with peaceful assemblies and demonstrations as well as deployment of appropriate anti-riot equipment. The Security Council of each province, city and town where assemblies or demonstrations are held shall rule if the assembly is peaceful or not. In its article 6, the Code reiterates the need for training of the operating police forces dealing with workers' assemblies and demonstrations by the "respective international organizations", if any, and requires the Minister of Cooperatives, Labour and Social Welfare (MCLSW) to be the focal point for arranging such training. The Government would welcome the engagement of the Committee in this regard. Finally, the Code calls for special courts that are trained and familiar with fundamental principles and rights at work to hear cases involving trade unionists.
- 93.** With regards to recommendation (e), the Government indicates that all charges against Mr Reza Rakhshan have been officially dropped and Haft Tapeh sugar plantation and refinery has accepted to reinstate him with a new employment contract. Mr Olyaifard was set free in 2011 and "is now at large". The Government indicates that his earlier prosecution had apparently nothing to do with his function as the lawyer of the Haft Tapeh Plantation as he was prosecuted on the ground of breaching the provisions of the Code of Conduct of Attorneys at Law concerning disclosure of clients' files.
- 94.** In a communication dated 22 May 2012, the Government informs that, after a basic agreement between Messrs Behrooz Nikoufard, Feridoun Nikoufard, Mohammed Heydari Mehr and Ghorban Alipour and the Haft Tapeh sugar plantation and refinery, they had restarted their work and the complaints against them were withdrawn.
- 95.** In another communication dated 30 May 2012, the Government highlights the commitment of the Minister of the MCLSW and his entrenched adherence to the fundamental principles and rights at work as well as the flexibility and understanding shown by the judiciary, which brought about the reinstatement of the workers who had been dismissed from the Haft Tapeh sugar plantation and refinery.

- 96.** The Government indicates that although in the remaining cases, the Dispute Settlement Board and other labour conflict management bodies did not recognize any apparent excuse for the dismissal of workers on the ground of their trade unions activities, and notwithstanding that it was not incumbent on the employer to reinstate the concerned workers, it had requested the employer to adopt all reasonable steps to ensure that the workers receive full compensation for their days off work without delay. In the meantime, thanks to the collaboration of the General Governor of Khuzestan province, the Director General of the MCLSW in the region and the employer who conceded constructively to provide for their return to their posts upon completion of the administrative stages, the workers are on the verge of being reinstated.
- 97.** *The Committee takes note of this information. The Committee expects that amendments to the Labour Law will bring the labour legislation into full conformity with the principles of freedom of association by ensuring that workers may freely come together without government interference, and to form organizations of their own choosing. The Committee requests the Government to keep it informed of the adoption of the draft Labour Law and to send the Committee a copy as soon as it is adopted. The Committee notes with interest the adoption of a Code of Practice on the Administration of Labour Demonstrations and Assemblies and requests a copy as well.*
- 98.** *The Committee once again requests the Government to inform it of any compensation for damages suffered paid to any workers who had been imprisoned in connection with the organizing and carrying out of an industrial action, and the creation of a trade union in June 2008. The Committee understands from the Government's communication that charges against Messrs Behrooz Nikoufard, Feridoun Nikoufard, Mohammed Heydari Mehr and Ghorban Alipour have been lifted, and that this includes the lifting of the prohibition to engage in trade union activities. However, it urges the Government once again to take the necessary measures to ensure that the prohibition to engage in trade union activities imposed on Messrs Ali Nejati, Jalil Ahmadi, Rahim Beshag, Reza Rakhshan and any other person is immediately lifted and that the union is allowed to function. The Committee requests the Government to indicate all steps taken in this regard.*
- 99.** *The Committee notes that according to a 5 December 2011 communication from the ITUC, Ali Nejati, Feridoun Nikoufard, Ghorban Alipour, Mohammed Heydari Mehr and Reza Rakhshan have not been reinstated, some of them have been expelled from their homes and compensation has not been offered or paid. It notes that according to a communication from the Government dated 30 May 2012, some of the dismissed workers were "on the verge of being reinstated". The Committee requests the Government to specify which workers have now been reinstated and to confirm that they have not lost any pay and that they were compensated for the damages suffered. The Committee considers it of particular concern that these workers were apparently rehired with new contracts and that the permanent nature of their prior contracts is no longer applied to them. It requests the Government to indicate whether they have now been reinstated to their position as at the time of dismissal. The Committee further requests the Government to respond without delay to the allegation that some of the workers have been expelled from their homes.*
- 100.** *The Committee understands that all charges against Mr Reza Rakhshan, the union's public relations officer, have been dropped. The Committee understands as well that Mr Mohammad Olyaiyard, the lawyer of the union, has been released in 2011 and that according to the Government, the charges against him had nothing to do with his activities as the lawyer of the union. The Committee requests the Government to transmit a copy of the judgment.*

**Case No. 2637 (Malaysia)**

- 101.** The Committee last examined this case, which concerns the denial of freedom of association rights to migrant workers, including migrant domestic workers, in law and in practice, at its November 2011 meeting [see 362nd Report, paras 87–91]. On that occasion, the Committee urged the Government to take the necessary measures, including legislative if necessary, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. Additionally the Committee urged the Government to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requested the Government to keep it informed of the progress made in this regard.
- 102.** In a communication dated 20 March 2012, the Government indicates that while it has yet to ratify Convention No. 87, it respects and applies its principles, subject to national laws and regulations. According to the Government, evidence of this is provided by the fact that, at the end of December 2011, 11,722 migrant workers had become members of trade unions. The Government further indicates that it still considers that in-depth analysis is needed before any policy allowing domestic workers to form and join associations is adopted and maintains its decision in this regard on the grounds previously communicated to the Committee. The Government indicates that the rights and welfare of domestic workers are addressed by recent amendments to the Employment Act 1955 which are made to ensure that the Government has control over the employment of domestic workers and that their rights are well safeguarded. These amendments include the requirement for employers to pay wages through bank accounts, the requirement for employers to register their domestic workers with the Department of Labour and to report to the same agency if their service is terminated.
- 103.** *The Committee takes note of the above information provided by the Government. It deeply regrets that no policy for domestic workers to form and join associations has been adopted and that no progress has been made since it last examined the case to ensure that migrant domestic workers may all effectively enjoy the right to establish and join organizations of their own choosing. The Committee once again urges the Government to take the necessary measures, including legislative, to ensure in law and in practice that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. The Committee invites once again the Government to avail itself of the technical assistance of the Office in this respect. Additionally the Committee urges the Government once again to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers so that they may fully exercise their freedom of association rights, and requests the Government to keep it informed of the progress made in this regard.*
- 104.** *The Committee, once again, recalls the provisions of Convention No. 189 concerning decent work for domestic workers, in particular Article 3 with respect to freedom of association and the effective recognition of the right to collective bargaining of domestic workers. The Committee invites the Government to consider ratifying Convention No. 189 and recalls more generally that when a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 15].*

**Case No. 2616 (Mauritius)**

- 105.** The Committee last examined this case, which concerned alleged use of repressive measures against the trade union movement, including criminal prosecutions, in violation of the right to strike and to engage in protests, at its March 2012 meeting [see 363rd Report, paras 187–190]. On that occasion, the Committee, while deploring the excessive delay in the resolution of the appeal lodged before the Supreme Court by the trade unionists, Mr Benydin and Mr Sadien, and the negative impact on their trade union rights and freedoms, expected that the court would issue its ruling without further delay. It requested the Government to provide a copy of the judgment of the court as soon as it is handed down. Moreover, in light of the previously raised concerns to the effect that the prosecution of two trade unionists commenced nearly one and a half years after the protests, thus leading one to query its rationale (ensuring public order or repressing the trade union movement as contented by the complainants), the Committee requested the Government to raise to the competent authorities the possibility of giving a favourable review to this matter, and to keep it informed in this regard. Finally, the Committee requested the Government to indicate whether the passports have been returned to Messrs Benydin and Sadien.
- 106.** In communications dated 3 March and 8 May 2012, the complainant indicates that the Supreme Court dismissed the appeal lodged by Mr Benydin and Mr Sadien (copy of the judgment appended). Following the ruling, on April 2012, Mr Sadien applied to the President of the Commission on Prerogative of Mercy for the conviction to be waived and his judicial file cleared on the ground that, while exercising his duties as trade union leader, he could not be indifferent to the fate of the workers, as duly recognized by the Court itself.
- 107.** *The Committee takes due note of the information provided by the complainant on the ruling of the Supreme Court concerning the cases of Mr Benydin and Mr Sadien. The Committee requests the Government and the complainant to keep it informed of the outcome of the application presented by Mr Sadien before the Commission on Prerogative of Mercy. In the meantime, the Committee requests the Government to indicate whether the passports have been returned to Messrs Benydin and Sadien.*
- 108.** *Furthermore, with regard to its previous recommendations concerning the Public Gathering Act (PGA), the Committee expects the Government will take steps to review its application, in full consultation with the social partners concerned, so as to ensure that sections 7, 8 and 18 are not applied in practice such as to impede the legitimate exercise of protest action in relation to the Government's social and economic policy. The Committee requests the Government to keep it informed of any development in this regard.*

**Case No. 2685 (Mauritius)**

- 109.** The Committee last examined this case, which concerns alleged acts of anti-union discrimination and refusal to recognize the Syndicat des Travailleurs des Etablissements Privés (STEP) by the Phil Alain Didier Co. Ltd (PAD), at its November 2011 meeting [see 362nd Report, paras 92–97]. On that occasion, the Committee, noting that there were no representative workers' organization in the PAD, requested further information from the Government and the complainant organization on the status of the STEP in the PAD. The Committee also requested the Government to keep it informed of developments with respect to the judicial proceedings related to the dismissals of Mr Martinet and Mr Lagaille.



110. In a communication dated 25 May 2012, the Government indicates that the cases of unjustified termination of employment of Mr Lagaille and Mr Martinet were not heard by the courts since the parties reached a settlement agreement in the sum of MUR75,000, respectively. *The Committee takes due note of the information provided from the Government on the settlement of the dismissal cases of Mr Martinet and Mr Lagaille.*

### **Case No. 2229 (Pakistan)**

111. The Committee last examined this case at its meeting in June 2011 [see 360th Report, paras 89–91]. On that occasion, the Committee noted the information provided by the Government regarding the findings of an independent inquiry carried out by the National Industrial Relations Commission (NIRC), and, in particular, that the allegations of anti-union discrimination had not been confirmed. It requested the Government to provide a copy of the findings. The Committee also requested the Government to indicate whether the Employees' Old-Age Benefits Institution (EOBI) Employees' Federation of Pakistan had been registered, could function freely and enjoyed collective bargaining rights.
112. In its communications dated 14 February and 11 March 2012, the Government indicates that the Industrial Relations Ordinance (IRO), 2011 has been promulgated by the President of Pakistan and that it places no restriction on the right of EOBI employees to form associations. Therefore, the EOBI Employees' Federation can freely apply for registration. The Government confirms that the Federation is functional and active. It also provides a copy of the findings of the independent inquiry carried out by the NIRC.
113. *The Committee takes due note of the information provided by the Government and the findings of the independent inquiry carried out by the NIRC, which considered that the protection against acts of anti-union discrimination was sufficient. The Committee understands, from the information available to it, that the EOBI Employees' Federation is currently certified to be a collective bargaining agent.*

### **Case No. 2086 (Paraguay)**

114. The Committee last examined this case, relating to the trial and sentencing in the first instance for “breach of trust” of the three presidents of the trade union confederations, the United Confederation of Workers (CUT), the Paraguayan Confederation of Workers (CPT) and the Trade Union Confederation of State Employees of Paraguay (CESITEP), Mr Alan Flores, Mr Jerónimo López and Mr Reinaldo Barreto Medina, at its November 2011 meeting [see 362nd Report, paras 105–107]. On that occasion the Committee deeply deplored the fact that these proceedings have gone on for more than ten years and recalled having noted at the time that an ILO mission had visited Paraguay in connection with the case and on that occasion had stated among other things that “the court of first instance violated the principle of *nullum crimen sine lege*, which prohibits applying criminal law retroactively, and the sentence was handed down on the basis on a rule of criminal law promulgated after the acts at issue took place” and that “the accused have served a substantial part of the terms of imprisonment imposed by the court of first instance” [see 332nd Report, para. 122]. The Committee stated that, as it understood matters, the officials in question were for the time being at liberty – as the Committee had requested at the time – although a court sentence hung over them. The Committee again reiterated the importance of ensuring that these trade union officials were not subject to criminal sanctions including imprisonment.
115. In a communication of 27 November 2011, CESITEP, the CUT, the CPT and the General Confederation of Workers (CGT) report that without any form of notification to their counsel, in proceedings that have lasted for more than 15 years, the executing judicial

authority ordered the arrest of the trade union officials (Mr Barreto Medina has been in Tacumbú jail since 10 November where he faces all manner of health risks and Mr Alan Flores has applied for political asylum in Argentina). In a communication of 24 April 2012, CESITEP reports that Mr Barreto Medina is still in prison five months later, which brings the time he has served up to two years and eight months, which should entitle him to parole and that Mr Alan Flores is still a refugee in Argentina. By a communication of 24 May 2012, CESITEP states that the Government agreed to mediation by the Inter-American Commission on Human Rights (IACHR) in order to look for common ground and explore possibilities for an amicable solution with the claimants, and that they have accordingly been invited to take part in a forum for dialogue, but that the Government seeks only to prolong the process. CESITEP adds that Mr Barreto Medina has already been imprisoned for seven months, that he has completed two-thirds of the four-year sentence, that the prison officers describe his conduct as exemplary, yet despite all this he has not been granted the parole that section 51 of the Penal Code entitles him to. In its communication of 25 October 2012, the CESITEP informs that, on 20 July, the trade union leader Barreto Medina was released on probation but that the Public Prosecutor has appealed the decision.

- 116.** *The Committee takes note of this information and requests the Government to send its observations concerning the communications of the CESITEP. It also requests the Government to ensure that Mr Alan Flores is able to return to Paraguay without being arrested in connection with these proceedings.*

#### **Case No. 2400 (Peru)**

- 117.** The Committee last examined this case at its November 2011 meeting, when it requested the Government to inform it of any decision handed down on the dismissal of the trade unionist of the enterprise Crediscotia Financiera SA, Mr William Alburquerque Zevallos (the court of first instance had ruled against him) [see 362nd Report, paras 111–112].
- 118.** In its communication of 14 May 2012, the Government states that the trade unionist in question appealed the decision of 31 January 2012, which contained a finding of serious misconduct unrelated to his status as a union leader.
- 119.** *The Committee takes note of this information and requests the Government to keep it informed of the outcome of the appeal.*

#### **Case No. 2527 (Peru)**

- 120.** The Committee last examined this case at its November 2011 meeting, when it made the following recommendations on matters still pending [see 362nd Report, para. 118]:

The Committee expects that, following the decision taken by the Constitutional Court regarding the dismissal of union official Mr César Augusto Elías García, this union official will be reinstated in his position without delay and with the payment of lost wages. The Committee also urges the Government once again to send its observations on the allegations of the CATP of 18 June 2009 regarding acts of violence against union official Mr César Augusto Elías García, and the outcome of the criminal complaint presented by that official in connection with the alleged assaults. Furthermore, the Committee requests the Government to keep it informed of the outcome of the appeal filed by the union official, Mr Arenaza Lander, with the Seventh Civil Chamber of the High Court of Justice of Lima relating to his dismissal.

- 121.** In a communication dated June 2012, the complainant organization alleges that the Committee's recommendations have not been carried out.

122. In its communication of 24 June 2012, the Government states that the union official César Augusto Elías García was reinstated in his position (with payment of wages and legal benefits), in application of the Constitutional Court decision of 15 July 2011; Mr Elías García subsequently gave up his contract in an out-of-court agreement with the company, which was approved by the judicial authority.
123. *The Committee takes note of this information. The Committee observes that the Government states that the union official, Mr Elías García, obtained a Constitutional Court decision reinstating him in his position. The Committee trusts that the criminal complaint regarding acts of violence filed by Mr Elías García in connection with alleged assaults will proceed without delay.*
124. *The Committee hopes that the appeal filed by Mr Arenaza Lander with the Seventh Civil Chamber of the High Court of Justice of Lima relating to his dismissal will be dealt with swiftly.*

### **Case No. 2533 (Peru)**

125. When it last examined the case, in June 2011, the Committee made the following recommendations on matters that were still pending [see 360th Report, para. 943]:
- (a) The Committee requests the Government to keep it informed of the outcome of the action for wrongful dismissal initiated by the trade union official Mr Wilmert Medina against the enterprise San Fermín SA (subsequently taken over by another enterprise).
  - (b) As regards the alleged dismissal by the company CFG Investment SAC of eight members of the executive committee, the members of the committee negotiating the list of claims, and 11 union members who had been reinstated and then dismissed again, the Committee notes that according to the Government, four union members have been reinstated and the others have initiated judicial proceedings. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings initiated following the dismissal of union officials and members working at the company, and expects that the judicial authority will give a ruling on those dismissals without delay.
  - (c) Lastly, with regard to the allegations presented by the CGTP (non-recognition of the Single Union of Workers of Textiles San Sebastián SAC, refusal to apply the check-off facility for the collection of union dues, refusal to provide a notice board, refusal to bargain collectively, outsourcing of production with a view to restricting the exercise of freedom of association, transfer of unionized workers, and dismissal of the union's General Secretary, secretary for workers' rights, and another member), the Committee notes that fines have been imposed on the enterprise as a result of the complaints that have been lodged, and instructions have been issued regarding their collection (including a recent fine for obstructing the activity of the labour inspectorate), but expresses its concern that according to the Government's annexes, a labour inspection visit at the company's premises on 13 January 2010 found that there was no activity at the premises in question. The Committee, as it did in its previous examination of the case, once again urges the Government to establish whether the company in question still exists and, if so, to take the necessary measures without delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the anti-union measures taken against it, refrains from adopting any such measures in the future, and encourages collective bargaining between the parties. The Committee requests the Government to keep it informed of any measures adopted in that regard.
126. In its communication of 23 September 2011, referring to recommendation (a) by the Committee, the Government states that the wrongful dismissal claim filed by the trade union official Mr Wilmert Medina against the enterprise San Fermín SA is pending settlement in the court of last resort. *The Committee requests the Government to keep it informed in this regard.*

127. As to recommendation (b) concerning the alleged dismissal by the company CFG Investment SAC of members of the executive committee and union members, the Government provides information on the status of the judicial proceedings brought by dismissed workers against CFG Investment (ten workers in all). The Government reports in particular on a case before the court of last resort (Mr Abel Antonio Rojas), four cases in which judicial proceedings are under way (Mr Rodolfo Toyco, Mr Primitivo Ramos, Mr Marco Antonio Malta and Mr Juan Germán Cáceres), and five cases which are under appeal (Mr Ángel Maglorio, Mr Alfredo Flores, Mr Segundino Flores, Mr Alex Javier Rojas and Mr Roberto Juan Gargate).
128. *The Committee notes this information and requests the Government to report on the outcome of the judicial appeal and last instance proceedings concerning the trade unionists from CFG Investment SAC.*
129. *Lastly, with regard to recommendation (c), in the absence of any information from the Government, the Committee reiterates its previous recommendation and once again urges it to ascertain whether the enterprise Textiles San Sebastián SAC still exists, and if it does, to take the necessary measures without delay to ensure that the enterprise reinstates the dismissed officials and workers with the payment of wage arrears, recognizes the union, rectifies the anti-union measures taken against it, refrains from adopting any such measures in the future and encourages collective bargaining between the parties. If reinstatement is not possible for objective and compelling reasons, the Committee urges the Government to ensure that the workers concerned receive sufficient and adequate compensation so as to constitute a dissuasive sanction against anti-union dismissals.*

### **Case No. 2559 (Peru)**

130. The Committee examined this case at its November 2011 meeting, at which it made the following recommendation [see 362nd Report, para. 121]:

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

131. In a communication of 10 May 2012, the Government states that Mr Roger Augusto Rivera Gamarra lodged successive judicial appeals which did not succeed.
132. *The Committee notes this information.*

### **Case No. 2594 (Peru)**

133. The Committee examined this case at its November 2011 meeting, at which it made the following recommendation [see 362nd Report, para. 125]:

The Committee requests the Government to keep it informed of the outcome of the judicial proceedings in connection with dismissals initiated by Ms María Eliza Vilca Peralta, Ms Carmen Rosa Mora Silva and Ms Liliana Jesús Sierra Farfán.

134. In its communications of 5 March, 4 May and 29 August 2012, the Government states that the enterprise Panamericana Televisión SA closed down and that the former workers filed claims with the courts to payment of their statutory social benefits. The courts found the claim filed by Ms Liliana Jesús Sierra Farfán to be founded in part and ordered payment of 28,334.62 soles (PEN). The claim filed by Ms María Eliza Vilca Peralta also succeeded in part, but the ruling was challenged by both parties to the judicial proceedings. Lastly,

concerning the proceedings brought by Ms Carmen Rosa Mora Silva, the judicial authorities have requested information as to payments she has received, as her complaint is still pending. The enterprise indicates that Ms Carmen Rosa Mora Silva was reintegrated on 1 July 2012. It adds that Ms María Eliza Vilca has obtained part of what she was owed in the context of the bankruptcy proceedings, but that payment will be made after the ruling is given.

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

### **Case No. 2638 (Peru)**

136. The Committee last examined this case at its March 2011 meeting, when it made the following recommendations on the matters still pending [see 359th Report, para. 130]:

The Committee requests the Government to transmit the outcome of the appeals or judicial reviews regarding the dismissal of the trade unionist in question (25 workers dismissed).

137. In its communications of 8 May 2011, 28 September 2011, 5 March 2012, 23 February 2012, 19 June 2012 and 6 August 2012, the Government informed the Committee of the decisions ordering the reinstatement of trade unionists Alejandra Mosqueira Espinoza, Atilia Celia Alcarraz de Cancharí, Gregoria Mendoza Callapiña, Vicente Félix Taza Quinto, Jeremías Santiago Romero Morales, Herminia Onoj Viuda de Mallco, Aquilino Sucasaca Mendoza, Brunita López Saravia de Ccencho, Josefina Quispe Huamán de Huayta, María Mendoza Araujo, Florinda Torres Tarrillo and Lucila Gónez Bando de Urbay.

138. The Government adds that trade unionists Margarita Olga Dávila Gabriel, María Magdalena Astocahuana Ovalle and Elizabeth Concepción Mayhuire Ampuero are awaiting a decision on the appeal lodged by the municipality of Surquillo, and that in the case of Flavia Donatilla Rosales Zapata, the cassation appeal of the municipality of Surquillo was declared inadmissible.

139. *The Committee takes note of the information received, in particular the reinstatement of 12 workers. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings relating to the dismissal of the 13 remaining workers (the Government has informed it that three are awaiting a decision on appeal proceedings) by the municipality of Surquillo.*

### **Case No. 2664 (Peru)**

140. When it last examined this case, in June 2011, the Committee made the following recommendation on matters that were still pending [see 360th Report, para. 959]:

- (a) The Committee requests the Government to take steps to ensure that in future an independent body with the confidence of the parties involved, rather than the administrative authority, is responsible for declaring strikes illegal, and to provide information on the legal basis on which the Ministry of Labour may declare a strike illegal.
- (b) The Committee expects that the Constitutional Court will give a ruling quickly on the dismissal of ten workers from the SPCC, and requests the Government to take the necessary measures to give it effect without delay. The Committee requests the Government to keep it informed in this regard.

- (c) As regards the appeal lodged with the Constitutional Court by eight workers dismissed from the Barrik Misquichilca SA mining company, the Committee expects that the judicial authority will give a ruling shortly and requests the Government to keep it informed in this regard.
- (d) As regards the murders of Manuel Yupanqui and Jorge Huanaco Cutipa, concerning which the Committee had taken note of the investigations that were under way before the national police and the Public Prosecutor, the Committee notes the Government's indication according to which it has requested information from the Ministry of the Interior. The Committee deeply regrets that the Government is unable to state that the investigations have resulted in the arrest of those responsible for the killings, and requests the Government to keep it informed in this regard.

- 141.** In its communication of 4 May 2012, in response to the Committee's first recommendation the Government states that section 4 of Supreme Decree No. 034-91-TR authorizes the Ministry of Labour and Employment Promotion to rule on the unlawfulness of strikes by workers who are covered by the private labour regime.
- 142.** With regard to the dismissal of ten workers from the Southern Peru Copper Corporation, the Government states that the workers concerned filed an appeal which the judicial authority allowed, with suspensory effect, and that a constitutional action was also allowed by the Constitutional Court.
- 143.** With regard to the appeal filed with the Constitutional Court by eight workers dismissed from the mining company Barrik Misquichilca SA, the Government reports a ruling of 10 November 2011 in which the Constitutional Court allowed the constitutional action (*amparo*) brought by eight miners and ordered the mining company Barrick Misquichilca SA to reinstate the applicants in their posts.
- 144.** With regard to the fourth recommendation concerning the killing of two trade union officials, the Government reports on the action taken and adds that in the case of Mr Manuel Yupanqui Ramos' death, it has not been possible to identify any suspected perpetrators or accomplices.
- 145.** *The Committee notes with satisfaction that the ruling of 10 November 2011 orders the reinstatement of the eight workers dismissed from the Barrik Misquichilca mining company.*
- 146.** *With regard to the previous recommendation that: (1) the Government provide information on the legal basis on which the administrative authority may declare a strike illegal, and (2) an independent body have responsibility for declaring strikes illegal, the Committee takes note of the information supplied by the Government and notes in particular that the Ministry of Labour and Employment Promotion is authorized by section 4 of Supreme Decree No. 034-91-TR to rule on the unlawfulness of a strike by workers covered by the private labour regime. In this connection, the Committee reiterates its earlier conclusions in which it pointed out that responsibility for declaring strikes illegal should not lie with the Government but with an independent body.*
- 147.** *With regard to the appeals lodged by ten workers dismissed from the Southern Peru Copper Corporation, the Committee takes note of the information supplied by the Government and notes in particular that the court allowed the workers' appeal with suspensory effect, and that the constitutional action was also allowed.*
- 148.** *Lastly, the Committee notes the information sent by the Government on the alleged murder of the trade union official Mr Manuel Yupanqui Ramos and trusts that further investigations will allow the facts to be clarified. The Committee once again draws the Governing Body's attention to the serious and urgent nature of this aspect of the case and*

*requests the Government to send information on the investigations into the alleged murder of the trade union leader Mr Jorge Huanaco.*

### **Case No. 2697 (Peru)**

**149.** The Committee examined this case at its November 2011 meeting, at which it made the following recommendation [see 362nd Report, para. 146]:

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

**150.** In its communication of 20 April 2012, the Government states that Ms Adriana Jesús Delgado Angulo was reinstated in her job; Ms Ana Elizabeth Mujica Valencia, Ms María Yolanda Zaplana Briceño, Ms Mirian Reyes Candela, Ms Nelly Cecilia Marimón Lino Montes, Ms Rosemary Alexandra Almeyda Bedoya and Ms Rocío del Carmen Rojas Castellares were reinstated in their jobs with payment of the remuneration accrued. The Government also indicates that the defendant filed an appeal.

**151.** *The Committee requests the Government to keep it informed of the outcome of the abovementioned appeal.*

### **Case No. 2757 (Peru)**

**152.** When it last examined the case, in June 2011, the Committee made the following recommendations on matters that were still pending [see 360th Report, para. 993]:

- The Committee requests the Government to take the necessary measures so that the right to organize is guaranteed in both law and practice for persons hired under training agreements.
- The Committee requests the Government to indicate whether the necessary regulations have been issued so that State workers covered by CAS are able to exercise the right to organize and to strike, in accordance with the ruling of the Constitutional Court, and, if not, to take the necessary measures for their adoption as soon as possible.
- The Committee requests the Government to keep it informed of current legislative reforms and expects that the Committee's conclusions and recommendations will be taken into account when amending the provisions referred to by the complainant organizations with a view to improving the exercise in practice of the rights of freedom of association and collective bargaining.

**153.** In its communication of 14 September 2011, in response to the Committee's first recommendation (guaranteeing the right to organize of persons hired under training agreements), the Government asserts that such training arrangements do not imply the existence of a labour relationship that confers social and labour rights – the right to organize, for example – on the beneficiary. The rationale for this premise is that the beneficiary is engaged in a process of supervised learning, which involves no professional responsibilities of the kind that would be expected of someone in an employment relationship. Because the law does not treat them as workers, the beneficiaries of such training arrangements are not entitled to form or join trade unions. It must be borne in mind, however, that like any member of the public they do have the right to set up associations as long as they are not trade unions.

**154.** As to whether the necessary regulations have been issued so that state workers covered by the Administrative Service Contract (CAS) are able to exercise the right to organize and to strike, the Government states that pursuant to the decision of the Constitutional Court

(requiring the Government to issue the necessary regulations so that workers covered by the CAS are able to exercise the right to organize and to strike enshrined in article 28 of the Political Constitution of Peru, 1993), the Office of the President of the Council of Ministers issued Supreme Decree No. 065-2011-PCM (published on 27 July 2011), to amend the CAS Regime Regulation, approved by Supreme Decree No. 075-2008-PCM. As amended, the CAS Regime Regulation contains provisions to guarantee and regulate the right to organize and to strike for CAS workers.

155. With regard to the legislative reforms under way to improve the exercise in practice of the right to freedom of association and collective bargaining, the Government states that the National Labour and Employment Promotion Council (CNTPE) – the competent body – drafted a general labour bill, which is currently among the pending issues on the agenda of the Plenary of the Congress of the Republic. The bill sets out general provisions to be applied to individual and collective employment relationships. The Government has decided, through Ministerial Resolution No. 257-2011-TR, to set up a committee of experts to be responsible for revising and updating the bill. The committee will be required to submit a technical report containing comments and/or observations on the bill which will address issues relating to freedom of association and collective bargaining.
156. *The Committee notes with satisfaction the information that Supreme Decree No. 065-2011-PCM, published on 27 July 2011, recognizes the right to organize and to strike of workers covered by the CAS regime.*
157. *With regard to the right to organize of persons hired under training agreements, the Committee notes that according to the Government, these persons may belong to associations but not form or join trade unions. The Committee reiterates its previous conclusions in this regard, namely that persons hired under training agreements should likewise have the right to organize and “the status under which workers are engaged with the employer, as apprentices or otherwise, should not have any effect on their right to join workers’ organizations and participate in their activities” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 258–259]. The Committee accordingly repeats its request to the Government to take the necessary steps to ensure that this right is guaranteed for the workers concerned both in law and in practice.*
158. *Lastly, the Committee takes note of the information provided on the current legislative reforms to amend the General Labour Act and improve the exercise in practice of the rights of freedom of association and collective bargaining, in particular as regards its request mentioned in the previous paragraph.*

### **Case No. 2771 (Peru)**

159. The Committee examined this case at its November 2011 meeting, at which it made the following recommendation [see 362nd Report, para. 159]:

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

160. In its communication of 1 March 2011, the General Confederation of Workers of Peru (CGTP) stated that in May 2010 these trade union leaders were furthermore detained for nearly three months for alleged obstruction of the running of public services. The CGTP also refers to other allegations, which have already been addressed.



161. In its communications of 24 February, 4 May and 14 September 2012, the Government repeats that the court acquitted the trade union leaders of the charge of homicide, ordering their release and the cancellation of the police and court records pertaining to the case. The Government provides no detailed information in response to the CGTP's new allegations (it sends only press reports).
162. *The Committee notes the acquittal of the trade union leaders and observes that the court ruling states among other things that it was impossible to identify the strikers who threw stones that hit a police captain, who died. Nothing in the documents sent indicates that the trade union leaders sought compensation, but the Government points out that acquittal entitles them to file a claim. The Committee takes note of this information.*
163. *The Committee asks the Government to comment in detail on the CGTP's communication of 1 March 2012.*

### **Case No. 2832 (Peru)**

164. The Committee last examined this case at its November 2011 meeting, when it made the following recommendations on matters still pending [see 362nd Report, para. 1334]:
- (a) The Committee awaits the information announced by the Government on the implementation of the agreement reached in July 2007 between the Ministry of Labour and the enterprise concerned in regard to the dismissal of three trade union officials, which would appear to refer to their reinstatement.
  - (b) The Committee requests the Government to indicate whether trade union official Mr Tito Alfredo Matos Galarza has lodged a judicial appeal against the ruling of the court of first instance convicting him of breach of the peace in the form of rioting. The Committee also requests the Government to indicate whether this union official instituted judicial proceedings concerning his dismissal in 2007.
165. In its communication of 6 August 2012, the Government states, with regard to recommendation (a), that the company has fulfilled its commitments under the agreement reached at an out-of-court meeting on 9 July 2007. The Compañía Minera Atacocha SA presented the contracting companies, AESA e IESA, with three workers mentioned in the complaint, for hiring by them. The Government further states that there is a firm judicial decision establishing that Atacocha has fulfilled the commitments it made.
166. The Government states, with regard to recommendation (b), that Mr Matos Galarza has been acquitted of the charges against him.
167. *The Committee takes note of the information received with regard to its previous recommendations. It takes note with interest of the court decision to acquit the union official Tito Alfredo Matos Galarza.*

### **Case No. 2652 (Philippines)**

168. The Committee last examined this case at its March 2010 meeting [see 356th Report, paras 1194–1225], at which time it made the following recommendations:
- (a) The Committee once again requests the Government to initiate discussions in order to reach a solution with respect to approximately 100 workers who did not previously accept the compensation package offered by the company in their previous employment including, if their reinstatement is not possible as determined by a competent judicial authority, the payment of adequate compensation. The Committee further requests the Government to inform it of the outcome of the complainant's urgent plea before the

Supreme Court requesting a review of the latter's 19 October 2007 and 17 March 2008 decisions.

- (b) The Committee requests the Government to keep it informed of developments regarding the initiatives to find "out-of-the-box solutions" with a view to dismissing the criminal cases involving members of the TMPCWA, as well as on the judicial proceedings relating to the two criminal cases.
- (c) The Committee requests the Government to inform it of the outcome of the complainant's motion for reconsideration of the Court of Appeals' 2 April 2008 decision confirming the TMPCLO's certification as the sole and exclusive bargaining agent. The Committee further expresses the firm expectation that the Court of Appeals, should it grant the complainant's motion, will give due consideration to the Committee's previous comments on the issue of certification.
- (d) The Committee requests the Government to continue to pursue measures to ensure the expeditious investigation, prosecution, and resolution of pending cases concerning the alleged harassment and assassination of labour leaders and trade union activists, and all other measures necessary to ensuring that freedom of association may be exercised by all workers' organizations, including the complainant, in a climate free from violence, harassment, and threats of intimidation of any kind, and to keep it informed of the progress made in this regard.
- (e) The Committee requests the Government to initiate a full, in-depth and independent inquiry into the complainant's allegations of discrimination against its members and, if they are found to be true, to take the necessary measures to ensure that the persons concerned are adequately compensated so as to constitute sufficiently dissuasive sanctions against future acts of anti-union discrimination. It further requests the Government to keep it informed of any court proceedings concerning these allegations.

**169.** The complainant organization provides additional information in support of its complaint in communications dated 30 August 2010 and 30 March 2011. It indicates that, despite its ongoing cooperation with the Department of Labor and Employment (DOLE) in implementing the possible solutions recommended by the ILO High-level Mission (HLM), Toyota struck anew against the union by illegally terminating four members of the Toyota Motor Philippines Corporation Workers' Association (TMPCWA), two of which were union officials. On 7 June 2010, the TMPCWA grievance committee submitted a letter to the management, requesting the company for a meeting to discuss the continuing harassment and intimidation of TMPCWA members. On 25 June, nine union members (Wenecito Urgel, the TMPCWA Vice-President; Ronald Belen; Gilbert Cruzado; Dante Pantino; Ricky Bindol; Ariel Lalap; Roderick Vidal; Reynan Magdaong and Alberto Tanael) received a show-cause notice with notice of preventive suspension from the company, according to which, based on a preliminary investigation, they had been involved in a critical line-stop disrupting the production operations for 18 minutes. On 1 July, the nine union members submitted their individual explanation to the company management. The supposedly 30-day preventive suspension was extended for one week. On 2 August 2010, the management illegally dismissed the four TMPCWA members including two union officials (Wenecito Urgel, the union's Vice-President and Ariel Lalap, member of the union Board of Directors). In its communication of 30 March 2011, the complainant indicates that, after several meetings set by the National Conciliation and Mediation Board (NCMB), which was not able to settle the issue, the TMPCWA brought the issue to the National Labor Relations Commission (NLRC) in October 2010.

**170.** According to the complainant, the workers neither committed production disruption nor participated in any riots or illegal strikes because they returned to their working places after the line-stop. The complainant asserts that it was the company that committed violations by extending the preventive suspension by one additional week simply because the investigation was not finished; and by not allowing the union representatives to represent the accused. According to the complainant, the Director from the Bureau of Labor Relations (BLR) attempted to persuade the company not to take any drastic actions

against the workers, in view of the ongoing DOLE initiative to implement the ILO HLM recommendations. But Toyota responded by terminating the four union members including the Vice-President of the TMPCWA, in disregard of the workers' family responsibilities and 15 to 20 years of continuing service to the company.

- 171.** As regards recommendation (a), the complainant states that, following a meeting in July 2010 initiated by the new secretary of DOLE, the set-up of the new government and several follow-up attempts on the part of the TMPCWA, a meeting was held with DOLE on 19 January 2011, focusing on the HLM recommendations and their implementation. In the complainant's view, there was no development because of lack of will on the part of the Toyota management to implement the recommendations. On 16 March 2011, the TMPCWA launched a protest action in front of the factory in Santa Rosa, Laguna, to commemorate the tenth anniversary of the illegal dismissal by Toyota of 233 members and the leaders of the TMPCWA.
- 172.** As regards recommendation (b), the complainant organization indicates that, in a hearing on 1 September 2010, the TMPCWA approached the complainants who had filed criminal suits against the dismissed workers. According to the complainant, this attempt was based on the last discussion between the union and DOLE and DOLE's communication to the company that the case should be withdrawn so that the HLM recommendations can move forward. Unfortunately, the complainants declined, and the next hearing is to be held on 15 June 2011.
- 173.** As regards recommendation (c), the complainant indicates that the Supreme Court had already released a decision on 9 August 2010 denying the TMPCWA's Motion for Reconsideration, and that, on 18 October 2010, the Supreme Court has issued its final judgment on the certification election case (G.R. No. 186627-30), denying the Motion for Reconsideration of the TMPCWA. The complainant criticizes that the Supreme Court did not resolve the important issue of the challenged votes but simply stated that the issue was already moot and academic because the TMPCWA participated in the second certification election in 2006. Also, the issue of the first collective bargaining agreement has been totally ignored.
- 174.** As regards recommendation (e), the complainant indicates that TMPCWA members inside the factory continue to experience anti-union discrimination. In 2009, 86 workers (eight supervisory workers and members of the Toyota Motor Philippines Corporation Supervisory Union (TMPCSU), six members of the TMPCWA and more than 70 members of the Toyota Motor Philippines Corporation Labor Organization (TMPCLO)) had submitted a receipt to the management to avail themselves of the cafeteria benefits under the collective bargaining agreement. Toyota management accused them of fabricating false receipts. If proven, the penalty is dismissal. According to the complainant, the management ignored the request of the TMPCWA to represent its six members. On 28 March 2011, after almost two years of investigation, the management finally released a decision for most of the workers (15 days' suspension), who reacted with relief. However, the decision was left hanging for the members of the TMPCWA; in the complainant's view, Toyota and the TMPCLO deliberately chose a moment when the collective bargaining agreement was soon to expire. Further, in January 2011, members of the TMPCWA did not receive incentives like all the other rank and file workers for their effort to achieve the yearly production target of the company.
- 175.** As regards recommendation (d), the complainant deplores that Toyota is not only still continuing to disregard the past ILO recommendations and refuse a solution to the pending issues, but is also opposing the newly issued recommendations in a logic of confrontation, as illustrated by the recent events.

- 176.** In a communication dated 8 July 2012, the TMPCWA provides additional information in support of their complaint. In particular, the complainant alleges that the enterprise continues to harass the illegally dismissed members with fabricated criminal cases and carries out acts of union-busting against the TMPCWA, including through dismissal of four of its members and suspension of another in 2010. On this latter point, the complaint indicates that it has appealed the NLRC dismissal of its case to the Court of Appeal.
- 177.** In its communication of 15 November 2010, and with reference to its earlier reports on the exploratory talks anchored in the TMPCWA proposal to withdraw the two remaining criminal cases (IS No. 01-1-3534, 02-621 and IS No. 01-1-3538, 02-620), the Government indicates that it had earlier extracted verbal assurances from both parties on the possibility of court-ordered withdrawal of the cases. However, the Government states that an incident that occurred in the Toyota plant on 5 June 2010, set back all initial progress for an “out of the box” solution. The incident involved nine employees belonging to the TMPCWA and resulted in a “line stoppage” (two cars equivalent) during the night shift. As a result of the incident investigation by the company, two persons were terminated due to direct offenses, two were terminated for lying as their version of the events was the complete opposite of what the witnesses indicated; two were given a 30-day suspension; two got warnings; and one was absolved. In its communication of 30 May 2011, the Government indicates that, in its July meeting, the TIPC Monitoring Body Technical Executive Committee would take up the new allegations of the TMPCWA concerning the dismissal of four union leaders and members.
- 178.** On the reinstatement of 100 dismissed workers as requested by the TMPCWA, the Government believes that the issue can no longer be worked out. In a communication dated 24 May 2010, Toyota Motors Philippines stated that reinstatement is not possible since the Supreme Court has ruled with finality on the validity of the dismissal and on the non-entitlement of the dismissed workers to severance pay. The company has, however, offered financial assistance and is willing to extend other forms of assistance. Based on the list provided by the company, out of the 233 dismissed TMPCWA workers, 141 have received financial assistance.
- 179.** On the alleged military harassment of the TMPCWA, one of the two activities organized by the ILO and DOLE on 22–23 April 2010, representing the second activity on freedom of association and civil liberties after the HLM, focused on Toyota and Philippine Economic Zone Authority (PEZA). The seminar entitled “Capacity Building Seminar on Freedom of Association, Collective Bargaining and Labor Law Implementation in the Philippine Economic Zones” was with tripartite components from Laguna, Cavite and Batangas economic zones (PEZA officials and staff; representatives from DOLE and the Regional Offices HI, IV-A and NCR of the Department of Interior and Local Government (DILG); selected representatives of the local government units; and tripartite participants especially from Laguna Technopark). In its communication of 30 May 2011, the Government indicates that, with respect to the Armed Forces of the Philippines, there is agreement on: (i) its participation in the Regional Tripartite Industrial Peace Council for better appreciation of social dialogue, freedom of association and civil liberties; (ii) the conduct of capacity-building seminars on freedom of association as it relates to civil liberties and human rights; and (iii) the crafting of a Memorandum of Agreement with DOLE, labour groups and employers that would clarify their engagement in the community and set the parameters on non-engagement in unions and workplaces. Moreover, the Government indicates that the newly created Tarlac-wide Tripartite Industrial Peace Council (TTIPC), which carried out localized seminars on international labour standards, is expected to implement follow-up actions identified in the above seminar.

- 180.** In its communication dated 28 February 2012, the Government indicates that the pace of the exploratory talks on the withdrawal/dropping of the criminal cases against Ed Cubelo, et al., has picked up. Meetings with complainants Leoro B. Pajarito, Napoleon S. Maniclang and Christopher F. Tolete, were conducted in 2012. The supervisory union, the TMPCSU, has continued to extend assistance in convincing the complainants for even a conditional withdrawal of the criminal cases. An update on the compromise agreement shall be provided as soon as finalized.
- 181.** The NCMB conducted preventive mediation conferences in relation to the dismissal and suspension incident. The TMPC manifested that the preventive suspensions were valid and necessary in the conduct of the investigation and due process, and that it was not willing to reconsider its earlier decision with regard to the penalty of termination or suspension. On 8 October 2010, the TMPCWA withdrew the preventive mediation before the NCMB and questioned the dismissals before the NLRC. The complaint was dismissed for lack of merit on 30 March 2011. The appeal before the NLRC was resolved adversely on 22 December 2011, and the complainants' motion for reconsideration was denied on 7 February 2012.
- 182.** In the certification case, the TMPCLC was affirmed as the sole and exclusive bargaining agent of the Toyota rank and file employees. The Supreme Court, in a resolution dated 9 August 2010, affirmed the decision and resolution of the Court of Appeals dated 2 April 2008 and 13 February 2009, respectively.
- 183.** A new certification election was conducted in 2011. Petitioners TMPCWA, the New Organized Workers of Toyota Motor Philippines Corporation-Independent (NOW-TMPC) and forced intervenor TMPCLC agreed in June 2011 to a consent election to determine the sole and exclusive bargaining agent following the expiration of the collective bargaining agreement of the TMPCLC on 30 June 2011. However, during the pre-election conferences, petitioner TMPCWA withdrew their participation, and on 12 July 2011 the consent election was conducted. A total of 738 members of the rank and file bargaining unit have cast their votes out of the total listed 796 eligible voters. NOW-TMPC garnered 255 votes while forced intervenor TMPCLC won with 466 votes. The TMPCLC was certified as the sole and exclusive bargaining agent on 20 July 2011, absent an election protest.
- 184.** *The Committee notes the detailed information provided by the complainant and the Government's reply on a number of points. The Committee notes that there is a divergence of views between the complainant and the company with respect to the legality and anti-union character of the dismissals arising out of an incident in June 2010, but observes the Government's indication that the complaint filed with the NLRC was dismissed for lack of merit. The Committee further observes the indication in the complainant's latest communication that it has filed an appeal against the NLRC dismissal. The Committee requests the Government to keep it informed of the outcome.*
- 185.** *As regards recommendation (a), the Committee notes that the complainant is of the view that the absence of progress is due to the lack of will on the part of the company to implement the recommendations, and that the Government believes that the issue can no longer be worked out, given that the company recently communicated in writing that reinstatement is not possible since the Supreme Court has ruled with finality on the validity of the dismissal and on the non-entitlement of the dismissed workers to severance pay and proposed financial assistance (accepted by 141 of the 233 dismissed TMPCWA workers according to the company) and other forms of assistance. Reiterating the freedom of association principles it enounced and the conclusions it made in this regard when it examined this case at its meeting in March 2010 [see 356th Report, paras 1215–16], the Committee urges the Government to pursue its efforts to intercede with the parties so as to reach an equitable negotiated solution in this longstanding case with respect to the*

*approximately 100 workers who did not previously accept the compensation package offered by the company in their previous employment including, if their reinstatement is no longer possible for objective and compelling reasons, the payment of adequate compensation. The Committee again requests the Government to inform it of the outcome of the complainant's urgent plea requesting a review of the Supreme Court 19 October 2007 and 17 March 2008 decisions and to supply a copy of the decision.*

- 186.** *As regards recommendation (b), the Committee notes the Government's description of its failed attempt to approach the complainants in September 2010 and the Government's indication that, while it had managed to extract verbal assurances from both parties on the possibility of court-ordered withdrawal of the cases, the abovementioned incident in the Toyota plant on 5 June 2010 set back all initial progress. The Committee further notes the additional information provided by the complainant concerning the latest hearings in this case in 2012. The Committee trusts that these proceedings – which were initiated over ten years ago – will finally be dismissed or withdrawn given the time that has elapsed and the conclusions made by the Committee on this matter over the years.*
- 187.** *As regards recommendation (c), the Committee notes that the Supreme Court issued its final judgment on the certification election case denying the Motion for Reconsideration of the T MPCWA. While noting with regret that little consideration appears to have been given to its previous conclusions on the issue of certification, the Committee now observes from the Government's latest reply that the TMP CLO won the election conducted on 12 July 2011 and was certified as the sole and exclusive bargaining agent of the Toyota rank and file employees, absent any election protest.*
- 188.** *As regards recommendation (d), given that part of the allegations in this case refer to general harassment and militarization of the workplace being addressed in Case No. 2745, the Committee will pursue its further examination of these matters within the framework of Case No. 2745.*

### **Case No. 2634 (Thailand)**

- 189.** The Committee last examined this case, which concerns obstruction and violation of the right to organize and bargain collectively, at its May–June 2012 session [see 364th Report, paras 215–220]. On that occasion the Committee requested the Government and the complainant organization to clarify whether the 178 trade unionists who had resigned from their jobs at Thai Summit Eastern Seaboard Autoparts Industry Co. Ltd (TSESA) (not the employees still working at the enterprise and concerned by decision No. 3801-3824/2553 of the Supreme Court) had filed a complaint before the Court and if not, it requested the complainant organization to indicate the reasons why these employees decided not to exercise their right to file a complaint against the acts of their employer. As to the dismissal of the ten trade unionists, the Committee urged the Government to provide without delay information on whether the Labour Court, in its hearing of the dismissal of the ten trade unionists (No. 780-787/2008), was in full possession of all the material facts referred to in the Committee's previous conclusions, including the report of the Thailand National Human Rights Commission, and requested the Government to transmit a copy of the judgment once handed down. It also requested the Government, once again, to initiate discussions in order to review the possible reinstatement of the ten workers or, if reinstatement is not possible, the payment of adequate compensation. Finally, as regards the measures taken by the Government to ensure that the union and the employer engage in good faith negotiations, the Committee requested the Government to ensure that specific measures are taken so that the union and the employer concerned can engage in good faith negotiations, with a view to concluding a collective agreement on terms and conditions of employment. The Committee requested the Government to keep it informed of any developments in respect of all these issues.

**190.** In a communication dated 19 April 2012, the Government indicates that: (1) the 178 employees did not submit the case to the Labour Relations Committee but submitted the case to the Labour Court; and that (2) “from monitoring of the case and the judgment” it found that the case which was brought to the Labour Court, and later appealed to the Supreme Court (decision No. 3801-3824/2553 of the Supreme Court), concerns 24 employees of TSESA. The Government provides a brief summary of the decision of the Supreme Court.

**191.** *The Committee understands from the Government’s communication that the 178 employees who had resigned from TSESA did not submit a case to the Labour Court. While the Committee had requested the complainant organization to indicate the reasons why these employees decided not to exercise their right to file a complaint against the acts of their employer, no further information has been provided. As to the dismissal of the ten trade unionists who have appealed, the Committee regrets that the Government has not provided the previously requested information and expects that all the material facts referred to in the Committee’s previous conclusions, including the report of the Thailand National Human Rights Commission, will have been brought before the Court. It recalls that justice delayed is justice denied and urges the Government to transmit a copy of the judgment once handed down. It also urges the Government to initiate discussions in order to review the possible reinstatement of the ten workers or, if reinstatement is not possible, the payment of adequate compensation. Finally, as regards the measures taken by the Government to ensure that the union and the employer engage in good faith negotiations, the Committee requests once again the Government to ensure that specific measures are taken so that the union and the employer concerned can engage in good faith negotiations, with a view to concluding a collective agreement on terms and conditions of employment. The Committee requests the Government to keep it informed of any developments in respect of all these issues.*

\* \* \*

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

<b>Case</b>	<b>Last examination on the merits</b>	<b>Last follow-up examination</b>
1865 (Republic of Korea)	March 2009	March 2012
1962 (Colombia)	November 2002	June 2008
2096 (Pakistan)	March 2004	March 2011
2301 (Malaysia)	March 2004	March 2012
2304 (Japan)	November 2004	November 2010
2355 (Colombia)	November 2009	March 2012
2384 (Colombia)	June 2008	June 2009
2399 (Pakistan)	November 2005	June 2011
2433 (Bahrain)	March 2006	March 2012
2450 (Djibouti)	March 2011	March 2012
2453 (Iraq)	June 2006	March 2012
2460 (United States)	March 2007	November 2011
2488 (Philippines)	June 2007	June 2011
2557 (El Salvador)	March 2010	June 2012
2602 (Republic of Korea)	March 2012	–
2613 (Nicaragua)	March 2011	June 2012

Case	Last examination on the merits	Last follow-up examination
2630 (El Salvador)	March 2010	June 2012
2658 (Colombia)	November 2009	June 2012
2678 (Georgia)	June 2010	November 2011
2704 (Canada)	March 2012	–
2717 (Malaysia)	June 2011	March 2012
2735 (Indonesia)	November 2010	June 2012
2752 (Montenegro)	March 2012	–
2754 (Indonesia)	March 2011	June 2012
2755 (Ecuador)	June 2010	March 2011
2760 (Thailand)	March 2011	March 2012
2789 (Turkey)	March 2012	–
2793 (Colombia)	November 2011	–
2819 (Dominican Republic)	March 2012	–
2837 (Argentina)	March 2012	–
2838 (Greece)	November 2011	–
2844 (Japan)	June 2012	–
2848 (Canada)	June 2012	–
2850 (Malaysia)	March 2012	–
2862 (Zimbabwe)	June 2012	–
2864 (Pakistan)	June 2012	–
2865 (Argentina)	June 2012	–
2868 (Panama)	March 2012	–
2875 (Honduras)	March 2012	–
2898 (Peru)	June 2012	–

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

**194.** In addition, the Committee has received information concerning the follow-up of Cases Nos 1787 (Colombia), 2268 (Myanmar), 2291 (Poland), 2292 (United States), 2341 (Guatemala), 2382 (Cameroon), 2422 (Bolivarian Republic of Venezuela), 2428 (Bolivarian Republic of Venezuela), 2430 (Canada), 2434 (Colombia), 2460 (United States), 2478 (Mexico), 2528 (Philippines), 2540 (Guatemala), 2547 (United States), 2575 (Mauritius), 2590 (Nicaragua), 2595 (Colombia), 2611 (Romania), 2639 (Peru), 2654 (Canada), 2656 (Brazil), 2660 (Argentina), 2667 (Peru), 2674 (Bolivarian Republic of Venezuela), 2676 (Colombia), 2677 (Panama), 2679 (Mexico), 2680 (India), 2690 (Peru), 2695 (Peru), 2699 (Uruguay), 2703 (Peru), 2710 (Colombia), 2719 (Colombia), 2722 (Botswana), 2724 (Peru), 2727 (Bolivarian Republic of Venezuela), 2733 (Albania), 2736 (Bolivarian Republic of Venezuela), 2737 (Indonesia), 2741 (United States), 2746 (Costa Rica), 2751 (Panama), 2757 (Peru), 2764 (El Salvador), 2775 (Hungary), 2780 (Ireland), 2788 (Argentina), 2795 (Brazil), 2809 (Argentina), 2818 (El Salvador), 2825 (Peru), 2831 (Peru), 2833 (Peru), 2836 (El Salvador), 2841 (France), 2843 (Ukraine), 2854 (Peru), 2856 (Peru), 2866 (Peru), 2867 (Plurinational State of Bolivia) and 2887 (Mauritius), which it will examine at its next meeting.



CASE NO. 2861

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

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

- the Confederation of Education Workers of Argentina (CTERA) and
- the San Luis Association of State Teachers (ASDE)

***Allegations: The complainant organizations allege acts of anti-union harassment against the General Secretary of the ASDE for having taken unpaid leave for the exercise of trade union activities, as well as the refusal to deduct ASDE members' union dues at source***

- 195.** This complaint is contained in a communication from the Confederation of Education Workers of Argentina (CTERA) and the San Luis Association of State Teachers (ASDE) dated 12 April 2011.
- 196.** The Government sent its observations in a communication in May 2012.
- 197.** 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), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainants' allegations**

- 198.** In their communication dated 12 April 2011, the CTERA and ASDE report a situation of unusual gravity which is detrimental to the education workers of San Luis province, giving rise to the submission of the complaint against the Argentine Republic for violation of the fundamental principles of freedom of association, the free and democratic right to organize, and the right to trade union representation which, as laid down in the treaties and Conventions of the ILO, are guaranteed by Argentine legislation, including the national Constitution ((articles 14bis and 75, paragraph 22) and other existing laws referred to below).
- 199.** The complainants state that the complaint relates to the actions of the state authorities in San Luis province, that is to say, the discriminatory and arbitrary acts of trade union harassment against Ms María Inés Quattropani, General Secretary of the ASDE and a member of the executive board of the CTERA. The complainants allege that Ms Quattropani was threatened with dismissal for taking trade union leave without pay pursuant to section 48 of Act No. 23551, which was communicated to the employer by the CTERA. Furthermore, the complainants add that San Luis province has also failed to deduct union dues at source for the ASDE despite doing this for other public sector organizations with the same legal status.
- 200.** The complainants allege that Ms Quattropani has suffered infringement of her rights as a state teacher and trade union representative, and her fellow union members have also been subject to clear discrimination. This has reached such illegal and arbitrary extremes that Ms Quattropani is threatened with arbitrary dismissal by the Ministry of Education of the

province after their absurd refusal to grant her trade union leave in her capacity as a member of the executive board of the CTERA, as expressly and categorically provided for under section 48 of Act No. 23551 concerning trade union associations. Ms Quattropani has been a state teacher in San Luis province since March 1985, and is a member of staff at school No. 240 "Provincia de Corrientes" in Villa Mercedes, San Luis province. She is also General Secretary of the ASDE and a member of the executive board of the CTERA as well as a full national congress member of the Confederation of Argentine Workers (CTA), having been elected General Secretary of the ASDE for two consecutive periods in 2007 and 2010.

- 201.** During her first term of office, Ms Quattropani requested trade union leave under section 101 of the Regulations for Teaching Personnel, Provincial Act No. XV-0387-2004, administrative file No. 0000-2009-005421, but has so far received no reply despite making repeated requests verbally and in writing. In mid-2010, Ms Quattropani repeated her formal request for trade union leave owing to the increasing difficulty of fulfilling both her work and union duties in the light of the upcoming elections at both the ASDE and the CTERA, as well as the subsequent elections at the CTA. Given the tacit refusal of previous requests, Ms Quattropani decided to make clear to the management of school No. 240 that the trade union leave would be without pay, as laid down in section 102 of the abovementioned Regulations, initiating file No. NOA-2082-2010-000460. In this document, dated 5 July 2010, she provided the required documentation and stated that from 2 August 2010 and until the end of her term of office – November 2010 if not re-elected – she would take trade union leave under section 102 of the Regulations, which clearly states: "Requests for trade union leave without pay ... will enter into force from the requested date."
- 202.** The complainants state that, under these conditions and without receiving any reply, Ms Quattropani was re-elected in September 2010 as General Secretary of the ASDE, a first-level trade union of the CTERA in San Luis province, and elected to the national executive board of the CTERA as a substitute member, which was communicated to the provincial authorities. On 6 December 2010, on the orders of the educational authority, the management of the state school of San Luis province told Ms Quattropani to return to work and informed her that her absence was unjustified (it should be noted that the trade union leave considered unjustified began after the requisite one month's notice on 2 August 2010 yet the authorities informed Ms Quattropani of this "news" on 6 December 2010, namely four months later).
- 203.** The complainants state that the reading and interpretation of section 102 of the abovementioned Regulations clearly show that the granting of trade union leave without pay is not at the discretion of the employer. The staff member only needs to respect the period of notice, as was the case with Ms Quattropani. This was ignored by the authorities who informed her in an arbitrary and illegal manner that she must return to work and dealt with her situation in such a manner that were Ms Quattropani to return to work, she could still face dismissal. Her right to trade union leave was denied and so far no reply has been forthcoming regarding the appeal lodged on 9 December 2010 against the administrative authority's decision of 6 December 2010. According to the complainants, it is important to make clear that the situation is worsening and to such an extent that it represents clear discrimination against, and harassment of, the ASDE, the CTERA and of course Ms Quattropani, given that trade union benefits that have been denied to these trade unions have been granted by the same authorities to other similar teachers' trade unions in the province (for example, trade union leave with pay was granted to Mr Danna, a delegate of the Argentine Teachers' Federation (UDA)).

**204.** The complainants explain that the provincial authorities claim Ms Quattropani's situation is not concerned with trade union leave without pay but is about unjustified absence, and are obviously acting deliberately and maliciously in a typical anti-trade union manner given that the request for trade union leave under section 102 of the Regulations for Teaching Personnel of the province arises from the tacit and discriminatory refusal by the authorities of the timely request for paid trade union leave. The complainants request that the discrimination and intimidation should cease and that a ruling be delivered to ensure that San Luis province recognizes the trade union leave that had to be taken without pay from August 2010. Furthermore, the complainants request that the ASDE and its members be accorded trade union leave with pay on the same terms as other teacher trade unions such as the UDA and the AMPPYA, both of which have their union dues deducted at source and have two members each on trade union leave, paid by the provincial government. According to the complainants, the ASDE should enjoy the same right so that these unfair inequalities cease, since the situation described above not only prevents it from functioning correctly but also puts its General Secretary at risk of dismissal.

## **B. The Government's reply**

**205.** In its communication of May 2012, the Government indicates that, in answer to its enquiries, the Ministry of Education of San Luis province replied as follows:

### **(a) The leave**

**206.** The San Luis Ministry of Education provided a brief, balanced overview, stating that the teacher, Ms Quattropani, kept changing her request for trade union leave. In the first instance, she requested trade union leave with pay, then later requested trade union leave without pay. The Ministry stresses the fact that this was itself confusing, since the two requests involved a mixture of the provisions of both types of leave contained in the Regulations for Teaching Personnel (those in section 101 and those in section 102). Indeed, in a note dated 14 July 2010, Ms Quattropani stated that she would take trade union leave without pay as of 2 August 2010. On 29 September, the Human Resources Department of the Ministry of Public Finance responded, indicating that the request could not be granted, since special leave as provided under section 102 of Act No. XV-0387-2004 was appropriate.

**207.** It is worth pointing out that the Regulations for Teaching Personnel (Act No. XV-0387-2004) do not provide for trade union leave without pay; in section 101, they provide for trade union leave and in section 102, for special leave without pay. The Ministry points out that, in this case, Ms Quattropani abandoned her teaching post on 2 August 2010 without first ensuring that the administrative measures granting her any type of leave had been implemented. It indicates that these details can be found in administrative file No. NOA-2082-2010-000460, which will be complete once the certified copy of the file has been delivered.

### **(b) Application for legal amparo**

**208.** At the same time as requesting trade union leave, Ms Quattropani applied for a judicial measure, which included a measure for no new action, dated 25 April 2011, prohibiting any action that might alter or modify the state of the claim in law or in fact, as prescribed by law. This case is currently before court No. 2 of the Third Civil Commercial and Mining Court of the First Judicial District of San Luis province, and is docketed under: "Quattropani María Inés c/Ministerio de Educación y otros *s/amparo*" (file No. 209962/11). The Ministry of Education adds that, since legal proceedings involving another branch of the State have been launched concerning this issue, it is necessary to

await the judiciary's decision and ruling on the case, not only because that is appropriate in a State subject to the rule of law, but also because there is a judicial measure that specifically requires that this be the case.

**(c) Multiple posts**

**209.** Lastly, the provincial education authorities point out that the teacher in question has another post in the San Luis province judiciary, namely in the second judicial district where she is a first administrative officer, with a 30-hour working week, file No. 5212. This situation not only violates article 23 of the provincial Constitution and the rules on activities compatible with teaching (section 65 of the Regulations for Teaching Personnel), but also runs counter to the very purpose of the request for the supposed trade union leave, given that such leave should be granted in order to enable the person concerned to adequately perform their trade union duties. Hence, reaffirming the above, if the reason Ms Quattropani applied for trade union leave was to carry out her duties as a trade union representative, those duties can hardly be performed if she continues to work in another field, regardless of whether both jobs are compatible or not.

**210.** In conclusion, the Government states that, by virtue of the abovementioned and bearing in mind the information provided by the provincial education authorities, it is appropriate to await the relevant court decision and the referral of the administrative file concerned.

**C. The Committee's conclusions**

**211.** *The Committee observes that, in the present case, the complainant organizations state that Ms María Inés Quattropani, a state teacher in San Luis province and General Secretary of the ASDE, a member of the executive board of the CTERA and a full national congress member of CTA, requested trade union leave several times under section 48 of the Act concerning trade union associations – according to the documentation attached to the complaint, on at least four occasions, in June and August 2009, and October and December 2010 – and having received no reply informed the authorities that, under the provisions of the provincial Regulations for Teaching Personnel, she would take trade union leave without pay. The Committee observes that the complainants allege that: (1) in an illegal and arbitrary manner – since according to the complainants the granting of trade union leave without pay is not at the discretion of the employer – on 6 December 2010, the management of the school in San Luis province told Ms Quattropani to return to work and informed her that her absence was deemed unjustified; (2) should Ms Quattropani return to work and end her trade union leave without pay, she could still face dismissal; (3) this situation represents clear discrimination against, and harassment of, the ASDE and its General Secretary since the benefits denied to this trade union (for example the deduction at the source of the union dues of its members) are granted to other teacher trade unions; and (4) so far no reply has been forthcoming regarding the appeal lodged on 9 December 2010 against the abovementioned decision of 6 December telling Ms Quattropani to return to work.*

**212.** *The Committee notes the Government's statement that it consulted the Ministry of Education of the San Luis province, which replied as follows: (1) the teacher, Ms Quattropani, kept changing her request for trade union leave (in the first instance requesting trade union leave with pay, then later requesting trade union leave without pay; this request was itself confusing, since the two requests involved a mixture of the provisions of both types of leave contained in the Regulations for Teaching Personnel); (2) in a note dated 14 July 2010, she indicated that she would take trade union leave without pay as of 2 August 2010 and on 29 September, the Human Resources Department of the Ministry of Public Finance responded, indicating that the request could not be*

granted, since special leave as provided under section 102 of the Regulations for Teaching Personnel was appropriate; (3) the Regulations for Teaching Personnel do not provide for trade union leave without pay; in section 101, they provide for trade union leave and in section 102, for special leave without pay; (4) Ms Quattropani abandoned her teaching post on 2 August 2010 without first ensuring that the administrative measures granting her any type of leave had been implemented; (5) at the same time as requesting trade union leave, Ms Quattropani applied for a judicial measure, which included a measure for no new action dated 25 April 2011, prohibiting any action that might alter or modify the state of the claim in law or in fact, as prescribed by law (this case is currently before court No. 2 of the Third Civil Commercial and Mining Court of the First Judicial District of San Luis province, and is docketed under: “Quattropani María Inés c/Ministerio de Educación y otros s/ amparo”); (6) since legal proceedings involving another branch of the State have been launched concerning this issue, it is necessary to await the judiciary’s decision and ruling on the case, not only because that is appropriate in a State subject to the rule of law, but also because there is a judicial measure that specifically requires that this be the case; and (7) the teacher concerned has another post in the San Luis province judiciary, and this situation not only violates article 23 of the provincial Constitution and the rules on activities compatible with teaching (section 65 of the Teaching Regulations), but also runs counter to the very purpose of the request for the supposed trade union leave, given that trade union leave should be granted in order to enable the person concerned to adequately perform their trade union duties.

**213.** *The Committee would like to recall that Article 6 of Convention No. 151 ratified by Argentina provides that such facilities shall be afforded to the representatives of recognized public employees’ organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work; and that the granting of such facilities shall not impair the efficient operation of the administration or service concerned. In this respect, the Committee takes note of the contradictory versions provided by the complainants and the provincial authorities concerning the request for trade union leave by the union leader Ms Quattropani. According to the allegations, the educational authorities of San Luis province did not respond to several requests for trade union leave with pay made by Ms Quattropani and the CTERA and that on this basis Ms Quattropani took trade union leave without pay. Noting that trade union leave is provided for in the law, and recalling that the exercise of this right must not impair the functioning and efficiency of the department concerned, and while noting that legal proceedings are under way concerning this case, the Committee expects that when the competent authorities of San Luis province issue a decision on this matter, they take into account the provisions of Article 6 of Convention No. 151. The Committee requests the Government to keep it informed in this regard.*

**214.** *With reference to the allegation that the ASDE, unlike other teacher trade unions, does not enjoy check-off facilities (deduction of trade union dues from wages), the Committee regrets that the Government has not sent its comments on this issue. The Committee notes that according to the law – Act No. 23551, section 38 – employers have the obligation to deduct the amounts which workers are required to pay as membership dues to workers’ trade unions with recognized legal status. The Committee expects that the ASDE will benefit from the deduction of trade union dues at source for its members.*

## **The Committee’s recommendations**

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

- (a) *The Committee expects that when the competent authorities of San Luis province issue a decision on Ms Quattropani's taking trade union leave without pay, they take into account the provisions of Article 6 of Convention No. 151, and requests the Government to keep it informed in this regard.*
- (b) *The Committee expects that the ASDE will benefit from the deduction of trade union dues at source for its members.*

CASE No. 2870

DEFINITIVE REPORT

**Complaint against the Government of Argentina  
presented by  
the Federation of Energy Workers of the Argentine  
Republic (FETERA)**

*Allegations: The complainant organization alleges obstacles and an 11-year delay in processing the application for trade union status filed with the labour administrative authority*

- 216.** The complaint is contained in a communication from the Federation of Energy Workers of the Argentine Republic (FETERA) of June 2011.
- 217.** The Government sent its observations in a communication dated 17 May 2012.
- 218.** 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**

- 219.** In its communication of June 2011, FETERA alleges that the Ministry of Labour has refused to grant the organization trade union status, displaying a clearly discriminatory attitude which is contrary to ILO Convention No. 87. The complainant states that FETERA is a second-level trade union organization registered on 10 February 1998 by Decision No. 69 of the Ministry of Labour and Social Security.
- 220.** The complainant points out that FETERA groups together all the first-level organizations representing workers employed in the production, exploitation, sale, transmission, transport and distribution of energy, broadly defined, or derivatives required for the production of energy, at every stage, and who work for private employers, the State at national, provincial or municipal level, cooperatives or employee stock ownership companies, whether as operators, administrative employees, technicians or managers, with nationwide coverage.
- 221.** FETERA states that it started the application procedure for trade union status ("personería gremial") in 2000, under file No. 1030777/00. It adds that, on 22 September 2006, the legal representative of the Federation adjusted the application for trade union status with

regard to its affiliates, the Light and Power Workers' Union of Mar del Plata and the Association of Gas Workers.

- 222.** In a new request dated 16 September 2008, the application for trade union status was again adjusted with regard to the Light and Power Workers' Union of Mar del Plata and the Association of Professional Workers of the National Atomic Energy Commission and the Nuclear Sector (APCNEAN), cancelling the request concerning the Association of Gas Workers. The complainant organization states that the following documentation was attached with the file: (1) a certified photocopy of the record of the APCNEAN executive committee meeting, dated 23 June 2006, in which it was decided to approve the union's affiliation with the Federation, submitting it to ratification by the general congress; (2) a certified photocopy of the record of the national extraordinary congress of delegates of the APCNEAN, dated 25 August 2006, at which it was decided to affiliate with the Federation; (3) a certified photocopy of the national extraordinary congress of delegates of the APCNEAN dated 24 August 2007; (4) a copy of the record of the Eighth National Extraordinary Congress of the Federation of Energy Workers of the Argentine Republic, dated 31 March 2007, at which the APCNEAN's affiliation was unanimously approved; and (5) a minute signed by the general secretary and the trade union secretary of the APCNEAN stating that they supported the application for trade union status filed by FETERA.
- 223.** FETERA states that this, however, was not enough for the labour administrative authority, which, in a decision issued in 2009, requested the following in addition to everything that had already been provided:
- (a) that the APCNEAN state whether it was affiliated with another second-level organization; and
  - (b) "given the time that has elapsed since the request was filed (3 May 2005), that the Light and Power Workers' Union of Mar del Plata state whether it is affiliated to another second-level organization and whether it gives its assent to the present application for trade union status".
- 224.** The complainant organization alleges that, in view of the above, and despite the clearly arbitrary nature of the decision of the National Directorate of Trade Union Associations of the Ministry of Labour, Employment and Social Security, it being patently obvious that the request was solely intended to delay its duty of bringing the procedure to its conclusion, FETERA, together with the abovementioned trade union organizations, complied with the new request in a timely and proper manner.
- 225.** Nonetheless, the complainant states that the Ministry of Labour still did not issue a final decision on the application; accordingly, a letter, the content of which is reproduced below, was sent to the Ministry:

I, JOSÉ JORGE RIGANE, in my capacity as General Secretary of the FEDERATION OF ENERGY WORKERS OF THE ARGENTINE REPUBLIC (FeTERA), located at Av. Belgrano 845, 3rd floor, Buenos Aires, in the application under consideration, request that the necessary steps be taken to ensure that the trade union organization which I represent is granted the trade union status for which it applied in a timely manner.

Our application procedure, which has been renewed, now dates back nearly 11 years, having been begun on 5 July 2000, after this body registered our organization as a second-level trade union association on 10 February 1998, by MTSS Decision No. 69.

I am pleased to inform you that the organization I represent has complied with each and every one of the requirements laid down in the law and administrative regulations. As may be seen from the documentation, its personal and geographical coverage has been duly demonstrated, and there is no conflict between the coverage claimed by FeTERA and the

organizations informed by the National Directorate under section 28 of Act No. 23551, none of which have come forward.

Our right is the very principle of freedom of association enshrined in Conventions Nos 87 and 98 of the International Labour Organization (ILO), and in the statements of the Committee on Freedom of Association of the Governing Body of that organization, the aim being for the workers in the energy sector of the Argentine Republic to be able to defend their rights through an organization such as FeTERA, which has demonstrated from its inception an unwavering commitment to the destiny of the workers employed in the sectors it represents.

Over the nearly 11 years of its regrettable administrative peregrinations in search of trade union status, our organization has fallen victim to legislation which has been repeatedly criticized by the global labour administration (ILO), as recently expressed by the Committee of Experts of the ILO when it made an observation criticizing the “Argentinian trade union model”, in which it urged the Government to amend Act No. 23551 and to grant trade union status to the Confederation of Workers of Argentina (CTA), our sister confederation, which has suffered the same fate as FeTERA for many years.

There can certainly be no justification for the administrative delay caused by your Ministry in the granting of the status requested. This is all the more so considering that our country’s highest tribunal, the Supreme Court of Justice of the Nation, issued a detailed opinion on new orientations to bring our legislation into conformity with the principles of freedom of association under the abovementioned ILO Conventions, which are recognized in article 75, para. 22, and article 14bis of our Constitution.

There is nothing to justify the implementing authority’s silence which denies our right in an essentially politically motivated stance on your part – of that we have no doubt at this point.

As a member of the executive branch, Sir, you have every right to exercise your ministerial mandate as you deem appropriate based on merit and expedience, but if legitimate requests such as this one are denied a decision systematically and without reason for so many years, while other similar cases are given due consideration, with no more ado than a mere formality, then, Sir, this is nothing but POLITICAL DISCRIMINATION through “princely power”, which is strange in a democratic State governed by the rule of law with social justice, which we seek to build together, with equality of opportunity and respect for collective freedoms.

- 226.** The complainant organization states that the Ministry of Labour’s only response was again silence, expressing disregard for the right of FETERA, its affiliates and all the members and workers represented by the latter.
- 227.** Lastly, the complainant points out that given the time that has elapsed since it applied to the Ministry of Labour for trade union status (11 years), it is presenting a formal complaint against the Government of Argentina in view of the fact that its action constitutes a clear violation of freedom of association.

## **B. The Government’s reply**

- 228.** In its communication of 17 May 2012, the Government states that, in view of the personal coverage claimed by FETERA and of the existence of another organization at the same level competing for similar status, the provisions of section 28 of Act No. 23551 apply.
- 229.** The Government adds that the complainant organization itself also recognized the complexity of the problem, since, as may be seen from the report of the General Directorate of Legal Affairs (a copy of which is attached by the Government), during all the time that has elapsed it has not availed itself of the legal remedies afforded by the legislation itself in order to protect its rights.



230. Lastly, the Government points out that another reason explaining the failure to use the judicial remedy available is that the first-level trade union affiliated to the complainant organization has trade union status, and the situation of the Federation thus does not affect its capacity to negotiate conditions of work, so that freedom of association is not impaired.

### C. The Committee's conclusions

231. *The Committee observes that in this case FETERA alleges that it started the application procedure for trade union status ("personería gremial") in 2000 with the administrative authority; that in 2006 and 2008 it adjusted its application with regard to two FETERA affiliates (the Light and Power Workers' Union of Mar del Plata and the APCNEAN); and that, although it complied with all the requirements, the Ministry of Labour's only response was silence.*

232. *The Committee notes that the Government states: (1) that in view of the personal coverage claimed by FETERA and of the existence of another organization at the same level competing for similar status, the provisions of section 28 of Act No. 23551 apply; (2) the complainant organization itself also recognized the complexity of the problem, since, as may be seen from the report of the General Directorate of Legal Affairs (a copy of which is attached to the Government's reply), during all the time that has elapsed it has not availed itself of the legal remedies afforded by the legislation itself in order to protect its right; and (3) another reason explaining the failure to use the judicial remedy available is that the first-level trade union affiliated to the complainant organization has trade union status, and the situation of the Federation thus does not affect its capacity to negotiate conditions of work, so that freedom of association is not impaired.*

233. *The Committee recalls that under the Act on trade union associations, No. 23551 "the association that is most representative in terms of geographical and personal coverage shall obtain trade union status, provided that it meets the following requirements: (a) it has been registered in accordance with this Act and carried out its activity for at least six months; (b) its membership includes over 20 per cent of the workers it seeks to represent; and (c) the designation of most representative association shall be granted to the association with the highest average number of dues-paying members out of the average number of workers it seeks to represent". Section 28 of the Act, referred to by the Government in its reply, provides that: "If another trade union association of workers with trade union status exists, the same status can be granted to another association to carry out its activity in the same area, occupation or category, only if the number of dues-paying members of the applicant association, for a continuous period of at least six months prior to the application, was considerably larger than that of the existing association with trade union status. Once the application has been filed, the association with trade union status shall be informed within 20 days in order to enable it to present its defence and provide evidence. The applicant shall be informed of the reply within five days. The evidence shall be subject to verification by both associations. Where the decision is taken to grant trade union status to the applicant, the trade union that had such status shall remain registered. The requested trade union status shall be granted without the need to carry out the procedure provided for in this section, provided that the express consent of the highest decision-making body of the association previously holding trade union status is given."*

234. *In this regard, the Committee observes that the Government states that in this case the provisions of section 28 of Act No. 23551 apply, given that there is an organization at the same level competing for status in a similar area as the complainant organization, but does not specify whether, judging from the information provided by FETERA (between 2000 and 2008) a comparison of the membership of the two associations was carried out and what the result was. In these circumstances, the Committee regrets the length of time that has elapsed (12 years) and recalls that a long delay in the procedure constitutes a*

*serious obstacle to the exercise of trade union rights. The Committee urges the Government to verify the percentages of membership to determine which of the two trade unions in question (FETERA in the areas of coverage requested or the organization with trade union status referred to by the Government) is most representative. If the complainant organization is found to be more representative than the organization with trade union status, the Committee requests the Government to grant it the trade union status it has been requesting since 2000.*

### **The Committee's recommendations**

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

- (a) The Committee regrets the length of time that has elapsed (12 years) since the complainant's request for trade union status and recalls that a long delay in the procedure constitutes a serious obstacle to the exercise of trade union rights.*
- (b) The Committee urges the Government to verify the percentages of membership to determine which of the two trade unions in question (FETERA in the areas of coverage requested or the organization with trade union status referred to by the Government) is most representative. If the complainant organization is found to be more representative than the organization with trade union status, the Committee requests the Government to grant it the trade union status it has been requesting since 2000.*

CASE NO. 2906

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

### **Complaint against the Government of Argentina presented by the Congress of Argentine Workers (CTA)**

***Allegations: The complainant organization alleges serious acts of violence against trade union officials and workers in the sugar industry in the Province of Jujuy***

- 236.** The complaint is contained in a communication from the Congress of Argentine Workers (CTA) dated 11 September 2011.
- 237.** The Government sent its observations in a communication dated May 2012.
- 238.** 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

- 239.** In its communication dated September 2011, the CTA states that it is presenting this complaint against the Government of Argentina for serious violations of freedom of association and the rights of workers' organizations and representatives guaranteed under Conventions Nos 87 and 98 and Resolution No. 19 adopted by the International Labour Conference in 1970, in the form of arbitrary detentions, repression by the state security forces using firearms, anonymous attacks, persecution and police harassment.
- 240.** The CTA states that in recent years in the sugar industry a process of reorganization and trade union growth has been under way of the bodies that represent the workers in the various enterprises in the sector, predominantly located in the provinces of Jujuy, Salta and Tucumán. One of the most powerful enterprises in the sugar industry is the Ledesma Refinery.
- 241.** According to the CTA, job insecurity, little regard for rights, high accident rates and abysmal wages were the determining factors that prompted a process to strive for change and to a series of actions led by trade unions in the sugar sector aiming to put an end to decades of being undermined. The deployment of these actions of self-protection triggered an immediate reaction by the employers in the form of various actions and reprisals against both the actions and the activists and repression by the state authorities, carried out by their security forces.
- 242.** The CTA adds that in this context, in the Province of Jujuy, on 28 July 2011 four workers were murdered and a further two were seriously injured during the violent eviction carried out by state law enforcement officers, and possibly by private security guards hired by Ledesma Refinery, of over 500 workers and their families who were occupying a 15 hectare site owned by the enterprise in Libertador General San Martín in the Province of Jujuy. In the same operation another 27 people participating in the occupation were arrested.
- 243.** The CTA states that most of the workers are members of both the Class Combat Movement, a social and trade union organization made up of employed and unemployed workers, and also of the CTA. The occupation of the site had been organized by the Class Combat Movement as a way of increasing visibility in order to obtain a response from the Government regarding the achievement of a fundamental right: access to decent housing.
- 244.** The CTA alleges that during these incidents, Mr Carol Leónides Sosa, social action secretary of the Trade Union of Ledesma Refinery Sugar Workers and Employees, affiliated to the CTA (SOEA-CTA), and vice-president of the benevolent fund for staff at the Ledesma Refinery, elected on 10 June 2011, was unjustifiably arrested by police when, during the clashes, he left his house to ask that no more tear gas be used against the occupiers or his home. Following his arrest he was moved to the Calilegua police station and held with other detainees, all accused of committing common crimes. No charges were brought against the official. The judicial complaint into the case lodged by the CTA is being heard as Case No. 16.409/11 and is under the responsibility of Judge Jorge Samman. But at the time of his arrest and during all the repressive measures, it was Judge Carolina Pérez Rojas who was responsible for the criminal court to which application was made for the release of the official, which was systematically refused and then only agreed to following 24 hours under entirely unlawful arrest.
- 245.** The CTA adds that Fernando Daniel Arias, representative of the trade union group Grey List, which won in the elections of 10 June 2011 held at the Trade Union of Ledesma Refinery Sugar Workers and Employees, affiliated to the CTA (SOEA-CTA), was a targeted victim of police repression on 28 July 2011. According to the CTA, Mr Arias was

singled out by police, approached by the officers and shot in the leg with a lead projectile. Mr Arias had to be operated on in a clinic in the city of San Pedro de Jujuy to remove a lead bullet, which has been seized by the criminal court to be used as evidence. The complaint is being heard under the same Case No. 16.409/11, and is also under the responsibility of Judge Jorge Samman, before Criminal Court No. 6, Registry No. 12 of the Judicial Centre of San Pedro de Jujuy, in the Province of Jujuy.

- 246.** The CTA also alleges that on 20 August 2011, at approximately 6 a.m., José María Castrillo, union secretary of the Trade Union of La Esperanza Refinery Sugar Workers and Employees, affiliated to the CTA (SOEA-CTA), had two hit men fire shots at him, using weapons of different calibres, in front of his home in the city of San Pedro de Jujuy. At least six shots were fired, two of which entered the house, where the official and his family were located. The CTA adds that Mr Castrillo is an important social representative of the Sugar Trade Union, a trade union activity that he has been involved in for many years with irreproachable conduct and major achievements in defence of workers' rights. His conduct and actions in defence of workers' rights constitute a threat to certain economic interests consolidated by reproducing archaic systems of worker exploitation and which are without a doubt linked to the cowardly action of carrying out a furtive attack on his home, endangering his life and the lives of his family, making them a target of trade union violence. The attack was reported to the police authorities (police file No. 586/11), and is being heard by Criminal Court No. 5, Registry No. 10 of the Judicial Centre of San Pedro de Jujuy, in the Province of Jujuy. According to the CTA, it is a matter of concern that the judge that is hearing the case is Judge Carolina Pérez Rojas (who is responsible for the court in question), as she was the one to order the eviction and repression that occurred on 28 July 2011 from land belonging to the Ledesma Refinery, during which four workers were murdered by police and security guards contracted by the enterprise that owns the land.
- 247.** The CTA also alleges that on Tuesday, 11 October, at approximately 4 a.m., unknown individuals, across a railing separating Mr Castrillo's home from the public footpath, managed to set fire to a motorbike of low cylinder capacity which the official uses to go to work and to carry out his union activities; the vehicle was a write-off. The legal case for this offence is also before Court No. 5. The CTA indicates that up until the time the complaint was lodged there has been no news on the investigation into the two attacks against the trade union official Mr Castrillo and his family.
- 248.** The CTA notes that it is universally accepted that it is not possible to exercise freedom of association without the full and unrestricted enjoyment of human rights. The assurance of the practical effectiveness of freedom of association necessarily requires the full application of the guarantees of civil rights and public freedoms. It is for this reason that the CTA believes that the anonymous attacks, the arbitrary detentions and the armed suppression of trade union officials from the unions in the sugar sector, as reported, constitute actions deployed or tolerated by the state authorities, intended to obstruct the proper exercise of freedom of association and of the other rights associated with it. This being the case, the institutional response afforded by the social rule of law can be no other than to investigate, prosecute and punish those responsible for planning and perpetrating the serious incidents referred to in the complaint.
- 249.** The CTA states that the history of impunity that exists in the face of state and semi-official repression targeting social and trade union officials does not inspire it with optimism with regard to the true commitment of the Government of Argentina to effectively address the cases in question. Consequently it is necessary to lodge all relevant complaints at both the national and international levels in order to obtain the minimum guarantees essential for the exercise of the activities and other rights involved in freedom of association. According to the CTA, the repression used by the Government of Argentina has violated both the

freedom of association of the persecuted officials, and the rights of freedom of expression, due process and physical integrity, seriously affecting the protections established in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

250. Lastly, the CTA highlights that both the characteristics of the specific allegations being referred to in the complaint and the context of the suppression of social protest in which they occurred lead to the inescapable conclusion that the Government's true aim is to silence the voices of dissent, thereby quite simply stifling workers' freedom of expression and limiting the full enjoyment of the rights emanating from freedom of association.

## **B. The Government's reply**

251. In its communication dated May 2012, the Government sent the reply communicated by the Director-General of the Labour Directorate of Jujuy Province on the complaint in question.

252. The authorities of the Provincial Labour Directorate of Jujuy Province state the following:

### ***(a) Events that took place in Libertador General San Martín on 28 July 2011***

According to the media, on 20 July 2011 approximately 600 families, with the support of a political organization called Class Combat Movement (CCC), under the command of the leader of the CCC of Jujuy, Enrique "Kike" Mosquera, illegally occupied land belonging to the enterprise Ledesma S.A.A.I., located on the "El Triángulo" site, of an area of approximately 15 hectares, in the vicinity of the sugar refinery owned by the company. Following the occupation, Ledesma S.A.A.I. initiated criminal proceedings before Criminal Court No. 6 at the Judicial Centre of San Pedro, Judicial Authority of the Province of Jujuy which, after authorizing the peaceful clearance of the land, finally ordered the eviction to be carried out on 28 July 2011; this was done by Ms Carolina Pérez Rojas, who replaced the judge when he went on leave. On 28 July 2011, in compliance with the court order, police officers appeared at the site at 6.00 a.m. For reasons that are under judicial investigation, Alejandro Farfán died after being shot in the neck, and three other people, Ariel Farfán, Félix Reyes and Víctor Heredia, were wounded. Dr Roberto Maizel at the hospital Oscar Orias in the nearby city of Libertador General San Martín, said that at least 30 people, including ten police officers, received treatment for a variety of injuries caused by lead bullets, rubber bullets and stones. The situation caused in Libertador General San Martín led to several arrests and a political and social crisis which led to the resignation of the government minister and of the provincial police chief, and to the suspension of internal elections in the Justicialist Party and the Radical Civic Union, scheduled for Sunday, 31 July 2011. As a result of these events judicial proceedings were initiated which are still in progress.

### ***(b) Events causing injury to José María Castrillo***

On 20 August 2011, at approximately 6.00 a.m., shots were fired at the home of José María Castrillo, union secretary of the Trade Union of La Esperanza Refinery Sugar Workers and Employees, located in the city of San Pedro de Jujuy, Province of Jujuy, allegedly by two hit men according to newspaper sources. The corresponding criminal proceedings were initiated in view of these unlawful acts and the judicial inquiry is currently before National Criminal Investigation Court of First Instance No. 5, Registry No. 10 of the Judicial Centre of San Pedro de Jujuy, in the Province of Jujuy.

### ***Explanatory introduction***

Turning to the ethical issues relating to the above events, I again consider that both should be dealt with differently as they relate to situations that are substantially different from the point of view of prevailing regulations.

### ***(a) Events that took place in Libertador General San Martín on 28 July 2011***

It should first of all be noted that the Government of Argentina is currently investigating these events in order to clarify the facts, identify those responsible and, as appropriate, assess

the degree of responsibility to be attributed to the protagonists; consequently it is too early to give any opinion on this matter at present, as it is only when the facts have been clarified that it will be possible to make an assessment.

With this proviso, as far as these events are concerned I consider that there is currently nothing to suggest anything akin to alleged trade union persecution or the hampering of freedom of association and the right to demonstrate and act in defence of workers' rights, that could be considered as violating ILO Conventions Nos 87 and 98, at least according to the information currently available, without prejudice to the judicial inquiry under way.

The regrettable events that led to the deaths and injuries occurred in the context of an occupation of private land by a group of people, currently under investigation, in other words to date there is no evidence that they were acting collectively in defence of the rights of workers at the refinery or of any other trade union interests.

The regrettable consequences of the events under examination do not undermine the premise of application of the Conventions invoked by the complainant, that is to say the exercise of the rights of association and collective bargaining for the purpose of defending workers' interests.

Acting in support of labour causes is the reason for and the substance of the organization and activities of trade unions. The instruments that the complainant is presenting to the Committee on Freedom of Association of the ILO for consideration protect the free exercise of this right from being tampered with or obstructed.

Article 1 of ILO Convention No. 98 provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment ...".

It is clear that the material sphere of application of this international standard presupposes claims made by a workers' organization seeking to protect trade union interests because the authentic defence of the collective rights of workers are being jeopardized; what is being legally protected is freedom of association as a means of ensuring the effective implementation of standards that protect labour law.

This dual dimension, both individual and collective, which is being jeopardized in the right to "associate for relevant purposes" as stipulated in Article 14 of the National Constitution, was expressly recognized by the Supreme Court of Justice in the recent decision handed down in the case "*the Association of State Workers v. the Ministry of Labour regarding the Act on Trade Union Associations*". On that occasion the High Court indicated: "... *the progressive development of the regulation of the right of association, already provided for in the National Constitution of 1853–1860 (Art. 14), highlighted the dual order of essential aspects contained in it, which, to the same extent, are essential to shed light on the case. On the one hand, it revealed the two interlinked dimensions associated with this right: individual and social. On the other, it warned of the specificity of the right of association in the trade union sphere, giving rise to the consolidation of so-called freedom of association ...*" (point 3).

The Supreme Court, in the above decision, refers specifically to these safeguards necessary for the democratic and peaceful development of these freedoms, in accordance with the judicial decisions of the Inter-American Court of Human Rights in the case of *Huilca-Tecse v. Peru* (Case of *Huilca-Tecse v. Peru*, merits, reparations and costs, judgment of 3 March 2005, Series C, No. 121, para. 74). In this respect it holds that: "... *the whole human rights corpus iuris highlights the content of the right to freedom of association and its two inseparable dimensions: individual and social*". According to the judgment of the Inter-American Court of Human Rights, the terms of Article 16.1 of the American Convention establish "literally" that "*those who are protected by the Convention not only have the right and freedom to associate freely with other persons, without the interference of the public authorities limiting or obstructing the exercise of the respective right, which thus represents a right of each individual*", but they "*also enjoy the right and freedom to seek the common achievement of a licit goal, without pressure or interference that could alter or change their purpose.*"

It then emphasizes "... *Furthermore, in various ways the international instruments cited established, in the far-sighted manner provided in Article 14bis, specific spheres of freedom of association. Thus, Article 8 of the International Covenant on Economic, Social and Cultural Rights stipulated the right of trade unions to function freely subject to no limitations other*

*than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”.*

According to the information currently available, no trade union organization was citing labour rights of any kind when the security forces intervened.

The court order was limited to clearing some occupied pieces of land, and did not involve monitoring, let alone suppressing, a trade union demonstration. With regard to the arrests, these occurred in a context of resistance to the court order, and as such the State cannot be blamed for having arrested people who were actively involved in the conflict. Moreover, the arrests are a result of the regular exercise of the police’s powers when dealing with unlawful acts and there are no elements to suggest that their status as trade union representatives had anything to do with the arrests of the people in question.

The complainants acknowledge that the arrest of Mr Carol Leónides Sosa was unrelated to his position as social action secretary of the Trade Union of Ledesma Refinery Sugar Workers and Employees or to his role in defence of labour rights, but was rather due to the fortuitous circumstance that his house is situated next to the area where the clashes were taking place and the fact that he went outside to ask the police to stop using tear gas.

Consequently I consider that the complaint is not justified on this point as this is not a case of coercive restriction of the free exercise of associational activities or activities in the defence of workers.

In addition, it should be noted that no direct responsibility can be attributed, at least until the judicial investigation has been completed, to the Government of Argentina, for the unfortunate events that took place on 28 July 2011, especially in view of the fact that many of the province’s police officers were wounded and one died as a result of a gunshot wound, so caution is called for in this regard.

***(b) Events causing injury to José María Castrillo***

With regard to the criminal acts carried out against the union secretary of the Trade Union of La Esperanza Refinery Sugar Workers and Employees (SOEA), it must first be determined whether these events are related to his union activities, but it is reasonable to suspect that there might be a link.

This possibility should be viewed in the context of internal struggles within the SOEA, which should be taken into account when assessing the situation.

It is common knowledge that since 2011 the trade union in question has been facing internal divisions, which were leaked to the public and resulted in the dismissal of union representatives, including Mr Castrillo, and accusations being made among the members of the executive committee, which in turn led to them presenting themselves to the Ministry of Labour, Employment and Social Security under file No. 172779/11 and all resigning from their posts on 9 May 2012, to call new elections in the following months, with an electoral standardizing delegate being appointed to oversee the trade union elections.

Whereas in the case of the events of 28 July 2011 the Government of Argentina was accused of being responsible for alleged trade union persecution on the basis of an unproven appraisal, given that there is no indication of the existence of trade union activities and neither is it clear that any repressive actions were taken by the security forces, in the case of the violence against Mr Castrillo, no direct intervention can be attributed to the Government of Argentina, as in any case it relates to a criminal act being committed against Mr Castrillo, who at the time was a trade union official, by unidentified individuals.

However, even if we advance the hypothesis of alleged indirect state responsibility in the guarantee of protection it owes its citizens, particularly in respect of trade union activities, it is also both premature and unfounded to accuse the Government of Argentina, as a judicial inquiry is under way in an attempt to clarify the facts, which have rightly been characterized as criminal and which are being dealt with as such.

The scourge of crime is a reality that is being tackled throughout the world and the Government cannot be implicated just because these offences occur, provided that the Government ensures that they are prosecuted and punished through legal and constitutional channels.

Beyond the real possibility that Mr Castrillo is indeed being persecuted because of his activities in defence of the collective interests of his colleagues, the fact is that the Government cannot be held responsible for these unlawful attacks while it is acting as it has been doing, putting its resources and energy into pursuing criminal prosecution for these actions.

Consequently I consider the injustice reported by the complainants on this matter to be unfounded, as the conduct of the public bodies has been irreproachable in respect of the offences suffered by Mr Castrillo.

### **C. The Committee's conclusions**

- 253.** *The Committee observes that in the present case the CTA alleges that the following acts of violence occurred during a period of unrest and the implementation of a series of actions by trade unions in the sugar sector aiming to put an end to decades of being undermined: (i) the murder of four workers (a further two were seriously injured) during the violent eviction of over 500 workers who were demanding decent housing on a 15 hectare site on the Libertador General San Martín facility in the Province of Jujuy, carried out by state law enforcement officers on 28 July 2011; (ii) the arrest during these violent clashes of Mr Carol Leónides Sosa, social action secretary of the Trade Union of Ledesma Refinery Sugar Workers and Employees, for 24 hours (without any charges being brought against him); (iii) an attack by the police using firearms directed at Fernando Daniel Arias, a representative of the same union; and (iv) a firearms attack in the early hours of the morning on the home in the city of San Pedro, Province of Jujuy, of trade union official José María Castrillo, union secretary of the Trade Union of La Esperanza Refinery Sugar Workers and Employees on 20 August 2011 (the trade union official and his family were at home) and the burning of a vehicle belonging to the trade union official (at his home) on 11 October 2011 in the early hours of the morning.*
- 254.** *The Committee observes, in respect of the allegations, that the Government has sent the reply of the Provincial Labour Directorate of Jujuy Province.*
- 255.** *Concerning the allegations relating to the death of four workers and the injuries suffered by two workers during a violent clearance of a site occupied by workers who were demanding decent housing, the Committee notes that the provincial administrative authority has indicated that: (i) the events are being investigated to clarify the facts, identify those responsible and, as appropriate, assess the degree of responsibility to be attributed to the protagonists; consequently it is too early to give any opinion on this matter at present, as it is only when the facts have been clarified that it will be possible to make an assessment; (ii) there are currently no elements suggesting anything akin to alleged trade union persecution or the hampering of freedom of association, the right to demonstrate and act in defence of workers' rights, that could be considered as violating ILO Conventions Nos 87 and 98, at least according to the information currently available, without prejudice to the judicial inquiry under way; (iii) the regrettable events that led to the deaths and injuries occurred in the context of an occupation of private land by a group of people, currently under investigation, in other words to date there is no evidence that they were acting collectively in defence of the rights of workers at the refinery or of any other trade union interests; and (iv) according to the information currently available, no trade union organization was citing labour rights of any kind when the security forces intervened, and the court order was limited to clearing some occupied pieces of land, and did not involve monitoring, let alone suppressing, a trade union demonstration.*
- 256.** *With regard to the alleged detention, during the violent incidents mentioned in the previous paragraph, of Carol Leónides Sosa, social action secretary of the Trade Union of Ledesma Refinery Sugar Workers and Employees, for 24 hours (without any charges being brought against him), the Committee notes that according to the provincial administrative*



authority, the complainants themselves acknowledge that his detention was unrelated to his status as social action secretary of the Trade Union of Ledesma Refinery Sugar Workers and Employees or to his role in defence of labour rights, but was instead due to the fortuitous circumstance that his house is situated next to the area where the clashes were taking place and the fact that he went outside to ask the police to stop using tear gas. The Committee requests the complainant to indicate whether they agree with this assertion. The Committee notes nevertheless that according to the complainant, this was the object of a complaint which is being heard (case No. 16.409/11).

**257.** Concerning the alleged firearms attack by the police, during the violence on 28 April 2011, targeting Fernando Daniel Arias, a representative of the same union, the Committee observes that neither the Government nor the provincial administrative authority have sent their observations on the matter, but that the complainant organization says that these have been reported and that it lodged a complaint which is being heard as case No. 16.409/11 before Criminal Court No. 6, Registry No. 12 of the Judicial Centre of San Pedro de Jujuy, in the Province of Jujuy.

**258.** With regard to the alleged firearms attack in the early hours of the morning on the home in the city of San Pedro, Province of Jujuy, of trade union official José María Castrillo, union secretary of the Trade Union of La Esperanza Refinery Sugar Workers and Employees on 20 August 2011 (the trade union official and his family were at home) the provincial administrative authority states that: (i) according to newspaper sources, the shots were fired at the home of the union secretary by two hit men; (ii) the corresponding criminal proceedings were initiated in view of these unlawful acts and the judicial inquiry is currently before National Criminal Investigation Court of First Instance No. 5, Registry No. 10 of the Judicial Centre of San Pedro de Jujuy, in the Province of Jujuy; (iii) it must be determined whether these events are related to his union activities, but it is reasonable to suspect that there might be a link; moreover, this possibility should be viewed in the context of internal struggles within the union, which should be taken into account when assessing the situation; (iv) it is common knowledge that since 2011 the trade union in question has been facing internal divisions, which were leaked to the public and resulted in the dismissal of union representatives, including Mr Castrillo, and accusations being made among the members of the executive committee, which in turn led to them presenting themselves to the Ministry of Labour, Employment and Social Security and all resigning from their posts on 9 May 2012, to call new elections in the following months, with an electoral standardizing delegate being appointed to oversee the trade union elections; (v) in the case of violence against Mr Castrillo, no direct intervention can be attributed to the Government of Argentina, as in any case this relates to a criminal act being committed against Mr Castrillo by unidentified individuals and it is both premature and unfounded to accuse the Government of Argentina as a judicial inquiry is under way in an attempt to clarify the facts, which have rightly been characterized as criminal and which are being dealt with as such; (vi) the scourge of crime is a reality that is being tackled throughout the world and the Government cannot be implicated just because these offences occur, provided that the Government ensures that they are prosecuted and punished through legal and constitutional channels; (vii) beyond the real possibility that Mr Castrillo is indeed being persecuted because of his activities in defence of the collective interests of his colleagues, the fact is that the Government cannot be held responsible for these unlawful attacks while it is acting as it has been doing, putting its resources and energy into pursuing criminal prosecution for these actions; and (viii) the conduct of the public bodies has been irreproachable in respect of the offences suffered by Mr Castrillo.

**259.** The Committee deplores the gravity of the allegations, the alleged deaths, acts of violence and detentions. It recalls that on previous occasions when examining allegations relating to acts of violence it has stated that “in the event of assaults on the physical integrity of individuals, the Committee has always considered that an independent judicial inquiry

*should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 50]. The Committee observes that judicial inquiries are under way in respect of the violent acts committed in the Province of Jujuy on 28 July 2011 in which four workers died and the trade unionist Fernando Daniel Arias was injured, and of the firearms attack on the home of trade union official José María Castrillo on 20 August 2011. The Committee notes that the administrative authority of the Province of Jujuy is questioning the anti-union nature of the violent acts committed on 28 July 2011 and has provided information concerning an intra-union dispute in respect of the acts of violence suffered by Mr Castrillo.*

- 260.** *In these circumstances, the Committee requests the Government: (1) to communicate the outcome of the judicial inquiries relating to the violent acts committed on 28 July 2011 in the Province of Jujuy in which four workers died and the trade unionist Fernando Daniel Arias was injured, and to the firearms attack on the home of trade union official José María Castrillo on 20 August 2011; and (2) to inform it whether a judicial inquiry has been opened into the alleged burning of a vehicle belonging to trade union official José María Castrillo (at his home) on 11 October 2011 in the early hours of the morning and, if so, to report on the outcome.*

### **The Committee's recommendations**

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

- (a) The Committee requests the Government to communicate the outcome of the judicial inquiries relating to the violent acts committed on 28 July 2011 in which four workers died, the trade unionist Fernando Daniel Arias was injured, and following which Mr Carlos Léonides Sosa was detained, as well as to the firearms attack on the home of trade union official José María Castrillo on 20 August 2011.*
- (b) The Committee requests the Government to inform it whether a judicial inquiry has been opened into the alleged burning of a vehicle belonging to trade union official José María Castrillo (at his home) on 11 October 2011 in the early hours of the morning and, if so, to report on the outcome.*
- (c) The Committee draws the Governing Body's attention to the serious and urgent nature of this case.*

CASE NO. 2858

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

**Complaint against the Government of Brazil  
presented by  
the National Federation of Federal Police Officers (FENAPEF)**

*Allegations: the complainant organization  
alleges acts of anti-union discrimination against  
its trade union officials in different Brazilian  
states*

- 262.** The complaint is contained in a communication from the National Federation of Federal Police Officers (FENAPEF) dated 2 March 2011. The FENAPEF sent further information in communications dated 12 July and 11 August 2011.
- 263.** The Government sent its observations in communications dated 26 June, 26 August and 7 October 2011 and 5 June 2012.
- 264.** 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), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 265.** In its communications dated 2 March, 12 July and 11 August 2011, the FENAPEF indicates that it groups together 27 state trade unions, and represents over 15,000 workers at all levels of the federal police. The FENAPEF alleges that the institution's management carry out acts of persecution aimed at restricting the exercise of trade union activity by the representatives of federal police employees.
- 266.** Specifically, the FENAPEF alleges that administrative disciplinary proceedings were initiated and a police investigation opened against the organization's Communications Director, Mr Josias Fernandes Alves, federal police officer. The complainant states that the official in question has been in post for almost 15 years and that he has never been subject to a disciplinary action.
- 267.** The FENAPEF alleges that at the end of 2010, the first disciplinary action was instigated against the aforementioned trade union official because of an article published on the organization's website in which criticisms were made about the selection process of a National Police Academy competitive examination (the trade union official was penalized with two days' suspension, which was completed on 8 and 9 August 2011). The complainant adds that, for the same misdemeanour, the launch of a police investigation was ordered into the alleged commission of the "offence of insult and defamation" and legal proceedings instigated for moral damages by the trade union official (the complainant reports that both actions were declared inadmissible by the Special Civil Court No. 2 of Brasilia). The complainant states that, by order of the Federal Police Regional Superintendant in Minas Gerais, further disciplinary proceedings were initiated against the same trade union official at the beginning of February 2011, for participating in a meeting of the trade union organization in Brasilia.

**268.** The FENAPEF indicates that provisions of Act No. 4878/65 of 1965 on the legal regime governing federal district federal and civil police officers were invoked in the aforementioned disciplinary proceedings. According to the complainant, this legislation was used to satisfy personal whims of the administrators, clearly aiming to restrict the exercise of freedom of association, freedom of demonstration and freedom of thought. The complainant states that the Act was adopted during the last dictatorship and that a number of its provisions violate the Constitution.

**269.** The FENAPEF adds that the President of the Union of Federal Police Officers of the State of Bahía, Ms Rejane Peres Teixeira, was also subjected to acts of anti-union persecution and that in that context, the Regional Superintendence of the Federal Police of Bahía initiated three administrative disciplinary proceedings against her because of a press interview in which she referred to defects in weapons acquired by the institution. She was charged with failing to obey a police assignment order and being absent from duty in order to participate in trade union events without the authorization of management. In that connection, the FENAPEF states that there is an obvious need for officials, in carrying out their trade union activities, to participate in meetings in various cities where unionized police officers work, but that Ms Peres Texeira always asked permission from her immediate superior and expressed her willingness to make up time for any absences from duty (the complainant states that these facts were reported to the Federal Public Ministry and that a habeas corpus petition was filed in the Federal Court of Bahía).

**270.** The FENAPEF also alleges the following acts of anti-union discrimination:

- the initiation of administrative disciplinary proceedings by the Federal Police authorities in Brasilia against Mr Julio Gomes de Carvalho Junio, an officer of the Union of Federal Police Officers of the Federal District (SINDIPOL/DF) in 2010, for publishing an article containing criticisms of the management of the institution’s Operational Aviation Coordination;
- the initiation of administrative disciplinary proceedings by the Regional Superintendence of the Federal Police Department of Paraiba against Mr Francisco Leodecio Neves, Deputy Director of the Union of Federal Police Officers of Paraiba in 2011, for writing an article criticizing investigation methods in Brazil;
- the initiation of disciplinary proceedings against Mr Paulo Pimenta, Vice-President of the Union of Federal Police Officers of Acre in 2009, for writing an article on the website of the FENAPEF (this official resigned after disciplinary proceedings were initiated because of the harassment he was subjected to); and
- the initiation of disciplinary proceedings in which the penalty of dismissal was imposed on Mr José Pereira Orihuela, President of the Union of Federal Police Officers of Roraima in 2004, because he requested illegally stored explosives to be removed in an area under the supervision of the Federal Police Department of Roraima (FENAPEF reports that a lawsuit seeking reinstatement was initiated seven years ago).

**271.** The FENAPEF notes that it is regrettable that an attitude of political persecution persists towards trade union officials within the authorities of the institution and that there is a failure to apply Convention No. 151 ratified by Brazil, or the police human rights “Directive” (guideline). According to the complainant, democratization of the federal police is needed to enable employees to fully exercise their citizenship rights, which is unfortunately still not the case.

## B. The Government's reply

272. In its communication dated 26 June 2011, the Government states that a draft bill on anti-union acts is being prepared and that the text is under discussion between the Ministry of Labour and Employment's team and the trade union leadership's Combat Command for anti-union practices, which aims to combat anti-union acts in the public and private sectors. The legal text on the subject will prevent and combat acts that violate the exercise of freedom of association.
273. Regarding the adequacy of Act No. 4878/65 of 1965, the Government states that, since it is a matter for the Ministry of Justice, it has been forwarded to it for any comments it may deem appropriate. Meanwhile, the Ministry of Labour and Employment (MTE) is willing to collaborate on conducting studies on the provisions that may not be in conformity with the new constitutional order. The Government adds that the MTE provides mediation services in labour disputes through the Labour Relations Secretariat.
274. In its communications dated 26 August and 7 October 2011, and 5 June 2012, the Government states that it is first important to note that article 8 of the Federal Constitution guarantees the right to form professional or trade union associations and that this freedom encompasses not only the right to form unions and join or leave them, but also the exercise of trade union activities in the broadest sense. In this context, in order to protect the efficient performance of trade union activities, the legislative system sought to protect this activity through the creation of mechanisms to prohibit anti-union conduct (the Government reiterates the comments made in its earlier communication with respect to the ongoing discussions on the adoption of specific legislation in that regard). As for the public sector, article 37(VI) of the Federal Constitution guarantees freedom of association in that sector. The guarantees granted to trade union officials in the public sector differ from those granted to the private sector and are governed by different regulations. The Government states that, in order to reduce the differences between the public and private sectors, Convention No. 151, which was ratified by Brazil, was adopted. Following ratification, measures were adopted and discussions undertaken within the Executive to draft bills to regulate the matter; for example, issues such as trade union organization in the sector, trade union leave and combating anti-union acts were discussed.
275. The Government maintains that, despite the absence of a legal standard dealing with the subject in detail, the Federal Constitution provides mechanisms to protect workers and trade union organizations, in particular through the principle of non-state intervention in trade union organizations. Thus, any acts aimed at impeding the free exercise of trade union activity must be investigated and punished through actions taken by public institutions such as the Public Ministry of Labour and the Judiciary.
276. The Government states that, with respect to the allegations, there are legal means at the national level to resolve the alleged wrongdoings. The Government explains that in administrative disciplinary proceedings the principles of due process are respected, they do not have the force of *res judicata* and the outcome may be appealed in the courts. The Government underlines that it considers any anti-union act to be harmful and punishable and thus it is undertaking to develop, within the framework of a tripartite discussion, legislation establishing which anti-union acts are liable to punishment.

## C. The Committee's conclusions

277. *The Committee observes that in this case the FENAPEF alleges that in carrying out trade union activities several of its officials suffered acts of anti-union discrimination by the police authorities. Specifically, the FENAPEF alleges: (1) the initiation of administrative disciplinary proceedings (a penalty of two days' suspension was imposed) and a police*

investigation into the alleged commission of the offences of insult and defamation against the organization's Communications Director, Mr Josias Fernandes Alves; (2) the initiation of three administrative disciplinary proceedings against the President of the Union of Federal Police Officers of the State of Bahia, Ms Rejane Peres Teixeira (according to the FENAPEF a petition for habeas corpus was filed in relation to this case); (3) the initiation of administrative disciplinary proceedings against Mr Julio Gomes de Carvalho Junio, an officer of the SINDIPOL/DF in 2010; (4) the initiation of administrative disciplinary proceedings against Mr Francisco Leodecio Neves, Deputy Director of the Union of Federal Police Officers of Paraiba in 2011; (5) the initiation of disciplinary proceedings against Mr Paulo Pimenta, Vice-President of the Union of Federal Police Officers of Acre in 2009; and (6) the initiation of disciplinary proceedings in which the penalty of dismissal was imposed on Mr José Pereira Orihuela, President of the Union of Federal Police Officers of Roraima in 2004 (according to FENAPEF, a lawsuit seeking reinstatement was initiated seven years ago).

- 278.** *The Committee notes that the Government states the following: (1) article 8 of the Federal Constitution guarantees professional or trade union freedom of association and that this freedom encompasses not only the right to form unions and join or leave them, but also the exercise of trade union activities in the broadest sense; (2) in order to protect the efficient performance of trade union activities, the legislative system sought to protect this activity through the creation of mechanisms to prohibit anti-union conduct; (3) as for the public sector, article 37(VI) of the Federal Constitution guarantees free trade union association in that sector; (4) a draft bill on anti-union acts is being prepared and the text is under discussion between the Ministry of Labour and Employment's team and the trade union leadership's Combat Command for anti-union practices, which aims to combat anti-union acts in the public and private sectors and the legal text on the subject will prevent and combat acts that violate the exercise of freedom of association; (5) the Federal Constitution provides mechanisms to protect workers and trade unions, in particular through the principle of non-state intervention in trade union organizations, thus any acts aimed at impeding the free exercise of trade union activity must be investigated and punished through actions taken by public institutions such as the Public Ministry of Labour and the Judiciary; (6) with respect to the allegations, there are legal means at the national level to resolve the alleged wrongdoings; (7) the Government explains that in administrative disciplinary proceedings the principles of due process are respected, they do not have the force of res judicata and the outcome may be appealed in the courts; and (8) the Government underlines that it considers any anti-union act to be harmful and punishable and thus it is undertaking to develop, within the framework of a tripartite discussion, legislation establishing which anti-union acts are liable to punishment.*
- 279.** *First of all, while taking due note that the Government, on a tripartite basis, proposes to develop a draft bill to prevent, investigate and combat anti-union activities, the Committee expects that the draft bill in question will shortly be submitted to the Executive and recalls that, if it so wishes, it can make use of ILO technical assistance in this process. The Committee requests the Government to keep it informed thereof. The Committee invites the Government to take into account the principle according to which the right to express opinions through the press or otherwise is an essential aspect of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 155].*
- 280.** *With regard to the specific alleged acts of anti-union discrimination against the six union officials, the Committee regrets that the Government has merely stated that the administrative disciplinary proceedings may be appealed in the courts and they respect the principles of due process. The Committee therefore requests the Government to report on the outcome of the administrative disciplinary proceedings concerning five trade union officials and whether appeals have been lodged in this regard. The Committee also regrets*

*the delay in the reinstatement proceedings initiated seven years ago by the official Mr José Pereira Orihuela, President of the Union of Federal Police Officers of Roraima and requests the Government to keep it informed of the outcome of this case.*

### **The Committee's recommendations**

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

- (a) The Committee expects that the draft bill on anti-union discrimination will shortly be submitted to the Executive and recalls that, if it so wishes, it can make use of ILO technical assistance in this process. The Committee requests the Government to keep it informed thereof.*
- (b) The Committee requests the Government to inform it about the outcome of the administrative disciplinary proceedings concerning five union officials and whether appeals have been lodged in this regard. The Committee also regrets the delay in the reinstatement proceedings initiated seven years ago by the official Mr José Pereira Orihuela, President of the Union of Federal Police Officers of Roraima and requests the Government to keep it informed of the outcome of this case.*

CASE NO. 2318

INTERIM REPORT

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

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

- 282.** The Committee has already examined the substance of this case on seven occasions, most recently at its November 2011 session where it issued an interim report, approved by the Governing Body at its 312th Session [see 362nd Report, paras 328–338].
- 283.** As the Government has not replied, the Committee has been obliged to adjourn its examination of this case. At its May 2012 meeting [see the Committee's 364th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting, even if the observations or information requested had not been received in due time. To date, the Government has not sent any information.
- 284.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

**A. Previous examination of the case**

**285.** In its previous examination of the case, regretting the fact that, despite the time that had elapsed, the Government had not provided any observation, the Committee made the following recommendations [see 362nd Report, para. 338]:

- (a) The Committee deeply regrets that, despite the time that has passed since it last examined this case, the Government has not provided its observations, although it has been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future.
- (b) As a general matter regarding all the subsequent issues, the Committee once again strongly urges the Government to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.
- (c) The Committee once again urges the Government to take the necessary measures to ensure that Born Samnang and Sok Sam Oeun are exonerated of the charges brought against them and that the bail be returned to them. Furthermore, the Committee once again strongly urges the Government to ensure that thorough and independent investigations into the murders of Chea Vichea, Ros Sovannareth and Hy Vuthy are carried out expeditiously, so as to ensure that all available information will finally be brought before the courts in order to determine the actual murderers and instigators of the assassination of this trade union leader, punish the guilty parties and thus bring to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed in this regard.
- (d) As concerns trade union leader Hy Vuthy, the Committee requests the Government to confirm that the Supreme Court ordered the Phnom Penh Municipal Court to reopen the investigation into his death on 3 November 2010.
- (e) Recalling the importance it attaches in this case to capacity building and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system, the Committee strongly urges the Government to indicate the steps taken in this regard.
- (f) The Committee strongly urges the Government, once again, to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of the results of these inquiries.
- (g) The Committee strongly requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.
- (h) With regard to the dismissals of Lach Sambo, Yeom Khun and Sal Koem San following their convictions for acts undertaken in connection with a strike at the Genuine garment factory, the Committee once again requests the Government to inform it of the status of their appeals proceedings and to indicate their current employment status.
- (i) The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia.
- (j) Given the lack of progress on these very essential points, the Committee is bound once again to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.



## B. The Committee's conclusions

286. *The Committee deeply deplores that, despite the time that has passed since it last examined this case, the Government has not provided its observations, although it has been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future. The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office.*
287. *Hence, in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1971)], 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.*
288. *The Committee once again reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see the Committee's First Report, para. 31].*
289. *In these circumstances, the Committee finds itself obliged to reiterate its previous recommendations and firmly expects the Government to provide information without delay, given the extreme seriousness of the issues under examination.*

## The Committee's recommendations

290. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee deeply deplores that, despite the time that has passed since it last examined this case, the Government has not provided its observations, although it has been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in the future. The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office.*
  - (b) *As a general matter regarding all the subsequent issues, the Committee once again strongly urges the Government to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.*
  - (c) *The Committee once again urges the Government to take the necessary measures to ensure that Born Samnang and Sok Sam Oeun are exonerated of the charges brought against them and that the bail be returned to them. Furthermore, the Committee once again strongly urges the Government to ensure that thorough and independent investigations into the murders of Chea Vichea, Ros Sovannareth and Hy Vuthy are carried out expeditiously, so as to ensure that all available information will finally be brought before*

*the courts in order to determine the actual murderers and instigators of the assassination of this trade union leader, punish the guilty parties and thus bring to an end the prevailing situation of impunity as regards violence against trade union leaders. The Committee requests to be kept informed in this regard.*

- (d) As concerns trade union leader Hy Vuthy, the Committee requests the Government to confirm that the Supreme Court ordered the Phnom Penh Municipal Court to reopen the investigation into his death on 3 November 2010.*
- (e) Recalling the importance it attaches in this case to capacity building and the institution of safeguards against corruption necessary for the independence and effectiveness of the judicial system, the Committee strongly urges the Government to indicate the steps taken in this regard.*
- (f) The Committee strongly urges the Government, once again, to institute without delay independent judicial inquiries into the assaults on trade unionists Lay Sophead, Pul Sopheak, Lay Chhamroeun, Chi Samon, Yeng Vann Nuth, Out Nun, Top Savy, Lem Samrith, Chey Rithy, Choy Chin, Lach Sambo, Yeon Khum and Sal Koem San, and to keep it informed of the results of these inquiries.*
- (g) The Committee strongly requests the Government to indicate the steps taken to prevent the blacklisting of trade unionists.*
- (h) With regard to the dismissals of Lach Sambo, Yeom Khun and Sal Koem San following their convictions for acts undertaken in connection with a strike at the Genuine garment factory, the Committee once again strongly urges the Government to inform it of the status of their appeals proceedings and to indicate their current employment status.*
- (i) The Committee continues to express its profound concern with the extreme seriousness of the case and the repeated absence of information on the steps taken to investigate the above matters in a transparent, independent and impartial manner, a necessary prerequisite to creating a climate free from violence and intimidation necessary for the full development of the trade union movement in Cambodia.*
- (j) Given the lack of progress on these very essential points, the Committee is bound, once again, to call the Governing Body's special attention to the extreme seriousness and urgency of the issues in this case.*

CASE NO. 2808

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

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

***Allegations: The complainant organization reports acts of anti-union interference, as well as decisions taken in retaliation for legitimate trade union activities (deductions from wages, suspension without pay of union members)***

- 291.** The Committee last examined the substance of this case at its November 2011 meeting and adopted an interim report approved by the Governing Body at its 312th Session [see 362nd Report, paras 339–357].
- 292.** The Government sent partial information in a communication dated 23 July 2012.
- 293.** Cameroon has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 294.** In its previous examination of the case in November 2011, the Committee made the following recommendations [see 362nd Report, para. 357]:
- (a) The Committee regrets that the Government has not replied to the complainant organization's allegations, despite having been invited on a number of occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urges the Government to be more cooperative in future.
  - (b) The Committee urges the Government without delay to initiate an inquiry into the allegations of interference by the Director-General of CNPS in the internal affairs of SNEGCBFCAM and to report on the outcome.
  - (c) The Committee urges the Government to indicate whether the rights of Mr Amogo Foe have been restored in accordance with the labour inspectorate's decision of 1 February 2010. The Committee expects that Mr Amogo Foe will be fully compensated and that the Government will ensure that such acts of anti-union discrimination do not recur in future, including through the provision of dissuasive sanctions.
  - (d) The Committee urges the Government to ensure that the labour inspectorate examines the case file of Mr Oumarou Woudang and to keep it informed in that regard.

**B. The Government's reply**

- 295.** In a communication dated 23 July 2012, the Government states that the National Social Insurance Fund (CNPS) has always respected freedom of association; this is corroborated by the fact that there are trade unions in the Fund, of which four sit on the executive board. The Government adds that thanks to various consultations initiated by the Ministry of Labour and Social Security, the outlook for trade union issues is very promising at the CNPS.

### **C. The Committee's conclusions**

- 296.** *The Committee recalls that this case concerns allegations of anti-union interference in the CNPS and decisions taken in retaliation for legitimate trade union activity (deductions from wages, suspension without pay of union members). The Committee also recalls that the complainant organization, the General Union of Workers of Cameroon (UGTC) had stated that it was acting on behalf of its affiliated organization, the National Union of Employees, Supervisors and Managers of Banks and Financial Establishments of Cameroon (SNEGCBFCAM).*
- 297.** *The Committee notes the Government's general reply concerning this case, especially its indication that, thanks to the various consultations initiated by the Ministry of Labour and Social Affairs, the outlook for trade union matters is very promising at the CNPS. The Committee welcomes this information and requests the Government to keep it informed of any developments in this respect. The Committee nevertheless reminds the Government that, during its previous examination of this case, it had made a certain number of recommendations on serious matters, to which the Government was bound to reply.*
- 298.** *The Committee recalls that the complainant organization had denounced acts of interference by the Director-General of the CNPS who had allegedly issued a statement disparaging the SNEGCBFCAM, calling its claims "highly exaggerated and contrary to the position of other unions"; he had also distributed a petition against the SNEGCBFCAM in order to gather staff signatures by coercion. The Committee strongly urges the Government once again to indicate without delay whether an inquiry into these allegations has been initiated and, if so, to inform it of the outcome.*
- 299.** *Furthermore, the Committee recalls that the complainant organization's allegations also concerned anti-union discrimination against a staff delegate, Mr Pierre Amogo Foe. Deductions had allegedly been made from his wages, in violation of the labour legislation, and the labour inspectorate had instructed the general management of the CNPS to restore the rights of Mr Pierre Amogo Foe in a ruling dated 1 February 2010. However, the CNPS general management refused to comply with the ruling of the labour inspectorate and wage reductions continued. The Committee expects the Government to inform it that the rights of Mr Amogo Foe have meanwhile been restored in accordance with the ruling of the labour inspectorate and that, furthermore, he has been fully compensated. The Committee reminds once again the Government of the need to ensure that such acts of anti-union discrimination do not recur in the future, including through the provision of adequately dissuasive sanctions.*
- 300.** *Finally, the Committee recalls that the UGTC also made allegations of anti-union discrimination against staff delegate Mr Oumarou Woudang, who was suspended without pay as a final warning before dismissal in July 2009 for "copying and distributing notice of trade union strike action during working hours". The Committee expects the Government to indicate the measures it has taken to ensure that the labour inspectorate examines the case file of Mr Oumarou Woudang as well as any follow-up action taken.*

### **The Committee's recommendations**

- 301.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee welcomes the information that the outlook for trade union issues is very promising at the CNPS and requests the Government to keep it informed of any new developments in this respect.*

- (b) *The Committee strongly urges the Government to indicate without delay whether an inquiry into the allegations of interference by the Director-General of the CNPS in the internal affairs of SNEGCBFCAM has been initiated and, if so, to report on the outcome.*
- (c) *The Committee expects the Government to inform it that the rights of Mr Amogo Foe, staff delegate, have been restored in accordance with the ruling of the labour inspectorate and that, furthermore, he has been fully compensated. The Committee reminds once again the Government of the need to ensure that such acts of anti-union discrimination do not recur in the future, including through the provision of adequately dissuasive sanctions.*
- (d) *The Committee expects the Government to indicate the measures it has taken to ensure that the labour inspectorate examines the case file of Mr Oumarou Woudang, the staff delegate who was suspended and then dismissed, as well as any follow-up action taken.*

CASE NO. 2812

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

**Complaint against the Government of Cameroon  
presented by  
the Confederation of Public Sector Unions of Cameroon (CSP)**

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

- 302.** The Committee last examined the substance of this case at its November 2011 meeting and adopted an interim report approved by the Governing Body at its 312th Session [see 362nd Report, paras 358–399].
- 303.** The Government sent partial information in a communication dated 23 July 2012.
- 304.** Cameroon has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 305.** In its previous examination of the case in November 2011, the Committee made the following recommendations [see 362nd Report, para. 399]:

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

## **B. The Government's reply**

**306.** In a communication dated 23 July 2012, the Government states that the Ministry of Labour and Social Security has renewed dialogue with the Confederation of Public Sector Unions of Cameroon (CSP), and that an ad hoc committee had been set up to examine and find a solution to all the organization's rational demands. The Government further indicates that all strong recommendations made by this ad hoc Committee will be communicated.

**307.** Furthermore, the Government reports that the Ministry of Labour and Social Security is at present drafting a single Act on trade unions, in accordance with section 4 of Act No. 90/053 of 19 December 1990 on freedom of association.

## **C. The Committee's conclusions**

**308.** *The Committee recalls that this case refers to allegations concerning the violent suppression of a peaceful strike by law enforcement officers, the arrest of union officials, the authorities' refusal to recognize the existence of the complainant organization, the CSP, as well as the occupation of its premises by law enforcement officers to prevent it from celebrating May Day.*

- 309.** *The Committee recalls that, according to the complainant organization, as soon as it had been freely established in 2000, it proceeded to declare its existence to the Prefecture of the Department of Mfoundi in Yaoundé, as required by the regulatory provisions in force. However, the Prefecture had not issued the CSP with a deposit slip, as provided for in the regulations, nor had the CSP received any formal reply to their request for legal personality. For its part, the Government had stated that the problems concerning the legal personality of the CSP would be resolved following the amendment of the Labour Code of Cameroon and the adoption of a law on trade unions. The Committee had urged the Government, in consultation with the most representative organizations of employers and workers, to accelerate the process of legislative reform, while guaranteeing full respect for the principles of freedom of association of public servants. It expected that, in the near future, the CSP would be able to lawfully represent its members and exercise all attendant rights.*
- 310.** *The Committee welcomes the Government's indication that a process of dialogue has been instigated between the Ministry of Labour and Social Affairs and the CSP. The Committee also notes that an ad hoc Committee has been set up to examine and find a solution to the organization's demands. The Committee therefore expects the Government to provide, in the near future, information on the recommendations made by the Committee, as well as on any follow-up measures taken in this respect. Meanwhile, the Committee expects that the CSP be recognized in practice and authorized to exercise its rights of freedom of association.*
- 311.** *The Committee moreover notes with interest that the Ministry of Labour and Social Affairs is at present drafting a single Act on trade unions, in accordance with section 4 of Act No. 90/053 of 19 December 1990 on freedom of association. Reminding the Government of the comments made by the Committee of Experts on the Application of Conventions and Recommendations on this matter, and of its previous recommendation concerning the respect of the right to hold public meetings and demonstrations on May Day, the Committee expects that this legislative reform will be made in full consultation with the most representative employers' and workers' organizations, and it requests the Government to keep it informed of any progress made, in particular with regard to the adoption of the single Act on trade unions. It therefore requests the Government to provide a copy of any bill drafted to the Committee of Experts.*
- 312.** *As regards the situation of the seven union members who were arrested during the sit-in that took place on 11 November 2010, the Committee recalls that the matter had been referred to the Court of First Instance of Mfoundi on 16 May 2011. The Committee requests the Government once again to keep it informed of developments in this case and to provide it with a copy of any legal rulings handed down. The Committee expects the case to be settled without delay.*
- 313.** *Finally, as regards the serious allegations concerning the violent intervention of law enforcement officials against striking trade unionists, and with respect to the conditions under which the union officials were detained and the ill-treatment to which they were subjected, the Committee expects that an inquiry be conducted on these matters to clarify the facts, determine responsibility, punish those responsible and prevent the repetition of such acts. It requests the Government to keep it informed of the outcome.*

## **The Committee's recommendations**

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

- (a) *The Committee expects the Government to provide, in the near future, information on the recommendations made by the ad hoc Committee that was set up once the dialogue between the Ministry of Labour and Social Affairs and the CSP had been resumed, as well as on any follow-up measures taken in this respect. Meanwhile, the Committee expects that the CSP be recognized in practice and authorized to exercise its rights of freedom of association.*
- (b) *Reminding the Government of the comments made by the Committee of Experts on the Application of Conventions and Recommendations on this matter, and of its previous recommendation concerning the respect of the right to hold public meetings and demonstrations on May Day, the Committee expects that the legislative reform undertaken in accordance with section 4 of Act No. 90/053 of 19 December 1990 will be made in full consultation with the most representative employers' and workers' organizations. The Committee requests the Government to keep it informed of any progress made, in particular with regard to the adoption of the single Act on trade unions. It therefore requests the Government to provide a copy of any bill drafted to the Committee of Experts.*
- (c) *As regards the situation of the seven union members who were arrested during the sit-in that took place on 11 November 2010, the Committee requests the Government once again to keep it informed of developments in this case and to provide it with a copy of any legal rulings handed down. The Committee expects the case to be settled without delay.*
- (d) *As regards the serious allegations concerning the violent intervention of law enforcement officials against striking trade unionists, and with respect to the conditions under which the union officials were detained and the ill-treatment to which they were subjected, the Committee expects that an inquiry be conducted on these matters to clarify the facts, determine responsibility, punish those responsible and prevent the repetition of such actions. It requests the Government to keep it informed of the outcome.*



CASE No. 2863

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

**Complaint against the Government of Chile  
presented by  
the National Association of Officials of the Directorate General  
of Civil Aviations (ANFDGAC)**

*Allegations: The complainant organization alleges that the Directorate General of Civil Aviation instituted administrative proceedings against four of the organization's officials as a result of the use of union leave and undermining the right to freedom of expression by prohibiting ANFDGAC from posting notices, banners and other similar signs*

- 315.** The complaint is contained in a communication dated 9 May 2011 from the National Association of Officials of the Directorate General of Civil Aviation (ANFDGAC). ANFDGAC sent additional information in a communication dated 16 August 2011.
- 316.** The Government sent its observations in a communication dated 14 May 2012.
- 317.** Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 318.** In its communication of 9 May 2011, ANFDGAC indicates that it is a national organization of officials of the Directorate General of Civil Aviation (DGAC), a unit of the Public Administration of Chile. It states that, in accordance with Act No. 19296, the structure of ANFDGAC includes a national directorate and regional and provincial directorates, recognized under a labour inspectorate certificate of validity establishing and managing trade union activity in the DGAC. Mr Cristian Fuentealba Pincheira and Mr Javier Norambuena Morales are, respectively, third national director and regional secretary of Concepción, and national and regional secretary of the Punta Arenas branch, and Mr Dalivor Eterovic Díaz and Mr Rodrigo Leficura Sánchez are the regional directors of the Punta Arenas branch.
- 319.** The complainant alleges that the Directorate General of Civil Aviation, through special resolution No. 0363 of 25 March 2010, adopted the first edition of the internal procedure known as PRO.DRH No. 23 on the recording of leave of the directors of the associations of officials of the DGAC, in accordance with Act No. 19296. The complainant notes that the ANFDGAC repeatedly challenged the aviation authority's decision to restrict trade union immunities through the use of the abovementioned internal procedure, including through the following petitions: (1) a complaint appeal was submitted to the Director-General of Civil Aviation in ANFDGAC letter No. 39/1/2010 dated 19 April 2010; (2) a complaint appeal was submitted to the Office of the Comptroller General of the Republic in ANFDGAC letter No. 52/1/2010 dated 10 May 2010; (3) opinion No. 75117 dated

14 December 2010 was issued by the Comptroller General of the Republic, which, in general terms, validated PRO.DRH No. 23; and (4) an appeal for reconsideration was submitted to the Comptroller General of the Republic in ANFDGAC letter No. 38/1/2011 dated 19 April 2011. There has been no response to date.

- 320.** According to the complainant, Act No. 19296 does not provide for setting down rules on the use of leave entitlement, yet senior management adopted measures to record respective leaves of absence. Indeed, the Directorate General of Civil Aviation published an internal procedure regulating union leave set out under Act No. 19296 known as PRO.DRH No. 23, under sections 2.2.1 and 2.2.4 which state: “2.2.1. Leave time is 11 hours per week for each director representing the association of officials of the DGAC at the respective regional level, and 22 hours per week for each association director at the national level.” “2.2.4. Directors may exceed the allotted time in the event of duly verified summons by public officials.”
- 321.** According to the complainant, the wording of the above points enabled the Director-General of Civil Aviation to initiate two administrative procedures against the four above-cited ANFDGAC officials, as it enabled the aviation authority to convert the minimum leave limit under Act No. 19296 into a maximum leave limit. In that regard, the complainant notes that, between 30 August and 3 September 2010, Carriel Sur Airport in Concepción was the subject of a special audit No. 15/2010, which stated that, “after examining the time sheets and staff shift schedules for the period from January to August 2010, attached hereto, pertaining to AVSEC official Mr Cristian Fuentealba Pincheira, member of the DGAC trade union, and third national director and regional secretary of Concepción, it was determined that he had not met the legal monthly working hours and consequently, no deduction was made for the hours not worked during that period”. Furthermore: “The foregoing is in violation of article 65 of Act No. 18834 (Administrative Statute) on the normal working hours for officials, which should be 44 hours a week; officials must thus perform their duties continuously during normal working hours, which Mr Fuentealba Pincheira failed to do. In light of the above, and in accordance with the legal standard, the hours mentioned above, which amount to 146 hours, should have been deducted from the money due to Mr Fuentealba.” In this regard, attention is drawn to ANFDGAC letter No. 151/1/2010 dated 6 December 2010, which sets out the relevant observations relating to the special audit report in question.
- 322.** ANFDGAC adds that on 14 October 2010, the Director-General of Civil Aviation, through DGAC resolution No. 30, ordered administrative proceedings with a view to determining possible administrative responsibilities in connection with the report prepared by the internal auditor of the DGAC through official communication (O) No. 03/0/239 dated 23 September 2010, in the light of the findings from the internal audit and that of the Director-General. In addition, on 24 November 2010, the Subdepartment of the Southern Airport Zone was subjected to a full audit No. 17/2010. This audit presented various findings relating to the compliance by the three regional directors – the regional president, Dalivor Eterovic Díaz, the regional treasurer, Rodrigo Leficura Sánchez and the regional and national secretary, Javier Norambuena Morales – with the legal monthly working hours. In that context, ANFDGAC letter No. 02/1/2011, dated 12 January 2011, set out the relevant observations on this full audit report. On 30 November 2010, the Director-General of Civil Aviation, through DGAC resolution No. 36, ordered administrative proceedings to investigate non-compliance with the legal monthly working hours of the directors of the Association of Officials of the Southern Airport Zone mentioned in audit report No. 17/2010, with a view to determining the possible administrative responsibilities that may arise from such facts.

- 323.** On 17 November 2010, the investigating prosecutor, having established a series of facts on the case, decided to close the investigation step in the administrative proceedings instituted against the national and regional director, Mr Cristian Fuentealba Pincheira, bringing his conclusions before the Director-General of Civil Aviation without charges. On 2 March 2011, the Director-General of Civil Aviation decided to reopen the administrative proceedings, instituted under DGAC resolution No. 33 of 14 October 2010, on the grounds that proceedings remain pending, with a view to confirming the complaint lodged by the internal audit office of the DGAC, appointing the official Mr Eduardo Demanet Hurtado as the investigating prosecutor.
- 324.** The complainant organization notes that on 2 May 2011, the Investigating Prosecutor, pursuant to the abovementioned DGAC resolution and DGAC resolution of 2 March 2011, stated that the Mr Cristian Fuentealba Pincheira was charged with the following: Having repeatedly failed to adhere to his working hours, accumulating 171 hours of service absence in the audited period from January to August 2010. Consequently, by virtue of exceeding the maximum leave entitlement of 33 hours per week for trade union officials, without registering any request for the accumulation or transfer of hours within the relevant calendar month, or having duly verified any summons by a public official, as required under the applicable legislation (Act No. 19296 and PRO.DRH No. 23), such behaviour is in violation of article 61(d) of DFL 29 and article 31 of Act No. 19296.
- 325.** According to the complainant, the charges arising from the administrative proceedings against the national director Mr Cristian Fuentealba Pincheira amount to a violation of article 61(d) of DFL No. 29 which states: “The strict observance of the principle of administrative integrity implies morally unimpeachable conduct on the part of officials and honest and loyal service with a view above all to the public interest rather than private interest.” Furthermore, article 125 states: “The decision of dismissal falls to the appointing authority competent to terminate the services of an official. The disciplinary measure of dismissal can be applied only when the facts constituting the offence are in serious violation of the principle of administrative integrity.”
- 326.** The complainant indicates that, to date, no charges have been brought against Mr Dalivor Eterovic Díaz, Mr Rodrigo Leficura Sánchez or Mr Javier Norambuena Morales in the administrative proceedings ordered under DGAC resolution No. 36 of 30 November 2011. Nevertheless, as both audits present the same arguments, it is expected that these directors will have the same kinds of charges levied against them as those brought against Mr Cristian Fuentealba Pincheira. The complainant considers that all of the above has enabled the Directorate General of Civil Aviation to flagrantly violate freedom of association by disrupting, threatening and denying the legitimate exercise of leave as set out under Act No. 19296, constituting acts of anti-union discrimination and retaliation against the directors by denying trade union immunities through instituting the relevant administrative proceedings with a view to dismissing the ANFDGAC union officials.
- 327.** In a communication dated 16 August 2011, the complainant alleges that the Directorate General of Civil Aviation adopted instructions interfering with trade union activity, which ban the posting of canvas signs, notices and banners in the premises under the administration of the Directorate, such as airports, aerodromes or other premises which have not been authorized.

## **B. The Government’s reply**

- 328.** In its communication dated 14 May 2012, the Government reports that the Directorate General of Civil Aviation states the following about the allegations.

- 329.** The Directorate General of Civil Aviation states that it totally rejects the allegations contained in the ANFDGAC complaint, since they are untrue and, conversely, the actions taken by the DGAC on the matter were strictly in accordance with current legislation and the international conventions signed and ratified by Chile.
- 330.** It states that the directors of the association of officials enjoy trade union immunity, protection against dismissal and the right to trade union leave as provided in Act No. 19296, as well as the prerogative to be exempt from undergoing an annual appraisal. Thus, the special status accorded to them would ensure their independence in the proper exercise of their trade union duties.
- 331.** It adds that the rules governing the leave of union officials of the association of officials are set forth in articles 31 and 32 of Act No. 19296; that whenever an ANFDGAC national or regional election has been held, the corresponding trade union immunities and legal benefits have been implemented; that in the DGAC there is a national association of officials that elects seven national directors and 49 regional directors; and that every week each of these officials has a right to 22 and 11 hours of leave respectively, which can be amalgamated should the same person simultaneously hold the post of national and regional director. Thus, it notes that the abovementioned officials benefit from 11 hours of leave as regional directors and 22 hours as national directors in a statutory 44-hour working week, i.e. should they play both roles, they devote 75 per cent of their working week to trade union duties and must perform the duties required under their appointments or contracts for the remaining 25 per cent of the working week. This would be the case for the directors Mr Guillermo Martínez San Juan, Mr Cristián Fuentealba Pincheira, Mr Manuel Soto Vega, Mr Víctor Hernández Maulen and Mr Javier Norambuena Morales.
- 332.** The DGAC authorities also state that its unit has fully complied with the rules on officials' leave, adhering strictly to the law, granting the 51 elected directors the leave they are legally entitled to and refraining from assigning duties to those officials. The officials of the association would also have benefited from other leave in addition to that explicitly provided for in legislation, under article 31 of Act No. 19296, as long as it has been requested in accordance with the instructions of the Office of the Comptroller General of the Republic. This supervisory body has stated that, should the fulfilment of trade union tasks require extra time, the competent authority, in exercising its general managerial powers, may authorize or refuse any new leave. They state that, notwithstanding the foregoing, ANFDGAC officials may fully participate in training, membership of working groups and activities connected with contests, appraisals, etc., none of which are deemed to fall under the item of trade union leave entitlement.
- 333.** They also mention that the Internal Audit Unit undertook as part of its duties internal monitoring, which led to the discovery that there were officials in Concepción and Punta Arenas aerodromes who were failing to work the statutory monthly working hours, and in particular that there was inadequate monitoring of the attendance and leave of at least three officials. Moreover, of the two administrative procedures referred to in the complaint, one was still under consideration and the other acquitted the officials involved, as it was verified that, despite the fact that they had been repeatedly absent from duty, exceeding leave hour entitlement, the investigation revealed that there were reasons exempting the staff concerned from administrative responsibility, thus concluding the disciplinary process.
- 334.** Lastly, the DGAC authorities state that there has been no anti-union practice, nor any acts of retaliation. They also reiterate that the unit has granted all officials of the association of officials, be they national or regional, the right to the leave to which they are legally entitled, thus guaranteeing the exercise of their trade union duties and adhering to the trade

union immunity granted under the law, but requiring compliance with current regulations applicable to all public employees.

- 335.** For its part, the Government states the following with respect to the allegations. Act No. 19296, which “Sets forth Rules on Associations of Officials of the State Administration”, stipulates in article 31 that:

Senior management of the respective division shall grant the necessary leave to allow the directors of associations to be absent from their work to carry out their duties outside of the workplace, which shall be no less than 22 hours per week for each director of a national association, or 11 hours for each director of a regional, provincial or communal association, or which has at least one or more health facilities, and for each regional or provincial director to be elected in accordance with article 17, subparagraph 2.

Weekly leave entitlement shall be accumulated by each director over the relevant calendar month and each director may transfer to one or more of the other officials all or part of the leave entitlement due to him/her, provided that written notice is given to the senior management of the respective division.

However, the limit specified in the aforementioned subparagraphs may be exceeded in the event of a duly certified summons being served on directors of associations, in their capacity as such, by the public authorities, and such summons must be duly verified if required by the senior management of the respective division. The extra hours will not be counted as the hours referred to in the above subparagraphs. The period included in the leave granted to the directors of associations will be deemed to be hours worked for all intents and purposes, thus maintaining the right to remuneration.

- 336.** The Government adds that, at the same time, article 32 of the Act states:

Entitlement to the following leave, in addition to that specified in the abovementioned article, shall be granted to:

- (a) The directors of associations, with the consent of the respective assembly, adopted in accordance with its statutes, may, while keeping their position, be excused from their obligation to provide their full or part-time services in the division in which they are employed, provided that it takes place for a period of no more than six months over the whole period of their term in office.
- (b) The officials may also, in accordance with the association’s statutes, take up to five working days of leave in the calendar year to undertake activities that were necessary or deemed to be essential in order to carry out their duties as officials, or to strengthen their capacity as officials.

In the cases described in the foregoing, the directors of the association shall inform, in writing and at least ten days in advance, the senior management of the respective division of the circumstances requiring the use of this extra time.

- 337.** The Government states that the salaries, benefits and pension contributions borne by the division during the leave periods referred to in this article and subparagraph 1 of the subsequent article shall be paid by the respective association, but only when the period of paid leave to which the directors are entitled is exceeded, in accordance with the provisions of subparagraph 1 of the aforementioned article.

- 338.** For its part, the DGAC established an internal procedure “to record the leave of the directors of the DGAC associations of officials, as provided in Act No. 19296 on Workers Associations in the State Administration”, also known as PRO.DRH No. 23.

The regulation provides in section 2.2.1: *“Leave time is 11 hours per week for each director representing the association of officials of the DGAC at the respective regional level, and 22 hours per week for each association director at the national level.”*

While section 2.2.4 of the instrument provides that: *“Directors may exceed the allotted time in the event of duly verified summons by public officials.”*

- 339.** In the light of the foregoing, the Government notes that the above regulation ensures strict adherence to the principle of freedom of association in the context of trade union officials’ leave since, rather than restricting trade union rights in any way, the DGAC authorities, in issuing an internal instruction, did no more than specify the minimum period of 11 or 22 hours stipulated in Act No. 19296. Periods exceeding this minimum of hours may be authorized or granted by the authority, in strict compliance with the managerial obligation that falls upon the authorities.
- 340.** With regard to establishing the internal procedure, the DGAC authorities developed the so-called PRO.DRH No. 23 to ensure an effective department and adequate monitoring, in accordance with article 5 of Act No. 18575, which requires the authorities and officials to provide an efficient public administration, ensuring the best use of the instruments available to them. Thus, they merely established a monitoring mechanism for officials’ leave, as permitted under domestic legislation, and the transfer and accumulation of leave hours, as it was necessary to have a tool to allow the recording of the leave actually taken by each of them.
- 341.** The foregoing is in line with the administrative case law of the Office of the Comptroller General of the Republic, which maintained in opinion No. 6171 of 2009 that the authority may adopt any measures it deems appropriate to verify that the leave in question does not exceed the time specified in Act No. 10296 and to require officials not only to give timely notice of their absences, but also to record each period of absence.
- 342.** Administrative procedures therefore constitute Chile’s administrative mechanism for investigating incidents within public departments in order to clarify administrative responsibilities; thus, the Government considers that it cannot be argued that by merely instituting them the rights to which the directors of association are entitled are being infringed. Similarly, the Office of the Comptroller has noted in its consistent case law that the officials retain their functionary linkage and continue to be subject to the rules of their respective statutes, meaning that should those be violated they would incur administrative responsibility, as specified in opinion No. 46592 of 2000 and other legislation.
- 343.** Furthermore, article 66 of Act No. 19296 recognizes that the directors may incur administrative responsibility in the performance of their duties, i.e. in fulfilling trade union objectives. Thus, the ANFDGAC directors are required to fulfil their usual working day, incurring administrative responsibility if no valid grounds are found for their absence. Otherwise, there would be constant abuse, which would contravene the constitutional principle of equality before the law, exploiting the provision contained in article 31 of Act No. 19296 in order to avoid compliance with the working hours of all public officials.
- 344.** Lastly, the Government adds that the administrative statute regulates and adequately guarantees the rights of interested parties, establishing the right to appear, give evidence, draw up defences and be legally notified and, in the event of being penalized, they had the right to make complaints to the relevant review bodies. In particular, any decision that is handed down in administrative procedures must be sent to the Office of the Comptroller so that an analysis can be made of the legality and constitutionality.
- 345.** In the light of the foregoing, the DGAC instituted two administrative procedures against the trade union officials (one of which ended in the acquittal of the officials, as previously mentioned), in respect of which an appeal was lodged with the higher hierarchical authority and subsequently a claim was filed with the Office of the Comptroller General of the Republic, to obtain an opinion on the legality of the procedure adopted by the

Directorate General to record the directors' leave, claiming that the regulation amounted to an anti-union practice and violated national and international rules governing the issue.

- 346.** In turn, the monitoring body issued opinion No. 75117 of 14 December 2010, through which a legal analysis of the internal procedure (PRO.DRH No. 23) was made, concluding that it is in accordance with current domestic and international legislation. This conclusion was based on the fact that, while Act No. 19296 does not provide for the possibility of issuing rules on the exercise of the right to leave, it does not preclude senior management from adopting measures, since it is responsible for ensuring the unit's progress and, as such, may take all necessary steps to enable the normal development of the institution. Thus, the national directorate can ask trade union officials to record any absences due to performing the tasks required of them in that capacity, i.e. there may be monitoring in place to prevent directors from using the allowance for purposes other than for those legally granted.
- 347.** However, the Board of Directors of the ANFDGAC, unsatisfied with this ruling, asked for the decision to be reconsidered, arguing that the procedure known as PRO.DRH No. 23 was unlawful. As a result, the Office of the Comptroller supplemented its prior ruling with opinion No. 43894 of 12 July 2011, reiterating its previous conclusions, i.e. that the procedure contested is lawful and that the manner in which points 2.2.1 and 2.2.4 have been drafted cannot be interpreted to mean that a maximum number of hours is being specified for trade union officials' leave entitlement, reiterating that it was up to senior management whether or not to grant hours exceeding the minimum provided for under the rule in question.
- 348.** In respect of that conclusion, the Office of the Comptroller maintained that, if carrying out trade union activities required more time, the competent authority, in the exercise of its managerial powers, may authorize or refuse new leave, citing prior rulings.
- 349.** The Government states that the DGAC has adopted the measures in the exercise of the powers granted to department heads under domestic law and which are based on the case law of the Office of the Comptroller General of the Republic. They were not intended to restrict or violate the exercise of the rights granted to directors of the associations of officials under Act No. 19296 and, despite the adoption of those measures, the directors of the association have exercised their rights under Act No. 19296, enjoying the leave entitlement set forth in current regulations.
- 350.** Lastly, the Government states that it is important to note that no anti-union act, or violation of ILO Conventions Nos 87, 98 and 151, has taken place because the DGAC authorities acted within the law. There have been appeals to the administrative authorities, as provided under the law, with supervisory bodies handing down their respective rulings, which maintain that they acted lawfully in implementing procedure PRO.DRH No. 23. In addition to the foregoing, on a weekly basis each national and regional director took his relevant legal leave entitlement, namely eleven (11), twenty two (22) or thirty three (33) hours, without the internal monitoring procedure in place causing any obstacle whatsoever to the exercise of the legal right.

### **C. The Committee's conclusions**

- 351.** *The Committee observes that in this complaint the complainant organization objects to internal procedure PRO.DRH No. 23 for recording the leave of the directors of the associations of officials of the Directorate General of Civil Aviation as set out under Act No. 19296 on the associations of state administration. The complainant organization alleges that: (1) Act No. 19296 does not provide for setting down rules on the use of leave entitlement, whereas this was nevertheless set out under PRO.DRH No. 23; (2) PRO.DRH*

*provides for 11 hours per week of leave for each director representing ANFDGAC and 22 hours per week for each national association director, and indicates that the directors may exceed the allotted time in the case of duly verified summons by public authorities; (3) the drafting of this procedure has enabled officials of the Directorate General of Civil Aviation to institute administrative procedures against four ANFDGAC officials (Mr Cristian Fuentealba Pincheira, Mr Javier Norambuena Morales, Mr Dalivor Eterovic Díaz and Mr Rodrigo Leficura Sánchez) since the aviation authority converted the minimum leave limit under Law No. 19296 into a maximum leave limit (to date, charges have been brought against Mr Cristian Fuentealba Pincheira and it is expected that charges will soon be brought against the other officials); and (4) the adoption of instructions which reiterate the prohibition to authorize installations including canvas signs, notices and banners in the premises under the administration of the Directorate, such as airports, aerodromes or other premises which have not been authorized.*

**352.** *The Committee notes that the Government reports with regard to the allegations relating to the procedure on trade union leave that the DGAC states the following:(i) the directors of the ANFDGAC enjoy trade union immunity, protection against dismissal and the right to trade union leave as provided in Act No. 19296, as well as the prerogative to be exempt from undergoing an annual appraisal; (ii) the rules governing the leave of union officials of the association of officials are set forth in articles 31 and 32 of Act No. 19296; and (iii) the DGAC has fully complied with the rules on officials' leave, adhering strictly to the law, granting the 51 elected directors the leave they are legally entitled to and refraining from assigning duties to those officials and there has not been on the part of the DGAC any anti-union practice or acts of retaliation. For its part, the Government states that: (1) the DGAC established an internal procedure to record the leave of the directors of DGAC associations of officials, as provided in Act No. 19296 on Workers Associations in the State Administration, also known as PRO.DRH No. 23; (2) the above regulation ensures strict adherence to the principle of freedom of association in the context of trade union officials' leave since, rather than restricting trade union rights in any way, the DGAC authority, in issuing an internal instruction, did no more than specify the minimum of hours stipulated in Act No. 19296, from 11 to 22 hours (periods exceeding this minimum of hours may be authorized or granted by the authority, in strict compliance with the managerial obligation that falls upon the authorities); (3) the Office of the Comptroller General of the Republic issued opinion No. 75117 of 14 December 2010, through which a legal analysis of the internal procedure (PRO.DRH No. 23) was made, concluding that it is in accordance with current domestic and international legislation; and (4) the ANFDGAC, unsatisfied with this ruling, asked for the decision to be reconsidered, arguing that the procedure known as PRO.DRH No. 23 was unlawful. As a result, the Office of the Comptroller supplemented its prior ruling with opinion No. 43894 of 12 July 2011, reiterating its previous conclusions, i.e. that the procedure contested is lawful.*

**353.** *The Committee recalls that Paragraph 10(3) of the Workers' Representatives Recommendation, 1971 (No. 143), states that: "Reasonable limits may be set on the amount of time off which is granted to workers' representatives." The Committee observes that PRO.DRH No. 23 (a copy of which has been sent by the complainant) provides for trade union leave to regional directors (11 hours per week) and national directors (22 hours per week), that leave may be accumulated over the month, that leave may be transferred to other officials and that during the leave period the officials remain entitled to remuneration and other allowances provided under the law. The Committee also notes that the Comptroller General of the Republic, on request by the complainant organization, ruled that "the proceeding instituted by the Directorate General of Civil Aviation, relating to the recording of leave of the directors of the associations of officials of this organization are in line with the standards and case law in force on the matter". Consequently, in the light of this information, the Committee concludes that the procedure contesting PRO.DRH*



*No. 23 does not in itself present problems of compliance with the principles of freedom of association.*

- 354.** *Moreover, as to the alleged institution of administrative proceedings against ANFDGAC officials, which, according to the complainant, is in violation of the freedom of association since it disrupts and denies the legitimate exercise of trade union leave, the Committee notes that the Government reports the following: (1) the Internal Audit Unit undertook as part of its duties internal monitoring, which led to the discovery that there were officials in Concepción and Punta Arenas aerodromes who were failing to work the statutory monthly working hours, and in particular that there was inadequate monitoring of the attendance and leave of at least three officials. Moreover, of the two administrative procedures referred to by the complainant, one was still under consideration and the other acquitted the officials involved, as it was verified that, despite the fact that they had been repeatedly absent from duty, exceeding leave hour entitlement, the investigation revealed that there were reasons exempting the staff concerned from administrative responsibility, thus concluding the disciplinary process; (2) an appeal was lodged with the higher hierarchical authority and subsequently a claim was filed with the Office of the Comptroller General of the Republic, to obtain an opinion on the legality of the procedure adopted by the Directorate General to record the directors' leave, claiming that the regulation amounted to an anti-union practice and violated national and international rules governing the issue; and (3) the Office of the Comptroller General of the Republic concluded that the internal procedure PRO.DRH No. 23 is in accordance with current domestic and international legislation, and that the national directorate can ask trade union officials to record any absences due to performing the tasks required of them in that capacity, i.e. there may be monitoring in place to prevent directors from using the allowance for purposes other than for those legally granted. The Committee requests the Government to keep it informed of the decision regarding the pending appeal and expects that the competent authorities will take into account the provisions of Article 6 of Convention No. 151.*
- 355.** *Lastly, as regards the allegation that the Directorate General of Civil Aviation adopted instructions interfering with trade union activity which ban the posting of canvas signs, notices, banners or other similar signs in units under DGAC management such as airports, aerodromes and other facilities, without prior authorization, the Committee observes that the Government has not sent its observations in this regard. The Committee recalls that Paragraph 15(1) and (2) of the Workers' Representatives Recommendation No. 143 states that workers' representatives acting on behalf of a trade union should be authorized to post trade union notices on the premises of the undertaking in a place or places agreed on with the management and to which the workers have easy access, and that management should permit workers' representatives acting on behalf of a trade union to distribute news sheets, pamphlets, publications and other documents of the union among the workers of the undertaking. Also, Paragraph 15(3) states that the notices and documents referred to in this paragraph should relate to normal trade union activities and their posting and distribution should not prejudice the orderly operation and tidiness of the undertaking. The Committee expects that the Government will take the necessary steps to bring closer together the authorities of the Directorate General of Civil Aviation and ANFDGAC officials, so that, drawing on the provisions of Recommendation No. 143 with regard to the distribution of trade union notices on the premises, an agreement can be reached on the matter.*

## **The Committee's recommendations**

- 356.** *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 decision relating to the administrative proceeding instituted against the officials of the ANFDGAC and expects that the competent authorities will take into account the provisions of Article 6 of Convention No. 151.*
- (b) *The Committee expects that the Government will take the necessary steps to bring closer together the authorities of the Directorate General of Civil Aviation and ANFDGAC officials, so that, drawing on the provisions of Recommendation No. 143 with regard to the distribution of trade union notices on the premises, an agreement can be reached on the matter.*

CASE NO. 2884

INTERIM REPORT

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

- **the National Association of University Professionals of the Labour Directorate (APU)**
- **the National Association of Public Servants (ANEF)**
- **the National Federation of Public Servant Associations of the Ministry of the Interior and related services (FENAMINSA), and**
- **the National Association of Public Servants of the Office of the Minister and Secretary-General of Government (ANFUSEGG)**

*Allegations: The complainants allege acts of anti-union discrimination against their leaders in the Labour Directorate and the non-renewal of contracts of members employed by the Ministry of the Interior and the Office of the Minister and Secretary-General of Government*

**357.** The complaints are contained in communications from the National Association of University Professionals of the Labour Directorate (APU), the National Association of Public Servants (ANEF), as well as in communications from the National Federation of Public Servant Associations of the Ministry of the Interior and related services (FENAMINSA) and the National Association of Public Servants of the Office of the Minister and Secretary-General of Government (ANFUSEGG) dated 20 June and 22 August 2011 respectively. FENAMINSA sent additional information in a communication dated 28 September 2011.

**358.** The Government sent its observations in a communication dated 21 October 2011.

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

## A. The complainants' allegations

- 360.** In its communication dated 20 June 2011, APU states that it is an association of public servants who are university professionals. The APU adds that it is affiliated with ANEF and the Amalgamated Workers' Union of Chile (CUT) and that it is lodging a formal complaint against the Government of Chile for its violation of the standards and principles set out in Convention No. 151 of the International Labour Organization (ILO), which protect and promote the right of public servants to organize and to freedom of association, on the grounds detailed below.
- 361.** The complainant explains that the incumbent President of the Republic took office on 11 March 2010. During his campaign and at a meeting with ANEF, he promised that, once he had been sworn in as the highest-ranking magistrate of the State, he would not dismiss any public servant and that he would respect labour stability and the rights conferred on public servants by the laws currently in force.
- 362.** The APU alleges that, despite the promises made by the President of the Republic and with or without his approval, the authority of the Labour Directorate proceeded to implement policies that resulted in the dismissal of a number of public servants and in pay cuts for others, as well as policies that violated the rights of the leaders of public servant associations and, in particular, those of the leaders of APU. This occurred as the result of acts that can only be described as decisions taken by the authority in question without so much as an unsatisfactory performance evaluation to justify them and with no regard for the norms enshrining freedom of association.
- 363.** As regards the acts committed against the leaders of APU, the complainant states that Mr Fernando Hidalgo Rojas, the national treasurer of APU, was the successful candidate in an internal recruitment process, which was announced in Circular No. 138 of 7 December 2006, and took up his post as Chief of the Provincial Labour Inspectorate of Linares, Seventh Region of Maule, on 1 April 2007. Subsequently, in Circular No. 102 of 30 August 2010, the Labour Directorate called for a new process for recruiting labour inspectors, including inspectors for the Provincial Labour Inspectorate of Linares. The APU considers that this act expressly violated Act No. 19296, which provides that "leaders shall not be transferred from the place or post they occupy without their written consent", which was not respected in this case. The complainant states that the acts committed against the national leader constituted a flagrant violation of an express norm. According to APU, this act was committed for the sole and specific purpose of removing the leader from his post without any grounds to justify such an act. In the light of this fact, APU proceeded to inform the authority in question that such an act violated trade union immunity and constituted an act of anti-union discrimination. The APU highlights that it publicly denounced this act, which forced the authority to overturn its decision.
- 364.** However, the complainant adds that a new act was committed against another national leader of APU on 7 March 2011. Indeed, the authority in question, without grounds related to her qualifications and/or of a disciplinary nature, proceeded to remove Ms Elena Creus Castro, the incumbent national president of APU, from her post while she was on legal leave. Therefore, this act was carried out without prior consultation and on the basis of a fait accompli.
- 365.** The complainants state that both acts have infringed and continue to infringe the rights of the national leaders of APU and that they have been carried out against the rule of law. The complainants argue that such acts have a basis in the instructions of the President of the Republic, who, through the Ministry of Labour and Social Security, has ordered the internal restructuring of the Labour Directorate and, in particular, of the Labour Inspection Department, where Ms Creus Castro had served as Chief of the Legal Unit since 2003,

during which time she maintained an exemplary record and never received any complaints regarding her performance. According to APU, the argument put forward by the authority to justify this decision has no basis in the Administrative Statute regulating public servants (Act No. 18834) and, in addition, violates Act No. 19296, which was promulgated on 28 February 1994 and which regulates associations of public servants employed by the Government. The relevant section of the Act provides as follows:

Section 25. Directors of public servant associations shall enjoy trade union immunity, in other words, they shall be protected from dismissal from the date of their election until six months after their resignation, provided that their resignation does not occur as a result of censure by the assembly of the association in question or of formal removal from office as a disciplinary measure authorized by the Office of the Comptroller General of the Republic. Similarly, immunity shall not apply in the case of the dissolution of an association, when that dissolution is the result of the application of section 61, paragraphs (c) and (e), or of factors provided for in the internal regulations, provided that, in the latter case, the factors in question attribute culpable or malicious conduct to the directors of that association. Moreover, during the period referred to in the previous paragraph, leaders shall not be transferred from the place or post they occupy without their written consent. Similarly, they shall not be subject to annual assessments during that period unless such an assessment is expressly requested by the leader. If no such request is made, the most recent assessment shall apply for all legal purposes.

**366.** The complainant states that the public body responsible for ensuring compliance with labour legislation, which includes these norms, and for remedying violations of trade union immunity by imposing fines on offenders and/or bringing perpetrators of acts undermining freedom of association before the national courts, as required by the Labour Code, has no qualms about carrying out the same acts, which, as a public service, it is required by law to remedy, against the leaders of APU, thereby setting a harmful precedent for workers' organizations in the country. The APU decided to bring the Labour Directorate before the labour courts for violating fundamental rights (acts of anti-union discrimination and the dignity of the persons involved). Currently, the trial is at the stage of discussion. The complainant believes that, by carrying out the aforementioned acts, the authority of the Labour Directorate attempted to deny the legitimacy of this public servant organization, and, in particular, that of its national leaders, by failing to provide the protection required by law, which constitutes a violation of the standards set out in ILO Convention No. 151 and of the law regulating its functioning.

**367.** The APU states that, according to the aforementioned norms, the National Labour Director, together with her executive board, has violated Act No. 19296, which regulates the functioning of public servant associations, and has disregarded and violated the standards set out in ILO Convention No. 151 by affording trade union activities inadequate protection, by disregarding the trade union immunity of its leaders, and by removing Ms Elena Creus Castro, the incumbent national president, from her post by means of an act that was arbitrary and had no basis in law. Therefore, this constituted a patent and flagrant act of anti-union discrimination against Ms Creus Castro and the organization. The APU believes that the fact that the State of Chile, under Supreme Decree No. 1539 of 11 September 2000, promulgated ILO Convention No. 151 as a law of the Republic, which had previously been adopted by the National Congress on 18 April 2000, makes the facts and acts described in the preceding paragraphs all the more serious. The fact that the Convention was fully incorporated into Chilean domestic legislation on 17 July 2001 makes these acts difficult to comprehend since they originated from the highest authority of the national public service, responsible for ensuring compliance with the law and for affording the principles of freedom of association special protection. The fact that Chile ratified ILO Convention No. 151 also implies that, in keeping with article 5 of the Constitution, the Convention enjoys constitutional standing, which means that the text in question prevails over domestic legislation, which, incidentally, includes the Administrative Statute regulating public servants (Act No. 18834).

- 368.** Thus, the state authorities are obliged to comply with domestic legislation, given that any failure to do so would constitute a violation of the principle of legality set out in articles 6 and 7 of the Constitution, in accordance with section 2 of the Constitutional Act establishing the General Principles of the State Administration (Act No. 18575). The APU adds that, under Act No. 29087, which was passed in 2006, a labour protection procedure was incorporated into domestic labour legislation. This procedure provides for the drafting of new sections of the Labour Code, namely sections 292 and 293, which refer to the violation of fundamental rights, such as anti-union discrimination, which are not mentioned in the Administrative Statute regulating public servants (Act No. 18834). Section 292 expressly provides that if the Labour Inspectorate, acting within its area of competence and without prejudice to its regulatory powers, learns of a violation of fundamental rights, it shall refer such an act to the competent court. From this, it may be deduced that the Labour Inspectorate is the body required by law to report any violation of the fundamental rights enshrined in ILO Convention No. 151 and in other normative instruments, which makes the conduct of the Labour Directorate all the more serious.
- 369.** It is surprising that the Labour Directorate and other state bodies, including the Office of the Comptroller General of the Republic, have attempted to avoid the full force and implementation of ILO Convention No. 151 by arguing that no law regulating its implementation has been passed. These excuses are a contradiction in terms and are repugnant to the moral and legal conscience of those who believe that the rule of law is maintained by a public order based on labour law, the main objective of which is to promote respect for and to protect the rights that, in turn, protect trade union activities and leaders. The APU believes that the Government should recant, with immediate effect, all the administrative actions it has taken or may take in the future through the Labour Directorate, which infringe the rights of any trade union leader representing public servants employed by the Labour Directorate and, in particular, the acts infringing the rights of Ms Elena Creus Castro, the national president of APU, given that these acts violate the normative provisions of domestic law and the principles and standards set out in Articles 4 and 5 of ILO Convention No. 151.
- 370.** In its communication dated 22 August 2011, ANFUSEGG, which is affiliated with ANEF, and through the latter, with the CUT, states that it is lodging a formal complaint against the Government of Chile for its violation of the standards and principles set out in ILO Convention No. 151, which protect and promote the right of public servants to organize and to freedom of association, on the grounds detailed below.
- 371.** The ANFUSEGG alleges that 178 public servants employed on fixed-term or fee contracts by various government services were dismissed from the Ministry between March and December 2010, and during the first trimester of 2011, without grounds other than their status as members of the organization, their participation in normal trade union activities and/or decisions taken by the authority in question, despite the total absence of any unsatisfactory performance evaluation to justify their dismissal.
- 372.** These dismissals affected public servants employed on a fixed-term contract. Despite their contracts being renewed every year, the public servants in question could be employed for two, four, five, ten, 20 or more years at a time. In other words, they perform permanent functions on behalf of the Office of the Minister and Secretary-General of Government. They do not service specific programmes, nor are they involved in politics, as the authority claims. Moreover, they maintain an exemplary professional record and are highly qualified.
- 373.** According to ANFUSEGG, these dismissals were the result of the mere presumption that the public servants in question thought differently to the new Government when it came to power on 11 March 2010. This attitude is ethically reprehensible and runs counter to the

principles and standards of the ILO. These mass dismissals have been carried out against the rule of law, on the pretext that the services of the aforementioned public servants are no longer necessary or that their contract has expired, which is part of a subterfuge contained in the Administrative Statute regulating public servants (Act No. 18834) but which, in reality, entails acts that may be classed as an “abuse of rights”.

- 374.** The complainants state that the grounds for dismissal, “as long as their services are necessary”, which have been invoked in the case of the trade union members, are not referred to anywhere in the relevant legal statutes. They add that attempts to seek remedies to safeguard their constitutional rights before the national courts of appeal, in the face of their dismissal, have proven futile, as inevitably, despite the fact that the courts have ruled in favour of the public servants and against the authority in more than 90 per cent of cases, the Third Constitutional Chamber of the Supreme Court of Justice has consistently overturned those rulings, thereby validating and legitimizing dismissals with an overt political bias.
- 375.** In its communication dated 22 August 2011, FENAMINSA, which is affiliated with ANEF and, through the latter, with CUT, alleges that the Ministry of the Interior, which is a branch of the Government, despite the promises made by the President of the Republic and with or without his approval, proceeded to dismiss 800 public servants employed on a fixed-term or fee contract by the Ministry and related services between March and December 2010 and during the first trimester of 2011, without grounds other than their status as members of the organization, their participation in normal trade union activities and/or decisions taken by the authority in question, despite the total absence of any unsatisfactory performance evaluation to justify their dismissal.
- 376.** The complainant also adds that these dismissals affected public servants employed on a fixed-term contract. Despite their contracts being renewed every year, the public servants in question could be employed for two, four, five, ten, 20 or more years at a time. In other words, they perform permanent functions on behalf of the Ministry. They do not service specific programmes, nor are they involved in politics, as the authority claims. Moreover, they maintain an exemplary professional record and are highly qualified. These dismissals were the result of suspicions that the public servants in question thought differently to the new Government when it came to power on 11 March 2010. This attitude is ethically reprehensible and runs counter to the principles and standards of the ILO. These mass dismissals have been carried out against the rule of law, on the pretext that the services of the aforementioned public servants are no longer necessary or that their contract has expired, which is part of a subterfuge contained in the Administrative Statute regulating public servants (Act No. 18834) but which, in reality, entails acts that may be classed as an “abuse of rights”.
- 377.** The grounds for dismissal, “as long as their services are necessary”, which have been invoked in the case of the trade union members, are not referred to anywhere in the relevant legal statutes, which only recognize “administrative malpractice”, which runs counter to the principle of legality governing administrative actions, and are endorsed by the Office of the Comptroller General of the Republic, a regulatory body that is always sympathetic to the authority when it comes to denying the rights and dignity of public servants. In other cases, fixed-term contracts have not been renewed. For the most part, this affected public servants who were recruited or reinstated after the fall of the military dictatorship and during the early days of the first democratic Government. The complainants also add that attempts to seek remedies to safeguard their constitutional rights before the national courts of appeal, in the face of their dismissal, have proven futile, as inevitably, despite the fact that the courts have ruled in favour of the public servants and against the authority in more than 90 per cent of cases, the Supreme Court of Justice has consistently overturned those rulings, thereby validating and legitimizing dismissals with

an overt political bias. Furthermore, the complainants add that, at the time of the filing of the complaint, the Office of the Comptroller General of the Republic had not handed down a ruling on this formal complaint that invokes ILO Convention No. 151 and that, in accordance with the law, repudiates the acts of the authority, which are denounced. As indicated in the preceding paragraphs, the Convention is a law of the Republic and enjoys constitutional standing in accordance with article 5, paragraph 2 of the Constitution.

**378.** The complainant adds that it should be noted that the Office of the Comptroller General of the Republic issued, without comment or objection, the decree promulgating ILO Convention No. 151 as a law of the Republic, despite maintaining a complicit silence as regards its implementation until the date on which this formal complaint, which details the publicly known facts behind it, was lodged. For the complainant, the fact that the acts in question may be attributed to the President of the Republic (who promised to respect labour stability and the work of public servants) and to an individual belonging to the Ministry of the Interior who, regardless of the individual temporarily occupying the post, are required by the Constitution to respect and to promote compliance with the law, does nothing to attenuate the seriousness of the acts mentioned in the formal complaint. In fact, it makes them all the more serious. This is especially the case for laws referring to international treaties ratified by Chile that are in force, in accordance with article 5, paragraph 2 of the Constitution, and, consequently, to the need to respect the principle of legality set out in articles 6 and 7 of that text, in accordance with section 2 of the Constitutional Act establishing the General Principles of the State Administration (Act No. 18575).

## **B. The Government's reply**

**379.** In its communication dated 21 October 2011, the Government provided the following information:

### *I. Concerning the allegations made by APU*

**380.** The organization that has referred the present case to the Committee on Freedom of Association is one of the two public servant associations established under Act No. 19296. The oldest and the most representative of the two is the National Association of Public Servants of Chile (ANFUNTCH), which was established in 1938, while APU was established in 1995. Both organizations function in total freedom and carry out all their trade union activities without restriction. In its communication, APU made the following allegations against the Chilean State: (1) that it violated the trade union immunity of the leader Mr Fernando Hidalgo Rojas when, in August 2010, under the auspices of the authority in question, it called for a recruitment process to appoint labour inspectors to various offices throughout the country, including the office overseen by Mr Rojas, which the complainants consider to constitute a violation of section 25 of Act No. 19296, which provides that leaders shall not be transferred from the place or post they occupy without their written consent; (2) that it violated the trade union immunity of Ms Elena Creus Castro when, under the auspices of the authority in question, it ordered the restructuring of the Labour Inspection Department of the Labour Directorate in March 2011, which altered the structure of the Legal Unit to which Ms Creus Castro belonged, a decision that, according to the complainant, has no basis in the Administrative Statute in force and violates section 25 of Act No. 19296; and (3) that, through these alleged acts, it attempted to deny the legitimacy of APU and, in particular, that of its leaders, thereby violating domestic law and Articles 4 and 5 of ILO Convention No. 151.

II. *The context in which the allegations and complaints were made. Redefining and restructuring labour services.*

**381.** The Government adds that it should be noted that the context in which these allegations were made was defined by the rational introduction of a series of changes, new approaches and regulations by the new authority. It is common knowledge that the arrival of the new Government in 2010 led to a natural change of administration in public institutions, including the Labour Directorate, which is a decentralized public service that comes under the authority of the Ministry of Labour and Social Security. The activities of the Labour Directorate fall within an area that is particularly complex and subject to change, which is the area governed by labour standards, where the demands of users are increasingly diverse and pressing, not to mention growing and exacting. In this context, the need to adopt diverse and progressive measures aimed at equipping the institution to successfully meet internal and external demands, and to complete the tasks entrusted to it for the common good, has proven unavoidable. This has been the situation across various areas of the Labour Directorate over the last decade, since it first perceived the need to adapt to a variety of challenging situations, namely, labour reform, the introduction of new technology, changes in administrative procedure, procedural reform and the growth of the working population, etc.

**382.** In this connection, the Government believes it should be noted that certain areas and levels of the institution have recently undergone change and reform in order to deal with new policies and challenges, which range from the appointment of new regional directors and of provincial and communal labour inspectors; the opening of new offices and an increase in field inspectors (*fiscalizadores de terreno*); to the closure, restructuring and creation of units within departments at the central level so that they can perform their functions in a more efficient, effective and coordinated manner, as required by the Constitutional Act establishing the General Principles of the State Administration (Act No. 18575). As regards the last point, the Labour Directorate, following the completion of the relevant studies and assessments, indeed called for changes, adjustments and streamlining measures not only within its regional and local bodies but also within the departmental structures at the central level. This was the context in which the authority made changes within the Administration and Finance Department, by appointing new chiefs, namely the Deputy Chief of the Department itself, the Chief of the Procurement Unit and the Chief of the Supply and Logistics Unit. Furthermore, a new chief was appointed to the Statistics Unit within the Department of Studies, and a new deputy chief to the Human Resources Department. In addition, the authority ordered the assimilation of the Data Processing Centre into the Personnel Unit and the closure of the Occupational Health Unit and the Training and Development Unit. However, as regards its operational lines, the Labour Directorate passed Exempt Resolution No. 133 of 17 March 2011, which established and streamlined the new organizational and functional structure of the Legal Department; Exempt Resolution No. 2 of 6 January 2011, which altered the structure of the Labour Relations Department and established the relevant units; and Exempt Resolution No. 176 of 8 March 2011 concerning the Labour Inspection Department, which will be mentioned in detail in the following paragraphs. By way of an example, these resolutions provided for the establishment of the Legal Oversight Unit within the Legal Department, for the closure of the Pre-judicial Individual Conciliation Unit and for the transfer of the latter's functions, which are linked to the institution's outcome of conciliation, to the Labour Relations Department. In addition, these resolutions provided for the establishment of the Alternative Conflict Resolution and Social Dialogue Unit within the Labour Relations Department.

**383.** As regards its lines of inspection, it should be noted that, during the first semester of 2010, the Ministry of Labour and Social Security launched a process aimed at assessing and diagnosing the problems of the Labour Directorate, which notably involved the intervention of an external consultant. The process yielded 22 proposals containing short-,



medium- and long-term measures aimed at optimizing and modernizing inspection procedures within the Directorate. These new policies governing labour services have truly re-engineered the current system to favour all users, be they workers, trade unions or employers. This re-engineering has been carried out under the auspices of the Ministry of Labour and Social Security and with support and constant feedback from all the bodies involved.

- 384.** Therefore, it is clear that the series of adjustments carried out within the Labour Directorate, which is behind the complaint lodged by the organizations in question, may be attributed to global restructuring or to restructuring that addresses operating lines in the widest sense at the central, regional and provincial levels. These adjustments are therefore the result of organizational and functional decisions that are not aimed at any person in particular, much less at curtailing the trade union activities of the associations that exist within the institution.

*III. Situation of the public servants mentioned in the complaint*

- 385.** The Government states that Mr Fernando Hidalgo Rojas is a public servant employed on a regular contract. He is classed as a grade 13 inspector (*fiscalizador*) and was appointed as a grade 11 inspector (*fiscalizador*) on a fixed-term contract to the Provincial Labour Inspectorate of Linares, Seventh Region of Maule, where he currently works as the Provincial Labour Inspector. He is a leader of APU and currently serves as the treasurer of the organization. Mr Hidalgo has worked for the institution for 11 years. He was initially employed as a grade 16 inspector (*fiscalizador*) on 1 June 2000 under Resolution No. 167 of 25 May of the same year. After several appointments, including a promotion to a grade 15 inspector (*fiscalizador*) employed by the institution on a regular contract under Resolution No. 414 of 27 July 2009, Mr Hidalgo was appointed as the Provincial Labour Inspector of Linares under Exempt Resolution No. 1436 of 29 March 2007, having successfully completed the recruitment process announced in Circular No. 138 of 7 December 2006, which set out the criteria governing the recruitment of chiefs to the offices based in Calama, Choapa Illapel, San Antonio, Linares, Molina and Puerto Montt. Paragraph III of the aforementioned Circular, entitled *Conditions governing posts*, provides that:

Having completed three years in the post, the Labour Director can decide to grant a three-year extension or to call for a new recruitment process. In order to take this decision, the Labour Director must be in possession of 4 reports: one report from the appropriate Regional Director, one from the Chief of the Labour Inspection Department, one from the Chief of the Labour Relations Department and one from the Chief of the Legal Department.

- 386.** By exercising her power to call for a new competition once the period of three years referred to in the aforementioned paragraph had elapsed, she proceeded to include the Provincial Labour Inspectorate of Linares in the call for the competition, which was held by the national authority and announced in Circular No. 102 of 30 August 2010, with a view to recruiting chiefs to the following Labour Inspectorates: the Provincial Labour Inspectorate of Iquique, the Communal Labour Inspectorate of Pozo Almonte, the Provincial Labour Inspectorate of Antofagasta, the Provincial Labour Inspectorate of San Felipe, the Communal Labour Inspectorate of Quilpue, the Provincial Labour Inspectorate of Concepción, the Provincial Labour Inspectorate of Ñuble, the Provincial Labour Inspectorate of Arauco, the Provincial Labour Inspectorate of Punta Arenas, the Provincial Labour Inspectorate of Tierra del Fuego, the Provincial Labour Inspectorate of Valdivia, the Provincial Labour Inspectorate of La Unión, the Provincial Labour Inspectorate of Arica, the Provincial Labour Inspectorate of Santiago Centro, the Provincial Labour Inspectorate of Melipilla, the Communal Labour Inspectorate of Buin, the Communal Labour Inspectorate of Santiago Norte and the Communal Labour Inspectorate of Norte

Chacabuco. However, it was noted that the decision to include the Provincial Labour Inspectorate of Linares necessitated special criteria (namely, the four reports), which differed from the criteria for recruiting chiefs to the remaining Labour Inspectorates, mentioned in Circular No. 102. Subsequently, in an effort to streamline the criteria for recruiting chiefs through the competition and to avoid the candidates for the post at the Provincial Labour Inspectorate of Linares having to satisfy criteria that candidates for the other Labour Inspectorates did not, a decision was taken to expressly exclude the Provincial Labour Inspectorate of Linares from the recruitment process in Circular No. 112 of 10 September 2010. Therefore, the post of Provincial Labour Inspector of Linares occupied by Mr Hidalgo Rojas was not affected in any way.

- 387.** The Government wishes to underline that in no way has the current administration violated or attempted to violate the trade union immunity of Mr Hidalgo Rojas who, to date, is performing his functions as the Provincial Labour Inspector of Linares without restriction, the very functions he falsely claims the authority to have infringed.
- 388.** As regards Ms Elena Creus Castro, she is the incumbent national president of APU and has been a leader of the organization since 1991. She is a public servant employed on a regular contract and is classed as a grade 7 professional. She joined the Labour Directorate on 17 August 1981 (between 1 January 1985 and 5 October 1986 she worked for the Social Security Service) and, since 6 October 1986, she has been working for the Labour Inspection Department, where she currently works as a legal advisor. In that Department, Ms Creus was Chief of the Fine Control and Review Unit until 2003, before being appointed as Chief of the Legal Unit, a post which she occupied until March 2011 before beginning work as a legal advisor following the restructuring of the Labour Directorate and of her department in particular, which led to the closure of the Legal Unit. The reasons for this closure will be explained below. It should be noted that, under Resolution No. 1142 of 6 October 2003, the Fine Control and Review Unit to which Ms Creus belonged was closed following the transfer of its functions to a new unit (the User Services Unit), created under the same Resolution, causing the public servant to be appointed to the Legal Unit, also established under that Resolution, in spite of her status as a trade union leader at that time.
- 389.** As regards the closure of the Legal Unit, the Government highlights that Resolution No. 1142 of 6 October 2003 established the structure of the Labour Inspection Department (previously known in Spanish as the *Departamento de Fiscalización*), which included four operative units, namely the Legal Unit, the Management Unit, the Inspection Support and Assessment Unit and the User Services Unit. Over time, its functional structure was subject to a number of alterations, which included the Management Unit overseeing the activities of the Inspection Support and Assessment Unit until March 2011. This also included specific tasks such as those overseen by what was then known as the Autonomous Inspection Unit, which had its own legal service. At the same time, the Legal Department gradually came to provide the technical support of a legal nature required for inspection activities, especially during the last four years, in keeping with the authority's desire to devise a strategy that was more cross-cutting in terms of the service's operational lines (legal and inspection lines as well as labour relations).
- 390.** As regards the assimilation of the Legal Unit, it should be noted that, under Resolution No. 1142, it was composed of two public servants (lawyers) and their respective functions, which were to advise the Chief of the Legal Department on legal matters falling within their area of competence, especially on proposing criteria and approaches for issuing authorizations and resolutions; to assist the office of the Chief of the Legal Department; to study and disseminate administrative jurisprudence on operational lines in response to queries and to submit requests based on emerging needs to the Legal Department; to assist

with external queries, complaints and requests submitted to the service, either directly or through government channels, by drafting appropriate replies.

- 391.** The arrival of the new Government led to the adoption of measures aimed at modernizing and optimizing the functioning of labour services which, in turn, necessitated a further restructuring of the Labour Inspection Department, which entailed the creation of new units and the closure of others from 8 March 2011, including the Legal Unit. Following the closure of the Legal Unit, Ms Creus was appointed as a legal advisor within the Labour Inspection Department and was required to perform the following functions: to advise the Chief and Deputy Chief of the Labour Inspection Department, as well as the units it comprises, on legal matters falling within her area of competence and especially on proposing criteria and approaches for issuing authorizations and resolutions; to study and disseminate administrative jurisprudence in response to queries and to submit requests based on emerging needs to the Legal Department; to complete all tasks assigned to her by the Chief or Deputy Chief of the Labour Inspection Department that fall within her area of legal competence; whenever it is necessary, to advise the Chief and Deputy Chief of the Labour Inspection Department, as well as the chiefs of its units, on drafting legal documents to deal with external queries, complaints and requests submitted to the service, either directly or through government channels.
- 392.** As regards the new structure of the Labour Inspection Department, the Government has already explained that new approaches, needs and institutional challenges compelled the authority to restructure the Labour Directorate. Thus, following the creation of the User Services Unit referred to in the preceding paragraphs, the authority proceeded to establish and streamline a new organizational and functional structure for the Labour Inspection Department at the beginning of March 2011, as provided for under Exempt Resolution No. 176. The Exempt Resolution established the structure of the Labour Inspection Department, which is composed of an executive board overseen by a chief and a deputy chief, and of the following five units: (1) the Plans and Programmes Unit; (2) the Electronic Fine Administration Unit; (3) the Instructions and Procedures Control Unit; (4) the Normative Oversight and Request Management Unit; and (5) the Labour Security and Health Unit. As stated in the text of the Exempt Resolution, its entry into force repealed any internal norms governing the composition of the Labour Inspection Department that ran counter to its new structure. It is in the context of the aforementioned changes that the appointment of Ms Creus as a legal advisor within the department should be considered.
- 393.** Lastly, as regards the aforementioned restructuring, it should be noted that Ms Creus took 25 days of annual leave from 31 January 2011, returning to work on 7 March 2011, when she was informed of the plans for the department by the Deputy Chief of the Labour Inspection Department, Mr Gabriel Ramírez. Following the announcement of Exempt Resolution No. 176 and, at the request of Ms Creus, the Chief of the Labour Inspection Department explained to her in detail the functions she was to perform within the new departmental structure, which, naturally, are similar to those she performed prior to the aforementioned changes.

*IV. Full respect for the freedom of association of public servant associations within the Labour Directorate*

- 394.** The Government states that, in Chile, the Labour Directorate has been the greatest defender of freedom of association in the different areas where it is exercised and has devised long-term and cross-cutting policies, as well as practical outcomes, with the aim of safeguarding the right of workers to establish organizations and enabling these organizations to function in keeping with the autonomy accorded to them by law. Moreover, over the last 20 years, the service has played an undeniable role in protecting

the individual and collective rights of workers, especially following the labour reform provided for under Act No. 19759 and the more recent procedural reform provided for under Act No. 20087, which have paved the way for the effective recognition of fundamental rights in the labour sphere which, incidentally, include the right to freedom of association.

- 395.** In this context, the establishment and functioning of public servant organizations within the Labour Directorate is a totally natural process that ensures full respect for the autonomy of the two existing organizations, namely APU and ANFUNTCH. However, the present complaint would make more sense if the actions of the authority involved either restricting the normal trade union activities of Mr Hidalgo and Ms Creus or the functioning of the association within the Labour Directorate, be it at the central, regional or communal level. However, this is in no way the case. It is sufficient to note that, last May, APU reshuffled its executive board without impediments or restrictions, in total freedom and with the relevant facilities of the service at its disposal. Both public servants were free to participate in this process to the extent that Ms Creus was able to obtain the number of votes required to become the national president of the organization for the period 2012–13, while Mr Hidalgo secured the post of national director for the same period.
- 396.** The Government states that, as is the case with all the leaders of the two associations operating within the Labour Directorate, Ms Creus, in her capacity as a leader and as a public servant at the central level, retains all her freedoms, rights, benefits and opportunities to fulfil her role as a representative, which can be verified both before and after the restructuring of the service. Thus, it is clear that her superiors are flexible in granting her trade union leave. She also enjoys unlimited personal, written, telephone and email access to public servants of different grades working at the central, regional, provincial and communal levels. The same applies to her relations with other associations and she enjoys constant access to the different authorities of the institution. Similarly, the authority does not restrict the trade union activities of Mr Hidalgo, a public servant appointed to the region of Maule, even when he has been appointed as the chief of a provincial office.
- 397.** It should also be noted that both associations, as well as their leaders, enjoy access to the email facilities of the Labour Directorate. Leaders are free to send any kind of communication to the service's generic inboxes, which ensures that any communication reaches every public servant in the country. This has been demonstrated over the last few weeks by the circulation of statements, meant for public disclosure, that openly criticize the Government through this institutional medium, as well as by exchanges of opinion concerning the restructuring of the Labour Directorate. Moreover, the associations and their leaders are still free to make use of other resources for their trade union activities, such as meeting rooms, telephones, wall calendars, links on the intranet site of the Labour Directorate, etc. without restriction.
- 398.** The allegation concerning the violation of freedom of association also lacks doctrinal evidence. No aspect of the freedom of association enjoyed by the association and the leaders in question has been affected in the slightest by the organizational and functional restructuring ordered by the Labour Directorate, which has already been described in detail in the preceding paragraphs. There is no debate as to the status of Mr Hidalgo and Ms Creus as trade union leaders, nor is any attempt being made to deny the applicability of section 25 of Act No. 19296 in this case. However, at the same time, it should be noted that their right to freedom of association has not been curtailed in any way. Similarly, it should be noted that in no way does this case constitute a violation of ILO Convention No. 151.

**399.** As regards Act No. 19296, which regulates the functioning of public servant associations, and the binding jurisprudence of the Office of the Comptroller General of the Republic, the Government states that since the legal framework in question is determined by provisions with a basis in administrative law, it is necessary to consider the jurisprudence of the Office of the Comptroller General of the Republic applicable to this case, in addition to the information contained in the preceding paragraphs. It should be noted that, by law and in accordance with the Constitution, the Labour Directorate, as a public service, is subject to the oversight of the Office of the Comptroller General of the Republic, given that its rulings are legally binding upon the Government currently in power, as may be deduced from Act No. 10336 and the relevant administrative jurisprudence.

**400.** Section 25 of Act No. 19296, which is invoked in the complaint, provides that:

Directors of public servant associations shall enjoy trade union immunity, in other words, they shall be protected from dismissal from the date of their election until six months after their resignation, provided that their resignation does not occur as a result of censure by the assembly of the association in question or of formal removal from office as a disciplinary measure authorized by the Office of the Comptroller General of the Republic. Similarly, immunity shall not apply in the case of the dissolution of an association, when that dissolution is the result of the application of section 61, paragraphs (c) and (e), or of factors provided for in the internal regulations, provided that, in the latter case, the factors in question attribute culpable or malicious conduct to the directors of that association. Moreover, during the period referred to in the previous paragraph, leaders shall not be transferred from the place or post they occupy without their written consent. Similarly, they shall not be subject to annual assessments during that period unless such an assessment is expressly requested by the leader. If no such request is made, the most recent assessment shall apply for all legal purposes. Directors of public servant associations shall have the right to request information from the authorities of the relevant institution on issues and norms related to the objectives of the associations and to the rights and obligations of their members. The authorities of the institution shall receive leaders appropriately and provide them with the relevant information. Moreover, they shall have the right to request participation in the examination of policies concerning the rights and obligations of the personnel of the institution in question.

**401.** The Office of the Comptroller General of the Republic, harmonizing the remit of section 25, paragraph 2 with the provisions of section 31, paragraph 2 of the Constitutional Act establishing the General Principles of the State Administration (Act No. 18575) (which empowers chiefs to direct, organize and administer their service; to monitor it, to ensure compliance with its objectives and to oversee its management), stipulated in Decision Nos 7659 of 2010, 45740 of 2008, 26282 of 2009, 26948 of 2009, 60641 of 2009 and 62877 of 2009, 20111 of 2007 and 55884 of 2007 that, while trade union leaders are protected by the immunity referred to in section 25 of Act No. 19296, which guarantees their right not to be transferred from the place or post they occupy, this cannot, however, prevent the authority of the service in question from exercising its power to reform or restructure its offices when circumstances call for such an action, especially when this internal restructuring has a basis in section 5 of Act No. 18575, which provides that authorities shall ensure the effective functioning of public services. In addition, Decision Nos 7526 of 2006, 38610 of 2005 and 49115 of 2000 of the same regulatory body maintain that a post whose nomenclature has not been provided for in the law regulating the distribution of permanent staff, as in the case of Ms Creus, may be assigned or entrusted functions. These Decisions add that the cessation of the functions entrusted to a leader does not constitute a violation of the trade union immunity referred to in section 25 of Act No. 19296 since it merely signals the end of a circumstantial situation defined by the needs of the institution.

**402.** The Office of the Comptroller General of the Republic adds that the cessation of the functions entrusted to a leader does not constitute a violation of the trade union immunity referred to in section 25 when, according to this principle, the functions that leaders are

entitled to retain are those attached to the post to which they have been appointed. The Government adds that the regulatory body has, in turn, pointed out that assigned or entrusted functions do not constitute a right that features in the patrimony of public servants who are assigned specific tasks but, in fact, constitute a necessary administrative measure that the authority must adopt in order for the relevant service to meet public or collective needs in a regular, uninterrupted and permanent manner. Lastly, as regards the case of Mr Hidalgo, it is difficult to see how the right he invokes (the right not to be transferred from the place or post he occupies without his consent) has been violated when, as has been explained, the functions assigned to him corresponded to those of the chief of office (the Provincial Labour Inspector of Linares) which, in this case, were already subject to review every three years; the same functions that, incidentally, he performs to date.

### **C. The Committee's conclusions**

- 403.** *The Committee observes that, in the present case, APU and ANEF allege that since the current Government came to power on 11 March 2010, the authority of the Labour Directorate proceeded to implement policies that violated the rights of the leaders of public servant associations, particularly those of the leaders of APU. They allege that: (1) in order to remove Mr Fernando Hidalgo Rojas, the national treasurer of APU, from his post, the authority of the Labour Directorate called for a new recruitment process to fill the post occupied by the leader, who was the successful candidate in an internal recruitment process (the complainants state that the authority only overturned its decision after they publicly denounced this act); and (2) Ms Elena Creus Castro, the national president of APU, was removed from her post while she was on legal leave. The Committee notes that (i) ANFUSEGG alleges that, between March 2010 and the first trimester of 2011, 178 public servants employed on fixed-term or fee contracts were dismissed from the Ministry for being members of ANFUSEGG and for participating in normal trade union activities (according to the complainant, the Third Constitutional Chamber of the Supreme Court of Justice validated the dismissals); and (ii) FENAMINSA also alleges that, between March 2010 and the first trimester of 2011, 800 public servants employed on a fixed-term or fee contract were dismissed (some of whom had served for over 30 years) for being members of this trade union organization (according to the complainant, the Office of the Comptroller General of the Republic and the Supreme Court of Justice validated these dismissals).*
- 404.** *As regards the allegations of APU and ANEF, the Committee takes note of the Government's statement to the effect that: (1) the arrival of the new Government in 2010 led to a natural change of administration in public institutions, including the Labour Directorate, which comes under the authority of the Ministry of Labour and Social Security, and whose activities fall within an area that is particularly complex and subject to change; (2) in this context, the need to adopt diverse and progressive measures aimed at equipping the institution to successfully meet internal and external demands, and to complete the tasks entrusted to it for the common good, has proven unavoidable; (3) the Labour Directorate, following the completion of the relevant studies and assessments, called for changes, adjustments and streamlining measures, not only within its regional and local bodies but also within the departmental structures at the central level (whereby new chiefs were appointed); and (4) it is clear that the series of adjustments carried out within the Labour Directorate, which is behind the complaint lodged by the organizations in question, may be attributed to global restructuring or to restructuring that addresses operating lines in the widest sense at the central, regional and provincial levels. These adjustments are therefore the result of organizational and functional decisions that are not aimed at any person in particular, much less at curtailing the trade union activities of the associations that exist within the institution.*

405. *As regards the allegation that a competition was called with the aim of removing the leader Mr Fernando Hidalgo Rojas from his post (a decision which was eventually overturned), the Committee takes note of the Government's statement to the effect that: (1) Mr Hidalgo has worked for the institution for 11 years and, under Exempt Resolution No. 1436 of 29 March 2007, was appointed as the Provincial Labour Inspector of Linares, having successfully completed the recruitment process announced in Circular No. 138 of 7 December 2006, which set out the criteria governing the recruitment of chiefs for the offices based in Calama, Choapa Illapel, San Antonio, Linares, Molina and Puerto Montt; (2) paragraph III of the aforementioned Circular provides that "having completed three years in the post, the Labour Director can decide to grant a three-year extension or to call for a new recruitment process. In order to take this decision, the Labour Director must be in possession of four reports: one report from the appropriate Regional Director, one from the Chief of the Labour Inspection Department, one from the Chief of the Labour Relations Department and one from the Chief of the Legal Department; (3) by exercising her power to call for a new competition once the period of three years referred to in the aforementioned paragraph had elapsed, she proceeded to include the Provincial Labour Inspectorate of Linares in the call for the competition, which was held by the national authority. However, it was noted that the decision to include the Provincial Labour Inspectorate of Linares necessitated special criteria (namely, the four reports), which differed from the criteria for recruiting chiefs to the remaining Labour Inspectorates; (4) in an effort to streamline the criteria for recruiting chiefs, a decision was taken to expressly exclude the Chief of the Provincial Labour Inspectorate of Linares. Therefore, the post occupied by Mr Hidalgo Rojas was not affected in any way; and (5) in no way has the current administration violated or attempted to violate the trade union immunity of the leader in question. In the light of this information, the Committee will not pursue its examination of this allegation.*
406. *As regards the alleged removal of Ms Elena Creus Castro, the president of APU, from her post while she was on legal leave, the Committee takes note of the Government's statement to the effect that: (1) Ms Castro is a public servant employed on a regular contract who has been working for the Labour Inspection Department since 6 October 1986, where she currently works as a legal advisor; (2) she was Chief of the Fine Control and Review Unit until 2003, before being appointed as Chief of the Legal Unit, a post which she occupied until March 2011 before beginning work as a legal advisor following the restructuring of the Labour Directorate, which led to the closure of the Legal Unit; (3) under Resolution No. 1142 of 6 October 2003, the Fine Control and Review Unit to which Ms Creus belonged was closed following the transfer of its functions to a new unit created under the same Resolution, causing the public servant to be appointed to the Legal Unit in spite of her status as a trade union leader; and (4) following the closure of the Legal Unit, Ms Creus was appointed as a legal advisor within the Labour Inspection Department with functions similar to those she carried out prior to these changes. In the light of the information provided by the Government and given the fact that the public servant is still performing the functions she carried out prior to the aforementioned restructuring, which do not prevent her from carrying out her trade union activities, the Committee will not pursue its examination of this allegation.*
407. *Lastly, the Committee regrets that the Government has not replied to the allegations made by ANFUSEGG concerning the dismissal of 178 public servants employed on fixed-term or fee contracts from the Ministry for being members of ANFUSEGG and for participating in normal trade union activities, or to those made by FENAMINSA concerning the dismissal of 800 public servants employed on a fixed-term or fee contract, some of whom had served for over 30 years, for being members of the trade union organization. In these conditions, the Committee urges the Government to reply to those allegations without delay.*

## The Committee's recommendation

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

*The Committee urges the Government to reply, without delay, to the allegations made by ANFUSEGG concerning the dismissal of 178 public servants employed on a fixed-term or fee contract from the Ministry for being members of ANFUSEGG and for participating in normal trade union activities, and to those made by FENAMINSA concerning the dismissal of 800 public servants employed on a fixed-term or fee contract, some of whom had served for over 30 years, for being members of the trade union organization.*

CASE NO. 2852

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

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

- **the Textile Industry of Workers of Colombia (SINTRATEXTIL – Medellín branch)**
- **the Workers' Association of Leonisa SA (ASOTRALEONISA) and**
- **the Single Confederation of Workers of Colombia (CUT)**

*Allegations: The complainants allege that, as part of anti-union persecution in LEONISA SA, trade union membership by workers has been obstructed and impeded, the collective bargaining agreement in force has been violated (members are denied the right to housing loans and to compensation for unfair dismissal) and, since 2002, no signing of a new collective agreement has been allowed*

**409.** This complaint is contained in a communication from the National Union of Workers of the Textile Industry of Colombia (SINTRATEXTIL – Medellín branch), the Workers Association of Leonisa SA (ASOTRALEONISA) and the Single Confederation of Workers of Colombia (CUT) dated 24 March 2011. The complainant organizations sent additional information in communications dated 20 June and 30 September 2011.

**410.** The Government sent its observations in communications dated 11 October 2011 and 24 September 2012.

**411.** 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 complainants' allegations

**412.** In their communications dated 24 March, 20 June and 30 September 2011, SINTRATEXIL – Medellín branch, a national organization, the ASOTRALEONISA and the CUT state that a trade union has existed in LEONISA SA for 52 years, formerly known as SINTRALEONISA. Today, there are two trade unions, one an industrial union, called SINTRATEXIL – Medellín branch, and the other a general union, called ASOTRALEONISA. Since its formation in 1958 until 1990, LEONISA SA complied with ILO Conventions Nos 87 and 98, signing a collective labour agreement, which applied to all workers (both union members and non-union members). These negotiations were agreed and signed by direct settlement in stages, as required by law. In other words, there had never been a strike, or recourse to an arbitration tribunal. Since 15 June 1992, the company has been lifting the legal and extralegal benefits contained in the collective agreement and imposing it on workers as a collective accord. From that year, the company began offering cash gifts to workers if they signed the collective accord.

**413.** The complainants state that in 1995 they filed for a protection order, seeking protection of the fundamental rights of free association and collective bargaining and the right to equality. On 2 August 1995, the Constitutional Court ruled in favour of the trade union organization, in judgment No. SU-342/95, whereby it was decided:

First. ... to grant protection of the infringed equal rights to freedom of association and collective bargaining of the petitioners, trade union, union members and non-union members who were beneficiaries of the collective labour agreement. Third. To order the company, henceforth and when concluding collective accords and collective agreements governing working conditions both for non-union workers who are signatories to those accords and for union workers, to refrain from setting working conditions in the aforementioned accords that are discriminatory against union workers and that result in the violation not only of the right to equality but also to freedom of association and collective bargaining.

According to the complainants, in practice the company continues to violate these rights since it fails to recognize protected and conventional rights.

**414.** The complainants contend that from 1992 to 2000 the collective agreement was updated in line with the economic benefits given in the collective accord, and that since 2002 no new agreement has been signed. They report that the company has 1,150 workers hired directly by it; it has branch companies with an average of 2,000 workers, 80 per cent of whom are hired under a union contract; production is carried out in over 200 workshops (micro companies) and these are non-contractual piece-rate workers; it has over 100,000 workers nationwide in catalogue sales with no benefits or contractual relationship; it uses all forms of outsourced recruitment allowed under Colombian labour legislation; and has four cooperatives, which have over 3,000 hired workers.

**415.** The complainants state that the company's two trade unions only had 140 union members between them.

**416.** In October 2006, recruitment began through union contracts with the trade union called SINTRACONTEXA. Today, it has over 1,400 workers through this form of outsourcing.

**417.** Specifically, the complainants allege that the company has been systematically violating the labour rights of its workers, attempting to polarize union and non-union workers with the following reprehensible behaviour:

- repression, anti-union persecution and discrimination of trade union members, by:
  - (a) violation of the fundamental right of free association. Trade union membership by workers has been obstructed and impeded through promises, gifts and pressure tactics

in the workplace. Refusal of benefits to those who dare to exercise the right to join a trade union, and (b) violation of the fundamental right of collective bargaining (refusal to negotiate with the trade union organizations on their legal set of claims);

- violation of the collective agreement, in the form of: (a) misappropriation by the company of the compensation to which the unionized workers have a right through the collective agreement when they are unfairly dismissed, and (b) denial of the right to housing loans to workers who are trade union members.

(The complainants also refer to other issues not connected to violations of trade union rights.)

- 418.** According to the complainants, the only form of protection available to them is by filing a set of claims to generate a financial dispute and thus obtain circumstantial immunity, which prevents unfair dismissal.

## **B. The Government's reply**

- 419.** In its communication dated 11 October 2011, the Government reports that in letter No. 1620 of 19 February 2010, the trade union organization ASOTRALEONISA requests the Ministry to investigate LEONISA SA for refusal to initiate discussions about the set of claims filed by the trade union in question. The investigation concluded with decision No. 0386 of 30 August 2010, fining the company 5,150,000 pesos. In legal appeals lodged, the penalty was upheld in both instances. The Government adds that, in letter No. 2078 of 3 March 2010, SINTRATEXTIL requests that LEONISA SA be investigated for alleged anti-union persecution. The investigation concluded with decision No. 2056 of 9 December 2010, declaring that the entity did not have the authority to settle the case submitted to it for consideration. Appeals lodged through government channels were rejected for non-compliance with the requirements of article 52 of the Administrative Disputes Code.

- 420.** The Government reports that on 5 August 2011 a ratification and clarification request was signed, in follow-up to the citation served by the Ministry in the light of the complaint presented jointly by SINTRATEXTIL – Medellín branch and ASOTRALEONISA to the ILO. In the aforementioned request, the representatives of the trade union organizations in question asked the Ministry for the complaint presented to be taken over by the Labour and Social Security Affairs Division of the Office of the Attorney-General, given that the Ministry carried out labour administrative investigations and referred them to the authority of the ordinary labour courts, as it could not settle issues falling within the jurisdiction of labour judges. The Ministry, in letter No. 14305-007602 of 17 August 2011, referred the aforementioned request and documents containing the complaint presented by the trade union organizations to the Deputy Attorney-General for Labour and Social Affairs. It was currently awaiting the decision of the Office of the Attorney-General.

- 421.** The Government states that pursuant to article 19 of Act No. 584 of 2000, in decision No. 0001070 of 2011, the Ministry orders the establishment of a compulsory arbitration tribunal in LEONISA SA. The company LEONISA SA lodged an appeal and sought the revocation of the aforementioned decision; this was settled through decision No. 00003177 of 29 July 2011, upholding the decision and exhausting administrative remedies.

- 422.** The Government reports that in connection with this case the following legal proceedings were initiated: protection proceedings, on the grounds that protection of the constitutional right to free association is being denied (Municipal Criminal Court No. 2, 23 November 2007); and on 8 February 2008 the Circuit Criminal Court No. 11 upheld the decision.

423. Lastly, the Government reports that labour administrative proceedings and legal action have been taken in this case, which the administrative authority abides by in the exercise of the separation of public powers. Again, it awaits the decision of the Office of the Attorney-General.
424. In its communication dated 24 September 2012, the Government indicates that a meeting of the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT) took place with regard to the issues raised in this case and that while the efforts of the parties did not result in an agreement, the stakeholders expressed their will to engage in dialogue. The Government transmits a communication from LEONISA SA in which the latter indicates that it had returned to the complainant, ASOTRALEONISA, trade union membership dues deducted from workers affiliated to this organization (in the present case, the complainant has not raised the question of trade union membership dues).

### C. The Committee's conclusions

425. *The Committee observes that in this case the complainants allege that, as part of anti-union activities in LEONISA SA, trade union membership by workers has been obstructed and impeded, the collective bargaining agreement in force has been violated (members are denied the right to housing loans and to compensation for unfair dismissal) and, since 2002, no signing of a new collective agreement has been allowed.*
426. *With regard to the allegations of anti-union activities in the company, the Committee notes that the Government reports that: (1) on 3 March 2010, SINTRATEXIL requested that the company be investigated for alleged anti-union persecution; (2) an investigation was carried out, which concluded with decision No. 2056 of 9 December 2010, in which it was declared that it did not have the authority to settle the case submitted to it for consideration; (3) on 5 August 2011 a request of confirmation was signed, in which the trade union organizations SINTRATEXIL – Medellín branch and ASOTRALEONISA asked the Ministry for the complaint presented to be taken over by the Labour and Social Security Affairs Division of the Office of the Attorney-General, given that the Ministry carried out labour administrative investigations and referred them to the authority of the ordinary labour courts, as it could not settle issues falling within the jurisdiction of a labour judge; and (4) on 17 August 2011, the Ministry referred to the Deputy Attorney-General for Labour and Social Affairs the aforementioned request and documents of the complaint presented by the trade union organizations and is currently awaiting the decision of the Office of the Attorney-General. In that regard, the Committee expects the Office of the Attorney-General to give a decision in the near future on the allegations of anti-union persecution and requests the Government to keep it informed thereof.*
427. *With regard to the allegation that since 2002 no signing of a new collective agreement has been allowed, the Committee notes that the Government states that: (1) in a letter dated 19 February 2010 the trade union organization ASOTRALEONISA requested the Ministry to investigate the company for refusal to initiate discussions about the set of claims filed by the trade union; (2) the investigation concluded with decision No. 0386 of 30 August 2010, fining the company 5,150,000 pesos; (3) legal appeals were lodged and the penalty was upheld in both instances; (4) pursuant to article 19 of Act No. 584, the Ministry ordered, in decision No. 0001070 of 2011, the establishment of a compulsory arbitration tribunal in the company; and (5) the company lodged an appeal against that decision, which was rejected, upholding the decision and exhausting administrative remedies. In that regard, the Committee, while taking note of the measures adopted by the Government concerning the difficulties preventing the parties from being able to conclude a collective agreement, strongly expects that the arbitration tribunal convened by the administrative authority will complete its tasks expediently and make an arbitral award in settlement of the dispute.*

**428.** *Lastly, concerning the allegation that the company is violating the collective agreement in force (members are denied the right to housing loans and to compensation for unfair dismissal), the Committee requests the Government to take all necessary steps to ensure that an investigation is carried out in that connection and that, in the event the allegations are found to be true, to guarantee implementation of the collective agreement and to apply the penalties provided for in legislation.*

### **The Committee's recommendations**

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

- (a) With regard to the allegations relating to anti-union activities in LEONISA SA, the Committee expects the Office of the Attorney-General to give a decision in the near future and requests the Government to keep it informed thereof.*
- (b) Concerning the allegation that, since 2002, no signing of a new collective agreement has been allowed in the company, the Committee strongly expects that the arbitration tribunal convened by the administrative authority will complete its tasks expediently and make an arbitral award in settlement of the dispute.*
- (c) Regarding the allegation that the company is violating the collective agreement in force (members are denied the right to housing loans and to compensation for unfair dismissal), the Committee requests the Government to take all necessary steps to ensure that an investigation is carried out in that connection and that, in the event the allegations are found to be true, to guarantee implementation of the collective agreement and to apply the penalties provided for in legislation.*

CASE NO. 2829

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

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

- **the Korean Confederation of Trade Unions (KCTU) and**
- **the Korean Public Services and Transportation  
Workers Union (KPTU)**

*Allegations: The complainant organizations allege repression of trade unions and violation of collective bargaining rights in several public institutions and enterprises; the issuance by the Government of a series of directives to curb trade union activities in general; and the refusal to recognize cargo truck drivers as workers and threat to cancel the trade union registration of the Korean Transport Workers' Union (KTWU)*

- 430.** The complaint is contained in communications from the Korean Confederation of Trade Unions (KCTU), and the Korean Public Services and Transportation Workers Union (KPTU), received on 10 January and 10 March 2011.
- 431.** The Government sent its observations in a communication dated 28 October 2011.
- 432.** The Republic of Korea 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**

- 433.** In communications received on 10 January and 10 March 2011, the complainant organizations allege repression of trade unions and violation of collective bargaining rights in several public institutions and enterprises; the issuance by the Government of a series of directives to curb trade union activities in general; and the refusal to recognize cargo truck drivers as workers and threatening the cancellation of the trade union registration of the Korean Transport Workers' Union (KTWU).
- 434.** In the complainants' view, since the inauguration of the new Government in 2008, the freedom of association of workers, an inalienable part of basic human rights, has been severely violated in South Korea. Workers in the public sector are particularly denied their basic labour rights such as the right to organize, the right to collective bargaining and the right to collective action. The Korean Government has issued a series of directives to curb trade union activities in general. Moreover, the so-called "Advancement of Public Institutions" project has resulted in strained labour relations, and, in case of resistance, public sector workers face draconian repression. The complainants summarize the infringements as follows.

**435.** The Railway Workers' Branch (the Korean Railway Workers' Union (KRWU)) of the KTWU, an industrial union affiliated to the KPTU, started collective bargaining in July 2008. Their employer, the Korea Railroad Corporation (KORAIL), proposed an offer for the collective agreement, according to which about 120 clauses out of 170 provisions of the previous collective agreement were to result in deterioration of working conditions. The proposed terms were aimed at removing the guarantee of trade union activities, forcing the trade union to consent to workforce reduction, reducing paid leaves, and adjusting the work system. The KRWU, seeking to make a compromise with the management through dialogue, made a concession and accepted most of the terms proposed by the management. However, KORAIL notified the trade union of the termination of the collective agreement on 24 November 2009. Two days later, the KRWU went on strike. Evidence now shows that the unilateral termination of the agreement by the management was intended to provoke the trade union into taking strike action. An internal company document was disclosed, which clearly says, "[the management] will provoke the trade union into waging a strike action by pressing it with collective agreement termination". Moreover, according to the document, the management was planning to force trade union members to abandon their trade union membership. The plot was that if the Government declares the provoked strike illegal, the management would debilitate the union through massive disciplinary measures, dismissal of unionists, and pressure on the members to withdraw from the union. The plot is still in operation. The November 2009 strike by the KRWU complied with regulations and legal procedures required to stage a strike. This time the trade union maintained essential services as required by law, even though the trade union recognizes that such regulation severely undermines the union's right to collective action. However, the administration called the strike illegal on the charge of business obstruction. The Government argued that the strike was to oppose government policies, which is not a subject of labour-management negotiation under pertinent labour laws. In this case, the government policies refer to the plan to advance public institutions. The trade union waged the strike to tackle expected degradation of working conditions. However, the Government argues that such activities constitute an objection to the government policy that is beyond the authority of individual employers. This means that all collective actions against public institutions that are subject to government directives and policies will be declared illegal. During the strike, arrest warrants were issued to 15 major trade union officials, and the trade union's office was seized for investigation by police. Later, 169 union officials were dismissed, and over 12,000 union members who participated in the industrial action faced disciplinary measures.

**436.** In the case of the Gas Corporation Chapter of the Korean Public and Social Service Workers' Union (KPSU), which is affiliated to the KPTU, a collective agreement reached by the management and the union was nullified due to unfair government intervention. In addition, the management offered deteriorated collective agreement terms in step with the public institution advancement project, and the trade union made a concession after a series of negotiation rounds to avoid the worst situation in its labour-management relations. Of course, the poisonous terms were mainly requested by the Government, as shown in the offer of the management. Finally, the two parties came to conclude a new collective agreement on 31 March 2010, which was scheduled to enter into effect from 30 April. However, the management refused to execute the agreement, as the Government took a firm stance and demanded that the management further deteriorate the terms of the collective agreement. The union filed a suit to verify the validity of the new collective bargaining agreement (CBA) and applied for an "injunction against obstruction of union activities". A court ruled in favour of the validity of the collective agreement. The management of the Korea Gas Corporation (KOGAS) had repressed the union in accordance with the overall government policy against public institution trade unions when KOGAS and the union negotiated the collective agreement. In November 2009, the union went on strike to press for the conclusion of a collective agreement through autonomous

labour–management negotiation. The Government and management, however, accused ten union officials on charges of obstruction of business defined by the Criminal Act, and a prosecutor demanded imprisonment of up to 12 months for them.

- 437.** In the case of the Social Solidarity Pension Chapter of the KPSU, similarly, the management repressed labour in step with the government’s instructions for the “advancement” of public institutions and their labour relations. The management also proposed the detrimental revision of the CBA, which would generally stifle trade union activities. Reaching an agreement between the two sides seemed to be difficult. The working-level representatives from the two parties, which had full responsibility for bargaining, however, had reached a provisional agreement on 23 December 2009, but the management overturned it and proposed additional revisions for the worse instead. The management is pushing forward the implementation of an annual salary system under the pretext of the government’s instructions and efficiency of performance evaluations. The union opposed the new compensation scheme, and the management responded by terminating the CBA in March 2010. Despite the union’s opposition to the annual salary system and other attempts to deteriorate working conditions as well as to curb union activities, the management is simply demanding that the union accept the new proposals, insisting they are consistent with government instructions. The union could not help but protest against the newly proposed provisions, but when the union began its collective action in July 2010, the management and Government brought charges against it, just as in the other cases. Six standing union officers were charged with obstruction of business under the Criminal Act. The management has refused to participate in any negotiation and is simply waiting for the union to give in, as there is no CBA in effect.
- 438.** In the case of the Korean Labour Institute Chapter of the Korean Union of Public Sector Research and Professional Workers (KUPRP), the management notified the union of cancellation of the CBA in February 2009. As can be expected, this was part of the destruction of labour–management relations and evisceration of unions taking place in the name of the government’s policy for advancement of public institutions. The Government analysed collective agreements at public institutions, including government-invested research institutions, and proposed a “plan for their improvement”. According to this plan, the range of union activities, the scope of union membership and the breadth of union authority must be “rationally” improved in line with government instructions. At the time of the government’s analysis, the wind of CBA termination was blowing and agreements were cancelled at the Korean Labour Institute and other public institutions. These were measures to “improve irrational collective bargaining agreements”. After the termination of the CBA the Korean Labour Institute Chapter began a strike. At the end of an 85-day strike, the institute director resigned and the workers went back to work. However, real negotiations between labour and management did not follow. Instead, management has been pressuring the union by demanding that the leadership resign, that the union disaffiliate from KCTU and that it agree to a CBA compliant to the government’s standards. In addition, after the director’s resignation, the Government, who until that point had been the main customer of this government-supported institute whose task it is to carry out research related to government labour policy, completely stopped orders for research projects. This is nothing more than a shameless act of revenge, which has led to financial troubles for the institute. As of May 2010, the full staff had their salaries cut by 30 per cent. The Government’s labour repression and control of the union at this government research institute is, in the complainants’ view, nothing less than unconstitutional.
- 439.** At the Korean Institute of Construction Technology Chapter, another chapter of the KUPRP, management carried out disciplinary measures against a worker who made a declaration of conscience against government policy in December 2008. When the union protested against these measures, the management responded in a retaliatory fashion. The complainants state that these measures illustrate the pursuit of “advancement of public

enterprises”. In December 2009, the union received notification of unilateral cancellation of its CBA and came under naked labour repression from the management. The Government and management originally promised they would not penalize a researcher who had made a declaration of consciousness. However, after the issue had died down, they went back on this promise and carried out disciplinary measures. The union responded with a determined protest against the measures. In the end, the researcher who had made the declaration of consciousness, a union member, was suspended for three months and the President of the union was fired. The union’s Vice-President was transferred to a testing site far away from Seoul, and when he filed a lawsuit for withdrawal of the unfair transfer, he was fired, too. These repressive measures against the union were clearly made in retaliation. This can be seen in the fact that management even raised issues with an ordinary statement of concern made by the union in April 2009 relating to suspicions that the Institute’s director had plagiarized his Ph.D. thesis. In response, the management is going so far as to attempt to annihilate the union. After only six months, the union, which used to have 400 members and a unionization rate of 90 per cent, has been reduced to only 70 members (17 per cent) due to management pressure. The management has said it would not promote a single union member and will penalize all union members, as well as demanded that they leave the union.

- 440.** The Korean Power Plant Industry Union (KPPIU), a union affiliated to the KPTU, faced a typical process of repressing public institution trade unions: a proposal for a deteriorated collective agreement from the management, unilateral termination of the collective agreements, and charges against trade union officials for calling a strike. All of these processes were in accordance with the Government’s drive to advance public institutions. The KPPIU and the management of power generation companies began collective bargaining in July 2008, and the two parties agreed upon 144 items with only five provisions left to be agreed. On 4 November 2009, a day after the 13th collective bargaining session for the collective agreement was held, the management unilaterally notified the KPPIU of the termination of the collective agreement. The management also closed down the offices of the KPPIU and its five branches in April 2010. In May, the management blocked the union dues check-off and stopped paying office expenses, communication expenses and electric charges of the trade union, thus closing down communication channels with the KPPIU. The KPPIU made concessions on the five unsettled terms and demanded the management to cancel the notification of terminating the collective agreement or extend the validity of the current collective agreement, but the management refused.
- 441.** The complainants conclude that the Government and the management of public institutions have attempted to purge trade unions and put their labour–management relations in peril. The Government demanded that the heads of public institutions “adhere to principles and not to make concessions in personnel and management rights”, ordering the employers of the power companies to thoroughly practice government instructions issued under the pretext of the public institution advancement project thus interfering in the labour–management relations of an individual institution by issuing specific instructions.
- 442.** The complainants believe that the above cases illustrate that basic labour rights of workers at public institutions have been severely damaged. The requirement of ensuring essential services during industrial action effectively denies workers in public institutions the right to collective action. The KCTU and KPTU filed a complaint regarding this issue to the ILO in 2008. Moreover, the right to collective bargaining of trade unions in public institutions is also severely damaged to the extent that autonomous labour–management negotiation is almost impossible. The Government puts restrictions on the scope of collective bargaining through official instructions, and even demands revision of already concluded collective agreements. The Government issued “Public Institution Advancement” directives to “advance” labour relations in public organizations. Any



objection from trade unions is rejected under the pretext of complying with government directives. If a trade union does not accept the unfavourable collective agreement, the management terminates the agreement. The trade union begins collective action against the worsening of the collective agreement and working conditions, and the Government calls the action illegal as shown in the case of the KRWU whose strike in 2009 was declared illegal not because of procedural matters but because workers went on a walkout for “non-negotiable” issues. The right to organize is also severely damaged. In accordance with government directives, almost all of the public institutions have demanded their trade unions reduce eligibility for trade union membership, actually denying the rights of a trade union as an independent organization of workers.

**443.** In addition, truck drivers are denied the right to organize from the outset. The Government argues that they are not workers but owner-operators. The Korean Transport Workers’ Union of the KPTU, which is organizing truck drivers, is now being threatened with cancellation of its trade union registration.

**444.** These violations of basic trade union rights are further detailed below.

**I. *Repression on trade unions at public institutions***

(1) Railway Workers’ Branch (KRWU) of KTWU

(i) *Collective negotiations and reason for strike*

**445.** The management of KORAIL and the trade union of its workers entered into negotiation in July 2008 to renew their collective agreement. During the four months of negotiation sessions, the management tried to revise over 120 clauses in the agreement, which was expected to deteriorate employees’ working conditions. The trade union and the management of the corporation had four main negotiation sessions, including those for collective bargaining and wage agreements, and 73 working-level sessions from 29 July to 14 October 2008. During the process, the two parties tentatively agreed on 81 entries out of 170, while about 90 items were left unsolved when they declared the failure of negotiation. Then the trade union balloted members on industrial action from 29 to 31 October, and the majority of union members were in favour of going on a strike.

**446.** On 11 November 2008, the CEO of the company was arrested for receiving bribes, and the management requested the trade union to delay collective negotiations until March 2009, when a new CEO was scheduled to assume the position. Negotiation sessions for the 2008 collective agreement were supposed to resume in March 2009, but they actually recommenced in May, when the new CEO came to office. On 12 May, labour and management agreed to have a main negotiation session once in every two weeks and working-level talks twice a week. Despite this agreement, the management kept neglecting main negotiations. Even the National Labour Relations Commission (NLRC), which was in charge of arbitrating the dispute over the collective agreement between the management and the KRWU, showed its concern over continued neglecting of negotiations on the part of the management. In the 16th working-level talks (held on 16 October 2009), the management demanded the amendment or annulment of 27 collective agreement provisions that the two parties had tentatively agreed upon during the 2008 negotiations, making it more difficult to find an amicable solution to the stalemate.

**447.** Finally on 9 November, the management suggested a special negotiation session. The KRWU postponed a strike, scheduled to commence on 14 November, until 26 November in an attempt to bring a peaceful end to the dispute. The KRWU accepted the suggestion and formed a special working-level negotiation team, which was invested with absolute

authority over negotiations. A series of special talks were held on 12, 18, 20 and 24 November. Trade union representatives presented their final offer on 23 November, while their counterpart revealed theirs one day later. However, the management unilaterally announced the termination of the collective agreement via fax less than an hour after the 24 November talks were closed, which was an unprecedented practice in the history of labour–management relations in the corporation. Management representatives made no mention of the termination during the last talks, and did not inform labour representatives of it prior to delivering the notice. This showed the management’s lack of intention to conclude a collective agreement through dialogue and negotiation. Finally, the KRWU began to take industrial action demanding the conclusion of a collective agreement on 26 November.

**448.** The complainants then describe evidence in their possession according to which the unilateral termination of the CBA by the management was planned with the intention to provoke the union into going on strike. Usually, company managers threaten the termination of the collective agreement in order to persuade trade unions to cancel a strike. However, in the KORAIL case, the management planned to terminate it to ensure the trade union went on strike and did not continue negotiation.

(ii) *Repression on the KRWU*

**449.** No collective bargaining process in the company has lasted longer than the 2008 negotiation. The management unprecedentedly kept demanding the revision of collective agreement terms to repeal provisions protecting trade union activities and reduce benefits guaranteed by the agreement.

**450.** The Board of Audit and Inspection of Korea (BAI) inspected the company in 2008 and pointed out that the corporation had failed to meet government standards with regard to full-time trade union officials, paid leave and holidays, providing the source of labour dispute. The “2008 Public Enterprise Management Performance Evaluation Report” published by the Ministry of Strategy and Finance (the MOSF) mainly pointed out that the company’s collective agreement was not consistent with government guidelines. The Report also recommended the corporation to alter monthly contractual working hours from 172 to 209 hours, reduce holidays, etc.

**451.** Moreover, on 31 August the same year, the Government issued a directive containing performance evaluation criteria for public institution directors with regard to the execution of their management plans. The criteria assigned more points to labour relations-related items, for example collective agreement revision to curb trade union activities, than those from the previous year. Thus, directors of public institutions, to whom the Government wields its budget allocation authority as a controlling tool, had to follow the directive and to make undue demands on trade unions, hampering an autonomous labour–management collective bargaining. Moreover, the criteria include “redressing irrational labour relations/adherence to the law and principles in managing labour relations/actual level of labour–management cooperation” categories to determine whether practices of labour–management relations are rational and legal. Trade unions in public corporations understand that the term “rational labour relations in the directive” actually refers to the termination of collective agreements or the revision of agreement terms to reduce the power of trade unions and that the overall assessment results are largely dependent on this labour relations category. To evaluate collective agreement clauses, there are categories such as “appropriateness of support for trade union activities/influence of trade union over personnel policy and overall management/appropriateness of maintaining working conditions and protecting industrial actions/improvements compared to previous collective agreement”. In addition, the level of performance-based compensation was dependent on evaluation results, and if a director fails to meet a certain standard, he or she would receive

a warning. If warnings are given two years in a row, the evaluation report automatically recommends the Government to dismiss the director in question.

- 452.** Today the practice of unilateral termination of collective agreements and repression of trade unions is quickly spreading throughout the public sector like a plague. In the second half of 2008, the Korean Government issued guidelines for collective bargaining to public institutions under the name of “Advancement of Public Institutions”. After their release, a number of public institutions, including the Korea Railroad Corporation, Korea Gas Corporation and five thermal power plant subsidiaries of the Korea Electric Power Corporation, notified trade unions of the termination of their collective agreements. These cases show the effect of the directive. All collective agreement terms in favour of trade unions must be annulled if a public organization is to revise the terms in accordance with the directive, and of course, trade unions can by no means accept these conditions. Thus, the organizations have to resort to the termination of the CBA in order to get points in the evaluation. The trade unions cannot accept the situation and have to respond to these unfair demands with industrial action. However, the performance assessment not just promotes agreement termination but monitors whether the heads of institutions can effectively prevent industrial action and whether they suppress existing labour disputes. Thus, the management takes every measure to oppress trade unions. This is what the “Adherence to rules and laws in managing labour relations” entry actually means. Furthermore, the “Actual progress of labour–management cooperation” provision really refers to a trade union declaring surrender in the form of “non-industrial action” announcement.
- 453.** According to the complainants, when the trade union began the strike, one of the newspapers reported that the Labour Ministry, Prosecutors’ Office, and Police held a joint meeting on 26 November to scrutinize the strike and concluded the strike was not an illegal industrial action. However, on 28 November, the President publicly stated that the public could not understand and should not tolerate the strike, and authorities should not compromise. Immediately after these remarks, the Prosecutors’ Office and the police suddenly changed their position calling the strike illegal and took drastic measures to suppress it, including aggressive criminal investigation. Finally, ministers and vice ministers of five ministries, including the Ministry of Labour and MOSF, issued an address to the nation, which reads “The KRWU strike is illegal, and the Government will respond to it with strict rules and laws.”
- 454.** According to the complainants, the Government applied section 314 of the Criminal Act (Obstruction of Business) to KRWU members passively refusing to work. Then, the Government began an all-out crackdown on the trade union’s collective actions: authorities raided trade union offices and seized equipment, while arrest warrants were issued for major union officials. The President himself ordered relevant officials to consider replacing railway drivers on walkout with military personnel.
- 455.** During the KRWU strike, union members never used physical force or committed crimes such as occupying or ruining facilities. Moreover, only 12,000 workers out of total 25,000 union members participated in the strike to maintain essential services in accordance with laws. The strike was done peacefully and union members just passively refused to provide services.
- 456.** However, the Seoul Central District Court accepted the argument of the Prosecutor’s Office that the strike was illegal and issued the following ruling:

Decisions regarding fulfilling workforce shortage of new businesses, workforce reduction and other programmes for the advancement of public institutions are made based on the determination of the management, which falls into the realm of management rights. Reinstatement of dismissed employees, cancellation of accusation, complaint and reprimand, and withdrawal of lawsuit for damage compensation are also the issues not relevant to the

determination of working conditions but belong to the authority of the management. Thus, the trade union shall not exercise its right to strike over these issues. Collective agreement clauses concerning maintaining proper number of employees, fulfilling the full number of staff and consultation with the trade union over workforce reduction are not relevant to the determination of working conditions. Thus, the trade union shall not launch a strike on the grounds that there are disputes over these issues.

- 457.** After the President's remarks, the police began to quell the strike by commencing a questionable investigation into it. On 27 November, the police subpoenaed leading KRWU officials on the charge of obstruction of business. However, the first two appearance dates, 28 and 29 November (Saturday and Sunday), were holidays. Finally, on 30 November, the police requested arrest warrants for the union officials.
- 458.** The management released 980 trade union officials from their positions on 26 November, the due date for the strike and forced them to attend an educational course and to write reports (i.e. admission of guilt). The personnel changes were maintained after 4 December, when workers returned to work. After the mass removal from position was conducted, the management delivered release notices in contents-certified mails to union members' homes.
- 459.** The company based such measures on Article 52.1 "Lack of abilities to perform duties" of the company's Personnel Rules. Generally, releasing from position is to exclude an employee temporarily, whose continuation of performing duties has a possibility to cause a severe problem. However, all of the union officials were collectively removed from their positions only because of their role in the trade union. As such, the trade union representatives were removed from their positions once they were confirmed to be participating in the industrial action, while those who returned from the walkout were spared from such disciplinary measures. Moreover, even union officials who were off duty, on leave and sick leave were subject to such measures.
- 460.** Furthermore, the complainants provide examples as to the manner in which, during the KRWU strike, the company put pressure on union representatives and their family members not to join the collective action through direct interview or other methods (home visits, phone, cell phone, text messages, internet and mails) by threatening workers with severe disciplinary measures, including dismissal, and civil and criminal liability, and by defaming the trade union and its leadership and even mentioning the children's shame at school to add pressure on union members.
- 461.** On 4 December 2009, the KRWU announced its return to work. One hundred and sixty-nine trade union officials were dismissed, and all of the some 12,000 strikers faced disciplinary measures (see table), a record number of disciplined employees for a single strike in the history of labour movement in Korea. The disciplinary processes progressed so abruptly that some of the union members were not given enough opportunity to vindicate themselves. The company installed video cameras in the places where disciplinary committees were held to record the proceedings. The trade union demanded their removal in order to protect the human rights of union members and to make sure the disciplined did not feel pressure, but most of the devices remained installed, which, considering procedural legitimacy, purpose, location, and management methods, was definitely illegal. The management also filed a lawsuit against more than 200 individual union officials and members for alleged damages caused by the industrial action worth about 10 billion South Korean wons (KRW) in total (958 million for the warning strike on 6 November and 8.7 billion for the strike from 26 November to 4 December). Some of the union members suffered from severe depression. Claiming damages worth about KRW10 billion for legitimate industrial actions is definitely aimed at destroying the trade union.

### Disciplined workers due to 2009 KRWU strike

Year	Dismissal	Suspension	Salary reduction	Reprimand	Warning	Total
2009	169	407	366	9 405	1 241	11 588

**462.** After the trade union stopped the strike on 4 December 2009, the management plotted schemes to force trade union members who were in the position of department chief to withdraw from the trade union by persuading them intensively and repeatedly via telephone and in interviews from 7 to 20 December.

**463.** The management did not have any plan to resume collective bargaining or wage negotiations after the end of the strike. The trade union called for the resumption of collective bargaining without any precondition, but the management rejected the request saying that they would never come to the table unless the union made an official declaration of “no more” strike. The right to collective action is enshrined in the Constitution of Korea, and union members’ collective rights are embodied in an industrial action. Thus, the renunciation of these rights without due process constitutes an illegal and unfair practice.

#### (2) Korea Gas Corporation Chapter of KPSU

**464.** The eighth CBA reached by the Korea Gas Corporation Chapter and the KOGAS expired on 13 March 2009. In order to conclude a new CBA, labour and management carried out negotiations from 6 April 2009 to 29 March 2010, which included nine main negotiation sessions and 20 working-level sessions. Breakdown of negotiations and the failure of mediation on the part of the National Labour Relations Commissions in August 2009, the union’s strike in November 2009 and then the KOGAS notification of unilateral termination of the CBA put labour–management relations in a state of intense confrontation.

**465.** On 6 November 2009 the rail, power plant and gas unions carried out a joint strike protesting against unfair government interference in collective bargaining and demanding independent negotiations, following legal procedures. Nonetheless, the Government claimed that the strike’s goal was to protest against government policy, and therefore illegal, and brought criminal charges against all the unions (in particular, see section I.1). In the case of the union, the single goal of the strike was the conclusion of a CBA. Yet, ten members of the executive committee (full-time union officers) are now facing final sentencing because of charges brought by the company against them. The prosecutor indicted all ten union offices on charges of having violated section 314 of the Criminal Act on obstruction of business and asked that they be given sentences of respectively eight to 12 months on 5 October 2010. In the case that the judge decides in favour of the prosecution, all union officers will be fired. As soon as the joint strike commenced, the company sent, on 11 November, notice of unilateral cancellation of the CBA. The management stated that the cancellation of the collective agreement was unavoidable due to government instructions.

**466.** Despite the strike, the company continued to avoid negotiations and demand unconditional concessions from the union. In the end, after having passed much time without a CBA, the union judged that it had to concede. In February–March 2010, labour and management agreed to recommence intensive negotiations concerning a total of 53 items with the goal of concluding a new agreement by the end of March. Through several rounds working-level agreements were reached on 50 items. No agreement could be reached on the scope of workers eligible for union membership or the number and treatment of union officers on company salary. However, the union eventually had to make complete concessions which led to a final accord, reached on 29 March 2010, which provided for the continuation of

most parts of the previous CBA, plus heavy concessions by the union, including reduction of the scope of workers eligible for union membership and the number of union officers on the company's payroll by two.

**467.** On 31 March 2010, representatives from labour and management agreed that the new CBA would go into effect on 30 April and signed an accord to this effect. Finally a valid agreement had been reached. The reason for delaying the entry into effect of the CBA was because the company asked for time to convince the Ministry despite the fact that there was no legal basis for requiring government approval. When the company signed the agreement on 31 March, because it had gotten concessions from the union during the bargaining process, it believed that the Government would eventually accept the agreement. However, as consultations went on, the Government continued to object to the CBA and to insist that new negotiations should be opened after the invalidation of the previous agreement went into effect. On 30 April, the day the CBA was to be announced and go into effect, the Government still maintained its stubborn position. The union, saying that the Government's opposition should have no effect on the validity of the CBA, requested the management to enforce the agreement. However, the company folded to consistent pressure from the government, with the management stating on 3 May 2010: "I acknowledge that an accord has been reached, but I don't have the capacity to execute it." The following day, a notice of unilateral withdrawal of the accord due to the Government's position was delivered to the union.

**468.** On 11 May 2010, KOGAS also notified the union that, as six months had passed since its unilateral cancellation of the previous CBA on 11 November 2009, the CBA would lose validity beginning on 12 May 2010. The company claimed that the provisions in the obligatory portion of the CBA including those concerning treatment of union officers on company salary and supporting staff, check-off for union dues, union shop rules, guarantee of paid union activities during work hours, paid education time for union members, protection of outreach activities, office space, vehicle use and other use of facilities, and so on were no longer valid. This was more than just repression against the union and an attack against union activities; it was a statement that it would no longer recognize the union's existence. But these were not measures the company had planned on its own. They were in accordance with instructions from the Government, which had recommended cancellation of the CBA, and were exactly the same as measures taken in relation to cancellation of CBAs with the power plants union and the metropolitan railroad workers' union (the Seoul Metropolitan Rapid Transit Corporation Workers' Union) previously.

**469.** Accordingly, the company began an all-out attack on union activities and repression against the union, including: (i) measures to return the ten salaried union officers to company work and stop union activities; the officers refused the company's order to return to work and continued to carry out union activities in the union office; the company sent multiple 'reminders' of the order to return to work, exercised pressure by stating that it was accumulating evidence necessary to fire the officers and stopped paying their salaries claiming that they were "absent without leave"; (ii) banning the payment of union activities during work hours; in relation to members who participate in various meetings and education programmes carried out by the union, the company warned it could enforce disciplinary measures based on inspections of workers' diligence; it also enforced a policy of "no work, no pay", thus pressuring the members not to participate in union activities; (iii) stopping check-off facilities; the company started discontinuing conveniences and facilities use that had been offered to the union based on the CBA; the first discontinued convenience was union dues check-off; while the union's collection of membership dues was not put at risk since roughly 98 per cent of members had agreed to pay dues through direct deposit, many unions face fiscal crises because their companies refuse to provide direct deposit services; and (iv) forcing the return of the union office and supplies; the demand that the union return, not only the office space, but also desks and other furniture,

telecommunications systems and vehicles amounts to complete denial of union activities. In addition, on 12 May, the company restricted the union's use of the internal communications network to post information.

**470.** In response, the union filed a lawsuit on 25 May 2010 to prove the validity of the CBA and at the same time applied for an "injunction against obstruction of union activities" based on the accord reached on the CBA, in order to get relief from the order to return to work and demands for return of the office. Although the court saw the accord reached on the CBA as provisional, on 23 July 2010, the court issued a ruling acknowledging the validity of the CBA stating that, "The agreement reached in this case implied the conclusion of a collective bargaining agreement. This was put into writing and signed by representatives from both the labour union and the employer. Thus, the agreement will be seen as a valid collective bargaining agreement." The company, however, is refusing to cease its unfair labour practices, stating that an injunction is only an injunction and that it will wait until the results of the lawsuit concerning the validity of the collective agreement. The company continues to follow the government orders, submitting an additional proposal for further regressive revision of the collective agreement and attempting to force the union to submit to it. The Government continues to express its lack of satisfaction with the content of the CBA and demand its further revision going so far as to deny the decision of a court of law.

**471.** The Government intervened in bargaining from the very beginning. The proposal submitted by the management in March 2009 reflected government orders and was composed of recommendations based on performance evaluations and instructions from the MOSF, items pointed out by the BAI and recommendations by the Ministries of Labour and Ministry of Knowledge Economy. The main content of government instructions included dismantlement of union shop rules, reduction of the scope of workers eligible for union membership by 20 per cent, reduction of union officers on company salary (staged removal of two out of ten officers), limitations on paid union activities and protection of union activities, expansion of workers prohibited from striking through designation of essential services, allowance of substitute work and new hires during strikes, etc. Bargaining tactics were employed with the Government using meetings and oversight measures to apply direct and indirect pressure on the company and ordering it to make absolutely no compromises or concessions in achieving the demands included in the bargaining proposal; thus, the company approached negotiations with a very passive and almost avoidance attitude, and the multiple bargaining sessions were, in fact, meaningless. Thus, the Government has interfered in the whole process of negotiations from the formulation of the company's proposals, to the negotiation strategy and tactics, to the conclusion of the agreement. The Government must stop its illegal interference in labour-management relations. Execution of the CBA, which was already concluded through independent negotiations, must be allowed.

(3) Public Pension Chapter for Social Solidarity of KPSU

**472.** The current labour-management relations between the National Pension Service and its trade union, the Public Pension Chapter for Social Solidarity, have been severely strained since the November 2009 strike. The main culprit of such strained labour-management relations is the management who considers the union as something to be exterminated, not as a productive partner. Moreover, the anti-labour sentiments of the Government and its policies unfavourable to workers have fuelled the management's repression against the union. The management repeatedly said that the National Pension Service, as a public institution, is supposed to follow the government's directives and is not free from government domination or intervention.

- 473.** At the National Pension Service, collective bargaining started in April 2009, and in 2009 alone the labour and management held 28 sessions in total (five main sessions and 23 working-level talks). The working-level representatives from both parties, who were granted full authority, reached a provisional agreement on 23 December 2009. However, the director unilaterally rejected it, simply because this agreement was inconsistent with his belief, turning labour relations sour. On 15 March 2010, the management notified the trade union of the unilateral termination of the collective agreement. Then, the director pledged good-faith negotiation. The union requested the resumption of negotiations, and the seventh main session was held on 3 June 2010. The labour and management agreed that the main negotiation sessions in 2010 would be limited to the issues the two parties failed to agree upon in the 2009 sessions. However, the chair ignored such an accord, and proposed to detrimentally revise more than 90 collective agreement provisions, including to reduce the management's responsibility to ensure employment security, to repress union activities, deprive workers of basic rights, cut employee benefits and deteriorate working conditions by introducing a performance-based annual salary system; to impose eligibility of trade union membership and limit the right to join the trade union with regard to workers at departments arbitrarily categorized as "managerial departments"; to limit to seven the number of full-time union officials under the paid time-off system according to the Handbook on Time-off System distributed by the Ministry of Labour; to reduce the frequency of union congress (from twice a year to once a year) and steering committee meetings; to simplify the procedure of transfer of union officials' position; and to deprive union members of basic rights by abolishing trade union education sessions, requiring the union to consult with the management beforehand when it intends to post banners or other propaganda material or guaranteeing employees who are subject to disciplinary actions only an "opportunity to make statement" rather than a "right to plead" in a disciplinary committee where the union is not allowed to take part to represent its members.
- 474.** The union could not help but oppose the proposal that was expected to hamper autonomous activities of the trade union, infringe basic labour rights, and worsen working conditions. Union members conducted local-level rotating strikes on 5–9 July 2010. There was no change in the behaviour of the management so the union went on a general strike on 15–27 July 2010. The management took a hard stance against the union's industrial action. Even though the rotating strikes, starting from 6 November 2009, were lawful with regard to procedure and purpose, the management abused disciplinary measures and filed lawsuits against unionists. The six standing executive committee members of the trade union are now accused of obstruction of business as defined by the Criminal Act.
- 475.** The intervention in autonomous labour–management relations by the Government entails serious consequences. The assessment on management performance of public institutions (evaluation of management) and related government directives are among the most significant cases. The Government's administrative directives also give an excuse for the retrogressive revision of the collective agreement. The Handbook on Time-off System published by Labour Ministry is used as a means to "bombard" the trade union with poisonous demands to curb its legitimate activities, and the MOSF directives give an excuse for wage freeze/cut.
- (4) Korean Labour Institute Chapter of the Korean Union of Public Sector Research and Professional Workers
- 476.** The Korean Labour Institute Chapter received a notification of cancelation of its CBA in February 2009. After receiving the notice, it carried out a strike for 85 days. To this date, union members are plagued by insecurity due to considerable government pressure.



- 477.** The root of the problem can be traced to the management's unilateral termination of the existing CBA before beginning a new round of collective bargaining. Up to the day the CBA was cancelled, the management had always approached bargaining with lack of sincerity.
- 478.** Repression against the union by the Korean Labour Institute is a part of the government's efforts to devastate trade unions and autonomous labour-management relations in the public sector under the name of the "Public Institution Advancement" plan. The Ministry of Labour analysed collective agreements at public institutions under its supervision and published proposals for their improvement in April 2009, after the notice of collective agreement termination was issued. According to this publication, the collective agreement of the Institute was scored the lowest among those of all analysed organizations. Key problems referred to by the Labour Ministry included the lack of trade union membership eligibility, extensive protection of trade union activities, obligation of the Institute to obtain union consent before reprimanding union officials, and the Employment Security Committee consisting of equal number of members from labour and management. Directors of public institutions were ordered to revise CBA terms that are advantageous to trade unions.
- 479.** Finally, after the cancellation of the collective agreement, the union determined that collective bargaining could no longer be carried out in a rational manner, and went on strike. The management's insincere attitude towards bargaining did not change. Management continued to refuse bargaining proposals. Therefore, the union chose to go on legal strike for 85 days for the sake of returning management-labour relations to normal, but management responded by closing the Institute and continuously delayed conclusion of a CBA. On 15 December 2009, the director suddenly resigned, after which the union ended its strike and all workers went back to work without having signed a CBA; but the management and the National Research Council for Economics, Humanities and Social Sciences charged all those who participated in the legal strike with obstruction of work. A police investigation is currently under way.
- 480.** Since the staff went back to work, the management has been putting pressure on the union making the following demands: disaffiliation from KCTU, conclusion of a CBA according to Ministry of Labour standards, and resignation of the union leadership. After the former director resigned, the presidency has been vacant, the nomination of a new director delayed and the Government, the Institute's main customer, has not contracted it for even one research project and has transferred projects to other agencies, meaning that funds for staff salary have become insufficient. Finally, in May 2010 the full staff had no choice but to agree to a 30 per cent reduction of salary.

(5) Korean Institute of Construction Technology Chapter of the KUPRP

- 481.** Until the beginning of 2010, the Korea Institute of Construction Technology Labour Union proudly counted 400 members and a union density rate of 90 per cent. However, six months of concentrated efforts on the part of the management to force members to leave the union, intentional causing of disadvantage to union members, and other pressure caused a rapid decrease in membership. As of the beginning of July, the union had a union density rate of 17 per cent, with only 70 members.
- 482.** Members have suffered disadvantages in terms of promotions and research projects for the sole reason that they joined the union. Union officials have experienced a series of punitive expulsions and suspensions. Union members and officers are facing severe hardship and the union is near collapse due to these measures.

**483.** Efforts to force members to quit the union began on 2 December 2009, when the management, in pursuit of its “advancement of public institutions” policy, unilaterally cancelled the CBA and told 21 employees of the administrative department that they could either leave the union or leave their positions. As a result 330 of 400 union members left the union, such that there are only 70 members left. Then a rumour had it that no union members would be included in the promotion list that was scheduled to be out on 1 May. Moreover, unionist researchers had trouble in carrying out their missions due to the pressure from the Institute management. Therefore, union members could not help but choose to leave the union.

**484.** In December 2008, there was an incident involving a researcher who made a “declaration of conscience”. The Government and management originally promised they would not penalize a researcher who had made a declaration of consciousness. However, after the issue had died down, they went back on this promise and carried out disciplinary measures in December 2009. The union protested against these measures and the management responded in retaliatory fashion. The management fired the union President for demanding that the punitive measures against the researcher be cancelled. In addition, it appointed the union’s Vice-President to a testing site in Andong, 300 kilometres away from Seoul, making it impossible for him to participate in negotiations, consultations and other regular union activities. The Vice-President responded by filing a lawsuit against the management calling for cancellation of the unfair transfer. As soon as he did this, the management fired him for filing the suit. For the same reasons, the management also suspended the union’s Secretary-General for three months.

**485.** Moreover, the management acted as if everyday union activities such as the issuing of a declaration and the holding of events were problematic and included them in the reasons for the President’s firing. The Director of the Institute had received extensive public criticism for having plagiarized his Ph.D. thesis. Thus, the union had raised the plagiarism as an issue in April 2009. It is thus impossible not to see the pressure exercised by the management against the union as a revenge. Accordingly, the union has begun a determined struggle against the management for firing the union President and Vice-President and other efforts to annihilate the union.

(6) Korean Power Plant Industry Union

**486.** The collective agreement between the KPPIU and the management of South-east, South, East-west, West and Central Electric Power Companies was concluded in arbitration by the National Labour Commission on 19 September 2006. On the expiry of the agreement, the management and labour began negotiation sessions to conclude the 2008 wages and collective agreements from 29 July 2008.

**487.** By the fifth negotiation session for collective agreement held on 22 October, the two parties agreed upon 79 items out of total 140 entries (137 main clauses and three appendices). In the sixth session, held on 4 December 2008, the two parties came to agree on 144 items with only five provisions left to be agreed. The labour and management, however, failed to come to a final agreement, and referred the matters to the arbitration of the NLRC on 12 October 2009. Three arbitration meetings followed on 21, 23 and 27 October. On 28 October, the NLRC decided to halt mediation. On 4 November 2009, a day after the 13th collective bargaining session for collective agreement was held, the management unilaterally notified the KPPIU of termination of the collective agreement.

**488.** The management closed down the offices of the union on 1 April 2010, when the fifth executive committee of the trade union took office. However, the trade union tried to solve the labour–management dispute through dialogue, and sent the management a memorandum to call for the resumption of collective bargaining the same day. The trade

union suggested that the two parties accept already agreed items and focus on undecided issues to solve the dispute without any confrontation.

- 489.** The management came up with a new offer for the collective agreement, which ignored previously agreed terms and contained deteriorated conditions instead, at the tenth working-level talks held on 14 April 2010, the first meeting between labour and management since the 5th executive committee took office. At the 14th collective agreement negotiation session on 21 April, the KPPIU made concession on the five unsettled terms for broader interests and required the management to accept the other 144 items and to cancel the collective agreement termination notification or extend its validity. However, the management refused the suggestion.
- 490.** On 26 April, with a view to the forthcoming expiry of the CBA, the management notified the trade union that it would disapprove of full-time trade union officials, block the check-off of union dues, repeal the union shop system, stop allowing trade union members to participate in union activities (general meeting, representative meeting, central committee, election management committee, audit committee, etc.) and stop acknowledging paid trade union education. In addition, the management said it would stop paying management expenses and electric charges of the trade union's office. The union reiterated its prior demands but the management refused.
- 491.** In accordance with section 32(3) of the TULRAA, the collective agreement became ineffective on 6 May 2010 (six months after unilateral termination). That day the management ordered full-time union officials to return to their original positions and announced that those refusing to return to work would be regarded as absent without permission and be disciplined. Thus, members of the executive committee spent annual and monthly leaves to hold two rounds of working-level talks in good faith, which was an attempt to reach an agreement by labour and management autonomously. However, the management neglected negotiation under the pretext of government guidelines and pressure from "higher positions". As such, the trade union filed for mediation to the NLRC on 17 May 2010. However, the management refused to accept such mediation so that the union decided to go on a no-time limit strike by designated trade union officials on 24 May.
- 492.** On 25 May, the management blocked the check-off, stopped paying trade union office management expenses, communication expenses and electric charges on behalf of the trade union as required by the collective agreement, and notified that it would terminate contracts for two telephone lines and internet access service provided to the office from 31 May. Such actions on the part of the management closed communication channels with the union.

## **II. Government directives to restrict labour rights of public sector workers**

- 493.** The Act on the Management of Public Institutions of 2007 establishes that 286 public institutions are now under the management and supervision of the Government (the Ministry of Strategy and Finance, hereafter MOSF). The main channels, through which the Government controls public institutions, include "Management Directives" and "Management Evaluation", issued and conducted by MOSF, as well as regular and timely inspections by the BAI.

(1) Government directives

- 494.** According to the Public Institutions Act, the Ministry is responsible for establishing guidelines for the administration of public institutions (Management Directives) after deliberation and resolution by the Committee for Management of Public Institutions (Management Committee). The Management Directives cover matters concerning the administration of organization, the prescribed number of staff, management of human resources, budget, fund administration and other matters.
- 495.** Around November every year, the MOSF issues budget compilation directives for public corporations and quasi-governmental institutions to refer to in planning their budgets for the following year, after the deliberation and resolution of the Management Committee. At the beginning of the year, the ministry also releases budget execution directives for the corporations and institutions in consultation with the committee.
- 496.** The Management Committee is officially responsible for the deliberation and resolution of the management and administration of public institutions. However, considering the structure and the actual operation of the committee, its main role is to rubber-stamp positions of the MOSF.
- 497.** The Act stipulates that “eleven or less persons commissioned by the President on the recommendation of the Minister of Strategy and Finance from among people from various fields including law, economy, press, academia, labour, etc. with good knowledge and experience in the area of management and business administration of public institutions and also good reputation for impartiality” could join the committee. However, those with labour background such as trade unionists have been excluded from the committee.
- 498.** The Directives for the advancement of public institutions, which could significantly affect the working conditions of public sector employees, had been rarely discussed by the committee until 11 August 2008, when they were announced. The Management Committee’s Subcommittee for the Advancement of Public Corporations (Advancement Committee), of which the members are designated by the chair of the Committee (MOSF Minister), once discussed this issue.

(i) *Budget compilation directives*

- 499.** Around November, the MOSF issued budget compilation directives for public corporations and quasi-governmental institutions after the deliberation and resolution of the Management Committee. The directives contained basic directions in devising budget plan of the following year and guidelines for major items in the plan. These major items included personnel expenses, general expenses, working expenses, fund and other budget items, and measures concerning non-regular workers in the public sector.
- 500.** The 2010 budget compilation directives were announced on 16 November 2009. The preamble reads, “Public organizations must restrain personnel and other expenses to share the national economic hardship, and improve management efficiency by curbing excess employee benefits.” As a result, the budget for personnel expenses was frozen in 2010, and even some of public financial institutions had to reduce wages by five per cent. Many of employee benefits were reduced or abolished under the pretext of “reforming the benefits system to a rational level”.
- 501.** Wage negotiations in public institutions are restricted within these directives. In this situation, wage negotiations could never change the terms. Even if labour and management agreed to set wages at a higher level than the directives stipulated, BAI inspection and

management evaluation by the Government will apply disciplinary measures to such an organization. The organization will also see their budget cut by the Government.

- 502.** For example, the BAI audit report of Korea Railroad Corporation (27 August 2009) said that the company disobeyed the 2007 budget compilation directives in bonus payment, and requested the organization to take the bonuses back. The management responded to the request by reducing wages for employees. In 2009, the basic salary was cut 50 per cent, which amounts to 9 per cent of total annual salary of the year or KRW32.8 billion in totals and KRW990,000 per person on average.
- 503.** The labour and management of the Korea Airports Corporation failed to come to an agreement in 2007 wage negotiations. Its trade union decided to go on strike, and the NLRC began to arbitrate the dispute. The Commission offered a mediation proposal at a level exceeding the government's wage guidelines at that time (3 per cent). Both the management and labour accepted it. However, the Government gave the corporation disadvantages in the 2008 management evaluation. Thus, in the following year, workers ended up being forced to accept a wage cut to offset the surplus in 2007 (6.8 per cent). It is an ironic situation where the Government demands to correct wage and CBAs, concluded by the arbitration of the Commission, the Government's highest organization in mediating labour relations.
- 504.** As of 1 October 2010, no public institution with KPSU affiliates has been able to conclude a wage agreement at an increased rate that goes beyond the personnel expenses increase limit set by the directives. Thus, the directives actually serve as a wage limit, which binds the whole processes of wage and collective bargaining in public organizations, making labour-management wage negotiations at such institutions meaningless.

(ii) *Budget execution directives*

- 505.** Budget execution directives are also considered as management guidelines stipulated in the Public Institutions Act. The 2010 directives were deliberated and resolved by the Management Committee on 29 January 2010. The purpose of these general directives is to "offer detailed guidelines for efficient budget execution to public institutions".
- 506.** These directives prescribe principles and standards in the implementation of major budget items such as personnel and general expenses. For example, as for the management evaluation-linked compensation system, which falls into the category of personnel expenses, the 2010 directives describe the number of evaluation result brackets, compensation differentials and the portion of each bracket. Of course, trade unions are completely excluded from the process of setting these criteria.
- 507.** In addition, the 2010 directives state, "Public institutions of which the structure or workforce has been changed due to merger, function adjustment, and streamlining must implement budget policies in consultation with competent agencies and the Minister of Strategy and Finance," implying that the management of public corporations must consult with MOSF over a broad range of issues that severely affect working conditions.
- 508.** As for employee benefits, the Government guidelines provide standards even for the payment of employee welfare fund. Moreover, according to the directives, "Any form of leave other than annual paid leave guaranteed by the Labour Standard Act must be prohibited, and unused leave cannot be compensated with money."

(iii) *Government plan for the advancement of public institutions*

- 509.** The Government announced that it would reform public corporations under the name of the advancement of public corporations in July 2008. The first set of detailed reform measures was out on 11 August 2008, and the last and sixth on 31 March 2009. Accordingly, 24 organizations were either to be privatized or to sell stakes, and 41 government agencies would be integrated into 16 organizations, while some agencies would undergo functional adjustment. The Government also cut budget and workforces for other agencies that were not subject to this restructuring programme. As a result, 129 organizations shed off around 22,000 workers, or 12.7 per cent of their total workforces combined.
- 510.** After the sixth round of reform measures, a second-stage plan was revealed: “Breaking the three major bubbles”, “Advancement of labour relations”, and “Provision of first-tier public services”. The three bubbles referred to public institutions’ wage levels, positions and business structure that are “overblown” given their actual productivity, in order to tackle lax management of public corporations, which have allegedly been the source of public censure about cushy jobs at public organizations (the so-called “god-given jobs”). The plan for the advancement of labour relations was designed to turn labour–management relations in the public sector into an exemplary case to the whole society by putting their industrial relations on a more “reasonable” footing through Government assessment. Afterwards, in the following management directives of public organizations, the share of criteria for the “advancement” or “rationalization” of labour relations was expanded.
- 511.** All of these programmes were expected to affect overall working conditions of public sector employees significantly, but the Government had not consulted trade unions at all and there have been no ways to reflect opinions of worker representatives in the process. The Government outlawed collective actions of trade unions in protest against the deterioration of working conditions that would be caused by the advancement of public institutions and wielded repressive measures, as in the case of KORAIL.
- 512.** In April 2009, the Labour Ministry analysed collective agreements of public institutions, and proposed “improvement programmes”. The analysis was focused on “basic collective agreement terms for rational labour relations”, and these terms were reorganized into 21 items in four sections (trade union membership and protection of trade union activities, restrictions on trade union intervention in personnel and management rights, wages and other working conditions, and collective bargaining and labour disputes). Each item was evaluated by a scale of five (from “very poor” to “very rational”). In general, the Labour Ministry’s analysis sees clauses favourable to the employer as rational, while those that guarantee trade union activities and rights are considered irrational. For example, the analysis construes a clause that requires the management to acquire trade union consent or consultation with regard to personnel changes of union officials as infringing the employer’s personnel right. Furthermore, trade unions’ participation in management activities (i.e. union officials attending managerial meetings) was presented as an irrational case, while employers’ attendance at trade union representative meetings and setting forth their views was presented as an exemplary case. The analysis also describes an employment security committee that comprises equal number of labour and management members as an irrational practice in that it infringes the employer’s personnel and management rights, even though such committee is supposed to deliberate the change of employment status of trade union members. The Labour Ministry launched the analysis in order to rectify “irrational collective agreement terms” of public corporations and quasi-governmental organizations, and proposed that criteria of the analysis be used in evaluating management performance of public institutions.

- 513.** In addition, the MOSF had required government agencies to make a monthly report about the progress of reforming collective agreements at public organizations under their auspices with regard to the advancement of labour relations, even asking them for a table comparing states before and after the revision with regard to the four sections (personnel policy, management rights, trade union activities, employee benefits, collective bargaining and industrial action). Moreover, the Government required the agencies to list revisions of so-called poisonous clauses encroaching personnel and management rights in their collective agreements.
- 514.** The Labour Ministry also analysed collective agreements of government-invested research institutions under the auspices of the Prime Minister's Office. In April 2009, the Ministry issued its report including measures for improvement. Out of 23 institutions, the Ministry scrutinized collective agreements of 18 institutions where trade unions are organized. The report graded these institutions into five ranks. The Prime Minister's Office convened a meeting of heads of such organizations, showed the results, and ordered them to revise "irrational" collective agreement provisions favourable to trade unions. After the meeting, the Korea Labour Institute and Korea Research Institute for Vocational Education and Training unilaterally terminated collective agreements, and the Korea Maritime Institute cancelled the agreement, which had not expired at that time.
- 515.** The public institution advancement drive was focused on "advancing" labour relations, which is actually the weakening of trade unions. This is shown by the Government's anti-trade union remarks. The Government emphasized the importance of forming new labour relations and that as public institutions were governmental organizations, not private ones, even their trade union members were not allowed to be against government policies, and if they were opposed to the government's policy direction, their managers must not tolerate such irresponsible attitude. The Government publicly condemned trade unions of public institutions that were opposed to the public institution advancement drive stating that "Public officers who take to the street and put anti-government bills on walls are not entitled to perform their duties." After the KRWU strike was quelled, KORAIL was chosen as one of the exemplary institutions for the public institution advancement project.
- 516.** Lastly, the complainant provides extensive information on the progress and details of the plan for advancement of public institutions by period. In particular, the complainant signals that the second-stage advancement plan (May–November 2009) aimed at restructuring public institutions from being free from, inter alia, bankruptcy, low productivity, militant trade unions, and lax discipline. The related projects included the scrutiny of labour relations by BAI which will adopt a "meet standard or fail" scheme in managing industrial relations, make requests for management dismissal in case of finding lax management cases and conduct preliminary inspection of labour relations.
- 517.** Concerning the 'advancement of labour relations' aspect of the second-stage advancement plan, the complainant indicates that the Government plans: (i) to implement a 'minimum standard' in labour relations in management performance evaluation; (ii) to include the "advancement of labour relations" category in the management plan implementation assessment for organization heads; public institutions should begin to review wage and leave systems, employee benefits, and trade union activities (trade union support, full-time trade union officials, participation in management process, intervention in restructuring); and (iii) to deteriorate labour relations in public institutions under the name of advancement of labour relations prior to changes scheduled to happen in 2010 (ban on putting full-time trade union officials on company payroll).

(2) Management performance evaluation of public institutions

- 518.** Management performance evaluation for public institutions is a tool to control public agencies that is used the most frequently. Assessment criteria are set at year-end. Every March or April, public organizations receive their evaluation results for the management performance of the previous year in accordance with the Public Institutions Act. The reports for the management performance and plan implementation of organizations and their heads are submitted to a group assigned for the assessment (the Assessment Committee). The whole assessment process is finished by June 20 after the deliberation and resolution of the Management Committee. Incentives and penalties are given to public institutions depending on the results, and budget allocation is affected. Organization heads with poor results could be dismissed.
- 519.** The 2010 Assessment Committee for the evaluation of 2009 performance consisted of 55 members for organization head assessment and 130 for organization assessment. The 2005 Committee included a few members with labour background when the Public Institutions Act was not established yet, but such figures have been completely excluded since the Act entered into force. Evaluation criteria cover sound labour–management relations, and the portion of such criteria accounts for more than 20 per cent in the assessment of organization heads. However, neither experts in industrial relations nor figures with labour background could join the Committee. No explanation has been provided on what criteria these non-experts would use to assess labour relations fairly.
- 520.** Evaluation criteria for the assessment of public organizations are described in the Handbook for Management Performance Evaluation of Public Institutions and Quasi-governmental Institutions, which is issued at the end of the year prior to the evaluation period. The 2009 Handbook has three categories of leadership/strategy, management system and management performance, and their ratios of points are 18/32/50 and 18/37/45 for public institutions and quasi-governmental institutions, respectively. The Leadership/strategy category is divided into leadership and major action plans, while the management system category into major business activities and management efficiency. The 17-point management efficiency entry includes organization and personnel resource management, compensation management, rational labour relations, performance management system, public institution advancement and organizational streamlining. The management performance category consists of three subcategories: major business achievements, customer satisfaction and streamlining outcomes.
- 521.** As regards criteria for organization and leadership assessment with regard to labour relations, the complainant refers to the Category “Advancement of public institutions”/Index “Advancement of labour relations”/with the related assessment category “Rational labour relations”, which is determined by evaluating whether labour relations management and labour–management cooperation are legal and rational, whether there is appropriate communication between labour and management to make consensus, whether appropriate efforts are being made to increase labour relations management capabilities, and whether collective agreement terms are rational and there are efforts to improve them.
- 522.** Criteria for the assessment of organization heads are also contained in the directive regarding “Criteria for Plan Implementation Assessment”, which is issued after the deliberation and resolution of the Management Committee. According to the directive, each organization head submits a management plan to the Government at the beginning of the year, and presents a plan implementation report to receive assessment after the evaluation year ends. The 2009 directive raised points assigned to the labour relations category to 20 points, and the management efficiency category was given another



20 points. This newly established entry covers issues that had been handled separately last year, which severely affect working conditions (including compensation adjustment, workforce reduction, merger and functional adjustment, privatization and youth internship programmes).

**523.** With specific regard to the “advancement of labour relations” aspect in the 2009 organization head assessment, the complainant indicates in particular that:

- (i) under the category “Are labour–management relations rational and legal?”:
  - criteria to evaluate efforts to form rational labour relations include the correction of irrational labour relations, efforts to rationalize personnel and organizational management, protecting management rights in case of labour disputes, efforts and achievements to stabilize labour relations after disputes, preparations for collective bargaining on the part of employer and efforts to conclude collective agreements in negotiations (good faith negotiations and others); and
  - criteria to evaluate efforts for legal management of labour relations include adherence to principles in response to undue demands from the trade union, including non-negotiable items in collective agreements, strict response to illegal labour disputes and proper follow-up measures, unfair labour practices on the part of employer, maintaining previous agreement terms in undue ways (special employment rules and labour–management accords) and secret agreements;
- (ii) under the category “Is there appropriate communication between labour and management to make consensus?”:
  - criteria to evaluate the organization head’s initiative for communication include on-the-spot visits and opinion collection, direct communication channel between labour and management to solve pending issues and its results and initiatives for labour–management cooperation and dialogue;
  - criteria to evaluate efforts to build individual labour–management communication channels include building communication channels with individual trade union members, efforts to collect opinions over major issues and surveys over major action plans; and
  - criteria to evaluate efforts to build collective labour–management communication channels include encouraging and supporting trade unions to have positive attitudes towards enterprise activities;
- (iii) under the category “Are collective agreement terms rational and are there efforts to improve the terms?”:
  - criteria to evaluate the appropriateness of trade union operation and trade union support include the eligibility for trade union membership (positions eligible to join trade union, written standard for non-eligible workers, approval for dismissed workers joining trade union, etc.), trade union activities during work hours (approval process, scope and frequency of approved activities, etc.), approval for trade union education during work hours (objects, type and duration of education, etc.), full-time trade union officials (the number of trade union members and full-time officials, whether to allow officials to work for upper trade unions, approval for additional officials, treatment of full-time officials, etc.), personnel management of trade union officials (consultation with trade union, etc.), equipment and facilities for trade union operation (list of items provided, administrative process, support of maintenance costs/ expenses of

trade union events/office workers, etc.) and provision of information to trade union and information level (provision of personal information, right to reject, request for secret protection, etc.);

- criteria to evaluate the trade union’s intervention in personnel and management rights include operation of organization (consultation with trade union over reorganization); employment and personnel transfer (ban on special appointment or consultation with trade union, participation of trade union officials in job interviews, consent from trade union over standard set for personnel transfer, etc.); promotion, evaluation, rewards (participation of trade union in promotion review committee, personnel assessment, or in recommending recipients of rewards, etc.); reprimand (restriction on management’s exercise of right to discipline—participation of trade union in disciplinary committee, appropriateness of the scope of relief measures in case of unfair discipline, restriction on dismissal of trade union members who are sentenced to be guilty due to trade union activities, etc.); and restriction on management rights (consultation with a trade union over transfer of worksites, overseas investment and others); and
- criteria to evaluate the working conditions (wages, retirement, leave etc.) and the appropriateness of protecting industrial actions include appropriateness of wages, retirement and leave, protection and liability of industrial actions and follow-up measures of industrial actions (including “no-work, no-pay” principle, and reckless reinstatement of fired workers).

### (3) Management performance evaluation and labour relations

**524.** The “Sound Labour Relations” criterion clearly shows that the management performance assessment is hostile to trade unions. The 2008 Common Evaluation Criteria for Public Corporations and Quasi-government Organizations explains the “Sound Labour Relations” criterion. The purpose of the criterion is to “appraise efforts for the advancement of labour relations”, and there are six subcategories with several checklists. For example, the checklist of the “Eligibility for Trade Union Membership” subcategory includes umbrella organization, multiple trade unions, membership eligibility, the portion of union members and union fee check-offs. The “Appropriateness of the Number of Full-time Trade Union Officials” entry states, “to determine whether the number of full-time trade union officials and its portion to the entire union membership are appropriate”. To evaluate umbrella union, membership eligibility and organization rates reveals the hidden intention of the Government to intervene in trade union activities. Some entries in the lists even see certain collective agreement terms problematic, e.g. in the “Collective Agreement and Management Rights” category, a statement reads, “This is to analyse how much organization flexibility and management rights are compromised by collective agreements.”

**525.** In the “Advancement of Labour Relations” and “Sound Labour Relations” categories, the Assessment Committee does not hide its intention to turn the current collective labour relations into individual company-based structure. Suggestions of the Assessment Committee fundamentally deny autonomous labour relations in individual companies. The complainant signals some of its findings, e.g. some organizations lost organizational flexibility due to collective labour relations; fringe benefits were found to be excessive in some cases; certain collective agreement clauses possibly violated management rights; most of the subject organizations did not follow government directives in relation to the number of full-time trade union officials; some institutions were identified to have problems to implement rational, mutually beneficial labour relations; specific collective agreement terms allowing trade unions to intervene in the management or personnel policy of the institutions remained to be fixed; the increase of wages beyond government

guidelines through collective bargaining needed to be prohibited; some trade unions were found to have more full-time trade union officials than their organizational needs and to be given excess support from their employers; etc.

**526.** The performance result report insisted trade unions escape from the influence of an umbrella organization in order to destroy collective labour relations. For example, the report states that it is essential for trade unions to discuss pending issues with open mindset, not fettered by the opinion of an upper trade union. It is also argued that the Government needed to control these institutions through strict directives. For example, the report states that the following meaningful changes were found: (i) wage negotiation has disappeared from the collective bargaining table; the occasion and duration of wage negotiations have been reduced because there is little room for change by collective bargaining, as the wage increase rate cannot exceed the limit set by government directives; and (ii) labour relations have generally been improved; however, this progress has resulted from the compromised effectiveness of taking collective labour relations due to strict government guidelines rather than from improved labour relations management skills on the part of employers. In this sense, the advancement of labour relations mentioned in this report actually refers to the debilitation of trade unions.

**527.** Lastly, the complainant provides examples of problematic sections in the management performance evaluation report, which:

- (i) depict legitimate trade union activities concerning public interests as militant trade unionism and undue demands, in particular:
  - KORAIL: “The management refused undue demands from the trade union and adhered to principles. It is an exemplary case for the KORAIL management to compel the trade union to halt a strike by creating public opinion critical to the labour dispute through meticulous preparation and proper public relations activities.” “The management strove enough to redress problems identified by the government management performance evaluation of the previous year: protect personnel and management rights, control illegal labour disputes of the trade union, and reduce full-time trade union officials by expanding dialog and negotiation through increased number of labour–management council meetings ...” “... the management and labour are still in a stalemate over financial independence of the trade union, peak salary system and retirement pensions. In addition, even though the management reduced ten full-time trade union officials through collective bargaining and joint council, the number of union officials currently stands at 55, still higher than the proper number of 21 considering the size of the trade union.”
  - KOGAS: “The management discarded its conventional compromising attitude in labour relations management to adhere to strict principles based on law and order, and the focus of labour relations spread to local workplaces from headquarters. The management is seeking to communicate with employees directly.” “Given the current situation, the management had no option but to adhere to principles and rules, as its trade union is exceptionally militant compared to other trade unions in public organization. For example, the management strictly applied the “no-work, no-pay” principle to those who were engaged in trade union activities during work hours. In case of illegal activities of the trade union, including interrupting general shareholders’ meeting and blocking the legitimately appointed president from entering office, the corporation took consistent measures based on principles: filing a lawsuit for damages, applying for provisional disposition prohibiting the trade union from obstructing business, filing a criminal complaint and reprimanding those concerned.”

- (ii) require employers to respond to trade union activities relating to participation in KCTU and industrial unions
  - Incheon International Airport Corporation: “... as the trade union changed its umbrella union, it is expected that the policy direction of the organization would change radically. The management must take these factors into consideration in order to keep the effectiveness of the master plan for new labour relations.”
  - Korea Electrical Safety Corporation: “It is judged that a new collective agreement must be concluded as soon as possible, which was delayed in the process that new director was appointed to the organization and an industrial union (the KPSU) denied an upper trade union’s demand for industry-wide bargaining, agreeing and agreed on an individual bargaining principle, so that a culture of mutually beneficial labour–management cooperation can be established.”
- (iii) require or state joint declaration on labour–management cooperation or on advancement of labour relations:
  - National Health Insurance Corporation: “... events which could foster labour–management cooperation and trust such as a ‘declaration of labour–management cooperation’ or ‘joint labour–management declaration’ are not being organized.”
  - Sports Promotion Foundation: “In a ‘Declaration of Labour–management Accord’ issued on 12 August, the Foundation, the trade union, and the General Union stated their intentions to contribute to improvement of management efficiency through labour–management accord and cooperation, finding solutions to systemic improvements through labour–management consultations, and establishment of an effective management system through a joint labour–management council.”
- (iv) stress conclusion of collective bargaining without negotiation or granting of negotiation authority to the management, in particular:
  - Sports Promotion Foundation: “No labour disputes have occurred for the last 19 years. The 2008 collective agreement and wage agreement were concluded without bargaining, and the duration of wage bargaining was also reduced compared to the previous year.”
  - Korea District Heating Corporation: “As it had the previous year, in 2008 the corporation concluded the wage agreement without bargaining in accordance with the range stipulated by the Government guidelines on wages. This reflects cooperative labour–management relations.”
- (v) require specific collective agreement clauses regarding labour relations advancement or increasing management efficiency, or assess them as positive achievements:
  - Korea Cadastral Survey Corporation: “... problematic provisions were identified in the collective agreement: ... Consultations with the trade union in case of adopting annualized salary system; ... Ban on lowering wages (management cannot lower ... wages for transfer of trade union members, change of wage payment system (annualized salary, etc.), working hour reduction, lowered productivity, low management performance or any other reason without acquiring consent from the trade union or in case of a justifiable reason). These provisions possibly place restrictions on advancing labour relations and

streamlining organization ... It is judged that labour and management review the appropriateness of these clauses, and provide reasonable solutions.”

- Korean National Pension Service: “The inspection conducted in the previous year identified collective agreement provisions that violate management rights, thus lowering the flexibility of the organization (employment security ... ). However, these clauses remain to be amended this year, and the corporation does not comply with government guidelines about full-time trade union officials. The contents of the collective agreement need to be improved and the collective bargaining period should be adjusted ... .”
- Sports Promotion Foundation: “The management deleted three collective agreement clauses violating management and personnel rights and showed efforts to abide by government directives.”

In conclusion, the 2008 assessment for organization heads, which was conducted in 2009, focused on common tasks such as advancement and increasing management efficiency. Sixteen out of the 19 “good-graded” institutions received good results in the categories workforce reduction, compensation adjustment and labour relations, and eight out of 11 “poor-graded” organizations received bad results in these categories. As such, the Government leveraged the assessment as a tool to enforce workforce reduction, wage reduction and deterioration of labour relations in all public institutions. Moreover, in the 2010 assessment, half of the evaluation was about labour relations advancement. As such, the Ministry of Strategy and Finance took advantage of the assessment as an instrument to intervene unfairly in labour–management relations in public organizations, which must be autonomously determined by labour and management.

### (3) Inspection of the Board of Audit and Inspection (BAI)

**528.** The BAI conducts regular inspection on public institutions at least once in every three years. The inspection reviews personnel and budget management of organizations subject to inspection. The BAI takes various measures depending on inspection results, which include requests for correction or improvement, recommendations on personnel and budget matters and accusations to investigation authorities. Such follow-up measures serve as one of the most powerful tools of the Government to control public institutions. Moreover, the administration took advantage of BAI inspection on public organizations as a preliminary attempt to merge organizations and reduce workforce in public enterprises and quasi-government organizations as well as to lay the logical groundwork for public-sector restructure.

#### (i) *2008 inspection for public institution advancement*

**529.** In 2008, the BAI launched massive rounds of audits on public enterprises and quasi-governmental organizations under the name of “increasing management efficiency of public institutions”. The audit agency concluded that some of them needed to be privatized, cutback organization and functions, delisted and integrated into the parent enterprise, or liquidated. Embarking on the inspection on local public corporations, the BAI stated that it was aimed at spreading the central Government’s public institution advancement policy throughout local governments, revealing that this move was meant to lay the groundwork for the central Government to merge, privatize and streamline local public corporations.

**530.** All public institutions except those who had received audits in the second half of 2007 were subject to the 2008 BAI inspection rounds, an unprecedented level in terms of range and scope. During the process, auditors urged inspected organizations to take voluntary restructuring measures.

**531.** The BAI launched such an inspection drive in order to control public institutions. Out of more than 300 entries in its checklist, about 100 items concern personnel management and about 100 are related to labour relations, while 70–80 are about personnel systems, directly influencing trade union activities. Auditors used the checklist to investigate trade union activities and the membership eligibility, causing the termination of collective agreements or halting collective bargaining in progress.

(ii) *2009 monitoring of the implementation of the Public Institution Advancement Plan*

**532.** The audit agency announced the Inspection Plan for the first half of 2009 on 4 February 2009. According to the plan, the newly established Public Institution Inspection Department would be in charge of monitoring the progress of the Public Institution Advancement policy. The plan was focused on “scrutinizing lax management to increase management performance of public institutions” and “monitoring the implementation of the Advancement Plan” as well as “inspecting organizations over undue intervention in management activities by trade unions, running excess number of full-time trade union officials and secret agreements between labour and management”. This means that the BAI points out trade unions as a main obstacle to the reform of public institutions. A document named “Direction of Future Inspections for the Advancement of Local Public Corporations” clearly reveals such a point of view. According to the document, the agency will apply the same principles that were used to inspect central public institutions to local public corporations in order to ensure principle-based management at local organizations, which adheres to rules and laws. However, given that the BAI relates all of the causes for lax management in public corporations to trade unions, such “rules and laws” actually mean the weakening of trade unions that are a possible obstacle to so-called “reform”.

**533.** The complainants state that the BAI identifies as causes for lax management: (i) lack of morality on the part of management (abuse of personnel rights such as wrongful employment, lack of specialty, overlooking illegal activities by trade unions, etc.), recommending and requesting to replace or dismiss the lazy management; (ii) illegal labour–management practices (violation of management rights, illegal wage increase through secret agreements, etc.) offering help to achieve legal and normal labour and management relations; and (iii) overlooking of local governments (retired civil servants descending on management posts riding so-called “golden parachutes”, overlong management’s slackened discipline, overlooking illegal labour relations, etc.), recommending to identify and reprimand those who were responsible for monitoring and supervising organizations in question.

(iii) *2009 audit for the Korea Railroad Corporation (KORAIL)*

**534.** The abuse of authority and illegal audit practices of the BAI are clearly identified in its audit report for KORAIL, which was out on 27 August 2009. The BAI argued that the company paid excess bonuses to employees in violation of the budget directives for government-invested organizations in 2007. However, at the outset, KORAIL workers did not demand special bonuses in 2007. In the 2007 collective bargaining, the trade union just requested compensation for their lower wages compared with other public corporation workers. Payment of such compensation had already been agreed upon between the management and labour as well as between the Government and labour in 2005 when Korean National Railroad was turned into the Korea Railroad Corporation. However, in 2007, the Ministry unilaterally notified the trade union that it would not carry out the agreement under the pretext of government directives for the payment of performance-linked remuneration. After the 2007 collective bargaining was completed, management decided to pay special bonuses worth 50 per cent of the original compensation. The BAI recognized such circumstances during the 2007 management performance evaluation of

the corporation, which was conducted in 2008, and published evaluation results. However, two years later, the agency suddenly requested to correct such measures which resulted in the reduction of workers' basic salary by 50 per cent in 2009. The complainant concludes that in this inspection round, the BAI considered autonomous labour-management relations as violating government guidelines and directives.

(iv) *2010 special audit for the progress of the Public Institution Advancement Plan*

**535.** In July 2010, the BAI announced it would carry out on-the-spot inspections on the progress made towards the public institution advancement policies. A total of 132 public institutions were the target of these inspections, which evaluated "advancement plans and progress" and "state of union management and support". The BAI announced the results of these inspections on 20 August 2010. The inspections covered five areas: corporate governance, progress on the "Advancement Plan"; advancement of labour relations; personnel expenses; and benefits. Thus, they covered the entirety of labour relations and working conditions, including the contents of CBAs, labour's participation in deciding working conditions, and even the rights of workers to join trade unions.

**536.** The BAI saw it as problematic that department chiefs, who it deems to fall into the category of employer, have joined the trade union. The audit agency bases its argument about the eligibility for trade union membership on article 2.2 of the TULRAA, which defines the term "employer" as a person who acts on behalf of a business owner with regard to matters concerning workers in the business. It argues that the department chiefs are "bestowed authority and responsibility from a business owner for determining working conditions of employees". The agency also cites article 2.4 of TULRAA, which states, "an organization shall not be regarded as a trade union when an employer or other persons who always acts in the interest of the employer are allowed to join it", to support its argument. The agency presented a company that had deprived six third-grade inspection department employees of trade union membership by revising the collective agreement as an exemplary case. However, the provisions in TULRAA seek to ensure the independence of a trade union, and court rulings support this point, stating that, even though a trade union allows those who act on behalf of an employer to join the trade union and, thus, some members of the trade union shall not be regarded as entitled members of the trade union, the trade union does not immediately lose its status as a trade union defined by the Act (TULRAA), but loses the status only if its independence has actually been damaged or could be damaged by the representatives of employers' interests. However, the BAI argues that reducing the scope of eligibility to trade union membership and restricting freedom of association is to follow government directives and to advance public institutions.

**537.** The BAI argues that holiday systems and employee benefits guaranteed by the collective agreement, which are not prescribed by the Labour Standard Act (LSA) or exceed "limits prescribed by the LSA and government directives for public corporations and quasi-governmental institutions" are not in conformity with the law. The BAI also demanded KORAIL to correct the practices of "paying overtime wages and compensation for unused paid leave in violation of the LSA and MOSF directives". However, article 3 of the LSA states as follows: "The working conditions prescribed by this Act shall be the minimum standards for employment, and the parties to labour relations shall not lower the working conditions under the pretext of compliance with this Act." There are no legal grounds that the Government controls working conditions agreed upon by the management and labour of a public institution through a collective agreement in accordance with the TULRAA, even though such working conditions are higher than those prescribed by the LSA.

- 538.** The BAI even encouraged public corporations to terminate collective agreements. After the 2009 Monitoring on the Progress of Public Institution Advancement Policy, the audit agency cited more than ten public corporations as exemplary cases to terminate collective agreements or give trade unions termination notice. The audit report pointed out that some of the institutions, however, just devised an Improvement Plan for Labour Relations but did not take effective measures to enforce it such as collective agreement termination. Thus, to the BAI, effective measures to advance labour relations include the termination of collective agreements by employers. As of 1 September 2010, more than 20 public institution unions have been notified of the termination of collective agreements since 2008, when the public institution advancement policy was launched. All of these unions are affiliated with the KCTU.
- 539.** The unilateral termination of collective agreements and the deterioration of their terms are the new methods to suffocate trade unions. In most public institutions, collective bargaining tables that began from 2008, employers demanded terms in accordance with government guidelines. If their trade unions refused the terms, the employers terminated CBAs unilaterally. Employers then coerced trade unions into agreeing on worse collective agreement terms. They pretext government guidelines, indicated problems in management performance assessment, government checklists and BAI audit recommendations. Most of the worsened terms are related to reducing of trade union membership eligibility, curbing trade union activities, and protecting management and personnel rights of employers.
- 540.** According to the TULRAA, a collective agreement becomes invalid six months after one party gives termination notice to the other. In this case, issues regarding working conditions (the normative part of the collective agreement) are regulated by individual employment contracts. Thus, employers can change employment contract terms depending on negotiations with individual workers, ruling out trade unions. More problematic are institutional issues (the obligatory part of collective agreements), which cover protection of trade union activities and trade union participation in management (attending committees, and obtaining consultation with or consent from the trade union). Once the collective agreement becomes terminated, the trade union loses its tools to check the management and channels through which it sets forth opinions. Then, the management decides issues unilaterally and the trade union becomes nullified.
- 541.** In case of accepting worsened collective agreement terms, results are the same. For the evaluation of collective agreement terms of public institutions, the following four subcategories with 25 points are assessed: trade union membership and protection of trade union activities; restriction on participation of trade unions in personnel management and overall management activities; working conditions such as wages; and collective bargaining and labour disputes. All of them relate to trade union activities. The objective of the regressive revision of collective agreements is the same as that of unilateral termination of collective agreements: debilitating trade unions through curbing and compromising protection for trade union activities and blocking or minimizing union participation in management processes.
- 542.** The participation of public workers in public institutions' management can shape government policy directly or indirectly. The Government's move, however, has resulted in the exclusion of public institution trade unions from the process of discussion for public interests. That is why the Government is attacking public institution trade unions. This goes beyond just labour-management issues to the extent that excluding trade unions from participation in management of public institutions leads to preventing citizens from being involved in public decision-making processes. In this sense, it is not just trade unions that are being threatened by the Government's move, but the democracy of society itself.



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**III. Denial of recognizing cargo truck drivers as workers and threat to cancel union registration of the Korean Transport Workers' Union (KTWU)**

(1) Recognizing cargo transportation workers as workers

- 543.** Court rulings determine a person as a worker under the Labour Standards Act depending on whether, in substance, a labourer provides labour for wages in a subordinate relationship to an employer, to a business or at a workplace. Further, to determine whether such a subordinate relationship exists, the following factors are considered: whether the contents of the work are determined by the employer, whether the worker is subject to the employer's concrete and specific direction and control, whether the employer determines the time and place of work, etc. According to these factors, cargo truck drivers are under relatively weak direct and concrete direction and control from the employer. This is because cargo transportation is independently carried out by the driver, and the work takes place outside the premise of the employer. However, these working processes are typical to other kind of jobs whose working processes happen outside workplaces, i.e. salespeople.
- 544.** Given the nature of freight transportation, the employer's direction and control focus more on the accurate, on-time delivery of the freight than on the process of transportation activity itself. During the transporting labour, truck drivers are bound to the employer's direction through a fleet schedule. This means that these independent workers cannot decide their work hours, places and duties, as they have no right to choose delivery time and path. In addition, transportation companies have a unilateral authority to cancel a contract. Therefore, independent workers transporting cargoes cannot be seen as self-employed business people. It is not reasonable to deny truck drivers to be workers on the grounds of their ownership of vehicles since the truck is not a means to run an independent business but an inevitable instrument to provide labour under the unique system of the transportation industry.
- 545.** Furthermore, the complainants provide a historical overview of the (non)-recognition as workers of truck drivers with owner-operator contract. In particular, the complainants indicate that in 1994, the Labour Ministry issued an administrative interpretation that recognized truck drivers with owner-operator contracts as workers for the first time. In 2000, the Labour Ministry issued a new administrative interpretation to reverse the previous one, denying transportation workers to be workers. The shift was based on court rulings. In 2003, the Korea Cargo Transport Workers' Union (KCTWU) staged a general strike and reached an agreement with the Government to accept truck drivers as special employees involved in freight transportation. In 2005, the Government announced to recognize the KCTWU as a representative body of cargo truck owner-operators. In 2009, the Government ordered that the Korea Transport Workers' Union cancel the membership of special contract workers voluntarily stating that giving membership to special contract workers could lead to the rejection of the union registration.
- 546.** The complainants also provide an overview of the relevant court rulings. Generally, the Supreme Court of Korea has constantly maintained that owner-operators are not under the employment relationship with the user of owner-operators. According to its rulings, owner-operators who have business registration and pay corporate income tax, do business with their trucks and do not receive specific instructions other than the initial assignment of consigners and consignees. Thus, they cannot be seen as employees working for the companies. However, some lower court decisions acknowledged the truck owners as employees based on the following reasons: trucking operation is instructed and monitored by the trucking company; the owner-operator is not allowed to hire a substitute driver to run the vehicle on behalf of him or her; and taking days off without the trucking company's approval is also not allowed.

**547.** Thus, the owner-operator is not recognized as a worker. Yet those who receive specific instructions and supervision from the trucking company and are not allowed to have substitute drivers operate their trucks are exceptionally deemed as workers.

(2) Threat to return application for the registration of the KTWU

**548.** In 2009, the KTWU was required to make voluntary corrections to a speculative situation where some of the KCTWU members are not workers. The Labour Ministry required the union to rectify its membership within 30 days citing that it has authority to reject the unionization application.

**549.** However, the complainants believe that, firstly, the Labour Ministry has no right to determine the qualification of a trade union after the completion of its establishment. The TULRAA only gives the Labour Ministry authority to review a registration application of union. There is no legal ground enabling the Ministry to examine whether to cancel the registration of an existing union that was once legally established. Secondly, the Labour Ministry cannot issue a corrective order over non-workers participating in a union. While the Ministry can order that a trade union take corrective measures based on article 21 of TULRAA regarding “Correction of Bylaws and Resolutions or Measures”, on the assumption that independent workers cannot acquire membership of a trade union, the Act only enables administrative agencies to order the correction with the “resolution of the Labour Relations Commission”. Thus, the corrective order is not legally valid because it did not go through an appropriate process. Even if the Ministry gained resolution from the NLRC and makes the correction order valid, the trade union could only be fined for violating it but not closed.

## **B. The Government’s reply**

**550.** In its communication dated 28 October 2011, the Government states that public institutions in Korea exert tremendous influence on the economy as they constitute a significant portion of the national economy executing a huge budget and provide major public services and social infrastructure including energy. As for industrial relations, the union density of public institutions is 59.7 per cent in 2010 corresponding to more than six times that of all sectors which is 9.8 per cent in 2010, thereby having a strong influence on overall industrial relations in Korea.

**551.** However, public institutions have come under mounting criticism for their continued problems such as inclusion of illegitimate terms in collective agreements, unfair labour-management practices and lax management by employers without a sense of ownership. Recognizing the need for addressing illegitimate elements of industrial relations and establishing a reasonable order for the sake of the public who are the eventual employers of the public institutions, the Government is seeking to advance industrial relations.

**552.** The Government is of the view that the complaint contains allegations that do not correspond to facts and are thus misleading. Therefore, the Government provides its observations based on facts with regard to the allegations made by the KCTU and the KPTU.

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***Alleged infringement of basic labour rights  
of workers in public institutions***

- 553.** With respect to the allegation that trade unions were excluded from the Committee for Management of Public Institutions (Management Committee), the Government indicates that the Management Committee is responsible for deliberation and resolution of matters concerning the management of public institutions. Given that public institutions are for public interest, the Management Committee should desirably be comprised of independent experts who represent the interest of the public. The Act on the Management of Public Institutions stipulates that “people with good knowledge and experience in the area of management and business administration of public institutions and also good reputation for impartiality” should be commissioned as the Committee members. Currently, the Committee includes seven appointed members from various fields – one from the legal circles, one from the Government, four from academia and one from civic groups.
- 554.** Concerning the allegation that trade unions were excluded from the Management Performance Evaluation Team for Public Institutions, the Government states that the management performance evaluation for public institutions is a tool to ensure more efficient and responsible management of public institutions by reflecting the management performance in the performance assessment of executive officers and the performance compensation for employees. Given that the evaluation is conducted on the employers and employees of public institutions, it is appropriate to exclude anyone who represents them from the Evaluation Team. In this regard, neither labour nor management is allowed to take part in the Evaluation Team and, the team is currently composed of independent experts such as lawyers and professors in accordance with the relevant law.
- 555.** As regards the allegation that the trade unions’ opinions were not reflected in the decision on working conditions for employees in public institutions, the complainants argue that the MOSF budget directives for public corporations and quasi-governmental institutions cover overall matters concerning wage and collective bargaining of public institutions, however, the trade unions are given no chance to participate in the process of determining major items of the directives such as the ones related to personnel and general expenses. The budget compilation and execution directives prescribe general principles and standards for budget compilation and execution to realize rational business administration and efficient management of public institutions. Considering the fact that public institutions are run on the taxpayers’ money for the purpose of providing public services, these directives set standards on various expenses including the wage increase rate, etc. pursuant to pertinent regulations. The wage increase rate prescribed in the budget compilation directives is to provide guidelines for wage bargaining, not to intervene in the overall wage and collective bargaining affairs of public institutions or to exert forceful control in that regard. Furthermore, the Government collected opinions from trade unions by holding discussions with labour including the Federation of Korean Trade Unions (FKTU) on 3 November and 12 November 2010 in the course of drawing up the “2011 budget compilation directive for public corporations and quasi-governmental institutions”.
- 556.** Furthermore, the complainants assert that there have been no consultations with trade unions or ways to reflect opinions of labour representative at all in the process of the advancement of public institutions. On the contrary, on 17 September 2009 the Government gathered opinions from the Federation of Korean Public Trade Unions (FKPU) on the “performance-based pay standard model” while restructuring the pay system of public institutions. It also attended the KCTU’s conference on management evaluation on 2 November 2010 to take account of their views in reshaping the 2011 Management Evaluation System. In addition, the Government sits with the presidents and leaders of the KCTU and the FKTU, the two largest umbrella unions in Korea, as

frequently as necessary to hear their voices in pursuit of the advancement of public institutions.

**557.** With respect to the alleged attempt to debilitate trade unions by raising issues with the collective agreements between labour and management, the complainants claim that the Government's advancement plan fundamentally denies the autonomous labour relations of the public institutions and intervenes in activities of the trade union which is by nature an autonomous association, by questioning the terms of the collective agreements produced as a result of negotiations and agreements between labour and management. Public institutions refer to organizations that provide public services within the scope commissioned to them by law, and the Government has the authority to guide public institutions according to relevant laws. It is along that line that the Ministry of Employment and Labour, as a competent government agency, performed consulting and provided opinions to public institutions under its umbrella in the face of a flood of inquiries by employers on the legality of their collective agreements with unions. The Ministry had no intention at all to question the contents of the collective agreements or to force their revision according to the Government's policy orientation. Basically, the Government's plan for advancing public institutions respects the autonomy of industrial relations. The management evaluation for public institutions is conducted to a reasonable extent to ensure efficient provision of public services. Indeed, it has nothing to do with intervening in activities of the trade union or denying the very nature of the union.

**558.** Concerning the allegation that the Government placed pressure through audits and inspections for the advancement of public institutions, the complainants argue that the Government's 2008 inspections for public institution advancement directly intervened in trade union activities, and that its 2009 monitoring on the implementation of the public institution advancement plan revealed its perception of the trade union as a main obstacle to the public institution reform. The purpose of audits and inspections of public institutions is to stimulate them to secure public interest and efficiency, given that they have little motivation for cost saving as they are granted financial supports and monopoly from the Government. The inspections conducted in July 2008 found cases of unfair practices including bonus payments based on false documentation. Accordingly, competent authorities concerned were notified to come up with measures and rules to prevent recurrence of such cases, which we believe cannot be seen as intervention in union activities. Likewise, in 2009, audits did not raise issues with fair and lawful labour practices or the trade union itself. The complainants claim that, when announcing a special inspection schedule in 2010, the BAI urged heads of public institutions to press trade unions, stressing that it would actively exercise its right to recommend dismissal of the management of public institutions in case of lax management resulting from a lack of morality or illegal labour-management agreements. However, it is only appropriate that public institutions, as government-invested organizations with the role of providing public services, are held responsible by the Government for lax management caused by their management's lack of morality. Again, it has nothing to do with union activities.

**559.** Furthermore, the complainants assert that based on the result of inspections in 2010, the Government recommended revision of the collective bargaining on the grounds that it is problematic that department chiefs, who fall into the category of employer, have joined the trade union. What the Government actually did was to recommend that corrections should be made in the case where the trade union includes staff of public institutions who has the authority to decide working conditions, issue orders or perform supervision, thus falling into the category of employer. The complainants argue against the BAI's opinion that holiday systems and employee benefits prescribed by collective agreements which exceed limits defined by the LSA are inappropriate. However, their argument that holidays and employee benefits can exceed the statutory limits overlooks the unique nature of public institutions which are run on the taxpayers' money for common good. Public institutions

are granted financial support and monopoly from the Government, and thus enjoy a much more stable status than private sector establishments. Nevertheless, their financial fundamentals appear to be unsound with debts of 286 public institutions totalling KRW386 trillion (about US\$330 billion) as of 2010. Against the backdrop, the Government saw it necessary to provide opinions to minimize lax management including doling out of hefty employee benefits and compensation excessively beyond the minimum requirements prescribed by the LSA.

- 560.** As regards the alleged Government intervention concerning unilateral termination of collective agreements (including a request for deterioration of terms), the Government states that termination of the collective agreement is intended to prevent the concerned parties from being unfairly bound by the existing collective agreement for a long while and at the same time to facilitate bargaining for a new agreement, in the case that the parties failed to make a new collective agreement past the expiration of the existing one. The relevant law stipulates any party to the agreement – either labour or management – can terminate the collective agreement, which, therefore, is fair to both parties. The complainants allege that the Government’s move to judge the rationality of terms of the collective agreement by its own standard and to rank public institutions in terms of rationality, putting pressure on them, is to deny collective agreements and to incapacitate trade unions. However, the Government has never coerced public institutions to terminate collective agreements or issued rationality rankings to press them. Moreover, the Government believes in the principle that in the matter of making or terminating a collective agreement it is up to labour and management to act with autonomy. The complainants go on to say that the Government is excluding trade unions from participation in management of public institutions, thereby preventing them from being involved in the public policy decision-making process, which is certainly not true. The Government guarantees trade unions’ participation in a wide range of committees that discuss and decide on major national policies. Among them are the Labour Relations Commission, the Minimum Wage Council, the Investigation Committee of the Employment Insurance, and the Investigation Committee of the Industrial Accident Compensation Insurance, to name a few related with the Ministry of Employment and Labour.
- 561.** The Government also provides its observations concerning the alleged Government intervention in collective bargaining of certain public institutions and repression of trade unions.
- 562.** With respect to the KOGAS, the complainants allege that the Government tactically led the management side in the collective bargaining and pressed it to notify the trade union of its withdrawal from the collective agreement. The Government does not exert pressure or intervene in the bargaining process as it sees the collective agreement as an autonomous regulation that is made through autonomous bargaining between labour and management. When it comes to the collective agreement of KOGAS tentatively agreed on 3 May 2010, labour regarded it as a valid agreement whereas management reckoned only part of it as agreed. The Government believes that this difference in perception led to the management’s decision to withdraw from the tentative agreement. Meanwhile, the collective agreement of KOGAS was concluded in a smooth fashion on 17 September 2010 through voluntary efforts of labour and management, and currently there is no pending issue between the parties.
- 563.** Concerning KORAIL, the complainants argue that the Government applied charges of obstruction of business to union members’ lawful passive refusal to work, waging an all-out crackdown on the trade union’s collective actions. The KORAIL union staged strikes six times throughout the year 2009 and the management filed criminal lawsuits against the union leadership on charges of obstruction of business. The Seoul Central District Court

upheld the charges and ruled the strikes conducted in November 2009 to be illegitimate. The accused appealed to the Supreme Court where the case is currently pending. In principle, the Government guarantees legal protection for legitimate strikes. During the KORAIL strike in 2009, the Government established and executed a contingency transportation plan including alternative transportations, regardless of the legitimacy of the strike, with a view to minimizing inconvenience to citizens due to possible disruptions of transportation services. Therefore, their allegation of the Government's repression on the trade union during the strike is not true.

**564.** As regards the Korea Labour Institute, the complainants claim that the Ministry of Employment and Labour, the Institute's main client, stopped all orders for research and transferred the ongoing projects to other agencies following the 2009 strike, exercising immoral pressure. However, the selection of researchers for the Ministry's policy research projects goes through due procedures such that the "Deliberation Committee on Policy Research Projects" including five external members pursuant to the "Rules on Research Projects of the Ministry of Employment and Labour" makes a decision based on objective criteria: (1) research capability; (2) whether submitted proposals meet the purpose of the research; (3) feasibility (practicability) of the proposed research plan; (4) adequacy of research costs, and so forth. Hence, the strike at the Institute and the selection of research agencies have no relation at all, and its allegation of the Ministry's illegitimate pressure is groundless. In addition, the "employment impact assessment project" that the complainants mention as an ongoing project transferred to another agency is a new project launched in 2011, following a pilot period in 2010. The researcher for this project was selected through an open competitive bidding process. Therefore, it is not true that the Government stopped the ongoing project that the Institute had been carrying out for years. In the case of the labour panel project, it became inevitable to change the researcher out of concern that the discontinued or incomplete statistical survey caused by the Institute's strike might undermine the value of the research as its outcome is to be used as the basis for employment and labour policies as well as academic studies.

**565.** Finally, with respect to the denounced denial of recognizing owner drivers of heavy goods vehicle as workers and the alleged threat to cancel union registration of the KTWU, the Government states that the KCTU had previously raised the same issue in the framework of Case No. 2602, and the Committee has adopted recommendations in March 2011. Therefore, the Government refers to its October 2010 observations submitted in the framework of Case No. 2602.

### **C. The Committee's conclusions**

**566.** *The Committee notes that, in the present case, the complainant organizations allege repression of trade unions and violation of collective bargaining rights in several public institutions and enterprises; the issuance by the Government of a series of directives to curb trade union activities in general; and the refusal to recognize cargo truck drivers as workers and threats to cancel the trade union registration of the KTWU.*

**567.** *The Committee notes that the issues raised by the complainant concerning the refusal to recognize cargo truck drivers as workers and the threats to cancel the trade union registration of the KTWU are being addressed in the framework of Case No. 2602 and were previously examined by the Committee in its 363rd Report, approved by the Governing Body in March 2012. The Committee therefore refers to the latest conclusions it has reached in Case No. 2602 [see 363rd Report, paras 454–466] and will thus not address these issues in the present case.*

**568.** *As regards the general allegations, the Committee notes that, in the complainants' view, the right to collective bargaining of trade unions in public institutions is severely damaged to the extent that autonomous labour-management negotiation has become almost impossible. The Committee notes the complainants' allegation that the Government restricts the right to collective bargaining by adopting various measures, without consulting trade unions beforehand, such as:*

- (i) *official directives concerning e.g. personnel expenses, which are issued by the MOSF after deliberation and resolution by the Management Committee; this body no longer includes persons with labour background, to the effect that unions are not consulted at all; within the framework of the Plan for the advancement of public institutions/Category "Advancement of Labour Relations", the Government analysed collective agreements at public institutions and proposed "improvement programmes" to revise "irrational" collective agreement provisions concerning trade union operation and support, protection of union activities and breadth of union authority so as to restrict the scope/eligibility of trade union membership (e.g. department chiefs, dismissed workers); limit the equipment, facilities and maintenance costs provided for trade union operation; reduce the number of salaried full-time trade union officials in proportion to union membership; limit trade union activities and education during work hours (application of "no-work, no-pay" principle); restrict trade union intervention in management and personnel rights of employers (e.g. through union attendance of managerial meetings, equal number of labour and management members in employment security committee and requirement of union consent or consultation over restructuring, wage reduction or personnel changes of union officials); and prohibit wage increase beyond government guidelines favouring disappearance of wage negotiations;*
- (ii) *related management performance evaluation reports and checklists, which equally include the above "Advancement of Labour Relations" category with the corresponding criteria for the evaluation of "rational collective agreement terms" and with criteria for "legal and rational labour-management relations" (e.g. protecting management rights in case of labour disputes; adherence to principles in response to undue demands from unions; strict response to illegal labour disputes in the form of criminal complaint, lawsuit for damages, disciplinary measures etc.; and no undue maintenance of previous agreement terms); neither experts in industrial relations nor with labour background can join the Evaluation Committee; and*
- (iii) *BAI audit recommendations following inspections to monitor the implementation of government directives, in particular the Plan for the advancement of public institutions; BAI even encouraged public corporations to terminate collective agreements by citing as exemplary those having recourse to such a measure.*

**569.** *The Committee notes that, according to the complainants, as a direct consequence of the above measures, the unilateral termination of collective agreements and the deterioration of their terms became common measures to "improve irrational collective agreements". In most public institutions where collective bargaining tables began as of 2008, employers demanded CBA terms in accordance with government directives, management performance evaluations reports and BAI audit recommendations. As soon as the trade unions refused the unfavourable terms, the employers terminated the collective agreements unilaterally. Employers then sought to coerce trade unions into agreeing on the deteriorated collective agreement terms, consistent with government instructions, mostly related to reducing trade union membership eligibility, curbing trade union activities, and protecting management and personnel rights of employers. In cases where the relevant trade unions began collective action against the worsening of the collective agreement and*

*working conditions, the Government called the actions illegal as shown in the case of the KRWU strike in 2009 because workers went on a walkout about “non-negotiable issues”.*

**570.** *The Committee further notes that the complainants allege that in specific public institutions and enterprises collective bargaining rights were violated and trade unions repressed as follows:*

- (i) In the case of KORAIL, collective bargaining with the KRWU started in July 2008. The employer’s proposal implied the deterioration of 120 out of 170 provisions of the previous collective agreement. After postponing negotiations, neglecting scheduled sessions and ignoring prior tentative agreements, and despite concessions on the part of the KRWU, the company notified the trade union of the unilateral termination of the collective agreement on 24 November 2009. Two days later, the KRWU went on strike. Evidence now shows that the unilateral termination of the agreement by the management was intended to provoke the trade union into going on strike. The administration declared the strike illegal on the charge of obstruction of business (section 314 of the Penal Act) arguing that it constituted an objection to government policies (esp. Plan to advance public institutions), which are not the subject of labour–management negotiation. The court confirmed the illegality of the strike holding that the union shall not exercise its right to strike over issues in the realm of management rights (e.g. workforce reduction, reinstatement, etc.). The trade union waged the strike to tackle expected degradation of working conditions. During the strike, arrest warrants were issued to 15 union officials, and the union’s office was seized for investigation by police. After the strike, 169 union officials were dismissed, over 12,000 union members who participated in the industrial action faced disciplinary measures (suspension, salary reduction, reprimand etc.), a lawsuit was filed against 200 unionists for alleged damages caused by the industrial action (KRW10 billion), and the management exercised pressure on union members in the position of department chiefs to disaffiliate.*
- (ii) In the case of KOGAS, collective bargaining with the Gas Corporation Chapter of the KPSU started in April 2009. Following the breakdown of negotiations and the failure of mediation in August, the union joined, in November 2009, the joint strike of the rail, power plant and gas unions to press for the conclusion of a collective agreement through autonomous labour–management negotiation. The management brought charges against ten union officials, and in October 2010 a prosecutor indicted them on charges of obstruction of business demanding prison sentences of eight to twelve months. As soon as the joint strike commenced, the company sent, on 11 November, notice of unilateral cancellation of the CBA and offered deteriorated collective agreement terms in step with the public institution advancement project. A series of negotiation rounds led to a final accord on 29 March 2010, which provided for the continuation of most parts of the previous CBA, plus heavy concessions by the union. On 31 March, the parties agreed that the new collective agreement would enter into effect on 30 April. However, the management refused to execute the agreement, due to the Government’s firm stance that the management further deteriorate its terms. Moreover, on 11 May 2010, the company notified the union that, as six months had passed since the cancellation of the previous CBA on 11 November 2009, the CBA (including provisions on salaried union officers, union dues check-off, paid union activities during work hours, use of office space, vehicle and other facilities) would lose validity. Accordingly, the management immediately took repressive measures by ordering the return of the ten salaried union officers to company work, prohibiting paid union activities during work hours, stopping check-off of union dues and forcing the return of the union office and supplies (incl. communication facilities). The union filed a suit to verify the validity of the new CBA and applied for an “injunction against obstruction of union activities.” A court granted the injunction confirming the*



*validity of the collective agreement. The company refuses to cease its unfair labour practices pending the lawsuit outcome and proposes further regressive revision of the collective agreement.*

- (iii) *In the case of the National Pension Service, collective bargaining with the Social Solidarity Pension Chapter of the KPSU started in April 2009. The management proposed the detrimental revision of the CBA, which would generally stifle trade union activities. Reaching an agreement between the two sides seemed to be difficult. The working-level representatives from the two parties, which had full responsibility for bargaining eventually reached a provisional agreement on 23 December 2009, but the management rejected it and proposed additional revisions for the worse instead. When the union opposed the implementation of a new annual salary system pushed forward under the pretext of efficiency, the management responded with the unilateral termination of the CBA on 15 March 2010. Negotiations resumed on 3 June 2010 based on the understanding that they would be limited to issues on which the parties had failed to agree upon in 2009. The management ignored the accord demanding the detrimental revision of 90 collective agreement provisions in line with government instructions. In order to protest against the newly proposed provisions, the union began its collective action in July 2010. The management abused disciplinary measures and filed lawsuits against unionists. Six standing union officers were charged with obstruction of business under the Criminal Act. The management has refused to participate in any further negotiation and is waiting for the union to give in, as there is no collective agreement in effect.*
- (iv) *In the case of the Korean Labour Institute, the management had approached bargaining with the Korean Union of Public Sector Research and Professional Workers (KUPRP) with lack of sincerity; before beginning a new round of bargaining, the management notified the union of the unilateral termination of the CBA in February 2009. In April 2009, the Institute's collective agreement was scored the lowest among all collective agreements of public institutions analysed by the Ministry of Labour, key problems referring to lack of provisions on union membership eligibility, excessive protection of union activities, obligatory union consent before reprimand etc. Since the management continued to refuse bargaining proposals, the union went on strike. The management responded by closing the Institute. At the end of the 85-day strike, the Institute's director resigned and the workers went back to work. The management brought charges of obstruction of business against all participants in the strike (police investigation underway). No real labour-management negotiations followed. Instead, management has put pressure on the union by demanding that the leadership resign, and that the union disaffiliate from KCTU and agree to a collective agreement compliant to government standards. In addition, the Government, the Institute's main customer, stopped orders for research projects. As of May 2010, staff had their salaries cut by 30 per cent.*
- (v) *In the case of the Korean Institute of Construction Technology, a worker who had made a declaration of consciousness against government policy in December 2008 faced disciplinary measures by the management one year later (contrary to initial promises). When the Korean Institute of Construction Technology Chapter of the KUPRP protested against these measures, the management responded in retaliatory fashion. Retaliation was probably also linked to an ordinary statement of concern made by the union in April 2009 relating to suspicions that the Institute's director had plagiarized his PhD thesis. In the end, the researcher, a union member, was suspended for three months; the union President was fired; the union's Vice-President was transferred to a remote testing site and subsequently fired after filing a lawsuit against the unfair transfer; and the union's Secretary-General was suspended for three months. At the same time, in pursuit of the "advancement of public enterprises" policy, the union received, on 2 December 2009, notification of*

*unilateral cancellation of its collective agreement. The management then undertook concentrated efforts to annihilate the union demanding 21 employees of the administrative department to leave the union or their positions, penalizing union members in terms of research projects and launching rumours that no single union member would be promoted. After only six months, the union, which used to have 400 members (90 per cent unionization rate), was reduced to 70 members (17 per cent) due to management pressure.*

- (vi) *In the case of the South-east, South, East-west, West and Central Electric Power Companies, collective bargaining with the Korean Power Plant Industry Union (KPPIU) started in July 2008. The two parties agreed upon 144 items with only five provisions left to be agreed. Following the breakdown of negotiations and the failure of mediation in October 2009, the management notified the union, on 4 November 2009, a day after the 13th collective bargaining session, of the unilateral termination of the collective agreement. On 1 April 2010, the management closed down the union offices when the executive committee took office. The union called for the resumption of negotiations but the management ignored previously agreed terms and proposed deteriorated provisions instead. Despite the union's concessions on the five unsettled terms, the management refused to extend the validity of the current collective agreement. On 6 May, the day the collective agreement became ineffective (six months after termination), the management ordered full-time union officials to return to their original positions. The management continued to neglect negotiations and refused mediation. The union decided on 24 May to go on a no-time-limit strike by designated union officials. One day later, the management blocked union dues check-off, stopped paying office expenses, discontinued communication facilities provided to the union and brought charges against trade union officials for calling the strike.*

**571.** *The Committee notes that, according to the Government:*

- (a) *public institutions have come under mounting criticism for inclusion of illegitimate terms in collective agreements, unfair labour-management practices and lax management by employers without a sense of ownership; recognizing the need for addressing these issues, the Government is seeking to advance industrial relations;*
- (b) *as to the alleged exclusion of trade unions from the Management Committee, this body should desirably comprise independent experts who represent the interest of the public; the Act on the Management of Public Institutions stipulates that "people with good knowledge and experience in the area of management and business administration of public institutions and also good reputation for impartiality" should be commissioned as Committee members; and currently, the Committee includes seven appointed members from various fields – one from the legal circles, one from the Government, four from academia and one from civic groups;*
- (c) *as to the alleged exclusion of trade unions from the Management Performance Evaluation Team, since the evaluation is conducted on the employers and employees of public institutions, it is appropriate to exclude anyone who represents them; thus, neither labour nor management is allowed to take part in the team, which is currently composed of independent experts such as lawyers and professors in accordance with the relevant law;*
- (d) *as regards the alleged lack of consultations, in the course of drawing up the "2011 budget compilation directive for public corporations and quasi-governmental institutions", relevant opinions were collected from trade unions by holding discussions with labour including the FKPU on 3 November and 12 November 2010; in the process of the advancement of public institutions, the Government gathered opinions from the FKPU on 17 September 2009 concerning the "performance-based*

*pay standard model” when restructuring the pay system of public institutions, attended the KCTU’s conference on management evaluation on 2 November 2010 to take account of their views in reshaping the 2011 Management Evaluation System and sits with the presidents and leaders of the KCTU and the FKTU as frequently as necessary to hear their voices; the Government also guarantees trade union participation in a wide range of committees that discuss and decide on major national policies (e.g. Labour Relations Commission, Minimum Wage Council, Investigation Committee of the Employment Insurance, Investigation Committee of the Industrial Accident Compensation Insurance, to name a few related with the Ministry of Employment and Labour);*

- (e) considering the fact that public institutions are run on the taxpayers’ money for the purpose of providing public services, MOSF budget compilation and execution directives set general principles and standards on various expenses, in order to realize rational business administration and efficient management of public institutions and corporations; the wage increase rate prescribed in the budget directives is to provide guidelines for wage bargaining, not to intervene in the overall wage and collective bargaining affairs of public institutions or to exert forceful control in that regard;*
- (f) the Government has the authority to guide public institutions according to relevant laws; it is along that line that the Ministry of Employment and Labour, as a competent government agency, performed consulting and provided opinions to public institutions under its umbrella in the face of a flood of inquiries by employers on the legality of their collective agreements with unions, without any intention to question the contents of the collective agreements or to force their revision according to the Government’s policy orientation; basically, the Government’s plan for advancing public institutions respects the autonomy of industrial relations;*
- (g) management evaluation for public institutions is conducted to a reasonable extent to ensure efficient provision of public services; the purpose of audits and inspections of public institutions is to stimulate them to secure public interest and efficiency, given that they have little motivation for cost saving as they are granted financial support from the Government; it is only appropriate that public institutions are held responsible by the Government for lax management; indeed, it has nothing to do with intervening in activities of the trade union or denying the very nature of the union;*
- (h) as regards the alleged recommended revision of collective agreements, the Government recommended that corrections be made in cases where the trade union includes staff of public institutions who has the authority to decide working conditions, issue orders or perform supervision, thus falling into the category of employer; in view of the unique nature of public institutions run on the taxpayers’ money for common good and their unsound finances with debts of 286 public institutions totalling KRW386 trillion (US\$330 billion) as of 2010, the Government saw it necessary to provide opinions to minimize lax management and dole out of hefty employee benefits and compensation excessively beyond the minimum requirements prescribed by the LSA;*
- (i) as regards the alleged Government intervention concerning unilateral termination of collective agreements, the termination of the collective agreement is intended to prevent the concerned parties from being unfairly bound by the existing collective agreement for a long while and at the same time to facilitate bargaining for a new agreement, in the case that the parties failed to make a new collective agreement past the expiration of the existing one; the relevant law stipulates that any party to the agreement – either labour or management – can terminate the collective agreement, which, therefore, is fair to both parties; the Government has never coerced public*

*institutions to terminate collective agreements or issued rationality rankings to press them, as it believes in the principle that in the matter of making or terminating a collective agreement it is up to labour and management to act with autonomy;*

- (j) *concerning the alleged Government intervention in collective bargaining of certain public institutions and repression of trade unions:*
- *in the case of KOGAS, the Government did not exert pressure or intervene in the autonomous bargaining process between labour and management; the collective agreement of KOGAS tentatively agreed on 3 May 2010, was regarded by labour as a valid agreement whereas management reckoned only part of it as agreed; the Government believes that this difference in perception led to the management's decision to withdraw from the tentative agreement; meanwhile, the collective agreement was concluded smoothly on 17 September 2010 through voluntary efforts of labour and management, and currently there is no pending issue between the parties;*
  - *in the case of KORAIL, the management filed criminal lawsuits against the union leadership on charges of obstruction of business, and the Seoul Central District Court upheld the charges and ruled the November 2009 strikes to be illegitimate; the accused appealed to the Supreme Court where the case is currently pending; in principle, the Government guarantees legal protection for legitimate strikes; during the KORAIL strike, the Government provided for alternative transportation, regardless of the legitimacy of the strike, with a view to minimizing inconvenience to citizens; thus, the allegation of Government repression of the trade union during the strike is not true; and*
  - *in the case of the Korea Labour Institute, the selection of research agencies for the Ministry's policy research projects goes through due procedures based on objective criteria; hence, the strike at the Institute and the selection of research agencies have no relation at all, and the allegation of illegitimate pressure by the Ministry is groundless.*

**572.** *As regards the issuance by the Government of budgetary guidelines regarding public institutions so as to ensure the efficient provision of public services, as well as the assessment by the Government of the soundness of their financial situation through performance management evaluation reports, audits or inspections, the Committee wishes to highlight from the outset that it has always been 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 budgetary laws – a situation which could give rise to difficulties. The Committee has even considered that the financial authorities could formulate in this regard recommendations in line with government economic policy. Noting, however, the conflicting versions of the parties as to the existence of adequate consultations with the trade unions prior to adopting such measures, the Committee recalls that, when doing so, provision should 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 are consulted and can express their points of view to the authority responsible for assessing the financial consequences of draft collective agreements. The Committee has always emphasized the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests. It has also pointed out the importance it attaches to the effective promotion of consultation and cooperation between public authorities and workers' organizations in this respect, in accordance with the principles laid down in the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), for the purpose of considering jointly matters of*

*mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 1037, 1072 and 1087]. The Committee therefore requests the Government to ensure the observance of the principles enunciated above and to indicate the steps it intends to take in this regard.*

- 573.** *Furthermore, the Committee understands that, following the expiry of a collective agreement, if the parties fail to agree on a new one, either party can unilaterally terminate the collective agreement, in order not to be bound by it for an excessively long period of time and to facilitate the conclusion of a new collective agreement. The Committee notes the conflicting versions provided by the complainant organizations and the Government as to the degree of government intervention in regard to the unilateral termination of collective agreements by the management of public institutions, since the Government denies the complainants' allegation that it encouraged, recommended and even coerced public institutions to unilaterally terminate their collective agreements. The Committee notes, however, that the abovementioned Government measures (directives, performance management evaluation reports, audits, etc.) have, at the very least, triggered a de facto wave of unilateral terminations of collective agreements by public institutions. In this regard, the Committee reminds the Government that, pursuant to Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), measures should be taken to encourage and promote collective bargaining. The Committee therefore requests the Government to take active measures, following the unilateral termination of the collective agreement by the management of a public institution, to bring the parties back to the bargaining table and promote good-faith negotiations based on mutual confidence and respect aimed at the conclusion of a new collective agreement regulating the terms and conditions of employment. The Committee requests the Government to indicate the steps taken in this regard.*
- 574.** *With respect to the revision of certain collective agreement provisions qualified as "irrational", which was recommended by the Government via various directives, performance management evaluation reports and audits, the Committee recalls that a fair and reasonable compromise should be sought between the need to preserve as far as possible the autonomy of the bargaining parties, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other [see **Digest**, op. cit., para. 1035]. Moreover, with respect to the prohibition of a wage increase beyond government instructions and the request to revise employee benefits that go excessively beyond minimum legislative requirements, the Committee wishes to highlight that the principle of autonomy of the parties to collective bargaining is valid as regards public servants covered by Convention No. 151, although the special characteristics of the public service require some flexibility in its application. Thus, in the view of the Committee, legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer, are compatible with the Convention, provided they leave a significant role to collective bargaining [see **Digest**, op. cit., para. 1038]. As to the recommendation to limit eligibility for trade union membership with regard to supervisory staff, the Committee recalls that it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to establish their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or*

branch of activity by depriving them of a substantial proportion of their present or potential membership. It also recalls that limiting the definition of managerial staff to persons who have the authority to appoint or dismiss is sufficiently restrictive to meet the condition that these categories of staff are not defined too broadly [see *Digest*, *op. cit.*, paras 247 and 249]. The Committee requests the Government to ensure that eligibility restrictions are in accordance with these principles, and to keep it informed in this regard. The Committee notes that, according to the complainants, several other collective agreement provisions have been qualified as “irrational” and recommended for revision, and that the Government neither denies nor replies to these allegations. In this regard, the Committee wishes to recall that, in examining allegations of the annulment and forced renegotiation of collective agreements for reasons of economic crisis, the Committee was of the view that legislation which required the renegotiation of agreements in force was contrary to the principles of free and voluntary collective bargaining enshrined in Convention No. 98 and insisted that the Government should have endeavoured to ensure that the renegotiation of collective agreements in force resulted from an agreement reached between the parties concerned [see *Digest*, *op. cit.*, para. 1021].

- 575.** *In particular, as regards the recommendation to limit eligibility for trade union membership with regard to dismissed workers, the Committee refers to its previous examinations of Case No. 1865 involving the Republic of Korea [304th Report, para. 251, and 346th Report, para. 761] and draws once again the Government’s attention to the general principle that the right of workers’ organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining conditions of eligibility of leaders or in the conduct of the elections themselves. More specifically, given that workers’ organizations are entitled to elect their representatives in full freedom, the dismissal of a trade union leader, or simply the fact that he leaves the work which he was carrying out in a given undertaking, should not affect his trade union status or functions unless stipulated otherwise by the constitution of the trade union in question. Moreover, the Committee once again recalls that a provision depriving workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organization of their choice. Such a provision entails a risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization. The Committee requests the Government to indicate, within the framework of Case No. 1865, the steps taken to respect these principles.*
- 576.** *Concerning the recommendation to review the requirement of union consent in case of restructuring, the Committee has emphasized that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees. It has always requested that, in the cases where new staff reduction programmes are undertaken, negotiations take place between the enterprise concerned and the trade union organizations [see *Digest*, *op. cit.*, paras 1081–1082]. The Committee expects that the Government will take due account of the principles enunciated above in the future before exercising its authority to make such decisions, and requests that steps be taken in this regard.*
- 577.** *Furthermore, the Committee notes with deep concern that, following strike action at several public institutions, numerous trade union officials and members participating in strikes have been indicted under section 314(1) of the Penal Act for obstruction of business and/or dismissed or subjected to disciplinary measures. 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 observes that industrial action is deemed illegitimate under section 314(1) of the Penal Act when the impact of the recourse to this fundamental right amounts to obstruction of business. In this respect, the Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests. As regards cases in which strikes may be restricted or prohibited, the Committee has always held that, by linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded [see *Digest*, op. cit., paras 521 and 592]. Moreover, the Committee wishes to emphasize that strikes are by nature disruptive and costly and that strike action also calls for a significant sacrifice from those workers who choose to exercise it as a last resort tool and means of pressure on the employer to redress any perceived injustices. The Committee is therefore bound to express its great concern at the excessively broad legal definition of “obstruction of business” encompassing practically all activities related to strikes and the extremely restrictive interpretations of what is deemed to be legitimate strike action and of what are deemed to be “negotiable” subjects that are covered by collective bargaining. The Committee once again urges the Government to take all necessary measures without delay so as to bring section 314 of the Penal Code (“obstruction of business”) into line with freedom of association principles, and to keep it informed in this regard. It also reiterates that penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. Moreover, 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 thus requests the immediate dropping of criminal charges (both fines and prison sentences) brought under section 314 of the Penal Code (“obstruction of business”) against union officials and members for participating in the relevant strikes at KORAIL, KOGAS, National Pension Service and South-east, South, East-west, West and Central Electric Power Companies, should they be sentenced for legitimate trade union activity. Moreover, the Committee observes that both the indications of the complainant and the Government coincide in the fact that the 169 trade union officials from KORAIL were dismissed due to their participation in the November 2009 strike that was deemed illegal under section 314 of the Penal Code (“obstruction of business”). Considering that the strike was declared illegal based on a legal requirement which is in itself contrary to the principles of freedom of association and has been repeatedly the subject of comment by the Committee in the framework of its examination of Case No. 1865, the Committee requests the Government to take measures to ensure the immediate reinstatement of the 169 trade union officials as well as the lifting of disciplinary measures against the workers from KORAIL and the National Pension Service. The Committee further requests the Government to keep it informed of the outcome of any ongoing judicial proceedings, including before the Supreme Court.

- 578.** As regards the Korean Labour Institute in particular, the Committee considers, with reference to its comments enunciated above concerning section 314 of the Penal Code (“obstruction of business”), that the criminalization of industrial relations is in no way conducive to harmonious and peaceful industrial relations, and requests the immediate dropping of criminal charges (both fines and prison sentences) brought under this provision against union officials and members for participating in the strike at the Korean Labour Institute, should they be sentenced for legitimate trade union activity. In relation to the alleged pressure to encourage disaffiliation from the KCTU exercised by the management of the Institute on the union following the strike, the Committee recalls that a workers’ organization should have the right to join the federation and confederation of its own choosing, subject to the rules of the organizations concerned, and without any previous authorization [see *Digest*, op. cit., para. 722]. Considering that the alleged behaviour would amount to a serious act of interference on the part of the employer, the Committee requests the Government to institute an independent inquiry without delay into

*this allegation and to keep it informed of the final outcome of such investigation and of any measures taken as a result.*

- 579.** *With respect to the allegation that, six months after the unilateral termination of the collective agreement, previously granted facilities were discontinued at KOGAS and the South-east, South, East-west, West and Central Electric Power Companies. The Committee considers that such an attitude and behaviour is hardly conducive to the development of normal and sound industrial relations based on mutual confidence and respect. Also, the Committee wishes to recall that, when examining an allegation concerning the denial of time off to participate in trade union meetings, the Committee recalled that, while account should be taken of the characteristics of the industrial relations system of the country, and while the granting of such facilities should not impair the efficient operation of the undertaking concerned, Paragraph 10, subparagraph 1, of the Workers' Representatives Recommendation, 1971 (No. 143), provides that workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions; subparagraph 2 of Paragraph 10 also specifies that, while workers' representatives may be required to obtain permission from the management before taking time off, such permission should not be unreasonably withheld. The Committee further recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., paras 475 and 1110]. The Committee expects that the Government will duly take these principles into account in the future and consider steps to restore the privileges taken away from trade unions at public institutions when the relevant collective agreements have lost their validity.*
- 580.** *Moreover, the Committee notes with regret the serious allegations of acts of anti-union discrimination and anti-union interference against officials and members of the trade union at the Korean Institute of Construction Technology. It also notes that the Government neither denies nor replies to these allegations. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom. As regards allegations of anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, as well as the alleged efforts made to create puppet unions, the Committee considers such acts to be contrary to Article 2 of Convention No. 98, which provides that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents in their establishment, functioning or administration [see **Digest**, op. cit., paras 799 and 858]. The Committee therefore requests the Government to institute an independent inquiry into the alleged acts of anti-union discrimination. Should it be found that the relevant trade union officials were dismissed or otherwise prejudiced due to their exercise of legitimate trade union activities/on account of their union affiliation, the Committee requests the Government to take the necessary steps to ensure that they are fully reinstated in their positions without loss of pay. Noting with deep concern the allegations of acts of anti-union interference by the employer, which have led to the union losing the majority of its union members, the Committee also requests the Government to initiate an independent inquiry into these allegations, in order to establish*



*the facts, and, if necessary, to take the necessary measures to ensure full respect of the principles of freedom of association. It requests the Government to keep it informed of the outcome of the inquiries conducted.*

- 581.** *Lastly, while being mindful of the fact that, as already mentioned above, collective bargaining in the public sector calls for verification of the available resources in the various public bodies or undertakings, the Committee expresses its deep concern about the apparently serious impact on the trade union movement of the measures taken by the Government in this context (i.e. the issuance of budgetary guidelines regarding public institutions, and the assessment of the soundness of their financial situation through performance management evaluation reports, audits or inspections). The Committee requests the Government to investigate, with this concern in mind, the detrimental impact of the above measures on the trade union movement as a whole and to take any remedial measures that it deems appropriate. It also requests the Government to take proactive measures to promote free and voluntary good-faith collective bargaining in public institutions and undertakings and harmonious industrial relations in the public sector that respect freedom of association and collective bargaining principles.*

### **The Committee's recommendations**

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

- (a) *While being mindful of the fact that collective bargaining in the public sector calls for verification of the available resources in the various public bodies or undertakings, the Committee requests the Government to ensure that trade unions are consulted prior to adopting measures such as the issuance of budgetary guidelines regarding public institutions, and the assessment of the soundness of their financial situation through performance management evaluation reports, audits or inspections. The Committee requests the Government to indicate the steps it intends to take in this regard.*
- (b) *Recalling that, pursuant to Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), measures should be taken to encourage and promote collective bargaining, the Committee requests the Government to take active measures, following the unilateral termination of the collective agreement by the management of a public institution, to bring the parties back to the bargaining table and promote good-faith negotiations based on mutual confidence and respect aimed at the conclusion of a new collective agreement regulating the terms and conditions of employment. The Committee requests the Government to indicate the steps taken in this regard.*
- (c) *As regards the revision of certain collective agreement provisions qualified as "irrational", which was recommended by the Government via various directives, performance management evaluation reports and audits, the Committee, recalling that a fair and reasonable compromise should be sought between the need to preserve as far as possible the autonomy of the bargaining parties, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other, expects that, in the future, the Government will ensure the observance of the*

*principles enunciated in its conclusions. In particular, the Committee requests the Government to ensure that eligibility restrictions are in accordance with these principles and requests to be kept informed in this respect.*

- (d) *Noting with deep concern that, following strike action at several public institutions, numerous trade union officials and members participating in the strikes have been indicted under section 314(1) of the Penal Act for obstruction of business and/or dismissed or subjected to disciplinary measures, the Committee, recalling 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, once again urges the Government to take all necessary measures without delay so as to bring section 314 of the Penal Code (“obstruction of business”) into line with freedom of association principles, and to keep it informed in this regard. The Committee also requests the immediate dropping of criminal charges (both fines and prison sentences) brought under section 314 of the Penal Code (“obstruction of business”) against union officials and members for participating in the relevant strikes at KORAIL, KOGAS, National Pension Service and South-east, South, East-west, West and Central Electric Power Companies, should they be sentenced for legitimate trade union activity. Moreover, the Committee requests the immediate reinstatement of the 169 dismissed trade union officials from KORAIL dismissed due to their participation in the November 2009 strike that was deemed illegal under section 314 of the Penal Code (“obstruction of business”), as well as the lifting of disciplinary measures applied to workers from KORAIL and the National Pension Service. It also requests the Government to keep it informed of the outcome of any ongoing judicial proceedings, including before the Supreme Court.*
- (e) *As regards the Korean Labour Institute in particular, the Committee refers to its conclusions concerning section 314 of the Penal Code (“obstruction of business”) and requests the immediate dropping of criminal charges (both fines and prison sentences) brought under this provision against union officials and members for participating in the strike at the Korean Labour Institute, should they be sentenced for legitimate trade union activity. In relation to the alleged pressure to encourage disaffiliation from the KCTU exercised by the management of the Institute on the union following the strike, the Committee requests the Government to institute an independent inquiry without delay into this alleged serious act of interference on the part of the employer and to keep it informed of the final outcome of such investigation and of any measures taken as a result.*
- (f) *With respect to the allegation that, six months after the unilateral termination of the collective agreement, previously granted facilities were discontinued at KOGAS and the South-east, South, East-west, West and Central Electric Power Companies, the Committee expects that the Government will in the future duly take into account the principles enunciated in its conclusions and consider steps to restore the privileges*

*taken away from trade unions at public institutions when the relevant collective agreements have lost their validity.*

- (g) *The Committee requests the Government to institute an independent inquiry into the alleged acts of anti-union discrimination against officials and members of the trade union at the Korean Institute of Construction Technology. Should it be found that the relevant trade union officials were dismissed or otherwise prejudiced due to their exercise of legitimate trade union activities/on account of their union affiliation, the Committee requests the Government to take the necessary steps to ensure that they are fully reinstated in their positions without loss of pay. Noting with deep concern the allegations of acts of anti-union interference by the employer, which have led to the union losing the majority of its union members, the Committee also requests the Government to initiate an independent inquiry into these allegations, in order to establish the facts, and, if necessary, to take the necessary measures to ensure full respect of the principles of freedom of association. It requests the Government to keep it informed of the outcome of the inquiries conducted.*
- (h) *Expressing its deep concern about the apparently serious impact on the trade union movement of the measures taken by the Government in the public sector (i.e. the issuance of budgetary guidelines regarding public institutions, and the assessment of the soundness of their financial situation through performance management evaluation reports, audits or inspections), the Committee requests the Government to investigate the detrimental impact of the above measures on the trade union movement as a whole and to take any remedial measures that it deems appropriate. It also requests the Government to take proactive measures to promote free and voluntary good-faith collective bargaining in public institutions and undertakings and harmonious industrial relations in the public sector that respect freedom of association and collective bargaining principles.*

CASE NO. 2851

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

**Complaint against the Government of El Salvador  
presented by  
the Federation of Independent Associations or Trade Unions  
of El Salvador (FEASIES)**

*Allegations: Arrest of trade unionists for striking at the Mayor's Office of Ilopango, use of violence to expel the striking workers*

- 583.** The complaint is contained in the communication of April 2011 presented by the Federation of Independent Associations or Trade Unions of El Salvador (FEASIES). The organization sent additional information on 14 June 2011.

- 584.** The Government sent its observations in a communication dated 14 June 2011.
- 585.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainants' allegations**

- 586.** In its communications of April 2011 and dated 14 June 2011, the FEASIES alleges that, ever since it was established on 5 December 2009, the Workers' Trade Union of the Mayor's Office of Ilopango (SITTAMI) has been the victim of anti-union pressure.
- 587.** The FEASIES states that in April 2010 SITTAMI presented a list of demands for improved safety and health at the workplace and full compliance with the Administrative Career Act and that, with the Mayor's Office, it set up a joint integration forum (five members from SITTAMI and five from the administration), of which very little eventually came.
- 588.** The FEASIES alleges that in January 2012 the Ilopango Municipal Council unilaterally decided to invite representatives of another association (ATRAM), which supports the Mayor's Office, to join the forum and granted it a number of local and other advantages. This meant that the forum could no longer deal with the issues before it properly, and SITTAMI therefore decided not to take part.
- 589.** The complainant alleges that SITTAMI accordingly called a strike at the Mayor's Office on 28 March 2011. The next day the workers were expelled from the area by the police without the trade unionists putting up any opposition. The same day the Mayor rejected the FEASIES' offer of mediation on the grounds that a forum for dialogue already existed; this the trade union had already rejected for the reason stated above.
- 590.** The complainant states that on 30 March 2011 workers who had remained in front of the Mayor's Office were beaten and attacked with tear gas by police from other municipalities. As a result, five trade unionists (including the union's general secretary, disputes secretary and press officer) sustained injuries that left them unable to work for two to five days. In response, they initiated legal proceedings with the Public Prosecutor. On 29 March 2011 the Mayor in turn brought criminal charges against the 14 members of the union's Executive Committee and other trade unionists for public disorder. The union took the matter to the Office of the Ombudsman for Human Rights, which set up a meeting with the Mayor and with the leaders of SITTAMI. On 1 April 2011 the two parties signed an agreement in which both undertook to enter into a dialogue and to defuse the conflict; the strikers would return to work and would not have to face reprisals.
- 591.** Finally, on 4 April 2011 the administration denied trade unionists (including members of the union's Executive Committee) access to the Mayor's Office and the police arrested them for their alleged involvement in crimes of public disorder, the violent exercise of trade union rights and damaging public property. The trade unionists concerned appealed to the Constitutional Chamber for their release.
- 592.** The complainant emphasizes that the incidents referred to occurred during the peaceful, democratic and legal exercise of the right to strike and constituted a violation of the agreement between the parties whereby the Mayor's Office had undertaken not to take reprisals.

## B. The Government's reply

593. In its communication dated 15 February 2012 the Government states that it appears from its inquiries that on 4 April 2011 the following 19 people were indeed placed under temporary arrest: José Walter Salas Rodríguez, Nubia Antonia Espinoza Posada, Rafael Humberto Placidón, Edgardo Evenor Aguilar, Juan Pablo Gallardo Salazar, Jorge Alberto García Flores, Rubén Antonio Araujo Guzmán, Teresa del Carmen Avilés Morán, Carlos Antonio Fuentes Menjívar, José Ricardo Moreno, José Gil Inglés, Sonia Aracely Calderón Rivera, Christian Alexander Cruz Cruz, René Galdámez Escobar, Hugo Alfredo Callejas de la Cruz, Arnulfo Federico Meléndez Cruz, José Roberto Hernández, Juan Bautista Castillo Martínez and Edwin Alberto Contreras Campos. Their arrest was subsequent to a complaint lodged with the Prosecutor's Office by the Mayor of Ilopango, Alba Elizabeth Márquez. On 1 April 2011, in application of article 348 of the Penal Code, the Prosecutor formally requested the temporary arrest of the 19 people as a precautionary measure, on charges of causing public disorder (article 348 of the Penal Code) such as to disturb the peace, the violent exercise of their rights (article 319 of the Penal Code) such as to hinder the administration of justice, damaging public assets (article 221 of the Penal Code) and thereby causing prejudice to the Mayor's Office of Ilopango, and the unlawful appropriation or possession of assets (article 217 of the Penal Code) belonging to the Mayor's Office.
594. The Government adds that, after due investigation by the Justice of the Peace of Ilopango, an initial hearing was set for 7 April 2011, as a result of which alternative precautionary measures were imposed on the 19 people concerned, one of them being a ban on their leaving the country without judicial authorization.
595. That said, and according to information provided by the general labour directorate, it would appear from the latter's records that at no time did the workers concerned apply to the Ministry of Labour and Social Welfare to intervene. On the other hand, it is on record that a plea of habeas corpus was entered by SITTAMI with the Constitutional Chamber of the Constitutional Court of Justice. The matter is being dealt with under the normal legal procedure, and the Committee will be informed of the outcome in due course.
596. Finally, the Mayor's Office of Ilopango was requested to report on the current state of its employment relationship with the 19 workers; in reply, the Mayor of Ilopango stated that they were currently working normally.
597. In the light of the foregoing, and in accordance with Article 8 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), stipulating that workers and employers and their respective organizations must respect the law of the land, and since the incidents alleged by the complainant do not constitute a violation of the exercise of trade union rights, the Government feels justified in requesting that the complaint presented by the FEASIES be dropped.

## C. The Committee's conclusions

598. *The Committee observes in the present case that the complainant alleges the arrest and criminal prosecution of 19 trade unionists (including the members of the Executive Committee of SITTAMI, which operates in the Mayor's Office of Ilopango) following the peaceful and legitimate exercise of their right to strike, as well as the expulsion of the strikers by the police on 29 and 30 March 2011, the violent and brutal expulsion of the strikers who were still in front of the Mayor's Office and the use of tear gas against them by police from other municipalities; as a result, three union officials and two trade unionists were medically certified as being unable to work for two to five days. According to the allegations, the Mayor ignored an undertaking she had entered into with the trade*

*union in the presence of the Ombudsman for Human Rights not to take reprisals, inasmuch as she brought criminal charges against 19 trade unionists (including the members of the union's Executive Committee) for exercising their right to strike – legitimately and peacefully, according to the complainant. Because of the charges brought against them, the 19 trade unionists were arrested and taken to court, after which they entered a plea of habeas corpus. According to the complainant, the dispute stemmed from the failure to resolve a set of demands (safety and health in employment, compliance with the Administrative Career Act, and the decision of the Mayor's Office to include representatives of a pro-employer association in the forum for dialogue (on this point, however, the complainant provides little information)).*

- 599.** *The Committee takes note of the Government's statement that: (1) the arrests of the 19 employees followed the presentation of a complaint by the Mayor of Ilopango to the Public Prosecutor on 1 April 2011 which led to the temporary arrest of 19 people charged with public disorder, the violent exercise of their rights, damage to public property and the unlawful appropriation and possession of municipal assets; (2) in the dispute referred to by the complainant no request was made to the Ministry of Labour and Social Welfare to intervene; (3) the Constitutional Chamber of the Supreme Court of Justice examined a plea of habeas corpus presented by SITTAMI, the outcome of which the Government will inform the Committee; (4) the 19 employees concerned have now returned to their workplace; and (5) the alleged incidents are a violation of the exercise of trade union rights inasmuch as Article 8 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), stipulates that trade unions must respect the law in the exercise of their rights.*
- 600.** *The Committee observes that the versions presented by the complainant and by the Government differ as to the peaceful and legal nature of the strike called by the union (which the Government refutes). The Committee observes that the Government has not responded to the allegation that the Mayor's Office infringed the terms of an agreement entered into with the trade union in the presence of the Ombudsman for Human Rights on 1 April 2011, in which it undertook not to take reprisals (the complainant sent the Committee a copy of the Ombudsman's ruling). The Committee requests the Government to send its observations on the subject, as well as on the injuries sustained by three union leaders and two other trade unionists, with an indication of whether the union has initiated legal proceedings in that connection.*
- 601.** *Given the contradiction between the allegations and the Government's reply regarding the peaceful and legitimate nature of the strike and observing that the temporary arrests of the 19 trade unionists has ended (although they have been charged), the Committee requests the Government to send it a copy of any sentence that may be handed down in connection with the plea of habeas corpus presented by the union and on the sentences concerning the criminal charges brought by the Mayor of Ilopango against 19 trade unionists for the commission of crimes against public assets, public disorder and other crimes. Taking into account the situation as a whole and the Mayor's promise (according to the allegations) not to take reprisals, the Committee suggests that the Government take steps to promote a negotiated solution to the dispute.*

## **The Committee's recommendations**

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

- (a) *Observing that the Government has not responded to the allegation that the Mayor's Office has infringed an agreement entered into with the trade union in the presence of the Ombudsman for Human Rights on 1 April 2011 in which it undertook not to take reprisals (the complainant has sent the Committee a copy of the Ombudsman's ruling), the Committee requests the Government to send its observations on the matter, as well as on the injuries allegedly sustained by three union leaders and two other trade unionists, with an indication of whether the union has taken legal action in that connection.*
- (b) *Given the contradiction between the allegations and the Government's reply regarding the peaceful and legitimate nature of the strike and observing that the temporary arrest of the 19 trade unionists has ended (although they have been charged), the Committee requests the Government to send a copy of any sentence that may be handed down in connection with the plea of habeas corpus presented by the union and on the sentences concerning the criminal charges brought by the Mayor of Ilopango against 19 trade unionists for the commission of crimes against public assets, public disorder and other crimes.*
- (c) *Taking into account the situation as a whole and the Mayor's promise (according to the allegations) not to take reprisals, the Committee suggests that the Government take steps to promote a negotiated solution to the dispute.*

CASE NO. 2871

INTERIM REPORT

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

- **the Trade Union Confederation of El Salvador Workers (CSTS)**
- **the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and**
- **the LIDO SA de CV Company Trade Union (SELSA)**

*Allegations: A strike at the LIDO SA de CV company declared to be illegal, arrest of the union's leader and dismissal of the workers' representatives.*

**603.** The complaint is contained in a communication from the Trade Union Confederation of El Salvador Workers (CSTS), the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA), and the LIDO SA de CV Company Trade Union (SELSA) dated 13 June 2011. The trade unions sent additional information in communications dated 11 July and 3 October 2011.

**604.** The Government sent its observations in a communication dated 20 August 2012.

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

#### **A. The complainants' allegations**

**606.** In communications dated 13 June, 11 July and 3 October 2011, the CSTS, the FESTSSABHRA, (the El Salvador affiliate of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF)) and the LIDO SA de CV Company Trade Union (SELSA) state that the LIDO SA de CV company has, for 67 years, been manufacturing several varieties of white bread, muffins (*pan dulce*), confectionery and cakes. For almost 40 years there has also been a collective labour agreement which is revised in its entirety every three years (latest revision in 2007) and whose clause on wages is reviewed every year.

**607.** In December 2008, the union asked for the wage scale to enter into effect in February 2009, as laid down in clause 43 of the collective agreement. Because of the world economic crisis, however, it was agreed on this occasion that the wage increase would become effective in December 2009 and there would be no annual review in February 2010. In a show of flexibility, SELSA accepted this arrangement; in December 2010, therefore, it again requested that the clause on wages be reviewed and that the new scale enter into effect in February 2011. At that point the company, arguing that there was an economic crisis and that sales were down, refused outright to agree to a wage increase. After complying with all the requisite legal stages and requirements, the union came out on strike, at which point the assistant production manager, José Heriberto Pacas, lodged false criminal charges that led to the arrest of trade union leader Guadalupe Atilio Jaimes Pérez and his imprisonment for four days.

**608.** In chronological order, the events were as follows:

- On 20 December 2010, SELSA requested the Ministry of Labour to initiate the direct procedure for revising the clause on wages and duly submitted the requisite documents to support its request.
- On 26 January 2011, negotiations convened by the Ministry of Labour began under the direct procedure. At this stage, no agreement was reached because the company would not offer any wage increase.
- On 7 March 2011, the conciliation procedure began under the good offices of the Ministry of Labour.
- On 8 April, the Ministry notified the parties that the conciliation phase had come to an end and that the company had not offered any wage increase.
- On 11 April, the union requested that the procedure enter the arbitration phase.
- On 14 April, the company rejected the request for arbitration and, on 15 April, the Ministry of Labour informed SELSA accordingly.
- On 28 April, SELSA informed the Ministry of Labour of the workers' decision to call a strike.
- On 11 May, SELSA informed the Ministry of Labour of the strike agreement.



- On 13 May, the Ministry of Labour informed of the company of the strike, following which the workers were, accordingly, at liberty to go on strike 30 days later.
- On 16 May, the company ordered 17 workers to take annual leave in a clear violation of the right to strike. The same day the union called for an inspection by the Ministry of Labour.
- On 6 July, the company ordered another 15 workers to take leave in a further infringement of the right to strike.
- The Ministry of Labour conducted its inquiry into the incident on 16 May.
- On 8 July, when the strike began, the civilian police proceeded to detain trade union leader Guadalupe Atilio Jaimes Pérez (General Secretary), following a complaint by the assistant production manager that he had received death threats, and incarcerated him along with common prisoners at the police delegation of San Bartolo-Ilopango.
- During the night of 8 July, the company's lawyer, Sergio Méndez, implied that the company might withdraw its charges against the union leader if the workers called off the strike.
- The union leader was released in the afternoon of 12 July.
- At a hearing on 13 July, held by the First Magistrates' Court of Ilopango, alternative measures were decreed in place of the union leader's arrest and formal proceedings began.
- On 17 July, the Fifth Labour Court of San Salvador notified the striking workers, through the Magistrates' Court of Soyapango, that the strike had been declared illegal and must be called off on 20 July.
- In the afternoon of 18 July, the workers called an end to the strike without having obtained any wage increase.

**609.** The complainants emphasize that the workers complied with each and every principle governing the right to strike: (1) the requirement to give advance notice; (2) the requirement that they resort to the voluntary conciliation, mediation and arbitration procedures for collective disputes before calling a strike; (3) the requirement that a quorum be present and that the strike be decided upon by majority agreement and secret ballot; (4) the adoption of appropriate measures to guarantee safety and prevent accidents and the maintenance of a minimum service in specific cases; and (5) the guarantee that those not on strike were free to work.

**610.** The complainants state that proceedings have begun with the labour authorities to have the union's representatives at LIDO SA de CV and of FAMOLCAS SA de CV (a subcontractor of LIDO SA) dismissed (Ana María Barrios Jiménez, María Isabel Oporto Jacinta and Oscar Armando Pineda).

## **B. The Government's reply**

**611.** In its communication dated 20 August 2012, the Government states that, according to proceeding No. 35/2010 of the General Labour Directorate of the Ministry of Labour and Social Welfare regarding the complaint brought by SELSA against LIDO SA de CV over the clause on wages in the collective labour agreement, pursuant to article 538 of the Labour Code, the parties concerned were invited by a special inspection unit representing

the Ministry to join them in monitoring the peaceful conduct of the strike and that during the inspection a forum for dialogue was set up with representatives of both the employer and the trade union. During the discussion the union's representatives stated that they had requested a special inspection because the representatives of LIDO SA de CV had violated their right to strike by placing 15 people on annual leave, including union leaders and other members. The purpose of the company's representatives had been to undermine the strike.

- 612.** The Government adds that during the discussions the union's representatives presented the following demands: (1) establishment of a dialogue committee with representatives from LIDO SA de CV with decision-making power; (2) a wage increase for all workers at LIDO SA de CV and FAMOLCAS SA de CV; (3) an agreement not to take reprisals against workers taking part in the strike; (4) the dismissal of the plant manager, Geovanny Sánchez, and assistant production manager, Heriberto Pacas; and (5) payment of wages deducted from trade union leaders during the period concerned.
- 613.** LIDO SA de CV denied the trade union's accusation that it was undermining the strike by placing workers on early annual leave and stated that it had done so at the request of a union leader. Regarding an increase in wages, it maintained its position that it was unable to meet such a demand and suggested an alternative, i.e. that the company acquire products for the basic food basket at wholesale prices.
- 614.** During the inspection, the representatives of the Ministry of Labour and Social Welfare were informed of a dispute between Guadalupe Atilio Jaimes Pérez and Heriberto Pacas, allegedly involving punching and fighting. Three members of the civilian police were brought in who proceeded to arrest Mr Jaimes, since Mr Pacas claimed to be the injured party. The Ministry of Labour and Social Welfare was not informed of the outcome of the incident.
- 615.** Subsequently, on 2 September 2011, SELSA's General Secretary, Guadalupe Atilio Jaimes Pérez, went to the Ministry of Labour and Social Welfare with a document stating that, since the legal procedures for collective disputes had been exhausted without any agreement and since the collective labour agreement was due to expire, it had been agreed to leave the dispute aside in order to proceed with the collective agreement's revision. The General Labour Directorate of the Ministry of Labour and Social Welfare accordingly decided to shelve the case.
- 616.** Moreover, civilian police file No. PNC/DG/núm. 131-0356-12 reveals that, on 8 June 2011, José Heriberto Pacas went to the investigations department of the police delegation of Soyapango to lodge a complaint against Guadalupe Atilio Jaimes Pérez who, he claimed, had, at around 2 p.m. that very day, threatened him and physically aggressed him inside the LIDO SA de CV plant located at 5th km of Boulevard del Ejército Nacional, where they both worked. At 2.30 p.m. on 9 June 2011, Mr Pacas, who declared himself to be the injured party, brought penal charges against Guadalupe Atilio Jaimes Pérez for threatening him.
- 617.** On 8 June 2011, the duty officer of the Prosecutor's Office of Soyapango issued resolution No. 1298-UDV-SOY-2011 calling for appropriate steps to be taken against Guadalupe Atilio Jaimes Pérez for having proffered threats against José Heriberto Pacas. At 5 p.m. on 9 June 2011, police officers from the investigations department of the police delegation of Soyapango arrested Guadalupe Atilio Jaimes Pérez and charge him with threatening José Heriberto Pacas. Finally, in ruling No. 1949-3-11, the First Magistrates' Court of Soyapango ordered the release of Guadalupe Atilio Jaimes Pérez.

### C. The Committee's conclusions

- 618.** *The Committee observes that, in the present case, the complainants allege: (1) that the company placed 17 workers, and later another 15 workers, on compulsory annual leave, in clear violation of the right to strike; (2) that between 8 and 12 July 2011, Guadalupe Atilio Jaimes Pérez, General Secretary of SELSA, was arrested and that criminal charges were brought against him following a false accusation by the assistant production manager of LIDO SA de CV alleging that he had been threatened; (3) that, on 17 July 2011, the strike was declared illegal by the judicial authority which ordered that it be called off despite the fact that the purpose of the strike was to seek a wage increase; and (4) that the company began dismissing the union's representatives at LIDO SA de CV and at FAMOLCAS SA de CV, a subcontractor (Ana María Barrios Jiménez, María Isabel Oporto Jacinta and Oscar Armando Pineda). The Committee observes that, according to the Government, the Ministry of Labour accompanied the opposing parties in discussions during the strike.*
- 619.** *The Committee takes note of the Government's statement that the judicial authority ordered the release of Guadalupe Atilio Jaimes Pérez, who had been accused by the assistant production manager of having threatened him on the LIDO SA de CV premises and that he had remained under arrest from 9 to 12 July 2011. The Committee requests the Government to clarify whether this union leader is still facing criminal charges and, if so, to inform it of the sentence handed down.*
- 620.** *The Committee take notes that, according to the Government, the SELSA union member formally notified the Minister of Labour and Social Welfare that the collective dispute had been dropped, that the case had been shelved and that SELSA had reached this decision in order to focus on revising the collective agreement that was due to expire. The Committee requests the Government to keep it informed of developments in this regard.*
- 621.** *Regarding the allegation that the company placed workers on compulsory annual leave during the strike, the Committee notes the Government's indication that, according to the company, the workers' annual leave had been advanced at the request of a trade union leader. The Committee requests the complainants to reply to this assertion. With respect to the allegation relating to the declaration of the strike as illegal, the Committee observes that the objective of the strike was a wage increase and that the declaration of the illegality of the strike on this basis does not appear to be justified. The Committee expresses its concern and requests the Government to inform it of the judicial ruling declaring the workers' strike at LIDO SA de CV to be illegal.*
- 622.** *Finally, the Committee observes that the Government has not responded to the allegation regarding the dismissal of trade unionists Ana María Barrios Jiménez, María Isabel Oporto Jacinta and Oscar Armando Pineda and requests it to send its observations without delay.*

### The Committee's recommendations

- 623.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to keep it informed of the revision requested by the trade union of the collective agreement at LIDO SA de CV, which is due to expire.*

- (b) *The Committee requests the Government to clarify whether union leader Guadalupe Atilio Jaimés Pérez (whose release was ordered by the judicial authority) is still facing charges and, if so, to inform it of the sentence that was handed down.*
- (c) *The Committee requests the complainants to reply to the assertion that the workers' annual leave had been advanced at the request of a trade union leader.*
- (d) *The Committee requests the Government to send it the court ruling which, according to the allegations, declared the strike at the company to be illegal.*
- (e) *Finally, the Committee observes that the Government has not responded to the allegation regarding the dismissal of trade unionists Ana María Barrios Jiménez, María Isabel Oporto Jacinta and Oscar Armando Pineda and requests it to send its observations on the matter without delay.*

CASE No. 2878

DEFINITIVE REPORT

**Complaint against the Government of El Salvador  
presented by  
the Union of Workers of the Salvadorian Institute for Rehabilitation  
of the Disabled (SITRAISRI)**

*Allegations: Obstacles to the deduction of trade union dues for members of the complainant organization*

624. The complaint is contained in a communication from the Union of Workers of the Salvadoran Institute for Rehabilitation of the Disabled (SITRAISRI) dated 30 May 2011.
625. The Government sent its observations in a communication dated 22 October 2012.
626. El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainant's allegation**

627. In its communication dated 30 May 2011, the SITRAISRI alleges that on 21 March 2011 it wrote to the National Department of Social Organizations of the Ministry of Labour and Social Welfare (as required under clause 1 of article 252 of the Labour Code, which stipulates: "All employers with workers affiliated to a trade union are required to deduct union dues and remit them to the union, provided the latter has provided it with a list of unionized workers, through the National Department of Social Organizations of the Ministry of Labour and Social Welfare, which must transmit the communication within five days"). The complainant requested that arrangements be made as soon as possible to deduct SITRAISRI members' union dues.

- 628.** The complainant adds that on 30 March 2011 it was notified of a ruling handed down by the National Department of Social Organizations requiring the union to ascertain within three working days from the date of notification that the workers whose names appeared on the list it attached were indeed union members. On 31 March 2011 the union wrote to the National Department of Social Organizations of the General Labour Directorate claiming non-compliance with article 252 of the Labour Code.
- 629.** On 31 March 2011 the union wrote to the Minister of Labour and Social Welfare informing her of the problem that had arisen with the Chief of the National Department of Social Organizations, who was not following the rapid procedure provided for in the law and that so far nothing had been resolved. On 11 April 2011 the Ministry notified the union of its ruling of 5 April 2011 reiterating the requirement that it submit the relevant documents certifying that the workers whose union dues it wished to have deducted were indeed union members, for which purpose it granted a further deadline of three working days from the date of notification. Some days later, on 15 April 2011, the Ministry issued the following ruling: “the request presented by Nohemy Carmen Hidalgo Germán de Tochez is hereby declared irreceivable, and the request for deduction of union dues will have to be resubmitted”. The complainant objects to the refusal to deduct union dues on such whimsical grounds, for which there is no justification in the Labour Code, and which are prejudicial to the union’s interests. The Ministry’s ruling, which diverges from the criteria applied hitherto to such a request, is a violation of freedom of association, inasmuch as it unjustifiably prevents the union from obtaining the financial resources due to it, particularly since its 209 members are scattered about the country.

## **B. The Government’s reply**

- 630.** In its communication dated 22 October 2012, the Government indicates that the Minister of Labour issued a resolution on 29 November 2011 ordering the deduction of union dues from the wages in favour of the complainant organization, in application of article 252 of the Labour Code.

## **C. The Committee’s conclusions**

- 631.** *The Committee observes that in the present case the complainant alleges that the Ministry of Labour and Social Welfare has made the deduction of union dues from a list of workers conditional on a requirement that is not provided for in the legislation (certification within three days that the workers whose dues the union asks to be deducted are indeed union members). The Committee observes that the complainant points out that article 252 of the Labour Code clearly stipulates that “all employers with workers affiliated to a trade union are required to deduct union dues and remit them to the union, provided the latter has provided it with a list of unionized workers, through the National Department of Social Organizations of the Ministry of Labour and Social Welfare (which must transmit the communication within five days)”. The complainant states that the Ministry’s position is an obstacle to the functioning of the organization, whose 209 members are scattered about the country. The Committee takes note of the points made in the Ministry of Labour and Social Welfare’s ruling of 5 April 2011 (which the complainant attached to its complaint), indicating that “the mere presentation of a list of names without documents attesting that the workers are members of the union and that they joined voluntarily, could undermine freedom of association in any number of ways if it were found that a worker was listed without the union itself having been consulted”.*
- 632.** *The Committee wishes to point out that both legislation which imposes accreditation or proof of affiliation of members of the trade union for their union dues to be deducted from their wages, and legislation which stipulates that it suffices for a union to submit a list of*

*members for the union dues to be deducted, are compatible with Conventions Nos 87 and 135 ratified by El Salvador. In this particular case, the Committee observes that the complainant indicates that, in addition to failing to comply with the provisions of article 252 of the Labour Code (which requires only that a list be submitted – and not proof of affiliation), the Ministry has unilaterally modified the criteria and practice that have been followed in the past.*

**633.** *The Committee notes the indication of the Government that the Minister of Labour finally ordered, on 29 November 2011, the deduction of union dues from the wages in favour of the complainant organization.*

### **The Committee's recommendation**

**634.** *In the light of its foregoing conclusions, and considering that the issue has been resolved in a satisfactory manner, the Committee invites the Governing Body to decide that the present case does not call for further examination.*

CASE NO. 2879

DEFINITIVE REPORT

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

- **the Union of Workers of the Digapan SA Company (SITREDAPSA) and**
- **the Workers' Trade Union Confederation of El Salvador (CSTC)**

***Allegations: Anti-union dismissals at the Digapan SA de CV company and impossibility for the dismissed workers to obtain the compensation and benefits to which they are entitled because of their inability to prove to the judicial authority that the company's legal representative is its titular representative***

**635.** The complaint is contained in a joint communication from the Union of Workers of the Digapan SA Company (SITREDAPSA) and the Workers' Trade Union Confederation of El Salvador (CSTC) dated 1 June 2011.

**636.** The Government sent its observations in a communication dated 22 October 2012.

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

### **A. The complainants' allegations**

**638.** In their communications dated 1 June and 27 July 2011, SITREDAPSA and the CSTC state that SITREDAPSA was established on 8 January 2011 when it was found that the company had financial problems with other companies, that the workers' social security benefits were not being paid, that wages were declining and that in some cases they were not even being paid. During the period in question the company's Chairman of the Board

and legal representative died. The complainants state that, on 15 February 2011, the Ministry of Labour and Social Welfare granted SITREDAPSA juridical personality but that on 16 February the union's founder members and the members of its executive board were dismissed, along with all the other workers (over 500).

- 639.** According to the complainants, the company's representatives refused to allow the labour inspectors onto the premises and failed to appear at a conciliation hearing convened by the General Labour Directorate of the Ministry of Labour. The company was accordingly fined by the labour inspectorate.
- 640.** The complainants state that they have initiated judicial proceedings through the labour courts to obtain payment of the compensation and unpaid wages to which they are legally entitled, but they have been caught up in proceedings that have lasted up to 18 months and then been declared null and void or shelved because of the impossibility for the workers to prove the official status of the company's legal representative (owner/Chairman of the Board or sole owner/administrator). The complainants have, however, established the company's legal existence. They state that they have brought the matter to the attention of the Public Prosecutor responsible for criminal offences, the Ombudsman for Human Rights and the Legislative Assembly.

## **B. The Government's reply**

- 641.** In its communication dated 7 October 2012, the Government declares that, after the enterprise failed to appear at the conciliation hearing, the Minister of Labour fined it, on 3 June 2011, the amount of US\$1,142.85. The Ministry therefore used all the measures that it had in order to find a solution. The proceedings brought by certain workers of the enterprise are pending. The Committee will be informed of the decisions.

## **C. The Committee's conclusions**

- 642.** *The Committee observes that the present case refers to the dismissal in February 2011 of all the employees of Digapan SA (over 500), including the founder members of the union and the members of its executive board. The Committee also observes that, according to the allegations, the dismissals occurred after the Chairman of the Board and legal representative of the company had died and at a time when it was in financial difficulties. The Committee observes that, according to the allegations and despite the fact that the union had appealed to various authorities, including the judicial authorities, in particular criminal, they had not managed to obtain payment of the workers' unpaid wages or of the compensation and benefits to which they were legally entitled. According to the allegations, after proceedings some of which lasted up to 18 months, the labour courts had shelved the entire complaint lodged by the company's workforce since, although the dismissals proved that the company existed, they did not prove the official status of the legal representative.*
- 643.** *The Committee takes note of the difficult situation in which all the dismissed workers, including the founders of the union and the members of its executive board, find themselves. The Committee wishes to point out, however, that, given that the entire company workforce had been dismissed (whether union members or not), in the circumstances as described the case is not strictly speaking an issue of anti-union discrimination, that the dismissals are therefore outside the Committee's specific mandate, which is confined to violations of trade union rights, and that the Committee can only examine allegations regarding dismissals when they entail anti-union discrimination.*

644. *The Committee takes note of the Government's declaration that it has fined the enterprise the amount of US\$1,142.85 for failure to appear at the conciliation hearing and that it will inform the Committee of the decisions in the proceedings brought by certain workers.*
645. *That said, the Committee observes that the documents sent by the complainants suggest that the founder members and officials of the union are entitled to special protection from dismissal by the existing legislation, including special forms of compensation. Therefore, considering that the founder members and officials of the union have not been able to prove the official status of the company's legal representatives before the labour courts and have not been able to obtain payment of the compensation and benefits to which they are legally entitled, the Committee, while waiting for the decisions mentioned by the Government, expects the labour court to ensure that they receive their unpaid wages and other legal compensation and benefits, taking into account the legal provisions on the priority afforded to workers' rights.*

### **The Committee's recommendation**

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

*The Committee, while waiting for the decisions mentioned by the Government, expects the labour court to ensure that the founder members and officials of the union receive their unpaid wages and other legal compensation and benefits, taking into account the legal provisions on the priority afforded to workers' rights.*

CASE NO. 2903

DEFINITIVE REPORT

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

***Allegations: Use of delaying tactics by the Ministry of Finance in collective bargaining, and interference by department chiefs by means of internal communications designed to influence trade union leaders and members***

647. The complaint is contained in a communication from the Union of Workers of the Ministry of Finance (SITRAMHA) dated 5 October 2011.
648. The Government sent its observations in a communication dated 20 August 2012.
649. El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).



## A. The complainant's allegations

- 650.** In its communication of 5 October 2011, SITRAMHA states that it was established on 18 July 2009 and that towards the end of 2010 it presented a list of demands to the Civil Service Tribunal, which the national legislation has appointed to monitor collective bargaining in the public sector for purposes of collective agreements.
- 651.** The complainant states that, although the direct bargaining stage between the parties should have begun in January 2011, at the verbal request of the Office of the Ministry of Finance it started in February 2011.
- 652.** Accordingly, the parties formally embarked upon the conciliation stage of the collective bargaining and a negotiating committee was set up by the Office of the Ministry and, albeit without any power to take decisions or enter into negotiations.
- 653.** At the end of July 2011, the Ministry of Finance embarked upon a media campaign and sent a series of internal memorandums (which the complainant attached) that were contrary to the spirit of collective bargaining and interfered in the affairs of the trade union and its executive board.
- 654.** On 12 August 2011, the Civil Service Tribunal issued an order for the third (arbitration) stage to begin. On 26 August, the Tribunal issued a further order listing the arbitrators appointed by the union and by the Ministry of Finance.
- 655.** On 21 September 2011, the Civil Service Tribunal summoned the arbitrators designated by the Ministry of Finance (José Antonio Morales Tomás Carbonell and Danilo Ernesto Flores López) and by the union (José Dagoberto Gutiérrez Linares and José María Esperanza Amaya) to be sworn in.
- 656.** On 27 September, however, the Civil Service Tribunal, in an obvious tactic to delay the negotiations, issued a report stating that the arbitrators appointed by the Ministry of Finance had resigned. On 28 September, the union sent the Ministry a note renewing its request for a hearing and proposing that the question of the resignation of the arbitrators appointed by the Ministry of Finance be placed on the agenda. The Ministry returned the note stating that the union had no right to demand anything.
- 657.** The complainant states that, owing to the Ministry's delaying tactics, the general budget was presented to the Legislative Assembly in September 2011 without the provision which the collective agreement was intended for, thus signalling the breakdown in the collective bargaining process.

## B. The Government's reply

- 658.** In its communication, dated 20 August 2012, the Government refers to the collective bargaining process between SITRAMHA and the Ministry of Finance before the Civil Service Tribunal, which is designated by the Civil Service Act to conduct negotiations on collective labour agreements in the public sector. The Government adds that the procedure laid down in article 129 to 158 of the said Act for collective agreements dealing with economic or group interest matters was strictly adhered to.
- 659.** The Government states that, on 18 November 2010, SITRAMHA presented a list of demands containing 128 clauses. Of these, 28 were approved at the direct discussion stage, 22 were approved at the conciliation stage (when it was also agreed to delete seven clauses) and 72 clauses were left pending agreement. Once the conciliation stage had ended, the points on which disagreement remained were submitted to arbitration, pursuant

to article 144 of the Civil Service Act, so that the clauses on which no agreement had been reached could be resolved.

- 660.** The Government states that, before the arbitration stage began and in accordance with article 145 of the Civil Service Act, each party appointed its representatives on the Arbitration Tribunal and so informed the President of the Civil Service Tribunal, who proceeded to swear in the Tribunal and its President. The Tribunal was called to order on 17 October 2011 when it embarked on an examination and analysis of each of the clauses set aside for arbitration, as required by article 153 of the Civil Service Act. The Arbitration Tribunal handed down its ruling on 1 December 2011, when it declared that state policy on the subject must reflect certain basic characteristics: (1) gradual implementation of the agreement over time; (2) financial sustainability in keeping with the country's economic situation; (3) the high quality of the public service, the ethical conduct of the services rendered, the vocational training of staff, technological development, the efficient use of resources and solidarity with the people in the conduct of their activities; (4) the equity and homogeneity of wage and labour union policies in all public institutions; (5) the responsible conduct of trade union affairs in a spirit of solidarity; and (6) the stability of the labour market, the promotion of careers according to personal merit and observance of the legal provisions in force. The ruling also approved 35 clauses, which the Tribunal ordered to be incorporated into those on which agreement had already been reached during the previous stages (i.e. inserted and numbered in the order in which they initially appeared in the list of demands).
- 661.** Finally, the clauses that were approved at the direct discussion, conciliation and arbitration stages were consolidated to form the collective labour agreement for 2012–14 of SITRAMHA and the Ministry of Finance. The agreement was registered with the National Department of Social Organizations of the Ministry of Labour and Social Welfare on 22 December 2011.

### **C. The Committee's conclusions**

- 662.** *The Committee takes note that in the present case the complainant alleges that the Ministry of Finance employed delaying tactics and deliberately slowed down the negotiation of the collective labour agreement (which began in February 2011), that the Ministry appointed officials who had no training in collective bargaining and decision-making and that it did not inform the union of the swearing in of the Ministry's new representatives on the Civil Service Tribunal (as those who had been appointed initially resigned on 27 September). As a result, at the date the complaint was presented (5 October 2011), the arbitration stage had not yet been concluded, which meant that no provision was submitted to the Legislative Assembly in the general budget presented in September 2011 that took into account the demands of the complainant trade union.*
- 663.** *The Committee takes note that the Government states that on 1 December 2011 the Arbitration Tribunal handed down its ruling, approving 35 clauses to be added to those on which the parties had already agreed – 28 at the direct discussion stage and 22 at the conciliation stage, at which it had also been agreed to delete seven clauses. According to the Government, the Arbitration Tribunal began its work on 17 October 2011 (20 days after the Ministry of Finance's arbitrators resigned and others had been appointed to replace them).*
- 664.** *In these circumstances and taking into account that the two parties approved a significant number of clauses during the direct discussion and conciliation stages and that the new arbitrators were appointed within 20 days, the Committee is unable to conclude that there was any lack of good faith by the Ministry of Finance by way of delaying tactics during the*

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*negotiations, especially since this was the Ministry's first collective agreement and would normally be expected to entail a longer bargaining process.*

- 665.** *The Committee also takes note of the complainant's allegation that, because of the delay in the negotiations, the general budget did not include any provision reflecting the financial clauses contained in their list of demands. However, the Committee observes that the complainant has not presented any further objections to the content or consequences of the Arbitration Tribunal's ruling and that it is not impossible that the said ruling touched on the union's wage demand or that the draft budget subsequently included a heading dealing with remuneration at the Ministry of Finance.*
- 666.** *Finally, the Committee takes note of the allegations concerning internal communications at the Ministry of Finance that were designed to interfere or to influence union leaders and members during the bargaining process and observes that the Government has not provided any observations on the subject. The Committee observes that the said communications (attached by the complainant to its complaint) refer, on the one hand, to the Ministry's refusal to authorize the holding of a union meeting on its premises during working hours and, on the other, to notification of decisions regarding certain perennial union demands (a basic food basket, recognition of mission expenses on a broader scale, an increase in the value of life insurance at the Ministry, more extensive medical and dental assistance and better coverage of transport costs), which the Ministry states were resolved independently of the negotiations on the collective agreement. The Committee states that, had these important decisions been reached during the collective bargaining, the strike called by the union to improve working conditions might have been averted. The Committee expects that decisions of this kind will in future be taken in consultation or during negotiations with the trade union. That said, observing that the main problem in the case has been resolved by the new collective agreement, the Committee considers that the case does not call for further examination.*

### **The Committee's recommendation**

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

CASE NO. 2516

INTERIM REPORT

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

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

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

- 668.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [see 362nd Report, paras 776–808, approved by the Governing Body at its 312th Session (November 2011)].
- 669.** The Government sent its observations in communications dated 7 March and 8 October 2012.
- 670.** Ethiopia 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**

- 671.** At its November 2011 meeting, the Committee considered it was necessary to draw the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein and made the following recommendations [see 362nd Report, paras 4 and 808]:
- (a) The Committee deeply regrets that, despite the time that has elapsed since the last examination of this case by the Committee, the Government has not provided any new information nor replied to the complainant's allegations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee therefore urges the Government to be more cooperative in the future.
  - (b) The Committee strongly urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It urges the Government to keep it informed of the progress made in this respect.
  - (c) The Committee strongly urges the Government to take the necessary measures, without delay, to ensure that the Charities and Societies Proclamation is not applicable to workers' and employers' organizations and that such organizations are ensured effective recognition through legislation which is in full conformity with the Convention. It requests the Government to provide information on all steps taken in this regard.

- (d) The Committee urges the Government to provide all relevant information on the application in practice of the Council of Ministers' Regulation to reinforce Charities and Societies Proclamation, as well as on Proclamation No. 652/2009 on Anti-Terrorism. It requests the Government to take the necessary measures to ensure that the existing legislation in general, and the Anti-Terrorism Proclamation, in particular, are not used in practice to intimidate and harass trade unionists and to keep it informed of all measures taken in this respect.
- (e) The Committee strongly urges the Government to take the necessary steps to ensure that the freedom of association rights of civil servants, including teachers in the public sector, are fully guaranteed and to keep it informed of all progress made in this respect.
- (f) The Committee once again urges the Government to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, led by a person that has the confidence of all the parties concerned, and if it is found that they have been subjected to maltreatment, to punish those responsible and to ensure appropriate compensation for any damages suffered. It urges the Government to keep it informed without delay of the steps taken in this regard, the results of the inquiry, as well as that of any other investigations that have been carried out in relation to these allegations.
- (g) The Committee once again invites the complainant to provide further information on the dismissal in 1995 of Kinfe Abate.
- (h) The Committee once again urges the Government to provide without delay information on the alleged denial of reinstatement of Nikodimos Aramdie and Wondewosen Beyene.
- (i) The Committee urges the Government to take the necessary measures without delay in order to ensure the payment of lost wages to Ms Demissie, as well as adequate indemnities or penalties constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination. It urges the Government to keep it informed in this respect without delay.
- (j) The Committee requests the Government to provide its observations on the new allegations of harassment of NTA activists submitted by EI.
- (k) The Committee once again urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu, Ms Elfinesh Demissie and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.
- (l) The Committee once again urges the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists which occurred between February and August 2008 and to provide a detailed reply as to its outcome.
- (m) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.
- (n) The Committee calls the Governing Body's attention to the extreme seriousness and urgent nature of this case.

## B. The Government's reply

**672.** In its communications dated 7 March and 8 October 2012, the Government points out that the main issue raised in this case implies that there is another legitimate teachers' union than the Ethiopian Teachers' Association (ETA). However, the Government has no mandate to grant or deny registration to any association; rather it is bound by law to work with any legally registered interlocutor of any trade or profession. As far as teachers are concerned, the only lawful association is the ETA. The Government reiterates, with regard to the refusal to register the National Teachers Association (NTA), that the Ministry of Justice denied registration because another association had already been registered under a

similar name. The NTA took the case to the courts, which all confirmed the Ministry's decision on the basis of the fact that by the time of the NTA's appeal, a new proclamation, the Charities and Societies Act, transferred jurisdiction over registration to a new agency, the Charities and Societies Agency (CSA). The Government once again explains that the NTA applied for registration to the CSA, but the agency upheld the previous decision denying registration and referred, in addition, to the time that has elapsed between the NTA's establishment and its application for registration. With regard to the NTA's complaint that it had never received the CSA's decision in writing, the Government points out that after receiving an application for registration, the CSA may issue a valid certificate or reject the application and explain the basis of its decision. The CSA is not obliged to provide a written explanation. Moreover, a written explanation is not a prerequisite for lodging an appeal against an unfavourable decision. According to the Government, in the present case, the CSA had indeed prepared a written document addressed to the NTA, which the latter failed to collect from the CSA's office. The Government considers that the NTA deliberately distorts the procedure to cover up its own negligence and other failures to lodge an appeal on time.

- 673.** With regard to the NTA's allegation that due to the denial of registration, it suffers harassment as it is forced to move its offices from place to place because landlords require a registration certificate before providing a lease and the complainant's concern that the Government could bring charges against it based on the anti-terrorism legislation, the Government considers that the NTA failed to provide detailed information on the matter. It explains that, in Ethiopia, a contractual relationship involving lease of immovable properties is governed by the Civil Code. A contractual relationship has nothing to do with political persuasion or political motive. The law of the land provides full legal protection of tenure for tenants regardless of their political identity. If a landlord abuses tenants' rights, the aggrieved party can seek remedy before the courts. The Civil Code contains provisions to protect the rights of tenants. Politics plays no role in the renting and leasing process: if that was not the case, none of the numerous regional and national political parties would have had an office to conduct their constitutionally protected political activities. In Ethiopia, landlords are required to verify the registration licence and identity cards of any lessee, regardless of whether it is an individual or an organization.
- 674.** The Government recalls that it has been subject to repeated terrorist attacks. Considering the gravity of the danger which the country is facing, the Government urges landlords to verify the identities of all renters in order to ensure public safety. It is against this backdrop that the new anti-terrorism legislation was enacted. This law provides to citizens full protection against unlawful search of domicile or place of work, or seizure. The Government points out that this, however, does not mean a duly issued search warrant cannot be executed. The Government stresses that the anti-terrorism legislation does not violate the provisions of the Constitution and considers that the NTA's claim that it could be charged under this legislation is a deliberate ploy to create hysteria; no law-abiding political opponent, much less trade union member, has ever and never will be charged under its provisions. The Government reiterates that public safety is its top priority and that as foreign-sponsored incidents were increasing, it was imperative to establish a legal framework to prevent deadly random acts of terrorism. The Government points out that the new Anti-Terrorism Proclamation does not differ from any European anti-terrorist laws and was adopted after a long process on the basis of other countries' best practices in drafting such laws. In the Government's view, Education International (EI) has no right to evaluate the Anti-Terrorism Proclamation No. 625/2009 which was promulgated by the House of Peoples' Representatives. The Proclamation respects international standards and practices in carrying out anti-terrorist activities. The Government therefore considers that criticizing the Proclamation is an unfair intrusion in the internal affairs of a sovereign State.

**675.** With regard to the *Ruling Party Publication for the Senior Cadres*, the Government explains that every political party has vested interest in expanding its membership and supporters. Likewise, any citizen, including teachers and students, has the right to join any political party based on his/her own interest. In the same vein, the party publishes training documents to update and upgrade its leaders' political skills and performance level. Criticizing the ruling party for producing booklets for the use of its membership is an encroachment of its rights. The Government states that contrary to the allegations in this case, it does not interfere in associations' internal affairs. The Government believes that without the free and unfettered operation of independent associations, the democratization effort in the country will not succeed. The proliferation of associations and trade unions and the expansion of their membership underscore the Government's commitment to freedom of association. The current Government, which has the popular mandate to administer the country, was formed by the ruling party and by virtue of its seats in Parliament, the ruling party formulates the Government's policies. Most cabinet members and high officials that oversee implementation of these policies can be ruling party members. This does not mean, however, that the boundary between the Government and the ruling party has been obliterated. Furthermore, the Constitution of the Federal Democratic Republic of Ethiopia was drafted under the leadership of the current ruling party after it overthrew the former military regime, which ruled the country by brutal dictatorship and terror. It was the current ruling party, which determinedly struggled for 17 years and brought an end to the suffering of Ethiopian people, which within days of toppling the military dictatorship convened an all-party conference and laid the foundation for the constitutional Federal Democratic State, and which incorporated international conventions on human rights and globally accepted rights-based treaties into the Ethiopian constitutional system. The Government therefore considers that tarnishing the record of the ruling party, which stood in the forefront in the struggle to close the old totalitarian chapter and chart a new democratic path, is not only perfidious but irresponsible as well.

**676.** As regards the Charities and Societies Act, alleged to restrict the implementation of ILO Conventions, the Government points out that contrary to the NTA's claim, this legislation was long in the making and therefore could not have been designed to deprive teachers of their right to register an organization. It further points out that the purpose of the Proclamation, as worded in its preamble, is to enact a law in order to ensure the realization of citizens' right to association, as enshrined in the Constitution of the country, as well as to facilitate the role of charities and societies in the overall development of its people. The Government indicates that the Proclamation is aimed at promoting the indigenous societies that have local constituencies at grass-roots levels. On the other hand, the law also aims at raising the bar for the so-called portfolio NGOs focused in the area of advocacy. The Proclamation stipulates that any advocacy association which receives more than 10 per cent of its funding from external sources has to register as a foreign NGO. The Government wishes to point out that whereas in most countries the foreign-funded political advocacy is prohibited, in Ethiopia, the law enables indigenous NGOs which mobilize more than 90 per cent of their funds from local sources to be only accountable to the beneficiaries and the Board of Directors. The Government states that contrary to EI's argument, such NGOs are mushrooming in Ethiopia. The Government reiterates that the Charities and Societies Proclamation has nothing to do with trade unions and was by no means meant to restrict the implementation of ILO Conventions. Since the enactment of this Proclamation and the Council of Ministers' Regulation No. 168/2009, 2567 charities and societies, of which 357 are foreign, were registered and are operating in the country. Before the enactment of this legislation, 1,655 charities and societies were actively operating in the country even though 3,800 were recorded. In the Government's view, this clearly demonstrates that the legislation meets its objectives by creating opportunities and favourable conditions for the establishment and operation of charities and societies in the country.

- 677.** As regards the amendment to the Civil Servant Proclamation, the Government reiterates that labour rights, including the right for civil servants to form associations, is protected under article 42 of the Constitution. In respect of grievances concerning their conditions of work, civil servants can seek redress pursuant to the legislation governing the civil service as well as other legal provisions, including through the Office of the Ombudsman. Civil servants can also establish professional associations. The Government affirms that public school teachers enjoy the enabling environment to exercise their constitutional rights to form an association as most have decided to become members of the ETA. Over the years, through social cooperation with the Government and struggle, the ETA has secured many gains for its 350,000-strong members.
- 678.** The Government further explains that during the past five years the country has been undergoing a comprehensive civil service reform programme, designed to provide efficient and effective services to the public. In this regard, civil servants, as part and parcel of the executive body, have a key role to play in the implementation of the reform. This reform is of paramount significance in strengthening democracy and ensuring good governance in the country. The Government trusts that the reform will greatly enhance the economic growth and guarantee the rights of all citizens of the country, including civil servants. The Government suggests that the ILO supervisory mechanisms take a global perspective on this matter that takes stock of the reality on the ground. While the law that governs civil servants is different from the Labour Proclamation, civil servants, including teachers of public schools, have the right to establish and join professional associations of their choosing.
- 679.** With regard to the Committee's request for independent and full inquiries into the alleged extrajudicial killings, arbitrary arrests and torture while in detention, the Government affirms that no one has been arbitrarily arrested and that there is no torture in the country. The Government explains that, following the 2005 elections, some of the opposition party members were involved in unlawful activities to overthrow the elected Government by force. In connection with this, there were persons detained on the basis of court orders. While in detention, they were repeatedly visited by international organizations which witnessed that the detainees were not tortured. The Government points out that an independent commission of inquiry was also established to investigate whether the Government took illegal and excessive measures. The commission reported that the Government did not use either excessive force or take illegal measures. The Government points out that the individuals mentioned by the NTA and EI were detained on the basis of a court order and that appropriate legal actions have been taken against those found guilty on charges of involvement in violent acts against the constitutional order. The Government therefore considers this matter closed as the unfounded allegations levelled by the NTA, the ITUC and EI have been refuted in court. The Government refers, in particular, to the case of Mr Tilahun Ayalew and indicates that this case was examined by an independent inquiry established after the election in 2005. The findings of the inquiry showed that Tilahun Ayalew represented the Coalition for Unity and Democracy (CUD). While there were no reports of any political pressure on him during the 2005 polling, after the announcement of the results, a court ordered his arrest on suspicion of involvement in a violent upheaval planned by the CUD. He was first detained and then released on bail pending the investigation where his movements were not restricted and he was allowed to pursue his teaching profession. When he was summoned to reappear in court, he disappeared, without saying a word to his family, his colleagues or the regional administration. His disappearance, at a time when the police had uncovered further evidence incriminating him, strongly suggests that he fled from justice. Later, evidence was found and confirmed that Mr Tilahun went to Kenya where he was interviewed by the Eritrean media. The fact-finding team met his family in Dangla, town where he lived before he fled the country, and concluded that he was neither beaten while in custody or during his arrest, nor tortured.



680. With regard to the alleged dismissals, the Government provides the following information:

- Mr Kinfé Abate was not arbitrarily dismissed, but rather decided to leave his post. He lives in Bonga, the Southern Nations Nationalities and Peoples' (SNNP) Region and works for the Ethiopian Commodity Exchange Services representing businessmen.
- Mr Nikodimos Aramdie was not arbitrarily dismissed. Currently, he is employed by the Harari National Regional State Emergency and Fire Fighting Agency.
- Ms Elfinesh Demissie was neither illegally suspended nor harassed. The loss of her salary is the result of a decision of the discipline committee of her institution for repeated misconduct and absenteeism.

### C. The Committee's conclusions

681. *The Committee recalls that the present case refers to the allegations relating to the exclusion of teachers in the public sector from the right to join trade unions by virtue of the national legislation; refusal to register the NTA (previously ETA) and interference in its administration and activities; and harassment, arrest, detention and maltreatment of teachers in connection with their affiliation, first to the ETA, and now to the NTA. The Committee further recalls that it has been addressing very serious allegations of violations of freedom of association involving governmental interference in the administration and functioning of the ETA, and the killing, arrest, detention, harassment, dismissal and transfer of members and leaders of ETA since November 1997 [see Case No. 1888].*

682. *The Committee notes the information provided by the Government. With regard to the registration of the NTA (recommendation (b)), the Committee notes once again the Government's statement that initially, the Ministry of Justice denied registration to the NTA because another association had already been registered under a similar name. The NTA appealed this decision, but due to the adoption of a new legislation, the Charities and Societies Act, which transferred jurisdiction over registration to a new agency, the CSA, the court confirmed the Ministry's decision. The NTA then applied for registration to the CSA, but the latter also upheld the previous decisions denying registration, and referred, in addition, to the time that had elapsed between the NTA's establishment and its application for registration. With regard to the complainants' allegation that because the NTA had not received the CSA's decision in writing, it is prevented from filing an appeal, the Government indicates that the agency did prepare a written document addressed to the NTA, which the latter failed to collect and that in any case, a written explanation is not a prerequisite for lodging an appeal against an unfavourable decision. The Committee regrets that the information provided by the Government is limited to merely summarizing the situation which the Committee has been examining for the last four years and deeply regrets that the Government failed to provide information on the measures taken to implement the Committee's specific recommendation to ensure the registration of the NTA. The Committee therefore once again strongly urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furtherance and defence of teachers' occupational interests without further delay. The Committee once again recalls that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 295]. It emphasizes that it is the Government's responsibility to ensure that this right is respected in law and in practice and expects that the Government will provide information on the concrete steps it has taken to ensure the NTA's registration.*

- 683.** *The Committee notes the information provided by the Government on the application of the Charities and Societies Proclamation and the Council of Ministers' Regulation to reinforce it (recommendations (c) and (d)). The Government indicates, in particular, that, since the enactment of the Proclamation and the Regulation, the number of charities and societies operating in the country has only risen. It further indicates that the Proclamation is not targeted at trade unions and is not meant to restrict the implementation of ILO Conventions. The Committee recalls, however, that the Committee of Experts on the Application of Conventions and Recommendations, which has examined in detail this piece of legislation, noted with concern that the Proclamation "organizes an ongoing and close monitoring of the organizations established on its basis and gives government authorities, in particular through the establishment of the CSA, great discretionary powers to interfere in the right to organize of workers and employers, in particular in the registration, internal administration and dissolution of the concerned organizations with respect to those falling within its scope, which appear to encompass civil servants, including teachers in public schools". The Committee regrets that the Government provides no information on the measures taken to ensure that the Proclamation is not applicable to workers' and employers' organizations and that such organizations are ensured effective recognition through legislation which is in full conformity with Convention No. 87. Moreover, the Committee considers that this legislation clearly has an impact on trade unions and workers' organizations as it is under the authority of the CSA that the NTA continues to have its requests for registration denied. The Committee therefore reiterates its request and expects that the Government will provide information on the progress made in this regard.*
- 684.** *The Committee takes due note of the information provided by the Government on Proclamation No. 652/2009 on Anti-Terrorism and in particular its assurance that no law-abiding political opponent, much less a trade union member, has ever been charged nor will they ever be charged under the provisions of the anti-terrorism legislation.*
- 685.** *On the issue of civil servants', including teachers, freedom of association rights (recommendation (e)), the Committee notes that the Government reiterates that the right of workers, including civil servants, to form an association is enshrined under article 42 of the Constitution. In respect of grievances concerning their conditions of work, civil servants are entitled to seek redress pursuant to the relevant legislation governing the civil service and other legal provisions, including through the Office of the Ombudsperson. Civil servants can also establish professional associations. The Government affirms that, in fact, public school teachers enjoy the enabling environment to exercise their constitutional rights to form an association as most have decided to become members of the ETA. The Government further indicates that the country is under a comprehensive civil service reform programme designed to provide efficient and effective services to the public and that civil servants, as part and parcel of the executing body, have a key role to play in implementing the reform. According to the Government, the reform will have a significant role in strengthening democracy, ensuring good governance and guaranteeing the rights of all citizens in the country, including civil servants. While noting this information, the Committee wishes to recall that the right of workers to establish and join organizations of their own choosing in full freedom cannot be said to exist unless such freedom is fully established and respected in law and in fact [see **Digest**, op. cit., para. 309]. This implies, in particular, the effective possibility for forming and joining organizations independent of those which already exist in the country. The Committee considers that the existence of an organization in a specific occupation should not constitute an obstacle to the establishment of another organization, if the workers so wish [see **Digest**, op. cit., para. 313]. The Committee expects that the Government will take, without delay, concrete measures, including in the framework of the civil service reform, in order to fully guarantee the right of civil servants, including teachers in public schools, to establish and join organizations*

of their own choosing for the promotion and defence of their occupational interests. It requests the Government to keep it informed of all progress made in this respect.

- 686.** *With regard to the Committee's previous recommendation to initiate without delay an independent inquiry into the allegations of torture and maltreatment of the detained persons, the Committee notes that according to the Government, there were no arbitrary arrests and torture in the country. The Government also indicates that all individuals mentioned by the complainant organizations were detained on a basis of a court order and that appropriate legal actions had been taken against those found guilty on charges of involvement in violent acts against the constitutional order. The Committee further notes the Government's indication that an independent commission of inquiry conducted an investigation and concluded that the measures taken by the Government were not illegal and excessive. The Committee recalls that according to the information previously provided by the Government, the Federal High Court ruled that a certain number of trade unionists should be released as there was no case against them. The Committee notes that the Government merely reiterates its previous statements and deeply regrets that, despite its repeated requests, the Government has once more failed to provide a report containing findings or conclusions on investigations carried out into the allegations of torture and maltreatment of the detained persons. The Committee therefore once again urges the Government to provide it with the reports of the various investigations that have been referred to by the Government.*
- 687.** *The Committee recalls that it had previously requested the complainants to provide information on the dismissal, in 1995, of Mr Kinfe Abate (recommendation (g)). The Committee notes that the Government refutes the allegation that he was arbitrarily dismissed. According to the Government, Mr Kinfe Abate decided to quit his previous post and now lives in Bonga, the SNNP Region and works for the Ethiopian Commodity Exchange Services representing businessmen. In the absence of the information requested from the complainants, the Committee will not pursue examination of this allegation.*
- 688.** *The Committee recalls that it had previously requested the Government to provide information on the alleged denial of reinstatement of Mr Nikodimos Aramdie and Mr Wondwosen Beyene (recommendation (h)), dismissed, according to the complainants, from Kombolcha Tulla Primary School in East Oromya region in September 2007 and from Awash Primary School in Afar region in December 2004, respectively. The Committee notes that the Government rejects the allegation that Mr Nikodimos Aramdie was arbitrarily dismissed from his job and indicates that he is currently employed by the Harari National Regional State Emergency and Fire Fighting Agency. The Committee regrets that no information has been provided with regard to the alleged dismissal of Mr Wondwosen Beyene. The Committee requests the complainants and the Government to provide relevant and detailed information in respect of this dismissal and the alleged denial of his reinstatement.*
- 689.** *The Committee notes that the Government further denies that Ms Elfinesh Demissie was illegally suspended or harassed and indicates that the loss of the salary was the result of a decision of the discipline committee of her institution for repeated misconduct and absenteeism (recommendations (i) and (k)). The Committee recalls that according to the complainants, Ms Demissie was punished by her headmaster for her trade union activities and was not paid for 36 days of work (about €120), despite the fact that the discipline committee, to whom the headmaster filed a complaint for absenteeism, dismissed unanimously all the allegations. In these circumstances, the Committee concluded that she was in fact punished for her trade union activities and therefore requested the Government to take the necessary measures without delay in order to ensure the payment of the lost wages to Ms Demissie, as well as adequate indemnities or penalty, constituting a sufficiently dissuasive sanction against any further act of anti-union discrimination.*

*Recalling its conclusions above, the Committee requests the Government to provide without delay a copy of the findings and conclusions of the disciplinary committee in the case of Ms Demissie.*

**690.** *The Committee once again urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.*

**691.** *The Committee also once again urges the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists which occurred between February and August 2008 and to provide a detailed reply as to its outcome.*

### **The Committee's recommendations**

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

- (a) The Committee once again strongly urges the Government to take all necessary measures to ensure that the appropriate authorities register the NTA without delay so that teachers may fully exercise their right to form organizations for the furthering and defence of teachers' occupational interests without further delay. It expects that the Government will provide information on the concrete steps taken in this regard.*
- (b) The Committee strongly urges the Government to take the necessary measures, without delay, to ensure that the Charities and Societies Proclamation is not applicable to workers' and employers' organizations and that such organizations are ensured effective recognition through legislation which is in full conformity with the Convention. It expects that the Government will provide information on the progress made in this regard.*
- (c) The Committee expects that the Government will undertake, without delay, concrete measures, including in the framework of the civil service reform, in order to fully guarantee the right of civil servants, including teachers in public schools, to establish and join organizations of their own choosing for the promotion and defence of their occupational interests. It requests the Government to keep it informed of all progress made in this respect.*
- (d) The Committee once again urges the Government to provide it with the reports of the various investigations into the allegations of torture and maltreatment of the detained persons.*
- (e) The Committee requests the complainants and the Government to provide relevant and detailed information in respect of the alleged dismissal and denial of reinstatement of Mr Wondwosen Beyene.*

- (f) *The Committee requests the Government to provide without delay a copy of the findings and conclusions of the disciplinary committee in the case of Ms Demissie.*
- (g) *The Committee once again urges the Government to initiate a full and independent investigation into the allegations of harassment in September–November 2007 of Ms Berhanework Zewdie, Ms Aregash Abu and Mr Wasihun Melese, all members of the National Executive Board of the complainant organization; as well as over 50 of its prominent activists in order to determine responsibilities, punish the guilty parties and prevent the repetition of similar acts. It requests the Government to keep it informed in this respect.*
- (h) *The Committee once again urges the Government to conduct an independent investigation into the allegations of harassment of seven trade unionists which occurred between February–August 2008 and to provide a detailed reply as to its outcome.*
- (i) *The Committee draws the Governing Body’s attention to the extremely serious and urgent nature of this case.*

CASE NO. 2723

INTERIM REPORT

### **Complaints against the Government of Fiji presented by**

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

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

- 693.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [362nd Report, paras 809–847 approved by the Governing Body at its 312th Session (November 2011)].
- 694.** The Fiji Trades Union Congress (FTUC) and the Fiji Islands Council of Trade Unions (FICTU) provided written submissions in relation to the matters raised in the complaint to the ILO Direct Contacts Mission that visited Fiji in September 2012.
- 695.** The Government forwarded its observations in a communication dated 28 May 2012 and provided a written brief to the Direct Contacts Mission on 17 September 2012.

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

#### A. Previous examination of the case

697. In its previous examination of the case in November 2011, the Committee made the following recommendations [see 362nd Report, para. 847]:

- (a) In light of the ongoing reshuffle of the judicial system in Fiji and the apparent absence of any constitutional guarantees, the Committee requests the Government to take the necessary steps to ensure that Mr Koroi is immediately reinstated in his former position as a school principal without loss of pay or benefits and to keep it informed of developments.
- (b) The Committee urges the Government to refrain from any further interference in the internal affairs of the FTA and to permit Mr Koroi, as its legitimate representative, to carry out his representation functions at the relevant forums, including the Education Forum, the Fiji Teachers' Registration Board, the JCC and the CSB.
- (c) Expressing its deep concern at the numerous alleged acts of assault, harassment and intimidation of trade union leaders and members for their exercise of the right to freedom of association, in particular the recent recurring acts of physical assault and harassment against the FTUC National Secretary, the Committee urges the Government to conduct an independent investigation without delay into these incidents and transmit detailed information with regard to its findings and the action taken as a result. The Committee urges the Government to take all necessary measures without delay to ensure, in the future, the full respect of the principles enounced in its conclusions in this respect. With particular regard to the allegation that an act of assault against a trade union leader was perpetrated in retaliation for statements made by the FTUC National Secretary at the ILC, the Committee urges the Government to ensure that no trade unionist suffers retaliation for the exercise of freedom of expression.
- (d) Alarmed by the arrest on 4 November 2011 and retention in custody without charges of the FTUC National Secretary, by the arrest of the FTUC President on 29 October 2011 and his retention in custody without charges, as well as by the arrest and overnight detention on 3 August 2011 of the FTUC President and the NUHCTIE General Secretary and a NUHCTIE member and the criminal charges of unlawful assembly brought against them on the grounds of failure to observe the terms of the Public Emergency Regulations, the Committee urges the Government to take full account of the principles enounced in its conclusions in the future, and urges the Government to take the necessary measures to ensure that the FTUC National Secretary and the FTUC President are immediately released from custody and that all charges against them and the NUHCTIE members are immediately dropped, and to keep it informed of any developments in this regard without delay, including the outcome of the hearing on 31 October 2011.
- (e) With regard to the alleged search of the union office and of the FTUC National Secretary's home by the police, the Committee requests the Government to provide its observations on this allegation.
- (f) Stressing that freedom of assembly and freedom of opinion and expression are a sine qua non for the exercise of freedom of association, the Committee urges the Government to take full account of the principles enounced in its conclusions in the future and refrain from unduly impeding the lawful exercise of trade union rights. It further requests the Government to provide detailed information without delay in reply to the FICTU communication dated 23 September 2011, and in particular as regards the impact of the PER on freedom of association and the alleged general ban on trade union meetings.
- (g) As regards the alleged infringement of trade union rights by executive decrees, especially targeting workers in the public service, the Committee urges the Government to take all necessary measures to ensure that public servants enjoy the guarantees

enshrined in Convention No. 87, to amend the relevant decrees without delay so as to guarantee access to courts, and to ensure, in the future, that prior consultations are undertaken with the relevant trade unions on proposed legislation affecting trade union rights.

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

## **B. The complainants’ new allegations**

### **1. Allegations of the FICTU**

**698.** Recalling its previous communications on its behalf and of its affiliate, the FTA, the FICTU provides a brief report on the current status of the matters covered in the complaint.

**699.** As regards the employment-related decrees, the complainant organization informs that Essential National Industries Decree No. 35 of 2011 and all other decrees violating workers’ rights continue in force with serious effects on workers and trade unions in the affected industries and companies. In the communication sector, the Communications, Mining and General Workers Union (CMGWU) represents workers at Telecom Fiji Limited (TFL). Following the Essential National Industries Decree, the union registered a bargaining unit at that company in compliance with that Decree. The bargaining unit sought to bargain with the employer but, to date, the employer has not commenced bargaining despite several written and verbal requests attached to the submission. The complainant believes that bargaining is unlikely to begin any time soon given that the decree allows for a three-year period of bargaining. In the meantime, the employer has made unilateral changes to workers’ employment conditions and benefits and has made some workers redundant without consultation or compensation. Check-off facilities have continued but the union remains at the mercy of the employer unless an agreement is concluded. During this period, union membership has declined by approximately 150 members and is continuing to diminish.

**700.** The complainant further indicates that the Telecommunication Employees Association (TEA) used to represent members at Fiji International Telecom Limited (FINTEL) and Fiji Broadcasting Corporation (FBC). The union’s combined membership was less than 75, the threshold to form bargaining units under the Essential National Industries Decree. As a

result, the TEA was unable to form bargaining units at either of the two companies and had to be voluntarily dissolved. These workers are now unrepresented and employed on individual contracts.

- 701.** In the transport sector, the Transport Workers Union (TWU) represented workers at Air Pacific and Pacific Sun. The complainant reports that the union could not form a bargaining unit at Pacific Sun because it could not meet the threshold requirement of 75 workers. These workers are now without representation. At Air Pacific, only cabin crew had the number of members required to form a bargaining unit under the Essential National Industries Decree. The cabin crew bargaining unit has entered into an agreement with the airline but had to forego conditions and benefits to this end. According to the complainant, the bargaining unit has very close association with the airlines management and has been obviously influenced by the airline to break links with the TWU. As a result, the bargaining unit has failed to remit union membership fees deducted at source to the union. The union has also had to close its office and now operates from the general secretary's residence.
- 702.** The complainant states that, in the banking sector, the FBFSU has been seriously affected by the Essential National Industries Decree. The union has lost around 400 members and has yet to conclude any agreement with the employers.
- 703.** With respect to the Public Emergency Regulation (PER), they have been lifted but the complainant alleges that restrictions on freedom of assembly are now enforced through the Public Order (Amendment) Decree (POAD). In recent months, the Government suspended the POAD following pressure from the union movement, political parties and the recently appointed Constitutional Commission to allow for consultation on constitutional development. However, the complainant believes that the meeting restrictions will be restored soon after the Constitutional Commission completes the public hearings, around mid-October.
- 704.** As for the freedom of media, the complainant states that Fiji's media is not free and alleges that, whilst the regime boasts of a free media and calls on media to report freely, agents of the regime contact the different media outlets directly to instruct them on what not to report. Three recent media statements sent by FICTU on the minimum wage debate in the country were not reported anywhere despite being sent directly to individual journalists and the official news addresses of media organizations.
- 705.** Concerning the Employment Relations Advisory Board (ERAB), the FICTU is not represented in the ERAB. The complainant organization indicates that, according to the information available to it, some discussions were held regarding the decrees; however, there has been no outcome, and it is believed that these discussions have ended.
- 706.** With reference to Mr Tevita Koroi, President of the FTA, the complainant informs that he remains dismissed despite the strong recommendation for his reinstatement by the ILO. He is said to have left the country due to financial constraints.
- 707.** As regards public sector unions, the complainant organization alleges that their check-off facilities have been discontinued. This has severely affected the finances of these unions. The situation is unlikely to improve in the near future.
- 708.** With respect to dispute resolution, the complainant states that all workers and unions affected by the Essential National Industries Decree and other employment-related decrees are unable to access the dispute resolutions mechanism under the 2007 Employment Relations Promulgation (ERP), Fiji's core labour legislation under which the mediation services and employment tribunal are established. All disputes which were pending



resolution at the time of issuance of the relevant decrees have since been terminated without resolution.

## **2. Allegations of the FTUC**

- 709.** The complainant states that, since the military takeover in 2006, the Government has made trade unions its specific target and sought to undermine their very existence, and that the ensuing decrees were promulgated to decimate the union movement altogether. According to the complainant, the Government has given false and repeated promises to the ILO, the European Union, the Commonwealth, the Pacific Forum Ministerial Contact Group and other international institutions that trade union rights are intact, while every attempt was made to trample on trade unions rights established in a number of ILO Conventions, in particular the right to organize and collectively bargain and to take industrial action. The complainant believes that the Government is violating basic human and trade union rights and all the ILO core Conventions, and that, given the antipathy of this regime, the trade unions will have to continue fighting hard to survive.
- 710.** The complainant indicates that, since the abrogation of the Constitution in April 2009, the Government introduced a series of decrees designed to curtail basic trade union rights along with other measures to suppress any dissenting views. According to the complainant, the media law promulgated by the regime has stifled the voice of Fiji citizens; the PER made meetings of more than three people illegal without a permit, and the POAD replacing the PER is even worse. The complainant adds, however, that on 19 July 2012, the Government announced the suspension of section 8 of the Public Order Act as amended by the POAD, which requires permits for meetings in public places, until the Constitutional Commission hands over a draft copy of Fiji's new Constitution to the President.
- 711.** According to the complainant, the continued emergence of decrees to restrict trade unions from exercising universally accepted principles and legislated rights at work has affected employment both in the public and private sector. Loss of jobs and economic stagnation have created havoc to such an extent that more than 50 per cent of the population live in poverty. The sharp increases in food prices and escalating cost of utilities like power and water have hit the low-income earners and the underprivileged the hardest (wage adjustments have not kept up with inflationary movements). These factors are causing misery and hardship on a scale never experienced before in Fiji causing the most devastating impact on the lives of ordinary people, while the regime is projecting itself as a stabilizing force that will help the country to constitutional democracy, community reconciliation and economic reconstruction. Unfortunately, it has failed to win the support and the confidence of the people to rebuild the country with the brand of "democracy."
- 712.** The complainant further states that the main reason for the military takeover in December 2006 was to weed out corruption not only in corridors of power but in every facet of governance in Fiji. After almost five and a half years, corruption, nepotism and self-enrichment have become the order of the day. Despite being unelected, the regime has made it clear that it intends to hold the reins of government until 2014 or possibly longer. It has made enormous policy interventions that are totally unacceptable in a civilized world by making changes to laws relating to land, labour, taxation, judiciary, public services and against trade unions.
- 713.** The complainant raises the following specific concerns about actions of the Government that have led to more obstacles for workers.

## Decrees Nos 9 and 10 of 2009 and 21 of 2011

- 714.** The complainant indicates that, since the abrogation of the Constitution, the Government has issued a series of decrees which have had a major impact on workers and trade unions; for the latter, it became a matter of survival. Initially the decrees focused particularly on the public service. Decrees Nos 9 and 10 of 2009 (Administration of Justice) terminated dozens of existing and pending grievances filed by public service employees. These decrees also prevented the public sector unions from negotiating any changes or upgrading the benefits of workers via collective bargaining. The State Services Decree No. 6 of 2009 abolished the Public Service Appeal Board and terminated all cases before it, and forcibly reduced the public service retirement age from 60 to 55, requiring the departure of some 2,000 staff from the public service. Decree No. 21 of 16 May 2011 revising the ERP was a decree of exclusion since one of its effects was to exclude 15,000 public service workers from the scope of labour law.
- 715.** According to the complainant, the public sector unions have been deprived of representing or defending their members in situations of discrimination since they are now excluded from the scope of the ERP. There is therefore no possible recourse against cases of discrimination or sexual harassment or any means of seeking maternity protection. Indeed, following the introduction of new section 266 in the ERP, the aforementioned workers no longer had any legal basis for claiming their rights. Not only is this contrary to Convention No. 111, but these workers have been further stripped of their right to be defended through the withdrawal of certain areas from the courts' sphere of competence. There is no forum where public officers can raise their grievances, and the FTUC, as the trade union representing the majority of employees in the public service, has on record the numerous grievances raised by its members on individual contracts. The FTUC has even filed judicial reviews on the issue of contractual appointment but the abovementioned decrees terminated the applications as there can be no challenge against the decisions of the Public Service Commission (PSC) to reform, restructure or change the terms and conditions of employment of officers in the public service. The complainant believes that this situation is an outright breach of Conventions Nos 87 and 98 as well as protection against discrimination. The fundamental principles of natural justice have been denied in the public service.

## Essential National Industries Decree No. 35 of 2011

- 716.** The complainant recalls that the Essential National Industries Decree was gazetted on 29 July 2011. On 9 September 2011, the Government issued a gazette notice containing regulations to implement the Decree with immediate effect. The following four industries and 11 corporations came under the Decree: (1) financial industry: (i) Australia and New Zealand Banking Group (ANZ); (ii) Bank of Baroda (BoB); (iii) Bank of South Pacific (BSP); (iv) Westpac Banking Corporation (WBC); and (v) Fiji Revenue and Customs Authority (FRCA); (2) telecommunications industry: (vi) Fiji International Telecom Limited (FINTEL); (vii) Telecom Fiji Limited (TFL); and (viii) Fiji Broadcasting Corporation (FBC); (3) civil aviation industry: (ix) Air Pacific; and (4) public utilities industry: (x) Fiji Electricity Authority; and (xi) Water Authority of Fiji (WAF).
- 717.** The complainant reports that the following trade unions are currently affected by the Decree: (i) Fiji Public Service Association (FPSA) representing workers in FRCA and WAF; (ii) Fiji Bank and Finance Sector Union (FBFSU) with members in ANZ, BoB, BSP and Westpac; (iii) Transport Workers Union (TWU) with staff of Air Pacific; and (iv) Fiji Post and Telecom Employees Association (FPTEA) covering FINTEL and TFL.

- 718.** The complainant recalls that the Decree prescribes drastic obstacles to trade unions continuing to represent workers in accordance with the ERP. It outlaws professional trade unionists, eliminates existing collective agreements, promotes a biased system of non-professional bargaining agents to represent workers, severely restricts industrial action, strengthens sanctions against legally striking workers and bans overtime payments and other allowances for workers in 24-hour operations.

Effects of decrees on certain trade unions,  
their members and workers

*Fiji Bank and Finance Sector Employees Union (FBFSU)*

- 719.** As regards the FBFSU, the union has members in the four foreign banks in Fiji and has been gravely affected by the Decree. The union believes that the Government was lobbied by the expatriate management to bring the four banks from overseas as the only private sector corporations under the Decree, so that they would be able to ignore or get away from the collective agreements signed between the union and the banks.
- 720.** Since the Decree, the union has suffered a net loss of around 450 members including 40 recent redundancies by the ANZ, i.e. a direct loss of around F\$60,000 (FJD) in subscription income. The remaining income is tenuous as the employers have the option to cease check-off facilities at any time. More than half of the loss has been at one bank, the BSP. The union had to reduce secretariat staff by two, cut costs generally, reschedule loan repayments etc.
- 721.** There is no collective bargaining with the union. Nine months after the Decree came into force, only two bargaining units have been registered, i.e. at BoB and ANZ. No units have been registered yet in Westpac and BSP even though applications were made eight or nine months ago. At BoB, some renegotiation commenced with bargaining unit representatives but without success as the bank did not want to talk about outstanding cost of living adjustment (COLA). The bank even threatened to impose the changes if representatives did not speed up agreement on changes to conditions that the bank was demanding. The ANZ bargaining unit was registered in December 2011 but subsequently deregistered upon pressure from the bank. The new registration has been done on ANZ's terms after excluding a large number of workers at ANZ Pacific Operations. The COLA from last year has been left in abeyance as the bank seeks to impose a new pay system. There has been no progress in discussions as the representatives lack skills and understanding and are reluctant to make any commitments on behalf of staff.
- 722.** Generally, the complainant states that the delay in collective bargaining works in the employer's favour as the union loses membership and contracts are being imposed on new employees. Old grievances and disputes have been terminated, and new grievances are not being processed since employers do not want to appoint internal review officers under the Decree; even if they did, workers have no recourse to independent adjudication. Terminated grievances include several dismissals waiting for decisions for several years, a number of contractual disputes/grievances involving thousands of dollars for individuals and changes to working conditions, as well as several major salary disputes worth around F\$1 million to staff. Police and military intelligence are present in union general meetings. Union officials regularly get visits from them and "polite" queries on the union's activities and views on certain issues.

*Transport Workers Union (TWU)*

- 723.** The complainant indicates that, prior to the Decree, the membership of the TWU (580) was mainly composed of employees of Air Pacific (Air Pacific Ground Staff – 250 (43.1 per cent); Air Pacific Cabin Crew – 240 (41.4 per cent); and Other Institutions – 90 (15.5 per cent). The annual subscriptions income has been approximately F\$124,000 which is a little over F\$10,300 monthly. On 5 October 2011, Air Pacific stopped the deduction of union fees for employees on weekly payroll, and on 12 October 2011, for employees on fortnightly payroll. Air Pacific has continued the union fee deduction for cabin crew until today. Around mid-December 2011, however, Air Pacific stopped remitting the cabin crew union fees to the TWU and, instead, wrote cheques payable to the Air Pacific Flight Attendants Bargaining Unit. The union's many attempts to convince the bargaining unit to redirect the funds to the union were not accepted by the representatives. They have since opened up their own bank account where they deposit these funds. According to the complainant, it has now become clear that the bargaining unit has been influenced by Air Pacific management into disassociating themselves from the TWU. The Chairman of the bargaining unit has had several personal meetings with the Chief Executive Officer of Air Pacific.
- 724.** The complainant states that the Decree and the decision by cabin crew to disassociate themselves from the TWU has had a great effect on the union's finances. All efforts are made at reducing costs. The union is diverting its efforts to organize new areas such as road transport, to bring in new members.

*Fiji Post and Telecom Employees Association (FPTEA)*

- 725.** According to the complainant, the FPTEA has tried to register a bargaining unit as prescribed in the Decree but no positive response has been received and the members have been waiting for government action for the last nine months. In the meantime, the Association has lost 15 per cent of its membership due to redundancy in various sections of the company's operation. The voluntary "check-off" is continuing without any written agreement. The FPTEA's requests to enter into an agreement for subscription deduction has been flatly refused. There is no collective bargaining but on the other hand the collective agreement is being changed at the management's whim and individual contracts are the norms for appointments and promotions.

*Fiji Sugar and General Workers Union (FSGWU)*

- 726.** The complainant alleges that, while not covered by the Decree, all its effects are very much applied by the Fiji Sugar Corporation (FSC). There is no acknowledgment, dialogue, collective bargaining or contact with the FSGWU, except for the fact that recently the Chief Executive of the company visited the General Secretary of the union in his office to confirm that there will be no collective bargaining and the management will make decisions unilaterally, and to caution that if need be the Government will bring the sugar industry under the Decree. In the complainant's view, this is a clear threat and intimidation for the union to remain dormant. The only relief so far is that union subscription is still being deducted by the company and paid to the union.

*Fiji Public Service Association (FPSA)*

- 727.** The complainant indicates that, at present, public sector unions are barely surviving without union subscription deductions and with membership dwindling day by day. Decree No. 21 of 2011 has removed not only the whole of the ERP provisions from 16,000 union members, but the Government ceased the check-off facility in full for approximately 2,050 salaried and 5,000 hourly paid members from the public service. Two months later,

after due submissions, part of the subscription was restored to cater for members' welfare contributions. Thus 25 per cent of subscription fees from this sector will be in arrears and payable by members via other means, as best feasible. Severe difficulties are faced in acquiring the full amount of subscription fees.

- 728.** The complainant further states that, due to the effects of the Essential National Industries Decree, there has been a serious decline in membership for all public sector unions. For example, following the Decree, the FPSA lost all of its members in the FRCA and WAF, totalling in excess of 2,500. Efforts to restore their status to normal are not producing any result. The FPSA has embarked on a cost reduction exercise to trim down the outlays in many areas, including a reduction in staffing.
- 729.** The complainant indicates that, even in normal times, most employers, including the PSC, would be reluctant and drag their feet during the collective bargaining process. In some individual and collective grievances or disputes, unions previously had to resort to other dispute settlement machinery or process to obtain redress or results under the ERP.
- 730.** However, since 2009, according to the complainant, the PSC has ceased to contact, respond or negotiate with the public sector unions. The Public Service Appeals Board was repealed, and only an inefficient and partisan Disciplinary Tribunal was later made available. All collective issues, e.g. COLA, were no longer entertained. Individual cases from the public service were being referred by unions to the procedure under the ERP with substantial success, until they were also terminated by Decree No. 21 of 2011. With the exclusion of the whole of the public service from the ERP, union members are completely deprived of any protective law and they are at the mercy of the employer. The PSC and Government entities like FRCA and WAF have completely withdrawn from any form of collective bargaining.
- 731.** The complainant indicates that the staff of Government statutory bodies or Government commercial companies and private sector workers still have the right to approach the ERP institutions with their grievances, since they are not yet subject to the above decrees although the authorities retain the right to make them so. Such union members' grievances are reported via the ERP processes but due to increase in the workload of the ERP mediation and tribunal forums, progress is slow in many cases.

#### ACTU fact-finding mission denied entry into Fiji

- 732.** According to the complainant, the Government's much touted challenge to overseas unions to visit Fiji and see the reality on the ground fell flat and resulted in public embarrassment when the ACTU/NZCTU fact-finding mission in December 2011 was banned and the delegation was not allowed to enter the country and put back immediately on the flight it came in under claims that the delegation would be biased and unfair.

#### Media

- 733.** The complainant indicates that the Fiji Media Decree imposes strict controls on print and other media reporting anything against the current regime, in complete defiance of principles of press freedom. The Media Decree has also limited individual freedom of speech on essential and critical issues and the fear of intimidation still exists. No views expressed contrary to that of the Government are published or aired on radio or television.
- 734.** The complainant alleges that media censorship continues unabated, undermining basic human rights. Although the Government censors are no longer in newsrooms, media censorship has now taken the far more invidious form of "self-censorship", driven by continuing intimidation of journalists and media owners. According to the FTUC, the

media is not only dropping stories against the regime but for more than a year it has also been refusing to take articles from anyone who they assess may be out of favour with the Government. Television and radio media have been effectively banned from running interviews with selected political leaders, trade unionists, and those perceived to be against the regime, depriving the public of independent professional opinions and commentaries, which can enlighten them on critical issues of public interest.

#### Judiciary

**735.** The complainant further expresses concerns about the practice in the judiciary especially in the following critical areas: (i) appointment of judges: the sourcing of judges from one particular country has raised questions when there are qualified individuals available elsewhere; (ii) independence: some judges are found to have linkages that question their independence and neutrality when presiding over cases; (iii) qualifications of certain appointed judges and magistrates are questionable; (iv) transparency in the appointment of judges and magistrates; (v) consistency on the appointments: ad hoc terminations and resignations without any given explanation continue to plague the legal system; in many cases, such action is taken if instructions or wishes of the Government are not met by the court.

#### Peoples Charter and the return to democracy

**736.** According to the complainant, the Government has paraded on the international scene promoting its way forward as the “Peoples Charter” which plans to build a stronger democracy through promoting unity between different cultures and races. The reality is that there is absolutely no transparency or accountability in Government today. All democratic institutions like the political parties, Town and City Councils, the Cane Growers Councils, the Provincial Councils, Churches and Trade Union organizations are being either hindered from carrying out their rightful roles or are totally denied from exercising their rights. The Government is attempting to demolish all democratic structures and institutions existing in Fiji. The complainant does not believe that a stronger democratic Fiji can be built by demolishing all democratic institutions.

**737.** Similarly, the complainant alleges that the appointment of military officers to senior civil service positions becomes more regular. Currently all District Commissioners are military officers. Senior District officers are military officers. A number of Permanent Secretaries are military officers and the list goes on. The militarization of the civil service illustrates that Fiji has moved closer to absolute dictatorship rather than a step closer to democracy.

#### Human rights

**738.** The Government has embarked since 2006 on a systematic plan to intimidate and harass citizens who in any way show opposition or express discontent with the regime. Many representatives from non-governmental organizations and trade unions have been forcefully taken to military camps and intimidated. This includes some politicians as well.

**739.** More recently, the assault and harassment of trade union leaders has affected the activists and members generally. Felix Anthony, National Secretary of the FTUC and his two union officials were severely assaulted on 18 February 2011. Mr Anthony’s ear drum was damaged as a result of the beating. They were released from military custody with threats of further violence. The FTUC President, Daniel Urai, has two cases pending in Court, one for talking to his members on pay increase issues and the other one for having allegedly committed treason. In the first case which has been pending for almost a year, the prosecution has not been able to identify the complainant nor have they produced any disclosures for the offence.

## Removal of FTUC representative from Air Terminal Services (ATS) Board

**740.** The complainant indicates that the FTUC Assistant National Secretary Rajeshwar Singh represents the FTUC on the ATS Board. The ATS Employees Trust appointed Mr Singh as the Chairman of the Trust and elected him in December 2011 to represent them on the ATS Board. The Trust has 49 per cent shareholding and the Government has 51 per cent. The complainant alleges that Mr Singh was removed from the Board on 31 December 2011 by the Government on the grounds that he addressed trade union meetings in Australia and allegedly requested unions to boycott tourism in Fiji and ground handling of Air Pacific in Australia. According to the complainant, this was a blatant lie perpetrated by the Government in order to remove Mr Singh from the ATS Board. No evidence of the allegations has been provided. In the complainant's view, the Government has a wholesale license to make personal and defamatory remarks against their opponents as and when suitable.

## Constitutional Commission

**741.** The Constitutional Commission has started its work hearing submissions from the members of the public, political parties and interested organizations. According to the complainant, the strong and clear message from the Government is that in the making of the new Constitution there will be non-negotiable issues, and the Government will manoeuvre the process so as to retain power at any cost. The public will not have a sense of ownership of the process but they would be mere bystanders in the whole saga. In the complainant's view, the Government's propaganda of public participation, inclusiveness in representation, transparency and national ownership is only a farce if civil society groups and political leaders are admonished and almost threatened for their views by none other than the military personnel. The complainant indicates that the Constituent Assembly will be handpicked by the Prime Minister and will not be a free and fair selection of individuals. After the Constituent Assembly hands the draft Constitution to the President, it will go to a panel of five judges to be chaired by the Chief Justice with two overseas judges who will then scrutinize it to find whether the 11 non-negotiable principles have been included in the Constitution. The draft Constitution will be handed to the President for his assent. According to the complainant, the process outlined above shows that in each and every step the Government has control of what would be in the Constitution.

**742.** The complainant indicates that the Commission stated that it was undesirable to write immunity for the coup makers into the Constitution, and that controls on the media, lack of court access and the wide reaching powers of the security forces were particularly worrying; in response, the Government claimed that the new decrees set out the framework for a free, fair, and open constitutional process, that immunity was common in nations promoting reconciliation, that having the Prime Minister decide who could sit in the Constituent Assembly would ensure that a broadly representative body was formed, and that the Commission was outside of its mandate and wrong in its claims because the media and the courts were independent and the security forces were subject to the country's laws.

## Workers to be jobless

**743.** The complainant informs that a New Zealand-based company has been granted approval through the Fiji Roads Authority Decree to take over a fully fledged Department of National Roads (DNR), a public owned entity, without any transparent tendering process or evaluation of any competitive bid. According to the foreign company's transition plan some 2,000 workers are due to lose their jobs as early as 31 December 2012. The Government's response to the public sector unions' concern for the 2,000 employees was treated casually as it responded by stating that like all other reforms it had an effect on

workers and government was looking for opportunities and doing its best to ensure the needs of workers were accommodated.

- 744.** The complainant indicates that it is appalling to imagine what is going to happen to 2,000 redundant workers in a country where the poverty level has reached an alarming 50 per cent, the food prices are rising (90 per cent in six years), utility bills are bulging (electricity charges increased by 87 per cent and gas prices by 67 per cent) and inflation is skyrocketing. According to the complainant, whereas the Government seemed to believe that national roads would improve by engaging an outside company, the only reason why roads have not been improving is that the request for road maintenance programmes have fallen on deaf ears. In the complainant's view, the funding that the Government is giving to the foreign company should have been provided to DNR so that national workers can build better roads and remain employed. The redundancy of approximately 2,000 workers is a disaster waiting to happen.

#### Appointment in civil service open to convicted criminals and nepotism

- 745.** The complainant states that the General Orders in Civil Service have been unilaterally amended to allow in section 206 the appointment of a Minister's wife, son, daughter, father, mother, brother or sister; of a convicted criminal or of a person dismissed earlier from the public service, in case of a recommendation to the Public Service Commission by a Permanent Secretary or a head of department.
- 746.** According to the complainant, the Fiji public service is already militarized, particularly at higher echelons of the service such as Permanent Secretaries, Divisional Commissioners, directors and heads of departments. In the complainant's view, the morale in the civil service is at its lowest as it is under the command of senior military officers dishing out orders in breach of rules and regulations, without the availability of any legal or administrative recourse; the Fiji public service currently exists at the behest of the military regime.

#### Minimum wages put on hold

- 747.** The complainant adds that the Government has decided to put on hold the ten new Wages Regulations Orders 2012 until 31 October 2012. The Wages Council made three submissions in the last four years seeking an increase in the wages for workers but this matter was deferred by the Government every time. Many studies in the past had proven that low wages in Fiji were one of the biggest factors leading to poverty. Workers in Fiji have been suffering long enough due to low wages over the years. The criteria used for elaborating the wage orders are those established in relevant ILO Conventions, namely the needs of workers and their families, the cost of living, the general level of wages in the country, social security benefits and economic factors. The complainant feels that the call for a just living wage is not an appeal for charity or good will; it is a call for justice.
- 748.** In conclusion, the complainant believes that the social and economic disaster facing Fiji is fast unfolding: unemployment is at its peak; the number of working poor continues to rise unabated; more homes are on mortgage sale; workers in all sectors are losing their jobs; cane farmers are no longer interested in farming and are leaving their farms to seek other forms of livelihood as collapse of the sugar industry is imminent; health care services are declining; corruption is rampant in the corridors of power; people with skills and money are migrating; poverty continues to rise with no less than 50 per cent of the population living below the poverty line; there has been an increase in squatter settlements around the semi-urban areas; and unemployment has risen to 11.9 per cent (unofficial), with the real unemployment rate predicted to be over 15 per cent (excluding underemployment).



749. According to the complainant, the human and trade union rights situation in Fiji has been steadily deteriorating at an ever increasing pace, and there is little or no hope of a return to democracy and revocation of draconian decrees against the trade unions. The complainant therefore calls for the following: (i) all draconian decrees should be withdrawn so that trade unions are able to operate and protect the rights of their members; (ii) all ILO core Conventions which Fiji has ratified should be observed and respected with sincerity; and (iii) the ILO should continue to engage with the Government until concrete action is taken to respect human and trade union rights in Fiji.

### C. The Government's replies

750. As regards the recommendation made by the Committee on Freedom of Association to reinstate Mr Koroi, President of the FTA, the Government indicates in its communication dated 28 May 2012 that this recommendation will be tabled at the tripartite ERAB for its deliberation and advice to the Minister for Labour, Industrial Relations and Employment.

751. Concerning the alleged physical attacks on trade unionists, the Government states that, like most responsible governments, it has check-and-balance processes in place to ensure citizens' rights are protected. These include in cases with allegations of a criminal nature requiring first a complaint to be lodged with the police department and/or the public prosecutor in order for a proper investigation to be conducted into the truth of the allegations and due process followed. To date, neither the Police Department nor the Office of Public Prosecutions has received any complaint filed by Mr Felix Anthony, National Secretary of the FTUC and General Secretary of the Fiji Sugar Workers Union, or Mr Mohammed Khalil for the alleged physical assaults. Therefore investigations have not been initiated and no specific observations can be provided in this regard. Internal legal mechanisms within the country itself have thus not been fully utilized by these two persons. The Government reaffirms its commitment to enhancing human rights for all its people, irrespective of race, religion or affiliation. Repealing the PER, restoring the POAD and initiating a dialogue with the Fijian unions about the repeal of decrees and the road to free and fair elections in 2014 are among the meaningful indicators of the Government's sincerity and conviction to pursue democracy transparently, fairly and inclusively.

752. With respect to the alleged arrest and detention of trade unionists, the Government provides the following summary of events: Mr Nitendra Goundar and Mr Daniel Urai convened and conducted a meeting with the Hotel Workers Union at the Mana Island Resort on 3 August 2011 without the appropriate permit under the PER. Union members employed by the resort confirmed that they made inciting remarks against the Government of Fiji specifically the Prime Minister and the Attorney General, in particular that all union members should stand together in order to request overseas counterparts to pursue a trade ban against Fiji. Police conducted investigations into the complaints and arrested the two trade unionists at the resort and escorted them to Nadi Police Station. They were detained for questioning in the Police Conference Room (rather than in locked cells as has been erroneously reported) in the Nadi Police Station for one day. Mr Goundar and Mr Urai were charged on 4 August 2011. By their own admissions, they erred by not applying for the relevant permit to hold a public meeting but denied allegations that they made statements against the current Government that could be interpreted to be inciteful. It should be noted that at no time were the two unionists coerced, threatened or assaulted and proper procedures were followed in their arrest and subsequent charging. They have been charged for breaches under the PER and are in the process of having their case heard. The case is set for mention on 4 June 2012. Further, in its ruling on 7 May 2012, the Chief Magistrate allowed Mr Urai to leave the jurisdiction from 13 to 19 May 2012 to attend the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Worker's Association meeting in Geneva, despite the contention of the Director of the Public Prosecutions that the charge was serious, the accused had an incentive to abscond,

and the security of the nation could be severely undermined if he was allowed to travel overseas for fear of organizing international disaffection against the State.

**753.** In regard to the recommendation relating to freedom of assembly and expression, the Government highlights that the PER, which imposed certain restrictions on public meetings, have been lifted as of 7 January 2012 and that Fiji is now once again guided by the Public Order Act, which has been in force in Fiji since independence (1970) and has been modernized through the POAD 2012. The removal of the PER is an important step as Fiji is currently developing its new constitution to be ready by early 2013 through an inclusive national dialogue towards the first non-race based democratic elections in 2014. Since the announcement of the POAD, the Fijian Police Commissioner has proactively invited the leadership of Fijian unions, along with other civil society groups, to an open discussion about the repeal of the emergency restrictions to establish an ongoing dialogue; the Government indicates that these actions have been met positively. Notwithstanding the above, the Government stresses that even during the period in which the PER were in force, it did not prohibit trade unions from convening meetings so long as they abided by the conditions required to hold a public meeting. In fact, the Government received requests for and approved numerous permits over the last five years. Freedom or rights come with responsibilities for one's action(s) or failure to act in any given scenario. For any public meeting to occur, the relevant permit would need to be applied for to the Divisional Commissioner stating the purpose of the meeting, the date, time and venue of the meeting. The meeting would only occur once consent has been given by the relevant Divisional Commissioner. This procedure was in place prior to the introduction of the PER and was well known amongst trade union executives. The Government states that, today in Fiji, trade unions under the Public Order Act are holding meetings and conducting their important work in promoting the rights and well-being of workers in Fiji – a goal which is shared by the Government.

**754.** As regards the right to recourse of public servants, according to the Government, all public servants in Fiji enjoy the same employment rights as those in the private sector. This has been made possible by the passing of the Public Service (Amendment) Decree (Decree No. 36) which encapsulates similar employment safeguard mechanisms as those in the ERP. The Government further indicates that civil servants have recourse to the High Court of Fiji by way of judicial review should they be unsatisfied with the decision of the PSC Disciplinary Committee. For example, in the *State v. Permanent Secretary for Works, Transport and Public Utilities ex parte Rusiate Tubunuarua & Ors HBJ01* of 2012, the High Court ruled that it has full jurisdiction to accept cases from public servants who seek to challenge a decision of the Government or the PSC, including any decision to terminate their employment or to suspend them. To facilitate speedy resolutions of employment grievances and disputes, the PSC has implemented a new internal grievance policy that includes the appointment of conciliators within government Ministries and Departments. The accredited training of these new conciliators has been conducted by the mediation service of the Ministry of Labour starting on 11 May 2012. Important employment issues such as sexual harassment grievances in the workplace are addressed internally through the passing of policies to positively address such matters before external measures are attempted. This has been made possible through the work of the PSC, as the employer for public servants, together with the active discussions taking place at the tripartite ERAB. Also, the updating of the PSC General Orders 2011 has enabled public servants to enjoy similar if not better leave entitlements than those in the private sector.

#### Essential National Industries Decree

**755.** With respect to the comments concerning the Essential National Industries Decree, the Government informs that a national peak tripartite body known as the ERAB has agreed at its meetings of 11 April and 9 May 2012 to, inter alia, review all Government decrees

relating to labour (including Decrees Nos 21 and 35) relative to the ILO core Conventions, with a view to recommending to the Labour Minister policy advice to bring all labour laws in line with the eight core Conventions, the four priority Conventions and other Conventions that Fiji has ratified, including the Conventions that the Cabinet has recently approved for ratification (the Maritime Labour Convention, 2006, the Maternity Protection Convention, 2000 (No. 183), the Human Resources Development Convention, 1975 (No. 142) and the Private Employment Agencies Convention, 1997 (No. 181)) and those to be approved for ratification on 4 June 2012. Thus, an ERAB subcommittee will be going through all decrees, proposals for amendments of the ERP and issues raised by the Committee and then submit proposals to the Board for endorsement. The Government renews its commitment to honour its obligations under the core ILO Conventions in the new Constitution. This proactive and inclusive social dialogue in the labour market through the tripartite ERAB to review current labour market policies, laws, institutions and practices is a vital part of the Government's wider national dialogue in the development of Fiji's modern and non-discriminatory Constitution to be in place early next year, paving the way for the general election in 2014.

- 756.** As regards the content of the Decree and its implementing regulations, the Government believes that the Decree sets forth realistic and balanced requirements for both employers and labour representatives. The purpose is to help create growth and long-term viability for companies essential to Fiji and, in doing so, protect jobs and ensure fundamental workers' rights. As other developed countries with similar labour laws governing essential industries have demonstrated, these are not mutually exclusive goals. The Government takes providing for and protecting workers' rights very seriously. It is important to emphasize that the rights protected and extended to workers of industries provided for in the Decree include the right to form and join unions, the right to vote in secret ballot elections, the right to strike, the right to collectively bargain and the duty of corporations and labour unions to renegotiate bargaining agreements in good faith; the right to a well-defined dispute resolution process; and the right to receive overtime pay. As Fijians prepare to take the necessary steps to vote in the country's Parliamentary elections in 2014, the Government intends to ensure that they continue to benefit from the fundamental guarantees for essential human rights and employment protections recognized by principled Governments and labour and social organizations all around the world. The Government states that it is working with the declared industries and their labour representatives to promote these rights.
- 757.** Generally, the Government stresses that the Decree is not a unique piece of legislation; it is comparable, in the main, with respect to its key provisions and principles to other major developed countries. As to the scope of the Decree, the Government states that it is limited to essential national industries. Only companies within industries that are vital to the Fiji economy, or in which the Government has a majority and essential interest, may be brought within its scope. It will not apply to the vast majority of employers in Fiji. It is incorrect to claim that the Decree will be "extended to cover all unions in all sectors of Fiji's economy". This is not the intention, and it would not be permitted by the Decree itself.
- 758.** According to the Government, it is certainly not the case, as has been claimed, that the Decree "abolishes all existing trade unions in Fiji". In companies within essential national industries designated under the Decree, workers can still join a trade union, and have that union recognized for the purpose of collective bargaining if a majority of workers clearly want that. Where that happens, the employer is obliged to recognize and negotiate in good faith with the union representatives. Workers who do not want to be represented by a trade union must also have that freedom. The Decree strikes a balance between the interests of all workers. The Decree contains the concept of "bargaining unit" which is found in other countries' laws. The bargaining unit does not "replace trade unions" as has been claimed –

the two are quite different concepts. Trade unions will continue to exist and can represent workers within a bargaining unit in designated corporations in accordance with the Decree.

- 759.** The Government indicates that the Decree requires trade unions which represent workers within designated corporations to re-register by going through the prescribed balloting process. This ensures that such unions continue to enjoy the freely given support of a majority of workers, and that workers who do not wish to be represented by a trade union have the opportunity to express that view. The registration process is modelled on other countries' labour laws and requires a secret ballot.
- 760.** According to the Government, the Decree does not "outlaw professional trade unionists" as misleadingly claimed. It requires that those who negotiate directly with the employer in designated corporations are employees of the company concerned, so that an employer may negotiate terms and conditions directly with its own employees who have a direct stake in the outcome, rather than with external third parties who may have a wider agenda of their own. Trade unions can continue to employ staff. Those staff can continue to advise workers' representatives engaged in negotiations with their employers in designated corporations, but would not have the right to conduct those negotiations themselves.
- 761.** The Government indicates that the Decree only allows an employer in a designated corporation to impose terms and conditions after it has conducted good faith negotiations for at least 60 days. Where a new collective agreement is imposed, there is a right of appeal to the Minister for a review of its contents. This is similar to the position in other countries.
- 762.** The Government states that the Decree upholds the fundamental right of workers to take industrial action in pursuit of their legitimate interests. But as in many countries, this right is circumscribed in order to avoid damaging disruption to commerce. Furthermore, the Government indicates that there are significant penalties for individuals or organizations that ignore the provisions of the Decree and attempt to disrupt operations in an essential national industry. The impact of such illegal action could be devastating to the companies concerned and could affect tens of thousands of Fijians. There needs to be an effective deterrent against actions for personal gain that could have such impact on others and on the Fijian economy.
- 763.** According to the Government, the Decree guarantees employees in designated corporations the right to various "dispute resolution" processes concerning disciplinary issues and contract interpretation issues (subject to a specified financial threshold). These are now required as a matter of law, not subject to the power game associated with collective bargaining.
- 764.** The Government states that the Decree does not ban the system of check-off in designated corporations, but allows employers not to operate it. This is a common approach in many other countries.

#### **D. The Committee's conclusions**

- 765.** *The Committee notes that, in the present case, the complainants allege several acts of assault, harassment, intimidation and arrest and detention of trade union leaders and members, ongoing interference with internal trade union affairs, the dismissal of a trade union leader in the public service education sector, undue restrictions on trade union meetings, and the issuance of several decrees curtailing trade union rights.*

766. *The Committee expresses its grave concern that, while the Government had accepted a direct contacts mission to the country in line with its previous recommendation, the ILO Direct Contacts Mission that visited Fiji in September 2012 was not allowed to continue its work and was advised to depart expeditiously so that the Government could welcome a visit under the new terms of reference presented by it. The Committee takes due note of the report of the Direct Contacts Mission in this regard (Appendix I). The Committee expresses its profound regret at this loss of opportunity to clarify the facts on the ground and assist the Government in finding, together with the social partners, appropriate solutions to the matters raised before the ILO supervisory bodies, including the legislative and practical application of freedom of association principles. Regrettably, the Committee is now obliged to examine the allegations before it without the benefit of the full information that could have been collected by the mission. The Committee firmly expects that the Government will rapidly re-establish dialogue in this regard so that the Direct Contacts Mission may return to the country without delay within the framework of the mandate bestowed upon it and report back to the Governing Body.*

### **Act of anti-union discrimination against Mr Koroi**

767. *The Committee notes with regret from the submission of the complainant organization that the dismissal of the FTA President, Mr Tevita Koroi, from his position as school principal, is still in force. It notes that, according to the Government, the Committee's recommendation concerning Mr Koroi will be tabled at the ERAB for its deliberation and advice to the Minister for Labour, Industrial Relations and Employment. While it understands that Mr Koroi has left the country, the Committee expects that this case will be deliberated by the ERAB without further delay, and that, in the framework of this exercise, the conclusions that the Committee made in this regard when examining this case at its meeting in November 2010 [see 358th Report, paras 550–553] will be duly taken into account, with a view to rehabilitating Mr Koroi and considering his reinstatement should he return to Fiji.*

### **Assault, harassment, intimidation and arrest of trade unionists**

768. *Concerning the alleged physical attacks on trade unionists, the Committee notes the Government's statement that: (i) to date, neither the Police Department nor the Office of Public Prosecutions has received any complaint filed by Mr Felix Anthony or Mr Mohammed Khalil for the alleged physical assaults, and investigations have thus not been initiated; and (ii) internal legal mechanisms within the country itself have therefore not been fully utilized by these two persons.*

769. *Reiterating its deep concern at the numerous acts of assault, harassment and intimidation of trade union leaders and members for their exercise of the right to freedom of association previously alleged by the complainants, the Committee once again emphasizes that it has always considered that, in the event of assaults on the physical or moral integrity of individuals, an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. Moreover, as regards allegations of the physical ill-treatment of trade unionists, the Committee has always recalled that governments should give precise instructions and apply effective sanctions where cases of ill-treatment are found. The absence of judgments against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 50, 52 and 55]. The Committee therefore urges the Government, even if the*

victims have lodged a complaint in the meantime, to conduct *ex officio* an independent investigation without delay into the alleged acts of assault, harassment and intimidation against Mr Felix Anthony, National Secretary of the FTUC and General Secretary of the Fiji Sugar Workers; Mr Mohammed Khalil, President of the Fiji Sugar and General Workers Union – Ba Branch; Mr Attar Singh, General Secretary of the FICTU; Mr Taniela Tabu, General Secretary of the Viti National Union of Taukei Workers; and Mr Anand Singh, lawyer. The Committee requests the Government to transmit detailed information with regard to the outcome of such inquiry and the action taken as a result. With particular regard to the allegation that an act of assault against a trade union leader was perpetrated in retaliation for statements made by a colleague at the ILC, the Committee reiterates that the functioning of the Conference would risk being considerably hampered and the freedom of speech of the Workers' and Employers' delegates paralysed if the relevant delegates or their associates were victims of assault or arrest due to the expression of views at the Conference. It urges the Government to ensure that no trade unionist suffers retaliation for the exercise of freedom of expression and to take full account of the above principles in the future.

- 770.** *With respect to the alleged arrest and detention of trade unionists, the Committee notes the complainant's indication that Mr Daniel Urai, the FTUC President and General Secretary of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE), still has two cases pending in court, one for talking to union members on pay increase issues and the other one for having allegedly committed treason; and that, in the first case which is pending for almost a year, the prosecution has not been able to identify the complainant nor to produce any disclosures for the offence. The Committee also notes the Government's summary of events: (i) Mr Nitendra Goundar, an NUHCTIE member, and Mr Daniel Urai convened and conducted a meeting with the Hotel Workers Union at the Mana Island Resort on 3 August 2011 without the appropriate permit under the PER and allegedly made inciting remarks against the Government of Fiji; (ii) police arrested the two trade unionists and detained them for questioning in the conference room of the Nadi police station for one day; (iii) Mr Goundar and Mr Urai were charged on 4 August 2011 for breaches under the PER; (iv) by their own admissions, they erred by not applying for the relevant permit to hold a public meeting but denied allegations that they made statements against the current Government; (v) it should be noted that at no time were the two unionists coerced, threatened or assaulted; and (vi) the case is set for mention on 4 June 2012.*
- 771.** *While noting that, since its last examination of the case, Mr Felix Anthony, Mr Daniel Urai, and Mr Nitendra Goundar have been released from custody, the Committee notes with concern that the criminal charges of unlawful assembly brought against Mr Goundar and Mr Urai on the grounds of failure to observe the terms of the PER are still pending. With reference to its conclusions concerning the PER as enounced in its previous examination of the case [see 358th Report, para. 839], the Committee reiterates that, while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, the arrest of, and criminal charges brought against, trade unionists may only be based on legal requirements that in themselves do not infringe the principles of freedom of association. With respect to the abovementioned trade unionists, the Committee urges the Government to take the necessary measures to ensure that all charges against them are immediately dropped, and to keep it informed of any developments in this regard without delay, including the outcome of the case hearing that the Committee understands has been deferred. Lastly, recalling that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular, and that the arrest, even if only briefly, of trade union leaders and trade unionists, and of the leaders of employers' organizations, for exercising legitimate activities in relation with their right of association constitutes a*

violation of the principles of freedom of association [see *Digest*, op. cit., paras 62 and 64], the Committee urges the Government to take full account of these principles in the future.

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

772. In regard to its previous recommendation relating to freedom of assembly and expression, the Committee notes the complainants' allegations that the POAD, which has replaced the PER in enforcing restrictions on freedom of assembly, does not, in its view, resolve the situation but even makes it worse. It further observes, however, that, on 19 July 2012, following pressure from the union movement, political parties and the recently appointed Constitutional Commission, the Government announced that it has suspended section 8 of the Public Order Act as amended by the POAD, which requires permits for meetings in public places, in order to allow for consultation on constitutional development. The complainants have, however, expressed their fear that soon after the Constitutional Commission completes the public hearings (around mid-October), the meeting restrictions will be restored.
773. The Committee, moreover, notes with concern the complainants' additional allegations that: (i) police and military intelligence are still present in union general meetings; (ii) the FTUC Assistant National Secretary, Rajeshwar Singh, who represents the FTUC on the Air Terminal Services (ATS) Board was removed from the Board on 31 December 2011 by the Government on the grounds that he addressed trade union meetings in Australia and allegedly requested unions to boycott tourism in Fiji and ground handling of Air Pacific in Australia; and that, according to the complainant, this was a blatant defamatory lie perpetrated by the Government without providing evidence in order to remove Mr Singh from the ATS Board; and (iii) media censorship continues unabated undermining basic human rights and has now taken the far more invidious form of "self-censorship", driven by continuing intimidation of journalists and media owners; media has also been regularly refusing to report on media statements sent by the trade unions.
774. The Committee takes due note of the Government's indication that: (i) the PER have been lifted as of 7 January 2012 and that Fiji is once again guided by the Public Order Act as modernized through the POAD, which is an important step in the ongoing elaboration of the new constitution; (ii) notwithstanding the above, the PER did not prohibit trade unions from holding public meetings so long as they abided by the conditions required; (iii) the Government received requests for and approved numerous permits over the last five years; and (iv) today in Fiji, trade unions under the Public Order Act are holding meetings and conducting their important work in promoting the rights and well-being of workers in Fiji.
775. While welcoming the lifting of the emergency legislation in the form of the PER on 7 January 2012, the Committee cannot but express particular concern at the new subsection (5) of section 8 of the Public Order Act as amended by the POAD, according to which "the appropriate authority may, in its discretion, refuse to grant a permit under this section to any person or organisation that has on any previous occasion been refused a permit by virtue of any written law or to any person or organisation that has on any previous occasion failed to comply with any conditions imposed with respect to any meeting or procession or assembly, or any person or organisation which has on any previous occasion organised any meeting or procession or assembly which has prejudiced peace, public safety and good order and/or which has engaged in racial or religious vilification or undermined or sabotaged or attempted to undermine or sabotage the economy or financial integrity of Fiji". In this regard, the Committee once again recalls that the ILC has pointed out that the right of assembly, freedom of opinion and expression and, in particular, freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers, constitute

civil liberties which are essential for the normal exercise of trade union rights (resolution concerning trade union rights and their relation to civil liberties, adopted at the 54th Session, 1970). As regards freedom of assembly in particular, the Committee recalls that permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused [see *Digest*, op. cit., paras 38 and 142]. Considering that the wording of this provision could be used in a way as to make it difficult for trade unions to hold public meetings, especially given the previous allegations of the use of the PER to restrict their rights in this regard, the Committee welcomes the decision to temporarily suspend the application of section 8 of the Public Order Act as amended and requests the Government to consider abrogation or amendment of the POAD so as to ensure that the abovementioned right may be freely exercised. Moreover, the Committee again emphasizes that it has always cautioned that, where a representative of the public authorities can attend trade union meetings, this may influence the deliberations and the decisions taken (especially if this representative is entitled to participate in the proceedings) and hence may constitute an act of interference incompatible with the principle of freedom to hold trade union meetings [see *Digest*, op. cit., para. 132]. With respect to freedom of opinion and expression, the Committee recalls that the right to express opinions through the press or otherwise is an essential aspect of trade union rights [see *Digest*, op. cit., para. 155]. Stressing that freedom of assembly and freedom of opinion and expression are a *sine qua non* for the exercise of freedom of association, the Committee once again urges the Government to take full account of the principles enounced above in the future and refrain from unduly impeding the lawful exercise of trade union rights in practice. With regard to Mr Rajeshwar Singh, FTUC Assistant National Secretary, the Committee is of the view that addressing trade unions abroad is part of the normal exercise of trade union rights and requests the Government to reinstate him in his position representing workers' interests on the ATS Board without delay.

### **Infringement of trade union rights by executive decree**

- 776.** The Committee notes that, according to the complainants, the Administration of Justice Decrees Nos 9 and 10 of 2009, the State Services Decree No. 6 of 2009, the Employment Relations Amendment Decree No. 21 of 2011 and the Essential National Industries Decree No. 35 of 2011 remain in force with major detrimental effects on workers and trade unions.
- 777.** As for the Essential National Industries Decree, the Committee notes that, according to the Government's reply, it sets forth realistic and balanced requirements for both employers and labour representatives with a view to helping create growth and long-term viability for companies essential to Fiji while protecting jobs and ensuring fundamental workers' rights; it is limited to essential national industries and will not be – as incorrectly claimed – extended to the vast majority of employers in Fiji; and the Decree is comparable, in the main, with respect to its key provisions and principles, to legislation of other major developed countries. In this regard, the Committee recalls that the mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions [see *Digest*, op. cit., para. 6].
- 778.** Concerning the specific provisions of the Decree, the Committee takes due note of the Government's indications and would draw attention to the following concerns:
- (i) Under section 6, all existing trade union registrations in essential national industries are effectively cancelled; in order to operate, unions are required to re-register under the Act. The Committee notes the Government's indication that the requirement for trade unions which represent workers within designated corporations to re-register



*ensures that such unions continue to enjoy the freely given support of a majority of workers, and that workers who do not wish to be represented by a trade union have the opportunity to express that view; and that the prescribed registration process requires a secret ballot. Considering that workers who no longer wish to be represented by a union are free to disaffiliate at any time, the Committee reiterates that it has underlined on many prior occasions that legislation which accords the minister the complete discretionary power to order the cancellation of the registration of a trade union, without any right of appeal to the courts, is contrary to the principles of freedom of association [see **Digest**, op. cit., para. 689].*

- (ii) *Section 7 provides that union officials must, subject to severe civil and penal sanctions, be employees of the designated corporations they represent. The Committee notes the Government's indication that section 7 of the Decree does not "outlaw professional trade unionists" but requires that those who negotiate directly with the employer in designated corporations are employees of the company concerned, so that an employer may negotiate terms and conditions directly with its own employees who have a direct stake in the outcome, rather than with external third parties who may have a wider agenda of their own; thus trade unions can continue to employ staff who can continue to advise workers' representatives engaged in negotiations but would not have the right to conduct those negotiations themselves. Noting that there may be elections of new union officials at the time of re-registration, the Committee recalls that the requirement of membership of an occupation or establishment as a condition of eligibility for union office is not consistent with the right of workers to elect their representatives in full freedom [see **Digest**, op. cit., para. 407]. It further recalls that workers' organizations must themselves be able to choose which delegates will represent them in collective bargaining without the interference of the public authorities. With regard to the ban on third-party intervention in the settlement of disputes, the Committee is of the opinion that such an exclusion constitutes a serious restriction on the free functioning of trade unions, since it deprives them of assistance from advisers [see **Digest**, op. cit., paras 984 and 987]. While recognizing the Government's concerns that negotiations take place with those directly affected by the matters, the Committee underlines that the unions concerned should be free to choose their representatives in collective bargaining and be accompanied by those external parties they consider appropriate.*
- (iii) *According to sections 10–12, a union must apply to the Prime Minister in writing to be elected or re-elected as representative of the bargaining unit, the Prime Minister shall determine the composition and scope of a bargaining unit for the purposes of conducting elections for its representative, and the registrar shall conduct and supervise elections in the bargaining unit. Noting the concerns expressed by the complainant at the extent of discretion of the Prime Minister when allowing an applicant to seek to represent the bargaining unit, and in the absence of any information provided by the Government, the Committee again reiterates that a law providing that the right of association is subject to authorization granted by a government department purely at its discretion is incompatible with the principle of freedom of association. Moreover, the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves [see **Digest**, op. cit., paras 273 and 391].*

- (iv) *As regards the role of representatives – union or not – as collective bargaining agents, as established by Part 3 in conjunction with section 2, the Committee recalls its previous conclusions concerning the need to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned.*
- (v) *Under sections 12 and 14, there is a single representative elected to represent workers in the bargaining unit, and a union will be registered as representative of the bargaining unit only if 50 per cent +1 of all workers in the bargaining unit affirmatively vote in its favour. The Committee notes the Government's indication that workers can still have a union recognized for the purpose of collective bargaining if a majority of workers clearly want that; and that workers who do not want to be represented by a trade union must also have that freedom. In this regard, taking into account that the wording of section 14, especially subsection (4), seems to indicate that the figure 50 per cent +1 appears not only to be the percentage necessary for a union to be the exclusive bargaining agent, but also for a union to be registered, the Committee once again recalls that the right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create – if the workers so choose – more than one workers' organization per enterprise. It also recalls its previous conclusion that a provision imposing a minimum membership of 50 per cent to form a workers' organization would not be in line with Convention No. 87.*
- (vi) *According to section 8, all existing collective agreements are null and void 60 days after the Decree enters into force, and new agreements are to be negotiated by the parties before the expiry of the 60 days; otherwise, the company may unilaterally implement new terms and conditions through a new collective agreement or individual contracts. The Committee notes the Government's indication that the Decree only allows an employer in a designated corporation to impose terms and conditions after it has conducted good-faith negotiations for at least 60 days; and that, where a new collective agreement is imposed, there is a right of appeal to the minister for a review of its contents. The Committee once again emphasizes that a legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining. In examining allegations of the annulment and forced renegotiation of collective agreements for reasons of economic crisis, the Committee was of the view that legislation which required the renegotiation of agreements in force was contrary to the principles of free and voluntary collective bargaining enshrined in Convention No. 98 and insisted that the Government should have endeavoured to ensure that the renegotiation of collective agreements in force resulted from an agreement reached between the parties concerned [see **Digest**, *op. cit.*, paras 942 and 1021]. In addition, no clear and imperative reasons have been provided concerning any need for economic stabilization in a specific context. The legislation has effect on whole sectors without any reference to specific provisions that cannot be implemented in the framework of an acute national crisis, but rather provides for wholesale intervention in all collective agreements. The Committee thus considers that the abrogation of the collective agreements in force, as well as the unilateral imposition of conditions of employment where the parties have failed to come to an agreement for their modification, is contrary to Article 4 of Convention No. 98 concerning the encouragement and promotion of collective bargaining.*
- (vii) *Pursuant to section 27, and subject to severe civil and penal sanctions, strikes in essential national industries in connection with efforts to obtain registration, efforts to influence the outcome of bargaining or in the course of negotiations, and disputes over the interpretation or application of a collective agreement, are expressly prohibited. The bargaining unit may only go on strike if the parties failed to reach a collective agreement after three years of bargaining, subject to a 28-day notice*

*period and prior written approval from the Government. The Prime Minister may, by order, declare any strike or lockout in any essential national industry unlawful. According to the Essential National Industries and Designated Corporations Regulations 2011, the above restrictions on the right to strike apply to the following sectors currently considered as “essential national industries”: financial industry (including customs); telecommunications industry; civil aviation industry; and public utilities industry (including electricity and water). The term “essential national industries” is defined in section 2 of the Decree as industries which are: (i) vital to the present and continued success of the Fiji national economy, or gross domestic product, or those in which the Government has a majority and essential interest; and (ii) declared as essential national industry by the ministry under regulations made pursuant to this Decree. The Committee notes the Government’s statement that: (i) the Decree upholds the fundamental right of workers to take industrial action in pursuit of their legitimate interests but that this right is circumscribed in order to avoid damaging disruption to commerce; and (ii) there are significant penalties for individuals or organizations that ignore the provisions of the Decree and attempt to disrupt operations in an essential national industry, since there needs to be an effective deterrent against illegal actions for personal gain that could have a devastating impact on the companies concerned affecting tens of thousands of Fijians and the Fijian economy. In this regard, the Committee once again wishes to highlight that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. The Committee once again recalls that the right to strike may only be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population). Accordingly, the Committee recalls that electricity services, water supply services and the telephone service may be considered to be essential services where the right to strike could be restricted or prohibited, and the prohibition of the right to strike of customs officers, who are public servants exercising authority in the name of the State, is not contrary to the principles of freedom of association. However, radio and television, banking and civil aviation more generally do not constitute essential services in the strict sense of the term. The Committee considers that by linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service “essential”, and thus the right to strike should be maintained. The Committee further wishes to emphasize that responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved. Moreover, penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike [see **Digest**, op. cit., paras 628 and 668].*

- (viii) *Under section 26, disputes over discipline and discharge, and the interpretation or application of a collective agreement must be settled internally or by the employer’s designated reviewing officer without recourse to a judicial or quasi-judicial body; disputes involving an issue of over F\$5 million (US\$2.78 million) which remained unresolved may be referred to the Prime Minister for a final and binding determination. The Committee notes the Government’s indication that the Decree guarantees employees in designated corporations the right to various “dispute*

resolution” processes concerning disciplinary issues and contract interpretation issues (subject to a specified financial threshold); and that these are now required as a matter of law, not subject to the power game associated with collective bargaining. The Committee once again recalls that rights disputes should be able to be appealed to the courts.

**779.** *In view of the above considerations, the Committee recalls its previous conclusion that numerous provisions of the Essential National Industries Decree and its implementing regulations give rise to serious violations of the principles on freedom of association and collective bargaining. Moreover, while noting the Government's indication that, where a union has been recognized for collective bargaining purposes, the employer is obliged to recognize and negotiate in good faith with the union representatives, the Committee takes due note of the alleged disastrous effects in practice of the Essential National Industries Decree on the trade unions representing industries coming under its scope, such as: inability to register bargaining units due to the high threshold of 75 workers employed by the same employer who perform similar types of work for the employer, stipulated in section 2 of the Decree; voluntary dissolution of one union due to its inability to form bargaining units at either of the companies where it was represented; no collective agreements concluded except by one bargaining unit with close association with the management; efforts of unions to initiate collective bargaining with the employer and conduct good-faith negotiations to no avail; instead, unilateral changes to terms and conditions of employment imposed or threatened to be imposed by the employer; full or partial withdrawal of the check-off facility; remittance of union dues directly to the bargaining unit rather than to the trade union concerned; and the delay in collective bargaining entailing a drastic decline in union membership and thus a serious loss of resources to defend workers' interests. The Committee had previously urged the Government to amend the provisions of the Essential National Industries Decree without delay, in full consultation with the social partners, so as to bring it into conformity with Conventions Nos 87 and 98, ratified by Fiji. In this regard, the Committee notes the reference in the report of the Direct Contacts Mission that, within the framework of the current process of developing a new non-race based Constitution for Fiji to be ready by early 2013 through an inclusive national dialogue paving the way to the first democratic elections scheduled in 2014, and in view of the fact that the new Constitution will reflect the eight fundamental ILO Conventions and that national labour legislation will need to be compatible with the Constitution, the tripartite ERAB subcommittee has been tasked with the review of all existing government decrees relating to labour in terms of their conformity with the ILO fundamental Conventions. The Committee further notes that, according to the submission of the FTUC, the tripartite ERAB subcommittee “has agreed to delete almost most of the offending provisions” of the Essential National Industries Decree. The Committee notes the Government's indication that the ERAB subcommittee, the last meeting of which took place on 13 August 2012, is expected to be reconvened towards the end of September with the views of the PSC and the Attorney-General, and that the work of the ERAB and its subcommittee was anticipated to be concluded by October 2012. The Committee firmly expects that the measures agreed by the tripartite ERAB subcommittee will be actively pursued and given effect without delay, so as to bring the legislation into conformity with freedom of association and collective bargaining principles, and requests the Government to keep it informed of the progress made in this regard without delay.*

**780.** *Concerning the right to recourse of public servants, the Committee notes that the complainant alleges that: (i) public sector unions still have no avenue for recourse, save in expensive cases, since no action or decision of the PSC or other government entities to reform, restructure or change the terms and conditions of employment can be challenged in any court or forum; (ii) public sector unions have been deprived of representing or defending their members in situations of discrimination as they are now excluded from the*

scope of the ERP; and (iii) while the staff of statutory bodies or government commercial companies and private sector workers have the right to approach the ERP institutions with their grievances because they are (not yet) subject to the above decrees, due to increase in the workload of the mediation and tribunal forums, progress is often slow. The Committee further notes the Government's indication that: (i) since the passing of the Public Service (Amendment) Decree (Decree No. 36), all public servants in Fiji enjoy similar employment safeguard mechanisms as those foreseen in the ERP for the private sector; (ii) civil servants have recourse to the High Court of Fiji by way of judicial review should they be unsatisfied with the decision of the PSC Disciplinary Committee. In this regard, the Government refers to the judgment of the State v. Permanent Secretary for Works, Transport and Public Utilities ex parte Rusiate Tubunaruarua & Ors HBJ01 of 2012, where the High Court ruled that it has full jurisdiction to accept cases from public servants who seek to challenge a decision of the Government or the PSC, including any decision to terminate their employment or to suspend them; and (iii) to facilitate speedy resolutions of employment grievances and disputes, the PSC has implemented a new internal grievance policy that includes the appointment of conciliators within government ministries and departments.

**781.** *The Committee notes with interest the adoption of the Public Service (Amendment) Decree No. 36 of 2011, which, after their exclusion from the ERP, restores the protection of public servants against discrimination including anti-union discrimination. As regards access to courts, the Committee welcomes the decision recently rendered by the High Court of Fiji and the new internal grievance policy implemented by the PSC. It requests the Government to supply a copy of the High Court decision and to take all necessary measures to ensure that, in practice, all public servants may have recourse to both administrative and judicial review of decisions or actions of government entities. Moreover, the Committee requests the Government to provide information on the relevant mechanisms currently available to public servants to address individual and collective grievances, and to indicate the results of the review by the tripartite ERAB subcommittee of all existing government decrees relating to the public service in terms of their conformity with the ILO fundamental Conventions.*

**782.** *Lastly, the Committee notes from the allegations that, as a direct consequence of the Civil Service (Amendment) Decree and the Essential National Industries Decree, public sector unions and unions representing industries coming under the Essential National Industries Decree face serious financial difficulties or even struggle for survival due to the discontinued or only partly restored check-off facility. It also notes the Government's statement that the Essential National Industries Decree does not ban the system of check-off in designated corporations, but allows employers not to operate it, which is a common approach in many other countries. The Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided. It further considers that the withdrawal of a facility of existential importance to unions that was previously granted could, in the current context, be viewed as another attempt to weaken the Fiji trade union movement. It requests the Government to take the necessary measures to ensure that arrangements are made between the parties to ensure the full reactivation of the check-off facility in the public sector and the relevant sectors considered as "essential national industries".*

## **The Committee's recommendations**

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

- (a) *Expressing its grave concern that, while the Government had accepted a direct contacts mission to the country in line with its previous recommendation, the ILO Direct Contacts Mission that visited Fiji in September 2012 was not allowed to continue its work and was advised to depart expeditiously so that the Government could welcome a visit under the new terms of reference presented by it, the Committee firmly expects that the Government will rapidly re-establish dialogue in this regard so that the Direct Contacts Mission may return to the country without delay within the framework of the mandate bestowed upon it and report back to the Governing Body.*
- (b) *While it understands that Mr Koroi has left the country, the Committee expects that this case will be deliberated by the ERAB without further delay, and that, in the framework of this exercise, the conclusions that the Committee made in this regard when examining this case at its meeting in November 2010 [see 358th Report, paras 550–553] will be duly taken into account, with a view to rehabilitating Mr Koroi and considering his reinstatement should he return to Fiji.*
- (c) *Reiterating its deep concern at the numerous acts of assault, harassment and intimidation of trade union leaders and members for their exercise of the right to freedom of association previously alleged by the complainants, the Committee urges the Government, even if the victims have lodged a complaint in the meantime, to conduct ex officio an independent investigation without delay into the alleged acts of assault, harassment and intimidation against: Mr Felix Anthony, National Secretary of the FTUC and General Secretary of the Fiji Sugar Workers; Mr Mohammed Khalil, President of the Fiji Sugar and General Workers Union – Ba Branch; Mr Attar Singh, General Secretary of the FICTU; Mr Taniela Tabu, General Secretary of the Viti National Union of Taukei Workers; and Mr Anand Singh, lawyer. The Committee requests the Government to transmit detailed information with regard to the outcome of such inquiry and the action taken as a result. With particular regard to the allegation that an act of assault against a trade union leader was perpetrated in retaliation for statements made by the FTUC National Secretary at the ILC, the Committee urges the Government to ensure that no trade unionist suffers retaliation for the exercise of freedom of expression. The Committee generally urges the Government to take full account of the relevant principles enounced in its conclusions in the future.*
- (d) *The Committee urges the Government to take the necessary measures to ensure that all criminal charges of unlawful assembly brought against Mr Daniel Urai, the FTUC President and NUHCTIE General Secretary, and Mr Nitendra Goundar, a NUHCTIE member, on the grounds of failure to observe the terms of the Public Emergency Regulations are immediately dropped, and to keep it informed of any developments in this regard without delay, including the outcome of the case hearing that the Committee understands was deferred.*

- (e) *While welcoming the lifting of the emergency legislation in the form of the PER on 7 January 2012, the Committee, further welcoming the decision to temporarily suspend the application of section 8 of the Public Order Act as amended by the POAD, which placed important restrictions on freedom of assembly, requests the Government to consider abrogation or amendment of the POAD. Stressing that freedom of assembly and freedom of opinion and expression are a sine qua non for the exercise of freedom of association, the Committee once again urges the Government to take full account of the principles enounced in its conclusions in the future and refrain from unduly impeding the lawful exercise of trade union rights in practice. It also requests the Government to reinstate Mr Rajeshwar Singh, FTUC Assistant National Secretary, in his position representing workers' interests on the ATS Board without delay.*
- (f) *Recalling its previous conclusion that the Essential National Industries Decree No. 35 of 2011 and its implementing regulations give rise to serious violations of Conventions Nos 87 and 98 and the principles on freedom of association and collective bargaining, and taking due note of its alleged disastrous effects on the unions concerned, the Committee notes the review by the tripartite ERAB subcommittee of all existing government decrees relating to labour in terms of their conformity with the ILO fundamental Conventions, as well as the subcommittee's agreement, as reported by the complainant, to delete most of the provisions of the Essential National Industries Decree that were considered as offending. The Committee firmly expects that the measures agreed by the tripartite ERAB subcommittee will be actively pursued and given effect without delay, so as to bring the legislation into conformity with freedom of association and collective bargaining principles, and requests the Government to keep it informed of the progress made in this regard without delay.*
- (g) *Noting with interest the adoption of the Public Service (Amendment) Decree No. 36 of 2011 and welcoming the decision recently rendered by the High Court of Fiji and the new internal grievance policy implemented by the PSC, the Committee requests the Government to supply a copy of the High Court decision. It also requests the Government to provide information on the relevant mechanisms currently available to public servants to address individual and collective grievances, and to indicate the results of the review by the tripartite ERAB subcommittee of all existing government decrees relating to the public service in terms of their conformity with the ILO fundamental Conventions.*
- (h) *The Committee requests the Government to take the necessary measures to ensure that arrangements are made between the parties to ensure the full reactivation of the check-off facility in the public sector and the relevant sectors considered as "essential national industries".*
- (i) *The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

- (j) *The Committee draws the special attention of the Governing Body to this case because of the extreme seriousness and urgency of the matters dealt with therein.*



## Appendices

- Appendix I Report on the ILO direct contacts mission to Fiji (Suva, 17–19 September 2011).
- Appendix II Communication dated 10 July 2012, in which the ILO confirms the background, scope and composition of the mission.
- Appendix III Draft terms of reference (TOR) for the mission, provided on 12 September 2012, by the Ministry of Labour, Industrial Relations and Employment.
- Appendix IV Draft mission schedule as of 14 September 2012.
- Appendix V New TOR for the mission, presented on 17 September 2012, by the Permanent Secretary of the Prime Minister’s Office.
- Appendix VI Explanatory note on the scope of the direct contacts mission.
- Appendix VII Letter from Judge Koroma, dated 18 September 2012 p.m. and hand delivered to His Honourable Jone Usamate, Minister for Labour, Industrial Relations and Employment.
- Appendix VIII Letter dated 18 September and hand delivered on 19 September 2012 a.m., signed by the Permanent Secretary of the Prime Minister’s Office.
- Appendix IX Letter from Judge Koroma to His Excellency, the Prime Minister, dated 19 September 2012.

## Appendix I

### Report on the ILO direct contacts mission to Fiji (Suva, 17–19 September 2011)

#### I. Background, purpose and terms of reference

The ILO direct contacts mission was called for by the Committee on Freedom of Association (CFA) in November 2011, in view of the seriousness of the violations of freedom of association alleged by the complainants in Case No. 2723 and the absence of a complete picture of the situation on the ground. This call was echoed in December 2011 by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), as well as by the ILO Asia and Pacific Regional Meeting in its resolution on Fiji. The objectives and purpose of the direct contacts mission were to clarify the facts and assist the Government in finding, together with the social partners, appropriate solutions to the matters raised before the ILO supervisory bodies, including the legislative and practical application of freedom of association principles.

The Government of Fiji accepted the ILO direct contacts mission by letter of 23 May 2012, signed by His Excellency, the Prime Minister Commodore Josaia Voreqe Bainimarama.<sup>1</sup> Following discussions with the Fiji delegation during the International Labour Conference, the ILO confirmed, in its communication dated 10 July 2012, the background, scope and composition of the mission (Appendix II). The Government of Fiji subsequently engaged with the ILO Office in Suva on terms of reference, on the basis of which it would invite relevant governmental authorities to meet with the mission. A broad draft of terms of reference, quoting extensively the recommendations made by the CFA was later simplified and, on 12 September 2012, the Ministry of Labour, Industrial Relations and Employment provided the ILO with revised terms of reference, approved by the Government (Appendix III).

The visit of the direct contacts mission to the country was scheduled from 17 to 21 September 2012. The mission was led by Judge Abdul G. Koroma, member of the CEACR and former Judge at the International Court of Justice. He was accompanied by Ms Karen Curtis, Deputy Director of the International Labour Standards Department responsible for Freedom of Association and Ms Christine Bader, Legal Officer (Freedom of Association and Collective Bargaining) of the International Labour Standards Department.

The mission began its programme on Monday, 17 September 2012, based on the above terms of reference, which were understood to be consistent with the objectives and purpose of the mission as endorsed by the Governing Body, and with an agreed list of senior public officials and representatives from the employers' organization and national trade union centres that would be met.

<sup>1</sup> Relevant extract: "In this regard, I understand that the ILO Committee on Freedom of Association has suggested that an ILO direct contacts mission is needed in order to clarify the facts. I consider that an objective, fair, transparent and all-inclusive ILO direct contacts mission will be most welcome. In this regard, my Government will shortly provide ILO with the terms of reference for the direct contacts mission. Given the commencement of the constitutional consultations and the electric voter registration, both of which will commence independently of each other in July, it is best that the direct contacts mission visit Fiji in the third or last quarter of 2012. The Minister for Labour, Industrial Relations and Employment, Mr Jone Usamate, will be in contact with your ILO Director in Suva, once the terms of reference is finalized."

## II. Meeting with the Minister for Labour, Industrial Relations and Employment

The first meeting took place on Monday, 17 September 2012, at 9 a.m. in the premises of the Ministry of Labour, Industrial Relations and Employment.

Persons present:

- Honourable Jone Usamate, Minister for Labour, Industrial Relations and Employment;
- Taito R. Waqa, Permanent Secretary for Labour, Industrial Relations and Employment; and
- Samuela Namosimalua, Deputy Secretary, Ministry for Labour, Industrial Relations and Employment.

The Honourable Minister for Labour, Industrial Relations and Employment welcomed the opportunity to present the accurate situation in Fiji and provide the mission with a more holistic view and understanding of the context. He expressed the hope that all allegations would be resolved following the direct contacts mission.

He informed the mission that Fiji had recently endorsed eight ILO instruments for ratification or adoption: the Maritime Labour Convention, 2006 (MLC, 2006); the Maternity Protection Convention, 2000 (No. 183); the Private Employment Agencies Convention, 1997 (No. 181), and its Recommendation; the Human Resources Development Convention, 1975 (No. 142); the List of Occupational Diseases Recommendation, 2002 (No. 194); the Promotion of Cooperatives Recommendation, 2002 (No. 193); and the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189).

As his country aspired to sustainable democracy, the Government's Peoples Charter for Change, Peace and Progress sought to address all issues that had led to military coups in the past, such as ethnic tensions, conflicts with the church, cronyism, corruption, etc. In developing a new non race-based Constitution for Fiji, efforts were being made to involve each and everyone. To this end, the Constitutional Commission was travelling throughout the country presenting its work and receiving submissions from the Fijian people.

There were three principles guiding the Government in moving forward on the road to democracy: (1) empowering people in line with the concept "one person, one vote, one value" by eliminating racist attitudes and implementing equal treatment for all Fijians; (2) modernizing Fiji through labour law reform; and (3) strengthening the national economy.

As regards the labour law reform, which included the review of all laws and decrees relating to ratified ILO Conventions, a tripartite consultative subcommittee of the Employment Relations Advisory Board (ERAB) had been set up composed of representatives of the Fiji Trades Union Congress (FTUC), the Fiji Commerce and Employers Federation (FCEF) and the Government. The Minister expressed the hope that the subcommittee's report would be ready at the end of September so that it could then be discussed by Cabinet.

The Permanent Secretary reaffirmed the commitment of the Prime Minister to the labour law reform and to ensuring compliance with ILO Conventions. The tripartite process before the ERAB, as well as its subcommittee, was essential since the new Constitution would reflect the eight fundamental ILO Conventions and the labour legislation would need to be compatible. He reiterated that Felix Anthony and Daniel Urai from the FTUC were part of the tripartite process, since the FTUC was the majority union in Fiji (the unionized workers in Fiji representing 28 per cent of the total workforce). The comments of the CFA and the CEACR had been submitted to the ERAB subcommittee so that they could be duly taken into account. The Government was making huge efforts to

complete this exercise rigorously and expeditiously but there were serious time constraints, as the new Constitution was to be adopted in March 2013.

The Permanent Secretary indicated that, since April 2012, there had been three ERAB meetings and seven meetings of its subcommittee. The work of the ERAB subcommittee was divided into four areas: (i) the review of the labour-related decrees; (ii) the review of the 22 amendments to the Employment Relations Act (ERA); (iii) the domestication of the eight recently endorsed ILO instruments; and (iv) the discussion of new labour policy matters (e.g. reform of wage councils, new mediation centre, etc.). The ERAB subcommittee's task was to make recommendations to the Government in these four areas.

Hitherto, the review of the labour-related decrees, as well as of the 22 amendments to the ERA, had been completed and awaited the Government's comments. The work concerning the domestication of the recently adopted instruments was finalized except for the MLC, 2006, due to its complexity; the Permanent Secretary signalled the need for technical assistance in this regard. The discussion of new labour policy matters had not yet been concluded; as regards mediation, it was highlighted that the success rate of preliminary labour mediation, and thus effective conflict resolution, was 80 per cent and that mediation would be used as a filter for disputes and a means that would need to be exhausted in the first instance, in order to increase productivity.

The last meeting of the ERAB subcommittee had taken place on 13 August 2012. It would be reconvened towards the end of September with the views of the Public Service Commission and the Attorney-General, which would also allow the parties to go back to their group, consult and prepare the discussion of labour policy issues. The ERAB subcommittee would probably need one or two more meetings to finish its task in all four areas, following which its recommendations would be submitted to the ERAB. It was therefore anticipated that the work of the ERAB and its subcommittee would be completed by October 2012.

In addition to the labour law reform being discussed in the tripartite ERAB process, the Permanent Secretary highlighted the Memoranda of Understanding (MOUs) signed with Papua New Guinea in the area of occupational safety and health and with Kiribati in the area of labour reform and labour inspection, which illustrated an excellent South-South cooperation.

Lastly, the Permanent Secretary provided the mission with a written brief, including a table, summarizing the meetings of the ERAB and its subcommittee.

### **III. Interruption of the work of the mission**

Toward the end of this constructive meeting, following a phone call to the Minister, he requested the mission to desist from any remaining meetings scheduled that day until further notice (see draft programme of meetings in Appendix IV).

At 5.35 p.m., the mission was provided with new terms of reference from the Government and requested to attend a meeting at the Prime Minister's Office at 6 p.m.

The following persons attended from the Government: the Permanent Secretary of the Prime Minister's Office; the Minister for Labour, Industrial Relations and Employment; and his Permanent Secretary.

The Permanent Secretary of the Prime Minister's Office requested that the following concerns be put on record: (i) as a result of miscommunication between the respective Fijian Ministries, the Government considered that the previously accepted terms of reference did not articulate appropriately the scope of the visit and wished to provide the mission with new terms of reference under which its work should be carried out (Appendix V); (ii) there were doubts regarding the independence and objectivity of the mission, the Head of the mission being a member of the CEACR, and the other members

working as officials in the International Labour Standards Department; and (iii) it would be premature to meet the Chairperson of the Constitutional Commission. He also stated that, if he could not receive assurances on the above, the present mission should leave so that the Government could invite another team as soon as possible.

The mission emphasized that the CEACR was an independent, objective and impartial supervisory body of the ILO, which is a tripartite international organization. It was also stressed that the task of the mission was distinct from the work of the supervisory bodies. The mission was mandated to collect and faithfully transmit to the competent ILO bodies all information and documents received. As regards the meeting with the Chairperson of the Constitutional Commission, the mission expressed its view that this might have been useful to highlight the overall efforts undertaken by the Government in preparing the new Constitution and its progress towards democracy, but was not essential to the conduct of the mission should the Government prefer they did not meet him.

With respect to the terms of reference, the mission observed that the proposed new terms of reference, *inter alia*, requested the mission to assess the representativity of the trade union movement in Fiji, as well as the political and financial interests of certain trade union leaders. More generally, the terms of reference set out a point of view of the Government for which it sought confirmation, while at the same time calling into question certain findings and principles of the tripartite CFA within which framework the mission had been acting. The mission first emphasized that any and all observations the Government might wish to make in relation to the alleged violations of freedom of association were welcome and would be duly reflected in its report in a fair and impartial manner. As such, however, the terms of reference represented an unacceptable, significant and serious deviation from the object and purpose of the ILO mission. The mission suggested as a possible way forward that, instead of negotiating a set of redefined terms of reference, the work of the mission could simply proceed under the broad mandate bestowed by the ILO Governing Body CFA, which would include all relevant information that the Government might wish to raise.

The Permanent Secretary of the Prime Minister's Office declared that the independence of the mission did not need to be reasserted and that the concerns expressed in this regard had been addressed. As regards the terms of reference, he stated that a paper clarifying the scope of the mission, in the absence of agreed terms of reference, would be helpful. The Government's position concerning a meeting with the Chairperson of the Constitutional Commission might change in view of the indication that the mission could convey to the Governing Body the efforts made by the Government on the road towards democracy.

As promised, the mission transmitted, that same evening, an explanatory note on the scope of the direct contacts mission to the Prime Minister's Office (Appendix VI).

On the following afternoon, 18 September 2012, in the absence of any reply and with the concern that the brief time available to it was dwindling, the Head of the mission addressed a letter to the Minister for Labour, Industrial Relations and Employment expressing concerns regarding the delays incurred and requesting an audience with the Prime Minister Commodore Josaia Voreqe Bainimarama and the Attorney-General and Minister for Justice Aiyaz Sayed-Khaiyum with a view to agreeing as to how the mission could proceed with its work (Appendix VII). However, to date, the Government has not replied or acknowledged this letter.

On Wednesday morning, 19 September, a letter dated 18 September 2012 was hand delivered to the Head of the mission (Appendix VIII), requesting the mission to depart expeditiously so that the Government could welcome a visit under the new terms of reference presented by it. The Head of the mission again wrote, this time to the Prime Minister (Appendix IX), regretting that he was not granted an audience to clarify any misunderstandings and to reach a common understanding to enable the mission to achieve its objectives, particularly as he considered that the Government could have raised all

issues of concern to it within the broader terms of reference under which the mission was acting.

The mission left Suva on the same day and the country on Thursday morning, 20 September 2012.

During its stay, the direct contacts mission briefly met with the FTUC<sup>2</sup>, the Fiji Islands Council of Trade Unions (FICTU)<sup>3</sup> and FCEF<sup>4</sup>, in order to explain the situation, including the cancellation of the scheduled meetings and the abortion of the mission. At this time, the FTUC and the FICTU presented written submissions to the mission, which have been transmitted to the Government within the framework of the CFA procedure.

<sup>2</sup> Felix Anthony, National Secretary of the FTUC; Daniel Urai, President of the FTUC; John V. Mudaliar, General Secretary, National Union of Factory and Commercial Workers (NUFCW); Rajeshwar Singh, General Secretary of the Fiji Public Service Association (FPSA) and Assistant National Secretary of the FTUC; Agni Deo Singh, General Secretary of the Fiji Teachers' Union (FTU) and National Treasurer of the FTUC.

<sup>3</sup> Attar Singh, General Secretary of the FICTU; Maika Namudu, General Secretary of the Fijian Teachers Association (FTA); and seven other trade unionists (names to be provided).

<sup>4</sup> Marc Matthews, President of the FCEF and Vice-Chairman of the Pacific Islands Private Sector Organisation (PIPSO).

## Appendix II

10 July 2012

The Minister for Labour, Industrial  
Relations and Employment  
PO Box 2216  
Government Buildings  
SUVA  
Iles Fidji

Ref.:TUR 1-208

Dear Sir,

I wish to thank you once again for the constructive meeting we had during the 101st Session of the International Labour Conference. I was very pleased to learn of the efforts made by your Government to ratify a number of ILO Conventions and look forward to receiving the instruments of ratification in the very near future.

As promised, I am now contacting you with reference to the up-coming direct contacts mission on freedom of association. His Excellency the Prime Minister's acceptance of this mission in his letter of 23 May 2012 is a noteworthy signal by the country to the ILO and its constituents of the importance it attaches to the Organization and the promotion of fundamental principles and rights at work and international labour standards.

As we discussed in Geneva, the mission would need to visit the country during the week of 17 September 2012 if the mission is to be in a position to report back on developments to the 316th Governing Body Session in November, as requested at its 313th Session (March 2012). Bearing in mind the concerns that you have raised, I have asked the honourable Judge Koroma from Sierra Leone to lead the mission. Judge Koroma is a man of great reputation, a long-time diplomat and ambassador for his country, a judge on the International Court of Justice and a distinguished member of the ILO Committee of Experts on the Application of Conventions and Recommendations. Judge Koroma will be accompanied by Ms Karen Curtis, Deputy Director of the International Labour Standards Department, and Ms Christine Bader from the Department.

The mission's terms of reference, emanating from the request by the Committee on Freedom of Association and the call echoed in the resolution adopted at the Asia and Pacific Regional Meeting, is to cover all matters relating to freedom of association, including legislative and practical application of this fundamental principle. It is therefore of utmost importance that the mission be able to meet freely with the various parties to the pending complaint, as well as with high-level Government officials and non-governmental actors of relevance to the issues dealt with in the case. In this regard, I would kindly ask you to your good offices to organize a schedule of meetings for the mission with: His Excellency the Prime Minister, Mr Commodore Josaia Voreqe Bainimarama, the Attorney General, Mr Sayed-Khyaium, the office of the Chief Justice and the Solicitor General, the Minister of Foreign Affairs and the Constitutional Commission. The mission should meet with you, honourable Minister, both at the very beginning of the visit to explain the objectives, purpose and conduct of the mission and at the end for a de-briefing. Should the conditions be ripe, the mission may further request to hold a tripartite de-briefing.

We will be in direct contact with the Director of the ILO Suva Office to make the necessary arrangements for meetings with the Fiji Trade Union Congress and the Fiji Commerce & Employers Federation, as well as with the other trade unions that are complainants in the case (Fiji Islands Council of Trade Unions and the Fiji Teachers Union).

I thank you very much for your assistance in making this mission a success and look forward to our further collaboration.

Yours faithfully,

For the Director General:

*(Signed)*

Cleopatra Doumbia-Henry,  
Director of the International  
Labour Standards Department



## Appendix III

### 2012 ILO DIRECT CONTACTS MISSION TO THE REPUBLIC OF FIJI

#### DRAFT TERMS OF REFERENCE

##### 1.0 BACKGROUND

1.1 The call for an ILO direct contacts mission to Fiji originated from the request by the Committee on Freedom of Association (CFA) to the Governing Body in 2011 and the tripartite resolution adopted at the 15th Asia and Pacific Regional Meeting held in Kyoto, Japan in December 2011.

1.2 In its 2012 Conference Report on Fiji on ILO Convention 87 (and ILO Convention 98), the Committee of Experts in the Application of Conventions and Recommendations (CEACR) noted the conclusions and recommendations reached by the CFA in the framework of Case No. 2723 (termination of Mr Tevita Korio) concerning, *inter alia*, alleged acts of assault, harassment, intimidation and arrest of trade unionists, in particular that it draws the Governing Body's attention to the urgency of the issues involved in this case and urges the Fijian Government to accept an ILO Direct Contacts Mission ("the Mission") to clarify the facts and assist the Government and the social partners in finding appropriate solutions in conformity with freedom of association principles.

1.3 During the 312th Session of the ILO Governing Body held in Geneva in November 2011, the Governing Body examined the 362nd Report of the CFA against Fiji. The CFA draws the legislative aspects of this case to the attention of the CEACR. The CFA also draws the special attention of the Governing Body to this case.

1.4 In the light of its foregoing interim conclusions, the Committee on Freedom of Association invites the Governing Body to approve, *inter alia*, the following recommendations:

- (i) Given the allegations by trade unions and the absence of a complete picture of the situation on the ground, the Committee urges the Government to accept a direct contacts mission to the country in order to clarify the facts and assist the Government in finding, together with the social partners, appropriate solutions in conformity with freedom of association principles;
- (ii) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts in the Application of Conventions and Recommendations; and
- (iii) The Committee also draws the special attention of the Governing Body to this case because of the urgency of the matters dealt with therein.

1.5 In response to the Report of the ILO Committee of Experts in the Application of Conventions and Recommendations against Fiji, (which included matters raised in paragraph 1.4 above) relative to alleged breaches of ILO Conventions 87 and 98, the Fijian Government provided comprehensive responses against the allegations in its 2012 Consolidated Report dated 25th May 2012 which was deposited at the ILO Standards Office in Geneva on 28th May 2012 before the start of the 101st Session of the International Labour Conference in Geneva.

1.6 An important part of the Report is the Fijian Prime Minister's letter of 23rd May 2012 to the ILO Director-General welcoming a Direct Contacts Mission by the ILO to Fiji to ascertain the facts on the ground, and also affirming the Fijian Government's commitment to review all its labour laws to ensure compliance with all the ratified ILO Conventions.

1.7 The Prime Minister also mentioned in his letter that Government has already activated the tripartite process in the review of all labour laws in Fiji at the Employment Relations Advisory Board meeting of 11th April 2012.

1.8 To effect the Prime Minister's commitment, the Board, in its meeting of 16th July 2012, referred the recommendations of the Committee on Freedom of Association and the Committee of Experts in the Application of Conventions and Recommendations to its tripartite Board Advisory Committee.

1.9 The Committee, which first met on 23rd July 2012, has started the scrutiny of all the labour laws in Fiji relative to all ILO Conventions ratified by Fiji, including Conventions 87 and 98, and will recommend amendments on Fiji's labour laws to the main Board in August 2012.

1.10 It was also recommended by the Board for all these amendments to be vetted by the Attorney General's Office and presented to the Minister for Labour, Industrial Relations and Employment for consideration by the Fijian Cabinet.

1.11 This labour law review is part of the Fijian Government's inclusive national social dialogue in the development of Fijian's modern and first non-ethnic based Constitution by early 2013 towards a truly free and fair General Election in 2014.

## **2.0 DIRECT CONTACTS MISSION**

2.1 This Direct Contacts Mission is undertaken in support of the procedures of the supervisory bodies, which include the Committee of Experts in the Application of Conventions and Recommendations, the Conference Committee on the Application of Standards and the Committee on Freedom of Association.

2.2 The Mission to Fiji consists of representatives of the ILO Director-General with a view to seeking solutions to the difficulties encountered in relation to the application of ratified Conventions, particularly ILO Conventions 87 and 98 and other core ILO Conventions.

2.3 The representatives of the ILO Director-General and the composition of the Mission have to give all the necessary guarantees of objectivity and impartiality and, following the completion of the Mission, a report has to be submitted to the Governing Body.

2.4 Once the Governing Body has examined the report and reached its conclusions, the report of the Mission shall be forwarded to the Fijian Government.

2.5 This Direct Contacts Mission is established at the consent and invitation of the Fijian Government.

2.6 The members of the Mission must be able to interview freely all the parties or persons identified in Section 5.0 in the acquisition of evidences, so as to be fully and objectively informed of all the aspects of the issues and matters raised in Section 1.4.

### **3.0 SCOPE OF THE MISSION**

3.1 The Contacts Mission's basic terms of reference, emanating from the request by the Committee on Freedom of Association under Section 1.4 and the call echoed in the resolution adopted at the 15th Asia and Pacific Regional Meeting, is to cover all matters relating to freedom of association, including legislative and practical application of this fundamental principle, including other relevant compliance matters.

### **4.0 COMPOSITION OF THE MISSION**

4.1 As the result of the discussion meeting between the ILO Director-General elect, Mr Guy Ryder and the Fijian Minister for Labour, Industrial Relations and Employment, Mr Jone Usamate at the International Labour Conference in Geneva on 14th June 2012, the members of the ILO Direct Contacts Mission to Fiji are –

- (a) The Honourable Judge Koroma from Sierra Leone – Leader of the Mission;
- (b) Ms Karen Curtis – Deputy Director of the International Labour Standards Department; and
- (c) Ms Christine Bader – Officer of the International Standards Department.

### **5.0 SCHEDULE OF MEETINGS**

5.1 To enable the Direct Contacts Mission to accomplish its task, it is therefore of utmost importance that the Mission is able to meet freely with the various parties to the pending complaint, as well as with high-level Government officials and non-governmental actors of relevance to the issues dealt with in the case.

5.2 In this regard, the Office of the Minister for Labour, Industrial Relations and Employment, in liaison with the Office of the ILO Director for South Pacific, will organize a schedule of meetings for the Mission with the following dignitaries and people –

- (a) His Excellency the Prime Minister, Commodore Josaia Voreqe Bainimarama;
- (b) The Attorney General, Mr Sayed-Khaiyum;
- (c) The Chief Justice, Mr Anthony Gates;
- (d) The Chairperson of the Public Service Commission;
- (e) The Acting Solicitor General, Mr Sharvada Sharma;
- (f) The Minister of Foreign Affairs and International Cooperation;
- (g) The Chairperson of the Constitutional Commission;
- (h) The Executives of the Fiji Trades Union Congress (FTUC);
- (i) The Executives of the Fiji Islands Council of Trade Unions (FICTU);
- (j) The Executives of the Fijian Teachers Association (FTA);
- (k) The Executives of the Fiji Commerce and Employers Federation (FCEF);

- (l) The Executives of the Fiji Chamber of Commerce and Industries (FCCI);
- (m) The Minister for Labour, Industrial Relations and Employment; and
- (n) Such other persons considered relevant.

5.3 The Mission will also meet with the Minister for Labour, Industrial Relations and Employment, both at the very beginning of the visit to explain the objectives, purpose and conduct of the Mission and at the end for a debriefing.

## **6.0 DURATION**

6.1 The Mission will be in Fiji to undertake its schedule of meetings and facts finding for a period of one week, between Monday, 17th September 2012 and Friday, 21st September 2012 inclusive.

## Appendix IV

### Draft mission schedule

Day/Time	Name	Position/Organization	Location
<b>Sunday, 16 September 2012</b>			
Delegation arrives on Air Pacific FJ392 (Nadi) at 07.05 and will immediately be driven to Suva.			
Dinner (19.00)	UNRC and core team		ILO Office
<b>Monday, 17 September 2012</b>			
09.00–10.30	Minister Jone Usamate and senior staff	Minister of Labour, Industrial Relations and Employment	Minister's Office
11.00–12.30	Meeting with FTUC	President/General Secretary	ILO Office
14.00–15.30	Meeting with FCEF	President/CEO and Board	FCEF Board Room
16.00–17.30	Meeting with FICTU and FTA	President/General Secretary	FICTU Office
<b>Tuesday, 18 September 2012</b>			
The Ministry of Labour, Industrial Relations and Employment will organize the following meetings which will be conducted during Tuesday, Wednesday and Thursday:			
<ul style="list-style-type: none"> <li>■ Prime Minister Commodore Josaia Voreqe Bainimarama</li> <li>■ Attorney-General and Minister for Justice, Anti-Corruption, Public Enterprises, Communications, Civil Aviation, Tourism, Industry and Trade, Mr Aiyaz Sayed-Khaiyum</li> <li>■ Chief Justice</li> <li>■ Minister of Foreign Affairs</li> <li>■ Solicitor General</li> <li>■ Chairperson of Public Service Commission</li> <li>■ Chairperson of the Constitutional Commission</li> </ul>			
<b>Wednesday, 19 September 2012</b>			
08.30–09.30	Breakfast	Members of the Diplomatic Corps	Holiday Inn
<b>Thursday, 20 September 2012</b>			
09.00–10.00	Fiji Mine Workers Union	Joseva Sadrau, President Hancy Peters, General Secretary	ILO Office
10.00–11.00	Father Kevin Barr	Ex-Chair of Wages Council (independent)	ILO Office
<b>Friday, 21 September 2012</b>			
11.00–11.45	FTUC	President/General Secretary	ILO Office
13.00–13.45	FCEF	President/CEO and Board	FCEF Board Room
14.00	Debriefing Minister Jone Usamate and senior staff	Minister of Labour, Industrial Relations and Employment	Minister's Office
15.30	Depart Suva for Nadi		
<b>Saturday, 22 September 2012</b>			

## Appendix V

### Terms of reference for the ILO Direct Contacts Mission

(17–21 September 2012)

#### *Scope of the Mission*

- (a) To review the impact of the Essential Industries Decree 2011 (“Decree”) on essential industries, in particular –
  - (i) whether the aims and objectives of the Decree are in conflict with the fundamental rights of workers and employers in an essential industry;
  - (ii) whether workers in an essential industry have been able to collectively organise and form unions;
  - (iii) whether workers in an essential industry have been able to reach collective agreements with their employers;
  - (iv) whether workers in an essential industry have been able to collectively agree with employers on a fair means of resolving employment disputes;
  - (v) whether the workers in an essential industry, in effect, now have better terms and conditions than what was prevalent before.
- (b) To assess whether Fiji has adequate laws and processes to effectively investigate, prosecute and adjudicate complaints of assaults, intimidation and harassment by any person, including any trade union official;
- (c) To review the terms and conditions applicable for public servants, in particular, whether public servants have the right to form and join trade unions, and whether they are entitled to the fundamental rights and principles at work;
- (d) To assess whether public servants have recourse to have their individual grievances addressed by an independent judiciary;
- (e) To assess whether unions representing public servants are prevented from negotiating terms and conditions for public servants;
- (f) To assess whether trade unions, workers and employers are able to hold meetings and associate, in light of the removal of the Public Emergency Regulations;
- (g) To assess whether complaints made against the Fijian Government are with respect to concerns of all workers in Fiji, or whether such complaints are only made by a select few trade unionists for their own personal, political or pecuniary interests;
- (h) To genuinely assess the situation of workers and employers in Fiji, without simply heeding to what is being stated by a select few trade unionists (as was done by the Committee of Experts and the Committee on Freedom of Association);
- (i) To discuss with Government officials on the various reforms undertaken by Government to preserve and create jobs for workers, to sustain industries essential to Fiji, and to improve living standards of all Fijians; and

- (j) To assess Fiji's commitment to ILO Conventions, in light of the recent ratification by Fiji of numerous ILO Conventions.

### ***Schedule of Meetings of the Mission***

Instead of just meeting the executives of FTUC, FICTU and FTA, the Mission must also meet directly with workers employed in essential industries. In particular, they must meet the workers' representatives in industries such as the airline industry (Air Pacific), factory workers' representatives, workers employed in financial and banking sectors. They must also meet numerous other trade union officials recommended by Government and the employers, rather than only meeting with the executives of FTUC and FICTU.

The Mission must also meet with the employers in essential industries, including Air Pacific, employers in the banking and financial sector (FRCA, ANZ, Westpac, BSP, Bank of Baroda, Bred Bank), telecommunications industry (FBCL, TFL, FINTEL), and the public utilities industry (FEA and WAF).

They must also meet with the Commissioner of Police, Commissioner of FICAC, and the Director of Public Prosecutions.

### ***Composition of the Mission***

As made clear to the ILO by the Prime Minister in his letter of May 2012, the Mission must be objective, transparent, fair and all-inclusive.

Considering that the Mission comprises persons who closely associate with the ILO Committee of Experts, the Committee on Freedom of Association, ITUC, and the ILO Labour Standards Division, the Fijian Government wishes to have an undertaking from the mission that it will be objective, fair and transparent in its deliberations with relevant stakeholders in Fiji and that its final report will reflect the good governance principles espoused above.

## Appendix VI

### Explanatory note on the scope of the ILO direct contacts mission

The objectives and purpose of the ILO direct contacts mission, called for by the Committee on Freedom of Association and accepted in the Prime Minister's letter of May 2011 to the ILO Director-General, are to clarify the facts and assist the Government and the social partners in finding appropriate solutions to the freedom of association matters raised before the ILO supervisory bodies, including as regards:

- the Essential National Industries Decree No. 35 of 2011;
- the Employment Relations Promulgation of 2007;
- the Employment Relations Amendment Decree No. 21 of 2011;
- the Administration of Justice Decree of 2009; and
- allegations of restrictions to freedom of association, assembly and expression as set out in various communications received by the ILO and shared with the Government.

The mission will carry out its task in an objective, fair and transparent manner with a view to bringing all views expressed to it to the attention of the Committee on Freedom of Association so that it may examine the outstanding matters in full knowledge of the facts.

The direct contacts mission and its reports will provide an important opportunity for all parties to be heard and to show the steps taken to resolve outstanding cases. To this end, the mission considers it to be of particular value to meet with Government authorities named in the draft mission schedule and welcomes the further suggestion made by the Government to meet with the Commissioner of Police, the Commissioner of FICAC, and the Director of Public Prosecutions.

The mission is guided by its concerns and responsibilities for assisting the parties in ensuring respect for the obligations under the relevant international labour standards.



## Appendix VII

### Letter from Judge Koroma, dated 18 September 2012, p.m. and hand delivered to the Honourable Minister for Labour, Industrial Relations and Employment

208FIJ/MoL

18 September 2012

Honourable Jone Usamate  
Ministry for Labour, Industrial  
Relations and Employment  
Level 4, Civic House  
Suva

Dear Honourable Minister

I would like to express my appreciation for your having received the mission yesterday and the useful information you were able to provide us. Unfortunately, following that constructive meeting, and your request to await further indication before proceeding with our meetings, our mission has suffered certain delays.

In this regard, I would like to point out that our mission is expected to be concluded on Friday of this week. The current delay is restricting our capacity to be fully informed by all relevant governmental authorities and reflect their views in our report. I would therefore be grateful if you could indicate how best to proceed so that I might carry out the mandate that has been bestowed upon me by the ILO Governing Body to the best of my ability.

Given the importance of this mission for the Government of Fiji, I would respectfully request, in light of the limited time available to the mission, an audience with His Excellency the Prime Minister Commodore Voreqe Bainimarama and the Honourable Attorney-General and Minister for Justice Mr Aiyaz Sayed-Khaiyum, at their earliest convenience.

Please accept, Honourable Minister, the assurances of my highest esteem.

*(Signed)*

Judge Abdul G. Koroma

## Appendix VIII

### Letter dated 18 September and hand delivered on 19 September 2012 a.m. signed by the Permanent Secretary of the Prime Minister's Office

Honourable Judge Abdul G. Koroma  
c/- International Labour Organisation  
8th Floor, FNPF Place  
Victoria Parade  
Suva

Dear Judge Koroma

#### **ILO Direct Contacts Mission**

1. I refer to our 17 September 2012 meeting with respect to your visit to Fiji.
2. As you are aware, the Honourable Prime Minister of Fiji, in his 23 May 2012 letter ("Letter") to the Director-General of ILO, welcomed an independent, transparent and objective fact-finding visit to Fiji.
3. In the Letter, the Prime Minister had also made it clear to the ILO Director-General that the Fijian Government will provide ILO with the terms of reference for such a visit.
4. Unfortunately, as a result of miscommunication between the respective Fijian ministries, the terms of reference provided by the Ministry of Labour did not articulate the correct scope of such a visit.
5. Please find attached the terms of reference, which I presented to you and your team last night, and which is what the Fijian Government wants the visit to carry out its work under.
6. Given the above, we advise that your visit, as currently constituted under the terms of reference as provided by you and which you have stated cannot be replaced, can no longer continue.
7. As per the Letter, the Fijian Government will be happy to welcome a visit under the attached terms of reference.
8. Accordingly, it is best that your and your team's departure be expedited to facilitate a visit under the attached terms of reference. We regret any inconvenience.

9. The Fijian Government reiterates its position that as a member of ILO, it welcomes an independent fact-finding visit under the attached terms of reference. It is also reiterates that it is firmly committed to promoting and safeguarding the rights of all workers and employers in Fiji, *inter alia*, by promoting economic growth and the ensuring the long-term viability of industries in Fiji.

Thank you.

Yours sincerely

*(Signed)*

Pio Tikoduadua  
Permanent Secretary, Office of the  
Prime Minister

18 September 2012

*Attach.*

## Terms of reference

### *Scope of the Mission*

- (a) To review the impact of the Essential Industries Decree 2011 (“Decree”) on essential industries, in particular –
  - (i) whether the aims and objectives of the Decree are in conflict with the fundamental rights of workers and employers in an essential industry;
  - (ii) whether workers in an essential industry have been able to collectively organise and form unions;
  - (iii) whether workers in an essential industry have been able to reach collective agreements with their employers;
  - (iv) whether workers in an essential industry have been able to collectively agree with employers on a fair means of resolving employment disputes;
  - (v) whether the workers in an essential industry, in effect, now have better terms and conditions than what was prevalent before.
- (b) To assess whether Fiji has adequate laws and processes to effectively investigate, prosecute and adjudicate complaints of assaults, intimidation and harassment by any person, including any trade union official;
- (c) To review the terms and conditions applicable for public servants, in particular, whether public servants have the right to form and join trade unions, and whether they are entitled to the fundamental rights and principles at work;
- (d) To assess whether public servants have recourse to have their individual grievances addressed by an independent judiciary;
- (e) To assess whether unions representing public servants are prevented from negotiating terms and conditions for public servants;
- (f) To assess whether trade unions, workers and employers are able to hold meetings and associate, in light of the removal of the Public Emergency Regulations;
- (g) To assess whether complaints made against the Fijian Government are with respect to concerns of all workers in Fiji, or whether such complaints are only made by a select few trade unions for their own personal, political or pecuniary interests;
- (h) To genuinely assess the situation of workers and employers in Fiji, without simply heeding to what is being stated by a select few trade unionists (as was done by the Committee of Experts and the Committee on Freedom of Association);
- (i) To discuss with Government officials on the various reforms undertaken by Government to preserve and create jobs for workers, to sustain industries essential to Fiji, and to improve living standards of all Fijians; and
- (j) To assess Fiji’s commitment to ILO Conventions, in light of the recent ratification by Fiji of numerous ILO Conventions.

***Schedule of Meetings of the Mission***

Instead of just meeting the executives of FTUC, FICTU and FTA, the visit must also meet directly with workers employed in essential industries. In particular, they must meet the workers' representatives in industries such as the airline industry (Air Pacific), factory workers' representatives, workers employed in financial and banking sectors. They must also meet numerous other trade union officials recommended by Government and the employers, rather than only meeting with the executives of FTUC and FICTU.

The visit must also meet with the employers in essential industries, including Air Pacific employers in the banking and financial sector (FRCA, ANZ, Westpac, BSP, Bank of Baroda, Bred Bank), telecommunications industry (FBCL, TFL, FINTEL), and the public utilities industry (FEA and WAF).

They must also meet with the Commission of Police, Commissioner of FICAC, and the Director of Public Prosecutions.

## Appendix IX

### Letter from Judge Koroma to His Excellency, the Prime Minister, dated 19 September 2012

208FIJI/PM

19 September 2012

Commodore Josaia V. Bainimarama  
Prime Minister of Fiji  
Office of the Prime Minister  
Level 4, New Wing  
SUVA

Excellency,

#### **ILO Direct Contacts Mission**

I refer to the communication from your office of 18 September 2012 in relation to the abovementioned matter.

In my letter also dated 18 September 2012 to the Honourable Minister of Labour, Industrial Relations and Employment, I had requested audience with Your Excellency regarding the object and purpose of my mission to Fiji, which I had hoped would clarify any misunderstanding and clear the way for this mission to be carried out successfully.

It is unfortunate that this opportunity was not made available prior to receipt of the abovementioned letter of the Permanent Secretary, Office of the Prime Minister.

It was our hope that such a meeting with Your Excellency would have facilitated a common understanding and enabled the mission to achieve its objectives. Moreover, I am of the view that the terms of reference attached to the Permanent Secretary's letter are fully encompassed within the broader terms that had been provided by the Minister of Labour and upon which we had begun our work on Monday, 17 September 2012.

Please allow me to assure you, Your Excellency, that I will faithfully transmit to the competent ILO bodies all information and documents received by the mission in a fair and impartial manner.

Accept, Excellency, the assurances of my highest esteem.

*(Signed)*

Judge Abdul G. Koroma

Copy: Mr Jone Usamate, Minister for Labour, Industrial Relations and Employment

Mr Pio Tikoduadua, Permanent Secretary, Office of the Prime Minister

CASE NO. 2820

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

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

- the Greek General Confederation of Labour (GSEE)
- the Civil Servants' Confederation (ADEDY)
- the General Federation of Employees of the National Electric Power Corporation (GENOP–DEI–KIE) and
- the Greek Federation of Private Employees (OIYE)

**supported by**

- the International Confederation of Trade Unions (ITUC)

*Allegations: The complainants allege that numerous violations of trade union and collective bargaining rights have been imposed within the framework of austerity measures implemented in the context of the international loan mechanism of the Greek economy*

**784.** The complaints are contained in communications from the Greek General Confederation of Labour (GSEE) dated 21 October and 2 December 2010, 18 November 2011 and 16 July 2012. The Civil Servants' Confederation (ADEDY), the General Federation of Employees of the National Electric Power Corporation (GENOP–DEI–KIE) and the Greek Federation of Private Employees (OIYE) associated themselves with the complaint and provided additional information in a communication dated 9 March 2011. The International Confederation of Trade Unions (ITUC) associated itself with the complaint in a communication dated 30 October 2010.

**785.** The Government sent its observations in communications dated 16 May 2011 and 16 May 2012.

**786.** Greece 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**

**787.** In its communication dated 21 October 2010, the GSEE alleges that the measures imposed within the framework of austerity measures implemented in the context of the international loan mechanism of the Greek economy have significantly affected workers' fundamental right to free collective bargaining as well as the right to set uniformly binding minimum standards of decent work through national general collective agreements (NGCAs).

**788.** In this regard, the GSEE refers to Law 3833/2010 on the "Protection of national economy – Emergency measures to tackle the fiscal crisis" which was adopted by the Greek Parliament on 5 March 2010. According to the GSEE, this Law, among other measures (i.e. the major reductions in the wages of all public employees), provides for:

- (a) important reductions and cuts in the wages of all workers under private law contracts, employed in the public and broader public sector (central Government, municipalities, public companies, local governments, state agencies and other public institutions, except banks):
  - (i) by 7 per cent in regular wages, allowances, remuneration and payments in general that are already provided for by general or specific provisions of law, clause or provision of a collective agreement or arbitration award or an individual employment contract or agreement; and
  - (ii) by 30 per cent in the workers' regular payments relating, under the law, to the annual leave and the Christmas and Easter period.
- (b) the prohibition also for the abovementioned workers, from the entry into force of this Law until 31 December 2010, to exercise their right to free collective bargaining and to conclude collective agreements that could provide increases in their wages (article 3, paragraph 1).

**789.** The GSEE also refers to Law 3845/2010, enacted as a framework instrument, which includes measures of direct implementation relating, among other things, to:

- (a) permanent measures through which the State intervenes in the system of free collective bargaining and alters the existing mechanism for fixing through the NGCA the generally binding minimum wages and working conditions applicable to all workers on Greek territory with dependent work contracts under private law (article 2, paragraph 7);
- (b) provisions that directly exclude or provide a basis for legal authorization to introduce measures that allow the exclusion of groups of workers, and particularly the most vulnerable such as young workers, from the scope of the NGCA and from the generally binding provisions on minimum wages and conditions of work that are in force (articles 2 and 9, paragraph 6, points (e) and (f));
- (c) permanent measures (not related to the income policy of the year 2010), that impose further reductions as from 1 June 2010:
  - (i) by 3 per cent in the regular wages of all workers under private law contracts in the broader public sector and in public enterprises in breach of collective agreements already in force;
  - (ii) by eliminating the abovementioned workers' regular payments relating to the annual leave and the Christmas and Easter period and replacing them with a very small flat amount;
  - (iii) provisions that serve as a basis for legal authorization to introduce additional measures that raise the minimum threshold for activating rules on collective dismissals and at the same time drastically reduce both the amount of severance pay and the notice periods; and
  - (iv) permanent measures that significantly cut pensions granted to pensioners of all principal social security funds.

**790.** The complainant underlines that, by adopting and imposing the following permanent measures the Greek Government has failed to observe and fulfil the country's international commitments. The complainant refers in this regard to the statutory restriction (abolition) of the system that hitherto set minimum wages and conditions of work (applied without



discrimination to all workers employed in the Greek territory) through the NGCA and the withdrawal of the core labour law principle that the provisions of the other collective agreements (sectoral, professional, enterprise) cannot be less favourable than the minimum standards introduced at national level. Article 2 of Law 3845/2010, paragraph 7, provides:

7. Professional and enterprise collective agreements' clauses can (from now on) deviate from the relevant clauses of sectoral and general national agreements, as well as sectoral collective agreements' clauses can deviate from the relevant clauses of national general collective agreements. All relevant details for the application of this provision can be defined by Ministerial Decision.

- 791.** The GSEE points out that freedom of association is further violated by the exception of young unemployed persons up to 24 years of age from the minimum standards of wages and conditions of work of the national agreement, who through “apprenticeship” contracts and extended probationary periods will be remunerated with 80 per cent of the minimum basic wage with relatively reduced social security contributions and protection, which is set out in article 2, paragraph 2, of Law 3845/2010.
- 792.** The following measures also are not in compliance with freedom of association principles: the abolition of the generally applicable and mandatory minimum wage provided for by the national agreement to both young workers up to 25 years of age entering the job market for the first time who are henceforth remunerated with 84 per cent of the minimum wage, but also for employed minors, who – through the right granted to employers to employ minors under “apprenticeship” contracts without any protection safeguards – are now remunerated with 70 per cent of the minimum wage, have their social security coverage reduced, while being excluded from the protective framework of the NGCA and the protective provisions of labour legislation (including permitted working hours, the start and end of working hours taking into account course schedules, obligatory periods of rest, obligatory paid annual leave, time off for attending school, studying, sick leave, etc.) (article 73, paragraphs 8 and 9, of Law 3863/2010).
- 793.** The GSEE alleges that these measures demonstrate a lack of due respect for and implementation of, as well as the intervention in, collective agreements in force that results from drastic reductions in wages (through permanent measures effected twice within six months) of workers under private law contracts in the wider public sector that is governed entirely by collective agreements, the negotiation and conclusion of which has been henceforth prohibited (articles 1, paragraph 1, and 3, paragraph 5, of Law 3833/2010, and articles 3, and 6, paragraph 4, of Law 3845/2010).
- 794.** The GSEE criticizes the commitment of the Government in the loan memorandum to further interfere in collective bargaining in the private sector:

In line with the lowering of public sector wages, private sector wages need to become more flexible to allow cost moderation for an extended period of time. Following consultation with social partners and within the framework of EU law, the government will reform the legal framework for wage bargaining in the private sector, including by eliminating asymmetry in arbitration. The government will adopt legislation for minimum entry level wages in order to promote employment creation for groups at risk such as the young and long-term unemployed.

- 795.** Further agreements and commitments in the original text of the “Memorandum of Understanding on Specific Economic Policy Conditionality” provide that:

by the end of the 2nd quarter of 2010 and in order to strengthen labour market institutions, Government starts discussions with social partners in order to revise private sector wage bargaining and contractual arrangements.

by the end of the 4th quarter of 2010 and in order to strengthen labour market institutions

... Adopt legislation to reform wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work and enhanced flexibility in the management of working time. Allow local territorial pacts to set wage growth below sectoral agreements and introduce variable pay to link wages to productivity performance at the firm level.

... Adopt legislation on minimum wages to introduce sub-minima for groups at risk such as the young and long-term unemployed, and put measures in place to guarantee that current minimum wages remain fixed in nominal terms for three years.

... Amend employment protection legislation to extend the probationary period for new jobs to one year, to reduce the overall level of severance pay and ensure that the same severance pay conditions apply to blue- and white-collar workers, to raise the minimum threshold for activation of rules on collective dismissals especially for larger companies, and to facilitate greater use of temporary contracts and part-time work.

**796.** The GSEE recalls the reiteration of the commitments included in the Updated Memorandum of Economic and Financial Policies with regard to the Structural Reform Policies, as follows:

20. Labor market reform is almost completed. Substantive legislative changes were introduced in July easing employment protection legislation and collective dismissals, reforming minimum wages, reducing overtime premia, and allowing firm-level agreements to prevail over other levels. Alongside reforms in public employment to reduce labor-market distortions, these will increase adjustment capacity of firms, ultimately boosting employment. Further measures will be taken to reform collective bargaining, including the elimination of the automatic extension of sectoral agreements to those not represented in the negotiations ... .

**797.** This approach has been pursued in the memoranda so that, by the end of the third quarter of 2010 and in order to strengthen labour market institutions:

Following dialogue with social partners, Government adopts and implements legislation to reform wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work and enhanced flexibility in the management of working time ... . Government ensures that firm level agreements take precedence over sectoral agreements which in turn take precedence over occupational agreements. Government removes the provision that allows the Ministry of Labour to extend all sectoral agreements to those not represented in negotiations ... . Government amends employment protection legislation to extend the probationary period for new jobs to one year, and to facilitate greater use of temporary contracts and part-time work.

**798.** The GSEE emphasizes that, according to the national institutional framework in force for the last 20 years, the minimum standards of wages and working conditions are defined by the national collective agreements, which are concluded after free collective bargaining between the most representative employers' organizations and the GSEE (that is the most representative unitary organization of all workers employed under private law contracts), while all other types of collective agreements (sectoral, enterprise, professional) cannot include provisions less favourable than those set at the national level. This ensures a very important and generally applicable safety net for all workers without discrimination.

**799.** By adopting the abovementioned legislation, the State not only violates its statutory obligation to respect the collective agreements, but essentially intervenes with permanent provisions of law in the free collective bargaining system by setting the minimum wages and working conditions in terms less favourable than those provided for by the minimum provisions of the national agreement. This directly contradicts the Government's obligation under Convention No. 98 "to encourage and promote" such a mechanism "with a view to regulating the terms and conditions of employment by means of collective agreements", under Convention No. 154 to refrain from taking inappropriate or inadequate measures that

prevent free collective bargaining and the conclusion of collective agreements and under Convention No. 87 “to take all necessary and appropriate measures to ensure” that the right to organize is freely exercised.

- 800.** The complainant recalls that Law 1876 on “Free Collective Bargaining” has been in force since 1990 and constitutes the legislative framework regulating free collective bargaining and the conclusion of collective agreements, in accordance with ILO core Conventions Nos 98 and 154.
- 801.** According to Law 1876/1990, collective agreements, through their scope and field of application, set the binding provisions for terms and conditions of work. The NGCA takes precedence over all statutory provisions for every category of collective agreement. According to the provisions of Law 1876/1990:
- (a) national agreements are concluded between GSEE, as the third-level trade union organization and the most representative or nationwide employers’ organizations;
  - (b) national agreements apply to all workers on Greek territory – regardless of their affiliation to a trade union or not – who are bound by an employment relationship under a private law contract to any employer (Greek or foreign), or to an undertaking, enterprise or service in the public or private sector of the national economy, including workers engaged in agriculture, livestock husbandry and related occupations, and homeworkers, as well as to persons who, while not bound by an employment relationship, perform their work in a situation of dependence and require protection similar to that enjoyed by employed workers; and
  - (c) national agreements set minimum standards of wages and conditions of work and are binding uniformly on all employers throughout the country.
- 802.** The institutional added value granted to national agreements as the statutory machinery for setting minimum standards for wages and working conditions for the protection of workers, was further reinforced by the protective principles set out in two key provisions of Law 1876/1990 which have now been derogated from:
- (a) Article 3.2: No sectoral or enterprise agreement, and no national or local occupational agreement shall contain provisions which are less favourable to workers than those set out in national general agreements.
  - (b) Article 10: Where an employment relationship is governed by more than one collective agreement in force, the agreement containing the terms most favourable to the workers shall prevail. In comparing and opting for the terms to be applied in this case, account shall be taken: (a) of uniformity of remuneration; and (b) of uniformity of other conditions.
- 803.** It should also be emphasized that Law 1876/1990, which wholly regulates, secures and promotes a system of free collective bargaining, is the result of a “Social Pact” endorsed unanimously in 1990 by all political parties in the Greek Parliament and empowered by the consensus of the high-level representative employers’ and workers’ organizations following intense social dialogue. In this context, the law in question had succeeded in creating a fully integrated and balanced system proving its validity, effectiveness and force throughout time. The standing of the NGCA concluded through free collective bargaining works as a mechanism to set the mandatory minimum wage standards and provides a national legitimate guarantee that largely justifies the non ratification by Greece of the ILO Minimum Wage Fixing Convention, 1970 (No. 131).

- 804.** Yet, the Greek Government has now intervened in the free collective bargaining process and in the collective agreements already in force in order to bindingly regulate wages and conditions of work for workers employed in the wider public sector by multiple reductions in their wages (article 3, paragraphs 4, 6 and 8, of Law 3845/2010, and article 1, paragraph 5, of Law 3833/2010).
- 805.** The complainant further emphasizes that following the entry into force of article 2, paragraph 7, of Law 3845/2010, employers and their organizations have intensified pressure during collective negotiations with a view to arrive at wages below the hitherto binding minimum standards of wages set by the NGCA, which were already low. This particular trend is exemplified by:
- (a) the enterprise collective agreement that set terms of pay and work in a prominent multinational company that provides security services (G4S SECURE SOLUTIONS SA) for the private as well as the public and wider public sectors, where the company has pursued and finally achieved to pay “new-comer” employees below the minimum wage standards set out by the national agreement in force, by including in this collective agreement an explicit clause which for the first three years of employment sets wages at €640 instead of the €739.56 of the national agreement. Furthermore, the detrimental pressure to suppress labour cost wholly affects workers employed under a contract to provide security services that was awarded to the aforementioned company by one of the most important state-controlled public utility companies of mass transportation, the Athens Piraeus Electric Railways SA;
  - (b) the enterprise collective agreement setting terms of pay and work in a company of the secondary agricultural sector (Greek Animal Feeding Stuffs Industries SA). This particular agreement sets, for their first eight years of work, “new-comer” pay below the minimum standards provided by the national agreement at the amount of €701.79. Thus the agreement in question regrettably violates not only the minimum wage, but also the negotiated and agreed rule to grant wage increases by three-year seniority periods, which from 1975 onward is an integral part of the national agreements.
- 806.** The GSEE condemns the intervention of the State in the collective autonomy by the adoption and imposition of permanent “structural” measures with the invocation of the national interest alongside the obvious violation of the principles of proportionality and the necessity of moderation, which has resulted in considerably weakening the fundamental institution of the national collective agreement and in less favourable regulation of the minimum standards of work in a way that is detrimental to all workers.
- 807.** The GSEE emphasizes that the scope, the effect and the wider implications of this intervention should be appraised in conjunction with the widespread precariousness in the labour market, the considerable volume of unregistered and/or flexible work and the steadily increasing unemployment that render applicants for work more vulnerable, inducing involuntary acceptance of reduced working rights and/or excessively flexible job positions.
- 808.** Such an intervention furthermore should be assessed by also taking into account the broad authorization – without the clarity required by the State’s Rule of Law – to further regulate crucial terms of work included in Law 3845/2010 and the memoranda (e.g. the increase of the minimum threshold for collective dismissals, reduction of severance pay, State determination of the minimum standards of wages and working conditions for young workers up to 25 years of age, the reduction on the sum unemployment benefits). Moreover, the same Law 3845/2010 stipulates significant increases in all types of VAT triggering substantial increases in the prices of consumer goods, fuel and public utility services. These obviously disproportionate measures disempower and render workers more

vulnerable vis-à-vis the combined spillover effect of lay-offs, wage freezes and the abolition of the minimum standards of wages. Such measures annul the State's fundamental obligation to provide and protect decent work, violate the core of individual and social rights and endanger social peace and cohesion.

- 809.** The argument pertaining to the necessity of the imposed austerity measures advanced by the Government cannot be extended to the point of violating the core of individual and social rights, as “necessary” should denote the sense of measure and moderation considered essential, applicable and suitable for a democratic society that respects and secures the value of the human being as well as the principles of equity, decent work and collective autonomy.
- 810.** There is furthermore no reasonable relationship nor a quantifiable economic result between the extent, the intensity and the duration of such restrictions in the private sector adopted and implemented to the detriment of collective autonomy, collective agreements and workers' rights and the pursued goal, which is primarily to ensure the fiscal discipline required to address the country's sovereign debt and budgetary deficit problem, the implementation of the stability programme and the re-establishment of trust to Greece vis-à-vis its European partners and the global financial markets. The unjustified policy of uneven austerity at the expense of workers that aspires to hold down wage costs weakens the entire process of free collective bargaining and minima contained in the NGCA. Even if in the future the Government were to take measures for the socially vulnerable groups, these measures would not suffice to address and provide restitution for the irreversible damage done to workers' occupational and economic interests through the radical reversal in the minimum standards of wages and working conditions.
- 811.** Furthermore, as the economic and income policy is defined on a yearly basis, the reduction or the non-regular readjustment of provisions of work and especially wages results not only in the real reduction of the wage itself but also in “freezing” workers' pay and in the ensuing permanent reduction of their real income. Notably, according to data by the Labour Institute of the GSEE, the freeze in wages will diminish the purchasing power of lower wage categories back to the levels of 1984. The major implication, among others, is the refutation of the subsistence function of the wage compounded by the grave impact on the country's economy that depends on domestic demand: the ability of the population to consume.
- 812.** The complainant further points out that the level of wages in Greece does not constitute a competitive disadvantage but rather an advantage for the businesses operating in the country, a fact recognized by the three representative Greek employers' organizations whose leaders have recently expressed the opinion that the wages in Greece are not high. Indeed the view is commonly held that, as grounded in the general national collective agreement, the national system of collective bargaining is well balanced and protects the healthy competition between businesses by not allowing the acquisition of competitive advantages through competing to compress ad infinitum the wage cost.
- 813.** The aim of collective autonomy as well as of freedom of association is the preservation and promotion of the economic and working interests of the workers. The realization of this objective is now significantly hampered by the intervention of the State, as: collective agreements are not respected and observed; the conclusion of collective agreements is either prohibited or not possible, or their role is limited; and consequently any intention of workers to be members of trade unions is seriously affected as the trade unions' bargaining power is weakened.

- 814.** Finally, the GSEE contends that the spillover effects of these laws have led to infringements of other ratified international labour standards. These measures were not the subject of social dialogue, but were rather forwarded to the Greek Parliament for adoption with urgent procedures. Only Law 3846/2010 on guarantees against work insecurity went through a social dialogue process, concluded in March 2010, but neither information nor consultation occurred, even though the country was already under pressure due to the economic crisis. It should be noted that the intense pressure of the employers' organizations during this particular social dialogue led to significant and substantial changes in their favour including in the form of flexible employment. The outcome was that this particular law, despite efforts to improve the institutional framework, did not respond adequately to its initial aim, combating work insecurity.
- 815.** Law 3863/2010 constitutes a further elaboration of the commitments undertaken by the Government and agreed upon in the memoranda in which there was no room for improvement within a framework of nearly non-existent due consultation. The Government did not respond to its obligation to conduct proper social dialogue. Rather, the Ministry of Labour and Social Security told the social partners that in a very short period of time they had either to decide unanimously on the issues in question or there would be an immediate adoption of the measures (that affected substantially workers' rights) as they first stood in the draft Bill.
- 816.** The GSEE further alleges that there had been an undue delay on the employers' side to conclude the national agreement (15 July 2010) only after the adoption of Law 3863/2010 so that employers could benefit from the provisions increasing the threshold for collective dismissals, reducing severance pay and pay rates for overtime work, reducing young workers' wages, etc., whereas the union had hoped that it would have been able to negotiate important provisions for the protection of workers during the economic crisis.
- 817.** The complainant concludes that the Government did not pursue real and substantial social dialogue that could have promoted alternative and more acceptable solutions and proposals as repeatedly advanced by the GSEE or other social partner organizations regarding, among others, the social dimension and the long-term effectiveness of measures to lead out of the financial crisis. The pressure that accompanied the imposition of the legislation in question cannot in any way retract or diminish the need to maximize social cohesion and mutual understanding. On the contrary, the urgency, the scope and the impact of the measures accentuated the need to pursue the maximum legitimization of the legislative power and emphasize the importance of substantial social dialogue.
- 818.** The GSEE considers that the Government has gone beyond what might be considered as acceptable limitations in urgent circumstances as these provisions: have not been imposed for an explicitly defined and limited period of time; are neither proportionate nor adequate; have been adopted without examining sufficiently other well-weighed and more appropriate alternatives; there is no perceivable causal relationship between the extent, the strictness and the duration of the imposed restrictions and the pursued aim; and they were not accompanied by adequate and concrete safeguards and guarantees to protect the living standard of workers and reinforce the ability of vulnerable groups in the population to address the combined direct impact of the economic austerity measures with the multiple, spillover and collateral side effects of the economic crisis.
- 819.** In its communication of 2 December 2010, the GSEE provides a letter from the President of the Economic and Social Council of Greece to the Prime Minister, which it considers reinforces its arguments about the impact of destabilization and the resulting abolition of the collective bargaining and collective agreement system. This letter calls upon the Prime Minister to proceed to the re-examination of the changes undertaken and engage in a

structured dialogue focused on these crucial issues before any legislative initiatives are taken.

- 820.** In their communication dated 9 March 2011, the ADEY, GENOP–DEI–KEI and the Greek Federation of Private Employees (OIYE) join the abovementioned complaint observing that they represent both private and public sectors that have been affected by the legislative measures in question. In particular, the complainants emphasize that a law which derogates from the imperative that higher level collective agreements must set the minimum with lower level agreements only diverging in a manner favourable to the employees necessarily violates the obligation under international Conventions to promote and encourage collective bargaining at all levels.
- 821.** In this regard, the complainants point out that Law 3845 of 6 May 2010 permits derogations, including those less favourable to workers, from the national inter-professional agreements by local territorial pacts. Branch-level and sectoral agreements may similarly be derogated from by enterprise-level agreements. The objective of this law is clearly declared and revealing: a framework for a free market under conditions of development and competition. These clear violations of Conventions Nos 87, 98 and 154, moreover, have paid no heed to the important principles elaborated for any exceptions which should be limited in time, ensure appropriate guarantees for the most vulnerable and be the result of consultations with the employers' and workers' organizations with a view to finding agreement. Law 3845/2010 was voted without prior dialogue with the unions.
- 822.** The complainants also raise deep concern about Law 3899/2010 which permits bargaining with the branch union if no union exists at the enterprise level. Given the possibility of any party bringing the matter to arbitration, the complainants are concerned that the branch-level organization would be placed in a situation where compulsory arbitration will force upon enterprise employees an agreement that no one accepted.
- 823.** As regards Law 3871 of 17 August 2010, the complainants state that this in effect places a salary freeze as it nullifies any arbitration decision that would provide an increase in wages for 2010 and the first semester of 2011. Similarly, it nullifies any provision in a collective agreement that would raise the wages by more than the increase provided in the NGCA, which is restricted to European inflation. According to the complainants, this would mean a decrease in wages as Greek inflation is higher than that at the European level. These restrictions, which first make reference to 2009, result in constraints on collective bargaining for over three years, largely exceeding the limited duration set out by the Committee on Freedom of Association in such cases.
- 824.** Finally, the complainants refer to Law 3863 of 15 July 2010, which provides special apprenticeship contracts for young workers between 15 and 18. This deprives young workers of the protective coverage of collective agreements and thus violates their trade union rights.
- 825.** In its communication of 18 November 2011, the GSEE provides additional information concerning recent provisions introduced by Law 4024/2011 which, it alleges, consolidates further the deconstruction of an industrial relations system that was working effectively to set minimum standards of work for all workers through collective agreements concluded after free negotiations in the private and the wider public sector. The new measures, among others, include provisions that abolish the fundamental protective principle of favourability, as well as the prevalence of less favourable firm-level agreements over the uniform standards of pay and work conditions provided in binding sectoral agreements. In addition, the new legislation eliminates the extension of the scope of sectoral collective agreements and introduces legislative intervention – beyond the unilateral drastic reduction in wage and salaries – to fully abolish binding collective labour agreements in force and to

implement a uniform pay scale in public utility enterprises in the broader public sector, where collective agreements are universally applicable and collective bargaining has already explicitly been prohibited by law from setting pay increases. Another highly questionable aspect of this recent legislation is the imposition of the so-called process of “labour-reserve”, which initiates concealed collective dismissals of thousands of workers in the public and the broader public sector.

- 826.** Other provisions in Law 4024/2011 overtly interfere in the structure and the operation of trade unions and contravene the right of workers to collective representation vis-à-vis their employers by persons that are freely and democratically elected. This essentially anti-union legislation extends the right to negotiate and conclude enterprise-level agreements to nebulous non-elected “associations of persons” and seriously undermines the principle of collective representation. In this context, the employer is relieved of any obligation he has towards a trade union organization, while the representatives of such “association of persons” do not have a permanent mandate to represent workers vis-à-vis the employer on collective issues of work and do not have the trade union rights and protection that lawful elected representatives of workers are entitled to. Under the pretext of facilitating the small and medium-sized enterprises to use the working-time arrangement system (increased and reduced work periods without an increase or reduction corresponding to pay at the relevant periods), the State allows an “association of persons” to be formed by 25 per cent of the personnel (in firms with more than 20 workers), or by 15 per cent of the personnel (in firms with less than 20 workers). Any agreement between the employer and such an “association of persons” – which could be composed even by one person in enterprises with ten workers – is binding on all workers. At the same time, this provision abolishes the employer’s obligation to observe the hierarchy of consultation and firstly address the representative enterprise trade union or, in the absence of a firm-level union, address the sectoral trade union that represents affiliated workers in order to agree upon a system of working-time organization. The complainant raises a particular concern that these latest actions have superseded article 13 of Law 3899/2010 on special firm-level collective agreements, which was a provision negotiated with the social partners in response to the memorandum conditions.
- 827.** By granting to these spurious formations of virtual representation the vital trade union right to conclude collective agreements, which under the Greek Constitution and the national legislation, is recognized exclusively as a right and responsibility of trade unions, the Greek Government violates the fundamental guarantees of the right to organize and collective bargaining enshrined in core ILO Conventions Nos 87, 98 and 135, diminishes substantially the role and the bargaining power of trade unions and paves the way for their marginalization. The danger is imminent for the creation at the enterprise level of “yellow” associations of persons and trade unions influenced/controlled directly by the employer, to facilitate the implementation of managerial decisions against the rights of workers and in particular allow the generalized implementation of enterprise-level collective agreements, that will reduce the level of protection of workers and will insert unequal pay and conditions of work.
- 828.** The GSEE states that there is already evidence that large enterprises – affiliated to sectoral employers’ organizations – with no enterprise union since workers were members of the relevant sectoral trade unions (i.e. hotels, supermarkets, security companies, etc.), will directly draw on these provisions to reduce wages by concluding “collective” agreements with the “yellow” company association of persons, established only for that reason.
- 829.** Furthermore, the threat to directly abolish the NGCA was repeatedly used as a leverage to pave the way for the imposition of new unilateral measures that “manipulate” the regulation of pay in the private sector. Thus, the following new additional measures were imposed cumulatively by article 37 of Law 4024/2011:



- Severe limitation of the duration of the binding effect of the extension of the collective agreements’ scope, in conjunction with the concurrent suspension of the procedure of the extension itself as regards sectoral and occupational collective agreements, imposed for an indefinite period namely “for the duration of the implementation of the Medium-term Fiscal Strategy Plan”.
- The suspension for an indefinite period, namely for “the duration of the implementation of the Medium-term Fiscal Strategy Plan” of the fundamental protective “favourability principle” that ensured the prevalence of those terms in collective agreements, which are more favourable for workers, with the ultimate aim to eliminate it as requested by Greece’s creditors.

**830.** As sectoral and occupational collective agreements are henceforth binding only on the employer and worker signatory parties and their members, without the institutional possibility to extend the scope of a collective labour agreement and to declare it as universally binding, employers at their discretion can leave their sectoral organizations and opt out from the binding effect of the sectoral collective agreement. This unavoidably provides the conditions for unfair competition between enterprises, as well as between organized and unorganized workers. In addition, this creates a situation where there is no incentive for enterprises to participate in employers’ organizations with a view to influence the outcome of collective negotiations relevant to the regulation of labour cost in a sector or occupation. By suspending the extension for an indefinite period, the State abandons numerous categories of wage earners to the mercy of individual bargaining with employers.

**831.** Considering that the institution of extension exists in most European Union (EU) countries, these developments would appear to show that a unique “experiment” to deconstruct the labour relations system and its sustaining institutions may well be under way. While collective agreements have not formally been forbidden and can be concluded, in practice employers are now entitled to multiple legitimate options by which they can avoid the binding effect of collective agreements and impose at their discretion on each of their workers less favourable terms of work. On the other hand, the favourability principle had created a “pyramid” of regulations at the sectoral level that, by assuring healthy competition around minimum labour cost in a sector, enterprises considering their capacity could determine better conditions of pay and work for their workers. For this reason, wages that were determined by enterprise-level collective agreements had steadily provided the basis for wages included in relevant sectoral collective agreements and were usually higher than the sectoral wage, which in turn were generally higher than the minimum wages set out by the national agreement. The abolition of this principle can only lead to an abrupt reduction of wages to the minimum wage level of the national agreement signalling reductions that will exceed 30 per cent.

**832.** These new provisions not only disempower free collective bargaining and collective agreements, which constitute a main pillar of democracy, but will reduce greatly the wages in the private sector and intensify the recession, without any positive result for the competitiveness of the economy. Following the decisive weakening of sectoral collective agreements, the disempowerment of free, democratic and effective trade union representation of workers and the concurrent deficiency of labour inspection mechanisms, the terms of pay and conditions of work will be regulated henceforth unilaterally from the employers, under the threat of dismissal. The adoption of these new measures was inappropriately and prominently proclaimed as a “sine qua non” condition for the release of the sixth loan disbursement to Greece. The due timely social dialogue before the adoption of any measure hitherto remains deficient. Social dialogue is inevitably degraded as foregone decisions are dictated by the Troika, committing the Government.

- 833.** Moreover, in this context, a mesh of regulations gives to employers the equal right to unilaterally seek the binding process of arbitration, while simultaneously: (i) the obligation of bona fide attendance in the previous stage of mediation is lifted by suppressing the obligation to accept the mediator's proposal before resorting to arbitration; (ii) the competence range of the arbitration is severely restricted to ruling only in cases concerning basic salary and daily wage determination; and (iii) the universal prohibition for trade unions to undertake strike action during arbitration is maintained, even when the employers unilaterally seek recourse to arbitration.
- 834.** These measures, that extend considerably beyond the scope of the recommendations of the Committee on Freedom of Association in Case No. 2261, substantially disempower trade unions and expose rights that workers acquired by collective agreements to potential definite elimination in a series of crucial matters including health and safety, the regulation of working time, personnel statutes, parental leave, elimination of gender discrimination at work, educational leave, trade union contribution regulations, as well as matters relating to the procedure and the terms of collective bargaining, mediation and arbitration.
- 835.** In this light, taking into account that the provision of work beyond its wage-cost aspect, integrally relates to the conditions under which work is provided, the content and the configurative frame of the arbitration award cannot be different from the general one constitutionally enshrined for the collective agreements that are concluded after collective bargaining.
- 836.** Critical further interference obstructs the work and the competence of the independent arbitrator, by additionally restricting the scope of rulings to disputes on basic wage terms and, in particular, by actually forbidding arbitrators, retrospectively from the beginning of 2010, to grant any wage increase for 2010 and the first half of 2011 whatsoever. For the period between 1 July 2011 and 31 December 2012, the scope of arbitration awards allows only increases limited to the base annual rate of European inflation and the law stipulates that failing to do so the arbitration award will be invalid without any legal effect while the same obligation is imposed to mediators. Additionally, the reform of the labour arbitration, the Organisation for Mediation and Arbitration (OMED), includes the *ipso jure* expiry of its current body of mediators'/arbitrators' mandate on 30 March 2011 at which date they are all to be replaced, regardless of the pending cases under their responsibility.
- 837.** The GSEE also refers to measures affecting all types of remuneration and benefits of all workers regardless of the type of their contract (indefinite or fixed duration) in public utility enterprises, the perpetuation of the general freeze in wages as well as the explicit prohibition also for the year 2011 to trade unions active in these enterprises to exercise their right to free collective bargaining – in breach of collective agreements – to conclude collective agreements that provide increases in their wages, as they are now formed after the abovementioned reductions imposed by law. Additionally, Law 4024/2011 (article 31) has imposed the general abolition of collective labour agreements that set out the terms of pay and work in all enterprises of the wider public sector and has set a wage ceiling notwithstanding previous wage cuts. Workers in these enterprises from now on will be ruled by the public sector pay regime, regardless of their entirely different existing pay systems that were appropriately defined by the business and/or production level of each enterprise, workers' occupational and/or educational profile and any specific work conditions (e.g. dangerous or unhealthy work). In addition, these measures provide for the abolition of all the collective agreements hitherto in force, the imposition of a compulsory start to collective negotiations with a content predefined by law and the obligation to conclude the collective bargaining process within a month after its commencement (failing which the terms of work will be exclusively determined by law), for workers in certain public utility enterprises. Most typical examples include Law 3891/2010 (articles 16–18) for the Hellenic Railways Organisation and Law 3920/2011 (articles 8–12) for the Athens

Urban Transportation. Despite this process that was forcibly imposed on the workers concerned, these enterprises as well are subject to the mandatory provisions of article 31 of Law 4024/2011.

- 838.** In addition to relevant provisions of 2010, a new provision set out that all the young workers in this category will receive only 80 per cent even of the minimum wage. Such contracts of “apprenticeship”, despite the initial commitment of the Government that they must not exceed one year, can now last for 24 months, thus further weakening the due protection of this vulnerable category of workers.
- 839.** The dismissal of workers without severance pay has been further facilitated and the “recycling” of temporary workers, by substantially increasing the probationary period of work in the private sector from two to 12 months, is now provided. The worker is automatically dismissed, without notice and without severance pay (article 18, paragraph 5(a), of Law 3899/2010), in case the employer considers – without an obligation to justify it – that the worker does not match managerial demands.
- 840.** In this regard, the GSEE refers to the abolition of protective clauses in work statutes contained in collective labour agreements that had safeguarded workers against dismissal via fixed-term contracts engineered to expire concurrently with the worker’s retirement date. The abolition of these clauses stipulating that such employment contracts could only be terminated under valid justification, opens the way to unfair dismissals in certain categories of enterprises (mainly banks and public utility enterprises – article 40 of Law 3896/2011).
- 841.** New severe fiscal measures have been introduced with effect on the employment and the remuneration of workers in the public and broader public sector (central Government, municipalities, public companies, local governments, state agencies and other public institutions) including:
- (a) an additional unilateral wage and salary reduction through the establishment of a special solidarity contribution of 2 per cent on regular pay to combat unemployment;
  - (b) a new wage freeze for workers in the public and in the broader public sector – notwithstanding previous severe wage cuts – this time by temporarily freezing career advancement premiums (change of remuneration grid); and
  - (c) the imposition of the new “labour reserve” scheme meaning that “surplus” staff in public enterprises and state agencies will be transferred to a labour reserve, after subjection to a re-evaluation process for job placement in the public or the broader public sector, paid on average 60 per cent of their base wage for one year (articles 37–38 of Law 3896/2010, and articles 33–34 of Law 4024/2011).
- 842.** These measures, including drastic steps with fiscal and tax costs, have been adopted without any effective reinforcement of the labour inspectorate mechanisms despite acute needs. To date, not only trade unions at large but the trade unions representing labour inspectors strongly complain about the labour inspectorate understaffing and emphasize that deficient training on numerous new legislation makes their task even harder.
- 843.** The revisions of both memoranda articulate the commitments undertaken by the Greek Government and illustrate the strong pressure by the country’s creditors, to promote and rapidly implement structural reforms in the labour market by weakening the institutional role of trade unions and their fundamental tool of action, namely the right to conclude binding collective agreements that set protective minimum standards of work (described as “obstacles in the labour market”), such as the NGCA and the national sectoral collective

agreements. Equally visible is the intention to reinforce the managerial prerogative and fully promote labour market flexibility aiming chiefly at reducing labour cost and boosting greater wage flexibility at the firm level.

**844.** The GSEE recalls the following Government commitments:

Further measures will be taken to reform collective bargaining, including the elimination of the automatic extension of sectoral agreements to those not represented in the negotiations ...

- (a) in the *Updated Memorandum of Understanding on Specific Economic Policy Conditionality* of August 6, 2010 that:

... by the end of the 3rd quarter of 2010 and in order to strengthen labour market institutions “Following dialogue with social partners, Government adopts and implements legislation to reform wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work and enhanced flexibility in the management of working time.

Government ensures that firm level agreements take precedence over sectoral agreements which in turn take precedence over occupational agreements. Government removes the provision that allows the Ministry of Labour to extend all sectoral agreements to those not represented in negotiations.

Government amends employment protection legislation to extend the probationary period for new jobs to one year, and to facilitate greater use of temporary contracts and part-time work ...”.

- (b) in the *Updated Memorandum of Economic and Financial Policies* of February 11, that:

- (i) Implementation of labor market reforms is underway. Legislation covering arbitration and collective bargaining was passed in December. Concerning collective bargaining, in order to encourage greater wage flexibility, the government allowed for special firm-level collective agreements. These were subject to some conditions, including the non-binding evaluation by the Labor Inspectorate (gathering representatives of the government, social partners, and local authorities), and consent by sectoral unions in small firms. The government will closely monitor the implementation of this reform and underscore the right of social partners at the firm level to utilize special firm level agreements, as well as reaffirm the nonbinding nature of the Labor Inspectorate assessments. The government is prepared to amend the legislation by end-July if it proves necessary to support greater firm-level wage flexibility.

- (c) in the *Updated Memorandum of Understanding on Specific Economic Policy Conditionality* of February 11, 2011 that:

- (i) Government reforms legislation on fixed-term contracts and on working-time management. Government simplifies the procedure for the creation of firm-level trade unions.

- (ii) By the end of the 3rd quarter of 2011 and in order to promote labour market structural reform Government promotes, monitors and assesses the implementation of the new special firm-level collective agreements. It ensures that there is no formal or effective impediment to these agreements and that they contribute to align wage developments with productivity developments at firm level, thereby promoting competitiveness and creating and preserving jobs. It provides a report on its assessment. Any necessary amendment to the law on sectoral collective bargaining is adopted before end-July 2011.

**845.** This context is characteristically revealed in the NGCA Preamble, where the signatory parties – national social partners – state the following:

The collective negotiations for the current National General Collective Agreement have taken place in a context of irregular circumstances due to the fiscal derailment, which led the country to the activation of the financial aid mechanism IMF-EC-ECB and the implementation of the measures included in the relevant memorandum and the Law 3845/2010.

The impact of the crisis makes more than necessary the protection of workers' and employers' organizations from the traditional interventional role of the State and the strengthening of their role in the formulation of social and economic decisions and policies.

Our Organizations consider the National General Collective Agreement the most decisive means of regulating and formulating policies with mid/macro term perspective for the most prevailing issues such as the exit from the depression, the tackling of the growing unemployment rate, the creation of growth conditions and the preservation of social cohesion.

In the framework of these crucial circumstances for the country, the signatory parties of the NGCA consider that there is a need to support workers' disposable income, especially the one of the lower paid workers, without ignoring the needs of the enterprises, for reasons of preserving social protection, as well as boosting the private economy, which suffocates from the lack of liquidity, that results to its decline and the great rise of unemployment.

- 846.** In this light, the GSEE would further like to emphasize that pressure by employers and their organizations during collective negotiations of 2010 has demonstrably intensified following the entry into force of article 2, paragraph 7, of Law 3845/2010, so as to arrive at wages below the hitherto binding – albeit low – minima set by the relevant agreements.
- 847.** As regards OMED, the GSEE observes that article 14 of Law 3899/2010 abolishes each party's previous obligation to accept the mediator's proposal before exercising its right to unilaterally have recourse to arbitration and simultaneously restricts the content of the arbitration ruling to the determination of the basic wage. Article 16 of Law 3899/2010 provides for the interruption of the mandate of the existing body of mediators and arbitrators in the beginning of 2011, despite cases pending for the resolution of collective disputes for the conclusion of collective agreements.
- 848.** Additionally the GSEE condemns the explicit reiteration of the Government's commitment to abolish the institution of extending the scope of sectoral collective agreements that were declared as generally binding as having a negative impact on ongoing collective negotiations for the conclusion of dozens of collective agreements that expired in the beginning of 2010 – particularly sectoral agreements – which cover and protect thousands of workers. The majority of these collective negotiations led to the conclusion of collective agreements covering the year 2010, with great difficulty and delay at the end of 2010 or at the beginning of 2011, while many of them are still pending. For example, the collective bargaining of the national sectoral collective agreements of 2010 to determine terms of pay and work for the banking sector is still pending; for workers in the tourism sector negotiations were concluded in August 2010; for workers in the metal sector in October 2010; for workers in the petroleum products, refineries and liquefied gas industry in December 2010; for workers in the commerce sector in April 2011; and for medical sales representatives in June 2011.
- 849.** Furthermore, according to data by OMED, there were currently ten cases for the year 2010 and 17 cases for 2011 pending in the stage of mediation, and ten cases pending in the stage of arbitration for the year 2011.
- 850.** As already mentioned, a key issue causing delay in the collective bargaining process and the conclusion of collective agreements, is the duration of the binding force of the collective agreement. According to the legislation in force, the clauses of a collective agreement have an immediate and binding effect and remain in force for a period of six months after the expiration or the denunciation of the collective agreement. On expiry of this period of six months, the existing terms of work (included in the collective

agreements) continue to apply as terms of the individual employment contract, until its termination or amendment. It is, therefore, obvious that the employers' bargaining position is unduly reinforced by the delay in completing collective negotiations and concluding the collective agreement, since after the expiration of the six-month period not only can they press substantially for a bargaining from a zero point but they can also now legitimately obtain different and unequal terms of pay and work for the new workers they are about to hire.

- 851.** It should also be noted that in the case of collective bargaining for the conclusion of maritime collective agreements, under the combined impact of the austerity measures and the drive to reduce or freeze wages, the subsequent disruption and delay of the collective bargaining process was unduly severe resulting in an excessive reinforcement on the employers' (shipowners) side and leaving no option to the Pan-Hellenic Seamen's Federation (PNO) but strike action. The legitimate and fully justified collective action of the PNO were right away repressed by the Greek Government that imposed a civil mobilization order valid until further notice (i.e. for an indefinite period) applicable to crews employed on coastal passenger vessels: a total prohibition of the right to strike. For this illegal practice, the PNO and the International Transport Workers' Federation (ITF) have submitted a complaint to the Committee on Freedom of Association, fully supported by the GSEE (Case No. 2838).
- 852.** The complainant alleges that, in the third review of Greece's adjustment programme, the European Commission criticized the Government for not doing enough to eliminate sectoral agreements and to replace them by firm-level contracts. This fixation by the European Commission and the International Monetary Fund (IMF), among others, to determine by law the level of bargaining in Greece goes directly against the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, whereby the determination of the bargaining level should essentially be left to the discretion of the parties and not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.
- 853.** The scope, the effect and the wider implications of the State's intervention in the collective bargaining system and the collective agreements should be appraised in conjunction with the dire impact of the economic policy implemented in Greece. This policy compounds the dire effect of deficiencies that existed in the Greek labour market before the crisis such as widespread precariousness in the labour market, the considerable volume of unregistered and/or flexible work and the steadily increasing unemployment that debilitate workers vis-à-vis the crisis and its effects.
- 854.** The main pillars of the economic policy implemented in Greece since October 2009 following the outbreak of the country's public debt crisis are based on consecutive rounds of austerity and tax measures, which have led to the erosion of living standards of Greek workers and pensioners in the public and private sector. Hence, the combined effect of the measures magnifies the detrimental effects of legislative interventions in the labour market and further consolidates the disempowerment of workers and pensioners. The dramatic reduction in workers' and pensioners' income coupled with the excess burden of taxation (direct and indirect) has caused a sharp fall in purchasing power, in consumption and in the living standards of wage earners and pensioners, thus making them particularly vulnerable to conditions of labour market deregulation and unprecedented recession. These conditions understandably induce involuntary acceptance of reduced working rights and/or excessively flexible job positions such as reduced term work by rotation.
- 855.** As the Greek economy goes through the third year of recession, the process of internal devaluation, which is now well under way, has not reached its goals, notably Greece's return to the markets in 2012, despite the painful sacrifices of workers and pensioners.

Deep recession has prompted a strong divergence in per capita income levels in Greece (falling back to 2000 levels) from the average of the 15 most advanced EU countries, in the purchasing power of the average wage (regressing to 2001–02 levels), in the unemployment rate (falling back to the levels it was in the 1960s) and in domestic demand (back to 2003 levels). At the same time, in 2010–11, the Greek economy experienced a divergence of 9 per cent from the average of the 15 most advanced EU countries. Convergence rates were reduced in 2009 from 84.5 per cent of the EU–15 average to 75.9 per cent in 2011. This manifests a regression of real convergence by one decade, namely back to 2001 levels.

- 856.** In fact, the programme has trapped Greece in a vicious circle where austerity generates recession, followed by more austerity, new taxes and deeper recession that strangles prospects of economic growth, stifles job creation and tests social cohesion. This self-defeating shock therapy has failed to put Greece's finances on a sustainable route or stabilize the Eurozone. It has damaged every indicator of the economy at huge human and social cost.
- 857.** Swamped in recession, EL.STAT (Hellenic Statistical Authority) figures show that the economy shrank by 7.3 per cent in the second quarter of 2011 exceeding all projections. The Labour Institute (INE) of the GSEE indicates that the spectacular fall (-16.4 per cent) in domestic demand in the period 2009–11 has led to a dramatic GDP reduction and to an explosive increase in unemployment. Moreover, the cumulative GDP reduction amounts to 10.2 per cent in the three-year period 2009–11. In the long term the fall in output is the biggest in the post-war period.
- 858.** In the period 2010–11, the reduction in private consumption has reached 11 per cent. The volume of private consumption is expected to continue to shrink in 2012 (-2.2 per cent according to the European Commission forecasts) while real consumption will regress to 2004 levels.
- 859.** The doubling of the unemployment rate for the period 2009–11 combined with the salary reductions for civil servants have caused a fall in real wages of 11.5 per cent in the whole economy and 9.2 per cent in the private sector for the period 2010–11. In addition, the combination of income reduction and unemployment increase has led a large part of working families and households with debt obligations to bankruptcy. The inability to pay back their loans would lead many households to a loss of their property rights.
- 860.** The INE/GSEE further shows that the rate of unemployment has doubled in the three-year period between 2009–11 registering a 95 per cent increase in the number of the unemployed between March 2008 and March 2011. The unemployment rate of 17.6 per cent in July 2011 is forecast to reach 18 per cent by the end of 2011 with real unemployment at 22–23 per cent. Youth unemployment is at 43.2 per cent with one out of two young people unemployed. Among women, a historically high rate of 20.3 per cent compared to male unemployment of 13.8 per cent indicates that austerity has also widened the gender pay gap. Greece is actually pushed back to the levels of the 1960s. For the first time in the post-war period Greece faces an employment crash: the number of the unemployed exceeds that of the economically active population.
- 861.** On the other hand, the sharp increase in unemployment drains vital resources from social security funds, thus making their sustainability uncertain in the future. According to estimates of the main Social Security Fund (IKA), the salaries of insured workers will fall by 6 per cent. This reduction will cause further losses in 2011 (€700 million just for IKA) and taking into account another 1 million uninsured and undeclared workers, pension funds will suffer an additional loss of €5 billion.

- 862.** The above data indicate that Greek workers have entered a long period of social and economic degradation, which, coupled with a decline in their living standards, will mainly hit low- and middle-income groups and lead to the marginalization of the most vulnerable social groups, particularly the long-term unemployed and pensioners. Most recent economic data show an increase in poverty rates and inequality levels as the 2010 income levels of 5 per cent of the population are pushed below the 2009 poverty line and added up on the top of the already poor 20 per cent of Greeks.
- 863.** Consequently, it is in the light of these developments that one should assess the extent, the impact and the wider implications of State intervention in the system of collective bargaining and collective labour agreements taking into account the growing precariousness in the labour market and the persistent rise in unemployment. The decline in workers' standard of living and the economic and social regression of Greece are not accompanied for the time being by any visible prospect for economic recovery and improvement. The Greek economy has entered a process of disinvestment and shrinking productive structures rendering its workforce obsolete.
- 864.** The measures in force mentioned above which aim at the abolition of the universal protective minimum standards set out in the NGCA and in the national sectoral collective agreements, attest to the interference of the State in collective autonomy, in free collective negotiations, in the binding force and the content of the collective agreements (through the drastic restriction of the content of the arbitration ruling), as well as the sum of measures of permanent character exposed above.
- 865.** Furthermore, the State intervenes in the content of the collective agreements, by undertaking an international obligation for the adoption of measures to freeze wages in the *private sector* of the economy: an obligation with no straightforward and quantifiable causal relationship to resolving the country's fiscal problem. Thus:
- (a) the obligation of the Greek Government to take all appropriate and adequate measures to promote and protect effectively the process of free collective bargaining and its results, as manifested in the content of collective agreements and in particular those that relate to minimum standards of work, stands violated;
  - (b) the obligation of the Greek State to take all the necessary and adequate measures to ensure the free exercise of the right to organize, is violated, because the imposed measures:
    - have a serious impact and damage the GSEE's trade union action and function, that is primarily realized through the conclusion of the NGCA and the implementation of its provisions, which determine the universal minimum standards of protection of all workers in the Greek territory, resulting further in the reduction of the protection level and in the erosion of labour rights of workers it represents;
    - have a serious impact and damage the most important trade union action and function of sectoral federations affiliated to the GSEE, that is primarily realized through the conclusion of the national sectoral collective agreements and the binding implementation of their provisions, which determine the uniform minimum standards of protection of all workers in the same sector, resulting further in the reduction of the protection level and in the erosion of labour rights of workers whom these organizations represent;



- influence negatively the intention of workers to join and be members of trade unions, while the bargaining power and the role of trade unions to protect and promote workers’ economic, labour and social security rights is seriously weakened;
- (c) the fundamental principle of the national, European and international legal order that establishes the “social acquis” is violated in practice with permanent and extensive restrictions imposed on the collective autonomy and freedom of association, especially through the abolition of the fundamental protective “favourability principle”.

Greece has been effectively turned into a “laboratory” to conduct hazardous social experiments that in all likelihood will be transferred to other countries in Europe, which are or will be caught in financial difficulty with urgent credit needs.

- 866.** The immediate perceptible objective explicitly stated in the initial and updated memoranda is the reduction of nominal wages in the private sector by at least 20 per cent until 2013 in order to restore the competitiveness of Greek products by internal devaluation. The long-term goal is to fully disrupt the wage-setting system that existed before the crisis and implies the disempowerment of the trade unions and their institutional support.
- 867.** The new unacceptable and harmful measures intensify the deconstruction of labour institutions and rights. The measures in question allow worker representation by groups composed of non-democratically elected people who are subject to employers’ influence, abolish the fundamental protective principle of favourability and establish the prevalence of firm-level contracts with less favourable terms over sectoral collective agreements. They eliminate the institution of extending the scope of collective labour agreements and intervene – beyond the drastic reduction in wages and salaries – by legislation to fully abolish collective labour agreements and to implement a uniform pay scale in public utility enterprises of the broader public sector where collective agreements are universally applicable and where collective bargaining is now explicitly prohibited to set pay increases. Furthermore, they introduce the objectionable concept of “labour reserves” that conceals unfair collective dismissal for thousands of workers in the public and the broader public sector.
- 868.** All the above measures will uproot the existing wage-setting system, decimate wages and dilute workers’ rights. The abrupt and sharp private sector wage decline effected by weakening free collective bargaining and abolishing collective labour agreements that set out uniform minimum terms of employment and pay cannot address the competitiveness problem of the Greek economy or combat unemployment. On the contrary, any new regulation along the same lines will further squeeze household budgets and deepen recession. Such regulation not only does not help the Greek economy, but pushes Greece into deeper recession. It also undermines fundamental democratic institutions and weakens trade union organizations and social partners at a time when a government priority should be to seek, now more than ever, cooperation and dialogue between all parties so as to achieve a minimum social consensus and ensure social cohesion.
- 869.** Greece’s commitments to its international creditors cannot sufficiently and soundly justify the permanent and extensive restriction of fundamental rights that are enshrined in the Greek Constitution and in international Conventions, which are binding for any country that ratifies a Convention and set out the minimum protective universal standards of work in the global community. The invocation of the memoranda on the implementation of the international loan mechanism cannot in any way legitimize the elimination of minimum protection of work.

- 870.** The GSEE emphasizes that it is fully aware of the seriousness of the country's financial situation, but it considers that any exit policy, to be effective, must be drawn up and implemented in consideration of the fundamental values and human rights that integrally and interdependently include social rights. In this context, any measure or mechanism of "economic governance" such as the international loan mechanism of the Greek economy must vitally include social clauses obligatory to the countries that implement it, while the mechanism supervising implementation must provide for the participation of officials with competence in employment, social affairs and equal opportunities, as well as fundamental rights.
- 871.** The GSEE stresses that this new evidence: (i) attests to the ongoing grave and permanent violation of the above core ILO Conventions as the direct result of consecutive measures adopted and continuously renewed by the Greek Government; (ii) substantiates the harmful impact of these measures on the exercise of the organization's lawful rights and activities that detrimentally affects its functioning and status as a trade union; and (iii) corroborates the disempowerment of its members. For these and all the above reasons, the measures in question should be immediately withdrawn.
- 872.** In its communication dated 16 July 2012, the GSEE submits new allegations in relation to Law 4046/2012 on the "Approval of the Plans for Credit Facilitation Agreements between the European Financial Stability Facility (EFSF), the Hellenic Republic and the Bank of Greece, the Draft Memorandum of Understanding between the Hellenic Republic, the European Commission and the Bank of Greece and other urgent provisions for reduction of public debt and recovery of the national economy" endorsed by the Greek Parliament on 12 February 2012. Among the annexes of the law in question, the text of the new (second) Memorandum of Economic and Financial Policies sets out the numerous commitments undertaken by the Greek Government including a fresh round of austerity and new permanent measures that further disintegrate fundamental labour rights and industrial relations institutions.
- 873.** The impact of these measures is devastating for collective labour institutions, freedom of association, social dialogue as well as the principle of independent social partnership. These new permanent measures will irreversibly and harmfully compound the effect of standing measures as regards fundamental rights of freedom of association, free collective bargaining and their proper exercise since they demolish almost every aspect of the collective bargaining system. Once more, as the case is in Greece since May 2010 when the country entered the conditionality of the IMF-EU-ECB loan mechanism, disproportionate and inadequate measures are adopted without examining other calibrated and more suitable alternatives and wholly disregarding the agreement reached by the national social partners on 3 February 2012 to respect the agreed minimum standards of work included in the NGCA for the years 2010-12. (The complainant attaches a letter of agreement dated 3 February 2012 signed by the GSEE, the Hellenic Federation of Enterprises (SEV), the Hellenic Confederation of Professionals, Craftsmen and Merchants (GSEVEE) and the National Confederation of Greek Commerce (ESEE).)
- 874.** Under unprecedented pressure and intimidation by the Troika, the Government of Greece undertook to abolish the NGCA itself and has explicitly legislated to decrease the wage rates in the NGCA and replace them with a statutory minimum wage after July 2012, despite the abovementioned agreement.
- 875.** According to the Greek statistics authority, EL.STAT, unemployment reached 21 per cent in December 2011 with the number of jobless Greeks exceeding 1 million people. In the 15-24 age group unemployment is at 51.1 per cent, meaning that one out of two young workers is without a job. In the 25-34 age group unemployment is at 21 per cent. Among women, it is at a historically high 24.5 per cent against 18.3 per cent for men, suggesting

that austerity also widens the gender gap. Nearly 30 per cent of the population has shifted below the poverty line.

**876.** In this context, the new measures bring a 32 per cent cut to not only the minimum wage, but any kind of pay provided in collective agreements for young workers from 15 to 25 years of age – and a 22 per cent cut to the minimum wage for all workers over 25. The unemployment benefit, one of the lowest in the EU and with a shorter duration, was reduced well below sustenance levels in the actual Greek economy by 22 per cent to €361 per month as it was indexed to the minimum wage despite the rising cost of living. At the same time the suppression of the protective “after-effect” framework of the collective agreements will pull wages down by 40 per cent as individual contracts after their expiry or denunciation will automatically revert to the base wage/salary floor while a series of benefits/allowances connected to the conditions of each work/profession are abolished. In the public sector, cuts range from -25 per cent to -40 per cent. A further 150,000 job losses are expected in the already depleted public sector along with more cuts to public services including health, social welfare and education.

**877.** To conclude, the new austerity package under the evocation of competitiveness not only deprives workers from minimum protective standards further demolishing industrial relations, but attempts to impose on Greek society a level of devastation that no person could accept.

### ***Violation of the national general collective agreement***

**878.** The GSEE raises the following additional measures that have been taken in violation of freedom of association and collective bargaining rights:

- *Freeze of the minimum daily/monthly wage* in collective agreements until the rate of unemployment falls below 10 per cent. This restriction is of indefinite duration, as the negative employment trends are not forecast to change under the continuing contraction of the economy.
- *Suspension of indefinite duration of the clauses of the NGCA related to the seniority* (years of service), which are directly linked to the rate of the minimum daily/monthly wage as well as to the rate of the social security contributions for both the worker and the employer. This unprecedented interference by the State to unilaterally modify the outcome of national social dialogue as well as outcomes of collective bargaining set out by the NGCA, not only demolishes the unanimously agreed protective minimum standards of work, but also pushes huge groups of the working population below the poverty threshold as social security contributions and taxes are included in the gross amount of the daily/monthly wage. Furthermore, the reduction of the minimum wage erodes a series of minimum social security benefits, such as those related to unemployment, sickness, old age, family, maternity, invalidity, etc.

### ***Violation of all collective agreements in force***

**879.** Further and cumulatively to all the measures previously imposed by the intervention of the State in the process and the content of free collective bargaining at all levels (national, sectoral, professional, enterprise), the GSEE alleges that the Government now imposes fresh measures directly interfering: (a) in the content of individual contracts affected by the scope of collective agreements (thus, legitimizing the unilateral harmful modification in pay and in conditions of work imposed by employers on workers); and (b) in the content of future collective agreements, by pre-defining the field of the collective bargaining to the benefit once more of the employer. Specifically the changes include:

- *The enforcement of a maximum duration to collective agreements up to three years, regardless of the agreement by the signatory parties as regards duration and/or the application of the collective agreement.*
- *The mandatory expiry of collective agreements already in place, despite the fact that many of the existing collective agreements were concluded and implemented during this period by the signatory parties in full awareness of the situation.*
- Simultaneous multiple intervention in any protective rule that remained in force after last year's interventions with regard to the binding effect (direct and after-effect) of the collective agreements:
  - (i) *intervention in the period of the direct binding effect, in case of expiry and renegotiation of the preceding collective agreement: the legislation hitherto in force provided for a maximum period of six months, during which the preceding collective agreement preserved its binding force, as a means to protect, in the framework of fair and in bona fide collective negotiations, the standards for pay and conditions of work included in the previous collective agreement (the so-called "grace" period). This time period is now critically reduced to three months;*
  - (ii) *concurrent intervention in the content of the expired collective agreements along with their compulsory expiry introduced by law: the legislation hitherto in force stipulated that on the expiry of the six-month period the conditions of work set by the collective agreement shall continue to apply until the termination or amendment of individual employment contracts, as a means to protect workers (covered by the scope of the expired collective agreement) from unilateral and illegal modification of their previous working conditions (the so-called "after-effect"). According to the new provisions, if a new collective agreement is not reached in the reduced three-month period, remuneration will revert directly to the base wage. Allowances for seniority, child, education, and hazardous professions will continue to apply, until replaced by those specified in a new collective agreement or in new or amended *individual* contracts. This particular provision violates another key protective labour principle set out in article 7, paragraph 2, of Law 1876/1990, whereby any terms of individual contracts at variance with the clauses of a collective agreement prevail in case they provide workers with greater protection. Given the adverse impact of all the measures imposed hitherto on the conclusion of new collective agreements – in particular sectoral and professional collective agreements – this provision implies the direct abolition of a series of minimum allowances related to the nature of work such as allowances for hazardous, arduous, intense and specially responsible work, to the status of the worker (marital, parental, single parent) and to professional and/or educational qualifications;*
  - (iii) *suspension of collective agreement clauses that configure seniority (years of service/work) which are directly linked to the daily/monthly wage rates as well as to the social security contribution rate for both the worker and the employer, considered by the Troika objectionable because they "provide for automatic wage increases". With Circular No. 4601/304 of 12 March 2012 the Ministry extends this restriction, not only to clauses related to the years of service, but also to *any clause* (i.e. promotion after evaluation process) that could be directly or indirectly connected to the rate of the minimum daily/monthly wage; and*
  - (iv) *elimination of clauses of "tenure" of individual contracts, which allowed dismissal only on justified grounds, and automatic conversion of such contracts of definite duration into contracts of indefinite duration for which standard lay-*

off procedures apply. Despite the fact that the memoranda refer to clauses of “tenure” related to contracts expiring upon age limit or retirement and usually included in collective agreements, the Act goes beyond these definitions and stipulates that any clause of “tenure”, explicit or implied, is abolished, thus leading to the abolition of any kind of stronger protection against dismissal.

### ***Violation of the right to have access to an effective mechanism to resolve collective disputes***

- 880.** The GSEE further maintains that a new radical change is introduced in the procedures and in the content of mediation and arbitration services provided by OMED which drastically curtails workers’ right of access to an effective and fair resolution process for collective disputes when negotiating collective agreements. Together with a far-reaching weakening of the mediation process, the right of workers – and employers – of independent recourse to arbitration for the resolution of collective disputes related to collective agreements is abolished. Requests for arbitration are allowed “only if both parties consent”.
- 881.** The scope of the arbitration award is restricted only to the base monthly/daily wage by an explicit prohibition to that effect imposed on arbitrators while “economic and financial considerations must be taken into account alongside legal considerations” excluding social criteria. The Act goes beyond the measures in the memoranda, as it further stipulates: (a) that the arbitrator – when and if a case is taken to arbitration – is obliged to adapt his/her decision to the need to reduce unit labour cost of about 15 per cent during the programme period as well as the competitiveness gap; (b) the arbitrator is not allowed to include in the arbitration award the “retainability clause” of the other issues of the preceding collective agreement; and (c) all the cases pending in the arbitration stage at the time Law 4046/2012 was published (14 February 2012) are compulsorily closed/archived, in sharp contrast with previous legislation which covered the entire procedure and recognized the right of both parties to have independent recourse to arbitration in case one of the parties opposed the procedure of mediation. *All* arbitration awards delivered during 2011 by the independent arbitrators of the new elected OMED’s arbitrators body had included the “retainability clause” justifying this decision with reference to the Greek Constitution.
- 882.** At the same time: (i) the obligation of bona fide attendance in the previous stage of mediation has already been lifted with Law 3899/2010 by suppressing the obligation to accept the mediator’s proposal before resorting to arbitration; and (ii) employers will have no interest in seeking mediation or arbitration since the above provisions ease the denunciation of the collective agreement which was hitherto binding. Employers’ bona fide participation in a new round of collective bargaining is discouraged as they can opt to stall negotiations until the expiry of the three-month “grace period” of the binding force of the collective agreement, with a view to capitalizing on the depletion of wages and the elimination of workers’ rights by law.

### ***The case of the Workers’ Social Fund (OEE) and the Workers’ Housing Organization (OEK)***

- 883.** On top of all the other provisions imposed so far eradicating almost all essential aspects of effective trade union action to protect workers’ rights, new provisions dismantle two autonomous organizations crucial to trade union social work, funding, and workers’ housing. These measures hit at the very heart of the existence of trade unions and the services they provide to workers and infringe the NGCA.

- 884.** As requested by the Troika, by an explicit provision in the new memoranda, the Government is closing down the OEK and the (OEE–Ergatiki Estia). According to the relevant Troika memorandum they fall in the category of “non-priority social expenditures” and “small earmarked funds” which should be closed down by “legislation enacted with a transition period not to exceed six months”.
- 885.** Among other unnecessarily painful cuts this particular request raises serious questions and has caused indignation as both bodies provide an indispensable social function and do not burden the state budget. The OEK and the OEE are funded by workers’ and employers’ contributions. Their mandate is directly linked to vital parameters of living such as housing, familial welfare, cultural and recreational activities for workers. Their activities have a highly developmental impact as they concern important sectors of the real economy such as tourism and construction. Both organizations are governed transparently by an administrative board where workers and employers are equitably represented and are supervised by the Ministry of Labour and Social Security that also appoints the chairperson of the board.
- 886.** The contribution rate to these two organizations set by free collective bargaining constitutes a core element of the NGCA and has never been questioned by any of the contracting parties. The abolishment of the two organizations thus also explicitly denotes a blatant interference by the State in the NGCA.
- 887.** The (OEE–Ergatiki Estia) has provided since 1937 vital social services to workers and their families including childcare services, summer camps for children, recreational and cultural services, sports, libraries, etc. The operation of the OEE, through the implementation of its statutory objective to support collective organization and action has also secured minimum finances for trade unions as a part of OEE resources, determined by objective and fixed criteria, which are allocated to support minimum operating needs of trade unions in their work. The OEE is also the main source of OMED financing, enabling the organization to preserve its autonomy vis-à-vis the State in providing independent mediation and arbitration services for the resolution of collective disputes. This aspect also raises serious questions, given the imposed measures on the disempowerment of the mediation and arbitration procedure. Contributions to the OEE until now were collected by the IKA–ETAM together with other workers’ and employers’ contributions but were not paid in full to the OEE, which delivered vital social services despite reduced resources.
- 888.** The abolition of the OEE will have a disastrous impact on the operation of trade unions as the wholly indispensable staff they employ face dismissal. The GSEE further refers to the important social services, such as nurseries and recreational programmes, which will be closed down as a result.
- 889.** Similarly the OEK has catered to workers’ housing needs and provided affordable first homes, favourable loan terms, repairs to old housing units, as well as first home rent subsidies for low-income workers since 1954. Since its foundation the OEK has constructed about 50,000 homes across Greece and accommodated or provided housing assistance to more than 700,000 families. Over the last decade it has subsidized 80,000 housing loans mainly to low-income workers and provided rent subsidies of €1.13 billion to low-income workers. The closure of the OEK will have disastrous and harmful effects for workers and their families: 120,000 families will be deprived of vital rent subsidies that provide relief to working people under critical current conditions of steeply deteriorating living standards; 10,000 loans per year granted for purchasing or repairing a house will be terminated; construction programmes in progress are suspended; 1,600 poor families will see their hopes to own a home evaporate over the next few months. All loans disbursed from the OEK’s capital reserves and debts due to the organization from already allocated houses which translate into a total amount of

€1.2 billion remain in abeyance. The payment of interest rate subsidies for bank loans also remains in abeyance. Some 83,000 loans have been granted in total, raising concern as to how beneficiaries will repay these loans when the OEK stops paying interest rate subsidies.

- 890.** The GSEE expresses its indignation at the fact that in a period where the social state is being demolished and nearly 30 per cent of the population has shifted below the poverty line, the services of two crucial organizations are abolished through their “downgrade” by the memoranda as “non-priority social expenditures”. This decision reveals an overt hostility towards trade unions starting with the GSEE as it will effectively impede trade union work, delegitimize social work by trade unions and contest the autonomy of trade unions to determine the management of worker contributions.

## **Social dialogue**

- 891.** The GSEE underlines that, since the signing of the first memorandum in May 2010, gradually and deplorably social dialogue is being demolished and replaced by authoritarian unilateralism that renders the role of the national social partners redundant. In addition to the matters already raised, the GSEE highlights that the decision to proceed unilaterally to legislation in full disdain of the social partners was predated and predetermined with the Government already committed to do so regardless of the outcome of the social dialogue. Both the draft wording of the memorandum and its final wording reveal the value the Troika ascribes to the social partners. In the first instance, it states that if social dialogue is “unsuccessful in identifying concrete solutions by end-February”, the Government will take legislative measures in the urgent public interest and, in the second instance, that social dialogue “fell short of expectations” justifying the intervention. Moreover, Law 4046/2012, describes provisions on labour market structural reforms as “complete rules of law with direct effect” implying their immediate applicability. In this light, passing references to “social dialogue” in the relevant texts is pretextual and misleading, since the measures in question are already adopted and will be directly implemented.
- 892.** These measures unequivocally expose the repeated non-compliance by the Government with the request of the Committee on the Application of Standards in June 2011 to intensify efforts so as to “undertake full and frank dialogue with the social partners to review the impact of the austerity measures taken or envisaged with a view to ensuring that the provisions of Convention No. 98 are fully taken into account in future action”. The GSEE emphasizes that in the current circumstances prevailing in Greece that most sorely test social cohesion, the demolition of social dialogue is inefficient, undemocratic and ultimately dangerous.

## **B. The Government’s replies**

- 893.** In its communication dated 16 May 2011, the Government indicates that it is confident that the legislative measures taken in 2010 do not violate the workers’ fundamental rights as they are stipulated in Conventions Nos 87, 98 and 154.

### ***I. The Greek financial crisis and the legislative measures taken for the regulation of industrial relations in order to support the Greek economy***

- 894.** Despite the euphoria created by the economic globalization during the 1990s and more specifically the one created among the Member States of the EU by the monetary union and the creation of the Eurozone through the introduction of the euro in 2001, the international financial crisis of 2007–08 was very threatening. It has created recession

conditions, increased unemployment and threatened the stability and quality of industrial relations in the whole world as well as the Eurozone area.

**895.** In 2009, Greece entered a period of severe financial crisis. The main characteristic of the crisis is the extremely high deficit which in 2009 was 13.6 per cent of GDP and the public debt was over 115 per cent of GDP, while the cost of public borrowing became so excessive that the country faced severe pressures inhibiting its ability to receive a loan. During the first months of 2010, the country was faced with serious financial problems, which cannot be resolved easily.

**896.** To this end, a financial support mechanism was developed at European level between February and April 2010, in order to avoid the hazard. The solution to the crisis was the recourse to the international support mechanism through an international loan. The loan to Greece amounts to €110 billion, €80 billion provided from bilateral loans by the EU Member States and €30 billion from the IMF. It was provided for that this loan would be granted in instalments, while the first instalment of €30 billion would be granted within 2010. The terms of the loan agreement between Greece and the European Commission, the European Central Bank and the IMF were accompanied by a programme of fiscal measures and other economic policy objectives aiming at the recovery of the Greek economy. The loan conditions were stipulated in the memoranda attached to it and ratified by article 1 of Law 3845/2010. The programme for the reduction in public expenses and the enhancement of the competitiveness of the Greek economy were linked with the terms of the disbursement of the loan while articles 2, 3, 4 and 5 included the necessary structural and fiscal arrangements.

**897.** The terms of the memoranda have the following objectives:

- (a) the elimination of the root causes of the debt crisis that Greece is facing, by means of implementing adequate measures and policies restoring the fiscal stability, so that the State might stop spending more than it collects;
- (b) the improvement of the competitiveness of the Greek economy, so that the country might stop importing more than it exports;
- (c) the creation of conditions for a sustainable public debt management, so that the Greek Government might continue to finance its borrowing needs through the financial markets, which the memoranda, through their overall planning, are helping it to return to; and
- (d) the restructuring of the national social security and financial system, which threatens the sustainability of the Greek economy.

**898.** Taking into account the above, the fiscal restrictions and the flexibility of industrial relations were considered as necessary in order to support the Greek economy as well as the sustainability and competitiveness of enterprises; objectives which are pursued by taking measures for the balanced safeguarding of workers' rights as well. These measures taken by the Greek Government include the restructuring of the legislation on wages and the wage policy.

## **II. Measures of the Greek Government to tackle the economic crisis**

**899.** Within the first quarter of 2010, the Greek Government attempted to deal with its economic crisis caused by the high public debt, by reducing public expenditure and improving the effective collection of public revenue. In order to reduce public debt the



Government, inter alia, reduced the wages of workers in the whole public sector in order to achieve the immediate and absolutely necessary reduction of fiscal expenditure. The measures taken in the first quarter of 2010 have not proven to be adequate to tackle the national economic crisis. The loan facility agreement introduced further systematic measures for the recovery of the Greek economy. These measures are fiscal, aiming at the immediate reduction of public expenses and the improvement of public revenue collection, and structural, aiming, inter alia, at the sustainability and competitiveness of Greek enterprises in general and the fight against unemployment. The measures taken by the Greek Government are the following:

*First: General and uniform reduction of wage labour costs in the whole public sector* for all civil servants employed in public services and for all workers bound by a dependent working relationship employed in all public services and all kinds of public undertakings. These measures have been taken by virtue of Law 3833/2010, Law 3845/2010 and Law 3899/2010.

*Second: General and uniform restriction on the increase in wages by means of collective agreements or arbitration awards for the employees in all kinds of legal entities in the public sector* (all civil servants and workers bound by a dependent working relationship who are employed in all public services and public undertakings). These measures have been taken by virtue of Law 3833/2010 and Law 3899/2010.

*Third: Measures for the reduction of the labour cost and the increase in flexibility of industrial relations.* The objective of these measures, taken by virtue of article 2 of Law 3845/2010, Law 3846/2010, article 74 of Law 3863/2010, and articles 13 and 17 of Law 3899/2010, was to strengthen the sustainability and competitiveness of the enterprises, in order to maintain employment and this in turn will help to revive the national economy. These measures are considered not to reduce the extent of legal protection of workers' interests, and not to affect the core of fundamental workers' rights within the framework of the principles of the welfare state and international and European law.

*Fourth: Structural rescue measures for the social security system.* The objective of the measures taken by virtue of Law 3863/2010 was to safeguard the sustainability of social insurance funds and included redesigning of the pension benefits and of the preconditions for the securing of pension rights.

### **III. General assessment of the impact of the Greek financial crisis on the fundamental trade union rights and the freedom of collective bargaining**

**900.** The Government emphasizes that the new legislation did not violate the minimum standards on freedom of association and the protection of the right to organize. No restrictions or prohibitions have been introduced concerning the freedom of collective bargaining in the private sector and this right has not been violated. Regarding the public sector, any legislative restrictions introduced were dictated by the financial crisis Greece is faced with, with an apparent duration up to 2012–13.

**901.** However, during the whole period of the economic crisis, the Greek Government continues to strongly support the full and continuous implementation of trade union rights, the dialogue among the social partners as well as between the social partners and the Government, and the freedom of collective bargaining, which constitute essential factors for the safeguarding of social cohesion in order to exit from the financial crisis.

## Freedom of collective bargaining in the Greek national law

- 902.** The Government first emphasizes that freedom of association and trade union action, as well as collective bargaining freedom, are protected by the Greek Constitution, the specific national legislation and the international labour Conventions Nos 87, 98 and 154, which have been ratified by law and prevail over any contrary legal provision, in accordance with article 28 of the Constitution, as well as by Law 1264/1982. The Greek Constitution establishes general protection for freedom of association and specific protection for the freedom of trade union action and the freedom of collective bargaining. Within the framework of these constitutional rules, freedom of association is regulated by Law 1264/1982, whereas freedom of collective bargaining is regulated by Law 1876/1990 for all workers bound by a dependent working relationship in the public and the private sector and by Law 2738/1999 for the civil servants of the public administration.
- 903.** The freedom of collective bargaining as regulated by Law 1876/1990, is mainly characterized by the statutory enforceability of collective negotiations, i.e. the immediate and binding application of the terms of the collective agreements within their scope of application; the principle of favourability for workers applies, thus the terms of the individual contract of employment prevail over collective agreements and the law, only if they are more favourable for the employee. The same favourability principle applies also in case of concurrent implementation of the NGCA with any other collective agreement, or in case of concurrent implementation of sector and enterprise-level collective agreement. Furthermore, it is provided for that the minimum monthly and daily wage are regulated by the NGCA, which will prevail over other, possibly less favourable, terms of occupational, sectoral and enterprise collective agreements. Finally, as has been mentioned above, the binding character of the more favourable terms of sectoral collective agreements ranks higher in hierarchy than possibly less favourable terms of enterprise collective agreements. These regulations are consistent with the international guarantees regarding the exercise of trade union rights and the freedom of collective bargaining. The Government recalls in this regard that *Article 2, paragraph 7, of Law 3845/2010*, establishes, on the basis of Law 1876/1990, the ability to determine working terms by means of occupational, enterprise-level and sectoral collective agreements; it is possible that the said agreements might deviate from each other as well as from the NGCA. According to the Government, this regulation in no way affects the freedom of collective bargaining, since every collective agreement has statutory enforceability among those represented by the contracting parties. This regulation does not contravene the representation principle for the binding effect of a collective agreement and stresses the possibility of deviation among the different types of collective agreements.
- 904.** In view of the current financial crisis, the Greek Government considered that the system of collective agreements, provided for by Law 1876/1990, must promote decentralization of collective bargaining through a new type of enterprise-level collective agreement, aiming mainly at the support of the sustainability and competitiveness of the enterprises which are faced with serious economic pressure. To this end, the Government has brought to the attention of the social partners its proposal and, following the dialogue conducted among them from October to November 2010, a new form of enterprise labour collective agreement was established under article 13 of Law 3899/2010, the special enterprise labour collective agreement. The said labour collective agreement may include terms relating to the organization of working time, the number of jobs to be preserved, the conditions of part-time work, shift part-time work, suspension of work, and any other terms of implementation, including its duration and the wages, which may deviate from sector collective agreements but not from the NGCA. These provisions strengthen the freedom of collective bargaining and do not constitute an impediment to this freedom or an intervention by the State.

- 905.** Pursuant to article 2, paragraph 6, of Law 3845/2010, the Government explains that the minimum wage provided for by the NGCA does not apply, as an exemption, to unemployed persons under 24 years of age, who conclude apprenticeship contracts of up to 12 months' duration and their minimum remuneration is rather set at 80 per cent. Under article 74, paragraphs 8 and 9, of Law 3863/2010, the remuneration offered to the new entrants to the labour market up to the age of 25, is set, as an exemption, at 84 per cent of that provided by the NGCA, while the remuneration offered to young persons aged between 15 and 18, who conclude yearly apprenticeship contracts, is set at 70 per cent of that provided by the NGCA. These minimum wage rates paid to young persons below the age of 25 have been stipulated by the law in connection with the subsidization of the social insurance cost and the purpose of the specific labour contracts, taking into account the lack of professional experience of young persons and the need to offer incentives for its acquisition. In addition, the minimum wage is expressed as minimum wage rates determined by the NGCA, therefore, such minimum wages follow the dynamics, as defined by means of free collective bargaining on national level. Finally, the said regulations are necessary for the restructuring of the labour market and the fight against youth unemployment and they are imperative, irrespective of the current financial crisis, which renders them urgent. These provisions constitute necessary employment policy measures to combat youth unemployment and do not contravene the freedom of collective bargaining nor infringe fundamental trade union rights.
- 906.** The Government further confirms that, *pursuant to article 1, paragraph 5, and article 3, paragraph 1*, of Law 3833/2010, and article 3, paragraph 4, of Law 3845/2010, the wages paid to persons employed in the public sector have been reduced and it has been prohibited to reach an agreement upon a clause relating to the increase in workers' wages based on terms of labour collective agreements.
- 907.** The Government emphasizes that this legislative policy is unprecedented in Greece, as is the financial crisis affecting the country's economy. The complexity of economic and political issues, the political consultations with international organizations (EU and IMF) and the EU Member States and, generally, the conditions, under which the European support mechanism for the Greek economy has been formulated, did not allow prior consultation with trade union organizations. The urgent need to reduce public spending in the year 2010 included the need for reduction of the labour cost for the civil servants and all persons bound by private contracts of employment in all kinds of public undertakings. This need would not be promptly and harmoniously achieved through collective bargaining that would result in revision of the total of collective agreements.
- 908.** The Greek Government according to the Constitution is obliged to consolidate social peace and protect the general interest, by means of planning and coordinating the economic activity of the country (article 106, paragraph 1) and guaranteeing the rights of the human being as an individual and as a member of society aiming at achieving social progress and national solidarity, while in cases where it can restrict these rights, it has to respect the principle of proportionality (article 25, paragraph 1). Paragraph 2 of article 106 provides that "Private economic initiative shall not be permitted to develop at the expense of freedom and human dignity or to the detriment of the national economy". The Government considers that Conventions Nos 98 and 154 cannot be considered as violated in this context as the national economic crisis is exceptional and grave.
- 909.** The compatibility of these measures with the domestic legal order and especially with the Constitution, as well as the international Conventions for the protection of civil and social rights, has been decided upon by the Supreme Administrative Court of the country, the Council of State, following the complaints of individual employees and trade unions, the GSEE included. The Council of State was due to deliver its decision very soon, since the hearing was held in November 2010. However, the proposal of the judge upon the

constitutional compatibility of the legislative measures reducing wages of the employees in the public sector recommended that the measures taken: "... are justified by overriding reasons of public interest pertaining to the reduction of the excessive fiscal deficit and the external debt of the country, in view of the obligations undertaken by the country within the framework of the Economic and Monetary Union. Besides, in order to achieve the objective of fiscal adjustment, legislative measures have already been adopted concerning not only restraint of expenditure in general but also measures to increase fiscal revenues ...". The Council also stressed that "... measures for fiscal adjustment have been taken in order to deal with the acute fiscal crisis which had made impossible the serving of the loan needs of the country through the international markets ..." and that "... the provisions at issue, through which intervention on property rights has taken place, in principle, ensure an equitable balance between the requirements of the general interest and the need for protection of the fundamental human rights ...".

**910.** For the private sector, the Government stresses that there are no legislative regulations on the reduction of earnings defined by the terms of collective agreements, nor are there other restrictions on the freedom of collective bargaining. The proper application of the freedom of collective bargaining in the private sector is manifested by the NGCA, signed on 15 July 2010 for the years 2010, 2011 and 2012, for the following reasons:

- The collective bargaining was long and has been affected by the emerging dramatic dimensions of the national financial crisis in the last quarter of the year 2009, which peaked from January 2010 onwards.
- Consultations have been conducted under the shadow of Law 3833/2010, which provided for reductions in wages paid to civil servants and to persons employed across the whole public sector and under the shadow of Law 3845/2010.
- The said collective agreement has been concluded, taking into account the financial developments and the economic measures that gave rise to sharp political disputes and caused long lasting workers' strikes and the strong reaction of employers' organizations against disturbance of industrial peace and the future of enterprises.

**911.** The terms of the NGCA did not provide for an increase in wages for the year 2010, but regulated limited increases at the level of the average euro-inflation of the previous year for the period from 1 July 2011 to 31 June 2012 and from 1 July 2012 onwards. The NGCA 2010–12 had a strong political impact upon the terms of all the collective agreements in the country that were concluded in 2010.

**912.** As regards the resolution of the National Commission for Human Rights, the Government indicates that the national law may stipulate and amend the social rights, including the workers' rights, either by improvements or restrictions, according to the evolving socio-political conditions, observing always the core of the international law, including the ILO standards. The Government considers that the resolution does not demonstrate a violation of human rights due to the severity of the measures taken, but rather expresses reasonable concern for the risks created by the economic crisis and emphasizes the need to apply the principle of proportionality.

**913.** In conclusion, the Government remains firmly committed, under the current economic crisis, to the protection of human rights and considers that trade union rights and freedom of collective bargaining covered by ILO Conventions support social cohesion and are absolutely necessary in times of crisis along with the policies of the Government. The exit from the financial crisis has imposed the need to take structural measures in the field of industrial relations. The measures taken were proportional to the severity of the unprecedented economic crisis and, according to the opinion of the Government, do not

constitute violations of ILO Conventions, nor do they infringe fundamental workers' rights that are guaranteed by other international Conventions.

- 914.** The Government considers in particular that the views of the GSEE have raised unjustified concern and represent political estimations concerning the possible discouragement of workers from becoming members of trade union organizations. The Government considers that the freedom of the trade union movement as well as its political role must be developed freely in the social environment without legislative and administrative interventions by the Government. This fact does not exclude the Government from taking policy measures on minimum wage standards and labour conditions, in general.
- 915.** Moreover, the supplementary regulation on minimum wage standards by the State through measures for the fight against youth unemployment is an expression of the obligation of the State to protect public interest and does not contest the role of collective agreements. And finally, the legislative measures on labour conditions supporting the sustainability and competitiveness of enterprises are perfectly compatible with the freedom of collective bargaining as well as the terms of the collective agreements.
- 916.** In its communication dated 16 May 2012, the Government emphasizes that its main obligation pursuant to the terms of the memoranda was the restructuring of the labour market with the aim of improving the competitiveness of the Greek economy. Respective measures have been included in the Medium-term Fiscal Strategy Framework 2012–15 as well as in the new loan agreement of 9 February 2012. The terms of the memoranda have been taken into account in the ILO High-level Mission report of 23 November 2011, which acknowledged the challenges faced by Greece and the impact of the Troika policies on the implementation of the international labour standards. The Government highlights that, according to the report: “The High-level Mission has been left with the impression that unprecedented changes are being introduced in the Greek labour market institutions in a manner which seems disconnected from Greek realities, thereby weakening, among other things, the impact and real effects of reforms”. The acute economic crisis in Greece is constantly worsening and, according to the figures of February 2012, has reached €368 billion, i.e. in excess of 169 per cent of the GDP. The largest portion of the debt expires in the next few years, thus the fulfilment of direct cash needs is imperative. The said debt evolution resulted from the high interest rates on loans that prevailed and continue to prevail on the world market. The debt restructuring imposed, inter alia, a drastic reduction in public spending and, at the same time, drastic reductions in the wages both in the public and private sectors, thus creating conditions of increasing economic downturn. The need to address these issues led to more drastic measures for the restructuring of the labour market. To a large extent, these measures were the prerequisite steps for the conclusion of the loan agreement of 9 February 2012.
- 917.** In this context, the Government stresses its firm commitment to the observance of international labour standards and states that the financial crisis and the international economic environment reduce the quality of labour rights, redefining the concept of core labour rights in an economically developed country, which will necessarily reduce the quality of life of its citizens. The loan conditions of the Government and their association with the drastic restructuring of the institutional framework of industrial relations constitutes an unprecedented challenge for Greece and the international community, a fact that has been noted both by the High-level Mission and the Committee of Experts. The international organizations that are offering financial aid to rescue the Greek economy have chosen to implement measures that will enhance labour market flexibility. The said measures are considered as the most appropriate method to enhance the competitiveness of the Greek economy.

**918.** The abovementioned policy of industrial relations flexibility, aiming at the strengthening of the competitiveness of the Greek economy, was planned by the Troika in the first memorandum. Its last updated version led to the adoption of legislative measures in October 2011 and, more specifically, to article 37 of Law 4024/2011. Then, the second memorandum of 12 February 2012 followed, pursuant to which additional legislative measures have been taken with a view to restructuring the collective bargaining system, under article 1, paragraph 6, of Law 4046/2012, through the adoption of Cabinet Decree (PYS) No. 6/12. According to the ILO High-level Mission report, which refers to the measures of the period from May 2010 up to and including October 2011, all these measures have the following characteristics, as regards their planning and content:

- (a) their planning is the result of the Troika economic policy choices to which the Greek Government had committed, with a view to strengthening the competitiveness of the Greek economy;
- (b) the Greek Government exercised its influence to maintain the core workers' rights; and
- (c) the social partners had no time left to develop common positions for the required structural changes, while on issues for which they directly presented common positions, such as maintaining the extension of collective agreements and the principle of favourability, they were against the crucial choices of the Troika.

**919.** All the above led to important political changes from November 2011 up to the parliamentary elections of 6 May 2012, a fact that did not allow the Government to submit a comprehensive opinion on the issues raised by the GSEE in the supplementary information to its complaint. Moreover, the socio-political scepticism concerning the effectiveness of the abovementioned legislative measures has been reflected in the outcome of these parliamentary elections, thus increasing the uncertainty regarding labour market restructuring in Greece.

**920.** In light of the above, the Government considers that the new and further intervention in the system of collective bargaining, in the formulation and the content of labour collective agreements and the existing collective labour dispute resolution system through OMED have come about due to the dire economic situation of the country. The measures taken include a partial restructuring of the free collective bargaining system, so that the core of trade union freedom and of collective bargaining might not be affected.

**921.** As regards special firm-level agreements, which were only in force for the time period between the entry into force of Law 3899/2010 (17 December 2010) and of the new Law 4024/2011 (27 October 2011), 14 special firm-level collective agreements were submitted to the competent authorities. The temporary establishment of a new level of bargaining and of a respective type of collective arrangement, required the prior exhaustive bargaining among the competent and adequate workers' and employers' trade union organizations, in accordance with the relevant provisions of Law 1876/1990. In this way, the freedom of bargaining of the parties concerned was protected and State intervention in the bargaining process was prevented, strengthening, thus, collective autonomy.

**922.** Law 4024/2011 not only repeals paragraph 5A of article 13 of Law 3899/2010, but, for the first time, provides that, in case there is no trade union organization in the company, an "association of persons", that already exists or is established for this purpose by at least three-fifths of the company's workers, is competent to conclude a firm-level labour collective agreement. Certainly, the employer may also conclude (firm-level) labour collective agreements irrespective of the number of workers employed in his/her enterprise. This association of persons is established, as explicitly provided for by the

legislator, irrespective of the total number of the company's workers and its duration is not subject to any time limitation.

- 923.** Also, as it is pointed out in the relative interpretative circular of the Ministry of Labour (Ref. No. 819/50/164-2012), the dialogue procedure is facilitated through the associations of persons, given that the workers and employers at enterprise level are provided with the ability to conclude firm-level collective labour agreements, mainly in enterprises in which, to date, no trade union organization operated. Firm-level collective labour agreements are concluded, in order of priority, by trade union organizations of the enterprise that cover the workers or, in the case that there is no trade union organization in the enterprise, by an association of persons, and, in any event, irrespective of the category, the post or the specialty of the workers in the enterprise, and if these are lacking, by the respective primary sectoral organizations and the employer. Priority is given to the negotiations between the employer and the representatives of the workers at enterprise level, and, in the case that they cannot be carried out at that level, the law provides for the carrying out of negotiations at sectoral level. At least three-fifths of the workers in the enterprise are required to draw up an instrument of establishment. Hence, the minimum number of workers required for the establishment of an association of workers is five. The instrument of establishment must refer to the aim, and at least two of the workers' representatives, who are determined following an election that is carried out by a three-member election committee.
- 924.** In accordance with paragraph 4 of article 14 of Law 1264/1982, the termination of a working relationship on the grounds of lawful trade union action is null and void also for the members of associations of persons. Finally, in accordance with the provisions of article 20, the associations of persons may exercise their right to strike following a decision, by means of a secret vote, of the majority of the workers in an undertaking, enterprise, public service, public body corporate or local self-government agency. By means of this clarification, the associations of persons that acquire the right to collective bargaining, as it was previously mentioned, although they already had the right to call a strike, now constitute particular trade union organizations. Therefore, no issue of competition or limitation of trade union rights is raised; on the contrary, these are extended with a view to enhancing the decentralization of collective bargaining. Given the above, the trade union movement, taking into account the potential to decentralize collective bargaining as provided for by the law, as well as the full protection of the freedom of association, has the ability to make policy which will cover the complexity and recruit the total of trade union organizations.
- 925.** The reinforcement of the decentralization of collective bargaining was included in the measures suggested by the Troika; measures that aim to strengthen the competitiveness of the Greek economy, a matter that was of direct interest to the Greek Government as well. Towards this direction, it was deemed essential by the Troika to suspend the extension of collective labour agreements and the principle of favourability in case of concurrent implementation of sectoral and firm-level collective agreements throughout the period that the Medium-term Fiscal Strategy Framework is in force, despite the fact that their retention had been an issue of political agreement of the social partners. However, the crucial economic circumstances led to the taking of the following measures, the effectiveness of which is under continuous monitoring.
- 926.** By virtue of article 37, paragraph 5, of Law 4024/2011, in case of concurrent implementation of sectoral and firm-level labour collective agreements, the firm-level labour collective agreement prevails and it should not contain working terms that are less favourable for the workers than the ones included in the NGCA. In this way, collective bargaining at firm level, which is obviously conducted under the special financial conditions of every individual enterprise, regulates the pay and working conditions without

going below the (minimum) wage and safety level provided for at the national level. More specifically, as far as the extension of collective labour regulations is concerned, article 11 of Law 1876/1990 provides that sectoral and occupational collective agreements that are binding on 51 per cent of the workers in that sector or occupation are extended, by decision of the Minister of Labour and Social Security, following a request made by the trade union or employers' organization bound by it. The purpose of this regulation is to create conditions of healthy competition among businesses as regards labour cost, provided that the non-directly bound businesses could be members of the bound employers' organization. The provision of paragraph 6 of article 37 of Law 4024/2011 suspends the application of the above provisions with a view to strengthening the flexibility of industrial relations, without any commitments for the workers and the employers that are not directly bound by the terms of labour collective agreements.

- 927.** Regarding the “associations of persons” and more specifically their connection with the working-time arrangement system, the Government indicates that article 42, paragraph 6, of Law 3986/2011 provides:

The working-time arrangement, mentioned in paragraphs 1 and 2, is determined through firm-level labour collective agreements or through an agreement between the employer and the trade union of the enterprise, concerning the members of the latter, or between the employer and the works council or between the employer and an association of persons. The association of persons, mentioned in the previous section, may be formed by at least 25 per cent of the personnel of an enterprise that employs more than 20 workers or by 15 per cent of the personnel, provided that the total number of workers is 20 persons at the most.

- 928.** Law 1264/1982 also recognizes associations of persons as trade union organizations under certain conditions. Consequently, not only is the employer's obligation to enter into negotiations with the trade union organization of the enterprise not repealed, but also the works council or the association of persons is given the possibility to enter into negotiations with the employer, with a view to reaching an agreement.

- 929.** Firm-level collective labour agreements are submitted to the competent labour inspectorate, according to article 5 of Law 1576/1990. It also has to be noted that a different system of working-time arrangements, depending on the sector or the undertaking, may be determined through firm-level or sector-level labour collective agreements. The changes adopted by virtue of article 42 of Law 3986/2011 aimed mainly at making the arrangement system more flexible and effective to enhance enterprise competitiveness without waiving the collective bargaining process which characterizes it and *is* necessary for its implementation. The Government affirms that these provisions meet the needs of enterprises to adapt to market conditions, with the aim of creating or maintaining jobs as well as of improving their productivity and competitiveness. Moreover, they enhance economic competitiveness and employment promotion and contribute to the creation of a stable and secure working environment for the workers.

- 930.** The Government further refers to article 14 of Law 3899/2010, whereby articles 14–17 of Law 1876/1990 concerning the collective dispute resolution system through mediation and arbitration have been amended. The main amendments to the collective disputes resolution system are the following: (a) unilateral appeal to arbitration by any party, after the submission of the mediation proposal, as long as both parties presented themselves and participated in the mediation procedure; (b) setting up of a three-member arbitration committee, at the request of any party; (c) determination of judicial assessment process of arbitration awards validity; (d) restriction of the arbitrator's jurisdiction in the determination of the minimum salary and wage only; and (e) assessment of the collective disputes resolution system after three years by the social partners involved in the drawing up of the NGCA and submission of proposals on its maintenance, amendment or abolition.



- 931.** More specifically, the suspension of the right to strike for ten days was also provided for by article 16, paragraph 2, of Law 1876/1990 with a view to creating an environment of understanding among the social partners also during the arbitration process when the arbitrator seeks the drawing up of a labour collective agreement and issues an arbitration award only in case of failure of such drawing up. It is obvious that since the jurisdiction of the arbitrator is restricted to determining the minimum salary, while the rest of the questions are open to bargaining, the suspension of the right to strike concerns any strike for the determination of the minimum salary and wage.
- 932.** The same Act provides for the strengthening of the social partners' role in the administration and operation of OMED, more specifically, their participation in the selection of mediators and arbitrators is enhanced. It is clearly provided for that, for the selection of OMED's board of directors and the renewal of their tenure, the unanimous decision of the social partners' representatives is required. The organization is now administered by a seven-member board of directors consisting of six social partners' representatives (GSEE, SBB, GSEVEE, ESEE) and a chairperson, who is elected unanimously by them.
- 933.** By virtue of the recent legislative regulation of article 1, paragraph 6, of Law 4046/2012, which was made more specific by Cabinet Decree No. 6/12, the following changes to the collective disputes resolution system have occurred: (a) the recourse to arbitration requires only the mutual agreement between employers and workers and, therefore, the right to unilateral recourse is abolished both for the employers and the workers; and (b) it is confirmed that the jurisdiction of the arbitrator is restricted to determining the minimum salary and wage through express reference to the exclusion of an arbitration award clause that keeps in force previous collective regulations. These amendments confirm the State's determination to strengthen the voluntary character of the collective labour dispute resolution system, in accordance with the provisions of Convention No. 154, as well as to enhance direct collective bargaining among the social partners.
- 934.** In addition to the above, the following new regulations have been added to the collective agreements system: (a) the maximum validity period of labour collective agreements has been determined by law at three years and collective agreements of indefinite duration have been abolished; (b) the duration of collective agreements' after-effect has been restricted from six to three months following their expiry or termination; (c) the collective agreements' terms which are maintained after the period of their after-effect as terms of individual employment contracts have been restricted to the basic salary and the seniority, child, university degree and hazardous work benefits; (d) the employer's right to unilaterally adjust the terms of individual employment contracts has been established in accordance with the above in point (c); and (e) the minimum salary and wage provided for by the NGCA of 2010 have been reduced by 22 per cent and the employer has the right to unilaterally adjust the individual employment contract.
- 935.** As regards the allegations concerning apprenticeship contracts, article 43 of Law 3986/2011 provides that: "young persons aged 18–25, in order to acquire work experience, may conclude employment contracts with employers of up to 24 months' duration. Their remuneration will be up to 20 per cent less than the one provided for a newly employed person of the same specialty without previous experience, as it is provided for by the applicable labour collective agreement (occupational, sectoral, firm-level or national general). They will be insured with the IKA–ETAM for pension, health care services (provisions in kind) and against occupational hazards and the insurance contributions will be paid by the employer to the IKA–ETAM." The Government stresses that these agreements do not constitute apprenticeship contracts, but rather are fixed-term contracts of employment to acquire work experience.

- 936.** The Government refers to the OECD *Jobs for Youth* report, which advocates the facilitation of young persons' entrance into the labour market, by introducing a lower salary. According to the report, the solutions proposed for the elimination of obstacles concerning the demand side as well as the reduction of costs incurred by the recruitment of young persons without experience, are either the introduction of a lower salary or the reduction of non-wage costs for new employees, whose remuneration is close to the minimum salary.
- 937.** The Government points out that an employers' subsidy programme is being implemented by the Manpower Employment Organization, according to which the insurance contributions for pension, health-care services and occupational hazards of young persons aged 16–24 are 100 per cent subsidized. Based on the latest data given by the Hellenic Labour Inspection Body (SEPE) (beginning of January 2012) and the contracts submitted to the labour inspectorate services in the whole country, the number of fixed-term employment contracts of young persons aged 18–25 for the acquisition of work experience amounts to 181.
- 938.** As regards the new pay scale in the public sector, the Government informs that Chapter Two of Law 4024/2011 conforms with the following principles: (a) the principle of fiscal adjustment, the observance of which has become a matter of crucial importance for the economic and political survival of the country in an international environment; (b) the principle of smooth functioning of the administration which is directly associated with the hierarchical classification of the levels of responsibility in the exercise of competences as well as with its performance measurement system; (c) the principle of equality and meritocracy as well as party neutrality, safeguarded through the connection between, on the one hand, the hierarchy according to the servant's grade and wage promotion and, on the other, his/her typical and essential skills and performance which is assessed on equal terms for every individual, taking into account the graded individual level of responsibility as well as the specific working conditions under which the employees exercise their duties with the aim to achieving the smooth functioning of the service or the body to which they belong; and (d) the principle of ensuring the highest possible standard of employees' performance with a view to serving the public interest.
- 939.** More specifically, the provisions of Law 4024/2011 introduce an assessment system based mainly on the objectified performance measurement – both of the organizational unit of the service or body concerned as well as of the employee who works in the said service or body – depending, on the one hand, on the level of classification of the unit concerned and, on the other, on the employee's grade. It is also directly associated with the system of promotion as far as their grades and salaries are concerned. Thus, the achievement of performance goals higher than the intended ones becomes the key requirement for the employees to be entitled to assessment, promotion and selection for posts of responsibility at any administrative level. Moreover, the provisions of the same Act provide for the association of promotions as far as grades are concerned with the system of emoluments and the wage promotion of the employees.
- 940.** Moreover, it has to be clarified that within the framework of a more rationalized operation of the public administration, by virtue of article 35 of Law 4024/2011, the restructuring of public services and the subsequent reallocation of permanent posts has been provided for. The said regulation aims at controlling the current organizational structure of public services, in order to identify units with clearly limited scope of activities or units with surplus staff or lacking staff in relation to the competences exercised by the unit, and then proceeding to the necessary reallocation of posts.

941. Furthermore, the provisions of articles 33 and 34 of Law 4024/2011 on the *ipso jure* dismissal, the pre-retirement suspension of work and the labour reserve constitute special provisions established under specific fiscal conditions. With these measures the country observes its commitments to the lenders–partners, in order to reduce public expenditure. Fundamental labour rights are ensured, mainly protecting those workers who are close to retirement and mitigating the effects of employment contracts termination for those workers who are put on labour reserve. For the said workers the insurance coverage, both of the employer and the worker, is borne by the employer for a period of 12 months, while they are paid 60 per cent of their basic salary with no obligation to provide work.
942. The major benefit of these provisions is the fact that immediate organizational, operational and fiscal results are being guaranteed with the aim of achieving the strategic goal of reducing the state as well as public expenditure without causing upheaval in the lives of the personnel working in the public administration and the broader public sector.
943. The Government further emphasizes that the provisions of the new pay scale aim at further rationalizing, simplifying and mitigating the differences of the pay system that applied until now to the public administration personnel. More specifically, the new pay scale:
- Incorporates to the basic salary part of the benefits paid until today.
  - Associates the grade of the employee with the respective salary. The employees are classified in four categories, depending on their typical skills (university education, technical education, secondary education and compulsory education). The employees are promoted to the grades provided for each category. A basic salary corresponds to each grade. In addition to the basic salary, for each grade there are pay steps.
  - Repeals all kind of benefits, provisions, compensations and determines the benefits that will be paid, provided that certain terms and conditions for their payment are met.
  - Repeals the family benefit (spouse) while increases the benefit for the employee's dependent children.
  - Increases the benefit provided for a post of responsibility.
  - Provides for the incentive for the achievement of goals, an amount granted to the employees who achieve 90 per cent of the goals set for the service they work in.
  - Provides for a maximum limit of 20 hours monthly as overtime work, which is paid.
  - Sets limits on compensation paid to collective bodies.
  - Defines the salary cuts in all cases of an employee's absence.
  - Sets the remuneration paid to employees who are seconded or transferred from their services.
  - Defines the way the disparities in earnings resulting from the implementation of the new act will be paid.
  - Finally, it provides that, from 1 November 2011, the personnel bound by contracts of indefinite period under private law, that is employed in the public sector, the local self-government agencies of A' and B' degree and in other public bodies corporate and paid under labour collective agreements or arbitration awards or joint Ministerial Decisions until the second chapter of Law 4024/2011 was put in force, will be paid according to the provisions of the said law.

- 944.** As regards the allegations on the new income and tax measures changing for the worse the scales for the calculation of income tax, the tax on capital and value added tax rates, the Government points out that article 38, paragraph 2, of Law 4024/2011, replaced article 9 of the Income Tax Scale. A new progressive income tax scale with fewer brackets and a tax-free threshold at €5,000 has been established. This change was due to the crucial fiscal situation of the country in order to be able to address the problem and to implement the medium-term fiscal support programme with immediate results. Moreover, the tax-free threshold at €5,000 corresponds to the average level of thresholds in the EU. Moreover, a tax reduction by 10 per cent for various expenses, such as medical and hospital expenses, expenses for school support, accrued interests on loans, rent paid for the primary residence of a taxpayer and his/her family, expenses for the energy upgrade of a property, contributions paid to social insurance funds, life insurance policies, etc. has been established.
- 945.** Article 42 of Law 4024/2011 regulates the way the special solidarity contribution, mentioned in article 29 of Law 3986/2011, will be withheld by the employers from the employees' monthly salary and by the insurance funds from the insured persons' monthly main pension amount, so that the special solidarity contribution may be collected in advance in instalments (every month), as is the case with wage tax which is withheld monthly. This regulation applies on salaried income earned from 1 January 2012 up to 31 December 2014 and aims at tackling the problem of the critical financial situation of the country and facilitating the implementation of the medium-term support mechanism, since it provides immediate results through the immediate collection of money. Furthermore, the Government stresses that an ongoing effort is being made to address extreme cases and find satisfactory solutions in order to serve the citizens within the set fiscal goals.
- 946.** More specifically, as regards the references made in the complaint to employment and unemployment in the country, the Government indicates that the Ministry of Labour and Social Security has taken a series of measures aiming mainly to the maintenance of jobs, the immediate rehabilitation of the unemployed, the facilitation of young persons' integration into the labour market and the support to sectors mainly affected by the crisis, such as tourism.
- 947.** Finally, regarding the reference to Case No. 2838 before the Committee, the Government indicates that it will send a separate reply to the allegations of the International Transport Workers Federation and the Panhellenic Seamen's Federation, thereunder.
- 948.** In light of the above, the positions of the Government can be summarized as follows:
- The legislative measures taken to restructure the labour market and to enhance the flexibility of industrial relations, as well as to decentralize collective bargaining are due to the circumstances of the financial crisis faced by the country.
  - The social, financial and political circumstances that have been created in the country from May 2010 to date have already been taken into account by the ILO High-level Mission, which expressed its concern especially as regards the application of the freedom of collective bargaining and the safeguarding of the workers' rights within the framework of proceedings of dialogue among the social partners; a concern that the Greek Government shares.
- 949.** The continuing financial crisis in Greece has imposed the conclusion of a new loan contract, in February 2012, a fact that led to the taking of additional measures to reinforce labour flexibility as an essential factor for the tackling of the increasing unemployment and the loss of competitiveness of the Greek economy. These measures were intertwined with the terms of the new loan and the chances to develop social dialogue and, above all, to

achieve consent as to their content, were slim, as in May 2010. The Greek financial crisis constitutes a specific expression of the global financial crisis that highlights the need to remain steadily focused on the policies applied in order to tackle it as regards the protection of workers' rights and the creation of conditions for financial growth. In such cases, the planning of adequate policies must be the main concern of both the national and the international community.

### C. The Committee's conclusions

- 950.** *The Committee observes that this complaint concerns numerous violations of trade union and collective bargaining rights imposed within the framework of austerity measures implemented in the context of the international loan mechanism of the Greek economy. In particular, the complainants contest certain articles of the following laws and the incorporated memoranda which they consider systematically dismantle the collective bargaining system in the country, negatively impact on the capacity of the trade union movement to protect its members' interest, provide no security for vulnerable workers, and disregard positions expressed by social dialogue institutions in the country: Laws 3833/2010; 3845/2010; 3863/2010; 3899/2010; 3896/2011; 4024/2011; and 4046/2012.*
- 951.** *The complainants first raise the alarm in respect of wage reductions in the public and broader public sector imposed under Law 3833/2010, in contravention of existing law and collective agreements (7 per cent cut in regular wages and allowances and 30 per cent cut in leave and holiday bonuses). The complainants add that the regular wages of the public sector workers were further cut by 3 per cent by virtue of Law 3845/2010 and further reductions were made, in contravention of collective agreements in force, by replacing the negotiated payment for annual leave and holidays by a very small flat amount. In addition, the introduction of measures that raise the threshold for activating the rules on collective dismissals and reduce severance pay and notice periods were authorized, along with permanent measures that significantly cut pensions. Any collective bargaining to conclude an agreement for an increase in wages was banned until the end of the year. Subsequently, further wage cuts and wage ceilings were imposed in the public sector and there were several interventions by the Government in the voluntary nature of collective bargaining in the railways and urban transport sector. In addition, the GSEE refers to the abolition of protective clauses in collective agreements which had hitherto safeguarded workers against dismissal by means of fixed-term contracts calculated to expire concurrently with the workers' retirement date. According to the GSEE, this has opened the way to unfair dismissals in certain enterprises, such as banks and public utilities. Finally, the GSEE criticizes the imposition of the "labour reserve" which, it alleges, initiates concealed collective dismissals of thousands of workers in the public and the broader public sectors.*
- 952.** *As regards the private sector, the complainants allege that Law 3845/2010 further alters the existing mechanism – the generally binding NGCA – for fixing minimum wages and working conditions applicable to all workers under private law and permits exclusions to be made from the scope of the NGCA for the most vulnerable, such as young workers.*
- 953.** *Moreover, young unemployed persons up to 24 years of age are allegedly exempted from the scope of relevant collective agreements through apprenticeship contracts that provide for extended probationary periods and remuneration at 80 per cent of the minimum basic wage. Subsequently, Law 3863/2010 abolished the general applicability of the mandatory national minimum wage with respect to young workers up to 25 years of age who, if entering the job market for the first time, would be remunerated with 84 per cent of the minimum wage and minors, 15 to 18 years of age, under apprenticeship contracts, would be remunerated at 70 per cent of the minimum wage with reduced social security coverage*

*and be excluded from the protective framework of the NGCA and national legislation as regards working hours, rest periods, paid annual leave and time off for school work.*

- 954.** *These measures were all taken within the framework of the commitments made by the Greek Government as conditionality for the negotiated loans with the international financial aid mechanism. The GSEE especially condemns the commitment of the Government within this context to reform the legal framework for wage bargaining in the private sector, including by eliminating the asymmetry in requesting compulsory arbitration, allowing territorial pacts to set wage growth below sectoral agreements, and adopting measures to ensure that current minimum wages remain fixed in nominal terms for three years. The Updated Memorandum called for further measures to reform collective bargaining, including the elimination of the automatic extension of sectoral agreements.*
- 955.** *The GSEE condemns the new measures taken in Law 4024/2011 which, in its view, consolidates further the deconstruction of an industrial relations system that was working effectively to set minimum standards of work for all workers through collective agreements concluded after free negotiations in the private and the wider public sector. The new measures, among others, abolish the fundamental protective principle of favourability and consolidate the prevalence of less favourable firm-level agreements over the uniform standards of pay and work conditions provided in binding sectoral agreements. They eliminate the extension of sectoral collective agreements and introduce further legislative intervention to fully abolish binding collective labour agreements in force and implement a uniform pay scale in public utility enterprises in the broader public sector. Moreover, collective agreements are now restricted by legislation to a maximum duration of three years; the direct binding effect of agreements are only applicable up to three months after their expiration, at which time remuneration will revert to the base wage; and seniority clauses have been abolished.*
- 956.** *The GSEE also refers to provisions in Law 4024/2011 which overtly interfere in the structure and the operation of trade unions and contravene the right of workers to collective representation, vis-à-vis their employers, by persons that are freely and democratically elected through the extension of the right to negotiate and conclude enterprise level agreements to nebulous non-elected “associations of persons” that do not have a permanent mandate to represent workers on collective issues of work and do not have the trade union rights and protection that lawful elected representatives of workers are entitled to. Moreover, the GSEE contends that this provision abolishes the employer’s obligation to observe the hierarchy of consultation and address the representative enterprise trade union first or in the absence of a firm-level union, address the sectoral trade union that represents affiliated workers in order to agree upon a system of working time organization.*
- 957.** *Finally, the GSEE refers to the ultimate changes to the functioning of OMED which, in its view, obstructs the work and competence of the independent arbitrator. These include the restriction on the scope of awards which are limited to wage increases of the level of European inflation; additional instructions to adapt awards to the need to reduce unit labour cost by 15 per cent; the abolition of the use of retainability clauses on other issues in the agreement; the abolition of single party recourse to arbitration to determine basic wage; and the replacement of the current body of mediators/arbitrators after 30 March 2011.*
- 958.** *By adopting the abovementioned legislation, the complainants conclude that the State not only violates its statutory obligation to respect the collective agreements in force, but essentially intervenes with permanent provisions of law in the free collective bargaining system by setting the minimum wages and working conditions in terms less favourable than*

those provided for by the minimum provisions of the national agreement. The complainants allege that this action directly contradicts the Government's obligation under Conventions Nos 87, 98 and 154. The complainants contend that these measures systematically dismantle an important collective bargaining framework that was established in 1990 as a result of a social pact endorsed by all parties and which was the only national mechanism available for the setting of a mandatory national minimum wage.

- 959.** *The GSEE further points to certain specific situations where the intensified pressure on the collective bargaining framework in the private sector has placed some employers in a stronger position to push clauses in the collective agreement setting a special rate of pay for new employees below the minimum wage set in the national agreement. In one case, the employer has been able to set a sub-minimum wage for “newcomer” pay that is valid for the first eight years of work. The combination of fiscal, tax and broader austerity measures, with the deregulation of the labour market have, according to the complainants, disempowered workers and rendered them more vulnerable to the spillover effect of lay-offs, wage freezes and abolition of the minimum wage. Such measures violate the core of individual and social rights and endanger social peace and cohesion. Any argument of necessity should be balanced with a sense of measure and moderation that is essential to a democratic society that respects human dignity, principles of equity, decent work and collective autonomy.*
- 960.** *The GSEE contends that such measures cannot be justified out of economic necessity as, according to research carried out by the INE, the freeze in wages will diminish the purchasing power of lower wage categories back to the levels of 1984, incapacitating domestic demand. This is further supported by the recognition made by the three representative Greek employers' organizations that “labour costs” are not what is hindering Greek business.*
- 961.** *The GSEE concludes that the Government did not pursue real and substantial social dialogue that could have promoted alternative and more acceptable solutions and proposals that would have borne in mind the social dimension and the long-term effectiveness of the measures to lead the country out of the financial crisis. To the contrary, the Government has further allegedly disregarded the agreement reached by the social partners in February 2012 to respect the agreed minimum standards of work included in the NGCA for 2010–12 and unilaterally imposed a decrease in the minimum wage rate to be replaced with an imposed statutory minimum wage.*
- 962.** *According to the complainants, the Government has gone beyond what might be considered as acceptable limitations in urgent circumstances as these measures were: not imposed for an explicitly defined and limited period of time; are neither proportionate nor adequate; have been adopted without sufficiently examining other well weighed and more appropriate alternatives; provide no perceivable causal relationship between the extent, the strictness and the duration of the imposed restrictions and the pursued aim; and are not accompanied by adequate and concrete safeguards and guarantees that could protect the living standard of workers and reinforce the ability of vulnerable groups in the population to address the combined direct impact of the economic austerity measures with the multiple, spillover and collateral side effects of the economic crisis. In addition, the GSEE stresses that these measures have seriously damaged its trade union action and function, which lies primarily in the conclusion and implementation of the NGCA. The resultant erosion of workers' labour rights has negatively influenced workers' intentions to join and be members of trade unions in a context of such reduced bargaining power.*
- 963.** *Finally, the GSEE maintains that the scope, effect and wider implications of the State's intervention in the collective bargaining system and the collective agreements should be appraised in conjunction with the dire impact of the economic policy implemented in*

*Greece, which only compounds the deficiencies that existed in the Greek labour market before the crisis, such as widespread precariousness, the considerable volume of unregistered and/or flexible work and the steadily increasing unemployment that have debilitated workers faced with the crisis and its effects. The GSEE contends that the programme has trapped Greece in a vicious circle where austerity generates recession, followed by more austerity, new taxes and deeper recession, that strangles prospects of economic growth, stifles job creation and tests social cohesion.*

- 964.** *The Committee takes due note of the substantial information provided by the Government in relation to the Greek financial crisis and the severity of the situation. It observes the Government's statement that, in light of the critical circumstances, it was necessary to resort to the international financial support mechanism through an international loan. The Government points out that the terms of the disbursement of the loan were linked to the programme for the reduction in public expenses and the enhancement of the competitiveness of the Greek economy, including the necessary structural and fiscal arrangements.*
- 965.** *According to the Government, the terms of the memoranda have the following objectives: (a) the elimination of the root causes of debt crisis by means of implementing adequate measures and policies restoring the fiscal stability so that the State might stop spending more than it collects; (b) the improvement of the competitiveness of the Greek economy, so that the country might stop importing more than it exports; (c) the creation of conditions for a sustainable public debt management so that the Government might continue to finance its borrowing needs through the financial markets, which the memoranda, through their overall planning, are helping it to return to; and (d) the restructuring of the national social security and financial system, which threatens the sustainability of the Greek economy.*
- 966.** *As regards the allegation of wage cutting in the public sector, contrary to existing collective agreements, the Committee notes the Government's statement that this was necessary to achieve an immediate reduction of fiscal expenditure. Similarly, the Government indicates that it was necessary to uniformly restrict any increase in wages by means of collective agreements or arbitration awards in the public sector. The Government, stressing the importance it places on full respect for trade union rights, social dialogue and free collective bargaining, essential to the safeguarding of social cohesion, maintains that these measures do not violate the minimum standards on freedom of association and adds that any legislative restrictions introduced were dictated by the financial crisis and had an apparent duration up to 2012–13.*
- 967.** *The Government emphasizes that this legislative policy is unprecedented in Greece, as is the financial crisis affecting the country's economy. The complexity of economic and political issues, the political consultations with international organizations (EU and IMF) and the EU Member States and, generally, the conditions, under which the European support mechanism for the Greek economy has been formulated, did not allow prior consultation with trade union organizations.*
- 968.** *In reply to the concerns raised in relation to public sector pay cuts and the more recent allegations of the introduction of a new pay scale by virtue of Law 4024/2011, the Government informs the Committee that these measures conform to the following principles: (a) the principle of fiscal adjustment, the observance of which has become a matter of crucial importance for the economic and political survival of the country in an international environment; (b) the principle of smooth functioning of the administration which is directly associated with the hierarchical classification of the levels of responsibility in the exercise of competences as well as with its performance measurement system; (c) the principle of equality and meritocracy as well as party neutrality,*



*safeguarded through the connection between, on the one hand, the hierarchy according to the civil servant's grade and wage promotion and, on the other, his/her typical and essential skills and performance which is assessed on equal terms for every individual, taking into account the graded individual level of responsibility, as well as the specific working conditions under which the employees exercise their duties with the aim of achieving the smooth functioning of the service or the body to which they belong; and (d) the principle of ensuring the highest possible standard of employees' performance with a view to serving the public interest.*

- 969.** *Furthermore, as regards the allegations of ipso jure dismissal, pre-retirement suspension of work and the labour reserve, the Government maintains that these constitute special provisions established under specific fiscal conditions under which the country observes its commitments to lenders–partners to reduce public expenditure. The Government states that fundamental labour rights are ensured, mainly by protecting those workers who are close to retirement and mitigating the effects of employment contract termination for those workers who are put on labour reserve. For these workers, the insurance coverage, both of the employer and the worker, is borne by the employer for a period of 12 months, while they are paid 60 per cent of their basic salary with no obligation to provide work.*
- 970.** *According to the Government, the major benefit of these provisions is the fact that immediate organizational, operational and fiscal results are being guaranteed with the aim of achieving the strategic goal of reducing the state as well as public expenditure without causing upheaval in the lives of the personnel working in the public administration and the broader public sector. The Government also refers to a number of other provisions that were introduced to further rationalize, simplify and mitigate the differences that had applied in the pay system for the public administration.*
- 971.** *For the private sector, the Government stresses in its first reply that there are no legislative regulations on the reduction of earnings defined by the terms of collective agreements, nor are there other restrictions on the freedom of collective bargaining.*
- 972.** *As regards more specifically the allegations of interference in free collective bargaining, the Committee notes that the Government and the complainant concur on the situation prevailing prior to the introduction of these measures and the establishment of the favourability principle whereby workers will be covered by the provisions of a collective agreement only where they are more favourable than those contained in an agreement at another level. According to the Government, Law 3845/2010, while permitting deviation in agreements at different levels, would maintain the principle that statutory enforceable agreements remain binding on those represented by the contracting parties.*
- 973.** *More specifically, however, the Committee notes the Government's indication that, in view of the financial crisis, it was necessary to promote decentralization of collective bargaining through a new type of enterprise level collective agreement, aiming mainly at supporting the sustainability and competitiveness of the enterprises which are faced with serious economic pressure. Initially, a new form of enterprise level agreement was approved by the social partners at the end of 2010. At that time, such agreements were allowed to deviate from sectoral or national level agreements only in terms of the organization of working time, the number of jobs to be preserved, the conditions of part-time work, shift part-time work, suspension of work, and any other terms of implementation, including its duration and wages.*
- 974.** *As regards the exemption from the minimum wage provided for unemployed persons under 24 years of age, the Government indicates that Law 3845/2010 sets the minimum remuneration at 84 per cent for new entrants and at 70 per cent for persons aged between 15 and 18 who have concluded yearly apprenticeship contracts. According to the*

*Government, these minimum wage rates have been stipulated by the law in connection with the subsidization of the social insurance cost and the purpose of the specific labour contracts, taking into account the lack of professional experience of young persons and the need to offer incentives for its acquisition. In addition, the minimum wage is still determined as a percentage of the NGCA and, therefore, follows the dynamics as defined by means of free collective bargaining on national level. Finally, the Government stresses that these measures are necessary for the restructuring of the labour market and the fight against youth unemployment and they are imperative, irrespective of the current financial crisis, which renders them urgent. The Government affirms that these provisions constitute necessary employment policy measures to combat youth unemployment and do not contravene the freedom of collective bargaining nor infringe fundamental trade union rights.*

- 975.** *The Committee notes the Government's expression of its firm and continuing commitment, under the current economic crisis, to the protection of human rights. The Government stresses that trade union rights and freedom of collective bargaining covered by ILO Conventions support social cohesion and are absolutely necessary in times of crisis along with the policies of the Government. The exit from the financial crisis has imposed the need to take structural measures in the field of industrial relations and those taken were proportional to the severity of the crisis. The Government maintains that all the measures raised were taken in the interests of fighting youth unemployment and supporting the sustainability and competitiveness of enterprises in a manner that is perfectly compatible with the freedom of collective bargaining as well as the terms of the collective agreements.*
- 976.** *More generally, the Government contests the views of the GSEE concerning the possible discouragement of workers from becoming members of trade union organizations which it considers have raised unjustified concern and represent political estimations.*
- 977.** *As regards the additional measures taken within the framework of the Medium-term Fiscal Strategy Framework 2012–15, as well as in the new loan agreement of 9 February 2012, the Government recalls the recognition of the severity of the situation made in the ILO high-level mission report of 23 November 2011, which acknowledged the challenges faced by Greece and the impact of the troika policies on the implementation of international labour standards. The Government states that the prerequisites for the loan agreement of February 2012 were based on the need for a drastic reduction in public spending and, at the same time, drastic reductions in wages, both in the public and private sectors, thus creating conditions of increasing economic downturn. The need to address these issues led to more drastic measures for the restructuring of the labour market.*
- 978.** *The Government, once again stressing its firm commitment to the observance of international labour standards, observes in its latest reply that the financial crisis and the international economic environment have reduced the quality of labour rights, redefining the concept of core labour rights in an economically developed country, which will necessarily reduce the quality of life of its citizens. The loan conditions and their association with the drastic restructuring of the institutional framework of industrial relations constitutes an unprecedented challenge for Greece and the international community. The international organizations that are offering financial aid to rescue the Greek economy have chosen to implement measures that will enhance labour market flexibility and are considered as the most appropriate method to enhance the competitiveness of the Greek economy. The socio-political scepticism concerning the effectiveness of these measures has been reflected in the outcome of the recent parliamentary elections, thus increasing the uncertainty regarding labour market restructuring in the country.*

- 979.** *The Government considers that new and further intervention in the system of collective bargaining, in the formulation and the content of labour collective agreements and the existing collective labour dispute resolution system through OMED have come about due to the dire economic situation of the country. The measures taken include a partial restructuring of the free collective bargaining system, so as to ensure that the core of trade union freedom and of collective bargaining might not be affected.*
- 980.** *Moreover, as regards decentralization of bargaining given the small number of special firm-level agreements that were submitted to the competent authorities, steps were taken so that, in the event that there is no trade union in the enterprise, an “association of persons” that already exists or is established for this purpose by at least three-fifths of the company’s workers, is competent to conclude a firm-level labour collective agreement. This association of persons is established, as explicitly provided for by the legislator, irrespective of the total number of the company’s workers and its duration is not subject to any time limitation. According to the Government, Law 3986/2011 subsequently enabled associations of persons to be formed by at least 25 per cent of workers in an enterprise that employs more than 20 workers or by 15 per cent in enterprises of less than 20 workers.*
- 981.** *As concerns the statutory protection of such associations, the Government asserts that dismissal for carrying out lawful trade union action is equally null and void as regards the members of associations of persons. In this context, firm-level collective labour agreements are concluded, in order of priority, by trade union organizations of the enterprise that cover the workers or, in the case that there is no trade union organization in the enterprise, by an association of persons and, if these are lacking, by the respective primary sectoral organizations and the employer. Priority is given to the negotiations between the employer and the representatives of the workers at enterprise level and, in the case that they cannot be carried out at that level, the law provides for the carrying out of negotiations at sectoral level. Finally, the associations of persons may exercise the right to strike following a decision, by means of a secret vote, of the majority of the workers in an undertaking, enterprise, public service, public body, corporate or local self-government agency. In this clarified context, associations of persons can now acquire the right to collective bargaining and constitute particular trade union organizations. The Government emphasizes that no issue of competition or limitation of trade union rights is raised, on the contrary, these rights are extended with a view to enhancing the decentralization of collective bargaining. Given the above, the trade union movement, taking into account the potential to decentralize collective bargaining as provided for by the law, as well as the full protection of freedom of association, has the ability to make policy which will cover the complexity of the situation and recruit all trade union organizations.*
- 982.** *The reinforcement of the decentralization of collective bargaining was included in the measures suggested by the troika; measures that aim to strengthen the competitiveness of the Greek economy, a matter that was of direct interest to the Government as well. In this regard, the troika considered it essential that the extension of collective labour agreements and the principle of favourability in the case of concurrent implementation of sectoral and firm-level collective agreements be suspended throughout the period that the Mid-term Fiscal Strategy Framework is in force, despite the fact that their retention had been an issue of political agreement of the social partners.*
- 983.** *As regards OMED, the Government emphasizes that the new measures have strengthened the social partners’ role in its administration and operation and specifically their participation in the selection of mediators and arbitrators. The selection of OMED’s board of directors and the renewal of their tenure requires the unanimous decision of the social partners’ representatives. The organization is now administered by a seven member board*

*of directors consisting of six social partners' representatives and a chairman, who is elected unanimously by them.*

- 984.** *The Government confirms that the more recent amendments to the functioning of OMED include: (a) permitting recourse to arbitration only where both employers and workers agree; and (b) restricting the jurisdiction of the arbitrator to determining the minimum salary and wage by expressly excluding from arbitration awards clauses that keep in force previous collective regulations. These amendments confirm the State's determination to strengthen the voluntary character of the collective labour dispute resolution system, in accordance with the provisions of Convention No. 154, as well as to enhance direct collective bargaining among the social partners.*
- 985.** *In addition, the Government refers to the following new regulations relating to the collective bargaining system: (a) the maximum validity period of collective agreements is set by law at three years and collective agreements of indefinite duration have been abolished; (b) the duration of the after effects of collective agreements has been reduced from six to three months following their expiration or termination; (c) the collective agreements' terms, which are maintained after the period of their after effect as terms of individual employment contracts have been restricted to the basic salary and the seniority, child, university degree and hazardous work benefits; (d) the employer's right to unilaterally adjust the terms of an individual employment contract has been established in accordance with the above in point (c); and (e) the minimum salary and wage provided for by the NGCA of 2010 have been reduced by 22 per cent and the employer has the right to unilaterally adjust the individual employment contract.*
- 986.** *As regards the references made in the complaint to employment and unemployment in the country, the Government indicates that the Ministry of Labour and Social Security has taken a series of measures aimed at maintaining jobs, the immediate rehabilitation of the unemployed, facilitating young persons' integration into the labour market and supporting sectors mainly affected by the crisis, such as tourism.*
- 987.** *The Government summarizes its position by referring to the necessity of enhancing the flexibility of industrial relations and decentralizing collective bargaining due to the circumstances of the financial crisis and indicating that it shares the concerns raised by the ILO high-level mission regarding the application of the freedom of collective bargaining and the safeguarding of workers' rights within a framework of social dialogue. However, the possibility of developing social dialogue and achieving consensus on the terms of the new loan of February 2012 were again slim. The Government concludes that the Greek financial crisis constitutes a specific expression of the global financial crisis that highlights the need to remain steadily focused on the policies applied in order to tackle it as regards the protection of workers' rights and the creation of conditions for financial growth.*
- 988.** *At the outset, the Committee wishes to state that it is deeply aware that the measures giving rise to this complaint have been taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis. The Committee observes that neither party to the complaint has called into question the gravity and urgency of the situation and that this must be duly taken into account as background for its conclusions below.*
- 989.** *The Committee further understands from the parties' references to the conclusions of the high-level mission report that all parties state that they have made important efforts to address these difficulties with the highest consideration for ratified international labour Conventions and most especially for the principles concerning freedom of association and collective bargaining. The Committee wishes to highlight in this regard the language from the NGCA where the signatory parties recognize that "the impact of the crisis makes more*

than necessary the protection of workers' and employers' organizations from the traditional interventional role of the State and the strengthening of their role in the formulation of social and economic decisions and policies". While recognizing the efforts made by the Government and the social partners to tackle these daunting times, the Committee recommends that the Government promote and strengthen the institutional framework for collective bargaining and social dialogue and urges, as a general matter, that permanent and intensive social dialogue be held on all issues raised in the complaint with the aim of developing a comprehensive common vision for labour relations in the country in full conformity with the principles of freedom of association and the effective recognition of collective bargaining and the relevant ratified ILO Conventions. The Committee recalls that possible avenues for constructive engagement can be based in the elaboration of adequate mechanisms for dealing with exceptional economic situations within the framework of the public sector collective bargaining system. [See Case No. 2821 (Canada), 364th Report, para. 378.] The Committee considers that such mechanisms can further be developed for the private sector, in full consultation with the social partners concerned.

990. As regards the successive wage cuts in the public sector, the Committee first wishes to recall that, as a general rule, the exercise of financial powers by the public authorities in a manner that prevents or limits compliance with collective agreements already entered into by public bodies is not consistent with the principle of free collective bargaining. If, however, 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. The Committee observes that in certain previously examined cases it has considered that a three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilization constituted a substantial restriction, and that legislation in question should cease producing effects at the latest at the dates mentioned in the Act, or indeed earlier if the fiscal and economic situation improves. Moreover, it has also considered in some cases that restraints on collective bargaining for three years are too long and that the public authorities should promote free collective bargaining and not prevent the application of freely concluded collective agreements, particularly when these authorities are acting as employers or have assumed responsibility for the application of agreements by countersigning them. [See **Digest of decisions and principles of the Committee on Freedom of Association, 5th edition, 2006**, paras 1034, 1024, 1025, 1026 and 1011.] While the Committee takes due note of the Government's indication that there was little choice as to the necessity of the measures to be taken given their clear identification in the Memoranda accompanying the international financial support mechanism, it considers it essential to the efforts for social peace in the country that consultations take place with the employers' and workers' organizations concerned as a matter of urgency to review these measures with a view to discussing their impact and to agreeing on adequate safeguards for the protection of workers' living standards.
991. As regards the staff reductions in the public service and the instauration of "labour reserves", the Committee observes that its mandate for examining economic rationalization programmes and restructuring processes is limited to matters involving acts of discrimination or interference in trade unions. It does however emphasize the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests and considers in particular that, when a restructuring programme is envisaged, it should be the subject of information and prior consultation with the social partners. Moreover, it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees. Although, and given

*the specific context in this case, it is not within its competence to comment on economic measures which a government may take in difficult times or on the recommendations of the International Monetary Fund, the Committee nevertheless notes that decisions involving dismissal of large numbers of workers should be discussed extensively with the trade union organizations concerned with a view to planning the occupational future of these workers in the light of the country's opportunities [see **Digest**, op. cit., paras 1079, 1081 and 1085]. Observing the Government's acknowledgement that it was not possible to carry out proper consultations prior to the taking of these measures due to the urgency of the situation, the Committee considers that it is of critical importance, given the massive impact that these measures can have, that the Government now engage in constructive dialogue with the workers' and employers' organizations concerned to consider appropriate steps for mitigating the consequences. The Committee wishes to highlight that it also considers such social dialogue can only have a positive impact on the social cohesion in the country, an element which may relieve the downward economic spiral caused by some of these measures. The Committee urges the Government to keep it informed of the steps taken to engage the social partners in in-depth dialogue in this regard.*

- 992.** *The Committee further notes the allegations of specific exclusions from the collective agreements in force made for young persons. It also notes the Government's indication that wages have been reduced for young persons in order to facilitate their entrance into the labour market and tackle youth unemployment (which was slightly above 50 per cent). In addition, the Government refers to a subsidy programme implemented by the Manpower Employment Organization under which the insurance contributions for pension, health-care services and occupational hazards of young persons aged 16–24 are 100 per cent subsidized. Based on data provided by the labour inspectorate as from the beginning of January 2012, the number of fixed-term employment contracts of young persons for the acquisition of work experience amounted to 181.*
- 993.** *The Committee observes that the special wage remuneration for young workers is similar to systems of special job offers that it has examined in the past, which introduce a new set of rules for determining the wages of a particular category of employees under the pretext that they would otherwise face long-term unemployment due to unfamiliarity with the labour market. In accordance with its previous considerations, the Committee trusts that these measures are restricted to a limited period of time and will not restrict the collective bargaining rights of these workers as regards their remuneration for a longer period than that announced by the Government (contracts of up to 12 months' duration). The Committee further trusts that on all other aspects these workers' freedom of association rights are fully guaranteed and requests the Government to review the use and impact of these measures with the workers' and employers' organizations concerned and provide detailed information thereon and to keep it informed of developments.*
- 994.** *As regards the allegations of interference in collective agreements and the system of collective bargaining in both the public and private sector, the Committee notes the numerous matters raised by the GSEE, including the abolition of the favourability principle, the nullification and banning of any future extension of collective agreements, the reduction of the negotiated national minimum wage by 22 per cent and its further freeze until the end of the programme period, the suspension of any clauses providing for wage increases or relating to seniority, the enforcement of a maximum duration for collective agreements of three years and the mandatory expiration of collective agreements in place for 24 months or more or with a residual duration of one year.*
- 995.** *Firstly, the Committee cannot but observe that the long list of issues raised by the complainants demonstrate important and significant interventions in the voluntary nature of collective bargaining and in the principle of the inviolability of freely concluded*

collective agreements. While noting the reasons advanced for the exceptional circumstances in this case, the Committee considers that such repeated and extensive intervention in collective bargaining can destabilize the overall framework for labour relations in the country if the measures are not consistent with the principles of freedom of association and collective bargaining. In this regard, the Committee observes that in a case in which the Government had, on many occasions over the past decade, resorted to statutory limitations on collective bargaining, the Committee had pointed out that repeated recourse to statutory restrictions on collective bargaining could, in the long term, only prove harmful and destabilize labour relations, as it deprived workers of a fundamental right and means of furthering and defending their economic and social interests. Where intervention by the public authorities is essentially for the purpose of ensuring that the negotiating parties subordinate their interests to the national economic policy pursued by the government, irrespective of whether they agree with that policy or not, this is not compatible with the generally accepted principles that workers' and employers' organizations should enjoy the right freely to organize their activities and to formulate their programmes, that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof, and that the law of the land should not be such as to impair or be so applied as to impair the enjoyment of such right. The suspension or derogation by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force. [See *Digest*, *op. cit.*, paras 1000, 1005 and 1008.] While it is not its role to express a view on the soundness of the economic arguments invoked to justify government intervention to restrict collective bargaining, the Committee must recall that measures that might be taken to confront exceptional circumstances ought to be temporary in nature having regard to the severe negative consequences on workers' terms and conditions of employment and their particular impact on vulnerable workers. The Committee asks the Government to provide full information on the evolving impact of these measures on the overall environment and to keep it informed of the efforts made for their duration to be temporary. The Committee expects that all these measures will be the subject of tripartite review without delay and that special focus will be given to the manner of determining the national minimum wage in the future.

- 996.** As regards the reduction to three months for the period of residual effect given to an expired collective agreement, the Committee does not consider this to be a violation of the principles of free collective bargaining but does observe that it comes within an overall context where imposed decentralization and weakening of the broader framework for collective bargaining are likely to leave workers with no minimum safety net for their terms and conditions of work, even beyond the wages issue.
- 997.** In this regard, the Committee notes the recent measures taken to promote special firm-level agreements which shall prevail in case of concurrent implementation of sectoral or occupational agreements. It further observes that, with the annulment of any extension effect of higher-level agreements, the only potential conflict that could arise between collective agreements is in the situation where an employer is actually directly bound by the higher-level agreement due to his or her voluntary membership in the employers' organization concerned. While taking due note of the Government's indication that the abolition of the favourability principle in this context supports collective bargaining at firm level for the regulation of pay and working conditions under the special financial conditions of the individual enterprise, the Committee considers that legislation should not constitute an obstacle for collective bargaining at industry level [see *Digest*, *op. cit.*, para. 990] and signals its concern that the concordance of all the above measures may

severely impede bargaining at a higher level. In any event, the Committee, recalling that meaningful collective bargaining is based on the premise that all represented parties are bound by voluntarily agreed provisions, urges the Government to ensure, as indicated in its reply, the statutory enforceability of every collective agreement among those represented by the contracting parties. The Committee underlines that the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers' and employers' organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98.

**998.** *In respect of the allegations related to the use of association of persons for special firm-level agreements, the Committee recalls that Article 4 of the Convention refers to the encouragement and promotion of the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations. The Committee considers that collective bargaining with representatives of non-unionized workers should only be possible where there are no trade unions at the respective level. In this regard, the Committee recalls that the Collective Agreements Recommendation, 1951 (No. 91), emphasizes the role of workers' organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exists and the Workers' Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), also contain explicit provisions guaranteeing that, where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned. [See **Digest**, op. cit., paras 944 and 946.] The Committee takes due note of the assurances provided by the Government that members of associations of persons will be similarly protected against acts of anti-union discrimination but further observes that the Government does not contend that such associations can be considered to be trade unions with full functions and guarantees of independence. In these circumstances, the Committee is concerned that the granting of collective bargaining rights to such associations may seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process. The Committee considers this all the more so given that the recognition of such associations comes within a context of a radical overhauling of the labour relations system as it was known in the country. The Committee expects that the question of the roles and responsibilities of association of persons will be the subject of a full and comprehensive discussion with the social partners, within the framework of an overall review of the labour relations system, with a view to ensuring that they do not undermine the position of trade unions in relation to collective bargaining.*

**999.** *As regards the suspension of the extension authority of collective agreements more generally, the Committee observes that, while there is no duty to extend agreements from the perspective of freedom of association principles, any extension that might take place should be subject to tripartite analysis of the consequences it would have on the sector to which it is applied [see **Digest**, op. cit., para. 1051]. The Committee trusts that, in their overall discussions of the most appropriate measures to be taken under the current circumstances in respect of the broader framework for collective bargaining, the Government and the social partners will fully consider the various impacts on social and economic policy that may be achieved through extension.*

**1000.** *Finally, the Committee takes note of the numerous allegations related to the modifications to the functioning and constitution of OMED. As regards the amendments to the law which now only permit recourse to binding arbitration when both parties agree, the Committee recognizes that this measure was taken in an effort to align the law and practice with its*



*principles relating to compulsory arbitration and does not consider this measure to be in violation of freedom of association principles. As regards the additional restrictions on the arbitrator's mandate, the Committee considers as a general rule that arbitrators should be free to make a determination on a voluntarily requested arbitration without government interference. Observing that these restrictions were introduced within the framework of the proposed stabilization programme, the Committee expects that these restrictions will be regularly reviewed by the social partners with a view to ensuring their elimination at the earliest possible moment. Moreover, the Committee requests the Government, in consultation with the workers' and employers' organizations to review without delay the impact on basic minimum standards other than wages of the elimination of the arbitrator's authority to uphold retainability clauses in collective agreements so that these elements may further inform the review of the overall labour relations system.*

- 1001.** *As regards the closing of the Workers' Housing Organization (OEK) and the Workers' Social Fund (OEE), the Committee notes the complainants allegation that these bodies are crucial to trade union social work, funding and workers' housing and that they provide an indispensable social function and do not burden the state budget. The Committee further notes with concern that one of the functions of the OEE was to secure minimum financing for trade unions in order to support their operating needs and that it has been the main source of OMED financing, enabling it to preserve its autonomy vis-à-vis the State to provide independent mediation and arbitration services for the resolution of collective labour disputes. The Committee requests the Government to provide detailed observations on this matter, including indications of measures taken to ensure that the closing of the OEE in particular has not led to a grave interference in the functioning of the GSEE or of OMED.*
- 1002.** *The Committee considers that it is a matter of utmost importance that the Government and the social partners urgently come together to review all the abovementioned measures and their impact not only on labour relations in the country, but also on the hopes for economic development and social cohesion. It has the firm expectation that they hold the key to the elaboration of a labour relations system that is workable and will be conducive to rebuilding the economy. In this regard, the Committee expects that the social partners will be fully implicated in the determination of any further alterations within the framework of the agreements with the European Commission, the IMF and the European Central Bank (ECB) that touch upon matters core to the human rights of freedom of association and collective bargaining and which are fundamental to the very basis of democracy and social peace.*

## **The Committee's recommendations**

- 1003.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Deeply aware that the measures giving rise to this complaint have been taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis, and while recognizing the efforts made by the Government and the social partners to tackle these daunting times, the Committee recommends that the Government promote and strengthen the institutional framework for collective bargaining and social dialogue and urges, as a general matter, that permanent and intensive social dialogue be held on all issues raised in the complaint and in its conclusions with the aim of developing a comprehensive common vision for labour relations in the country in full conformity with the principles of freedom of association and the effective recognition of collective bargaining and the relevant ratified*

*ILO Conventions. The Committee requests the Government to keep it informed of all developments in this regard. The Committee further requests the Government to consider availing itself of ILO assistance in respect of the matters raised.*

- (b) *Recalling that meaningful collective bargaining is based on the notion that all represented parties are bound by voluntarily agreed provisions, the Committee urges the Government to ensure, as indicated in its reply, the statutory enforceability of every collective agreement among those represented by the contracting parties.*
- (c) *The Committee requests the Government to provide detailed observations in reply to the latest allegations of the closing of the Workers' Social Fund (OEE) and the Workers' Housing Organization (OEK), including indications of measures taken to ensure that the closing of the former has not led to a grave interference in the functioning of the GSEE or of OMED.*

CASE NO. 2709

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

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

– **the Movements of Trade Unions, Indigenous Peoples  
and Agricultural Workers of Guatemala (MSICG)**

**represented by the following organizations**

- **the Altiplano Agricultural Workers' Committee (CCDA)**
- **the General Confederation of Workers of Guatemala (CGTG)**
- **the Unified Trade Union Confederation of Guatemala (CUSG)**
- **the National Trade Union and People's Coordinating Body (CNSP)**
- **the National Front for the Defence of Public Services  
and Natural Resources (FNL) and**
- **the Guatemalan Workers' Trade Union (UNSITRAGUA)**

**supported by**

- **the International Trade Union Confederation (ITUC)**

*Allegations: Anti-union dismissals and acts of  
intimidation following the establishment of the  
Trade Union of the National Institute of  
Forensic Sciences (SITRAINACIF)*

**1004.** The Committee examined this case at its June 2011 meeting and submitted an interim report to the Governing Body [360th Report of the Committee, paras 642–655, approved by the Governing Body at its 311th Session, June 2011].

**1005.** The Government sent its observations in communications dated 25 October 2011 and 6 September 2012.

**1006.** 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**

**1007.** At its June 2011 meeting, the Committee made the following interim recommendations on the allegations submitted by the complainant organizations [see 360th Report, para. 665]:

- (a) The Committee urges the Government to send its observations on the allegations without further delay.
- (b) With regard to the dismissal of the 16 INACIF workers, the Committee requests the Government to indicate whether the workers have indeed been reinstated and, should this not be the case, to take the necessary measures to give effect to the orders of the labour and social welfare courts as soon as possible.
- (c) With regard to the application for trade union registration of the SITRAINACIF, the Committee requests the Government to take all necessary measures without delay to ensure that the trade union is immediately registered if, as it appears, it meets all the legal requirements for registration.
- (d) The Committee requests the Government to communicate the status of the complaints filed with the Department of the Public Prosecutor by the trade union's interim Secretary-General.
- (e) With regard to the alleged criminal proceedings against the trade union's interim Secretary-General, the Committee requests the Government to provide its observations on the matter and to communicate the status of those proceedings.
- (f) With regard to the forum for dialogue that met to find solutions and which, according to the allegations, the trade union's interim Secretary-General was prevented by the Government from participating, the Committee requests the Government to take the necessary measures to ensure that the parties involved can meet with a view to reaching an agreement without pressure and to keep it informed in that respect.

## **B. The Government's reply**

**1008.** In a communication dated 25 October 2011, the Government provides detailed information about the measures taken with regard to working conditions at the National Institute of Forensic Sciences (INACIF), particularly safety and health, training and matters that were raised by the complainant organization.

**1009.** With regard to the allegation that INACIF officials have resorted to disguising the employment relationship by hiring the majority of staff on a temporary basis to avoid having to set money aside for labour liabilities and to keep workers in a state of job insecurity, preventing them from forming or joining a trade union, the Government states that Guatemalan law deals with the hiring of staff under budget lines 011 and 022, and the hiring of professional services under budget lines 029 and 182. INACIF has staff hired under all these lines. Those recruited under budget lines 022 and 011 enjoy more employment benefits than professional services staff, as well as ongoing training. The right to join and form trade unions is guaranteed in the Political Constitution of the Republic of Guatemala and all employers are required by law to observe it. The abovementioned forms of recruitment are determined by law, so workers can be hired under any of them without breach of any constitutional rights.

**1010.** With regard to the allegation that the workers who took the initiative to establish the Trade Union of the National Institute of Forensic Sciences (SITRAINACIF) were denied access to their place of work by order of the Institute, the Government indicates that no order was

issued barring employees from their place of work; on the contrary, anyone hired by INACIF is required to report for duty punctually.

**1011.** As regards the employment status of the workers who were allegedly denied access to their place of work, the Government reports as follows:

- *Ms Evelyn Jannette Garcia Caal*, on ascertaining that she had indeed been dismissed, filed an application for reinstatement with the Third Labour and Social Welfare Court, which ordered her reinstatement by a decision of 23 April 2008. INACIF appealed that decision before the First Chamber of the Labour and Social Welfare Appeals Court. The Chamber allowed the appeal and accordingly set aside the decision of the Court of First Instance, thereby quashing the reinstatement. The employee lodged a constitutional (*amparo*) appeal with the Supreme Court of Justice (Chamber for the Protection of Rights (*amparo*) and Preliminary Hearings (*antejuicio*)) on 20 November 2009. The court allowed the *amparo* appeal against the decision of the First Chamber of the Court of Appeals, thereby reinstating the employee in the position she had been in prior to that decision. It also ordered INACIF to settle matters in accordance with the law. INACIF filed an appeal against that ruling with the Constitutional Court on the grounds that an *amparo* action was not admissible in a body responsible for reviewing the decisions of the competent authorities and that the matter was one for the ordinary courts. However, the Constitutional Court upheld the decision of the Supreme Court of Justice and sent the file back to the First Chamber for execution. The First Chamber ordered reinstatement of the employee, thus confirming the decision of 23 April 2008 handed down by the Third Labour and Social Welfare Court, and dismissed INACIF's appeal.
- *Ms Dora María Caal Orellana* applied for reinstatement to the Fifth Labour and Social Welfare Court, which granted it on 22 April 2008. INACIF having failed to comply, the Fifth Court issued an enforcement order. INACIF sought reconsideration of the order but the Fifth Court rejected the appeal. INACIF challenged that decision before the Third Chamber of the Labour Appeals Court. This time the appeal succeeded and the enforcement order was revoked on the grounds that the National Institute of Forensic Sciences of Guatemala (INACIF) is not the entity denounced in the proceedings against the "National Institute of Forensic Sciences (INACIF)" since it has a different legal personality.
- *Ms Ana Verónica Lourdes Morales* applied for reinstatement to the First Labour and Social Welfare Court, which ordered her reinstatement in a decision of 28 April 2008. But, on 1 September 2009, she informed the court that she wished to withdraw all her claims, and the court recorded the withdrawal of her suit on 10 September 2009, the date on which the higher court returned the file to it.

**1012.** With regard to the dismissal of the other 13 workers who took part in the establishment of the union, the Government provides the following information on the status and outcome of the court proceedings:

- *Mr Byron Minera* applied to the Second Labour and Social Welfare Court. In a decision of 18 April 2008 the court ordered his reinstatement and imposed on the Director-General of INACIF a fine equal to ten minimum monthly wages at the rate applying to non-agricultural work. On 29 January 2010 the employee withdrew his claim to reinstatement so as to end the dispute, having reached an out-of-court settlement with INACIF. The court endorsed the settlement on 5 February 2010 and ordered the closure of the proceedings.
- *Mr Carlos Rubio* applied for reinstatement to the Seventh Labour and Social Welfare Court, which ordered it in a decision of 30 April 2008. INACIF failed to implement

the order and, in exercise of its right of defence, challenged the court's decision, pursuing all available means of redress. At present the decision still stands and is enforceable, all the means of redress having been exhausted. A new decision was accordingly issued on 15 April 2011 appointing a bailiff from the Auxiliary Services Centre of the Labour Law Administration to enforce the decision and secure the reinstatement. That decision has been duly notified to the parties and all that now remains is for INACIF to implement it.

- *Mr Ellison Barillas* applied for reinstatement to the Second Labour and Social Welfare Court. By a decision of 23 April 2008 the court ordered reinstatement and imposed on INACIF a fine equal to ten minimum monthly wages at the rate applying to non-agricultural work. On 6 May 2008, the Director-General of INACIF challenged the decision but provided no evidence of any authorization from a court to terminate the employment relationship with the employee. Consequently, on 1 August 2008, the Second Chamber of the Court of Appeals upheld the impugned decision. It also ordered a 50 per cent increase of the fine. On 17 October 2008, the Secretary of the Second Chamber certified that the decision stood, there having been no appeals or notifications, and sent the file back to the Second Court for execution of the decision. The Second Court ordered the employer to reinstate the worker in his post immediately and to pay him the wages that had accrued between the date of his dismissal and his actual reinstatement. To date, there has been no response from INACIF.
- *Mr Flavion Díaz* applied for reinstatement to the Sixth Labour and Social Welfare Court on 21 April 2008. Following the completion of those proceedings, on 21 May 2008, the Court ordered INACIF to reinstate the employee immediately and under the same working conditions, and to pay a fine of 15,000 Guatemalan quetzales, which is equal to ten monthly minimum wages at the rate applying to non-agricultural work. On 15 June 2009, the employee informed the Sixth Court that he withdrew his claim to reinstatement unreservedly, having reached a satisfactory agreement with INACIF. The court recorded the withdrawal of his suit and ordered the case to be closed.
- *Ms Irma Palma* applied for reinstatement to the Eighth Labour and Social Welfare Court, which ordered it by a decision of 24 April 2008. The decision has not been implemented owing to various appeals filed by INACIF, and the employee last renewed her application on 1 February 2011. She has not been reinstated because her employer has declined to comply with the reinstatement order.
- *Mr Jorge Hernández* applied to the Court of First Instance which ordered his reinstatement in a decision of 19 April 2008. INACIF challenged the decision and the appeal was heard by the First Chamber of the Court of Appeals. By a decision of 30 October 2008, the First Chamber rejected the appeal and upheld the decision of the lower court. Dissatisfied with this outcome, INACIF filed an appeal under the constitution (*amparo*) against the First Chamber's ruling. The appeal was allowed by the Supreme Court of Justice (Chamber for the Protection of Rights (*amparo*) and Preliminary Hearings (*antejuicio*)). In response to the latter's ruling, the First Chamber issued a new decision on 14 July 2010, revoking the decision by the Court of First Instance, thereby rejecting the employee's application for reinstatement. At present, that decision stands and is enforceable.
- *Mr Leonel Pérez* applied to the Fourth Labour and Social Welfare Court for reinstatement, which was ordered on 18 April 2008. INACIF appealed, but by a decision of 13 November 2008, the First Chamber of the Court of Appeals upheld the impugned decision on the grounds that INACIF failed to apply the procedure for terminating a work contract laid down in sections 379 and 380 of the Labour Code. Dissatisfied with this outcome, INACIF brought *amparo* proceedings before the

Supreme Court of Justice (Chamber for the Protection of Rights (*amparo*) and Preliminary Hearings (*antejuicio*)), which rejected the appeal on 21 September 2009 as inadmissible. INACIF appealed against that ruling to the Constitutional Court, which found that the provisions of the Civil Service Act ought to have been applied. INACIF argued that the employee was a probationer and had been ever since he was hired (on 3 March 2008), and that throughout the probationary period his performance was to be appraised so as to ascertain whether he met the requirements and was suited to the post. If his performance reports showed that he was unable to perform his duties, his contract might be terminated, with or without reason, and without notice or any form of compensation. The Constitutional Court found the decision of the First Chamber of the Court of Appeals to be at odds with the law and so allowed INACIF's *amparo* appeal thereby suspending the First Chamber's ruling. The employee filed an appeal for clarification of the Constitutional Court's ruling but, on 1 September 2010, the Constitutional Court held that its ruling was clear and unambiguous and overlooked none of the issues submitted. It accordingly rejected the application for clarification. The file went back to the First Chamber of the Court of Appeal, which, on 5 November 2010, issued a decision allowing INACIF's appeal, thereby revoking the decision of 18 April 2008 of the Fourth Labour and Social Welfare Court and rejecting the employee's application for reinstatement.

- *Ms Lesly Escobar* applied for reinstatement to the Fifth Labour and Social Welfare Court, which issued a decision on 18 April 2011 ordering reinstatement in her former job. As matters now stand, INACIF has not reinstated her, despite an executor having been appointed several times to enforce the court's order. She has several times asked to have the reinstatement order notified to Miriam Dolores Ovalle de Monroy in her capacity as Director-General of INACIF, but her applications have been turned down on the grounds that the name she indicated was incorrect. She has therefore not been reinstated.
- *Ms Lucrecia Solórzano* applied for reinstatement to the Third Labour and Social Welfare Court, which issued a decision on 23 April 2008, ordering INACIF to reinstate her in the same post and under the conditions she enjoyed before dismissal until actual reinstatement. On 18 June 2009, she filed an unqualified withdrawal of her claim to reinstatement, having reached a final settlement with INACIF. The notice of withdrawal meeting all the legal requirements, the court recorded the withdrawal of suit on 19 June 2009.
- *Ms María Girón* applied for reinstatement to the Fourth Labour and Social Welfare Court, which ordered it by a decision of 23 April 2008. INACIF appealed and, on 3 October 2008, the First Chamber of the Labour and Social Welfare Court of Appeals upheld the lower court's decision. Receiving notification of the decision, INACIF brought *amparo* proceedings before the Supreme Court of Justice (Chamber for the Protection of Rights (*amparo*) and Preliminary Hearings (*antejuicio*)). The Supreme Court rejected the *amparo* action brought by INACIF on 11 February 2010 and, since no further remedies were pending, remanded the file to the Fourth Labour and Social Security Court for implementation of the decision.
- *Mr Mario Yaguas* applied for reinstatement to the Seventh Labour and Social Welfare Court, which ordered it in a decision of 2 May 2008, which was duly notified to the parties. Dissatisfied with this outcome, INACIF challenged the decision, resorting to all available means of redress. A new decision was issued on 17 April 2011 appointing a bailiff from the Centre for Auxiliary Services of the Labour Law Administration to execute the decision and reinstate the employee. That decision was duly notified to the parties and all that now remains is for INACIF to comply with the decision of the Seventh Labour and Social Welfare Court.

- *Mr Minor Ruano* applied to the Sixth Labour and Social Welfare Court, which issued a decision on 28 April 2008 ordering his reinstatement. On 9 May 2008, INACIF appealed against that decision. On 20 January 2011, the Third Chamber of the Court of Appeals examined the decision of the Sixth Labour Court and upheld it. That ruling was notified to the parties on 20 May 2011.
- *Mr Oscar Velázquez* applied for reinstatement to the Second Labour and Social Welfare Court, which ordered it on 18 April 2008. INACIF having exhausted all available remedies, the reinstatement was upheld. At present the decision stands but has not been implemented by INACIF.

- 1013.** With regard to the complainant's statement that Ms Miriam Gutiérrez de Monroy filed a petition with the General Labour Directorate objecting to the establishment of the INACIF trade union, SITRAINACIF, an act that implies a clear violation of freedom of association and of the principle of non-interference, the Government has forwarded the observations of INACIF's general secretariat. The secretariat explains that the purpose of the petition was not to object to the establishment of a union, but to point out that there were substantive flaws in that the written consent of 20 workers was missing. At no time did the Director object to freedom of association: the law guarantees it and public servants are not above the law. Furthermore, as regards INACIF's application for reversal of the decision by the General Labour Directorate to dismiss the objection to the founding of a union, the General Labour Directorate states that, by Decision No. 114-2009 of 11 June 2008, the Ministry of Labour and Social Welfare rejected INACIF's application as inadmissible.
- 1014.** With regard to the accusations of harassment and persecution of the union's interim secretary, the Government and the Attorney-General's Unit for Investigation of Crimes against Journalists and Trade Unionists indicate that in the complaint identified by the number MP001/2008/42310, in which the aggrieved party is Ms Evelyn Jannette García Caal, the latter was heard by the Office of the Attorney-General on 25 August 2009 and submitted an application to withdraw her complaint. The application was found admissible and the withdrawal recorded on 19 October 2009. It was notified on 5 November 2009.
- 1015.** With regard to the allegation that INACIF officials are exerting pressure on the employees who were not dismissed for having taken part in the union's founding, threatening them with dismissal, the General Secretariat of INACIF states that the Institute respects the right of all workers to form and join a trade union or an association, and has never threatened or put pressure on staff, as is borne out by the labour inspectors who pay regular visits to INACIF facilities and interview serving staff members.
- 1016.** With regard to the definitive shelving of the union's application for registration, the General Labour Directorate indicates that the dossier was wrongly and unlawfully shelved by General Labour Directorate Order No. 14-2009, that the procedure has accordingly been rectified and the offending order withdrawn. Instructions have been given to pursue the proper procedure.
- 1017.** With regard to the forum for dialogue which the union's interim secretary was barred from attending, the Government states that, in March 2009, SITRAINACIF was a union in the process of being formed. In the forum for dialogue, the Ministry of Labour unflinchingly respected the rights conferred on such unions by section 217 of the Labour Code. By Decision No. 84-2009 of 7 December 2009, the General Labour Directorate recognized the legal personality of SITRAINACIF, approved its statutes and ordered that it be registered and published free of charge in *Diario Oficial* No. 1967, folios 10713 and 10729, Book 21, pertaining to registration of the legal personality of trade union organizations, 10 December 2009. Accordingly, the union is now operational.

## C. The Committee's conclusions

- 1018.** *The Committee takes note of the detailed information sent by the Government and recalls that in this case the complainant organization alleges anti-union dismissals and acts of intimidation following the establishment of SITRAINACIF on 15 April 2008.*
- 1019.** *With regard to recommendation (b) concerning the dismissal of 16 INACIF employees, the Committee notes that the Government reports as follows: four of them withdrew their claims to reinstatement; two had their applications for reinstatements dismissed; six have not been reinstated despite a court ruling in their favour because INACIF declines to execute the court decisions; and the last four were awarded reinstatement but it is not as yet known whether they have actually been reinstated. The Committee reiterates that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 105]. The Committee strongly urges the Government to take the necessary steps to secure the immediate execution of the rulings of the labour and social welfare courts in favour of Ms Evelyn Jannette García Caal, Ms Dora María Caal Orellana, Mr Carlos Rubio, Mr Ellison Barillas, Ms Irma Palma, Ms Lesly Escobar, Ms María Girón, Mr Mario Yaguas, Mr Minor Ruano and Mr Oscar Velázquez. The Committee asks the Government to keep it informed in this regard.*
- 1020.** *With regard to recommendation (c) concerning the registration of SITRAINACIF, the Committee notes that, according to the Government, the union's legal personality has been recognized and the union's statutes approved, and that its registration and publication in the Diario Oficial were ordered, thus the union is now operational.*
- 1021.** *With regard to recommendation (d) concerning the status of the complaints of harassment and persecution filed with the Department of the Public Prosecutor by SITRAINACIF's Secretary-General, the Committee notes the Government's statement that the injured party was heard by the Office of the Attorney-General on 25 August 2009, that an application for withdrawal of suit was filed, that it was allowed and the withdrawal recorded on 19 October 2009 and notified on 5 November 2009.*
- 1022.** *With regard to recommendation (e) concerning the alleged criminal proceedings against SITRAINACIF's interim Secretary-General, the Committee notes that the Government has not commented on this matter and requests it to do so without delay.*
- 1023.** *With regard to the forum for dialogue to which the union's interim Secretary-General was denied access, the Committee notes that the Government reports that, at the time, the union was in the process of being formed and that the rights conferred on it by law were always observed. Noting that SITRAINACIF has now been registered, the Committee requests the Government to indicate whether the parties have been able to meet in order to reach agreement on matters still pending.*

## The Committee's recommendations

- 1024.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee strongly urges the Government to take the necessary steps to secure early implementation of the rulings issued by the labour and social welfare courts in favour of Ms Evelyn Jannette García Caal, Ms Dora María Caal Orellana, Mr Carlos Rubio, Mr Ellison Barillas, Ms Irma Palma, Ms Lesly Escobar, Ms María Girón, Mr Mario Yaguas, Mr Minor Ruano and*



*Mr Oscar Velázquez. The Committee requests the Government to keep it informed in this regard.*

- (b) *With regard to the alleged criminal proceedings against the interim Secretary-General of SITRAINACIF, the Committee notes that the Government has not sent observations on the matter and accordingly asks it to do so without delay.*
- (c) *With regard to the forum for dialogue to which the union's interim Secretary-General was denied access, the Committee notes that SITRAINACIF has now been registered and asks the Government to indicate whether the parties have been able to meet in order to reach agreement on matters still pending, particularly the reinstatement of the workers dismissed.*

CASE NO. 2840

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

**Complaint against the Government of Guatemala  
presented by  
the Trade Union, Indigenous and Peasant Movement  
of Guatemala (MSICG)**

***Allegations: Obstacles to the establishment of  
trade unions and to the right to draw up trade  
union rules freely, and anti-union transfers***

- 1025.** The complaint is contained in two communications from the Trade Union, Indigenous and Peasant Movement of Guatemala (MSICG) dated 22 and 23 February 2011.
- 1026.** The Government sent partial observations in a communication dated 25 October 2011.
- 1027.** 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**

***Anti-union transfer of workers***

- 1028.** In a communication dated 22 February 2011 the complainant alleges that, in 2007 the Union of Workers of the Criminal Investigation Department of the Public Prosecutor's Office (SITRADICMP) was established but that the Public Prosecutor prevented the union from functioning by transferring the members of its provisional Executive Committee (Case No. 2580). Following legal action by members of the union, the Public Prosecutor issued agreement No. 0411-2007 revoking the transfers of the first three union officials concerned. Despite this agreement, however, the Public Prosecutor filed complaints against the three officials and requested authorization to dismiss them for non-compliance with the transfer order, thereby going against the ruling of the Constitutional Court of Legal

Protection suspending the legal and material effects of the transfer ordered by the Public Prosecutor in an act of anti-union reprisal.

- 1029.** The complainant emphasizes that the situation has deteriorated since the appointment of the Director of the Criminal Investigation Department of the Public Prosecutor's Office, who has engaged in a series of reprisals against members and officials of SITRADICMP and has warned the other workers that they too will face reprisals if they join the union. When the Public Prosecutor took up office, SITRADICMP presented a request on 16 December 2010 in an attempt to establish a dialogue with her to discuss employment conditions in the Department. On 6 January 2011 Javier Adolfo de León Salazar, a SITRADICMP official, was informed that the Public Prosecutor had unilaterally decided that he was to be transferred, in violation of article 22 of the collective agreement in force. His transfer was ordered by agreement No. 003-2011 of 3 January 2011.
- 1030.** The complainant adds that, as part of her reprisals against Mr Salazar, the Public Prosecutor failed to grant him annual leave for 2009 and 2010. This was confirmed by the General Labour Inspectorate in its records dated 11 January and 3 February 2011, which also noted the former's refusal to grant him annual leave. A complaint against the anti-union transfer of SITRADICMP's General Secretary was lodged with the Labour Inspectorate which, in its records dated 18 January and 3 February 2011, declared Mr Salazar's transfer to be an anti-union measure that was against the law and instructed the Public Prosecutor to revoke the decision.
- 1031.** The complainant states that, as a reprisal against the Labour Inspectorate's instruction, the Public Prosecutor challenged the authority of the inspector in charge of the case and requested that someone else be appointed in his stead. As a result, the General Labour Inspectorate has not yet been able to verify the Public Prosecutor's compliance with its instruction. Mr Salazar also requested the General Labour Inspectorate to rule on whether article 22 of the collective agreement was applicable under the terms of ILO Convention No. 87. On 4 February 2011 the General Labour Inspectorate ruled that in the circumstances Mr Salazar's transfer was an infringement of the said collective agreement.
- 1032.** According to the complainant, far from revoking the illegal transfer of SITRADICMP's General Secretary, the Public Prosecutor had stepped up her anti-union activities by engaging in acts of interference. On 27 January 2011 she lodged a request with the General Labour Inspectorate calling on it to investigate Mr Salazar's use of his trade union prerogatives and to report back to the Public Prosecutor's Office. The General Labour Inspectorate rejected the Public Prosecutor's request and reminded her of the provisions and scope of Convention No. 87. The complainant stresses its opinion that the increase in the Public Prosecutor's anti-union pressure on SITRADICMP, and especially on its General Secretary who is a member of the MSICG's Policy Board, is attributable to her desire to break up the union, which she sees as an obstacle to a proposal by certain circles that she frequents, notably the Guatemala Institute of Comparative Criminal Science, to do away with the Criminal Investigation Department.
- 1033.** The complainant states that, as part of this strategy, political allies of the Public Prosecutor challenged the constitutionality of a provision in the Organic Law Governing the Public Prosecutor's Office that provides for the possibility of reviewing decisions taken by the Public Prosecutor that entail the dismissal or transfer of employees of the Office. The challenge, which the Constitutional Court examined under Case No. 2523-2010, resulted in its ruling on 1 February 2011 that the said provision was unconstitutional. Although the Court's ruling affected the existing collective agreement and the workers' right of defence against measures relating to labour rights, the Court failed to give a hearing to the trade unions operating in the Public Prosecutor's Office. In practice, the ruling has effectively eliminated any possibility of challenging transfer orders and dismissals. The complainant

emphasizes that, in the first place, the General Labour Inspectorate has complied strictly with the principles embodied in Convention No. 87 and, secondly, that the Public Prosecutor's Office has not only failed to comply with the Committee on Freedom of Association's request with regard to Case No. 2580 but has actually stepped up its anti-union measures against SITRADICMP, and especially against its General Secretary, Javier Adolfo de León Salazar.

- 1034.** In its communication of 23 February 2011 the complainant cites the following incidents: obstructing the registration of trade unions by claiming that they do not meet legal requirements and giving employers a hearing to voice their opinion for or against the establishment of a trade union; subcontracting staff through satellite companies that are set up to prevent the establishment of trade unions, to help break them up or to make sure they have little social backing for their demands; contracting the services of companies that provide information on the background of jobseekers; refusing to recruit workers who have been employed in unionized workplaces or involved in establishing trade unions; illegal and repeated waiving by labour tribunals of the trade union immunity that prohibits employers from dismissing workers engaged in negotiating union demands; dismissing all workers who help to organize trade unions; co-opting leaders of the work centres movement or of the federations and confederations that support them; co-opting officials and employees of the Ministry of Labour and Social Welfare so as to prevent or delay the registration of trade unions; setting up "yellow" trade unions in work centres; establishing "Solidarista" associations that are controlled by the employers; recruiting workers illegally under civil or mercantile contracts that deny them their workers' rights; using unions backed and controlled by the employer to take over established trade unions; closing down work centres simply by changing their name and location so as to disrupt the trade union; assassinating union leaders, kidnapping, sexually assaulting their family members, attempted assassination, threats, persecution, intimidation, harassment, defamation, calumny, insults and other forms of coercion of unionized workers or the members of their families, to prevent them from setting up unions or from engaging in union activities. All these incidents occur with total impunity because of the State's refusal to investigate.

***Obstruction and interference by the authorities  
in the registration of trade unions***

- 1035.** The complainant cites 16 trade unions that have requested registration since 2009, none of which have so far been recognized:
- (1) Sindicato de Trabajadores de Inversiones y Servicios Imperia SA;
  - (2) Sindicato de Trabajadores Municipales de Fray Bartolomé de las Casas;
  - (3) Sindicato de Servidores Municipales de San Lorenzo de Suchitepequez;
  - (4) Sindicato de Empleados Municipales del Municipio de Ixchiguan del Departamento de San Marcos;
  - (5) Sindicato del Ministerio de Educación del Departamento de Alta Verapaz;
  - (6) Sindicato de Trabajadores Ramón Adán Sturtze;
  - (7) Sindicato de Gerentes Financieros del Ministerio de Salud Pública y Asistencia Social;
  - (8) Sindicato de Trabajadores Técnicos y Administrativos del Ministerio de Educación de Occidente;

- (9) Sindicato de Trabajadores de la Superintendencia de Administración Tributaria;
- (10) Sindicato de Trabajadores del Hospital de San Marcos del Departamento de San Marcos;
- (11) Sindicato Nacional de Trabajadores de la Secretaría Ejecutiva de la Coordinadora Nacional para la Reducción de Desastres;
- (12) Sindicato de Trabajadores de la Dirección Departamental de Educación de Quetzaltenango;
- (13) Sindicato de Trabajadores Administrativos del Segundo Registro de la Propiedad de Quetzaltenango;
- (14) Sindicato de Trabajadores de la Municipalidad de Chiquimula;
- (15) Sindicato de Trabajadores Unidos de la Municipalidad de San Pedro Sacatepequez del Departamento de San Marcos;
- (16) Sindicato de Trabajadores del Plan de Empleo Municipal.

**1036.** The complainant states that the labour authorities interfere by imposing requirements for trade union registration that are not based on the law, as well as the payment of taxes before unions can be registered. The unions cannot then be registered until they have complied with the requirements of the Ministry of Labour and Social Welfare. The demands that the authorities make for registering trade unions include: amending or correcting various provisions in the union's rules; changing the union's juridical status; correcting the union's constitutive act; signing every page of the draft rules; entering the data on each member in the order the authorities require.

### ***Interference by employers in the establishment of trade unions***

**1037.** The complainant refers to two cases: (1) the Union of Employees and Allied Workers of the Los Ángeles and El Arco Estates; and (2) the Workers' Trade Union of the Municipality of San José Ojotenam of the Department of San Marcos.

#### **Union of Employees and Allied Workers of the Los Ángeles and El Arco Estates**

**1038.** Regarding the first of these two cases, the complainant states that in 2009, the Union of Employees of the Los Ángeles and La Argentina Estates and the Union of Employees and Allied Workers of the El Arco Estate applied to the Ministry of Labour and Social Welfare for the merger of their organizations, which had agreed to merge, inter alia, to strengthen the trade union movement in the estates concerned. Shortly after the merger was requested, the Ministry agreed to hear the employer, represented by the general manager and legal representative of Agropecuaria Los Ángeles SA. At the hearing, according to the complainant, the employer objected to the merger for a number of reasons, among other things, because many of the union members requesting the merger (identified by name) had already been dismissed and because the monies due to them had been paid deposited with the relevant tribunal. Given the employer's objections, the Ministry invited the two trade unions to express their views on the matter. So far the merger has not been made official.

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**Workers' Trade Union of the Municipality of San José Ojotenam**

- 1039.** As to the second case, concerning the request for registration presented by the Workers' Trade Union of the Municipality of San José Ojotenam, the complainant states that the union was initially set up in January 2008 with 22 workers and that it submitted its request for registration and for the approval of its rules on 30 January. On 12 February 2008 the Ministry objected to the union's registration on the grounds that the personal details of one of the founder members did not match the data on his residence card. According to the complainant, the problem was resolved when the trade union confirmed in writing that there was in fact no such inconsistency and that the member's name was correctly written as it appeared on his residence card.
- 1040.** The complainant adds that on 7 March 2008 the General Labour Directorate brought the matter before the Ministry of Labour and Social Welfare, as the hierarchically superior body. On 8 March the Ministry agreed to recognize the union and approved its rules. On 11 March the General Labour Directorate issued a ruling requesting the corresponding entry to be made in the *Official Gazette of Central America*. However, the Directorate cancelled the said ruling by decision No. 186-2008 dated 10 March 2008 and sent the Ministry a ruling explaining that the union's registration was inadmissible on the grounds that it did not meet legal requirements.
- 1041.** The complainant goes on to state that, in its ruling No. 91-2008, the General Labour Directorate raised further objections to the registration of the union, to which the latter responded in order to speed up the process. According to the complainant, on 11 March a lawyer allegedly representing the employer requested the General Labour Inspectorate to provide him with the list of the union's founder members along with their personal details. The Ministry of Labour and Social Welfare wrote to the trade union requesting authorization to provide the employer's lawyer with the requested information, which the union refused. On 8 April 2008 the Labour Directorate received the resignation of 12 supposed founder members of the trade union. The following day the Directorate declared that only three of the resignations were admissible as only three were from founder members. On 24 April the very same Directorate issued a ruling declaring that the trade union's request for registration was inadmissible as it was not signed by the number of members required by law.

**B. The Government's reply*****Obstruction and interference by the authorities in the registration of trade unions***

- 1042.** In a communication dated 25 October 2011 the Government states that it requested the General Labour Directorate to submit its observations. Regarding the registration of trade unions, the Directorate states that the Labour Code lays down requirements for recognizing the juridical personality of trade unions; these do not entail a strict review but simply observations and procedures that have to be complied with before a union's juridical personality and registration can be recognized. It is quite normal for minor errors to come to light and in such cases the preliminary review is suspended while the union is informed and makes the appropriate amendments, corrections or substitutions. Once these preliminaries have been dealt with and the errors corrected, an opinion is immediately issued in favour of the union's recognition and registration.
- 1043.** With regard to the requirements which the complainant claims are illegal, the General Labour Directorate offers the following clarification:

- the presentation of photocopies of identity cards was jointly accepted by the General Labour Inspectorate and members of the worker’s sector, so that there are no mistakes in the members’ names on the credentials for a union’s executive committee and advisory board;
- the National Workers’ Protection Department states that, under article 221(i) of the Labour Code, provision must be made for holding general assemblies;
- the requirement that all proceedings be certified by a plenary meeting of the executive committee is based on article 223(a) of the Labour Code;
- the requirement that the documents presented bear the trade union’s official seal is based on article 225(a) and (d) of the Labour Code;
- the requirement that the place of residence be indicated is based on article 221(c) of the Labour Code.

### ***Interference by employers in the establishment of trade unions***

Union of Employees and Allied Workers of the  
Los Ángeles and El Arco Estates

- 1044.** Regarding the Union of Employees and Allied Workers of the Los Ángeles and El Arco Estates, the General Labour Directorate states that on 2 November 2009 the Union of Employees and Allied Workers of the Los Ángeles and La Argentina Estates and the Union of Employees and Allied Workers of the El Arco Estate applied for a merger of their two organizations, under the new name of Union of Employees and Allied Workers of the Los Ángeles and El Arco Estates, and submitted the unions’ respective rules. On 13 November 2009 the Guatemala Workers’ Protection Department issued a preliminary opinion, to which the nascent trade union replied on 1 December.
- 1045.** The General Labour Directorate recalls that on 22 April 2009 the Ministry of Labour and Social Welfare requested the dissolution of the Union of Employees and Allied Workers of the Los Ángeles and La Argentina Estate. On 9 October the Seventh Labour and Social Welfare Court acted on the request and set a hearing for 9 a.m. on 10 February 2010. The members of the union opposed the request, arguing that the Constitutional Court’s ruling of 21 May 2009 had granted definitive immunity to the ten workers involved and had ordered their reinstatement.
- 1046.** The General Labour Inspectorate states that on 25 February 2010 the National Workers’ Protection Department issued another preliminary opinion to which the union members responded on 29 May 2010. On 6 May 2010 the general manager and legal representative of the employer presented a memorandum arguing against the establishment of the trade union and opposing the union’s rules; he requested, first, that his opposition be duly recognized and, second, that the General Labour Directorate rule against the union’s establishment. The Guatemala Labour Protection Department arranged a hearing for the trade unions concerned.
- 1047.** The General Labour Directorate states that on 20 May 2012 the National Workers’ Protection Department issued a statement referring to the general manager and legal adviser’s objections and summoned the members of the Executive Committee of the Union of Workers of the Los Ángeles and La Argentina Estates and of the Union of Employees and Allied Workers of the El Arco Estate to a hearing. The National Workers’ Protection Department issued a further statement on 8 June 2010 summoning the members of the

provisional Executive Committee of the Union of Employees and Allied Workers of the Los Angeles and El Arco Estates "STAA" (merged). On 5 July 2010 the National Workers' Protection Department issued a statement once again summoning the members of the provisional Executive Committee of the STAA. The series of statements was duly recorded. The General Labour Directorate states that the National Workers' Protection Department subsequently issued statements again inviting the union members to a hearing to discuss the general manager's objections.

- 1048.** On 13 July 2010 the members of the Union of Employees and Allied Workers of the Los Angeles and La Argentina Estates and of the Union of Employees and Allied Workers of the El Arco Estate submitted a memorandum arguing that the managing director's objections were not a legally recognized form of challenge and that they should be rejected out of hand. On 28 July the National Workers' Protection Department so informed the manager of Agropecuaria Los Angeles, SA. On 10 August the general manager again presented a memorandum calling for the rejection of the merger, to which he attached photocopies of several previous rulings. On 12 August 2010 a new statement was issued informing the union members of the general manager's memorandum.
- 1049.** On 25 August 2010 the National Workers' Protection Department issued a statement recalling the successive stages in the matter of the request presented by the STAA; the interested parties were notified on 26 August. On 19 November 2010 the General Labour Directorate sent the union a telegram to the effect that, according to its files, the STAA had not responded to the summonses sent to them on 25 August 2010.

#### Workers' Trade Union of the Municipality of San José Ojotenam

- 1050.** Regarding the Workers' Trade Union of the Municipality of San José Ojotenam, the General Labour Directorate again explains the procedure, stating that on 31 January 2008 it received an official document concerning the union's establishment together along with the constitutive act dated 10 January 2008, showing a membership of 22, and the union's rules. On 11 February 2008 the Director of the General Labour Inspectorate stated that recognition of the union's juridical personality was conditional on its indicating where the members' residence cards had been issued, since the information did not appear in the constitutive act. On 7 March 2008 the General Labour Directorate stated that the requirement had now been met, issued a ruling recognizing the juridical personality of the Workers' Trade Union of the Municipality of San José Ojotenam of the Department of San Marcos and ordered the union's inclusion in the public register of trade unions and publication of the Inspectorate's ruling free of charge.
- 1051.** The General Labour Directorate adds that on 11 March the Vice-Minister of Labour and Social Welfare requested the union to indicate where the residence card of founder member Juan Bautista Cifuentes Martínez had been issued, on the grounds that the 7 March ruling had cancelled it in response to the Vice-Minister's request of 10 March 2008. On the same day a lawyer requested the list of names of the union's founder members. Following the union's refusal, the General Labour Directorate declared the lawyer's request to be inadmissible on 4 April.
- 1052.** The General Labour Directorate states also that on 8 March 2008 the following workers presented duly authenticated memorandums requesting that their names be struck from the list of members of the union as they had resigned: Claudio Paulino Borrayes Roblero, Rosario Ireneo González Roblero, Daniel Elías López Roblero, Bekely Wilcox Cifuentes Barrios, Filadelfo Pedro Roblero Roblero, Eleazar Aureo Velásquez Roblero, Dulce Flor Cifuentes Barrios, Valeriano Juan Hernández Cifuentes, Heller Trinidad de León Sánchez and Andrés Roblero Bravo. On 9 April 2008 the General Labour Directorate rejected their request on the grounds that they were not members of the union. The Labour Inspectorate

did, however, approve the resignation of three other workers: Benito Roblero Velásquez, Iven Godofredo Barrios Marroquín and Enedina Eladia Morales Santizo.

**1053.** On 24 April 2008 the General Labour Directorate issued a ruling refusing to recognize the union's juridical personality, approve its rules or order its registration. On 2 May Ludwin Oliverio Monzón Sánchez appealed against the Directorate's ruling. After examining the appeal, the Technical and Legal Advisory Board of the Ministry of Labour and Social Welfare stated that, by virtue of the second paragraph of article 275 of the Labour Code, the appeal was rejected because the deadline had expired.

### **C. The Committee's conclusions**

**1054.** *The Committee takes note that in the case under examination the complainant alleges anti-union transfers, obstruction and interference by the authorities in the registration of trade unions and interference by the employer in the establishment of trade unions.*

#### **Anti-union transfer of a trade union leader**

**1055.** *Regarding the alleged anti-union transfer of the trade union leader, Javier Adolfo de León Salazar, the Committee recalls, as does the complainant, that the same issue was examined under Case No. 2580. The Committee takes note specifically that: (1) the complainant states that not only has the Committee on Freedom of Association's request with regard to Case No. 2580 not been complied with but the anti-union measures against SITRADICMP have actually been stepped up, especially against its General Secretary, Javier Adolfo de León Salazar; (2) the General Labour Inspectorate declared Mr Salazar's transfer to be an anti-union measure that was against the law and instructed the Public Prosecutor to revoke the decision; (3) the complainant states that, as a reprisal against the Labour Inspectorate's instructions, the Public Prosecutor challenged the authority of the inspector in charge of the case and requested that someone else be appointed in his stead; (4) as a result, the General Labour Inspectorate has not yet been able to verify compliance with its instructions; and (5) the Committee notes that the Government has not sent its observations on the matter. The Committee recalls that, in its examination of Case No. 2580, it had requested the Government, in the absence of any information to the contrary, to adopt the necessary measures to cancel the transfer of the Executive Committee members of SITRADICMP and to ensure that the union and its members can exercise their legitimate activities without being subjected to intimidation and persecution. The Committee requests the Government to send its observations in this regard without delay and proposes to examine the complainant's allegations concerning SITRADICMP together with the observations that it is awaiting from the Government in connection with its follow-up of Case No. 2580.*

#### **Obstruction and interference by the authorities in the registration of trade unions**

**1056.** *The Committee takes note that the complainant alleges the authorities' obstruction and interference in the registration of 16 trade unions that have not been registered since they presented their request in 2009. The Committee observes that, according to the complainant, the labour authorities interfere by imposing requirements for trade union registration that have no legal basis, for example: amending or correcting various provisions in the union's rules; changing the union's juridical status; correcting the union's constitutive act; signing every page of the draft rules; entering each member's personal details in the order required by the authorities. The Committee takes note that, for its part, the General Labour Directorate states that the requirements called for by the*



authorities to register trade unions are based on agreements between the parties and on the provisions of the Labour Code.

- 1057.** *While taking note of this information, the Committee wishes to recall that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations. Moreover, the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations, and any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 276 and 279]. In these circumstances, the Committee requests the Government to take the necessary measures to ensure the swift registration of the 16 trade unions that have applied since 2009 and to keep it informed of developments.*

### **Interference by employers in the establishment of trade unions**

Union of Employees and Allied Workers of the  
Los Angeles and El Arco Estates

- 1058.** *Regarding the establishment of the Union of Employees and Allied Workers of the Los Angeles and El Arco Estates (STAA), the Committee takes note that, according to the complainant and in the context of the merger of the Union of Workers of the Los Angeles and La Argentina Estates with the Union of Employees and Allied Workers of the El Arco Estate, the Ministry of Labour and Social Welfare agreed to hear the employer's side, represented by the company's managing director, and that this has so far prevented the merger from taking place. The Committee notes that, for its part, the General Labour Directorate confirms the managing director's objections to the merger and adds that: (1) a hearing was granted to the members of the Executive Committee of the Union of Employees and Allied Workers of the Los Angeles and La Argentina Estates and of the Union of Employees and Allied Workers of the El Arco Estate; (2) a hearing was granted to the members of the provisional Executive Committee of the Union of Employees and Allied Workers of the Los Angeles and El Arco Estates (STAA); (3) the National Workers' Protection Department issued a statement recalling the successive stages in the matter of the request presented by the STAA; and (4) the trade union has not yet responded to earlier summonses that are mentioned in the relevant file.*
- 1059.** *In the light of this information, the Committee requests the complainant to respond to the National Workers' Protection Department's 25 August 2010 statement referring to errors in the STAA's Constitutive Act that have to be corrected for the STAA to be recognized. The Committee also wishes to recall that, under Article 2 of Convention No. 87, workers and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. The Committee considers that, if a trade union complies with legal requirements and if the union's rules are respected, it should be recognized. In this regard, the Committee recalls as well that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations [see **Digest, op. cit.**, para. 276]. Therefore, the Committee requests the Government, once the errors in the STAA's constitutive act have been corrected, to take the necessary measures for the said trade union to be recognized and immediately registered.*

## Workers' Trade Union of the Municipality of San José Ojotenam

- 1060.** *Regarding the establishment of the Workers' Trade Union of the Municipality of San José Ojotenam, the Committee takes note that the complainant states that: (1) following the General Labour Directorate's request that the union's rules be published and its juridical personality recognized, the Directorate revoked its ruling and declared that the union's request for registration was inadmissible as it did not comply with the legal requirements (20 members); (2) the General Labour Directorate declared that three resignations from the union were admissible because only three of the 13 workers who resigned were founder members; and (3) the very same Directorate issued a ruling declaring that the trade union's request for registration was inadmissible as it was not signed by the number of members required by law. Regarding the alleged interference of the employer in the establishment of the union, the Committee takes notes that the complainant states that on 11 March 2011 a lawyer allegedly representing the employer requested the General Labour Directorate to provide him with the list of names of the union's founder members, along with their personal details, and that the union refused.*
- 1061.** *The Committee takes note that the General Labour Directorate states that: (1) the legal requirements had been met and the Directorate issued a ruling recognizing the union's juridical personality and ordering its inclusion in the public register and the publication of the Directorate's ruling; (2) subsequently, the Vice-Minister of Labour and Social Welfare requested the union to indicate where the residence card of founder member Juan Bautista Cifuentes Martínez had been issued and the aforementioned ruling was revoked; (3) in April 2008 the General Labour Directorate approved the resignation of three workers from the union (out of the 13 who had presented their resignation) and issued a ruling refusing to recognize the union's juridical personality, approve its rules or order its registration; (4) an appeal against the ruling was rejected because the deadline had expired. Regarding the employer's alleged interference, the Committee takes note that the General Labour Directorate confirms that a lawyer requested the list of the said union's founder members, that the union members refused and that on 4 April 2008 the Directorate declared the lawyer's request inadmissible.*
- 1062.** *Taking note of the information at its disposal, the Committee understands that the Workers' Trade Union of the Municipality of San José Ojotenam complied fully with the requirements for its registration until the resignation of three workers was approved by the General Labour Directorate, as a result of which there was no longer the legal minimum number of workers (20) required for establishing a trade union. It would therefore appear that the reason for refusing to register the union is the insufficient number of founder members and not the interference of the lawyer for the employer's side in the process. In these circumstances, the Committee will not pursue its examination of this allegation any further.*

**The Committee's recommendations**

- 1063.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Regarding the alleged anti-union transfer of Javier Adolfo de León Salazar, the Committee recalls that, in its examination of Case No. 2580, it had requested the Government, in the absence of any information to the contrary, to adopt the necessary measures to cancel the transfer of the Executive Committee members of SITRADICMP and to ensure that the union and its members can exercise their legitimate activities without being subjected to intimidation and persecution. The Committee requests the*

*Government to send its observations in this regard without delay and proposes to examine the complainant's allegations concerning SITRADICMP together with the observations that it is awaiting from the Government in connection with its follow-up of Case No. 2580.*

- (b) *The Committee requests the Government to take the necessary measures to ensure the swift registration of the 16 trade unions that have applied since 2009 and to keep it informed of developments.*
- (c) *The Committee requests the complainant to respond to the National Workers' Protection Department's 25 August 2010 statement referring to errors in the STAA's Constitutive Act that have to be corrected for the STAA to be recognized. The Committee also requests the Government, once the errors in the STAA's constitutive act have been corrected, to take the necessary measures for the said trade union to be recognized and immediately registered.*

CASE NO. 2872

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

**Complaint against the Government of Guatemala  
presented by  
the National Federation of Trade Unions of State  
Employees of Guatemala (FENASTEG)**

*Allegations: Anti-trade union persecution and practices, refusal to negotiate a list of demands, obstacles to exercise of the right to collective bargaining and non-observance of provisions of a collective agreement in the Ministry of Labour and Social Welfare*

- 1064.** The complaint is contained in a communication from the Trade Union Federation of Public Employees (FENASTEG) dated 27 May 2011. The complainant organization sent further allegations in communications dated 29 February, 26 March, 9 May, 1 June and 20 June 2012.
- 1065.** The Government sent its observations in a communication dated 12 March 2012.
- 1066.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

**A. The complainant's allegations**

- 1067.** In a communication of 27 May 2011, FENASTEG alleges non-observance by the Ministry of Labour and Social Welfare of the collective agreement on working conditions in force in the Ministry. One requirement of the agreement is that any claims relating to labour

disputes are to be addressed with the trade union that signed the agreement, which was not done. Furthermore, the so-called “recreation bonus” of 250 quetzales (GTQ), due at the end of April 2011, has not been paid.

- 1068.** The complainant organization further states that the Ministry of Labour and Social Welfare has recognized two groups of workers as having authority to discuss wage increases and job reclassification. The workers in question may be entitled to submit claims but they lack authority to seek economic gains collectively; trade unions exist for that purpose and according to labour law have sole responsibility in this area. The complainant stresses that in this case the two groups are unconnected and that they do not represent any trade union, in breach of ILO Conventions Nos 87 and 98. Only workers who are organized in unions are entitled, through their legal representatives and in accordance with Guatemalan labour law, to negotiate economic and social gains through collective instruments such as collective labour agreements and collective agreements on working conditions. The groups of workers set up to seek wage increases may take individual action, either singly or severally, but they may in no event take action in the area of collective rights and the law is quite clear that any economic or social gains are to be negotiated with the trade union having the largest membership, which in the case of the Ministry of Labour is the General Trade Union of Employees of the Ministry of Labour and Social Welfare (SIGEMITRAB), which is joint signatory, together with the Ministry of Labour, of the collective agreement on working conditions that governs labour relations in the Ministry.
- 1069.** The complainant also reports anti-union discrimination against SIGEMITRAB officials, although the Ministry set up a committee of three labour inspectors who at the same time are SIGEMITRAB officials, and indicates that the Ministry approved an annual plan of inspection visits to farms and agricultural institutions which has not been implemented. The complainant objects that the head of the General Labour Inspectorate is constantly seeking to obstruct the plan by slandering and stigmatizing the labour inspectors who hold trade union office. The latter have been accused of corruption without so much as a shred of evidence or any legal action against them, the sole aim being to discredit them in a context of persistent discrimination due to their trade union leadership.
- 1070.** The complainant states that the head of the General Labour Inspectorate wanted to pit the trade union leaders against the other inspectors in the belief that in the course of their work and in carrying out the inspections, they would deplete the inspectorate’s travel allowance budget so that there would be none left for the other inspectors. The complainant asks the Minister to secure proper implementation of the plan that he himself authorized; failure to do so will perpetuate the discrimination against the labour inspectors who hold trade union office in SIGEMITRAB, namely: Mr Shuvert Alf del Valle Rodríguez, Mr Víctor Manuel Dávila Rivera and Mr Néstor Estuardo de León Mazariegos.
- 1071.** Furthermore, on 17 May 2011 the collective agreement on working conditions was terminated and a new draft agreement proposed. The Ministry has not as yet appointed a negotiating committee and the complainant says it fears that the intent may be to restrict the right to collective bargaining on the pretext that there are not the funds to negotiate a new agreement. This complaint has been filed as an incentive to the State of Guatemala to seek the means to fulfil the right to collective bargaining in the institution at the head of labour policy, namely the Ministry of Labour.
- 1072.** In a communication of 29 February 2012, the complainant reports that a collective dispute about social and economic matters, triggered by the refusal to negotiate a new collective agreement, is currently before the 11th Labour and Social Welfare Court. It points out that the dossier of the proceedings contains the lists of members of the three trade unions coexisting in the Ministry of Labour, which clearly state that the majority union with authority to discuss and negotiate the new collective agreement is SIGEMITRAB, which

initiated the collective dispute. According to the complainant, there is no real will to negotiate since a delegation to discuss the new collective agreement has not been formed. The Ministry sought a recount to satisfy itself that SIGEMITRAB is indeed the majority union and was informed that a conciliation tribunal has already been set up. The complainant adds that several equal pay claims were filed because cash bonuses were given to some workers and this amounted to discrimination against the rest.

- 1073.** In a communication of 26 March 2012, the complainant organization states that the Ministry of Labour and Social Welfare has declined to solve labour issues that have arisen in the municipality of Siquinala. The mayor dismissed a member of the executive committee of the Siquinala Municipal Workers' Union (SISEMUS), which is affiliated to FENASTEG, and the Minister of Labour has not played the role required of him by ILO Conventions Nos 87 and 98, and section 211(a) of the Labour Code. The complainant organization believes it important to point out that because the Secretary of FENASTEG – who is also the General Secretary of SIGEMITRAB – has worked in the Ministry in a supervisory capacity in connection with the implementation of the collective agreement on working conditions applying in the Ministry, and with further submissions for the complaints he lodged on FENASTEG's behalf, the Ministry of Labour and Social Welfare has stated openly to other members of FENASTEG's executive committee that he wished to initiate proceedings to dismiss the Secretary on the grounds that he is disrupting his own work, provoking disorder in the institution and overstepping his boundaries, among other shortcomings that he lists, including acts of corruption. The aim is to intimidate the trade union leader so that he will give up his supervisory work and drop the duties he performs as trade union officer for all the workers affiliated to the union and the federation he represents.
- 1074.** In a communication of 9 May 2012, the complainant indicates that it has been informed that the Ministry of Labour and Social Welfare has appointed the committee to negotiate the agreement in the context of the collective dispute on social and economic issues currently before the 11th Labour and Social Welfare Court. The complainant contends that it did so with the sole aim of hindering negotiation in the court proceedings, filing an application under the constitution (*acción de amparo*) to delay the court proceedings and requesting direct negotiations. It was again explained that according to section 51(b) of the Labour Code, the employer, in this case the State of Guatemala as represented by the Ministry of Labour and Social Welfare, must negotiate the collective agreement with the majority trade union in the institution, which in this instance is SIGEMITRAB. In fact, the Minister's sole intent is to delay the administration of justice and the negotiation of the new collective agreement.
- 1075.** The complainant further reports that several equal pay claims have been filed on grounds of wage discrimination: some labour inspectors were granted a bonus known as a "personal supplement", and job reclassification is not the answer because the bonus is applied to people, not to posts and reclassification improves only the post and pay. The only way out is for the Minister himself to extend the bonus to the other labour inspectors. Proceedings also had to be brought to quash the appointment of the General Inspector of Labour which was in breach of the Civil Service Act and Regulations. According to the complainant, because of these suits the Minister has seen fit to tarnish the image of the officers of SIGEMITRAB and has initiated disciplinary proceedings against the General Secretary for having accompanied a female colleague in her inspection work. However, such conduct is not subject to any legal constraints under section 281 of the Labour Code and the attempt to sanction it constitutes a typical act of reprisal.
- 1076.** In communications of 1 and 20 June 2012, the complainant organization reports that on 20 October 2011, the Ministry of Labour and Social Welfare signed a collective agreement on working conditions with the two other trade unions in the Ministry, namely the General

Trade Union of Workers of the Ministry of Labour and Social Welfare (SITRAMITRAPS) and the Trade Union of Workers of the Ministry of Labour and Social Welfare. Neither is a majority union and according to section 51(b) of the Labour Code the new agreement ought to have been negotiated with SIGEMITRAB. The law does not provide for a majority to be reached by adding two unions together, because votes are counted for each union separately. Furthermore, the collective dispute proceedings are still under way; they were suspended temporarily by the *amparo* (protection of constitutional rights) action brought by the Minister to the Second Labour and Social Welfare Chamber, which ordered a temporary stay of proceedings almost immediately. According to the complainant, the signing of a collective agreement with the other two unions was aimed at destabilizing the majority union, limiting the exercise of its trade union rights and particularly the right to collective bargaining. The complainant indicates that SIGEMITRAB filed an appeal challenging the approval of the new collective agreement.

- 1077.** The complainant indicates that SIGEMITRAB will also seek *amparo* remedies because there has been breach of both constitutional rights and rights established in the ordinary law. Furthermore, the General Secretary of FENASTEG had to bring retaliatory proceedings before the 11th Labour and Social Welfare Court.

## **B. The Government's reply**

- 1078.** In a communication of 12 March 2012, the Government provides information on the failure to pay the "recreation bonus" and to implement the plan for the inspection of farms and agricultural institutions, and the refusal to appoint the committee for the negotiation of the collective agreement on working conditions between the union of workers and the Ministry of Labour and Social Welfare.

- 1079.** The Government states that it sought information from the Human Resources Directorate and the Financial Administration Unit about progress in the transfer of funds to pay Ministry workers the recreation bonus of GTQ250. According to the workers, this was done in the first half of August 2011.

- 1080.** With regard to the failure to implement the plan of inspection visits to farms and agricultural institutions, the General Labour Inspectorate indicated that it was never the intention of the central authority to ignore a plan falling within the commitment undertaken by the State under ILO Convention No. 129. The inspections were carried out in September, October, November and the first week of December 2011. Inspectors were appointed to take part in the operation and in all 912 inspections were conducted in the departments of Quetzaltenango, Izabal, Alta Verapaz and Baja Verapaz. Once the work undertaken jointly with the Secretariat of Food and Nutrition Safety is finished, the labour inspectors Mr Víctor Manuel Dávila Rivera, Mr Shuvert Alí del Valle Rodríguez and Mr Néstor Estuardo de León Mazariegos will continue the implementation of the annual plan of visits to undertakings and/or farms throughout the country up until the prescribed dates. The Government further states that there have been contacts with the abovementioned inspectors and the complaint has been resolved through dialogue, the inspectors having decided to withdraw their claims there being no longer any reason to pursue them.

- 1081.** As to the committee to negotiate the collective labour agreement, the Government reports that it has already been set up and consists of the Vice-Minister for Financial Administration, the Director-General of Labour and an adviser from the Office of the Labour Ombudsman. It is now at work in the context of the collective dispute before the 11th Labour and Social Welfare Court.

## C. The Committee's conclusions

**1082.** *The Committee observes that this case concerns anti-union persecution and practices, a refusal to negotiate a list of demands, obstacles to exercise the right to collective bargaining and non-observance of provisions of a collective agreement in the Ministry of Labour and Social Welfare.*

### **Non-observance of provisions of a collective agreement**

**1083.** *With regard to the non-observance of provisions of the collective agreement in force, the Committee notes the complainant's statement that the so-called "recreation bonus" of GTQ250, due at the end of April, has not been paid. The Committee notes that, according to the Government, the payment was made in the first half of August 2011. It will therefore not pursue its examination of this allegation.*

### **Refusal to negotiate a list of demands and obstacles to exercise the right to collective bargaining**

**1084.** *As regards the obstacles to the exercise of the right to collective bargaining arising from the signing of a collective agreement with minority unions in the Ministry, the Committee notes that the complainant states that: (1) the collective agreement in force at the material time (up to 17 May 2011) provided that demands relating to labour disputes shall be addressed with the union that signed the agreement, and that this was not done; (2) the Ministry of Labour and Social Welfare has recognized and authorized two groups of workers to discuss wage increases and job reclassification; (3) the law is quite clear that any economic and social gains are to be negotiated with the union having the largest membership, that in the case of the Ministry of Labour this is SIGEMITRAB; (4) on 20 October 2011 a collective agreement was signed between the Ministry of Labour and Social Welfare and the two minority unions that exist side by side in the Ministry, namely: SITRAMITRAPS and the Trade Union of Workers of the Ministry of Labour and Social Welfare; and (5) SIGEMITRAB brought retaliatory proceedings to challenge the approval of the new collective agreement. Noting that in its observations the Government has not questioned the representativeness of SIGEMITRAB, the Committee expects that the Government will embark on negotiations with the majority union and requests it to keep the Committee informed in this regard. It regrets that the Government has not sent its observations on the allegation that negotiations were held and collective agreements signed with minority unions, as a result of which, according to the complainant, SIGEMITRAB's position was weakened. The Committee requests the Government to provide its observations in this regard.*

**1085.** *As regards the setting up of the negotiating committee to discuss a new collective agreement, the Committee notes that, according to the complainant: (1) a collective dispute about economic and social matters arising from the refusal to negotiate a new collective agreement is being heard by the 11th Labour and Social Welfare Court; (2) the Ministry of Labour and Social Welfare requested direct negotiations; and (3) the Minister of Labour and Social Welfare delayed setting up the negotiating committee by filing an amparo appeal in order to hold up the court proceedings. The Committee notes that the negotiating committee has already been set up and consists of the Vice-Minister for Financial Administration, the Director-General of Labour and an adviser from the Office of the Labour Ombudsman, and is in the process of negotiating in the context of the collective dispute being heard by the 11th Labour and Social Welfare Court. The Committee recalls that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement: moreover, genuine and*

*constructive negotiations are a necessary component to establish confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 935]. The Committee expects that the negotiations will be conducted without further delay and asks the Government to keep it informed of the outcome thereof and the settlement of the collective dispute being heard by the 11th Labour and Social Welfare Court.*

### **Anti-union persecution and practices**

- 1086.** *With regard to the alleged anti-union persecution and practices, the Committee notes that the complainant states that: (1) the Ministry set up a committee consisting of three labour inspectors – who are also trade union officials – and approved an annual plan of inspection visits to farms and agricultural institutions, which has not been implemented; (2) the head of the General Labour Inspectorate obstructed the plan by consistently slandering and stigmatizing the labour inspectors who hold trade union office; and (3) it requests the Minister to implement in full the plan he himself authorized, as failure to do so will perpetuate the discrimination against the labour inspectors who hold trade union office in SIGEMITRAB, namely Mr Shuvert Alí del Valle Rodríguez, Mr Víctor Manuel Dávila Rivera, and Mr Néstor Estuardo de León Mazariegos. The Committee notes the Government's response to the effect that: (1) it was never the intention of the central authority to disregard a plan falling within the commitment undertaken by the State under ILO Convention No. 129; (2) the inspection visits were implemented in September, October, November and the first week of December 2011; (3) there have been contacts with the abovementioned labour inspectors and the complaint they submitted has been resolved through dialogue; they have stated their intention to withdraw their claims since there are no longer any grounds for pursuing them. The Committee asks the complainant organization to confirm that the complaint has been withdrawn following the settlement.*
- 1087.** *With regard to the disciplinary proceedings and the other court proceedings the complainant refers to as reprisals against the trade union activity of the General Secretary of SIGEMITRAB, who is also Secretary of the complainant organization, the Committee regrets that the Government has not responded and requests it to send its observations on these matters.*

### **The Committee's recommendations**

- 1088.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Noting that in its observations the Government has not questioned the representativeness of SIGEMITRAB, the Committee expects that the Government will initiate negotiations with the majority union and requests it to keep the Committee informed in this regard. It also asks the Government to send it observations on the allegation that negotiations were held and collective agreements concluded with minority unions, as a result of which, according to the complainant, SIGEMITRAB's position was weakened.*
  - (b) With regard to the setting up of a negotiating committee to discuss a new collective agreement, the Committee expects that the negotiations will be conducted without further delay and asks the Government to keep it informed of the outcome thereof and the settlement of the collective dispute now before the 11th Labour and Social Welfare Court.*



- (c) *With regard to the alleged anti-trade union persecution and practices in the context of the annual inspection plan of the labour inspectorate, the Committee asks the complainant organization to confirm that the claim has been withdrawn following the agreement reached.*
- (d) *With regard to the disciplinary proceedings and other court proceedings referred to by the complainant organization as reprisals for the trade union activity of the General Secretary of SIGEMITRAB, who is also Secretary of the complainant organization, the Committee regrets that the Government has not responded and requests it to send its observations in this regard.*

CASE NO. 2807

INTERIM REPORT

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

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

- 1089.** The Committee last examined this case at its March 2012 meeting, when it presented an interim report to the Governing Body [see 363rd Report, paras 706–722, approved by the Governing Body at its 313th Session (March 2012)].
- 1090.** The Government sent its observations in a communication dated 30 May 2012.
- 1091.** The Islamic Republic of Iran 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. Previous examination of the case**

- 1092.** In its previous examination of the case, the Committee made the following recommendations [see 363rd Report, para. 722]:
- (a) Noting the Government's indication that, together with its social partners, it has collectively negotiated amendments of the Labour Law and that it strongly hopes that the newly drafted Labour Law that is expected to be approved by the Parliament also addresses the core concerns of the Committee of Freedom of Association, the Committee trusts that the Government will avail itself of the technical assistance of the ILO, as a matter of urgency, so as to ensure that the Bill before the Parliament will be in full conformity with the principles of freedom of association. The Committee urges the

Government to keep it informed of the progress made in amending article 131 of the Labour Law and firmly expects that the legislation will be brought into conformity with freedom of association principles in the very near future.

- (b) The Committee requests the Government to provide a copy of the amended Code of Practice on the Formation, Scope of Duties, Authorities and Method of Performance of Trade Unions and Related Associations.
- (c) The Committee requests the Government to clarify any difference there is between the Coordinating Center of Workers' Representatives (CCR) and the High Assembly of Workers' Representatives. Reiterating its deep concern at the apparent absence of workers' organizations' delegates, appointed in the full spirit of freedom of association, among the official delegation to the International Labour Conference, the Committee stresses that it is a matter of utmost urgency, in view of the upcoming session of the International Labour Conference, that the Government deploy all efforts, with the technical assistance of the ILO, for the rapid amendment of the labour legislation.

## **B. The Government's reply**

**1093.** In its communication dated 30 May 2012, the Government reiterates its earlier observations and expresses its cognizance of the fact that the Committee takes into account national circumstances, such as the history of labour relations and the social and economic context.

**1094.** The Government expresses its conviction that by allowing the establishment of independent and self-governing workers' and employers' organizations and by vesting them with means of promoting and defending the interests of their members, it allows such organizations to become a source of social justice and to serve the purpose of safeguarding sustainable peace in Iranian society. The Government considers that the development of free and independent organizations and negotiation with all those involved in social dialogue is indispensable to enable it to confront social and economic problems and to resolve them in the best interests of workers and to develop their social and economic well-being. It considers that in order to defend the interests of their members more effectively, workers' and employers' organizations of Iran, as recognized by the national labour legislation, including the Workers' Representatives, should have the right to form federations and confederations of their own choosing.

**1095.** The Government welcomes the Committee's recommendation (a) and indicates that, in line with the principles of freedom of association, the newly amended text of the Labour Law has been collectively negotiated and drafted by the social partners considering the observations reflected in the Committee's 363rd Report.

**1096.** As regards the clarification requested in recommendation (c), the Government explains that the difference between the Coordinating Center of Workers' Representatives (CCR) and the High Assembly of Workers' Representatives pertains to the gradual process of one turning into another. The said organization, also duly recognized by the provisions of the existing labour law, began coordinating workers' representatives from across the country and, upon holding its general assembly, drafting its by-laws, etc. was finally registered as the High Assembly of Workers' Representatives. Furthermore, with regard to the Committee's recommendation to the effect that the Government should deploy all efforts, with the technical assistance of the ILO, for the rapid amendment of the labour legislation, the Government indicates that the revision is under way benefiting from the observations of the ILO, the social partners and competent experts of the Ministry of Cooperatives, Labour and Social Welfare.

## C. The Committee's conclusions

- 1097.** *The Committee recalls that this case, referred to it by the International Labour Conference in June 2010 upon a proposal of the Credential's Committee, concerns the issue of organizational monopoly imposed by the legislation and genuine representation of workers in practice. In particular, the Committee recalls that on several occasions it has requested the Government to amend article 131 of the Labour Law, enshrining organizational monopoly, so as to ensure that the legislation allows for trade union pluralism. The Committee notes that in its communication dated 30 May 2012, the Government reiterates that the newly amended text of the Law has been negotiated and drafted together with the social partners taking into account the recommendations of the Committee. The Committee further notes that with regard to its recommendation to the Government to seek the ILO technical assistance for the rapid amendment of the labour legislation, the Government indicates that the revision is under way benefiting from the observations of the ILO, the social partners and competent experts of the Ministry of Cooperatives, Labour and Social Welfare.*
- 1098.** *The Committee understands that the technical advice of the Office was not sought in the process of preparing the mentioned amendments and deeply regrets that, despite its repeated requests, a copy thereof has not been communicated to it for its evaluation of this case in full knowledge of the facts. The Committee expects that the proposed draft amendments will be in full conformity with the principles of freedom of association and once again recalls that the principle of trade union pluralism, which the Iranian Government has been called to ensure in law and in practice on many occasions, is grounded in the right of workers to come together and form organizations of their own choosing, independently and with structures which permit their members to elect their own officers, draw up and adopt their by-laws, organize their administration and activities and formulate their programmes in the defence of workers' interests without interference from the public authorities. Given the explanation provided by the Government on the difference between the Coordinating Center of the Workers' Representatives (CCR) and the High Assembly of Workers' Representatives, which it understands pertains to the gradual process of one turning into another, and the absence of response from the Government to the Committee's recommendations that it seek ILO technical assistance and transmit the amended text of the legislation, the Committee can only express its deep concern at the lack of cooperation from the Government in this regard. While the Government has repeatedly assured the Committee that the new legislation will take into account the principles of freedom of association, the Committee regrettably can see no concrete and tangible indications that this is the case. The Committee therefore once again strongly urges the Government to transmit a copy of the draft amendments without delay so that it may examine their conformity with freedom of association principles.*
- 1099.** *The Committee also regrets that the Government has not provided a copy of the amended Code of Practice on the Formation, Scope of Duties, Authorities and Method of Performance of Trade Unions and Related Associations, despite its previous request, and urges the Government to do so without delay.*

## The Committee's recommendations

- 1100.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee expects that the proposed draft amendments to the Labour Law will be in full conformity with the principles of freedom of association and would allow for trade union pluralism and strongly urges the*

*Government to transmit a copy thereof without delay so that it may examine their conformity with freedom of association principles.*

- (b) *The Committee regrets that the Government has not provided a copy of the amended Code of Practice on the Formation, Scope of Duties, Authorities and Method of Performance of Trade Unions and Related Associations, despite its previous request, and urges the Government to do so without delay.*

CASE NO. 2794

INTERIM REPORT

**Complaint against the Government of Kiribati  
presented by  
the Kiribati Trade Union Congress (KTUC)**

***Allegations: The complainant organization  
alleges the infringement of the right to strike in  
the education sector***

- 1101.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [362nd Report, paras 1123–1140 approved by the Governing Body at its 312th Session (November 2011)].
- 1102.** Since there has been no reply from the Government, the Committee has been obliged to postpone its examination of the case on two occasions. At its meeting in May–June 2012 [see 364th Report, para. 5], the Committee issued an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested had not been received in due time. To date, the Government has not sent any information.
- 1103.** Kiribati has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 1104.** In its previous examination of the case in November 2011, the Committee made the following recommendations [see 362nd Report, para. 1140]:
- (a) The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the complainant's allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on this case. The Committee urges the Government to be more cooperative in this case and invites the Government to seek technical assistance from the Office.
- (b) The Committee requests the Government to provide detailed information in reply to the allegations that the Minister of Labour declared the strike illegal even though the KUT complied with all the prerequisites to declare a strike under the applicable laws.

- (c) The Committee further urges the Government to provide detailed information without delay in relation to the allegations of threats and intimidation made by the Minister of Education during the strike, to the effect that failure to return to work would lead to the dismissal of the strikers, as well as the allegations concerning sanctions and the dismissal of members of the KUT for the strike action, and requests the Government to take the necessary measures to ensure that any worker who has been dismissed for the exercise of legitimate strike action is reinstated in his or her post, with payment for lost wages and that the sanctions taken against them are lifted.
- (d) The Committee requests the Government and the complainant to indicate the status of the negotiations between the MOE, the PSO and the KUT and to indicate whether a new CBA has since been signed.

## **B. The Committee's conclusions**

- 1105.** *The Committee deeply regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has once again not replied to the complainant's allegations even though it has been requested several times, including through an urgent appeal.*
- 1106.** *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1971)], the Committee is obliged to present a report on the substance of the case without being able to take account of the information which it had hoped to receive from the Government.*
- 1107.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments, in turn, will recognize the importance of presenting, for objective examination, detailed replies concerning allegations made against them [see First Report, para. 31].*
- 1108.** *Under these circumstances, recalling that this complaint concerns allegations of infringement of the right to strike of the Kiribati Union of Teachers (KUT) by the Government and acts of anti-union discrimination in connection with the strike which took place from 4 to 7 December 2009, the Committee finds itself obliged to reiterate the conclusions and recommendations it made when it examined this case at its meeting in November 2011 [see 362nd Report, paras 1133–1139].*

## **C. The Committee's recommendations**

- 1109.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee deeply regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has once again not replied to the complainant's allegations, even though it has been requested several times, including through an urgent appeal. The Committee urges the Government to be more cooperative in this case and invites the Government to seek technical assistance from the Office.*
  - (b) *The Committee urges the Government to provide detailed information in reply to the allegations that the Minister of Labour declared the strike illegal*

*even though the KUT complied with all the prerequisites to declare a strike under the applicable laws.*

- (c) *The Committee further urges the Government to provide detailed information without delay in relation to the allegations of threats and intimidation by the Ministry of Education during the strike, to the effect that failure to return to work would lead to the dismissal of the strikers, as well as the allegations concerning sanctions and the dismissal of members of the KUT for the strike action. It urges the Government to take the necessary measures to ensure that any worker who has been dismissed for the exercise of legitimate strike action is immediately reinstated in his or her post, with payment for lost wages and that any sanctions taken against them are lifted.*
- (d) *The Committee requests the Government and the complainant to indicate the status of the negotiations between the Ministry of Education, the Public Service Office and the KUT and to indicate whether a new collective bargaining agreement has since been signed.*

CASE NO. 2902

INTERIM REPORT

**Complaint against the Government of Pakistan  
presented by  
the Karachi Electric Supply Corporation Labour Union (KESC)**

*Allegations: The complainant organization alleges refusal by the management of the Karachi Electric Supply Enterprise to implement a tripartite agreement, to which it is a party. It further alleges that the enterprise management ordered to open fire at the protesting workers, injuring nine, and filed criminal cases against 30 trade union office bearers*

- 1110.** The complaint is contained in a communication from the Karachi Electric Supply Corporation Labour Union (KESC) dated 12 October 2011.
- 1111.** The Government sent its observations in a communication dated 7 June 2012.
- 1112.** Pakistan has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1113.** In its communication dated 12 October 2011, the complainant indicates that it is an industrial trade union elected as collective bargaining agent to represent the workers

engaged in the Karachi Electric Supply Enterprise under the provisions of the Industrial Relations Act.

- 1114.** The complainant alleges that the enterprise declared 4,500 senior/experienced workers as redundant while recruiting new employees on contract basis through a private contractor in order to avert financial obligations such as gratuity/higher pay and fringe benefits, in violation of the fundamental rights of freedom of association of the workers and the relevant national laws.
- 1115.** In this regard, the union made concerted efforts to get these issues resolved through social dialogue but the management did not respond. The Provincial Governor of Sindh held a tripartite meeting with the union representatives, the management and the local government administration of Karachi on 26 July 2011 and a tripartite agreement was signed by the parties. This agreement provides for the assignment of the redundant employees on alternative posts and the recovery of unpaid wages as well as the constitution of a dispute resolution committee to make appropriate recommendations to resolve all other pending issues (the complainant attached the agreement to the complaint). However, the management refused to respect and implement the said agreement.
- 1116.** The workers therefore decided to hold a public demonstration on 29 August 2011 in front of the headquarters of the enterprise demanding the payment of unpaid wages (four months) and for the respect and implementation of the tripartite agreement. During that demonstration, the management of the enterprise ordered its security officers to open fire on the workers, injuring more than nine who remained under medical treatment.
- 1117.** Following this demonstration, the management dismissed and/or filed criminal cases against 30 trade union office bearers on false charges under the Anti-terrorism Act, in order to defeat the lawful efforts of the union and to prevent the implementation of the tripartite agreement. However, no criminal cases were filed by the police against the management, despite the written requests of the union. This was only possible following an order of the honourable court and the First Information Report (FIR).

## **B. The Government's reply**

- 1118.** In a communication dated 7 June 2012, the Government indicates that an agreement has been reached between the management and the KESC as a result of an effective intervention of the Governor of Sindh. Subsequently, the government of the Province of Sindh has also been asked to make all efforts to ensure the implementation of this agreement in letter and spirit.

## **C. The Committee's conclusions**

- 1119.** *The Committee notes that in this case the complainant alleges that the management of the Karachi Electric Supply Enterprise refused to implement a tripartite agreement signed on 26 July 2011, to which it is a party and that during a demonstration against the refusal of the enterprise to implement this agreement, the enterprise management ordered its security guards to open fire on protesting workers, injuring nine, and subsequently dismissed and/or filed criminal cases against 30 trade union officers. The Committee notes that according to the complainant, the police refused to file criminal charges against the management of the company, but the complainant was only able to bring such a case following an order of the honourable court and the FIR.*
- 1120.** *The Committee deeply regrets that the Government has sent only partial information indicating that an agreement has been reached between the management and the KESC as*

a result of an effective intervention of the Governor of Sindh and that subsequently, the government of the Province of Sindh has also been asked to make all efforts to ensure the implementation of this agreement in letter and spirit. It is not clear whether the Government is referring to the July 2011 agreement or to a more recent one that might have addressed the unfortunate events of August 2011. In these circumstances, the Committee requests the Government to clarify which agreement it is referring to and should there be a more recent agreement, to transmit a copy thereof to the Committee. The Committee further requests the Government and the complainant to indicate whether the July 2011 agreement has now been implemented.

**1121.** *As regards the allegations of violent intervention in a peaceful demonstration, the Committee recalls that workers should enjoy the right to peaceful demonstration to defend their occupational interests. In the event of assaults on the physical or moral integrity of individuals, the Committee has considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibilities, punishing those responsible and preventing the repetition of such acts. 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. Moreover, the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association. Allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, paras 133, 50, 52, 666 and 41]. The Committee therefore requests the Government to institute immediately an independent judicial inquiry into the allegations that: (i) violence was used against trade union members during a demonstration against the refusal of the enterprise to implement the tripartite agreement, injuring nine; and (ii) 30 trade union bearers were dismissed following this demonstration and/or criminal charges were brought against them, with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. The Committee requests the Government to inform it of the outcome of this investigation and to keep it informed of any follow-up measures taken. It expects that, should it be found that these unionists were dismissed or charged for the exercise of legitimate trade union activities, the Government will take all necessary steps to ensure their reinstatement and the dropping of all pending charges. If reinstatement is found not to be possible for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the union members concerned are paid adequate compensation so as to constitute a sufficiently dissuasive sanction for anti-union discrimination.*

**1122.** *The Committee observes that, according to the Government's statement in the Conference Committee on the Application of Standards (June 2011) when reviewing the application of Convention No. 87, Presidential Ordinance No. IV of 1999, which amended the Anti-terrorism Act by penalizing with imprisonment the creation of civil commotion, including illegal strikes or slowdowns, has been repealed and is no longer in force. Noting from the complainant's allegations that charges were brought against trade union officers under the Anti-terrorism Act, the Committee requests the Government to indicate precisely under which provisions of the Anti-terrorism Act the trade union officers were charged and invites it to ensure that the charges are dropped should they relate to the exercise of legitimate strike action.*

## **The Committee's recommendations**

**1123.** *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 clarify which agreement it is referring to in its reply and should there be a more recent agreement, to transmit a copy thereof to the Committee. The Committee further requests the Government and the complainant to indicate whether the July 2011 agreement has now been implemented.*
- (b) *In view of the gravity of the matters raised in this case, the Committee requests the Government to institute immediately an independent judicial inquiry into the allegations that: (i) violence was used against trade union members during a demonstration against the refusal of the enterprise to implement the tripartite agreement, injuring nine; and (ii) 30 trade union officers were dismissed following this demonstration and/or criminal charges were brought against them, with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. The Committee requests the Government to inform it of the outcome of this investigation and to keep it informed of any follow-up measures taken. It expects that, should it be found that these unionists were dismissed or charged for the exercise of legitimate trade union activities, the Government will take all necessary steps to ensure their reinstatement and the dropping of all pending charges. If reinstatement is found not to be possible for objective and compelling reasons, the Committee requests the Government to take the necessary measures to ensure that the union members concerned are paid adequate compensation so as to constitute a sufficiently dissuasive sanction for anti-union discrimination.*
- (c) *Noting from the complainant's allegations that charges were brought against trade union officers under the Anti-terrorism Act, the Committee requests the Government to indicate precisely under which provisions of the Anti-terrorism Act the trade union officers were charged and invites it to ensure that the charges are dropped should they relate to the exercise of legitimate strike action.*

CASE NO. 2648

INTERIM REPORT

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

- **the Trade Union of Workers and Employees of Cañas Paraguayas SA (SOECAPASA)**
- **the General Confederation of Workers (CGT)**
- **the Trade Union Confederation of Workers of Paraguay (CESITEP) and**
- **the Paraguayan Confederation of Workers (CPT)**

*Allegations: The complainant organizations allege anti-union dismissals and transfers, as well as acts of violence against one member of the union*

**1124.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [see 362nd Report, paras 1141–1148]. At its meeting in June 2012, the Committee made an urgent appeal to the Government and drew its attention to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body at its 184th Session in November 1971, it could present a report on the substance of the case at its next meeting, even if it had not received the information or observations from the Government in due time. To date, it has not received any observations from the Government.

**1125.** Paraguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

**1126.** The Committee recalls that at its meeting in November 2011, when examining the allegations of anti-union dismissals and transfers, as well as acts of violence against one woman member during a peaceful demonstration, it made the following recommendations [see 362nd Report, para. 1148]:

- (a) The Committee requests the Government to keep it informed of the employment status of the fourth SOECAPASA union official who, according to the complainants, was dismissed.
- (b) The Committee again urges the Government to take the necessary measures to initiate without delay an investigation into the alleged transfer of SOECAPASA General Secretary, Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation. The Committee requests the Government to keep it informed of developments in this regard. It also requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention or sanctioning of anti-union discrimination.
- (c) The Committee again urges the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against the worker, Juana Erenio Penayo.

## B. The Committee's conclusions

- 1127.** *The Committee deeply deplores that, despite the time that has elapsed since the beginning of the case, the Government has not provided the information requested, despite being invited to do so, including by means of an urgent appeal.*
- 1128.** *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 that it had hoped to receive from the Government.*
- 1129.** *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.*
- 1130.** *The Committee recalls that the allegations that had remained pending in this case concern the anti-union dismissal of one union official from the Cañas Paraguayas SA enterprise (CAPASA), the transfer of the General Secretary of the Trade Union of Workers and Employees of Cañas Paraguayas SA (SOECAPASA), Mr Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation, as well as the assault against the worker, Ms Juana Erenio Penayo de Sanabria, by one of the company's managers (the complainant organization enclosed with its own complaint a copy of the complaint lodged with the national police).*
- 1131.** *The Committee deeply deplores the fact that the Government has not sent its observations in this regard and finds itself obliged to reiterate the recommendations it made when it examined this case at its meeting in November 2011 [see 362nd Report, para. 1148].*

## The Committee's recommendations

- 1132.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee deeply deplores that, despite the time that has elapsed since the beginning of this case, the Government has not provided the information requested, despite being invited to do so, including by means of an urgent appeal.*
  - (b) The Committee once again strongly requests the Government to keep it informed of the employment status of the SOECAPASA union official who, according to the complainants, was dismissed.*
  - (c) The Committee again strongly urges the Government to take the necessary measures to initiate without delay an investigation into the alleged transfer of SOECAPASA General Secretary, Mr Gustavo Acosta, and the mass transfer of workers following peaceful demonstrations held in order to inform the general public of the company's situation. The Committee requests the Government to keep it informed of developments in this regard.*

*It also requests the Government, in consultation with the social partners, to ensure effective national procedures for the prevention or sanctioning of anti-union discrimination.*

- (d) *The Committee again strongly urges the Government to keep it informed with regard to the investigation carried out following the complaint lodged with the national police concerning the assault against the worker, Ms Juana Erenio Penayo.*

CASE NO. 2905

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

**Complaint against the Government of the Netherlands  
presented by  
the Netherlands Post Distribution Employers Federation (WPN)**

*Allegations: The complainant alleges that, by means of section 8 of the Postal Act and the ensuing decrees, the Government obliged the WPN to negotiate collectively and conclude a collective agreement with certain non-representative trade unions, and imposed a specific content for collective agreements. The complainant also alleges that the Government appointed a seemingly biased and partial mediator*

- 1133.** The complaint is contained in a communication dated 6 October 2011 from the “Werkgeversvereniging Postverspreiders Nederland” (Netherlands Post Distribution Employers Federation) (WPN).
- 1134.** The Government sent its observations in a communication dated 31 May 2012.
- 1135.** The Netherlands 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 allegation**

- 1136.** In a communication dated 6 October 2011, the WPN, an organization legally established in March 2009, denounces section 8 of the Postal Act of 2009 as well as the temporary decree on postal employment contracts – and subsequent decree(s) – passed by the Government based on the Postal Act and which makes it compulsory for the WPN to enter into a collective labour agreement (CLA) and prescribes specific contents.

- 1137.** As a background to the complaint, the complainant indicates that the contested decree which makes it compulsory for postal companies to enter into employment contracts with their mail distributors relates to the liberalization of the European postal market. In fact, the European Union (EU) has adopted measures under the First and Second Postal Directives (1997/67/EC and 2002/39/EC, respectively) to implement the phased liberalization of the postal market. With the entry into force of the Third Postal Directive (2008/6/EC) on 27 February 2008, the full liberalization of the European postal market had to be achieved by no later than 1 January 2011. Consequently, all Member States within the European Union must have transposed the Third Postal Directive into national law by 31 December 2010.
- 1138.** The complainant further indicates that TNT Post BV (hereinafter: TNT), previously as a state-run enterprise and later as a private company, was the sole letter post concessionaire within the Dutch postal market. TNT's statutory monopoly was gradually phased out in accordance with the European Postal Directives, by which the Dutch Government aimed to fully liberalize the postal market by 1 January 2008, namely also for addressed mail from 0 to 50 grams. In the end, the Dutch postal market (on paper) was fully liberalized by the implementation of the Postal Act on 1 April 2009 (Bulletin of Acts and Decrees 2009, 155). The Dutch legislature therefore formally liberalized the postal market almost 18 months later than originally intended. The reason for this delay was that it wanted liberalization to be contingent on a "careful structuring of the employment conditions of mail distributors", among other factors. The Dutch legislator was namely fearful that liberalization would lead to such competition in the area of labour costs that there would be a "race to the bottom" in relation to the employment conditions of mail distributors.
- 1139.** According to the complainant, the new entrants to the postal market (new postal companies) have yet to gain market share from the former monopolist (TNT) – which has a tight-knit delivery network due to its long-standing monopoly, by which the labour costs per postal item are relatively low. Therefore, the new postal companies are forced to organize their enterprise and labour structure as efficiently as possible, in order to keep the labour costs per postal item as low as possible. They have chosen to deliver post only two days a week. As a result, the new postal companies make use of casual workers on the basis of a contract for services to deliver post. These workers, who are not financially dependent on their work at the new postal companies, mainly include students, housewives and senior citizens willing to earn money to supplement their student grants, household income or (pre-)pensions. According to the complainant, several surveys determine that these workers, for the most part, would not want employment contracts, precisely because of the flexibility and freedom that is inherent to the contract for services (e.g. the lack of fixed working hours and an unlimited number of days' holiday). These workers are remunerated according to a refined standard pay system, based on which they can earn minimum wage if they deliver the post at an average speed. The calculation of the wage level does not only take into account the number of delivered items, but also the weight thereof, the number of postal items for each postal address and the distance that has to be covered between the different addresses.
- 1140.** By contrast, the former state-run enterprise (TNT) still operates with a workforce of traditional postmen, consisting for the most part of mail distributors who are employed on the basis of full-time employment contracts for an indefinite period of time. These workers are financially dependent on their jobs, and the labour costs are considerably higher as a result of the inherent and compulsory deduction of social security and pension contributions coupled with employment conditions that date back to when TNT was still a state-run enterprise. The complainant states that it was already clear back in 2007 that drastic cutbacks in TNT's workforce would eventually be inevitable mainly on account of the significant shrinkage of the postal market caused by the digitization process, the automation of the postal sorting process and the competition of the new postal companies

that would come into play. Therefore, a number of major trade unions which had many members among TNT's traditional postmen insisted that the Government adopt measures before the full liberalization of the postal market went ahead.

**1141.** The Ministry of Economic Affairs, Agriculture and Innovation, in joint consultation with the Ministry of Social Affairs and Employment, then approached the new postal companies and their investors with the urgent request to enter into a CLA with the trade unions. The conclusion of such a CLA was set as a pre-condition for the full liberalization of the postal market with effect from 1 January 2008. However, the liberalization was postponed when no CLA had been concluded by 1 January 2008. The Ministries were already aware of the trade unions' demand for the conclusion of a CLA: a time frame had to be agreed within which the new postal companies would also employ mail distributors – just as TNT's postmen – on the basis of an employment contract (hereinafter: “the transitional model”).

**1142.** The new postal companies found themselves under pressure and entered into an Agreement in Principle followed by a CLA with the trade unions on 12 November 2008, in which they agreed to endeavour to employ 80 per cent of their mail distributors on the basis of an employment contract within 3.5 years of the liberalization of the postal market. However, the Agreement in Principle, which forms an integral part of the later CLA, expressly stipulates that the transitional model ought to be contingent on (uncertain) market developments and other uncertain developments. The parties therefore intended to create a flexible transitional model. The final percentage of 80 per cent would need to be achieved by means of a flexible transitional model created by independent economists in accordance with the Agreement in Principle. This transitional model was created on 31 March 2009 by the SEO Institute (an independent economic research institute) on the instructions of the CLA parties and contained the following transitional percentages: 14 per cent in April 2010, 40 per cent in April 2011, 74 per cent in April 2012 and 80 per cent in October 2012 (attached to the complaint). These percentages were flexible in the sense that the SEO Institute would determine in April of each year whether the percentages had been achieved or examine the reasons why they had not.

**1143.** The complainant underlines that the economists concerned at the SEO Institute have explicitly referred to the crucial importance of a flexible transitional model in several research reports where they concluded that “transition towards better employment conditions costs money, and if that cannot be earned by factoring the rise in labour costs into tariffs, this will result in the bankruptcy of the postal companies concerned”. Furthermore:

the current competition in the already liberalized part of the market is destructive as the prices are too low to cover the incurred costs and the companies cannot continue to survive. A transition to more effective competition is needed in order to be able to pay for the transition from the contract for services. ... Briefly put, market players can afford better employment conditions by passing on the cost to the market. ... The transitional model has a flexible structure. Certain knobs in the model can be tweaked depending on actual market developments.

**1144.** The new postal companies united in a new employers' organization (WPN) and agreed to sign the CLA on 11 August 2009 with the trade unions. The transitional model created by the SEO Institute was then incorporated and detailed further in the CLA. The postal market was only liberalized after the CLA and the flexible transitional model came into being. As such, the Ministry issued a press release on 24 March 2009 stating that the Government had decided, after taking everything into consideration, that the conditions for liberalization had been met and that the postal market could be opened in a “socially responsible manner” on 1 April 2009.

- 1145.** The CLA and its flexible transitional model were immediately placed under pressure by the Government, even though neither the new postal companies nor their mail distributors – the majority of whom favoured the more flexible contract for services – had any need for them. While the mail distributors working at the new postal companies were for the most part not organized in a trade union, the trade unions with which the WPN had to enter into the CLA were not actually representative of these workers. As the trade unions that wanted to enter into the CLA and its transitional model had practically no members among the mail distributors working at the new postal companies, they were namely not able to enforce the conclusion of this CLA, for instance by means of strike action or the threat thereof. For that reason and because neither the new postal companies nor the vast majority of their mail distributors had any interest in the incorporated transitional model, the trade unions feared that the new postal companies would not comply sufficiently or fully with the CLA, or would even terminate it once the full liberalization of the postal market was a reality. Consequently, they requested the Government for “a deterrent” in the form of a Government measure to prevent the termination of the CLA and indirectly enforce compliance with it.
- 1146.** The possibility of introducing the Government measure was determined during the drafting of the Postal Act 2009. Section 8 of the Act creates the power to lay down rules by means of a governmental decree in relation to employment conditions that are to be observed if:
- (a) work is performed under socially unacceptable employment conditions;
  - (b) there is a temporary problem restricted to the postal sector; and
  - (c) in so far as the problem cannot be resolved, by adapting generally applicable rules or by way of agreement between the employer concerned and representatives of workers’ organizations.
- 1147.** The complainant indicates that although it has never been objectively proven that there were any socially unacceptable employment conditions, let alone a temporary problem restricted to the postal sector, and despite the fact that the social partners had already reached agreement on the content of employment conditions for mail distributors at new postal companies, the State Secretary issued a governmental decree under section 8 of the Postal Act 2009, which made it compulsory for the new postal companies to employ all their mail distributors on the basis of employment contracts from the date of its entry into force, namely 1 January 2010. If they fail to do so, the OPTA (the government agency entrusted with supervising compliance with the Postal Act 2009) can impose very high fines on these postal companies.
- 1148.** As a justification for imposing this obligation by means of a governmental decree, the State Secretary referred to the results of an investigation that the Health and Safety Inspectorate carried out in 2007 into the wage levels of mail distributors working at the new postal companies. The Health and Safety Inspectorate investigated whether the new postal companies complied with the Minimum Wage and Minimum Holiday Allowance Act. The investigation supposedly revealed that the mail distributors do not always receive the statutory minimum wage for their work. Therefore, according to the explanatory notes to the decree, the State Secretary regarded this as socially unacceptable.
- 1149.** The complainant contends that the investigation conducted by the Health and Safety Inspectorate only took place among 357 of the 30,000 mail distributors employed by the new postal companies, and a post round was only actually completed together with 11 of these randomly selected mail distributors. A counter investigation has thus revealed that the result of the Health and Safety Inspectorate’s investigation does not provide a reliable picture. The investigation moreover intentionally disregarded the refined standard pay

system used by the new postal companies to calculate the wage level, as well as the individually determined preferences for the desired work pace. Those personal preferences are particularly relevant for determining the wage level in relation to the number of hours worked. More recently, it comes as no surprise that the Health and Safety Inspectorate could not conclude from a new investigation that it conducted in 2010 into the wage level of mail distributors working at the new postal companies – who are paid in the same way as the mail distributors from the 2007 investigation – that there is any question of underpayment.

**1150.** However, notwithstanding the expert counter investigations, the State Secretary went ahead with the introduction of the governmental decree. He based this decision on there being a temporary problem restricted to the postal sector that could be resolved by temporarily imposing the obligation on new postal companies to work with mail distributors employed on the basis of an employment contract, or to make arrangements in that regard with the trade unions. For that reason, the governmental decree was given a fixed term (the current version expires on 1 January 2017).

**1151.** In order to ensure that mail distributors would receive the statutory minimum wage (including holiday allowance), the governmental decree made it compulsory for new postal companies to only work with employees employed on the basis of an employment contract, with effect from 1 January 2010. However, in accordance with article 2, paragraph 2, of the decree, this obligation did not apply to a postal company bound by a CLA that compels new postal companies to ensure that:

- (a) at least 80 per cent are appointed as mail distributors [on the basis of an employment contract (added by lawyer)] no later than 42 months after the law enters into force; and
- (b) this percentage is reached progressively in the preceding months, whereby at least the following are appointed as mail distributors (on the basis of an employment contract):
  - (1) 10 per cent: no later than 12 months after the law enters into force;
  - (2) 30 per cent: no later than 24 months after the law enters into force; and
  - (3) 60 per cent: no later than 36 months after the law enters into force.

**1152.** The complainant states that both the decision to introduce the governmental decree and the content thereof took the new postal companies by surprise. Since the WPN had already entered into a CLA with the trade unions on behalf of the new postal companies, a strict interpretation of section 8 of the Postal Act did not leave any further room for the introduction of the governmental decree. In addition, the governmental decree, contrary to the transitional model that had been agreed with the trade unions in the CLA, included inflexible transitional percentages. The State Secretary ultimately decided on a governmental decree with transitional percentages that were “cast in stone” because of the sustained pressure exerted on him by the trade unions. After the State Secretary yielded to their pressure, the trade unions insisted that the WPN adapt the flexible transitional model agreed in the CLA to the new inflexible requirements laid down by the decree.

**1153.** The alternative was an immediate switch from working with mail distributors employed on the basis of a contract for services, to working with mail distributors employed on the basis of an employment contract. The governmental decree made this compulsory if the new postal companies were not bound by a CLA that complied with the inflexible requirements set by the governmental decree. According to the complainant, this alternative would quickly lead to their bankruptcy because the companies would not be able to absorb the



sudden and very significant associated increase in costs. Furthermore, the trade unions regularly used this alternative as a threat.

**1154.** The complainant also advises that one of the researchers of the SEO Institute that had been brought in by the CLA parties and previously created the transitional model for them has therefore expressed criticism over the requirements set by the governmental decree for the transitional model. In her opinion, the flexible transitional model agreed by the CLA parties has been “ruthlessly sidelined” given that the transitional model prescribed by the governmental decree is “cast in stone”. The researcher considers that the financial scope to make the transition cannot be determined in advance, but only estimated at best. She points out that the new CLA to be agreed for the postal companies is only affordable if a greater volume of post can be achieved and higher tariffs can be charged than at present. Agreeing to a fixed transitional model would make this very difficult. The researcher concluded by pointing out that the Government has not resolved the most pressing problem in the postal market, namely unfair competition. There is namely still no proper competition regulation for the postal market and TNT is therefore able to price its competitors out of the market due to its far greater market share. Without proper competition regulation and with the “rigid governmental decree that is out of line with market conditions”, there is therefore a significant chance, that newcomers will either disappear from the market or only have a marginal role. TNT would then remain as the de facto monopolist.

**1155.** As the new postal companies were “backed up against the wall” in the negotiation process by the governmental decree, the WPN instituted interlocutory proceedings on their behalf against the State and applied for an order prohibiting the entry into force of the governmental decree. This application was based on the following grounds:

- the governmental decree does not comply with any of the requirements laid down by section 8 of the Postal Act;
- the governmental decree is contrary to section 610, Book 7 of the Dutch Civil Code and the underlying individual freedom of contract;
- the governmental decree is contrary to the collective bargaining and contractual freedom of the WPN and its members, as guaranteed, inter alia, in various ILO Conventions ratified by the Netherlands;
- the governmental decree is contrary to primary and secondary EU law (namely the free movement of services and the freedom of establishment and to the European Postal Directive that prescribes the liberalization of the postal market);
- the governmental decree is contrary to several principles of good governance and/or regulations.

**1156.** On 31 December 2009, the Court granted the WPN’s application in the first instance already on the basis of the first ground: as a CLA had been concluded, there was no scope in the Court of First Instance’s opinion for the entry into force of the governmental decree. This ruling was however overturned by The Hague Court of Appeal in a judgment of 13 April 2010 because the WPN was held not to have had any urgent interest at the time of its application. According to The Hague Court of Appeal, the CLA (and its transitional model) actually did comply with the requirements laid down by the governmental decree and so the obligation to employ all mail distributors on the basis of an employment contract with effect from 1 January 2010 did not apply to the new postal companies. The Court of Appeal firstly held that the transitional model with flexible transitional percentages was part of the CLA and secondly, that since the flexible transitional percentages mentioned in the CLA were higher than those prescribed by the governmental decree, the prevailing CLA complied with the requirements of the governmental decree.

For the time being, therefore, there was no urgent interest in judicial intervention as requested by the new postal companies.

- 1157.** Although the WPN considered the interpretation by legislative history of the Court of Appeal to be correct, the State Secretary remained firmly of the view that the transitional model agreed on between the new postal companies and the trade unions did not comply with the requirements of the governmental decree and requested OPTA to supervise compliance with the governmental decree with effect from the autumn of 2010, in order to also place the new postal companies under pressure in this way. This development prompted the WPN to institute an action on the merits (which is still pending) against the State in which it requests an order declaring the governmental decree to be non-binding.
- 1158.** In the meantime, the new postal companies had offered 14 per cent of their mail distributors an employment contract in accordance with the transitional model agreed with the trade unions under the CLA before 1 April 2010. However, only 3.2 per cent of the mail distributors accepted the offer, even though they were informed about the pros and cons of working on the basis of an employment contract during information sessions with brochures and verbal advice organized by the new postal companies and the trade unions. The complainant asserts that this again confirmed that the overwhelming majority of mail distributors working at the new postal companies did not require an employment contract. The reason for this was that they were not financially dependent and favoured an adaptable form of contract with flexible working hours and an unlimited number of days off.
- 1159.** The trade unions were so dissatisfied about the very low percentage of mail distributors who actually accepted the offer to convert their contracts for services into employment contracts, that they decided in June 2010 to terminate the CLA with effect from 1 October 2010. As a result, there was a threat that the new postal companies would fall directly under the obligation in the governmental decree to employ their mail distributors on the basis of employment contracts (or otherwise face fines of €450,000 per contravention) three months after the termination of the CLA, i.e. with effect from 1 January 2011. Even if the new postal companies were to succeed in finding an adequate number of mail distributors prepared to enter into an employment contract with them (which, given the perceived lack of willingness, seems to be an impossible task) – this would lead to such a sudden increase in costs that bankruptcy for these postal companies seems inevitable.
- 1160.** The complainant observes that the new postal companies are accordingly trapped between the requirements of the trade unions and the legislator on the one hand, and the price war and difficult circumstances in the liberalized postal market on the other hand, including the fact that most of their mail distributors do not wish to enter into an employment contract with them. As an alternative to the governmental decree, the new postal companies have also repeatedly insisted – without success – on supervision in the postal market in order to prevent a price war and to achieve fair competition in the postal market.
- 1161.** As a result of the termination of the CLA, the WPN tried to reach consensus with the trade unions on a new CLA, but the negotiations fell through on 27 September 2010 since the trade unions continued to insist on the impossible requirement of agreeing to fixed (inflexible) interim transition percentages that the new postal companies could not possibly achieve because of the low tariffs in the postal market. The Minister of Economic Affairs, Agriculture and Innovation suspended the governmental decree and appointed a “pathfinder” to get the CLA negotiations back on track. While the new postal companies insisted that the obligation under the governmental decree – namely that all mail distributors must work on the basis of an employment contract – needed to be withdrawn or at least relaxed, the Minister of Economic Affairs, Agriculture and Innovation (hereinafter: “the Minister”) proved unwilling to do that during the emergency debate with the Lower House on 7 October 2010. It was noteworthy, however, that the Minister

acknowledged during the debate that specific employment conditions should not be a political issue.

- 1162.** As a result, the Minister decided to temporarily suspend the effect of the governmental decree in order to give the new postal companies and trade unions time to agree on a new CLA. In order to get the stalled CLA negotiations back on track, Mr R.L. Vreeman was appointed as “pathfinder”, with the mandate to mediate between the WPN and the trade unions and to issue an opinion containing a solution for the CLA dispute. The trade unions had an initial dismissive reaction to the appointment of a mediator. They set this out in a letter to the Minister, in which they also made tough transitional and other claims and demands with regard to the content of the CLA. In other words, they were asking for government intervention instead of allowing the consultation between social partners to get back on track again through a “pathfinder”.
- 1163.** On the other side, the WPN and its postal company members indicated that they were not opposed to attempted mediation via a “pathfinder”, but viewed the sudden appointment of Mr Vreeman, without any prior consultation, with distrust as he was a former trade union leader, as well as the former leader of a large left-wing political party in the Dutch Parliament that advocates mandatory employment contracts for the new postal companies. However, the Government rejected the alternative, objective and skilled candidates nominated by the WPN. Mr Vreeman stated at the very outset of the first “exploratory” talks with all concerned that nothing other than the creation of a transitional model towards working with employment contracts (such as guaranteeing minimum wage) could therefore be up for discussion. The Government was therefore exerting pressure on the CLA negotiation process once again. This time it was through a unilaterally appointed “pathfinder”, who set himself the task of ensuring that the joint objective of the Government and trade unions was achieved, namely introducing employment contracts in new postal companies, to the exclusion of all other reasonable alternatives put forward by the new postal companies.
- 1164.** The complainant refers in this regard to the frequent consultations between the State Secretary and the Lower House of the State from October 2010 up to and including March 2011. The new postal companies obviously took note of these deliberations, in which the State Secretary was called upon by the Lower House to adopt more draconian and stricter measures against the new postal companies to “force” them to implement employment contracts for all mail distributors. The trade unions also regularly referred to the inclination of the parliamentary debate in the Lower House during negotiations about the new CLA whereby the trade unions felt that they were being supported.
- 1165.** After the termination of the CLA by the trade unions effective 31 October 2010, in a letter of 28 June 2010, the WPN felt it had no option, also having regard to the political pressure coming from the deliberations in the Lower House, but to again request the Court, in interlocutory proceedings, to intervene because of the threat that the governmental decree would enter into force on 1 January 2011. As a result, however, the State Secretary offered to temporarily suspend the governmental decree (initially until 15 January 2011 and later until 1 April 2011 in order to allow the appointed “pathfinder” to consult with the parties), so as to facilitate consultation, on condition that the WPN would abandon its new legal action. The complainant had no alternative but to accept and took up the State Secretary’s proposal to suspend the governmental decree and temporarily abandon new interlocutory proceedings, in order to allow the “pathfinder” to do his work and to consult further with the trade unions.
- 1166.** Against the aforementioned backdrop of deliberations in the Lower House and knowing that the alternative to the mediation consisted of the immediate entry into force of the governmental decree, the complainant states that it was forced to go and sit around a table

with this mediator and the trade unions. Mr Vreeman's advice was twofold: enter into a CLA with a transitional path and fixed percentages and establish a sectorial fund from which the transition in the new postal companies to employment contracts could be financed. The new postal companies would have to finance this sectorial fund themselves and the associated costs would have to be passed on to their clients and customers. This was an impossible solution contrary to antitrust law. The mediator alternatively suggested that the legislature intervene directly and pass law (by a Postal Act or a governmental decree) that would prescribe employment contracts. While the complainant came back to the bargaining table, it came as no surprise that the trade unions made tough demands concerning the transitional percentages, the time frame and compliance with the transitional model. The issue of any flexibility of transitional percentages – once the parties' starting point – was long since off the agenda.

- 1167.** The new postal companies meanwhile found themselves under time pressure: the suspension of the governmental decree until 1 April 2011 was almost over and the trade unions did not want to make any concessions in the form of flexible transitional percentages. The trade unions referred to the parliamentary debates in the Lower House in which tough measures were being requested and simply sat back. On 31 March 2011, under pressure of the parliamentary debates in the Lower House and the aforementioned time pressure, the WPN entered into a new CLA Mail Distributors, which included a transitional model with seemingly inflexible transitional percentages.

For instance: Section 13, subsection 1, of the CLA stipulates:

At least 80 per cent of the mail distributors employed at every employer and/or client must be appointed on the basis of an employment contract by 30 September 2013. The interim steps are as follows:

- 10 per cent by 31 December 2011;
- 25 per cent by 30 June 2012;
- 40 per cent by 31 December 2012;
- 60 per cent by 30 June 2013;
- 80 per cent by 30 September 2013.

- 1168.** This new transitional model therefore gives the postal companies an extra year in which to make the transition, but is still based on the final target of 80 per cent of the mail distributors being employed on the basis of an employment contract, in this case with effect from 1 October 2013. It is also clear from section 13, subsection 4, of the CLA that the transitional percentages constitute specifically enforceable obligations.

- 1169.** The State Secretary meanwhile arranged for the entry into force of a newer version of the governmental decree – the Temporary Decree Postmen 2011 and the simultaneous repeal of the original decree (Bulletin of Acts and Decrees 2011, 159). Whilst this subsequent decree still prescribes a transition towards employment contracts, it no longer sets specific requirements for the transition percentages to be included therein. After scathing criticism was levelled at the State Secretary by the trade unions and political pressure was exerted on him from within the Lower House as a result of this second “watered-down version” of the original governmental decree, he announced a newer (third) version of the governmental decree just two weeks after the implementation of the second one, which will set tougher requirements for the transitional model again. The complainant regrets that although the exact content of the third version of the governmental decree has not yet been disclosed, it already hangs like a “sword of Damocles” above its head and its new postal company members.

- 1170.** Since the Council of State (the advisory body of the Dutch legislator) had indicated on several occasions that section 8 of the Postal Act 2009 offers an inadequate basis for the governmental decree, for various reasons, the Minister submitted a legislative bill to amend this section to Parliament. According to this legislative bill, section 8 of the Postal Act 2009 would have to read as follows: “Rules concerning the nature of the legal relationship between a postal company and mail deliverers may be laid down by means of a governmental decree. The application of those rules may also be limited to certain categories of postal companies or to specific circumstances.” The purpose of the amendment is to make it even simpler for the State Secretary to intervene and force the new postal companies to only work with mail distributors who are employed on the basis of an employment contract, so that it is easier to place the new postal companies under pressure to also comply with the transitional model as currently agreed with the trade unions.
- 1171.** In the complainant’s view, the present case can be compared to the situation in the 1980s when the Government intervened by means of the Pay Adjustment (Semi-Public Sector) Act in wage developments in this sector. This Act made it possible for the Government to freeze employment conditions for a specific period. As the result of a complaint by the trade unions who were parties to the sectorial CLA (the Christian Trade Union Federation (CNV), the Trade Union Confederation (FNV) and MHP), the International Labour Organization (ILO) held in June 1989 that the power to freeze employment conditions was contrary to the right to free collective bargaining of employment conditions entrenched in the ILO Conventions (see Case No. 1469). While the Government wanted to intervene in the 1980s in the collective bargaining of employment conditions within the semi-public sector in order to prevent costly employment conditions, the Government is in the present case intervening in the collective bargaining of employment conditions in the postal sector to prevent “socially unacceptable employment conditions”. The complainant asserts that the Government has acted in both cases contrary to the limits of collective bargaining and contractual freedom. The complainant is of the view that the Government should limit itself to creating general statutory frameworks for consultation on employment conditions (such as the Minimum Wage Act) and ought to refrain from judging the outcome of specific consultation between social partners in a particular sector. In contrast, the Government has involved itself in a specific and far-reaching way in the present case with the collective bargaining of employment conditions in the postal sector and has thereby become a biased umpire between the social partners. This has in fact given rise to a “monstrous alliance” between the trade unions and politicians.
- 1172.** This “monstrous alliance” has resulted in the complainant being forced to engage in collective bargaining and enter into a CLA for its new postal company members, even though neither of these postal companies nor their mail distributors have any interest in the CLA. Moreover, the complainant denounces the fact that it has even been forced – completely contrary to the interests of its new postal company members – to enter into a CLA with a specific content: namely a transitional model consisting of seemingly inflexible transitional percentages. The complainant was also forced to amend existing CLA arrangements, in the form of a flexible transitional model. As such, the balance of power at the bargaining table was shifted very unnaturally to the side of the trade unions.
- 1173.** According to the complainant, this intervention by the Government has clearly been driven by its struggle with the lack of trade union power in the new postal market. In view of the fact that the diminishing influence of the trade unions is not a unique phenomenon limited to the postal sector, and can be expected in other sectors, it is undesirable and contrary to collective bargaining and contractual freedom if the Government would intervene in every sector where trade union power is waning.

**1174.** Due to the permanent threat that emanates from section 8 of the Postal Act and the original, current and future governmental decrees based thereon, which continues to disrupt the balance of power at the bargaining table in an unacceptable way and because the national action on the merits instituted may still drag on for years, the complainant is of the view that it has an interest in a fundamental opinion on the lawfulness of this governmental measure as soon as possible, in view of its right to collective bargaining and contractual freedom as guaranteed in the provisions and the rationale of Conventions Nos 98 and 154.

## **B. The Government's reply**

**1175.** In its communication dated 31 May 2012, the Government asserts that it has in no way violated the right of free and collective bargaining of the WPN, protected by ILO Conventions Nos 98 and 154. Out of true concern about socially unacceptable terms of employment (as a result of increased competition and decreasing volumes), the Government encouraged the parties in the CLA to come to agreements on the terms of employment and on contracts themselves.

**1176.** The Government explains that the Dutch postal market entered a new phase upon its full liberalization in 2009 because of European directives. During the transitional phase from a legitimate monopoly on postal delivery to a free postal market with increased competition pressure in terms of employment, one of the preconditions for a fully open postal market, therefore, is the presence of socially acceptable terms of employment. According to the Government, terms of employment can only be seen as such if postal carriers work under an employment contract, in which case the Minimum Wage and the Minimum Holiday Allowance Act would apply. With the latter Act, the Netherlands meets the obligations entered under ratified ILO Convention No. 131 regarding the establishment of a minimum wage.

**1177.** The social partners are primarily responsible for the realization of terms of employment but the Government and Parliament are prepared to support the realization of employment contracts in the postal market with legislation in this transitional phase. The Temporary Decree Postal Carriers of 2011 (hereinafter: the Decree) was established to that end. The Decree supports the social partners in the transitional phase to come to socially acceptable terms of employment for postal carriers in the market. Once the transitional phase is over, the Government's supporting role will no longer be necessary.

**1178.** In the Government's view, the postal market is different from other markets in the transitional phase. The new postal distribution companies have no tradition of agreements on collective terms of employment and generally binding (provisions of) agreements in the CLA. Furthermore, the postal market is a declining market; the number of postal items carried between 2005 and 2010 decreased from 5.6 billion to 4.8 billion. This increases the competitive pressure.

**1179.** The postal sector is a labour-intensive sector. The pressure on the terms of employment is felt to be relatively stronger because of this. The pressure is expressed by the fact that postal carriers of the new postal companies mainly work on commission contract, whereas most people in the Netherlands work on an employment contract. Because of the social protection which is part of the employment contract, promoting the use of the legal relationship of the employment contract is an effective means to achieve the intended objective, which is promoting the realization of socially acceptable terms of employment. As regards terms of employment, the law stipulates minimum provisions such as the minimum wage and the minimum number of vacation days.

- 1180.** The realization of socially acceptable terms of employment requires Government support in the transition phase, also in the light of recent developments such as the realization of a CLA and its generally binding declaration. The Government asserts that its support is still required at the time the present reply is being drafted, since until now it appears difficult to foresee the end of the transitional phase and because the CLA and its binding declaration have a limited period of effectiveness.
- 1181.** Fixing the adjustment percentages and the final objective in the Decree of 2011 ensures the adjustment to employment contracts can be maintained, should the CLA be cancelled at a certain moment. If no CLA applies, there is no basis for the decision for a generally binding declaration and this decision will be revoked. Fixing the agreements made in the CLA in the Decree is also necessary should this situation occur. Such Decree aims at supporting a development in the postal market with socially acceptable terms of employment with the employment contract being the prevailing contract form.
- 1182.** The Government indicates that the difficulties encountered in the postal sector are temporary and limited to the postal sector. They cannot be solved by adjustment of the regulations that apply generally or by a CLA between the employers and trade unions. The Decree guarantees specifically in the postal sector the execution of the agreements in the CLA on adjusting to the situation in which at least 80 per cent of the postal carriers have an employment contract.
- 1183.** The Decree was finalized at a time where no CLA was yet concluded. It was therefore not clear at that time at which moment in time the social partners envisioned for the realization of the final percentage of 80 per cent of the employment contracts. Furthermore, it was still unclear which agreements the social partners envisioned for the adjustment speed towards that final percentage. The Decree only mentions a final percentage and a final date. This stimulated the social partners and gave them enough space to come to further agreements in the CLA. In the meantime, the social partners signed a CLA on September 2011. This CLA includes an adjustment path on the basis of which fixed intermediate steps (increasing percentages on certain dates) help reach 80 per cent of employment contracts as of 30 September 2013. An adjustment path is important to enable parties to adjust to the new situation.
- 1184.** The Government indicates that the Decree was amended in spring 2012. This latest amendment brings the Decree into line with the CLA agreed on September 2011. Firstly, the date of 30 September 2013 is included in that CLA as the point in time at which the postal companies concerned must have concluded employment contracts with 80 per cent of their postal carriers. Secondly, the CLA contains a so-called adjustment path with interim percentages to help reach 80 per cent of employment contracts as of 30 September 2013. This adjustment path has now been included in the Decree.
- 1185.** The Government further provides its observations and some specific explanations in view of the extensive substantiation of the complaint by the WPN; because the labour costs are an important part of the total operation costs in postal distribution, there was a risk that an increasing competition would lead to a downward pressure on the terms of employment. The most important term which the Government linked to a fully open postal market in April 2009 was that postal carriers would work at socially acceptable terms of employment. Some new postal companies chose to keep the labour costs as low as possible by closing commission contracts with the postal carriers instead of the employment contract common in the country. The commission contract is the usual form for rendering services by entrepreneurs or self-employed persons. Because of its specific legal form, the commission contract is not covered by the Minimum Wage and the Minimum Holiday Allowance Act and the minimum provisions of the employment agreement. The protection these acts intend to offer was evaded for postal carriers in this way. The Government

explains that the labour inspectorate (the entrusted authority to supervise the legal minimum wage and the labour conditions) investigated the remuneration of postal carriers and found that the ones between the age of 23 and 65 years on average were paid about 30 per cent below the level of the legal minimum wage. Consequently, the concerns about socially acceptable terms of employment – the most important condition attached to the full liberalization of the postal market – were justifiable. The implementation of measures to protect postal carriers received broad political support in the Parliament. In this context the basic principle remains that the postal distribution companies and trade unions should reach agreement on the terms of employment as they bear the primary responsibility for reaching agreement on (collective) terms of employment as laid down in the provisions of ILO Conventions Nos 87 and 98. In the Government's view, the legislation and regulations are intended to support the agreements reached by the parties to a CLA and serve as "the big stick" in the event of non-compliance with the provisions of the CLA. Pursuant to customary practice in the country, the relevant legislation and regulations impose obligations governing terms of employment (usually statutory minimum requirements). Parties to collective bargaining may exercise their joint discretion in departing from those obligations. Pursuant to the provisions of ILO Convention No. 154, the Government is under the obligation to promote collective bargaining. Therefore, the Government is committed to the principle of collective bargaining.

- 1186.** The Government encouraged the conclusion of a CLA for the new postal companies, although this was not the condition attached to a fully open market. The condition was that postal carriers would work in accordance with socially acceptable terms of employment. The initiative was left to the collective labour agreement parties, according to the principle that social partners are primarily responsible for the forming of employment terms. The realization of a collective labour agreement for the new post distribution companies was an extremely laborious process, both the realization of an agreement in principle as the conversion of that agreement into a collective labour agreement. The Dutch Government never forced parties to come to a collective labour agreement. The Dutch Government did assist the collective labour agreement parties in formulating the collective labour agreement texts at their request so that these texts would qualify for a generally binding declaration.
- 1187.** The parties agreed on a CLA with a flexible adjustment model for the conversion from commission contracts to employment contracts. The final goal of 80 per cent of employment contracts was fixed and the interim percentages could be adjusted by new interim agreements between the postal distribution companies and the trade unions. It was the trade unions' intention – if there was insufficient progress – to enter into interim agreements in order to achieve the agreed percentages of employment contracts anyway.
- 1188.** The postal market was fully opened on 1 April 2009 and the first CLA for the new postal companies was signed on 12 November 2008. The complainant states in this regard that the market was only fully opened after the first collective labour agreement had been concluded. The Government indicates that the first version of the CLA (validity 1 April 2009 to 30 September 2012) was indeed signed on 12 November 2008, but the starting date was put on the "date of the full opening of the postal distribution market" – which became 1 April 2009. Moreover, the CLA was only registered at the Ministry of Social Affairs and Employment on 11 August 2009. The receipt notification was sent on 17 August 2009. Pursuant to article 4 of the Wages Act, a CLA should be registered at the Ministry, after which it can be effective as being a CLA in the sense of the Collective Labour Agreement Act with all rights and duties connected to it by the Act. In fact, there was a CLA in the sense of the Collective Labour Agreement Act only after an ample four months after the full opening of the postal market. The CLA was then changed in between (registered at the Ministry of Social Affairs and Employment on 2 November 2009 and receipt of notification sent on 3 November 2009). The termination of this CLA was



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registered at the Ministry of Social Affairs and Employment on 13 July 2010. The following CLA (duration from 1 April 2011 to 31 December 2013) was registered on 26 September 2011, after which the receipt of notification was sent on 27 September 2011.

- 1189.** In the Government's view, the CLA and the adjustment model is a free agreement between the new postal companies and the trade unions. It did not come about through pressure of TNT employees. These employees indeed have an interest in fair competition as regards employment terms and that is what the CLA for the new postal companies is meant to achieve.
- 1190.** Regarding the argument from the complainant that trade unions hardly have members in the new postal distribution companies, the Government indicates that such a statement is not substantiated by figures. The postal carriers in the new postal companies are perhaps relatively less well organized, but that does not mean that the trade unions cannot make a stand for their interests. It was specifically important for the trade unions to gain influence in this new part of the market, considering the bad employment terms in effect there and the unbalanced/downward competition on the employment terms by these companies.
- 1191.** Investigation by the labour inspectorate shows that the postal carriers at the new postal distribution companies having a commission contract (between 23 and 65 years old) on average were paid about 30 per cent under the level of the legal minimum wage. Although the new postal distribution companies continuously contest this investigation and its results, they have yet to deliver proof that the remuneration indeed is satisfactory. The labour inspectorate did not investigate whether the new postal distribution companies complied with the requirements of the Minimum Wage Act. It investigated the remuneration level and compared it with the level of the Minimum Wage Act. The investigation was criticized at three important points: a too wide spread in the results, the investigation objective was insufficiently represented and it was insufficiently familiar to the group. This criticism, however, was not relevant in the Government's view. The spread in the results had been corrected in a statistically solid way and the investigation objective had been misrepresented in a preliminary draft. The third point, the familiarity of the investigation objective, was verified by the investigators. It turned out that even though the objective was known, the respondents had not expressed themselves in a socially desirable way to influence the results. The opposite was noticeable. Lastly, the investigation of 2010 was carried out under a different population, i.e. the carriers working on an employment contract. This group seems to be paid at around the level of the Minimum Wage Act. This group cannot be compared, however, to the group of carriers on a commission contract which was not investigated in 2010. The Government also recalls that the new postal companies committed to carry out an independent audit of the remuneration systems. This is yet to be done.
- 1192.** Furthermore, the Government asserts that the trade unions did not trust compliance to the CLA by the new postal companies, partly because of the laborious realization of the CLA, and therefore requested the Government for a "big stick" in the form of supporting legislation. It was only because of the commitment of the Government (the current Decree) that the trade unions entered into a CLA and no longer opposed the full opening of the postal market.
- 1193.** The Decree was set up in such a way that postal distribution companies could deviate from it via a CLA. Besides that, the adjustment path for the conversion from commission contracts to employment contracts in the Decree was about 30 per cent below the level of the CLA, so that there was enough built-in flexibility for the parties to downsize the agreements if there was a need for it. The Decree does not oblige companies to enter into a CLA and imposes minimum requirements that may be deviated from in a CLA. The adjustment path has been established in a first Decree deliberately after the CLA was

signed, and about 30 per cent below the level of the agreements in the CLA, so that the parties would be sufficiently flexible also in this sense. Also in the second (and present) Decree, the percentages were set after the parties had come to an understanding. The percentages of employment contracts in the Decree are not higher than, but equal to, the percentages in the collective labour agreement.

- 1194.** The Government asserts that in no way have threats been expressed against the new postal distribution companies. It recalls that a Decree was passed only after the CLA (with lower demands than the CLA). The potential bankruptcy that is being paraded by the complainant cannot be substantiated in any way. The new postal companies did not go bankrupt. However, if a new postal company were to go bankrupt, it very much remains to be seen if this is because of legislation. There are only minimum legislative requirements to the adjustment to a socially acceptable level of employment terms. The Government is of the view that if a minimum level of employment terms cannot be achieved by a financially sound company, its viability should then be questioned.
- 1195.** The legal proceedings by the new postal companies against the Decree had the trade unions' faith in the compliance with the CLA decreased to almost zero. The resistance against the "big stick" did not go down well with the trade unions, because the demands of the Decree were well below the agreements in the CLA. The new postal companies believed that a Decree could not exist because they had agreed on a CLA. The Government, however, believes that the single fact of a new CLA does not mean that a situation has been reached and that it works towards socially acceptable employment terms. The Order in Council remains the "big stick" so that such a situation can be reached eventually. The Government does not recognize itself in the position stated by the complainant that the Decree was "temporarily suspended" on the condition that the new postal companies would cancel the proceedings against the Decree. The Government declares that it has never requested the new postal companies to suspend the legal proceedings. Concerning the legal proceedings, the Government indicates that the new postal companies lost the procedure on the merits against the Decree and have recently appealed.
- 1196.** In the Government's view, the reason for rejecting the employment contract is given quite decidedly by the complainant. It was indeed mandatory, according to the CLA, to offer the employment contract to 14 per cent of the postal carriers. The new postal distribution companies chose to offer the employment contracts to postal carriers who had been employed by them already for a time. They could also have chosen for the new carriers (50 to 80 per cent yearly turnover). The new CLA provides for such and the first adjustment of 10 per cent employment contracts was realized on 31 December 2011.
- 1197.** The Government has decided to actively respond to the deadlock that was created after the termination of the CLA by the trade unions. There was a risk that the new postal companies would not be able to meet the 100 per cent employment contracts on 1 January 2011. That is why a "political mediator" was used, namely Mr Vreeman, who advised on the adjustment to a postal market in which the employment contract is the usual employment contract form (as in all sectors). He broke the deadlock between the companies and the trade unions, after which a new CLA was concluded. In order not to affect such a CLA, the Government decided to lift the Decree and formulated a new Decree that allowed for CLA negotiations. The adjustment path stated in the new CLA was included in the Decree at the request of the Parliament. The new Decree allows postal distribution companies about two-and-a-half years extra until 30 September 2013 to adjust to a situation in which an employment contract represents 80 per cent of the postal carriers. While the new Decree contains the obligation to enter into an employment contract with 80 per cent of the post carriers, such an obligation may be deviated from by a CLA. Therefore, there is no obligation to enter into a CLA. The Decree allows the parties room

to enter into agreements. If they do not enter into a CLA, the Decree prescribes the adjustment. The Decree only stipulates that agreements have to be made on the adjustment to employment contracts, it does not determine which agreement.

- 1198.** Calling upon Mr Vreeman as a “political mediator” was, in the Government’s view, an attempt to break the deadlock. A motion adopted by the Parliament was executed by appointing the “political mediator”. Mr Vreeman was given a wide and open assignment, because the positions of the parties to the negotiation were wide apart. The Government confirms that there was indeed wide political pressure on achieving socially acceptable employment terms in the postal sector. This important condition for full market opening had not been forgotten by the Parliament. In a way, the trade unions may have felt supported by the political pressure.
- 1199.** With regard to the Postal Act, an important reason for the amendment to the Act was that the timeline to have the possibility to arrange something by Order in Council had to be lengthened, also at the request of the Parliament urging for a permanent arrangement. A Decree could only exist for four years, according to article 89 of the Postal Act, and this period had to be prolonged because of the postponement. At the same time, it provided a stronger legal basis for the Order in Council in article 8. The Government indicates that the Bill is now in Parliament.
- 1200.** The Government indicates that a comparison is wrongly made by the complainant between the current situation and the case concerning the Act on Pay Adjustment in the semi-public sector (WAGGS). In the WAGGS case, the maximum room for improvement of the employment terms could be set by the Government and when that room was exceeded by parties in a new CLA, the Government could more or less block its implementation. That is not at all the case presently. Moreover, the freedom to agree by means of contract on a lower wage than the legal minimum wage is limited, but the right to collective bargaining is not infringed upon. A basic socially acceptable employment term is fixed and it should be respected when negotiating, in the same way like the minimum vacation claims in an employment agreement, equal treatment legislation, etc. Parties to a CLA in the present case are free to conclude a CLA and its implementation will not be stopped. The Government is of the view that it is rather promoting collective labour agreements, even by appointing a political mediator to come to a new CLA.
- 1201.** The Government cannot go along with the (unsubstantiated) discussion around the trade unions not being representative. FNV, CNV, and the sectorial trade union BVPP are active in the postal market and do have many members: almost 17,000 members. The rate of unionization in the postal market is thus around 40 per cent.
- 1202.** In its conclusions, the Government states that the right to free and collective bargaining is not barred or otherwise restricted in any way. On the contrary, the Government rather encouraged parties to develop themselves collective employment terms in a relatively new liberalized sector. Out of genuine concern about socially unacceptable employment terms (as a result of increased competition and decreasing volumes), the Government has encouraged the parties to make agreements themselves on the employment terms and contracts. Moreover, the Government provided for a “big stick” in the legislation and regulations in the event that the parties should fail to assume their responsibility. Fortunately, this ultimately was not a problem.

**C. The Committee's conclusions**

- 1203.** *The Committee notes that the present case concerns allegations that a governmental decree obliged employers in the postal sector to negotiate collectively and to conclude a collective agreement with non-representative trade unions, and imposed a specific content for collective agreements.*
- 1204.** *The Committee notes the background indication that TNT was the sole letter post concessionaire within the Dutch postal market until 2009. In accordance with the EU Postal Directives aimed at the full liberalization of the European postal market to be achieved by 1 January 2011, TNT's statutory monopoly was gradually phased out, the Government aiming at liberalizing the Dutch postal market by 1 January 2008, in a first stage for addressed mail from 0 to 50 grams. However, the postal market was only effectively liberalized by the implementation of the Postal Act adopted by Parliament on 1 April 2009, almost 18 months later than originally intended. According to the WPN (the complainant) the reason for such delay was that the Parliament wanted liberalization to be contingent on a "careful structuring of the employment conditions of mail distributors", among other factors, it was fearful that liberalization would lead to such competition in the area of labour costs that there would be a "race to the bottom" in relation to the employment conditions of mail distributors.*
- 1205.** *The Committee notes the indication from the complainant that the new entrants to the postal market (new postal companies) had yet to gain market share from TNT which had an established delivery network with relatively low labour costs per postal item. Therefore, in order to keep the labour costs per postal item as low as possible, the new postal companies chose to deliver post only two days a week, making use of casual workers on the basis of a contract for services to deliver post. According to the complainant, these casual workers are not financially dependent on their work at the new postal companies and include categories such as students, housewives and senior citizens willing to earn money to supplement their student grants, household income or (pre-)pensions. According to the complainant, these workers, for the most part, would not want employment contracts, precisely because of the flexibility and freedom that is inherent to the contract for services (e.g. the lack of fixed working hours and an unlimited number of days' holiday). These workers are remunerated according to a refined standard pay system, based on which they can earn minimum wage if they deliver the post at an average speed. The Committee notes the allegation that, by contrast, TNT operates with a workforce of traditional postal workers, consisting for the most part of mail distributors who are employed on the basis of full-time employment contracts for an indefinite period of time and are financially dependent on their jobs, consequently the labour costs are considerably higher as a result of the inherent and compulsory deduction of social security and pension contributions.*
- 1206.** *In the complainant's view, it was already clear back in 2007 that drastic cutbacks in TNT's workforce would eventually be inevitable, mainly on account of the significant shrinkage of the postal market caused by the digitization process, the automation of the postal sorting process and the competition of the new postal companies that would come into play. Therefore, according to the complainant, the trade unions pressured the Government to adopt measures before the full liberalization of the postal market went ahead. As a result, the Government approached the new postal companies and their investors with the urgent request to enter into a CLA with the trade unions. The conclusion of such a CLA was allegedly set as a precondition for the full liberalization of the postal market. The trade unions' demand for the conclusion of a CLA was a time frame to be agreed upon within which the new postal companies would also employ mail distributors on the basis of an employment contract (hereinafter: "the transitional model").*

- 1207.** *The Committee notes that the new postal companies and the trade unions entered into an Agreement in Principle followed by a CLA on November 2008, in which they agreed to endeavour to employ 80 per cent of their mail distributors on the basis of an employment contract within three-and-a-half years of the liberalization of the postal market. However, according to the complainant, the CLA stipulated that the transitional model should be contingent on market developments. In the complainant's view, the parties intended to create a flexible transitional model whereby the final percentage of 80 per cent would need to be achieved by means of a flexible transitional model created by the SEO Institute, an independent economic research institute. The transitional model was created on March 2009 and contained the following transitional percentages: 14 per cent in April 2010; 40 per cent in April 2011; 74 per cent in April 2012; and 80 per cent in October 2012. Furthermore, the complainant asserts that the percentages were to be flexible in the sense that the SEO Institute would determine each year whether the percentages had been achieved or examine the reasons why they had not.*
- 1208.** *The Committee notes that the new postal companies united in a new employers' organization, the WPN, and agreed to sign the CLA on August 2009 with the trade unions. The transitional model created by the SEO Institute was incorporated in the CLA. The postal market was only liberalized after the CLA and the flexible transitional model came into being. As such, the Ministry issued a press release on March 2009 stating that the Government had decided, after taking everything into consideration, that the conditions for liberalization had been met and that the postal market could be opened in a "socially responsible manner" on 1 April 2009.*
- 1209.** *The Committee notes the Government's statement that one of the preconditions for a fully open postal market was that the postal carriers would work at socially acceptable terms of employment. The postal market, which was a declining market, increases the competitive pressure and, since the sector is labour intensive, the pressure on the terms of employment was felt to be relatively stronger. The pressure was expressed by the fact that postal carriers of the new postal companies mainly worked on a commission contract, whereas most people in the country worked on an employment contract. The commission contract is the usual form for rendering services by entrepreneurs or self-employed persons. Because of its specific legal form, the commission contract is not covered by the Minimum Wage and the Minimum Holiday Allowance Act. The protection these acts intend to offer was evaded for postal carriers in this way.*
- 1210.** *The Committee further notes the Government's indication that the Labour Inspectorate investigated the remuneration of postal carriers in 2007 and found that they were, on average, paid about 30 per cent below the level of the legal minimum wage. Consequently, the concerns about socially acceptable terms of employment were justifiable and the implementation of measures to protect postal carriers received broad political support in the Parliament. However, in the Government's view, in this context, the basic principle remained that the postal distribution companies and trade unions should reach agreement on the terms of employment as they bear the primary responsibility for reaching agreement on collective terms of employment. The legislation and regulations were only intended to support the agreements reached by the parties and would serve as "the big stick" in the event of non-compliance with the provisions of the CLA. As a result, the Government encouraged the conclusion of a CLA for the new postal companies, although this was not the condition attached to a fully open market. The condition was that postal carriers would work in accordance with socially acceptable terms of employment. The initiative was left to the parties, according to the principle that social partners are primarily responsible for the forming of employment terms. While the realization of a CLA for the new postal companies was an extremely laborious process, the Government never forced the parties to come to a CLA. It did, however, assist the parties in formulating the CLA texts at their request. Finally, the new postal companies and the trade unions agreed on a CLA with a*

*flexible adjustment model for the conversion from commission contracts to employment contracts with the final goal of 80 per cent of employment contracts.*

- 1211.** *With regard to the allegation concerning the lack of trade union representativeness in the postal sector, the Committee notes the allegation that the mail distributors working at the new postal companies were, for the most part, not organized in a trade union; the trade unions with which the complainant had to enter into the CLA were not actually representative of these workers. In the complainant's view, the intervention by the Government had clearly been driven by its struggle with the lack of trade union power in the new postal market. In the complainant's opinion, the diminishing influence of the trade unions is not a unique phenomenon limited to the postal sector, and can be expected in other sectors, it is undesirable and contrary to collective bargaining and contractual freedom if the Government would intervene in every sector where trade union power is waning. The Committee also notes the Government's statement that it cannot go along with the discussion around the trade unions not being representative in the postal sector and the Government's recollection that a number of trade unions are active and have many members in the sector where the rate of unionization is around 40 per cent.*
- 1212.** *The Committee recalls, in the first place, the principle of free and voluntary negotiation expressed in Article 4 of Convention No. 98, and emphasizes that action by the public authorities to promote and develop collective bargaining on conditions of work and employment in all sectors are fundamental principles of both Conventions Nos 98 and 154, which the Netherlands has ratified. The Committee considers that the first matter to be examined is whether the conclusion of the CLA between the new postal companies and the trade unions raise any issue with regard to the right to collective bargaining. In this regard, although it is acknowledged that the process of reaching an agreement was extremely laborious, out of legitimate concerns and pressure about socially acceptable terms of employment for postal carriers, the Committee is of the view that there is no inconsistency between the process of reaching the CLA described by both the complainant and the Government and the principles of free and voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, as a fundamental aspect of the right to collective bargaining. As to the substance of the agreement, the Committee does not consider itself in a position to interpret the intentions behind it.*
- 1213.** *The Committee notes the allegation that because neither the new postal companies nor the vast majority of their mail distributors had any interest in the transitional model incorporated in the CLA, the trade unions feared that the new postal companies would not comply sufficiently or fully with it, or would even terminate it once the full liberalization of the postal market was a reality. The complainant indicates that, consequently, the unions requested the Government to adopt a measure to prevent the termination of the CLA and indirectly enforce compliance with it. Such a measure, concretized in section 8 of the Postal Act of 2009, which provided the Government with the power to lay down rules, by means of decree, in relation to employment conditions that are to be observed if: (a) work is performed under socially unacceptable employment conditions; (b) there is a temporary problem restricted to the postal sector; and (c) in so far as the problem cannot be resolved by adapting generally applicable rules or by way of agreement between the employer concerned and representatives of workers' organizations.*
- 1214.** *The Committee notes the complainant's allegation that, although it had never been objectively proven that there were any socially unacceptable employment conditions, and despite the fact that the social partners had already reached agreement on the content of employment conditions for mail distributors at new postal companies, the Government issued a decree on January 2010 under section 8 of the Postal Act 2009, which made it compulsory for the new postal companies to employ all their mail distributors on the basis of employment contracts from the date of its entry into force. If they failed to do so, the*

OPTA (the government agency entrusted with supervising compliance with the Postal Act 2009) could impose very high fines. As a justification for imposing this obligation, the Government referred to the results of the investigation carried out in 2007 into the wage levels of mail distributors working at the new postal companies. The complainant, however, contends that the investigation only took place among a relatively small portion of the 30,000 mail distributors employed by the new postal companies and that it intentionally disregarded the refined standard pay system used by the new postal companies to calculate the wage level, as well as the individually determined preferences for the desired work pace which are particularly relevant for determining the wage level in relation to the number of hours worked. The Committee also notes the Government's view that, although the new postal companies continuously contested the 2007 investigation and its results, they have yet to deliver proof that the remuneration indeed is satisfactory. The labour inspectorate did not investigate whether the new postal distribution companies complied with the requirements of the Minimum Wage Act. It investigated the remuneration level and compared it with the level of the Minimum Wage Act. The Government also recalled that the new postal companies committed to carry out an independent audit of the remuneration systems and that is yet to be done.

**1215.** *The Committee observes that the Decree made it compulsory for postal companies to only work with employees under employment contracts (Article 2), with effect from 1 January 2010 (Article 3). However, this obligation did not apply to a postal company bound by a CLA that compels new postal companies to ensure that: (a) at least 80 per cent are appointed as mail distributors no later than 42 months after the law enters into force; and (b) this percentage is reached progressively in the preceding months, whereby at least the following are appointed as mail distributors:*

- (1) 10 per cent: no later than 12 months after the law enters into force;*
- (2) 30 per cent: no later than 24 months after the law enters into force; and*
- (3) 60 per cent: no later than 36 months after the law enters into force.*

**1216.** *The Committee notes the allegation that the Decree, contrary to the transitional model incorporated in the CLA agreed with the trade unions, included inflexible transitional percentages. If the new postal companies were not bound by a CLA that complied with the inflexible requirements set by the Decree, the only alternative was an immediate switch from working with mail distributors employed on the basis of a contract for services, to working with mail distributors employed on the basis of an employment contract. According to the complainant, this alternative would quickly lead to their bankruptcy because the companies would not be able to absorb the sudden and very significant associated increase in costs. As a result, the complainant states that the trade unions pressured the WPN to adapt the flexible transitional model agreed in the CLA to the new inflexible requirements laid down by the Decree.*

**1217.** *The Committee notes the viewpoint from the Government according to which the Decree was rather set up in such a way that the postal companies could deviate from it via a CLA with a slower adjustment path for the conversion from commission contracts to employment contracts in the Decree, so that there was enough built-in flexibility for the parties to downsize the agreements if there was a need for it. The Decree did not oblige companies to enter into a CLA and imposed minimum requirements that may be deviated from in a CLA. Furthermore, the Government asserted that in no way have threats been expressed against the new postal companies and that the Decree contained lower demands than the CLA. The potential bankruptcy that was being paraded by the complainant could not be substantiated in any way. However, if a new postal company were to go bankrupt, it very much remains to be seen if this is because of legislation. Lastly, in the Government's*

view, if a minimum level of employment terms cannot be achieved by a financially sound company, its viability should then be questioned.

- 1218.** *The Committee wishes to recall that Article 4 of Convention No. 98 in no way places a duty on the Government to enforce collective bargaining, nor would it be contrary to this provision to oblige social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The public authorities should, however, refrain from any undue interference in the negotiation process [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 928]. With regard to the allegation that the governmental decree obliged, in practice, employers in the postal sector to negotiate collectively and to conclude a collective agreement with seemingly an imposed specific content, the Committee understands that the Decree was a mere reflection of the adjustment model for the conversion from commission contracts to employment contracts and the final goal of 80 per cent of employment contracts foreseen in the initial CLA. The Committee observes that the Decree did not oblige companies to enter into a CLA and provided enough built-in flexibility for the parties – i.e. an adjustment path of about 30 per cent below the level of the CLA – to downsize the agreements if there was a need for it. In this regard, the Committee wishes to recall that it has consistently taken the view that it is up to the legislative authority to determine the legal minimum standards for conditions of work or employment which, in its opinion, does not restrict or impede the promotion of bipartite bargaining to fix conditions of work, as foreseen in Article 4 of Convention No. 98.*
- 1219.** *The Committee notes that the WPN instituted interlocutory proceedings on behalf of the new postal companies against the State and applied for an order prohibiting the entry into force of the governmental decree on various grounds, including grounds that the governmental decree does not comply with any of the requirements laid down by section 8 of the Postal Act; that the governmental decree is contrary to section 610, Book 7, of the Dutch Civil Code and the underlying individual freedom of contract; that the governmental decree is contrary to the collective bargaining and contractual freedom of the WPN and its members, as guaranteed, inter alia, in various ILO Conventions ratified by the Netherlands, etc. Although the Court granted the WPN's application in the first instance in December 2009, the ruling was overturned by the Hague Court of Appeal in a judgment of 13 April 2010 because the WPN was held not to have had any urgent interest at the time of its application. The Hague Court of Appeal, firstly, held that the transitional model with flexible transitional percentages was part of the initial CLA and, secondly, that since the flexible transitional percentages mentioned in the CLA were higher than those prescribed by the Decree, the prevailing CLA complied with the requirements of the Decree. Therefore, there was no urgent interest in judicial intervention as requested by the new postal companies. Although it considered the interpretation by legislative history of the Court of Appeal to be correct, the WPN asserts that the Government remained of the view that the transitional model agreed on between the new postal companies and the trade unions did not comply with the requirements of the governmental decree and requested OPTA to supervise compliance with the Decree with effect from autumn of 2010, in order to place the new postal companies under pressure. Such development prompted the WPN to institute an action on the merits against the State in which it requests an order declaring the Decree to be non-binding. The Committee further notes the Government's indication that the new postal companies lost the procedure on the merits against the Decree and have recently appealed. The Committee requests the Government to keep it informed of the outcome of the procedure before the Court of Appeal.*
- 1220.** *The Committee notes the allegation that while the new postal companies had offered 14 per cent of their mail distributors an employment contract in accordance with the transitional model agreed with the trade unions under the CLA before 1 April 2010, only*



3.2 per cent of the mail distributors accepted the offer. As a result, the trade unions were allegedly so dissatisfied about the very low percentage of mail distributors who actually accepted the offer to convert their contracts for services into employment contracts, that they decided in June 2010 to terminate the CLA with effect from 1 October 2010. The Committee notes that, according to the complainant, as a result of the termination of the CLA, there was a threat that the new postal companies would fall directly under the obligation in the Decree to employ their mail distributors on the basis of employment contracts or otherwise face fines of €450,000 per contravention three months after the termination of the CLA (with effect from 1 January 2011). The complainant tried to reach consensus with the trade unions on a new CLA, but the negotiations fell through since the trade unions continued to insist on the requirement of agreeing to fixed interim transition percentages that the new postal companies could not possibly achieve.

- 1221.** *The Committee notes that, in view of the deadlock, the Government decided to temporarily suspend the effect of the Decree in order to give the new postal companies and trade unions time to agree on a new CLA. A mediator was appointed as “pathfinder”, with the mandate to issue an opinion containing a solution for the CLA dispute. The trade unions allegedly had an initial dismissive reaction to the appointment of a mediator. While the WPN indicated that it was not opposed to attempted mediation via a “pathfinder”, the sudden appointment of the mediator, without any prior consultation, was perceived with distrust as he was a former trade union leader, as well as the former leader of a political party that advocated mandatory employment contracts for the new postal companies. The complainant felt that the Government was once again exerting pressure on the CLA negotiation, this time through a unilaterally appointed “pathfinder”, who set himself the task of ensuring that employment contracts would be introduced in new postal companies, to the exclusion of all other reasonable alternatives put forward. The Committee notes the Government’s acknowledgment that calling upon a “political mediator” was an attempt to break the deadlock. It confirmed that there was indeed wide political pressure on achieving socially acceptable employment terms in the postal sector and, in a way, the trade unions may have felt supported by the political pressure.*
- 1222.** *The Committee recalls that various arrangements can facilitate negotiations and help promote collective bargaining, however, legislation or practices establishing machinery or procedures for arbitration or conciliation designed to facilitate bargaining between both sides of an industry should guarantee the autonomy of parties to collective bargaining. Consequently, in case of a body appointed for settlement of disputes between parties to collective bargaining, the latter should be independent, and recourse to this body should be on a voluntary basis. In the present case, the Committee observes that the Government does not contest the allegation that the mediation process was put in place without prior consultation of the parties and understands that the parties may have had a dismissive reaction to such practice. Moreover, the Committee notes the allegation that the unilateral appointment of the mediator and his professional background was perceived with distrust by the complainant. In this regard, the Committee is of the view that the mediation process should have been initiated bearing in mind the abovementioned principles, in a manner which would inspire the confidence of all parties concerned. In this regard, the Committee expects that the Government will ensure that any conciliation machinery or procedure put in place in the future will respect the abovementioned principles.*
- 1223.** *The Committee notes the complainant’s statement that it felt forced to go back to the bargaining table with the mediator and the trade unions and it came as no surprise that the trade unions made tough demands concerning the transitional percentages, the time frame and compliance with the transitional model. The issue of any flexibility of transitional percentages – once the parties’ starting point according to the complainant – was no longer on the agenda. The WPN entered into a new CLA, which included a*

*transitional model with seemingly inflexible transitional percentages provided for under section 13, subsection 1, of the CLA:*

*At least 80 per cent of the mail distributors employed at every employer and/or client must be appointed on the basis of an employment contract by 30 September 2013. The interim steps are as follows:*

- 10 per cent by 31 December 2011;*
- 25 per cent by 30 June 2012;*
- 40 per cent by 31 December 2012;*
- 60 per cent by 30 June 2013;*
- 80 per cent by 30 September 2013.*

**1224.** *The Committee notes that, pursuant to the new CLA, the Government arranged for the entry into force of a newer version of the Decree. The adjustment path stated in the new CLA was included in the Decree at the request of the Parliament. The new Decree allows postal distribution companies about two-and-a-half years extra – until 30 September 2013 – to adjust to a situation in which an employment contract represents 80 per cent of the postal carriers. The Committee notes the Government’s view that the new Decree allows the parties room to enter into agreements on the obligation to enter into an employment contract with 80 per cent of postal carriers, but there is no obligation to enter into a CLA.*

**1225.** *The Committee understands that the new Decree is a codification of the clauses contained in the new CLA, which include the adjustment path until 30 September 2013. Although it was confirmed that the negotiations were carried out under strong political pressure for the achievement of socially acceptable employment terms and mindful of its reservation with regard to how the conciliation process was undertaken, the Committee nevertheless observes that the clauses of the new CLA are not, as such, put into question in the complaint. The Committee must again emphasize that the codification by Decree of clauses contained in a CLA is not inconsistent with the principles of free collective bargaining, which has, as a basis, the notion of agreements that are legally binding on the parties. As a general rule, the Committee wishes to emphasize that it is not within its mandate to assess the legislative and regulatory action of the Government to establish minimum employment and contractual conditions in a particular sector, i.e. in the present case in the postal sector.*

**1226.** *With regard to the legislative bill to amend section 8 of the Postal Act, the Committee notes the complainant’s view that the purpose of the amendment is to make it even simpler for the Government to intervene and force the new postal companies to only work with mail distributors who are employed on the basis of an employment contract. In view of its conclusions above, the Committee will not pursue its examination of this matter.*

## **The Committee’s recommendations**

**1227.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expects that the Government will ensure that any conciliation machinery or procedure for the settlement of disputes put in place in the future will respect the principles that such bodies should be independent and perceived as such by the parties and recourse to them should be had on a voluntary basis.*

- (b) *The Committee requests the Government to keep it informed of the outcome of the procedure before the Court of Appeal with regard to the action on the merits against the State in which the complainant requested an order declaring the Decree to be non-binding.*

CASE NO. 2934

DEFINITIVE REPORT

**Complaint against the Government of Peru  
presented by  
the Peruvian Federation of Workers of “Luz y Fuerza” (FTLFP)**

*Allegations: The complainant organization objects to a ministerial decision requiring the parties involved in voluntary arbitration in collective bargaining with the public sector to use State appointed and trained arbitrators; it also objects to the requirement for arbitrators to adhere to the weighting criteria relating to the public budget*

- 1228.** The Peruvian Federation of Workers of “Luz y Fuerza” (FTLFP) presented a complaint in a communication dated 14 February 2012.
- 1229.** The Government of Peru sent its reply in a communication dated 4 May 2011.
- 1230.** Peru 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**

- 1231.** In its communication dated 14 February 2012, the FTLFP states that it is a national organization with branches nationwide, representing workers from electricity-generating companies in Peru, i.e. the workers of companies considered to be essential services, but subject to private sector labour laws.
- 1232.** The complainant states that, on 17 September 2011, Supreme Decree No. 014-2011-TR, inserting the so-called “article 61-A” into the text of the Regulations of the Labour Relations Act approved by Supreme Decree No. 011-92-TR, was published in the *Official Standards Bulletin*. Supreme Decree No. 014-2011-TR provided for, inter alia, the inclusion of the notion of voluntary arbitration. This means that, in the absence of a collective bargaining agreement, either party may, through the legal institution for labour affairs and pursuant to national labour law standards, subject the other party to arbitration proceedings in which a third party will settle the financial dispute. In accordance with article 2 of Supreme Decree No. 014-2011-TR, Peru established the so-called “National Register of Arbitrators”, an institution which, according to the standard itself, will be coordinated by the Ministry of Labour and Employment Promotion, and will also be composed of professionals with recognized experience. The last part of article 2 states that, “when the rules on collective labour relations stipulate that the administrative labour

authority must appoint an arbitrator, or when requested by one or both parties, it is understood that this power shall be conferred on the General Labour Directorate”.

- 1233.** The complainant states that the Peruvian State, after incorporating voluntary arbitration into domestic legislation, established a body responsible for training arbitrators to intervene in a dispute, should any of the parties so request, and not because of any requirement of the Peruvian State itself.
- 1234.** The complainant notes that, on 24 September 2011, the Minister of Labour and Employment Promotion published Ministerial Decision No. 284-2011-TR in the *Official Standards Bulletin*. This is a lower ranking standard relating to the Collective Labour Relations Act, Supreme Decree No. 011-92-TR (Regulations of the Collective Labour Relations Act) and Supreme Decree No. 014-2011-TR itself. This decision introduces the requirement that, in order to arbitrate in collective bargaining in state institutions and companies subject to private sector labour laws, which includes the companies where the FTLFP members are employed, arbitrators should be listed on the National Register of Collective Bargaining Arbitrators (RENANC) and also to have completed the training course on collective bargaining in the public sector organized by the Ministry of Labour and Employment Promotion.
- 1235.** According to the complainant, over-regulating with a lower ranking standard such as a ministerial decision on the act and a supreme decree not only violates the universal principle of the hierarchy of standards, but also requires the parties, in this case from state institutions and companies, to use an arbitrator (an individual), or arbitrators (court) appointed, trained and predetermined by the State itself, without allowing either party to choose their arbitrator freely, undermining the principle of impartiality and independence. In fact, before the amendments to the Collective Labour Relations Act No. 25593 (now included in the Consolidated Text approved by Supreme Decree No. 003-2010-TR), participation by the labour authority in collective bargaining in state companies subject to private sector labour laws used to be an exception, i.e. when no consensus had been reached on the choice of arbitrator, or when the arbitrators were appointed by the party and no agreement had been reached on the choice of chair of the Arbitration Tribunal – as provided in article 64. This situation has now been changed by the legislation under dispute.
- 1236.** The complainant adds that, on 9 December 2011, Act No. 29812 on the Public Sector Budget for 2012 was published in the *Official Standards Bulletin*, whose 54th supplementary and final provision created a “special council”, which will appoint the chair of the Arbitration Tribunal in the event the parties fail to agree on the appointment. The “special council” will be established by supreme decree. Lastly, Ministerial Decision No. 331-2011-TR sets out the requirements for entry on the National Register of Collective Bargaining Arbitrators, corroborating the requirement for the parties of state companies subject to private sector labour laws only to appoint as arbitrators experts included on the professional register and who have completed the course organized by the Ministry of Labour itself, which impinges on the freedom of the trade union to choose the expert to represent it in the arbitration process freely and undermines the principle of independence.
- 1237.** Thus, according to the complainant: (i) a register of arbitrators was established, compiled by the State, to settle financial disputes in which the State itself is a party, since it involves state companies subject to private sector labour laws; (ii) the parties in the dispute are required to use arbitrators from the Ministry of Labour and Employment Promotion’s register, with pro-State training and legal criteria, since their training is provided by the Ministry of Labour and Employment Promotion; (iii) a body was created (special council) which will directly appoint the chair of the Arbitration Tribunal in the event the arbitrators on the register fail to agree on the selection; and (iv) moreover, at the time of submitting

the present complaint, there was only one register with 19 arbitrators working at national level, comprising lawyers from law firms sponsoring employers' interests, i.e. the Peruvian State.

- 1238.** The complainant considers that, in the present case, requiring one of the parties to use an arbitrator from a register compiled by the State itself through its Ministry of Labour and Employment Promotion restricts the freedom of the FTLFP to make a free choice in selecting the expert to represent it in arbitration proceedings to settle disputes in the collective bargaining of which it is a party. This requirement is contained in article 2 of Supreme Decree No. 014-2011-TR.
- 1239.** In addition, the complainant states that, as provided in article 65 of the Collective Labour Relations Act, arbitrators decide on the collective bargaining of workers in state institutions and companies subject to private sector labour laws using the criteria of "fairness". In other words, in settling the financial dispute they do not necessarily use the existing legal framework. Article 2 of Ministerial Decision No. 284-2011-TR, however, requires collective bargaining arbitrators within a state institution or company to use the so-called "weighting criteria", which are none other than those contained in articles 77 and 78 of the State's Political Constitution, relating to the public sector budget, and those contained in the Constitutional Court's judgments upholding full adherence to the budget standards set by the National Fund for Financing the Business of State (FONAFE), a body that decides on the remuneration policy for workers in state companies. In conclusion, arbitrators settle the dispute following criteria pursuant to the Collective Labour Relations Act. However, Ministerial Decision No. 284-2011-TR, a lower ranking standard, requires an arbitration settlement following restrictive legal criteria on remuneration, which are none other than those specified by the FONAFE, a body that decides on the wage policy of state companies. This situation yet again demonstrates the serious interference of the Peruvian State in collective bargaining.
- 1240.** In conclusion, according to the complainant, the above legislative changes have merely served to conceal increasing State intervention in collective bargaining, which is regulated by the Collective Labour Relations Act, in order to restrict its effectiveness in solving the labour and wage problems of national trade unions formed within Peruvian state companies. These legal modifications violate the collective and external aspects of the principle of freedom of association.

## **B. The Government's reply**

- 1241.** In its communication of 4 May 2012, the Government first states that the complaint is unfounded, for the following reasons:
- the requirements for entry on the RENANC are extremely flexible and in no way define a certain pro-employer or pro-State profile for the arbitrators registering on it. Consideration has also been given to prohibiting registration by persons directly involved with the State (public officials and public employees);
  - in the interests of safeguarding the impartiality of arbitrators, a discretionary restriction has been imposed on the Regional Labour Directorate whereby when it is called upon to appoint an arbitrator, it will not choose lawyers, advisers, representatives or, in general, anyone who has a relationship with the parties or direct or indirect interest in the outcome;

- the purpose of the training course on collective bargaining in the public sector is not to train arbitrators using pro-State criteria. It is purely an eight-hour, non-assessed training course with the sole purpose of informing potential arbitrators about the special circumstances existing in state institutions due to budgetary constraints;
- the budget restrictions called for in collective bargaining cases in state institutions or companies subject to private sector labour laws have been validated by the highest authority interpreting the Spanish Constitution, the Constitutional Court itself;
- inhibiting the power of the Ministry of Labour and Employment Promotion to appoint the chair of the Arbitration Tribunal when the parties fail to agree, and granting this power to a special council, which will include a representative from civil society, far from undermining or violating the principle of independence, means just the opposite; the aim is for an independent body, rather than a state institution, to appoint the chair of the Arbitration Tribunal.

**1242.** The Government adds that voluntary arbitration has been established as a mechanism for peaceful dispute settlement, actionable only in certain circumstances and not merely in the absence of an agreement. Thus, according to article 61-A of the Collective Labour Relations Act, which was inserted into the text by Supreme Decree No. 014-2011-TR, recourse to voluntary arbitration may be possible: (a) when no agreement has been reached on the level and contents in the first round of collective bargaining; and (b) when, during collective bargaining, malicious acts are observed which are aimed at delaying, hindering, or preventing any agreement being reached. According to the Government, it is thus promoting the peaceful settlement of disputes, respecting the negotiating autonomy of trade union and employers' organizations.

**1243.** It should be noted that the RENANC, implemented by the Ministry of Labour and Employment Promotion, is an open register containing highly flexible eligibility requirements. Indeed, article 1 of Ministerial Decision No. 331-2011-TR states that the only requirements for registration on the RENANC are: (i) to hold a professional qualification; (ii) to be listed on a professional register when membership of the relevant professional association is compulsory; (iii) to have at least five years' experience in professional practice and/or university teaching; (iv) not to be disqualified from working for the State and/or from public service; and (v) not to have been disciplined because of their professional conduct by the judiciary, Constitutional Court, or the relevant professional association.

**1244.** These requirements do not define a certain pro-corporate profile, as the complainant suggests, but merely ensure that the arbitrators selected by the parties possess professional skills. Article 2 of the ministerial decision has also taken care to prohibit the registration of public officials and public employees in order to safeguard their impartiality. Furthermore, article 3 of the aforementioned standard provides that, when the general labour inspectorate is called upon to appoint an arbitrator, on no account will they be lawyers, advisers, representatives or, in general, anyone who has a relationship with the parties or direct or indirect interest in the outcome, which provides evidence of the intention to ensure the impartiality of Ministry-appointed arbitrators.

**1245.** With regard to the training course on collective bargaining in the public sector, the Government states that, since it is an eight-hour, non-assessed course, its purpose is not to train arbitrators using pro-State criteria, as the complainant claims. On the contrary, the purpose of the course is to inform arbitrators about the special circumstances existing in state institutions due to budgetary constraints. It should be noted that even the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have noted that it is entirely valid to establish special

circumstances with regard to collective bargaining in central administration institutions. It is precisely these special circumstances that are referred to in Ministerial Decision No. 284-2011-TR. In fact, article 2 of the decision states that in collective bargaining in state institutions and companies subject to private sector labour laws the provisions of articles 77 and 78 of the Peruvian Political Constitution and those expanded upon by the Constitutional Court in the judgments handed down in Cases Nos 008-2005-PI/TC and 1035-2011-AC/TC must be taken into account.

- 1246.** The Government adds that the Constitutional Court, in its judgment on Case No. 008-2005-PI/TC, ruled that:

...

Therefore, to ensure a proper interpretation of the exercise of the right to collective bargaining by public servants, according to the fourth final and transitional provision of the Constitution, we must pay heed to the ILO Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, 1978 (No. 151).

Article 7 of the Convention provides that measures appropriate to national conditions should be taken, where necessary, to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

In the case of Peru, the exercise of the right to collective bargaining by public servants, through their unions, like any other right, is not absolute and is subject to limits.

In fact, within the national conditions referred to in Convention No. 151, the Constitution lays down certain rules relating to the public budget. Indeed, under articles 77 and 78 of the supreme law, the budget allocates public resources fairly, and its programme must be effectively balanced.

Consequently, if the employer of public servants is the State through its various agencies, budgetary constraints arising from the Constitution must be adhered to in all areas of the State.

Collective bargaining involving public servants should, therefore, be carried out taking into consideration the constitutional constraint imposed by a fair and balanced budget, which is approved by Congress, as the terms and conditions of employment in the public service are funded from resources contributed by taxpayers and the State.

Furthermore, collective bargaining in the workplace involves balancing positions, negotiating and reaching a genuine agreement that both parties can fulfil. In this regard, if the law fails to stipulate that any action relating to public employment that has budgetary implications must be properly authorized and budgeted, it would infringe the right to collective bargaining and freedom of association.

Indeed, immediately after agreements reached through collective bargaining, in accordance with existing legislation for public servants, any actions that have financial implications may be authorized and included in the budget programme.

The Constitutional Court therefore considers that article IV, paragraph 10, of Title 1 of Act No. 28175 does not violate the right to collective bargaining of public servants, as this standard is compatible with the constitutional budgetary constraints provided for under the Constitution.

- 1247.** The Government states that the only condition that the Constitutional Court imposes on the collective bargaining exercise is adherence to the budgetary constraints arising from the Peruvian Political Constitution. It is clear that the Constitutional Court does not deny state employees the enjoyment of the right to collective bargaining, but it does subject them to budgetary rules, pointing out that any financial agreements reached should be budgeted.

- 1248.** With regard to Case No. 1035-2011-AC/TC, the Constitutional Court recognizes certain special budgetary circumstances existing in local government relative to central government given that, although the former is financed from the public budget, it also has its own funding source. This leads to the recognition of a special autonomy in budget matters, which in turn validates the application of special rules for establishing specific conditions for the granting of wage increases through collective bargaining. This is recognized in successive budget rules, which stated that local government measures to increase remuneration should be funded exclusively from its own resources.
- 1249.** Furthermore, the Government adds that it should be pointed out that the complainant organization is composed of state company employee trade unions, whose income comes almost entirely from funds raised directly. Budgetary constraints on state institutions (which have also been validated at both national and international level) therefore have little impact on them.
- 1250.** With regard to the extreme nature of the complaint filed against the 54th supplementary and final provision of the Act on the Public Sector Budget for 2012, the Government states that, far from amounting to State interference and a violation of the principle of independence, the aim is to reduce the extent of State intervention. In fact, the provision states that when the parties fail to agree on the appointment of the chair of the Arbitration Tribunal, a special council, which will include a representative from civil society, will appoint the chair of the Arbitration Tribunal, rather than the selection being made by the Ministry of Labour and Employment Promotion. It is clear, therefore, that the purpose of the provision referred to, far from undermining the independence of the Arbitration Tribunal and freedom of association, is to safeguard both rights.
- 1251.** According to the Government, there has been no violation of the right to freedom of association, as the complainant claims; indeed, the State has managed to safeguard this right through its regulations, since protection has been afforded by its ratification of supranational instruments and the enactment of domestic legislation.

### **C. The Committee's conclusions**

- 1252.** *The Committee observes that in the present case the FTLFP objects to Ministerial Decision No. 284-2011-TR, which introduces the requirement that, in order to act as an arbitrator in collective bargaining in state institutions and companies subject to private sector labour laws, arbitrators should be listed on the RENANC and also have completed the training course on collective bargaining in the public sector organized by the Ministry of Labour and Employment Promotion. The complainant alleges that: (1) the principle of impartiality and independence is being undermined by this decision, which requires the parties to use arbitrators appointed, trained and predetermined by the State itself without allowing them to make that choice (according to the complainant, to date only 19 arbitrators working at national level have been registered, who are lawyers from law firms sponsoring employers' interests); (2) it was decided through the Act on the Public Sector Budget for the 2012 tax year to create a special council, to be established by supreme decree, to appoint the chair of the Arbitration Tribunal in the event the parties fail to agree on the appointment; and (3) article 2 of the decision in question requires collective bargaining arbitrators within a state institution or company to use the so-called weighting criteria relating to the public sector budget contained in articles 77 and 78 of the State's Political Constitution and those contained in the Constitutional Court's judgments upholding full adherence to the budget standards set by the FONAFE (a body that decides on the remuneration policy for workers in state companies).*



- 1253.** *With regard to the allegations that within the framework of voluntary arbitration the parties are required in collective bargaining in state institutions and companies subject to private sector labour laws to use arbitrators appointed, trained and predetermined by the State itself without allowing them to make that choice, the Committee notes that the Government states as follows: (1) the requirements for entry on the RENANC are extremely flexible and in no way define a certain pro-employer or pro-State profile for the arbitrators registering on it. Consideration has also been given to prohibiting registration by persons directly involved with the State (public officials and public employees); (2) in the interests of safeguarding the impartiality of arbitrators, a discretionary restriction has been imposed on the regional labour directorate whereby when it is called upon to appoint an arbitrator, it will not choose lawyers, advisers, representatives or, in general, anyone who has a relationship with the parties or direct or indirect interest in the outcome; (3) the purpose of the training course on collective bargaining in the public sector is not to train arbitrators using pro-State criteria. It is purely an eight-hour, non-assessed training course with the sole purpose of informing potential arbitrators about the special circumstances existing in state institutions due to budgetary constraints; (4) it is an open register containing highly flexible eligibility requirements: (i) to hold a professional qualification; (ii) to be listed on a professional register when membership of the relevant professional association is compulsory; (iii) to have at least five years' experience in professional practice and/or university teaching; (iv) not to be disqualified from working for the State and/or from public service; and (v) not to have been disciplined because of their professional conduct by the judiciary, Constitutional Court, or the relevant professional association; (5) these requirements do not define a certain pro-corporate profile, as the complainant suggests, but merely ensure that the arbitrators selected by the parties possess professional skills (care has been taken to prohibit the registration of public officials and public employees in order to safeguard their impartiality and, furthermore, article 3 of the aforementioned standard provides that, when the general labour inspectorate is called upon to appoint an arbitrator, on no account will they be lawyers, advisers, representatives or, in general, anyone who has a relationship with the parties or direct or indirect interest in the outcome, which provides evidence of the intention to ensure the impartiality of Ministry-appointed arbitrators); and (6) with respect to the training course, its purpose is to inform arbitrators about the special budget circumstances existing in the public sector, since even at international level it has been noted that it is entirely valid to establish special circumstances with regard to collective bargaining in central administration institutions.*
- 1254.** *In this respect, the Committee observes that, according to article 1 of Supreme Decree No. 014-2011-TR, in the case of voluntary arbitration "the parties must appoint their arbitrators within a period of no more than five working days" and that under article 2 of the decree the RENANC was established, on which arbitrators must be registered to be able to take part in collective bargaining. The Committee considers that these provisions, which, as indicated by the Government, set out conditions to ensure the independence and impartiality of the arbitrators, do not violate the principles of freedom of association. Furthermore, the Committee observes that the requirements for entry on the RENANC are reasonable. In these circumstances, the Committee will not proceed with the examination of these allegations.*
- 1255.** *With regard to the disputed decision to create a special council, to be established by supreme decree, to appoint the chair of the Arbitration Tribunal in the event the parties fail to agree on the appointment, which was handed down through the Act on the Public Sector Budget for the 2012 tax year, the Committee notes that the Government states that inhibiting the power of the Ministry of Labour and Employment Promotion to appoint the chair of the Arbitration Tribunal when the parties fail to agree, and granting this power to a special council, which will include a representative from civil society, far from undermining or violating the principle of independence, means just the opposite; the aim is*

for an independent body, rather than a state institution, to appoint the chair. In this respect, observing that the Budget Act does not specify who the members of the special council will be and that it merely states that it will include a representative from civil society, the Committee requests the Government to take the necessary steps to ensure that the members of the special council who appoint the chair of the Arbitration Tribunal in the event the parties fail to reach an agreement are appointed in consultation with the social partners.

**1256.** Concerning the allegation that article 2 of Ministerial Decision No. 284-2011-TR requires collective bargaining arbitrators within a state institution or company to use the so-called weighting criteria relating to the public sector budget contained in articles 77 and 78 of the State's Political Constitution and those contained in the Constitutional Court's judgments upholding full adherence to the budget standards set by the FONAFE (a body that decides on the remuneration policy for workers in state companies), the Committee notes that the Government states that: (1) the budget restrictions called for in collective bargaining cases in state institutions or companies subject to private sector labour laws have been validated by the Constitutional Court, which is the highest authority interpreting the Spanish Constitution; (2) the purpose of the training course on collective bargaining in the public sector is to inform arbitrators about the special budget circumstances existing in the public sector; (3) the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have noted that it is entirely valid to establish special circumstances with regard to collective bargaining in central administration institutions and it is precisely these special circumstances that are referred to in Ministerial Decision No. 284-2011-TR; (4) article 2 of the decision states that in collective bargaining in state institutions and companies subject to private sector labour laws, the provisions of articles 77 and 78 of the Peruvian Political Constitution and those expanded upon by the Constitutional Court in the judgments handed down in Cases Nos 008-2005-PI/TC and 1035-2011-AC/TC must be taken into account; (5) the only condition that the Constitutional Court imposes on the collective bargaining exercise is adherence to the budgetary constraints arising from the Peruvian Political Constitution and it is clear that the Constitutional Court does not deny state employees the enjoyment of the right to collective bargaining, but it does subject them to budgetary rules, pointing out that any financial agreements reached should be budgeted; and (6) the complainant organization is composed of state company employee trade unions, whose income comes almost entirely from funds raised directly; budgetary constraints on state institutions (which have also been validated at both national and international level) therefore have little impact on them.

**1257.** In this regard, the Committee recalls that it shared the viewpoint of the Committee of Experts in its 1994 General Survey, when it stated that: "While the principle of autonomy of the parties to collective bargaining is valid as regards public servants covered by Convention No. 151, the special characteristics of the public service described above require some flexibility in its application." Thus, in the view of the Committee, legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention, provided they leave a significant role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts. This is not the case of legislative provisions which, on the grounds of the economic situation of a country,

*impose unilaterally, for example, a specific percentage increase and rule out any possibility of bargaining, in particular by prohibiting the exercise of means of pressure subject to the application of severe sanctions. The Committee is aware that collective bargaining in the public sector “calls for verification of the available resources in the various public bodies or undertakings, that such resources are dependent on state budgets and that the period of duration of collective agreements in the public sector does not always coincide with the duration of budgetary laws – a situation which can give rise to difficulties”. The Committee therefore takes full account of the serious financial and budgetary difficulties facing governments, particularly during periods of prolonged and widespread economic stagnation. However, it considers that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; where the circumstances rule this out, measures of this kind should be limited in time and protect the standard of living of the workers who are the most affected. In other words, a fair and reasonable compromise should be sought between the need to preserve as far as possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 1038]. Hence, while it considers that the requirement itself for arbitrators to take into account available resources in the public budget is not contrary to the principles of freedom of association and collective bargaining, the Committee requests the Government to ensure respect for those principles.*

### **The Committee’s recommendation**

**1258. *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:***

*With regard to the disputed decision to create a special council, to be established by supreme decree, to appoint the chair of the Arbitration Tribunal in the event the parties fail to agree on the appointment, which was handed down through the Act on the Public Sector Budget for the 2012 tax year, the Committee requests the Government to take the necessary steps to ensure that the members of the special council in question are appointed in consultation with the social partners.*

CASE NO. 2815

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

**Complaint against the Government of the Philippines  
presented by  
the Trade Federation 4, Trade Federation for Metals, Electronics, Electrical and  
other Allied Industries – Federation of Free Workers (TF4–FFW)**

*Allegations: The complainant organization  
alleges anti-union dismissals and anti-union  
discrimination at the Cirtek Electronics  
Corporation and at Temic Automotive  
Philippines*

- 1259.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [362nd Report, paras 1335–1385, approved by the Governing Body at its 312th Session (November 2011)].
- 1260.** The complainant sent supplementary information in a communication dated 29 February 2012.
- 1261.** The Government forwarded additional observations in a communication dated 5 March 2012.
- 1262.** The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. Previous examination of the case**

- 1263.** At its November 2011 session, in the light of the Committee's interim conclusions, the Governing Body approved the following recommendations:
- (a) With respect to Cirtek Electronics Corporation, the Committee:
    - (i) noting with interest from the Government's reply the creation of an impartial Tripartite Team Cirtek Electronics Corporation (TTCEC) from among the members of the Tripartite Industrial Peace Committee of the Monitoring Body (TIPC-Monitoring Body) with the mandate to conduct a plant-level verification of the parties' claims and propose recommendations with a view to achieving a settlement by the end of November 2011, and further noting the detailed information concerning the works of the TTCEC, expects that the TTCEC will review the initial allegations of the complainant relating to the dismissals of three sets of trade union officials and requests the Government to provide detailed information with regard to the results of the conducted inquiry;
    - (ii) requests that, should it be found in the course of the inquiry that the abovementioned trade union officials were dismissed due to their exercise of legitimate trade union activities, the Government take the necessary steps to ensure that they are fully reinstated without loss of pay and keep it informed of any developments in this respect;

- (iii) requests the Government to ensure that the above inquiry also deals with the allegations that the company has stopped deducting union dues, refuses to recognize the union and has replaced it by a council composed of non-elected worker representatives, and to keep it informed in this regard;
  - (iv) urges the Government to keep it informed of the final outcome of any relevant judicial or other proceedings, including those pending before the Supreme Court, the National Labor Relations Commission (NLRC) and the arbitration branch, and of all measures of redress taken; and
  - (v) invites the complainant organization or the Government to supply a copy of the arbitration decision rendered with regard to the first collective dismissal of union officers.
- (b) With respect to Temic Automotive Philippines, the Committee:
- (i) deeply regretting that the Government has provided no information in relation to these allegations nor indicated whether this matter has been brought before the TIPC or whether the relevant employers' organization has been consulted, expresses great concern at the alleged hidden reason for outsourcing the two departments normally belonging to the bargaining unit;
  - (ii) expects that the principles enounced in its conclusions will be taken into account in practice, in a manner so as to ensure that, in the remaining legal proceedings, the relevant bodies will effectively consider in their review the allegations put forward by the complainant that the outsourcing plan was actually aimed at eliminating any form of union in the departments concerned;
  - (iii) invites the Government to propose the creation of an impartial Tripartite Team from among the TIPC-Monitoring Body members with the mandate to conduct a plant-level verification of the parties' claims, and to provide detailed information with regard to the conduct and outcome of such an inquiry; and
  - (iv) requests that, should it be found in the course of the inquiry that the 28 terminations were anti-union in nature and aimed at eliminating any union representation for the departments concerned, the Government take the necessary steps to ensure that the union members and officials concerned are fully reinstated without loss of pay and keep it informed of any developments in this respect.

## B. The complainant's allegations

### *Cirtek Electronics Corporation*

**1264.** In its communication dated 29 February 2012, the complainant organization recalls that in June 2005 the Cirtek Employees Labor Union – FFW (hereafter: “the union”) went on strike due to a bargaining deadlock; the Department of Labor and Employment (DOLE) assumed jurisdiction and directed the workers to return to work; while the deadlocked issues were being reviewed by the Secretary of Labor and Employment (SOLE), a few union officers agreed to conclude a Memorandum of Agreement (MOA) because the management pledged to abide by any more favourable SOLE award; the SOLE resolved the deadlock by improving the wage increase agreed in the MOA and incorporating in the collective bargaining agreement (CBA) the agreed items in the MOA. The management questioned the arbitral award before the Court of Appeals, which reversed it due to an alleged settlement agreement of some members. Hence, the union brought the matter before the Supreme Court. The complainant informs that, on 15 November 2010, the Supreme Court handed down its decision reversing the decision of the Court of Appeals and reinstating the SOLE award, and subsequently denied with finality two motions for reconsideration filed by the company. The complainant organization supplies a copy of the decision.

**1265.** The complainant further indicates that the union's struggle for recognition as the exclusive bargaining agent for the rank-and-file employees of the company is ongoing. The management has been showing a flip-flopping attitude towards recognizing the union. Despite conceding before the TTCEC that they will now recognize the union, a different situation occurs at the plant level. In particular, the complainant alleges that the human resource manager of the company continuously harassed the union officers and/or offered them special packages to leave the union or, if not, resign from the company. At the moment, three of the union officers already resigned from the company since they could no longer bear the pressure.

*Temic Automotive Philippines*

**1266.** In its communication dated 29 February 2012, the complainant organization informs that the case of Endrico Duomolong, the employee who refused to accept the Voluntary Retirement Programme (VRP) and as a consequence was dismissed from employment, is presently pending before the Court of Appeals. It also indicates that the case on the illegal contracting out of functions of the Warehouse and Facilities Department in violation of the provisions of the collective bargaining agreement which was initiated before a voluntary arbitrator is also presently pending before the Court of Appeals.

**C. The Government's reply**

*Cirtek Electronics Corporation*

**1267.** The Government recalls, in its communication dated 5 March 2012, that an election of a new set of officers of "the union" had been peacefully conducted on 5 July 2011. The Government further informs that an agreement to merge with the newly created Cirtek Electronics Corporation-Independent Labor Union (CEC-ILU) into the United Cirtek Employees Union (UCEU) was reached on 30 September 2011. According to the Government, the agreement was formalized upon its adoption by the TTCEC and was to serve as a basis for the withdrawal of the present complaint. Following a referendum on 26 October 2011 where 331 of 345 voted in favour of the merger, the two unions in the company merged officially, the UCEU transitory constitution and by-laws were approved on 19 December 2011 and their ratification was scheduled on 29 December 2011. The Government indicates, however, that the ratification was cancelled by the union due to the management's willingness to negotiate with it a new collective agreement in line with the new decision of the Supreme Court ordering the parties to enter into a new collective agreement. The Government was informed by the complainant that, on 9 February 2012, the proposed collective agreement was submitted to the management.

*Temic Automotive Philippines*

**1268.** The Government informs that, pursuant to the Committee's recommendation, the TIPC-Monitoring Body recommended through Resolution No. 12, Series of 2012, of 15 February 2012, the creation of an impartial tripartite team to conduct plant-level verification of the parties' claims and to provide detailed information on the case within 30 days of its creation. The TIPC-Monitoring Body deemed it appropriate to constitute the impartial tripartite team from members of the Regional Tripartite Monitoring Body-National Capital Region for expediency and mobility. The Government indicates that, accordingly, the Secretary of Labor issued Administrative Order No. 80, Series of 2012, creating a Tripartite Team for Temic Automotive Philippines on 28 February 2012, and that updates will be provided as soon as available.

## D. The Committee's conclusions

**1269.** *The Committee notes that, in the present case, the complainant organization alleges anti-union dismissals and anti-union discrimination at two enterprises.*

### *Cirtek Electronics Corporation*

**1270.** *The Committee notes the complainant's indication that the Supreme Court recently rendered a decision favourable to the union as regards the 2005 SOLE award which was questioned by the management and had been reversed by the Court of Appeals due to an alleged settlement through an MOA with certain union members. The Committee notes that the Supreme Court decision of 15 November 2010 reversed the judgment of the Court of Appeals thus reinstating the arbitral award. The Court subsequently denied with finality two motions for reconsideration filed by the company. The Committee also notes that, according to the complainant, the union's struggle for recognition as the exclusive bargaining agent for the rank-and-file employees of the company is ongoing. In particular, the Committee notes the complainant's allegation that the company's human resource manager continuously harassed the union officers and/or offered them special packages to leave the union or, if not, resign from the company, and that, at present, three of the union officers already resigned from the company since they could no longer bear the pressure.*

**1271.** *The Committee notes from the Government's response that, following the election of a new set of officers on 5 July 2011, the union agreed to merge with the newly created CEC-ILU, and this agreement was formalized by the TTCEC and was to serve as a basis for the withdrawal of the present complaint. However, the ratification of the new constitution and by-laws was cancelled by the Cirtek Employees Labor Union – FFW due to the management's willingness to negotiate with it a new collective agreement in line with the decision of the Supreme Court ordering the parties to enter into a new collective agreement. The Committee regrets that it has not received any information concerning the outcome of the inquiry that was to be conducted by the TTCEC.*

**1272.** *In the absence of any information on the initial allegations concerning the dismissal of three sets of union officers by the company, the Committee recalls that, given the large number of union leaders (21 named and several unnamed) dismissed by the company, an impartial tripartite team had been created with the mandate to conduct a plant-level verification of the parties' claims. Reiterating the conclusions it reached when it examined this case at its meeting in November 2011 [see 362nd Report, paras 1369–1371], the Committee therefore expects that the TTCEC will review the initial allegations of the complainant relating to the dismissals of three sets of trade union officials without further delay and once again requests the Government to provide detailed information with regard to the results of the conducted inquiry. Should it be found in the course of that inquiry that the abovementioned trade union officials were dismissed due to their exercise of legitimate trade union activities, the Committee requests that the Government take the necessary steps to ensure that they are fully reinstated without loss of pay. It requests the Government to keep it informed of any developments in this respect. Also, the Committee requests to continue to be kept informed of the final outcome of any relevant judicial or other proceedings and of all measures of redress taken.*

**1273.** *Moreover, the Committee requests to be informed whether, in the meantime, the collective bargaining agreement between the union and the management has been concluded, and, if not, expects that the Government will take measures to promote collective bargaining between the parties so that, in line with the decision of the Supreme Court, a collective bargaining agreement will be concluded in the near future either through negotiation or, if necessary, with the assistance of voluntary conciliation, mediation or arbitration.*

**1274.** *Lastly, as indicated in its previous conclusions, given that, since 2003, the company has repeatedly terminated trade union officials that were preparing a strike or were taking up office, the Committee cannot but express deep concern at the new allegations of harassment of the recently elected set of union officers by the company, including the offer of special packages to leave the union or resign from the company, which has already led to three resignations. The Committee recalls that, as regards allegations of anti-union tactics in the form of bribes offered to union members to encourage their withdrawal from the union and the presentation of statements of resignation to the workers, the Committee has always considered such acts to be contrary to Article 2 of Convention No. 98, which provides that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents in their establishment, functioning or administration [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 858]. The Committee urges the Government to ensure that the investigation conducted by the TTCEC examines these new allegations as a matter of priority. It requests the Government to keep it informed of any developments in this respect.*

### **Temic Automotive Philippines**

**1275.** *The Committee notes the complainant's indication that both the case of Endrico Duomolong, the employee who refused to accept the VRP and as a consequence was dismissed from employment, and the case on the illegal contracting out of functions of the Warehouse and Facilities Department in violation of the provisions of the collective agreement are presently pending before the Court of Appeals.*

**1276.** *The Committee notes with interest from the Government's reply that, pursuant to the Committee's recommendation, the TIPC-Monitoring Body recommended through Resolution No. 12, Series of 2012, of 15 February 2012, the creation of an impartial tripartite team from members of the Regional Tripartite Monitoring Body-National Capital Region with the mandate to conduct plant-level verification of the parties' claims, and that, accordingly, the Tripartite Team for Temic Automotive Philippines was established on 28 February 2012 through Administrative Order No. 80, Series of 2012. The Committee requests the Government to provide detailed information with regard to the conduct and outcome of such an inquiry. Should it be found in the course of the investigation that the 28 dismissals were anti-union in nature and aimed at eliminating any union representation for the departments concerned, the Committee requests the Government to take the necessary steps to ensure that the union members and officials concerned are fully reinstated without loss of pay, and to keep it informed in this respect.*

**1277.** *Reiterating the conclusions it reached when it examined this case at its meeting in November 2011 [see 362nd Report, paras 1380–1383], the Committee recalls that it has always requested that, in the cases where new staff reduction programmes are undertaken, negotiations take place between the enterprise concerned and the trade union organizations, and that, when voluntary retirement programmes are carried out, the trade union organizations in the sector should be consulted [see **Digest**, op. cit., paras 1082–1083]. The Committee further wishes to generally recall that the dismissal of workers on grounds of membership of an organization or trade union activities violates the principles of freedom of association, and that subcontracting if conducted for anti-union purposes and accompanied by dismissals of union leaders constitutes a violation of the principle that no one should be prejudiced in his or her employment on the grounds of union membership or activities. It therefore emphasizes that acts of anti-trade union discrimination should not be authorized under the pretext of dismissals based on economic necessity, and that a corporate restructuring should not directly or indirectly threaten unionized workers and their organizations [see **Digest**, op. cit., paras 789, 790, 795 and 797]. Recalling also that the basic regulations that exist in the national legislation*



*prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest**, op. cit., para. 818], the Committee firmly expects that these principles will be taken into account in practice, in a manner so as to ensure that, in the remaining still ongoing legal proceedings, the relevant bodies will effectively consider in their review the allegations put forward by the complainant that the outsourcing plan was actually aimed at eliminating any form of union in the departments concerned (e.g. previous attempts of the company to exclude those departments from the bargaining unit, doubts as to the invoked reason of cost-saving for outsourcing the two departments, the compulsory nature of the purportedly voluntary compensation, the contractual prohibition of the service provider workers to join any union and their exclusion from the scope of the CBA). The Committee requests to be kept informed of the outcome of the pending legal proceedings.*

## **The Committee's recommendations**

**1278.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

*(a) With respect to Cirtek Electronics Corporation, the Committee:*

- (i) expects that the TTCEC will review the initial allegations of the complainant relating to the dismissals of three sets of trade union officials without further delay and once again requests the Government to provide detailed information with regard to the results of the conducted inquiry;*
- (ii) requests that, should it be found in the course of that inquiry that the abovementioned trade union officials were dismissed due to their exercise of legitimate trade union activities, the Government take the necessary steps to ensure that they are fully reinstated without loss of pay and keep it informed of any developments in this respect;*
- (iii) requests to continue to be kept informed of the final outcome of any relevant judicial or other proceedings and of all measures of redress taken;*
- (iv) requests to be informed whether, in the meantime, the collective bargaining agreement between the union and the management has been concluded, and, if not, expects that the Government will take measures to promote collective bargaining between the parties so that, in line with the decision of the Supreme Court, a collective bargaining agreement will be concluded in the near future either through negotiation or, if necessary, with the assistance of voluntary conciliation, mediation or arbitration; and*
- (v) urges the Government to ensure that the above inquiry examines the new allegations of anti-union interference and harassment as a matter of priority, and requests the Government to keep it informed of any developments in this respect.*

- (b) *With respect to Temic Automotive Philippines, the Committee:*
- (i) *noting with interest the creation of an impartial Tripartite Team composed of members of the Regional Tripartite Monitoring Body-National Capital Region with the mandate to conduct a plant-level verification of the parties' claims, requests the Government to provide detailed information with regard to the conduct and outcome of such an inquiry;*
  - (ii) *requests that, should it be found in the course of the inquiry that the 28 dismissals were anti-union in nature and aimed at eliminating any union representation for the departments concerned, the Government take the necessary steps to ensure that the union members and officials concerned are fully reinstated without loss of pay, and keep it informed of any developments in this respect; and*
  - (iii) *firmly expects that the principles enounced in its conclusions will be taken into account in practice, in a manner so as to ensure that, in the remaining still ongoing legal proceedings, the relevant bodies will effectively consider in their review the allegations put forward by the complainant that the outsourcing plan was actually aimed at eliminating any form of union in the departments concerned, and requests to be kept informed of the outcome of the pending legal proceedings.*

CASE NO. 2713

INTERIM REPORT

**Complaint against the Government of the  
Democratic Republic of the Congo  
presented by  
the National Union of Teachers in Registered  
Schools (SYNECAT)**

*Allegations: Various acts of harassment against the General Secretary of the union and the interruption of the union's national congress by the police*

**1279.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [see 362nd Report, paras 1413–1425, approved by the Governing Body at its 312th Session (2011)].

**1280.** At its May–June 2012 meeting [see 364th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.

**1281.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

## **A. Previous examination of the case**

**1282.** In its previous examination of the case in November 2011, deploring the fact that, despite the time that had elapsed, the Government had not provided any information on the allegations, the Committee made the following recommendations [see 362nd Report, para. 1425]:

- (a) The Committee deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through three urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 360th Report, 359th Report and 356th Report para. 5]. The Committee notes with regret that the Government continues to fail to comply, despite assurances given to the President of the Committee at a meeting held in June 2011, and expects the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.
- (b) The Committee, recalling the principle of the inviolability of trade union premises and property, and in the absence of any reply from the Government, requests the latter to provide its observations on the allegations relating to the forcible entry by the police of SYNECAT premises, and to indicate whether the action taken by the police was based on a judicial warrant.
- (c) The Committee urges the Government to investigate without delay the allegations concerning the suspension of the SYNECAT General Secretary from his teaching functions following a strike and the retention of his salary for a period of 36 months, to communicate the outcome of the investigations and, if it is found that the union official in question was suspended for having carried out his legitimate trade union activities, to ensure that the salary arrears owed to him are paid.
- (d) The Committee requests the Government to provide its observations on the allegations of harassment of the SYNECAT General Secretary without delay, to report on the current situation and on the action taken on the matter referred to the Gombe higher court in connection with which he received a summons.

## **B. The Committee's conclusions**

**1283.** *The Committee once again deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through four urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 362nd Report, 360th Report, 359th Report and 356th Report, para. 5].*

**1284.** *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present another report on the substance of the case without being able to take account of the information it had hoped to receive from the Government.*

- 1285.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for this freedom in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning allegations brought against them [see First Report of the Committee, para. 31].*
- 1286.** *The Committee once again notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints submitted since 2009, which have already been examined in the absence of a response from the Government, and which allege grave violations of freedom of association. Furthermore, the Committee once again notes with deep regret that the Government continues to fail to comply, despite the assurances given to the Chairperson of the Committee at a meeting held in June 2011, and urges the Government to be more cooperative concerning this case.*
- 1287.** *The Committee is obliged to reiterate its previous recommendations and firmly expects the Government to provide information without delay, given the gravity of the allegations in this case.*
- 1288.** *The Committee requests the Government to accept a high-level mission to discuss all the complaints pending before the Committee concerning the Democratic Republic of the Congo.*

### **The Committee's recommendations**

- 1289.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee once again deeply deplores that, despite the time that has elapsed since the presentation of the complaint in April 2009, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through four urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 362nd Report, 360th Report, 359th Report and 356th Report, para. 5]. The Committee notes with regret that the Government continues to fail to comply, despite the assurances given to the Chairperson of the Committee at a meeting held in June 2011, and urges the Government to be more cooperative concerning this case.*
  - (b) The Committee, recalling the principle of the inviolability of trade union premises and property, and in the absence of any reply from the Government, once again requests the latter to provide its observations on the allegations relating to the forcible entry by the police onto the SYNECAT premises, and to indicate whether the action taken by the police was based on a judicial warrant.*
  - (c) The Committee urges the Government to investigate, without delay, the allegations concerning the suspension of the SYNECAT General Secretary from his teaching functions following a strike and the retention of his salary for a period of 36 months, to communicate the outcome of the investigations and, if it is found that the union official in question was suspended due to*

*his exercise of legitimate trade union activities, to ensure that the salary arrears owed to him are paid in full.*

- (d) *The Committee once again requests the Government to provide its observations on the allegations of harassment of the SYNECAT General Secretary without delay, and to report on the current situation and on the action taken regarding the matter referred to the Gombe higher court, which resulted in him receiving a summons.*
- (e) *The Committee requests the Government to accept a high-level mission to discuss all the complaints pending before the Committee concerning the Democratic Republic of the Congo.*

CASE NO. 2797

INTERIM REPORT

**Complaint against the Government of the Democratic Republic of the Congo presented by the following organizations:**

- the Trade Union Confederation of Congo (CSC)
- the National Workers' Union of Congo (UNTC)
- the United Workers' Organization of Congo (OTUC)
- the Democratic Confederation of Workers (CDT)
- SOLIDARITÉ
- the Conscience of Workers and Peasants (CTP)
- the Solidarity of Workers and Peasants (SOPA)
- ACTIONS
- the Workers' Alliance of Congo (ATC)
- the New Union Dynamics (NDS), replaced by the General Confederation of Independent Unions (CGSA)
- the Kongo General Workers' Federation (FGTK) and
- the Union Power of Congo (FOSYCO)

*Allegations: The complainants allege the mass dismissal of trade union officials, managers and employees of the financial authorities following a strike*

**1290.** The Committee last examined this case at its November 2011 meeting, when it presented an interim report to the Governing Body [see 362nd Report, paras 1438–1457, approved by the Governing Body at its 312th Session (2011)].

**1291.** At its May–June 2012 meeting [see 364th Report, para. 5], the Committee made an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.

**1292.** The Democratic Republic of the Congo has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

#### **A. Previous examination of the case**

**1293.** In its previous examination of the case in November 2011, deploring the fact that, despite the time that had elapsed, the Government had not provided any information on the allegations, the Committee made the following recommendations [see 362nd Report, para. 1425]:

- (a) The Committee regrets that the Government has not replied to the complainants' allegations, even though it has been requested several times, including through an urgent appeal, to present its comments and observations on the case. Noting furthermore that this case is the fifth successive case for which the Government has failed to provide information in reply to the allegations presented, the Committee urges the Government to be more cooperative concerning this case and invites it to avail itself of the technical assistance of the Office.
- (b) The Committee is particularly concerned by the fact that this case concerns the dismissal of a large number of public servants, including many trade union members and officials, and requests the Government to provide, without delay, its observations on the complainants' allegations. Should it be found that the officials in question were dismissed due to their involvement in a legitimate and peaceful strike, the Committee urges the Government to take any steps that may be necessary to ensure their reinstatement with full payment of back wages. If that is not the case, the Committee requests the Government to provide any information on the reasons for the decision to remove the employees from office, as per Presidential Ordinance No. 10/001 and Ministerial Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009. It also requests the Government to keep it informed of any conclusions reached by the review commission which has examined the appeal against the Ordinance and of any follow-up thereto.

#### **B. The Committee's conclusions**

**1294.** *The Committee once again deeply deplores the fact that, despite the time that has elapsed since the presentation of the complaint in April 2010, the Government has still not replied to the complainant's allegations, even though it has been requested several times, including through two urgent appeals, to present its comments and observations on the allegations and its response to the recommendations made by the Committee in its previous examination of the case [see 362nd Report and 360th Report, para. 5].*

**1295.** *Hence, in accordance with the applicable procedural rules [see 127th Report, para. 17, approved by the Governing Body at its 184th Session (1972)], the Committee is obliged to present another report on the substance of the case without being able to take account of the information it had hoped to receive from the Government.*

**1296.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to ensure respect for this freedom in law and in practice. The Committee is confident that, while this procedure protects governments against unreasonable accusations, they must recognize the importance of formulating, for objective examination, detailed replies concerning allegations brought against them [see First Report of the Committee, para. 31].*

- 1297.** *The Committee once again notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints submitted since 2009, which have already been examined in the absence of a response from the Government, and which allege grave violations of freedom of association. Furthermore, the Committee once again notes with deep regret that the Government continues to fail to comply, despite the assurances given to the Chairperson of the Committee at a meeting held in June 2011, and urges the Government to be more cooperative concerning this case.*
- 1298.** *The Committee is obliged to reiterate its previous recommendations and firmly expects the Government to provide information without delay, given the gravity of the allegations in this case.*
- 1299.** *The Committee requests the Government to accept a high-level mission to discuss all the complaints pending before the Committee concerning the Democratic Republic of the Congo.*

### **The Committee's recommendations**

- 1300.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee regrets that the Government has not replied to the complainants' allegations, even though it has been requested several times, including through two urgent appeals, to present its comments and observations on the case. The Committee once again notes with deep regret that the Government has still not provided any information whatsoever regarding the five consecutive complaints submitted since 2009, which have already been examined in the absence of a response from the Government, and which allege grave violations of freedom of association. Furthermore, the Committee once again notes with deep regret that the Government continues to fail to comply, despite the assurances given to the Chairperson of the Committee at a meeting held in June 2011, and urges the Government to be more cooperative concerning this case.*
- (b) *The Committee is particularly concerned by the fact that this case concerns the dismissal of a large number of public servants, including many trade union members and officials, and requests the Government to provide, without delay, its observations on the complainants' allegations. Should it be found that the officials in question were dismissed due to their involvement in a legitimate and peaceful strike, the Committee urges the Government to take any steps that may be necessary to ensure their reinstatement with full payment of back wages. If that is not the case, the Committee requests the Government to provide any information on the reasons for the decision to remove the employees from office, as per Presidential Ordinance No. 10/001 and Ministerial Order No. CAB.MI/FP/MBB/TAS/SDB/185/2009. It also requests the Government to keep it informed of any conclusions reached by the review commission which has examined the appeal against the Ordinance and of any follow-up thereto.*
- (c) *The Committee requests the Government to accept a high-level mission to discuss all the complaints pending before the Committee concerning the Democratic Republic of the Congo.*

CASE NO. 2758

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

**Complaint against the Government of the Russian Federation  
presented by**

- the All-Russia Confederation of Labour (VKT) and
- the Confederation Labour of Russia (KTR)

**supported by**

- the Federation of Independent Trade Unions of Russia (FNPR)
- the International Trade Union Confederation (ITUC)
- the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF)
- the International Metalworkers' Federation (IMF) and
- the International Transport Workers' Federation (ITF)

*Allegations: The complainant organizations allege numerous violations of trade union rights, including physical attacks on trade union leaders, violations of freedom of opinion and expression, Government's interference in trade union matters, refusal by the State authorities to register trade unions, acts of anti-union discrimination and absence of effective mechanisms to ensure protection against such acts, denial of facilities for workers' representatives, violation of the right to bargain collectively and the failure of the State to investigate those violations*

**1301.** The complaint is contained in a communication from the All-Russia Confederation of Labour (VKT) and the Confederation Labour of Russia (KTR) dated 20 January 2010. Since the lodging of the complaint, the complainants merged into the KTR. The KTR submitted new allegations and additional information in communications dated 18 October 2010 and 9 December 2011.

**1302.** In communications dated respectively 2, 4, 10, 15 and 22 February 2010, the International Trade Union Confederation (ITUC), the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), the International Metalworkers' Federation (IMF), the Federation of Independent Trade Unions of Russia (FNPR) and the International Transport Workers' Federation (ITF) associated themselves with the complaint.

**1303.** The Government sent its observations in communications dated 24 September 2010, 1 March, 12 and 23 May, and 1 August 2011, and 3 February 2012.



**1304.** The Russian Federation has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

#### **A. The complainants' allegations**

**1305.** By its communications dated 20 January and 18 October 2010, the KTR submitted a complaint against the Government of the Russian Federation detailing numerous allegations of violations of freedom of association in the country.<sup>1</sup>

#### **Physical attacks, harassment and intimidation against trade union leaders**

**1306.** The complainant describes in detail physical attacks suffered by trade union leaders and alleges, in this respect, the failure of the authorities to duly investigate their cases. Firstly, the KTR alleges that, in November 2008, Mr Alexey Etmanov, Chairperson of the primary trade union organization at the Ford Motor Company, had been attacked and beaten on two occasions. With regard to the first incident, which occurred on 7 November, Mr Etmanov filed an official complaint to the local Prosecutor's Office. At first, the Prosecutor's Office refused to open a criminal case. About a month later, this decision was overturned by the Deputy Prosecutor of the Leningrad region who requested further investigation. The complainant further alleges that on 21 November 2008, as he entered his apartment building, Mr Etmanov was attacked by a man who threw an iron bar at him. Mr Etmanov called a local police inspector who arrested the attacker and escorted the latter to the police station. However, the attacker was released, appeared at one interrogation session with a lawyer, and then disappeared. Mr Etmanov was later informed that the police could not find the suspect. While Mr Etmanov filed a complaint with the authorities, as in the first case, the outcome of the investigation is still not known.

**1307.** Secondly, the complainant alleges that in December 2008, Mr Evgeniy Ivanov, Chairperson of the primary trade union of the Interregional Union of Automotive Industry Workers (MPRA) received several calls from a man who claimed knowing which kindergarten Mr Ivanov's sons were enrolled in and recommended to Mr Ivanov to stop his trade union activities. Mr Ivanov recorded the phone calls and filed complaints with the police station, requesting that a criminal case be opened. However, the police did not find anything criminal in the recordings and refused to open a criminal case. On 8 February 2009, two unidentified persons attacked Mr Ivanov in front of his house and hit him several times in the face. Mr Ivanov was treated for a contusion and a broken nose. He filed a complaint with the police department and, on 10 February 2009, a criminal case was opened. Soon after the assault, Mr Ivanov was summoned to a meeting with officers of the Saint Petersburg Office for Combating Extremism ("E" Centre) of the Ministry for Internal Affairs. The officers tried to get Mr Ivanov to cooperate with them, i.e. asked him to be their informant on the activities of the enterprise and Saint Petersburg trade unions. Believing that the officers were involved in carrying out the attack, Mr Ivanov addressed the Kolpino district police department requesting that the criminal investigation be transferred to the Prosecutor's Office. This motion was dismissed. The Kolpino District Court also refused to examine this case considering that that all disputes regarding investigative jurisdiction fall under the jurisdiction of the Prosecutor's Office and not the

<sup>1</sup> Several specific allegations are not included in the description of allegations. These concern issues which are no longer relevant due to the time that has elapsed since the lodging of the complaint, as indicated by the complainant organization during an ILO mission to Moscow in October 2011. The report of the mission appears in the Annex to this case.

court. Furthermore, request for the investigation regarding possible involvement of the “E” Centre officers in the 8 February attack was denied. The criminal case was later suspended due to the inability to identify those responsible.

**1308.** The third case relates to the assaults on Mr Sergey Bryzgalov and Mr Alexey Gramm, trade union activists of the primary trade union at TagAZ company in Taganrog. Both trade unionists were beaten by unknown persons on 24 June 2008. The day prior to the attack, Mr Gramm participated in a picket line staged by the union at the entrance of the company to demand the management to comply with the labour legislation, to provide payslips, and recognize the trade union. Following these attacks, Mr Bryzgalov and Mr Gramm filed complaints with the police, pointing out the connections between the attacks and trade union activities. However, according to Mr Bryzgalov, the police did not react to the complaints and closed the case on 26 July 2008. On 24 July 2008, on his way home from work, Mr Bryzgalov was once again attacked and beaten up by an unidentified person.

### **Violation of freedom of opinion and expression**

**1309.** The complainant alleges that, by its decision of 28 August 2009, the Zavoljsky District Court of Tver declared that trade union leaflets, newspapers and materials prepared and circulated by trade activists of the MPRA at the “Tsentsrosvarmash” company in Tver were extremist material. The complainant indicates that following this decision, in autumn 2009, the Federal List of Extremist Literature, routinely compiled by the Ministry of Justice, was updated as to include the following:

- Leaflets with the header that includes a caricature showing a declining economic indicator and the slogan “Let those who caused the crisis pay for it!”;
- Leaflet with the header that includes the MPRA logo and the slogan “Fight substandard employment”;
- Leaflet with the header saying “Let those who caused the crisis pay for it!” and the footer including a “SotsSopr” logo and the full name of the organization, “Socialist Resistance (Section of the Committee for Workers International in the CIS)” along with the website, email address and mobile phone number in Tver;
- Leaflet with the header including the “MPRA Trade Union Tsentsrosvarmash” logo, the address “Comrades Workers!”, and a report entitled “A new trade union has been formed”;
- Leaflet with the MPRA logo and the slogan “We Demand Our Night Shift Pay!”;
- Leaflet with the header including a caricature showing the “Culprit in the Crisis” on top of the page, wearing a top hat with the dollar sign over whose head a recession curve of some indicator is drawn, and the slogan “We Must Not Pay for Their Crisis”.

The complainant points out that under section 13 of the Law on Prevention of Extremist Activities of 27 June 2002, as amended on 29 April 2008, it is forbidden to disseminate, produce and possess extremist materials.

**1310.** The KTR explains that the court decision was based on the following reasoning: “On the basis of a linguistic analysis of the printed material carried out on 12 March 2009 by a specialist of the philological faculty of the Tver State University, this leaflet has been found to contain indications of extremist activity, to excite social dissension and hostility, and to preach exclusiveness and the superiority or inferiority of individuals based on the social group to which they belong”. The decision does not, however, refer to any specific wording to indicate in what way the materials are supposed to be extremist.

- 1311.** According to the KTR, the case was heard on the submission by the Deputy Prosecutor for the Zavoljsky district of Tver. The management of the “Tsentrosvarmash” company and officers of the Ministry of Justice of Tver region were called to appear as third parties to the proceedings. Neither the MPRA nor its “Tsentrosvarmash” primary trade union were invited to attend, nor were they given notice of the hearing of this case or of the decision taken by the court.
- 1312.** On 4 February 2010, the MPRA lodged, with the Tver Provincial Court, a supervisory appeal against the decision of the Zavoljsky District Court. However, on 8 February 2010, the President of the Provincial Court decided to refer back, without a hearing on the merits, the MPRA appeal on the following grounds: “According to section 376.2 of the Code of Civil Procedure, judicial decisions may be appealed to a court of supervisory jurisdiction within six months, provided the appellants have exhausted other methods of appealing the judicial decision. The decision of the District Court, dated 28 August 2009, has not been appealed in cassation proceedings.” The judge further considered that a supervisory appeal must be referred back without consideration of the merits if the appeal documents do not contain copies of the judicial decision against which the appeal is lodged duly certified by the court. The supervisory appeal by the MPRA did not meet this requirement. In this respect, the KTR explains that the MPRA and its “Tsentrosvarmash” primary trade union were unable to obtain certified copies of the decision of the Zavoljsky District Court because the court categorically refused to issue copies thereof to any person not a party to the case. It was only possible to obtain the text of the decision through an intervention by a member of Parliament, after several months had elapsed.
- 1313.** On 18 March 2010, the MPRA lodged an appeal with the Tver District Court in Moscow against the judicial action taken by the Ministry of Justice to place the “Tsentrosvarmash” primary trade union information materials on the Federal Register of Extremist Literature. On 10 June 2010, the court dismissed the MPRA’s claim. In its decision, the court stated that pursuant to the Law on Prevention of Extremism, the presence of signs of extremism in any material is established by the court on the basis of a submission by the Public Prosecutor, or through the related court proceedings in an administrative, civil or criminal case. A copy of the decision, once it has taken effect, is sent to the Ministry of Justice. Non-compliance with a judicial decision is an offence, and therefore officers of the Ministry must execute even those which are known to be unlawful. The MPRA filed a cassation appeal with the Moscow Municipal Court, but the appeal has not yet been heard.
- 1314.** The KTR informs that, on 26 February 2010, the MPRA sent an application to the European Court of Human Rights, complaining of the violation of freedom of expression (Article 10 of the European Convention on Human Rights) and the right to a fair hearing (Article 6.1 of the Convention).

### **Refusals to register trade unions and amendments to trade union by-laws**

- 1315.** By way of background, the KTR explains that under section 8(1) of the Law on Trade Unions, unions, their associations and primary trade union organizations are registered as legal entities upon notification. According to section 8(3) of the same Law, the registering authorities have no right to exercise control over trade unions’ activities or to deny official registration. The registering bodies may, however, deny registration on the basis of section 23(1)(2) of the Law on Public Associations, according to which, state registration may be denied in cases where the required documents are not submitted or not properly prepared. Pursuant to section 8(2) of the Law on Trade Unions, trade unions can appeal in court the denial of state registration or avoidance thereof.

- 1316.** The complainant alleges that, in practice, however, the law enforcement bodies exercise broad control over trade union registration and the content of trade union by-laws. According to the KTR, there are numerous cases where the registration was denied or documents have been returned to trade unions with comments regarding the contents of their by-laws. Rigid control is exercised over the accuracy of trade union names when they refer to geographic areas covered by the unions. According to the complainant, section 3 of the Law on Trade Unions (entitled “Basic terms”), contains only definitions of terms used in that law, but is often interpreted as a complete list of legitimate types of trade unions. For instance, registering bodies interpret the legal requirement to provide a reference to the geographic area where a trade union operates as a requirement for interregional trade unions and trade union associations to provide a complete list of specific regions where their affiliates are active at the time they submit their documents for registration. Under these conditions, in order to accept affiliates from other regions, trade unions have to amend their by-laws and register the amendments through a procedure which the law enforcement bodies make as complicated as possible.
- 1317.** By way of example, the KTR indicates that, in August 2006, the MPRA applied for the state registration in Saint Petersburg. In November 2006, the authorities refused to register the MPRA on the following grounds: (i) it was not clear from the documents submitted whether the organization was a public association or a trade union; (ii) the trade union was not listed in the Unified State Registry of Real Estate Rights at the address indicated as its location; (iii) the geographic area where the trade union operated was not specified and the by-laws contained an open list of regions where the trade union could operate to enable it to expand to other areas; and (iv) the trade union by-laws provided that the trade union has the right to carry out other types of activities not forbidden by law. The by-laws also provided that any new primary trade union organization founded would notify the MPRA of its establishment, while according to the authorities, a primary trade union organization was a structural unit of an umbrella union and could not be established without the prior knowledge of the registering authorities. Interested in obtaining legal entity rights as soon as possible, the MPRA modified its by-laws. One year later, the amendments began to interfere with the union development and it became necessary to amend and reregister the amendments to the by-laws, as the original by-laws restricted the area where the trade union could operate by referring to specific regions where the trade union could carry out its activities. On 28 July 2008, the MPRA applied for the registration of amendments to its founding documents so as to expand the list of regions where it could operate. On 28 August 2008, the Ministry of Justice denied the registration on the following grounds: (i) instead of three copies of the revised by-laws, the union submitted only the amendments, without providing the original by-laws; and (ii) instead of original documents, only copies of the minutes and payment order were submitted. The MPRA followed the Ministry’s instructions, made all the necessary corrections to the documents and sent them to the Ministry of Justice on 14 November 2008. On 1 February 2009, seven months later, the MPRA was registered.
- 1318.** The complainant also indicates that the Russian Trade Union of Locomotive Brigades (RPLBJ) was established on 27 January 1992 to operate at the Russian Railroads and its branches. On 31 December 1999, the Ministry of Justice registered amendments to the RPLBJ’s by-laws changing its status to all-Russia. In 2003, the RPLBJ went through a re-registration process, during which documents were submitted to the Ministry of Justice confirming its all-Russia status. On 14 June 2005, a certificate confirming its all-Russia status was issued. In 2007, the President of the company requested the Prosecutor-General to audit RPLBJ’s activities. The Moscow interregional Transport Prosecutor’s Office was assigned to conduct such audit. On 1 February 2008, it filed a complaint with the Lyublino District Court of Moscow asking the RPLBJ to amend its founding document so as to remove all reference to its all-Russia status. On 26 November 2008, the Lyublino District Court partially satisfied the request of the Transport Prosecutor’s Office by ruling that the

RPLBJ must amend and reregister its by-laws. On 30 April 2009, the bailiff service began the enforcement procedure despite the fact that the RPLBJ had on multiple occasions pointed out that in order to amend its by-laws it needed to convene an extraordinary congress, which could make an appropriate resolution. This required additional time. Nevertheless, the following orders were issued against the RPLBJ and Mr Evgeny Kulikov, its Chairperson, for failure to comply with the court order: (i) on 26 May 2009, the bailiff issued an order for the recovery of an enforcement fee of 5,000 rubles (RUB); (ii) on 27 May 2009, Mr Kulikov was warned about potential criminal liability for a failure to execute the court order; (iii) on 15 June 2009, the bailiff issued a demand to comply with the court ruling; (iv) on 30 June 2009, the bailiff issued a resolution imposing on the RPLBJ a penalty of RUB30,000; (v) on 13 July 2009, the bailiff issued a warning of potential criminal liability for failure to comply with the court ruling; (vi) on 20 July 2009, the bailiff issued and forwarded to the bank an order to charge the enforcement fee of RUB30,000 to the RPLBJ bank account; and (vii) on 11 September 2009, the bailiff issued another warning on potential criminal liability for failure to comply with the court ruling. On 9 and 10 September 2009, an extraordinary assembly of the RPLBJ was held and a decision was made to amend the by-laws by changing the name of the union to the Federal Trade Union of Railroad Workers (FPJ), thereby removing the reference to its status of an all-Russia trade union. On 29 September 2009, all required documents were submitted to the Ministry of Justice for registration. However, on 22 October 2009, the Ministry of Justice refused to register the amendments. Moreover, on 19 November 2009, a criminal case was brought against Mr Kulikov for failure to act in accordance with the court's verdict. After an interrogation on 11 December 2009, it was decided to extend the investigation for another month. The KTR indicates that following a number of appeals, by a decision of the Head of the Lyblinsky Bailiffs' Department of the Federal Court Bailiffs' Service in Moscow, dated 11 June 2010, the criminal case against Mr Kulikov was dropped for lack of evidence.

- 1319.** With regards to the fine imposed against the funds of the RPLBJ for non-compliance with the court order to amend the union by-laws (RUB30,000 and RUB5,000 levied for costs), the KTR indicates that following an appeal, on 16 October 2009, the Deputy Head of the Moscow Court Bailiffs' Service Department found that the actions of the enforcement officer in fining the union RUB35,000 had been unlawful. The union applied to the court for the return of the funds which had been unlawfully levied. However, the claim was dismissed on 26 August 2010 by a decision of the arbitration judge. The court stated that the decisions taken by the enforcement officer to levy costs and impose a fine, and the actions taken to implement those decisions, had not been appealed in the manner prescribed by law.
- 1320.** On 27 January 2010, the union held a second extraordinary general assembly to adopt further amendments to its by-laws, and, on 9 February, pursuant to the decision of the court, the relevant documents were sent to the head office of the Ministry of Justice in Moscow. On 16 March 2010, in accordance with the adopted amendments, the RPLBJ was renamed to become the Interregional Union of Railway Workers (MPJ). Nevertheless, on 27 February 2010, RUB50,000 were taken from the bank account of the union. On 12 April 2010, the RPLBJ applied to the Lyublinsky District Court in Moscow requesting the court to declare that the decision by the enforcement officer to impose a fine and the action taken to withdraw RUB50,000 from the union's bank account were unlawful. On 5 August 2010, the court considered that replacing the word "Russian" by "Federal" did not constitute an adequate compliance with the court decision of 26 November 2008. According to the KTR, the court ignored the fact that the trade union had held a second extraordinary general meeting on 27 January 2010. To date, the rights of the RPLBJ (now MPJ) have not been restored: it has not yet succeeded in obtaining recovery of the fine levied on its account.

**1321.** The complainant further refers to the case of the Federal Union of Air Traffic Controllers (FPAD), in operation since 1991 and affiliating air traffic controllers and other workers. It alleges, in particular, that in 2010 a number of the FPAD primary trade unions were notified by the relevant prosecutors' offices that the following provision contained in their by-laws, as in the FPAD's by-laws, was unlawful: "The trade union committee, *acting in the manner prescribed by law*, organizes and conducts collective actions in support of demands which have been put forward, acting in conformity with the law in force, takes decisions on whether to call a strike, decides which body should lead the strike and who should represent workers in conciliation procedures relating to the staff of civil aviation airlines". As the relevant provisions contained a reference to these actions being carried out "in accordance with the law", the FPAD and its primary organizations did not consider it necessary to amend the by-laws and rules concerning primary trade unions. In the trade union's view, these matters were governed by legislation, which may impose different forms of regulation at different times. Nevertheless, the courts endorsed the position taken by the prosecutors' offices, and decided that this provision was unlawful. Thus, on 11 May 2010 the Savelovsky District Court in Moscow, acting on an application of the Moscow Air and Water Transport Prosecutor, ruled that paragraph 7.5, subparagraph 8 of the Rules of the primary trade union of workers at the State enterprise "Russian Air" was unlawful. On 3 August 2010, the Moscow Municipal Court upheld this decision. Similar provisions contained in the by-laws of the primary trade union of air traffic controllers of Kolpashevo, Tomsk Union of Air Traffic Controllers and Mirninsky Union of Air Traffic Controllers have also been declared unlawful by the courts upon the application by the transport prosecutors' offices. In all cases, the unions were ordered to amend their by-laws. Finally, the KTR indicates that the Savelovsky District Court in Moscow, upon an application filed by the Moscow Prosecutor's Office monitoring compliance with the laws in air and water transport, declared similar provision contained in the FPAD by-laws unlawful.

### **Interference by the authorities in trade union activities**

**1322.** The complainant alleges that trade unions encounter several types of interference by the authorities. In some cases, trade union leaders are summoned for interrogations by various law enforcement bodies to give explanations. In other cases, criminal lawsuits are open against trade union leaders. Some of these have no further consequences and, in the opinion of the complainant, are used to exert pressure and harass trade union representatives.

**1323.** In particular, the KTR refers to the case of Mr Valentin Urusov who is currently serving a six-year prison sentence. By way of background, the KTR explains that the primary trade union organization "PROFSVOBODA" of the Russian Metalworkers Trade Union SOTSPROF, representing employees of the "ALROSA" company, was formed on 16 June 2008. Mr Urusov was the person responsible for setting up and leading the organization. Workers of vehicle depot No. 2 of the Udachny ore-processing plant, which is a subsidiary of the "ALROSA" company, had repeatedly made claims to the employer requesting to increase wages, which were unjustifiably low for territories in the far north, improve working conditions and to bargain collectively, which the employer had ignored. In mid-August drivers of vehicle depot No. 2 sent the employer a letter declaring a hunger strike, and on 25 August 2008 they went on strike. On 28 August 2008 a trade union meeting was held in the town square and attended by over 200 workers. At the initiative of the trade union committee headed by Mr Urusov, claims were laid with the employer in a collective dispute. However, representatives of the management of the "ALROSA" company refused to meet with workers, and began to resort to violence against members of the trade union. In the morning of 3 September 2008, Mr Urusov was attacked by persons dressed in civilian clothes. They beat him, dragged him in handcuffs into a car and tossed a package containing narcotic substance in his pocket. It subsequently became clear that they were officers from the Mirny Drug Control Department. Mr Urusov was forced to write a

statement saying that the package containing drugs had been in his pocket before he was arrested. From 3 to 9 September 2008 Mr Urusov was held at the duty office of the Drug Control Department in Mirny. Only on 4 September, over 24 hours after his arrest, was he given a meal. Afterwards, he was sent to be tested for drugs. The test showed that he had ingested morphine. No test had been carried out upon his placement in the duty office cell, and in court the doctor who had performed the test stated that the ingestion of the morphine could have occurred up to two hours beforehand. On 5 September 2008, the justice of the peace for Mirny division No. 18 made two decisions concerning Mr Urusov – to fine him RUB500 for resisting arrest, and to detain him for ten days under section 6.9 of the Code of Administrative Offences for using narcotic substances without medical prescription.

- 1324.** At the same time, a criminal case was opened and, on 13 September 2008, Mr Urusov was arrested on suspicion of possessing narcotic substances. On 26 December 2008, the Mirny District Court in the Republic of Sakha (Yakutia) sentenced Mr Urusov to six years of imprisonment for possessing narcotic substances. In the opinion of Mr Urusov’s lawyer, the court had failed to examine the evidence which would have cleared the accused. The court had not attached any weight to Mr Urusov’s statement that he had been subjected to physical force and threats during his arrest and that the only witnesses present at the search were members of the security staff of the “ALROSA” company. According to the KTR, Mr Urusov’s arrest is a clear case of persecution for trade union activities. Following his conviction, on 26 December 2008, Mr Urusov lodged an appeal with the Supreme Court of the Republic of Sakha against the decision of the Mirny District Court. On 12 May 2009, the criminal division of the Supreme Court set aside the verdict of the Mirny District Court, finding that there were serious procedural errors in the handling of the case by the first instance court, and referred the case back for retrial. The restraint measure against Mr Urusov was altered to a written undertaking not to leave his place of residence, and he was released from custody. However, following the retrial, the Mirny District Court did not change its previous findings and, on 26 June 2009, handed down a decision similar to the previous one: Mr Urusov was sentenced to six years of imprisonment in an ordinary regime corrective colony.
- 1325.** Furthermore, the KTR alleges that an attempt was made to bring a criminal case against Mr Dmitry Kojnev, Chairperson of the MPRA trade union at the “Tsentsrosvarmash” company. In April 2009, an officer of the Federal Security Service called him to say that he wanted to talk about Mr Kojnev’s extremist activities. The Federal Security Service considered opening a criminal case under section 280(1) of the Criminal Code on public encouragement of extremist activities. The investigation concerned the *Tsentsrosvar Worker* newspaper, certain leaflets and several issues of the *Socialist and Levyy Avangard* newspaper. Mr Kojnev explained that fewer than 1,000 copies of the *Tsentsrosvar Worker* newspaper were printed and paid for by trade union dues, and that it contained materials on the day-to-day news of the trade union and that he had nothing to do with other newspapers. Furthermore, on 30 June 2009, Mr Vasili Molchanov, Deputy Chairperson of the primary trade union organization “Nashe Delo”, affiliated with the Independent Miners’ Union of Russia, was interrogated by the officers of the Department for Combating Organized Crime without producing any document authorizing his summons. A lawyer was not allowed during questioning, which related to his trade union activities.
- 1326.** The complainant also alleges that in the context of tax inspections and audits into the sources of funding of trade union organizations, trade unions are required to provide lists of their members, which has very serious consequences. It refers, in particular, to an audit of the primary trade union organization of the Russian Dock Workers Union (RPD), an affiliate of the KTR at the Novorossiysk Maritime Commercial Port (NMTP). The complainant explains that following a collective labour dispute, which was followed by a work-to-rule action, conciliation and ultimately an agreement between the union and the

management, the state authorities began putting pressure on the primary trade union organization and interfering with its work. On 23 January 2007, Mr Pereboev, the union Chairperson, was invited to the office of the transportation police of Novorossiysk to give explanations with regard to the financial damage caused to the company, following a complaint by the First Deputy General Director of the NMPT, who is also a deputy of the legislative assembly of the Krasnodar Region. On 7 February 2007, three police officers came to the trade union office and, referring to the deputy's inquiry, demanded Mr Pereboev to provide trade union documents, including lists of its members. On 5 March 2007, the police department of Novorossiysk also asked for a list of trade union members and the documents based on which trade union dues were checked off. The documents, including individual application forms authorizing deduction and transfer of trade union dues, were provided to the police on the same day. Nevertheless, on 27 April 2007, the Acting Head of the criminal police of Novorossiysk ordered an investigation of financial, business and commercial operations of the RPD, search of trade union offices and an audit of documents reflecting trade union financial and business activities. The work of the trade union was practically put to a standstill for three months because the police confiscated all trade union documents and sealed the accounting office of the trade union. According to the complainant, the findings of the audit were not documented and its results were not formulated and made known to the union. Based on those facts, the KTR submitted a complaint to the General-Prosecutor's Office. From there, the complaint was forwarded to the Prosecutor's Office of the Krasnodar region for consideration, and, from there, to the Prosecutor of Novorossiysk; however, no reply has been received. Complaints were also lodged with the Minister of Internal Affairs. The reply of the authorities merely stated that the audit was carried out at the request of a deputy and no reference to an evaluation of the lawfulness and necessity of the audit was made. On 20 July 2007, criminal proceedings on accusations of misappropriation of funds entrusted to him were opened against the union's Chairperson. On 23 July 2007, Mr Pereboev was summoned for an interrogation to the investigation department of the Novorossiysk police. Later, the case was dismissed. The complainant states that, because of the actions of the employer and the state authorities, normal operations of the trade union were blocked. The audits and criminal proceedings against the union's Chairperson undermined the morale of the union and showed that it was dangerous to be a member of the trade union. As a result, the membership of the union has significantly decreased.

- 1327.** The complainant also alleges that following a strike, in November 2007, at the Ford Motor Company, the MPRA-affiliated primary trade union organization received, on 28 April 2008, a notification of an upcoming tax audit and a demand to provide financial documents and a list of all trade union members to the tax inspectorate of the Petrogradsky district of Saint Petersburg. The requested financial documents pertained to the funds that were transferred to the account of the trade union during the strike. The trade union refused to provide the documents and appealed the tax inspector's demand in court. The court ruled that the demand to submit the lists of trade union members was illegal.
- 1328.** Between September and June 2009, a police officer from the Investigation and Search Department of the Samara criminal police made three founders of the primary trade union organization "Nashe Delo" at the "Togliattikauchuk" sign statements saying that they had not been present at the founding meeting of the union. Those statements were used as a basis for claiming to the State Tax Inspector that the information submitted for the registration of the union was false. On this basis, the State Tax Inspector filed an administrative liability case, alleging the submission of false information.
- 1329.** Furthermore, on 20 November 2009, members of the MPRA, established on 16 October 2009 at the Tver Rail Car Building Plant, were summoned to the Prosecutor's Office to provide explanations concerning the establishment of their trade union. A few days later, on 23 November 2009, a senior assistant to the Zavoljsky District Prosecutor of Tver



visited the company to question the Chairperson of the union about the establishment of the union at the enterprise.

- 1330.** The complaint further alleges that following the declaration of a strike in November 2007, subsequently declared illegal by the court, police officers searched the office of the RPLBJ, allegedly on a basis of an anonymous complaint which claimed that the RPLBJ kept agitation leaflets, money and explosives to be used in mass riots on railroads during the elections. The trade union's premises were searched in the absence of trade union representatives. The next morning, an officer of the Economic Security Department demanded from the union a list of staff members, accounting documents, documents confirming the source and amount of income, as well as payroll documents. The same police officer threatened to find grounds for bringing criminal charges against the union. Following these events, by 20 March 2008, the territorial and primary organizations of the RPLBJ were evicted from their respective offices. Since then, some trade union organizations are still without an office space.
- 1331.** The KTR also alleges violation of the rights of the RPD the primary trade union organization of dockers, of the Tuapse Seaport (MPT). In this respect, it indicates that, in early February 2008, the building on the company's site where the primary union had its office was demolished. Prior to this, the trade union office had been broken into and documents, together with some of the equipment and supplies belonging to the trade union, had disappeared. The primary trade union wrote to the Prosecutor's Office and the internal affairs authorities asking for a criminal investigation to be open to find and punish those responsible for the theft of the property. While, on 28 March 2008, the legal proceedings were opened, the matter was not investigated. Thus, to date, the union's property has not been found and the guilty parties have not been identified. As the employer refused to provide the RPD primary trade union of dockers of the MPT with an office space, the union now shares the office with another primary trade union operating at the port (affiliated to the Union of Water Transport Workers of the Russian Federation).
- 1332.** The KTR further alleges that, on 29 January 2008, the managing director of the Tuapse Maritime Commercial Port complained to the Tuapse Department of Transport Internal Affairs that the leadership of the RPD primary trade union of dockers was stealing its funds. On 8 February 2008, officers of the Department for Combating Economic Crime entered the premises shared by both primary trade unions and demanded that unions handed over their financial documents. Due to the events described above, the RPD primary trade union was unable to provide its documents. On 3 March 2008, a criminal investigation was opened in the course of which over 150 members of the RPD primary trade union were questioned and searched. Both primary trade unions appealed these actions in administrative proceedings, in which they complained about the unlawful actions of the employer in making a false statement. They also complained to the office of the Prosecutor-General against the unlawful actions of the internal affairs authorities. These complaints were forwarded to the Tuapse Transport Prosecutor's Office, which did not find any violations. The investigation into the criminal case is continuing at present, and is a serious hindrance to trade union activity.

### **Refusal by employers to recognize newly formed trade unions**

- 1333.** The complainant indicates that according to the national legislation a trade union is considered established from the moment the decision to create a union is made, its constitution is adopted and its governing and auditing bodies are elected. State registration of a legal entity is not mandatory. However, primary trade union organizations often face situations of refusal by an employer to recognize a union established at the enterprise, which entails refusal to accept and to respond to any correspondence from that union, or

cooperate and negotiate with it. The complainant provides several examples where trade union leaders sent notifications of establishment of a union to the enterprise management with a request to provide the union with an office space, pursuant to the provisions of the Labour Code, as well as access to the workplace and a space to post trade union information. According to the complainant, the management often refuses to accept documents and trade union communications delivered either by hand or registered mail. Subsequently, the management simply denies that it is aware of the union's existence. Employers also use this argument in court when cases of alleged violations of labour and/or trade union rights are examined.

**1334.** According to the complainant, such was the case when the court examined the case of 25 laid-off employees, members of the trade union at the GM-AVTOVAZ enterprise. The court, by its decision of 14 September 2009, refused to order the reinstatement of all workers except one. The company claimed not to have been aware of the existence of the union. After the union proved that since its establishment, on 28 July 2006, it had, on many occasions, notified the company of its establishment, the company acknowledged it, but denied the fact that the union had sent information on the recently elected trade union activists whose layoffs had to be agreed upon with the union. The court refused to order the reinstatement of the laid-off employees, accepting the company's arguments that it had not received notifications concerning their election to the union leadership.

**1335.** Furthermore, the complainant alleges that the management of the TagAZ company did not recognize the MPRA primary trade union organization, established on 31 August 2007, did not respond to its letters proposing to start collective bargaining, did not provide check-off facilities and claimed to the state auditing agencies that there was no trade union at the company. Similarly, the administration of the State School of Higher Education, Saint Petersburg University of the Ministry of Internal Affairs refused to recognize the primary trade union of the All Russian Union of Trade and Service Workers (OPRTU) established in February 2008 and encouraged the leaders of the union to resign from the university. After all attempts by the trade union to establish a constructive dialogue with the administration have failed, the union ceased to exist.

### **Anti-union discrimination and pressure against workers**

**1336.** The complainant indicates that while the legislation prohibits anti-union discrimination, in practice, anti-union practices by employers, involving discrimination and pressure on trade union leaders and members to leave unions or to prevent them from joining one, are common. The complaint refers to section 3(4) of the Labour Code, pursuant to which, persons who believe to have suffered discrimination at work have the right to file a lawsuit demanding restoration of their rights, compensation for material loss and redress of moral damage. The interpretation of this provision by the state bodies is to effect that only courts have the competence to examine complaints of anti-union discrimination, hence such complaints cannot be considered by the labour inspectorate bodies. Section 29 of the Law on Trade Unions also provides for the judicial protection of trade union rights. Consequently, all complaints relating to cases of anti-union discrimination must be filed in court; labour inspectors dismiss such complaints as being outside of their competence. Furthermore, national legislation does not provide for an administrative liability of persons found guilty of violation of trade union rights, including anti-union discrimination. While section 136 of the Criminal Code punishes persons responsible for acts of discrimination and creates a liability for violation of the equality rights, in practice, this legal provision is never applied and no one has ever been held criminally responsible for committing acts of discrimination. This results in the widely used practice of discrimination and pressuring workers and union leaders. The absence of protection against discrimination by state bodies enhances the feeling that such behaviour is permissible and normal. By way of

illustration, the complainant alleges that even after acts of anti-union discrimination against members of the trade union of the Independent Miners Trade Union of Russia (NPGR) at the “Togliattikauchuk” were established by the court, the company’s officials, guilty of committing these acts, did not bear responsibility under section 136 of the Criminal Code because the Prosecutor’s Office consistently refused to open a criminal case on the grounds of the absence of the elements of crime. One of such decisions was motivated by the following statement: “The actions of the management of the company were not criminal, as they presented no public danger and caused no considerable damage to the rights and lawful interests of the union, as the latter had not been denied the opportunity to defend workers’ rights in court”. While the Samara District Court has subsequently cancelled this decision, no criminal case has been opened.

- 1337.** Furthermore, the complainant alleges that, on 2 August 2008, Mr Dmitry Kojnev was elected Chairperson of the trade union committee of the MPRA primary trade union at the “Tsentrosvarmash” company. Upon his election, Mr Kojnev appealed to the General-Director of the company demanding safe working conditions and compliance with the occupational safety and health rules. The appeals led to numerous disciplinary measures taken against Mr Kojnev, including warnings and the dismissal on 19 January 2009 for having left the workplace, together with other eleven workers, twenty minutes before the end of the shift. The complainant explains in this respect that the temperature at the workplace was only 6°C, but that the workers in question have completed their assignments. Mr Kojnev and other eleven workers were fired pursuant to section 81(1)(5) of the Labour Code for multiple unjustified failures to perform their duties. The management did not ask for the trade union’s opinion regarding the dismissal of the trade union leader. By the verdict of the Zavoljsky District Court of Tver, on 28 May 2009, Mr Kojnev’s dismissal was declared illegal, among other reasons, for failure of the company to obtain the consent of the MPRA council for the dismissal of an elected trade unionist, pursuant to section 374 of the Labour Code. In the courtroom, the employer’s representatives pointed out that Mr Kojnev’s dismissal from work should not have been discussed with the MPRA. The management considered that the establishment of the trade union at the company was illegal because the union’s by-laws stated that the MPRA was active in Samara and Leningrad regions only, and therefore a primary trade union organization could not have been established in the Tver region. They further argued that according to its by-laws, the union is active in the automotive industry, and the company belongs to the railroad industry. The management further alleged that it did not receive properly notarized documents regarding the establishment of the union. The Prosecutor supported the defendant’s allegations and insisted that the establishment of the MPRA at the company was illegal. However, the court judged that the considerations of the legality of the union’s existence were irrelevant. Mr Kojnev was reinstated without loss of pay and awarded compensation for moral damages. Despite the court verdict pronounced on 28 May 2009, Mr Kojnev was prevented from working from 14 to 31 July 2009, and subsequently placed on downtime until February 2010 (at two-thirds the standard rate of pay), under separate monthly orders by the employer. The pay he actually received for the period on downtime was about RUB4,000 (€100). Considering that there were no objective reasons for declaring downtime at the “Tsentrosvarmash” company and that the decision was prompted solely by the desire to deprive him of his means of subsistence and was a form of anti-union discrimination, Mr Kojnev applied to the court requesting to declare the orders to place him on downtime unlawful. On 15 April 2010, the Zavoljsky District Court in Tver dismissed Mr Kojnev’s claims, giving as the reason for its decision the argument put forward by the company that “the downtime was not under the control of the defendant because the lack of work was caused by a lack of orders from contractors” and “a ban against placing on downtime a worker for whom there is no work for objective reasons, is a disproportionate restriction of the employer’s rights as a party to the employment contract and also as a participant in the economy and a proprietor”. The fact that other workers continued working was ignored by the court.

- 1338.** A cassation appeal was lodged against the decision of 15 April 2010, but was dismissed by the Tver Provincial Court on 1 June 2010. On 1 February 2010, Mr Kojnev was summoned to the personnel department and told there was an order to cease work. According to this order a number of workers, including Mr Kojnev and his deputy, Mr Adrianov, were placed on downtime from 1 to 12 February 2010. At the employer's insistence they have signed an acknowledgement of the order, however, not on the document itself, but on a separate sheet containing only the title of the order and a list of the workers' names. When Mr Kojnev and Mr Adrianov went back to work on 15 February 2010, they were asked to explain why they had absented themselves from work. The copy of the order to stop work shown to them by the employer referred to different dates for the stoppage: from 1 to 5 February. On 5 March 2010, Mr Kojnev and Mr Adrianov were dismissed for a "single grave breach of their employment obligations". Considering that their dismissal was unlawful, both trade union leaders lodged an appeal with the court. On 28 April 2010, the Zavoljsky District Court dismissed the claims. According to the KTR, the court failed to consider the question of the proportionality of the punishment and the circumstances in which it had taken place. A cassation appeal was lodged with the Tver Provincial Court, but dismissed on 3 August 2010.
- 1339.** The complainant also alleges that members of the MPRA "Edinstvo" primary trade union organization at the Avtovaz company in Togliatti have been subjected to systematic and large-scale pressure and discrimination for a number of years. From the moment of the trade union's establishment in 1991, the employer has been highly negative towards the new union and has constantly, by threats and sanctions, pressured workers who have joined it to withdraw from the union. The pressure used against workers resulted in the trade union's membership dropping from 2,500 persons in 2000, and to 1,000 persons in 2008–09. The KTR alleges that many workers who supported the activities of the "Edinstvo" primary trade union and would have liked to join it were scared to do so for fear of sanctions. A number of workers testified that they had written notices of their disaffiliation from the union under the management's pressure between 2005 and 2009. Other trade union members were denied the possibility of working overtime and/or certain benefits.
- 1340.** The KTR also alleges that, throughout 2009, such methods of intimidation and pressure have been used against members of the "Edinstvo" primary trade union at other enterprises. Ms Vera Gundareva employed at the Plastic Items Unit reported that from the moment she joined the union she has not been assigned any double-paid overtime shifts. Instead, she was given low-paid assignments, which resulted in her pay falling from RUB12,000–13,000 to RUB8,000–10,000. Mr Mikhail Tarasov, an equipment technician, who joined the union in 2007, reported that the manager of his workshop had on many occasions insisted that he and other trade union members must leave the union. According to the management, the union hampered its interaction with workers. In March 2009, Mr Tarasov quit the union. Ms Olga Lisova, an economist at the Catering Company (KOP), together with other employees had joined "Edinstvo" primary trade union at the end of 2008. Once the list of trade union members was given to the management, those on the list were put under pressure to leave the union. The management of the company allegedly told Ms Lisova that she had destroyed her career by joining the union and that she was not going to be hired even for temporary positions. One of Ms Lisova's colleagues was informed that she would be hired only if she left the union. Indeed, once she withdrew from the union, she was hired.
- 1341.** According to the complainant, the Prosecutor's Office to which the union appealed several times seeking protection from the acts of pressure and discrimination did nothing more than formal inspections. Despite the evidence collected by the union, the authorities refused to take action to protect workers. In a number of cases, as in the case of the "Edinstvo" trade union, prosecutors communicated only with the employers'

representatives and never talked to the workers who had filed complaints. In the KTR's opinion, the prosecutorial investigation system that permits hearing only one of the parties, i.e. employers' representatives, demonstrates a biased approach that does not allow for an understanding of the actual situation and an efficient protection of the rights of the victims.

- 1342.** The complainant further alleges that, on 7 April 2008, the RPLBJ forwarded to the employer, the Moscow Railroad, its demands, as adopted by the employees' conference and approved by the trade union conference. The employer failed to consider the demands brought forward by the union and avoided participation in conciliation procedures. On 28 April 2008, workers went on strike. The strike involved not only RPLBJ members but also the Rosprofjel trade union members. The strike was followed by about 150 locomotive engineers and their assistants at the Moscow Railroad (Yaroslavl, Gorky and Kashira directions). To avoid the typical situation where employers being notified of a strike in advance applied to the court to declare the strike illegal, the union disobeyed the Labour Code by failing to notify the employer of the upcoming strike ten days in advance. The trade union has complied with all other requirements of the law, and made sure that the minimum services were provided. The complainant explains that, under the provisions of the Labour Code, employees may be disciplined for their participation in a strike only if they do not stop the strike after a court verdict declaring the strike illegal comes into effect. The complainant alleges that, despite the fact that the company had not challenged the legality of the strike in court, all participants were disciplined in the form of a reprimand or denial of a bonus due to them. The bonus amount ranged from RUB3,000–10,000 (about 40 per cent of workers' salaries). Five workers were dismissed and two workers were subject to an administrative action for organizing the strike. These employees filed suits with the Meshchansky District Court of Moscow seeking reinstatement and the overturning of the disciplinary actions. The court rejected their claims on the ground that, under section 17 of the Law on Rail Road Transportation in the Russian Federation of 10 January 2003, strikes as a means of collective labour dispute settlement by employees in general use railroad transport whose work involves train traffic and manoeuvring, as well as servicing passengers, cargo senders and cargo recipients on railroad transport of general use, are illegal and shall not be permitted. The Moscow City Court and the Supreme Court confirmed this verdict.
- 1343.** The complainant indicates that following the publication by the enterprise management of an order dated 28 November 2008 on cutting back the staff and eliminating jobs, the MPRA workers at "Festalpine Arkada Profil" filed a complaint with the state labour inspectorate for the Smolensk region on 4 December 2008, in which it highlighted a number of violations and, in particular, the fact that 65 of all employees who were to be laid off were members of the trade union, including seven (out of 12) members of the trade union committee. In his reply dated 26 December 2008, the labour inspector stated that the management of the company had not committed any violations of labour laws. The arguments of the trade union related to discrimination were not examined by the inspector. Following an intervention, on 24 February 2009, by Mr Kravchenko, the then President of the VKT, the inspector discovered certain violations committed during the layoffs but failed to examine the issue of discrimination. On 16 January 2009, the trade union filed a complaint about the order with the Prosecutor's Office for the Smolensk region, pointing once more to the anti-union discrimination of workers in the course of layoffs. In his reply dated 16 February 2009, the interregional Prosecutor of Yartsevo did not refute the incidents of discrimination nor indicated that this allegation of anti-union discrimination had been examined. Thus, no investigation has taken place to determine whether trade union members were discriminated against in the course of layoffs.
- 1344.** The KTR also alleges that, following the arrest of Mr Urusov (as detailed above), the "ALROSA" company persisted in its campaign to destroy the union. Representatives of the management threatened activists and even those who had merely applied to join the union.

In January–March 2009, the last 13 of the union activists were dismissed. They appealed their dismissal in court, but did not succeed in being reinstated. Those who had been dismissed failed to find jobs because all enterprises in the city are linked to the “ALROSA” company.

- 1345.** The complainant also provides detailed information on anti-union practices (pressure to withdraw from trade unions, dismissals, suspensions, transfers, denial of bonuses, denial of access to trade union leaders) at the following enterprises: GM-AVTOVAZ in Saint Petersburg; GM-AVTOVAZ in Togliatti; TagAZ in Taganrog; Baltika Brewery–Baltika Rostov in Rostov-on-Don; State School of Higher Education, Saint Petersburg University of the Ministry of Internal Affairs; “Nevskiye Porogi”; and Saint Petersburg and Leningrad Regional Department of the Federal Post Office, “Pochta Rossii Piter”.

### **Denying trade unionists access to workplaces**

- 1346.** The complainant alleges that trade union leaders have been denied access to the workplaces. It refers, in particular, to the situation at the GM-AVTOVAZ, where from the moment of the establishment of the “Edinstvo” primary trade union organization in 2007, the management have been denying access to the company premises to representatives of the primary trade union and leaders of its umbrella trade unions. With regard to the latter, while the reasons for refusal were not specified, a reference to section 29 of the Labour Code, according to which, the interests of workers at an enterprise may be represented only by a primary trade union organization and passes may be provided only to representatives of a primary trade union organization, was made. “Edinstvo” primary trade union has repeatedly applied to the state authorities, including the Samara region state labour inspectorate, requesting to ensure the right of access to the company premises and the right to receive a copy of the instructions on access to and internal regime of the company. The state labour inspectorate replied that the monitoring of compliance with the Law on Trade Unions was outside of its sphere of competence. The Ministry of Health and Social Development confirmed the labour inspectorate’s position and advised the union to apply to a Prosecutor’s Office and the court.
- 1347.** The Chairperson of “Edinstvo” had also submitted a complaint to the Avtozavodsky District Court of Togliatti against the company with regard to the refusal to grant access to the leaders of the MPRA and VKT. On 11 March 2009, the complaint was dismissed. The court concluded that it did not see the need to issue those individuals with permanent passes to the company’s premises, since it could be inferred from the provisions of the Labour Code that “the authorized MPRA officers can have free access to the company’s premises only in their capacities of trade union labour inspectors and exclusively for the purpose of carrying out inspections ... The application by the “Edinstvo” Chairperson was aimed at making the company to issue a pass to its territory so as to enable the trade unionist to conduct visits without supervision, rather than to exercise trade union’s lawful rights”. The complainant adds that while officers of another primary trade union organization have permanent passes and can enter the company premises without being searched, “Edinstvo” leaders have to apply for a single-entry pass, which places their ability to communicate with trade union members under control of the management, and substantially limits the time they can spend with trade union members.
- 1348.** The complainants also allege that representatives of the Russian Trade Union of Seamen (RPSM), the RPD and the Russian Trade Union of Maritime Transport Workers, all affiliated to the Federation of Trade Unions of Workers of Maritime Transport, cannot fully exercise their right to unhampered access to the workplaces of their members. Numerous state and private security companies operating on the territory of commercial seaports put all kinds of obstacles, such as refusals to issue passes, procrastination in the consideration of appeals for passes, demands to provide lists of trade unions members,

charging and sometimes extorting fees for passes. Repeated attempts by the Federation to solve this issue with the Ministry of Transport and the Federal Agency of Sea and River Transport have not yielded positive results. An attempt to apply for help to the office of the General Prosecutor, asking to verify compliance with the legislation concerning trade union rights in all seaports also failed since the appeal by the Federation was redirected to the Ministry of Transport, which does not have the appropriate authority.

- 1349.** Furthermore, the complainant indicates that in 2007, the RPD primary trade union of dockers of the Tuapse Seaport, in operation since 1991, requested the employer to consider a wage increase. After the employer turned down this request, the trade union undertook a number of collective actions. The management of the port reacted by taking steps intended to hinder trade union activity. One of such means was to restrict access to the workplaces to trade union leaders. In this respect, the KTR explains that while, until the end of 2007, the Chairperson of the trade union committee was able to make unhindered visits to the workplaces after the end of working hours, on 21 December 2007, the management of the port introduced a pass system, which changed the conditions for entry. However, according to the complainant, these changes were, and are still being, applied selectively – and only to members of the primary trade union and their leaders. Other workers, and even outside persons, are able to pass freely through to the port. The trade union committee wrote to the Tuapse Transport Prosecutor’s Office. In its reply, dated 11 August 2008, the Prosecutor’s Office stated that the applicant’s arguments had not been substantiated, that the procedure for issuing and using passes had been laid down for all categories of workers, was the same for all and did not allow for any exceptions. The second appeal to the Transport Prosecutor’s Office did not bear any further results.

### **Refusal to bargain collectively**

- 1350.** The complainant explains that, pursuant to section 37 of the Labour Code, a primary trade union organization, a single employee representative body, or another representative body of employees, empowered to initiate collective bargaining, must notify of its intention to initiate collective bargaining all primary trade union organizations active at an undertaking at the same time as they approach the employer with a proposal to begin collective bargaining; within the following five working days, it must form a single representative body and to include representatives of other primary trade unions to the existing single representative body. If within this time frame the primary trade union organizations do not announce their decision or refuse to assign their representatives to a single employees’ representative body, the collective bargaining shall begin without their participation. At the same time, trade unions, which do not participate in the collective bargaining, retain the right to assign their representatives to the single representative body for one month following the beginning of the bargaining process. The KTR alleges that, despite clear legislative provisions, complainants’ primary trade union organizations are restricted in the exercise of their right to participate in the collective bargaining process due to the failure by majority trade unions to notify them of the beginning of the collective bargaining process. The complainant alleges that in 2006, the “Edinstvo” trade union committee filed a complaint with the Samara region state labour inspectorate over the failure by the “Avtoselhoz mash” trade union committee to notify it of the beginning of the collective bargaining at the Avtovaz. The labour inspector did not find grounds for issuing a directive either to the union, which initiated collective bargaining, or to the employer. The inspector considered that a union, which unites more than half of the total number of workers at the enterprise, has the right to propose to the employer to begin collective bargaining on behalf of all employees without a prior creation of a single representative body of employees. It was further explained to the union that, in such cases, the state labour inspectorate is deprived of any means of legal interference, as the failure to notify other primary trade union organizations of the beginning of collective bargaining does not constitute an administrative offence in terms of the Code of Administrative Offences. This situation

repeated itself in 2008. In 2009, when the “Edinstvo” trade union committee proposed its participation in the drafting of a collective bargaining agreement for 2009, the “Avtoselhoz mash” trade union committee replied that all employees could take part in the drafting of a new collective agreement by submitting their proposals. A single representative body of employees that would represent members of both unions was not formed. Years of appeals to the law enforcement bodies at all levels have not led to the enforcement of the right of minority unions to participate in collective bargaining. Thus, the norms of the Labour Code concerning the participation of trade unions uniting less than one half of employees of an undertaking in collective bargaining do not work and do not ensure an effective right to participate in negotiations.

### **Failure by the Government to create an efficient system to defend trade union rights**

- 1351.** The complainant alleges that the majority of new trade union organizations, as well as many of those which have been active for a long time, encounter violations of their rights. It further alleges that in practice attempts to defend trade union rights are time-consuming, demand much effort, but yield no results. The KTR explains that cases relating to violations of trade union rights are tried by courts upon a prosecutor’s petition, or upon a complaint by a trade union. According to section 30(1) of the Law on Trade Unions, violations of trade union legislation by state and local officials, by employers, their representatives and associations entails disciplinary, administrative, or criminal liability in accordance with federal laws. However, neither the Criminal Code nor the Code of Administrative Offences contain any special norms on the liability for violations of trade unions rights. Repeated attempts by trade unions to draw the Government’s attention to the need to establish such a liability have not brought about the desired positive results.
- 1352.** The complainant further explains that, according to section 356 of the Labour Code, the state labour inspectorate carries out monitoring and control over employers’ compliance with the labour legislation and with other laws containing labour-related norms by performing inspections and examinations, by issuing binding directives to correct violations, drawing up reports of administrative offences within its competence, and preparing other materials for holding guilty parties accountable in accordance with federal laws and other regulations. Since some of the provisions regulate the rights of trade unions and, in particular, the rights pertaining to social partnership, collective bargaining, collective labour dispute resolution and the provision of certain conditions for trade union activities by employers are included in the Labour Code, there is a lack of clarity as to the distinction between the monitoring of compliance with the labour legislation on the one hand, and with trade union rights legislation, on the other. While in some regions, labour inspectorates consider complaints of violations of trade unions rights filed by trade unions, in many other regions, they refuse to consider such complaints. While the complainant is aware that the competencies of the federal labour inspectorate, as determined by its Statutes, do not include the oversight and control of compliance with the provisions of the Law on Trade Unions, it alleges that appeals by trade union organizations to prosecutors’ offices bear no results and that in many cases, even lead to increased pressure on trade unions. According to the complainant, the prosecutors’ offices often fail to conduct objective investigations.
- 1353.** Furthermore, according to the complainant, while it is possible to lodge a complaint with the courts in cases of specific violation of trade union rights, this is a complicated and costly procedure in terms of time and resources needed. Besides, even when courts rule in favour of trade unions, this does not help to change the situation as a whole, as there are numerous and constant systemic violations of trade union rights. Thus, the complainant concludes that there is no mechanism or body to oversee and monitor the observance of



trade union rights, with a power to react to specific or systematic violations and to restore the rights.

- 1354.** In addition, according to the complainant, the system of legislative guarantees aimed at protecting trade union leaders from discrimination has been shrinking. On 3 November 2009, the Constitutional Court invalidated section 374 of the Labour Code, which prescribed that employers should consult with higher elected trade union bodies before dismissing leaders of elected trade union bodies. This provision provided for guarantees afforded to workers elected to trade union office and who continued working at their main jobs. Paragraph 1 of the section prescribed that the consent of the elected trade union body was necessary for dismissals of elected trade union leaders in the case if one of three following grounds was invoked: staff cutbacks and elimination of jobs (section 81(2) of the Labour Code); inadequacy for a position or a job due to insufficient qualification confirmed by an evaluation (section 81(3)); and multiple failures to perform work duties without sufficient justification by workers who have been disciplined earlier (section 81(5)). The Constitutional Court declared section 374(1) of the Labour Code in application to dismissals falling into the latter category unconstitutional. Referring to its previous decision, the Court considered that this provision imposed, *inter alia*,

... a disproportionate restriction on the rights of an employer as a party to an employment contract, and also as a subject of economic operations and as a proprietor. Such a restriction is not justified by the protection of rights and liberties as established in articles 30(1), 37(1), and 38(1) and (2) of the Constitution and interferes with the freedom of economic operations (entrepreneurship) and with the ownership right, and misrepresents the essence of the principle of free labour. Therefore, it contradicts the regulations contained in articles 8, 34(1), 35(2), 37(1), and 55(3) of the Constitution. The provisions in question grant workers participating in trade union bodies who also work at their main jobs unjustified advantages over other workers, and open up venues for an abuse of the right, which is also inconsistent with the provisions of article 19 of the Constitution on the equality of all before law and court, and which guarantees the equality of human and civil rights and liberties.

- 1355.** The complainant alleges that on 26 November 2008, due to numerous violations of the rights of the MPRA primary trade union organization at the “Tsentsrovarmash”, Mr Kojnev, trade union Chairperson, addressed to the Prosecutor of the Zavoljsky district of Tver a complaint concerning unlawful actions of the company, highlighting violations by employers’ representatives of the right of the union to receive information and to oversee compliance with the labour laws and describing the pressure exercised by the management on trade union activists. He asked a prosecutor to intervene. In the course the investigation, however, explanations were obtained exclusively from representatives of the employer. Then, instead of verifying the facts described by Mr Kojnev, the Prosecutor’s Office decided to verify the legality of the establishment and activities of the union. In the course of the investigation, the union was requested to provide minutes of its meetings containing, in particular, lists of workers who were present at the meetings and who joined the union. By a letter dated 11 January 2009, the first deputy of the district Prosecutor wrote to the MPRA indicating that the investigation revealed that the primary trade union organization had not been established at the company. Therefore, its affiliation with the MPRA and the adoption of its by-laws had no legal effect. Consequently, there were no grounds for intervention by the Prosecutor’s Office. On 21 January 2009, Mr Kojnev filed a complaint with the Tver region Prosecutor’s Office. The Prosecutor’s investigation consisted in interrogating members of the MPRA primary trade union whose names were mentioned in the minutes of the trade union’s committee meetings. Most of these workers were interrogated several times on the issues that had been discussed at trade union meetings, the work of the union, and its Chairperson. Trade union members were told that the union was illegal, did not exist and that the Federal Security Service would keep records on all trade union members. Several trade union members felt threatened and intimidated and left the union.

- 1356.** On 22 April 2009, Mr Kojnev filed a complaint over the actions of the Prosecutor in which he pointed out that the absence of a registration with the Ministry of Justice could not serve as proof of the trade union's non-existence, because, in accordance with section 8 of the Law on Trade Unions, trade unions have the right to remain unregistered. The reply dated 21 May 2009 by the Head of the Department for Overseeing Compliance with Legislation of the Tver region Prosecutor's Office put forward a new argument, namely that primary trade union organizations, branches and representative offices of the MPRA may not be established in the Tver region because according to the MPRA by-laws, the trade union operates in the Leningrad and Samara regions, and the Tver region is not on the list of the areas where the trade union can operate. On 11 June 2009, Mr Kojnev filed another complaint with the Prosecutor of the Tver region. This time, the complaint concerned the above letter dated 21 May 2009. Mr Kojnev pointed out that on 3 March 2009, a Federal Registration Service for Saint Petersburg and the Leningrad region had registered the changes and amendments to the MPRA by-laws according to which, there were no restrictions as to the territory in which the trade union could carry out its activities. In reply to his complaint, Mr Kojnev received a letter stating that his complaint had been forwarded to the Acting Prosecutor of the Zavoljsky district of Tver for investigation. On 17 July 2009, the union received a reply identical to those already received.
- 1357.** The KTR explains that in total Mr Kojnev had made at least six complaints to various prosecutors' offices about violations of trade union and labour rights. All have failed to consider the complaints on the merits. Considering that prosecutors' offices had negligently allowed a violation of the rights and freedoms of citizens, Mr Kojnev applied to the Zavoljsky District Court in Tver challenging the negligence of officials and seeking to declare unlawful their findings that no MPRA primary trade union has been established at the "Tsentrosvarmash". On 3 February 2010, the District Court dismissed this claim and justified its position by stating that "... the Prosecutor's Office has given a reply from which it is evident that an inquiry has been carried out and that there are no grounds for the Prosecutor's Office to act ... Accordingly, the Prosecutor has not identified any breaches of law". The court further stated that the negligence of officials of the Zavoljsky district Prosecutor's Office had not been proved, and that "... all applications have been promptly considered and looked into through a variety of means; conclusions have been reached on the basis of the available information, and a reply has been given within the time limit prescribed by law". As for the matter of finding unlawful the decisions of the Prosecutor's Office, the court stated that "... no such decision was taken by the Prosecutors", "the opinions contained in these replies have no legal consequences, cannot affect the rights of the applicant and do not indicate any unlawful action by the Prosecutor". The KTR points out, however, that in practice the Prosecutor's Office's replies deprived the union and its members of the protection it should have benefited from.
- 1358.** On 3 February 2010, Mr Kojnev appealed the above decision to the Tver Regional Court, but the latter upheld the decision of the lower court. The KTR indicates that the latter decision was also upheld by the Presidium of the Tver Regional Court on 21 July 2010. The KTR points out that the fact that the actions taken by the Prosecutor's Office were carried out in connection with matters not raised in the applications made by Mr Kojnev, and that no action was taken by the Prosecutor on the substance of those applications, was ignored by the court.
- 1359.** By its communication dated 9 December 2011, the KTR expresses its satisfaction with the work of the ILO mission which visited the country in October 2011. This allowed for the opportunity to discuss the issues raised in the complaint with the ILO officials and the Government. The KTR stresses that the allegations in this case refer to systemic issues relating to the lack of effective mechanisms for protection of freedom of association rights in the country. In the KTR's view, all participants in the meetings held by the mission have reached this understanding. In this connection, the KTR and FNPR prepared a joint

document entitled “Proposals for the Resolution of the Issues Raised in the Complaint”. The KTR points out that it is in its interest to interact with the Government with the view of attaining tangible results on the basis of the joint proposal.

**1360.** The KTR informs that to date it had been unable to detect any reciprocal moves from the Government’s side. It stresses, in particular, that no measures have been taken with respect to the two specific cases that are of extreme importance to the union: the case of Mr Urusov and the case of trade union material declared to be extremist. With regard to Mr Urusov, the KTR indicates that, on 29 November 2011, the Supreme Court of the Republic of Yakutia dismissed Mr Urusov’s appeal of the ruling of the Khangalassky District Court of the Republic of Sakha dated 29 September 2011 denying parole to Mr Urusov. Furthermore, trade union leaflets, newspapers and materials that were declared extremist by the ruling of the Zavoljsky District Court of Tver, on 28 August 2009, are still on the federal list of extremist materials.

## **B. The Government’s reply**

**1361.** In its communication dated 24 September 2010, the Government indicates that the right of the citizens to associate in public organizations, including trade unions, and the freedom of trade union activities are guaranteed by article 30 of the national Constitution. This constitutional right is further implemented through a number of federal laws, in particular, the Law on Public Associations of 1995 and the Law of Trade Unions, their Rights and the Guarantees of the Activities of 1996. The Government further informs that the Ministry of Health and Social Development held consultations with the KTR leadership on the issues raised in the complaint.

**1362.** With regard to the threats and attacks against trade union leaders and activists of the primary trade union organizations of the Interregional Trade Union of the Workers of the Automobile Industry at the “TagAZ” and the Ford Motors companies, the Government informs of the following. In 2009, the Ministry of Health and Social Development held a consultative meeting on the observance of the labour legislation and the protection of the labour rights with the leader of the trade union organization, Mr Etmanov. Following the meeting, upon the instructions of the Ministry of Health and Social Development, the territorial bodies of the Federal Service on Labour and Employment (Rostrud) carried out inspections at both enterprises and issued orders to eliminate the detected violations of the labour legislation. The officials concerned were brought to administrative and disciplinary responsibility. All violations of the labour legislation, listed in the order of the state labour inspectorate have been eliminated.

**1363.** The Government further informs that the Ministry of Health and Social Development, together with the KTR, discussed the KTR’s proposals on the improvement of the legislation and practice of protection of freedom of association rights. The proposals mainly concern the improvement of the legislation with regard to the regulation of administrative responsibility for violation of trade union rights and the right to unionize; and enhancement of the prosecutorial supervision over the observance of trade union legislation. According to the Government, the proposal of institutional arrangements to address issues related to the activities of trade union organizations are noteworthy and should be considered in the framework of the Russian Tripartite Commission for the Regulation of Social and Labour Relations (RTK) so as to reach an agreement of all parties of the social partnership. The issue of collective bargaining also deserves attention. The proposals concerning settlement of collective labour disputes and conduct of strikes will be reflected in the Concept of Social Partnership Development, which is being elaborated by the Ministry of Health and Social Development.

- 1364.** The Government further informs, on 1 December 2009, the RTK established a working group on the elaboration of the proposals relating to the improvement of social partnership. This working group is composed of representatives of the relevant federal bodies of the executive authority, federations of trade unions, including the KTR, and associations of employers. The new Concept of Social Partnership Development will cover the whole range of problems related to the development of social partnership, and will focus on the improvement of the process of collective bargaining, including the issue of representation of workers' and employers' interests, and mechanisms for the settlement of collective labour disputes. The Government further informs that the enlarged tripartite permanent working group on the law enforcement practice and elaboration of proposals on further improvement of the labour legislation resumed its activities under the authority of the State Duma Committee on Labour and Social Policy. It is composed of the representatives of the RTK, representing the Government, All-Russia federations of trade unions and All-Russia associations of employers.
- 1365.** The Ministry of Health and Social Development and Rostrud hold, on a regular basis, consultative meetings with trade union leaders on the issue of protection of labour rights and interests of workers. An open exchange of opinions helps to tackle the vital issues related to the development of the labour market, employment, wages and social protection of citizens. Furthermore, in accordance with the instructions of the Ministry of Health and Social Development, the territorial bodies of the Rostrud carry out inspections with regard to the observance of labour legislation in various undertakings with a view to eliminating violations of labour rights. The managers of the undertakings concerned are brought to disciplinary, administrative, civil and criminal responsibility. Round tables have been organized with the participation of representatives of the federal bodies of the executive authority, trade unions and employers to discuss problems arising in cases of failure to reach an agreement between employers and workers with regard to the conclusion or observance of collective agreements.
- 1366.** The Government further informs that, on 15 June 2010, the State Duma faction "Spravedlivaya Rossiya" adopted a decision to establish a commission on social and labour relations, which would include the State Duma deputies, representatives of the broad strata of the trade union movement, including the KTR and some of its affiliates. The Commission's meeting held on 14 September 2010, discussed the improvement of the labour legislation and, in particular, the issues related to the need to amend the Labour Code so as to ensure the rights of workers to associate and unionize the right to collective bargaining and to improve the procedure for settlement of labour disputes.
- 1367.** In its communication dated 1 March 2011, the Government submits the information gathered by the Ministry of Health and Social Development, Ministry of Justice, Ministry of Internal Affairs, Attorney-General and Rostrud during inquiries carried out into the allegations raised in this case.
- 1368.** With regard to the right to establish organizations without prior authorization and the alleged refusal to register trade unions despite legislative provision prohibiting such refusals, the Government indicates that under section 8(1) of the Law on Trade Unions, the legal capacity of trade unions, federations (associations) of trade unions, primary trade unions (collectively referred to as trade unions) as legal persons arises from the moment of their state registration, in accordance with the Law of 8 August 2001 on State Registration of Legal Persons and Individual Entrepreneurs. Registration of trade unions, however, is the subject to the special (notification) procedure. Trade unions also have the right not to be registered. Pursuant to section 8(1), subparagraph 8, of the Law on Trade Unions the registering authorities do not have the right to control activities of trade unions or to refuse to register them.

**1369.** By virtue of section 10(3) of the Law on Trade Unions, trade union activities may be suspended or prohibited in the following cases:

- if the trade union activity is in violation of the Constitution and legislation in force – by a decision of the Supreme Court or decisions of the relevant court of administrative divisions of the Russian Federation, on the application of the Attorney-General or the Public Prosecutor of the relevant administrative division; and
- on the grounds set out in the Law of 25 July 2002 on Prevention of Extremist Activities – by decision of the court on the application of the Attorney-General, or local Public Prosecutors, or the Ministry of Justice, or its local offices.

**1370.** Section 8(2) of the Law on Trade Unions and section 23 of the Law on Public Associations provide that the refusal or avoidance of state registration may be appealed in court. Registration of a trade union may be denied on the grounds set out in section 23 of the Law on State Registration of Legal Persons and Individual Entrepreneurs in the following cases: the failure to provide the required documents; and the submission of the documents to the wrong authority. The decision on the state registration is preceded by an examination of its documents in respect of their conformity with the legislation in force.

**1371.** With regard to the allegations of anti-union discrimination against workers based on their trade union membership or activities, and pressure exercised on workers with the view to compel them to resign from their union and absence of protection by the authorities, the Government indicates that section 2 of the Labour Code prohibits discrimination in the labour sphere. Section 3 of the Code prohibits discrimination at work on the basis of membership in voluntary organizations. Persons who consider to have suffered discrimination at work have the right to complain to the courts. According to section 136 of the Criminal Code, persons guilty of discrimination are criminally liable. Section 29 of the Law on Trade Unions provides for judicial protection of trade union rights; under this provision, acts in violation of trade union rights are examined by the courts on the application by the Public Prosecutor, or at the request of a trade union concerned. In addition, article 356 of the Labour Code provides for the right to request the labour inspectorate to carry out an investigation of compliance with the labour laws and other related legislation. In this regard, in order to eliminate infringements of labour rights, local offices of the federal labour and employment service carry out monitoring of compliance with the labour legislation in undertakings and organizations; if violation is revealed, heads of enterprises are subject to disciplinary, administrative, civil and criminal liability. Thus, mechanisms for protection against discrimination on grounds of trade union membership and activities exist and are effective.

**1372.** With regard to the inclusion of trade union leaflets on the list of banned extremist literature, the Government explains that in February 2009 the management of the company requested the Prosecutor's Office of the Zavoljsky district of Tver Province to verify the legality of the activities of the Chairperson of the primary trade union, Mr Kojnev, in relation to the distribution by him of documents and materials of an extremist character. An expert from the philology faculty of the Tver State University carried out a linguistic analysis of the printed material and found it to be of extremist nature as it intended to incite social divisions and hostility, to preach exclusiveness, and the superiority or inferiority of individuals based on their social background. By the decision of 28 August 2009, the Zavoljsky District Court granted the application of the Prosecutor's Office to declare the information materials extremist. The Government explains that, pursuant to section 13 of the Law on Prevention of Extremist Activities, a decision of the court declaring literature extremist may be appealed in accordance with the established legal procedure. In this case, however, the court's decision was not appealed and therefore became final on 8 September 2009. Thus, in application of section 13 of the Law on Prevention of Extremist Activities, and on the basis of the above court decision, the Ministry of Justice placed the items

referred to in the complaint on the list of banned extremist literature. The Government also indicates that, while pursuant to section 15 of that Law, an author of printed and other literature (publications), intended for public use, which contains any one of the indications referred to by the said Law, is deemed to be a person engaging in extremist activity and is liable in accordance with the legislation in force, no criminal case has been opened against Mr Kojnev as his actions did not constitute a criminal offence.

- 1373.** With regard to the allegation of violation of the right to life, security, physical and moral integrity, attacks on trade union leaders and the failure to carry out an effective investigation, the Government provides the following information. With regard to the physical injury caused to Mr Etmanov, the Government indicates that, while a criminal case was opened on 18 November 2008, the investigation failed to identify the persons responsible for the attack and assault on Mr Etmanov and, on 30 November 2010, the case was closed as time-barred. On 8 February 2011, the case was reopened. Yet again, the investigation failed to identify those responsible for attacking Mr Etmanov; the criminal investigation was therefore suspended. However, later on, pursuant to the decision of the Saint Petersburg Prosecutor's Office, the case was returned for reinvestigation.
- 1374.** With regard to the physical injury caused to Mr Ivanov, the Government indicates that a criminal case was opened on 10 February 2009. In the course of investigations, it was established that, contrary to Mr Ivanov's allegations, the police were not involved in the attack. However, the investigation failed to identify the person responsible for the crime and was therefore suspended. The Government further indicates that Mr Ivanov was dismissed from the GM-AVTOVAZ on 20 November 2009 on the grounds of unauthorized absence. On 15 March 2010, the Pushkin District Court in Saint Petersburg declared the dismissal unlawful. On 16 March 2010, Mr Ivanov was reinstated, but resigned on the same day.
- 1375.** With regards to the alleged refusal by the state authorities to register the amendments to the MPRA by-laws, the Government indicates that an application for registration was submitted on 5 October 2006. Upon examination of the documents provided, the registering authorities considered that they did not comply with the legislative requirements as they did not contain information on the address of the union's governing body and that the union by-laws were in violation of the Law on Trade Unions. Accordingly, on 3 November 2006, the registration service answered to the union by referring to the reasons justifying the refusal to register the organization. On 28 July 2008, the MPRA notified the registering authorities of the amendments to its by-laws by submitting a copy of the minutes of the union conference which took place on 16 July 2008 and other required formalities. The Government points out that the trade union submitted only the amendments to the by-laws, whereas the law requires the complete text of the by-laws to be submitted in three copies. Therefore, on 28 August 2008, the registering authorities refused to register the amendments. Having rectified the errors, the trade union resubmitted the documents, which were registered on 26 February 2009. Thus, the allegation that the registration of the amendments took eight months cannot be objectively justified.
- 1376.** With regard to the refusal to register the RPLBJ, the Government indicates that following the amendments of its by-laws, the union submitted the relevant documents to the registering authority, which confirmed that the trade union was active in the territory of 54 administrative divisions of the Russian Federation. On this basis, on 14 June 2005, the union's status of all-Russia union was reconfirmed. In 2006, in connection with the application of the Vice-President of the Russian Railways company (RGD), an investigation was carried out to confirm the existence of the RPLBJ structural subdivisions in all of the administrative divisions of the Russian Federation which were listed in the trade union's by-laws. As a result of the investigation, it was established that the trade

union was not active in 19 administrative divisions of the Russian Federation. On 1 February 2008, the Moscow interregional Transport Prosecutor filed an application to the Lublinsky District Court in Moscow for an order that the union by-laws be amended and brought in conformity with the legislation. By its decision of 26 November 2008, the court ordered the RPLBJ to amend its by-laws so as to exclude the word “Russian” from its name and to register the amendments. This decision was upheld by the Moscow Civil Court on 2 April 2009. On 27 January 2010, the extraordinary assembly of the union approved the amendments, which were then duly registered on 16 March 2010. On 4 March 2010, the Moscow office of the Ministry of Justice approved the registration of the amendments to the by-laws, including the new name of the union – the Interregional Union of Railway Workers’ Union.

- 1377.** With regard to the alleged examples of violations of trade union rights by the state authorities and interference in trade union internal affairs, the Government provides the following information. The Government denies that the responsible tax authorities have ever required the MPRA primary trade union at the Ford Motor Company to submit its financial documents and the list of its members; in fact, an investigation into this allegation revealed that this primary trade union is not even registered with the tax authorities.
- 1378.** As regards the allegation of interference into the activities of the primary trade union of the RPD of Novorossiysk Commercial Port by carrying out an investigation and instituting criminal proceedings against its Chairperson, Mr Pereboev, the Government indicates that the case against Mr Pereboev was dropped in August 2007 due to lack of evidence of a criminal offence. Since 2007 and up to the present, the Novorossiysk Transport Prosecutor has been engaged in investigative measures, including in relation to the examination of the allegations by the leaders of trade unions in maritime transport companies.
- 1379.** As regards the allegation of interference by the state authorities in the activities of the RPLBJ following a strike notice on 29 November 2007, the Government indicates that by a letter dated 22 June 2007 addressed to the President of the RGD, the union sent claims of a social and economic nature. Having considered these claims, the management of the company, by its letter dated 7 August 2007, refused to accept them, whereupon the trade union sent notice of a 24-hour strike to be carried out on 28 November 2007. On 19 November, the company applied to the Moscow city court for an injunction declaring the strike unlawful. This injunction was granted on 23 November 2007. On 7 April 2008, the RPLBJ Moscow primary trade union of Moscow rail workers sent a claim to the Head of the Moscow Rail Company, a subsidiary of the RGD and the President of the latter, requesting the application of Order No. 3/N which provided for the raise of wages up to the level established in that order in accordance with the qualifications of each worker, etc. As the management refused to act on this claim, in violation of section 410 of the Labour Code, members of the primary trade union carried out a strike, which involved some 150 workers, from 4 a.m. on 28 April 2008 to 12 a.m. on 29 April 2008. In connection with this action, on 28 April, the Chairperson of the RPLBJ trade union committee in the Pushkino engine depot, Mr Pavlov, and his deputy, Mr Mukhin, were charged with administrative offences under section 20.26 of the Code of Administrative Offences. The Government points out, however, that no criminal investigation had been carried out and that no RPLBJ member was charged with criminal offences or questioned. At the same time, an investigation into the complaint dated 28 May 2009 lodged by Mr Mukhin alleging physical violence committed by the police at the Pushkino station was carried out. Following an investigation, no criminal proceedings have been opened due to the lack of evidence. At that time, no criminal charges were brought against Mr Mukhin. However, on 8 February 2011, the Moscow–Yaroslavl Prosecutor’s Office reversed that decision and sent the case for further investigation. Finally, the Government indicates that the allegations that the RPLBJ office were torched have not been confirmed.

- 1380.** With regard to the allegations of anti-union discrimination at the “Tsentrosvarmash” company, the Government indicates that the labour inspectorate carried out an inspection on 21 September 2009, following which, it issued an order to the management of the company to pay Mr Kojnev two-thirds of the wage for the period of downtime, as well as wages owed and compensation for the late payment of wages. The company appealed this decision in court, which, on 10 June 2010, declared the order of the inspectorate unlawful. Furthermore, the Government indicates that the Zavoljsky District Court examined the applications by Mr Andrianov and Mr Kojnev arguing that their dismissals were unlawful, asking for reinstatement and payment of compensation for enforced absence and recognition of the fact of anti-union discrimination. On 28 April 2010, the court concluded that the applicants were absent from their workplace without justifiable cause on 8, 9, 10 and 11 February 2010 and were therefore lawfully dismissed for breach of the workplace rules pursuant to section 81(1)(6a) of the Labour Code. This decision was upheld by the provincial court on 3 August 2010.
- 1381.** With regard to the alleged discrimination of members of the “Edinstvo” primary trade union at the Avtovaz company, the Government indicates that according to the information provided by the labour inspectorate in 2010, 13 complaints by the Avtovaz workers who were members of the “Edinstvo” primary trade union were filed and heard. The complaints related to the questions of infringement of health and safety rules, wages, failure to provide workplace certificates, illegal imposition of disciplinary measures, and failure to comply with instructions. There were no complaints of anti-union discrimination. In the course of the investigation carried out on 9 February 2011, Mr Zolotarev, Deputy Chairperson of the MPRA and Chairperson of the “Edinstvo” primary trade union, explained that while there were instances of pressure on workers to leave the union, no complaints have been lodged in this regard with the courts.
- 1382.** Mr Zolotarev also explained that the primary trade union of workers of the GM-AVTOVAZ was established in August 2006. He further alleged that following the notification to the employer of the founding of the union, the elected representatives were victimized and that, by dismissing 23 elected representatives, the employer destroyed the MPRA primary trade union at the enterprise. Each of these workers complained to the court. In this respect, the Government indicates that the court decisions refusing their reinstatement are being challenged on appeal.
- 1383.** The Government further provides information on the outcome of the investigations into the allegations of discrimination of trade union members at the following enterprises:
- GM-AVTOVAZ in Saint Petersburg: the MPRA primary trade union was established in 2009. During the period since GM-AVTOVAZ began operating (March 2006), seven investigations into compliance with labour legislation have been carried out. The investigations did not reveal any cases of discrimination against workers who are members of the MPRA primary trade union.
  - “Festalpine Arkada Profil”: it was established that on 22 November 2008 the management of the company proposed to reduce the company’s workforce. However, the workers concerned, including members of the trade union, were temporarily transferred to other workplaces. The Government indicates that this transfer was carried out in violation of the Labour Code, as none of the workers consented to the transfer. The dismissal of the Deputy Chairperson was also in violation of the legislation. On 16 February 2009, the Prosecutor’s Office instituted administrative proceedings in relation to the Head of the personnel. As a result of his investigation, the responsible manager was convicted of an administrative offence on 1 March 2009 and fined. In 2009–10, the labour inspectorate received ten complaints by workers of the enterprise relating to the conditions of work in winter. There were no complaints



of anti-union discrimination. Currently, 39 workers are members of the MPRA primary trade union. On 20 January 2011, a meeting was held at the enterprise between representatives of the company's management and members of the primary trade union. In the course of the meeting, it was established that workers' complaints were examined in the established period in accordance with the legislation in force and that there were no cases of anti-union discrimination.

- TagAZ: according to the labour inspectorate, in 2010, there were 24 complaints filed by workers of the enterprise, including members of the MPRA primary trade union. These complaints have been examined. In the course of investigations, infringements of labour legislation were discovered and instructions issued. The enterprise management was fined for administrative offences.
- “Togliattikauchuk”: according to the labour inspectorate, in 2009, there were 40 complaints by representatives of the enterprise trade union “Nashe Delo”. Measures were taken by the inspectorate to respond to all of these complaints. In the course of an inspection carried out on 16 January 2009, the Managing Director of the enterprise was found guilty of an administrative offence under article 5.27(1) of the Code of Administrative Offences and fined. There were no complaints to the Ministry of Labour or its local offices by members of the NPGR primary trade union, also active at the enterprise.
- Baltika Brewery–Baltika Rostov: an investigation by the labour inspectorate found no evidence supporting the allegations of exertion of psychological pressure on members of the primary trade union to compel them to withdraw from the union. It was found that two trade union members were dismissed upon agreement of the parties and received a compensation equivalent of five months of average wages.
- Saint Petersburg University of the Ministry of Internal Affairs: the primary trade union of the Union of Workers of Trade and Services, consisting of three members, was established on 25 February 2008 but ceased to exist the same year as a result of the resignation of its Chairperson and another member.
- “Nevskie Porogi”: the labour inspectorate indicated that, at 28 February 2007, the OPRTU primary trade union consisted of four people and, at 29 November 2007, the trade union had no members: its Chairperson had resigned voluntarily; the Deputy Chairperson was dismissed for serious breaches of technical safety (disconnecting cut-off devices on automated production lines); another Deputy Chairperson resigned voluntarily (for family reasons); the third Deputy Chairperson was dismissed for absenteeism.
- “Pochta Rossii Piter”: the courts examined complaints of unfair dismissal and reduction of wages. In cases where the court found that the proper procedure for the dismissal had not been followed, it ordered the reinstatement.

**1384.** With regard to the allegations of violation of trade union rights by employers, the Government indicates that the liability of employers for violation of trade union rights is set out in the Code of Administrative Offences. In particular, sections 5.28–5.34 of the Code establishes administrative liability for violations related to the prohibition of trade union activities with regard to the collective bargaining and the monitoring of implementation of collective agreements. In particular, avoidance by employers or their representatives to participate in collective bargaining as well as employers' failure to provide information relevant to the collective bargaining and the monitoring of compliance with a concluded collective agreement is subject to an administrative fine ranging between RUB1,000 and 30,000; an unjustified refusal by employers or their representatives to conclude a collective agreement, as well as a failure to comply with the provisions of a

collective agreement is subject to an administrative fine ranging between RUB3,000 and 5,000; avoidance by employers or their representatives of receiving claims of workers as well as failure to provide premises for holding meetings or conferences of workers to formulate such claims, or interfere with the conduct of such meetings is subject to an administrative fine of RUB1,000–3,000; dismissal of workers in connection with the organization of or participation in strikes is subject to an administrative fine ranging between RUB4,000 and 5,000. The Government further indicates that cases of administrative violations are examined by officials of the Rostrud and its state labour inspectorate. In the light of the above, and taking into account that, on 1 July 2010, the Government ratified Convention No. 135, it considers that the legislation in force adequately and sufficiently regulates questions concerning liability for offences relating to failure to comply with labour legislation. The Government also points out that the Rostrud has not received any complaint of refusal by employers to recognize or to cooperate with trade unions.

- 1385.** With regard to the allegation of interference by the state authorities with the right of the FPAD of Russia to draw up its own constitution and rules, the Government explains that, according to section 413 of the Labour Code and section 52(1) of the Air Traffic Code, to protect the rights and lawful interests of citizens, to ensure the defence of the country and security of the state, civil aviation personnel serving or controlling air traffic are not permitted to strike or stop work. Meanwhile, the resolution of the conference of the FPAD primary trade unions of 30 March 2010 called upon workers of the Air Traffic Control Corporation (FGUP) to organize a mass action leading to a restriction or stoppage of air traffic movements. Between 9 and 28 April 2010, 400 workers of the enterprise took part in a protest action, called by the participants a “hunger strike”. Furthermore, on 14 April 2010, the Chairperson of the FPAD Russia made a public statement that to resolve the dispute at the State Corporation for Air Traffic Management air traffic controllers will stop providing air traffic services. This, in the Government’s opinion would have led to the restriction of flights and endangered the defence of the country, state security, and the life and health of citizens. In this regard, on 21 April 2010, the Moscow Prosecutor’s Office responsible for compliance with air and water transport legislation issued a warning that the proposed action was illegal and submitted representation against the FPAD primary trade union seeking to declare unlawful the provisions of their respective by-laws regulating the declaration of strikes involving, in particular, aviation staff providing air traffic support and control services. These applications have been granted in full.
- 1386.** With regard to the alleged violation of the rights of the MPT primary trade union, the Government indicates that, while a new system of entry to the regulated port premises had been introduced, trade union leaders have access to the workplaces on the basis of temporary passes.
- 1387.** With regard to the allegation of theft from the premises of the MPT primary trade union of dockers, the Government informs that the preliminary investigation was suspended as no suspect had been identified. It further informs that a preliminary investigation in the criminal case concerning the alleged embezzlement by the leadership of the MPT primary trade union was also suspended on the grounds that the period for criminal prosecution was time-barred. Currently, this is being examined by the Transport Prosecutor’s Office. The Government further indicates that the Tuapse Transport Prosecutor’s Office, together with the state labour inspectorate and the primary trade union of dockers, carried out an inspection at the port to monitor the compliance with the labour legislation. Several breaches of labour legislation were revealed and in this respect, a notice requesting to redress the violations was sent on 24 November 2009 to the port’s management. With regard to the refusal of the Chairperson of the MPT primary trade union, Mr Zhuravlev, to provide documents required for an investigation, on 24 November 2009, the Tuapse Transport Prosecutor opened administrative proceedings in which, by the decision of the

arbitration tribunal of 15 December 2009, he was found guilty of an administrative offence and was imposed a fine of RUB2,000. This decision was upheld in court. Moreover, in April 2010, in the course of investigations into the compliance with the labour legislation, violations were found which served as the basis for the prosecution against Mr Zhuravlev. By an order of the State Inspectorate of Labour, on 4 May 2010, Mr Zhuravlev was imposed a fine of RUB1,000. On the issue of premises, the Government indicates that in 2009–10, the port administration proposed to the primary trade union to take separate premises situated in Tuapse at 12, Gorky Street. The union accepted this offer on 19 February 2010. Finally, the Government indicates that from 2007 to the present, the Tuapse Transport Prosecutor's Office has investigated and replied to all complaints submitted to it by trade union organizations.

- 1388.** With regard to the allegation of refusal by employers to recognize newly formed trade union organizations, the Government indicates that the complaints of the MPRA primary trade union of TagAZ workers about the management's refusal to cooperate with the union have been examined by the labour inspectorate on several occasions. In this respect, labour inspectors have repeatedly explained that questions of compliance with the legislation must be resolved in accordance with the procedure set out in the Law on Trade Unions, i.e. such complaints must be examined by courts upon application by a prosecutor or at the request or complaint of a trade union. The Taganrog Municipal Court examined the application of the MPRA primary trade union of TagAZ requesting the court to oblige the company to provide premises for trade union activities, ensure access to the company premises to trade union leaders and allow the distribution of trade union information in a place accessible to the workers. The court denied this request.
- 1389.** In light of the above, the Government considers that it has taken all legal measures and procedures to address the matters contained in the KTR complaint. The national legislation and international agreements, including Conventions Nos 87 and 98 are implemented in full. The most important measures in the development of the social partnership at the federal level take place in the framework of the RTK. The 2011–13 General Agreement between All-Russia Federations of Trade Unions, All-Russia Federations of Employers and the Government was signed in December 2010. In the framework of the implementation of this Agreement, the Ministry of Health and Social Development regularly holds tripartite consultative meetings and seminars. Practically all amendments to the legislation in force and new legislative acts are discussed by the RTK.
- 1390.** By its communications dated 12 and 18 May as well as 13 July 2011, the Government reiterates that the Ministry of Health and Social Development, Ministry of Justice, Ministry of Interior, the Office of the Prosecutor-General and the Rostrud have investigated the complaints raised in this case and that many of the alleged facts have not been confirmed. In relation to several cases, the relevant courts and law enforcement agencies have already taken decisions. In particular, in addition to those discussed above, the Government refers to the case of Mr Urusov.
- 1391.** The Government further indicates that taking into account the problem raised with regard to the state registration of trade unions, the Ministry of Justice, in cooperation with the Ministry of Health and Social Development, envisages creating a joint working group to discuss proposals on the improvement of the legislation and development of ubiquitous registration procedures. This working group would include representatives of the Prosecutor's Office, the Ministry of Interior, the Ministry of Transport and the KTR.
- 1392.** The Government further informs of an agreement of cooperation with regard to ensuring observance of workers' labour rights was signed between the Rostrud and the KTR on 10 June 2011. This agreement sets out the obligations of the Rostrud and the KTR with regard to the exchange of information on violations of labour rights and on matters relating

to the improvement of labour legislation, participation in the settlement of collective labour disputes, the selection of mediators and arbitrators and other matters.

- 1393.** Finally, in its communication dated 30 January 2012, the Government indicates that during an ILO technical mission, a proposal for addressing the issues raised in the complaint have been jointly prepared by the KTR and the FNPR. At the concluding tripartite meeting held on 14 October 2011, the FNPR Chairperson stated that the proposals should be discussed with the social partners within the framework of the RTK. The Government explains that, in accordance with the RTK regulations, each member of the RTK has the right to submit proposals for consideration at the RTK meetings and working groups. However, the trade union side has not yet submitted its joint proposal.
- 1394.** The Government also indicates that, since the mission's visit, there have been some positive developments in the country. On 22 November 2011, the Federal Law on amendments to the Labour Code to improve the procedure for settlement of collective labour disputes was adopted. Furthermore, pursuant to the Presidential instruction, the Ministry of Health and Social Development, together with workers' and employers' organizations, had prepared another bill to amend the Labour Code. The proposed amendments are designed to improve the collective bargaining process and further develop a mechanism for settlement of collective labour dispute. This bill was considered and approved by the RTK at its meeting of 21 November 2011 and has been submitted to the Government for consideration. Moreover, a draft law on the amendments of certain laws and regulations concerning the establishment and activities of employers' associations has been submitted to the State Duma. This draft law is designed to develop such associations and enhance their role in the social partnership.
- 1395.** The Government discussed with the ILO mission the possibility of organizing special training for employees of the court system, officials of the Prosecutor's Office and members of the police so as to enhance their knowledge of international labour standards; the development of methodologies; and the support to tripartite programmes and initiatives aimed at ensuring respect for trade union rights. The Ministry of Health and Social Development is currently considering the possibility of organizing a seminar for Eastern Europe and Central Asian countries. The Government is committed to continuing social dialogue with the social partners in addressing social and labour issues.

### **C. The Committee's conclusions**

- 1396.** *The Committee notes that the complainants in this case allege numerous violations of trade union rights, including physical attacks on trade union leaders, violations of freedom of opinion and expression, Government interference in trade union matters, refusal by the state authorities to register trade unions, acts of anti-union discrimination and absence of effective mechanisms to ensure protection against such acts, denial of facilities for workers' representatives, violation of the right to bargain collectively and the failure of the state to investigate those violations. The Committee notes the detailed information provided by the complainants to substantiate their allegations, which according to the KTR, refer to systemic issues relating to the lack of effective mechanisms for protection of freedom of association rights in the country. The Committee also notes equally detailed information provided by the Government. In this respect, it observes that the complaint had been examined by all relevant authorities and that the issues raised therein have received a considerable degree of attention.*
- 1397.** *The Committee further notes that upon the Government's invitation, an ILO technical mission visited the country in October 2011 to discuss the complaint with all interested parties in view of its complexity and the large amount of information contained therein. The Committee notes the mission report (see appendix). The Committee notes with interest*

that both the complainant and the Government appear to be satisfied with the conduct and outcome of the mission. It further notes with interest the tripartite discussions that concluded the work of the mission and a joint KTR–FNPR proposal for addressing the issues raised in the complaint, which all parties have agreed to examine in the framework of the RTK. In this respect, the Committee notes the KTR’s interest in interacting with the Government with the view of attaining tangible results on the basis of the joint proposal. The Committee notes that, while the trade union side has not yet submitted its joint proposal to the RTK, each member of this body, including from the Government’s side, has the right to do so. The Committee expects that the proposal will be discussed by the RTK without delay with the view to resolving the issues raised in this case. It requests the Government to keep it informed in this respect.

**1398.** *The Committee notes that the joint proposal refers to legislative measures, training activities, adoption of guidelines and explanatory notes as means of addressing the issues raised in this case. With regard to the former, the Committee notes the information provided by the Government in its communications and to the ILO mission regarding legislative measures taken and envisaged to ensure that trade union rights are respected in law and in practice. The Committee recalls that it had previously examined several provisions of the Labour Code in the framework of Cases Nos 2216 and 2251. In addition to these matters, the Committee notes the complainants’ allegations of ineffective mechanisms of protection against acts of anti-union discrimination and interference by employers in trade union internal affairs, despite the existence of legislative provisions prohibiting such acts. The Committee also notes the alleged difficulty of proving anti-union discrimination in practice and rather rare application of penalties on persons found responsible for such acts and notes from the mission report that this appears to be the case in practice. The Committee recalls that basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, 2006, para. 818]. Recognizing that the legislative matters in this case are also being addressed by other parts of the ILO supervisory mechanism, the Committee, noting its specific mandate, requests the Government to take steps to bring the legislation into conformity with the principles of freedom of association and collective bargaining and to keep it informed in this regard.*

**1399.** *The Committee notes with grave concern that trade union leaflets were declared to be extremist material by a local court. The Committee notes the Government’s reply which confirms that trade union leaflets referred to in the complaint have been put on the Federal List of Extremist Literature pursuant to the court decision which considered that the trade union material in question intended to incite social divisions and hostility, to preach exclusiveness, and the superiority or inferiority of individuals based on their social background and was therefore of an extremist nature. The Committee notes that these leaflets contain such slogans as “let those who caused the crisis pay for it”, “fight substandard employment”, and “we demand our night shift pay”. The Committee considers that placing leaflets containing such or similar slogans on the list of extremist literature impedes considerably the right of trade unions to express their views and is an unacceptable restriction on trade union activities and, as such, a grave violation of freedom of association. The Committee recalls in this respect that the right to express opinions, including those criticizing the Government’s economic and social policy, is one of the essential elements of the rights of occupational organizations. The Committee therefore urges the Government to take the necessary measures without delay in order to remove the trade union leaflets in question from the list of extremist literature and to ensure that this does not happen again. It requests the Government to keep it informed in this respect.*

**1400.** *The Committee also expresses its deep concern at the allegation that Mr Urusov, Chairperson of the primary trade union PROFSSVOBODA, was sentenced to six years' imprisonment for his trade union activities by a district court. The charges laid against him related to the possession of narcotic substances, which the complainant alleges were put on him at the time of his arrest during which he was beaten and forced to sign an admission of possession of drugs. The Committee notes that according to the complainant, the Supreme Court of the Republic of Sakha set aside the verdict of the district court finding that there were serious procedural errors in the handling of this case and referred the case back for retrial. The retrial, however, did not change the verdict of the court. It further notes the complainants' allegations that the allegation of anti-union persecution was not examined or considered by the court. The Committee deeply regrets that the Government provides no other observation than the statement that the courts have ruled on this case. The Committee notes that, in November 2011, the Supreme Court of the Republic of Yakutia denied parole to Mr Urusov. The Committee recalls that in cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the Government's replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has always followed the rule that the governments concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations [see *Digest*, op. cit., para. 111]. The Committee therefore requests the Government to indicate whether the allegation of anti-union persecution has been duly investigated by the relevant authorities and to provide details of such investigation, as well as all other relevant information, including judicial decisions in this case. If the allegation of anti-union persecution has not been examined, the Committee requests the Government to conduct an independent inquiry into this allegation without delay, and if the investigation reveals that anti-union motives were behind the arrest of Mr Urusov to take the necessary measures for his immediate release.*

### **The Committee's recommendations**

**1401.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) The Committee expects that the joint KTR–FNPR proposal will be discussed by the RTK without delay with a view to resolving the issues raised in this case. It requests the Government to keep it informed in this respect.*
- (b) Recognizing that the legislative matters in this case are also being addressed by other parts of the ILO supervisory mechanism, the Committee, noting its specific mandate, requests the Government to take steps to bring the legislation into conformity with the principles of freedom of association and collective bargaining and to keep it informed in this regard.*
- (c) The Committee urges the Government to take the necessary measures without delay in order to remove the trade union leaflets from the list of extremist literature and to ensure that this does not happen again. It requests the Government to keep it informed in this respect.*
- (d) The Committee requests the Government to indicate whether the allegation of anti-union persecution has been duly investigated by the relevant authorities and to provide details of such investigation, as well as all other*

*relevant information, including judicial decisions in this case. If the allegation of anti-union persecution has not been examined, the Committee requests the Government to conduct an independent inquiry into this allegation without delay, and if the investigation reveals that anti-union motives were behind the arrest of Mr Urusov to take the necessary measures for his immediate release.*

## Appendix

### Mission report

Moscow, Russian Federation  
(10–15 October 2011)

#### I. Background information

1. On 20 January 2010, the All-Russia Confederation of Labour (VKT) and the Russian Labour Confederation (KTR) presented a complaint to the Committee on Freedom of Association (CFA).<sup>1</sup> The complainants alleged numerous violations of trade union rights experienced by their affiliates, including imprisonment and physical attacks on trade union leaders, violations of freedom of opinion and expression, government interference in trade union matters, refusal by state authorities to register trade unions, acts of anti-union discrimination and absence of effective mechanism to ensure protection against such acts, denial of facilities for workers' representatives, violation of the right to bargain collectively and failure of the State to investigate those violations. In February 2010, the International Trade Union Confederation (ITUC), the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), the International Transport Workers Federation (ITF) and the Federation of Independent Trade Unions of Russia (FNPR) associated themselves with the complaint.
2. By a communication dated 11 August 2011, the Government of the Russian Federation invited a technical mission of the International Labour Office to visit the country in order to discuss the complaint with all interested parties in view of its complexity and the large amount of information contained therein. The mission consisted of Mr Kari Tapiola, Special Adviser to the Director-General, and Ms Oksana Wolfson, Senior Legal Officer of the International Labour Standards Department. It held a series of meetings in Moscow with public authorities and representatives of trade unions and employers from 10 to 15 October 2011.

#### II. Officials and other persons met by the mission

3. The mission met with Mr A. Safonov, Deputy-Minister of Health and Social Development (MHSD); Mr A. Gorban, Director of the Department of Economic Cooperation of the Foreign Ministry; Mr A. Selivanov, Deputy Head of the Federal Service on Labour and Employment (ROSTRUD) and Deputy General State Labour Inspector of the Russian Federation; Mr A. Leonov, Deputy Head of the Apparatus of the Committee on Labour and Social Policy of the State Duma; representatives of the Ministry of Interior, Ministry of Justice, General Prosecutor's Office, Presidential Administration, Ministry of Transport, Federal Air Transport Agency (Rosaviatsia), State Corporation for Air Traffic Management; Mr M. Shmakov, Chairperson of the FNPR; Mr B. Kravchenko, Chairperson of the KTR; Mr F. Prokopov, Deputy-President of the Russian Union of Industrialists and Entrepreneurs (RSPP) and Ms M. Moskvina, Director of the RSPP's Office of Labour Market and Social Partnership; and other officials and representatives of the abovementioned bodies. The mission had requested a meeting with judges or representatives of the court system. Such a meeting did not take place although the request had been accepted.

<sup>1</sup> Since the lodging of the complaint, these trade union Confederations have merged to constitute the KTR.



### III. Conduct of the mission

#### *Ministry of Health and Social Development*

4. The Deputy Minister, who was also a Deputy Coordinator of the government side of the Russian Tripartite Commission for the Regulation of Social and Labour Relations, Mr A. Safonov, explained to the mission that ILO Conventions served as the basis for Russian labour legislation. The Government strongly believed in social dialogue and exercised it in practice. The agreement of social partners was sought on all labour issues, and national, sectoral and regional agreements were regularly signed in the country. In 2011, the President of the Russian Federation had twice met with trade union leaders to discuss labour protection and social partnership. Following these meetings the President had instructed the relevant bodies to strengthen social dialogue institutions in the country. The Deputy Minister further indicated that the Government considers that trade union pluralism was necessary and monopoly positions were dangerous. The Government does not intervene in trade union affairs. The Ministry itself works with all trade unions and tries to address their problems.
5. The Government considered that any enterprise on its territory should respect the law of the land and therefore should engage in dialogue with trade unions. Dealing with multinational enterprises was a particular problem for small trade unions. Another problem for small unions arose out of their relationship with larger unions on the question of collective bargaining. While the legislation provides for a joint negotiating body, in practice problems continued to exist. The Ministry had approached the KTR with the view of receiving a concrete proposal as to how to deal with this problem in practice so that procedures could not be violated. Mr Safonov also indicated that draft amendments had been prepared to the Labour Code to simplify the procedure for declaring a strike. The Government considered that trade unions should have the right to strike and should be able to exercise it in practice.
6. With regard to the complaint, the Government would have preferred that the KTR had discussed the allegations at the national level before lodging a complaint with the ILO. Small unions could use various forums at the national level. The issues raised in the complaint could have been brought to the attention of the Russian Tripartite Commission for the Regulation of Social and Labour Relations where 30 persons represent trade unions' side (while the majority are FNPR representatives, five represent other trade unions). The Chairperson of the KTR was a member of the Commission. While the Tripartite Commission dealt with issues arising at the federal level and not with particular cases or enterprises, it could examine specific complaints and look into systemic violations at the local level. Mr Kravchenko was also a member of the Presidential Committee on Human Rights while there were no FNPR representatives on this body.
7. Other representatives of the Ministry explained to the mission that the Government was aware of the complaint even before it was submitted to the ILO. Once the Office had forwarded the complaint to the Government, the Ministry contacted the KTR and offered to establish a plan of action, which could have included meetings, dissemination of information, etc. As such consultations did not take place, the Government conducted the relevant investigations and sent a reply to the ILO. The Ministry wished that the KTR addressed it when there was a problem so that the Ministry could respond appropriately either by issuing the necessary instructions to the relevant state bodies or particular enterprises, or by bringing certain issues to the attention of the Tripartite Commission or, in case of systemic problems, by proposing legislative amendments in consultation with the social partners.
8. With regard to the issue of registration raised in the complaint, Mr Safonov explained that the Ministry of Justice had no right to deny the registration of a trade union organization. It can ask the Prosecutor's Office to instruct the union to rectify existing problems (for example by bringing its by-laws into conformity with the requirements of the legislation). In cases of a disagreement or non-compliance, the Prosecutor's Office could appeal to the court system. A trade union could function even without being registered, and there were no cases of dissolution of trade unions even when the legislation in force had been violated.
9. The Deputy Minister further indicated that labour arbitration was a new notion in the Russian Federation. More experience in this respect would benefit the Government and trade unions alike. He also pointed out that while large unions are more knowledgeable about labour legislation, new trade unions have less experience. Furthermore, employers had only limited experience of dealing with trade unions. While the Government was trying to educate them, the biggest challenge was reaching small entrepreneurs. Mr Safonov stressed the importance for the Government to build a

stable society where the social partners can reach agreements. In this respect, the labour inspectorate played an important role and its powers had recently been expanded.

### ***Joint meeting with FNPR and KTR***

10. Mr Shmakov considered that the main problem for the FNPR was the attitude of the state bodies which represent both executive and judicial powers. He also explained that violations of trade union rights are more frequent at the regional than at the central level. Furthermore, the Prosecutor's Office did not understand its role in protecting labour and trade union rights, which in his view was due to the sometimes poor quality of training of prosecutors. While an agreement concluded in 2010 between the FNPR and the Prosecutor's Office was helpful, it did not directly apply to specific situations. Reference was made to the agreement when problems arose. Such agreements had also been concluded at the regional level. The FNPR considered that despite these agreements, the Prosecutor's Offices occasionally still favoured employers. With regard to the complaint addressed to the ILO by the KTR, the FNPR Chairperson noted that his organization had supported it. The issue of the relationship between trade unions in the framework of collective bargaining (as the FNPR-affiliated unions often have the majority of workers and the KTR's affiliates often represent a minority) is at most a very small part of it.
11. Mr Kravchenko stated that the KTR had observed the following practice in the country: employers resisted trade union establishment and activity at their enterprises, and the law enforcement agencies, especially the Prosecutor's Office, and the labour inspection, did not take any action. Sometimes they acted against trade unions. Once a trade union was established, employers often requested the Prosecutor's Office and/or tax inspection to inquire into the legality of the establishment of an organization. During the ensuing inspection, the relevant authority could obtain the list of trade union members and usually forwarded them to the employers. Mr Kravchenko further pointed out that anti-union actions had escalated with the economic crisis. The complaint mentioned 25 enterprises where the KTR-affiliated unions had experienced violations of their rights.
12. According to Mr Kravchenko, the current legislation did not sufficiently ensure the protection of trade union rights. He pointed out that the recommendations of the ILO supervisory bodies in respect of the Labour Code had not been implemented despite the fact that in 2007, a working group had prepared draft amendments based on the recommendations of the CFA and Committee of Experts on the Application of Conventions and Recommendations (these amendments were subsequently rejected) and despite the instructions given by the President.
13. At the national level, the KTR considered that the relationship with employers was difficult. Employers had proposed amendments to the Labour Code to make labour relations more flexible and they were not ready for a dialogue with trade unions which, in turn, had made their own proposals. Furthermore, whereas the RSPP is at least aware of the ILO and international labour Conventions, individual employers have no respect for the labour legislation, trade union rights and even the opinion of the RSPP.
14. KTR representatives further noted that while the legislation guaranteed the right to strike, in practice, trade unions could not resort to industrial actions. In the last few years there had been only two-three legal strikes, which had taken the form of protests. The procedure for registration of trade unions posed some difficulties. Trade unions had to follow the same registration procedure as other non-commercial organizations or NGOs while the KTR considered that there should be a special and simplified registration procedure for them. Trade unions could function without registration but then they cannot bargain collectively and sign collective agreements. Small organizations experienced problems in particular with the access to workplaces. For instance, in such restricted areas as ports if trade union officials do not have a permanent pass, they have to make a payment for each entry, which small trade unions cannot always afford.
15. According to the KTR, despite the fact that the law provided for the prohibition of discrimination, protection especially against anti-union discrimination was virtually non-existent. Furthermore, the bodies whose role should be to protect trade union rights were not effective. The KTR representatives explained that the system of protection of labour rights involved three bodies: the Prosecutor's Office, courts and the labour inspectorate. The Prosecutor's Office dealt with the supervision of the application of the legislation; it also dealt with allegations of violations of human rights. However, according to the KTR, the Prosecutor's Office often refused to deal with alleged violations of trade union rights considering that such violations fell outside its sphere of competence and should rather be brought to the attention of labour inspectors. Yet the labour inspectorate's

position was that trade union rights were outside the scope of the labour law. Thus, it was not competent to deal with the alleged violations of trade union rights and therefore referred the trade unions to courts. In the case of anti-union discrimination, this became particularly difficult: while under the legislation, courts were competent to deal with cases of discrimination, they did not like to examine such cases as they were very difficult to prove. Even if discrimination was established by the court, the Prosecutor's Office did not pursue the cases against employers, who, in any case, refused to reinstate or compensate a worker who had been subjected to anti-union discrimination. While the legislation provided for administrative and criminal responsibility, in practice, violations of trade union rights were not punished. The KTR representatives explained that administrative responsibility could be engaged within two months after the lodging of a complaint; in such cases, an investigation was carried out but it usually took over two months. According to the KTR there were no cases where an employer or an official had been found criminally responsible for violating trade union rights.

16. Finally, the KTR stressed that while the complaint was rather voluminous and referred to a multitude of examples of violations, the reason behind it was to demonstrate the general and systemic problems in the country with regard to the non-respect of trade union rights. While some cases referred to in the complaint were either resolved or were no longer an issue because of the time that had elapsed since their occurrence, the case of Mr Urusov, a trade unionist serving a prison sentence, and the case where a court had declared that trade union material was "extremist" were very serious and urgent.

### ***KTR and its affiliates***

17. In a separate meeting which the mission had with the complainants, Mr Kravchenko once again stressed that the main problems faced by trade unions are with regard to the establishment and registration of trade unions, the actions of law enforcement bodies, anti-union discrimination, limitations of the exercise of the right to strike and access to collective bargaining.
18. With regard to registration, members of the Executive Council of the KTR claimed that it was much easier (and less costly) to register a commercial entity than a non-commercial one; in their experience it was even more difficult to register a trade union. Because the procedure could be complicated, non-commercial entities, including trade unions, had to rely on the services of special companies which deal with registration (the average price for such services was between 50,000 and 60,000 roubles). Admittedly, due to the legislation in force, the registering authorities under the Ministry of Justice could not in the end deny registration. However, the Ministry of Justice almost systematically requested the Prosecutor's Office to conduct an inquiry into the legality of the establishment of an organization. Should the Prosecutor's Office conclude that a trade union organization had been established illegally, it could apply to the court seeking an order of prohibition of its activities and ultimately, its dissolution. Employers could also request the Prosecutor's Office to investigate whether the by-laws of a newly established trade union were in conformity with the legislation. Moreover, according to the KTR, every investigation involving either a particular trade union or its member conducted by the Prosecutor's Office began with the question of the legality of the establishment of the trade union. The KTR considered that the law enforcement bodies should not intervene in internal trade union affairs upon employers' requests and the latter should not use the law enforcement bodies to this end.
19. Cases of anti-union discrimination were extremely difficult to prove in court and even if the court found that an employer was guilty, in practice there were no sanctions. This created a situation where workers were afraid of being dismissed on anti-union grounds and trade unions could not defend their members should this happen. The KTR stressed that there should be an independent body, whose decisions were binding and which could exercise control over the implementation of its decisions.

### ***Federal Service on Labour and Employment (Rostrud) – State labour inspectorate***

20. Mr A. Selivanov, Deputy Head of Rostrud, explained to the mission that the following matters came under the responsibility of the Service: employment, supervision of the application of the labour legislation, social partnership, alternative civil service and internal migration. The Service also deals with the mediation and conciliation of labour disputes and maintains a database of labour arbitrators. He was aware that both the FNPR and KTR considered that the power of the labour

inspectorate should be broadened to include the protection of trade union rights. The mission was informed that there are 82 labour inspectorates in the country which employ nearly 3,000 inspectors. In 2013 this number will fall to 2,800 which means that there will be one inspector for every 25,000 workers. Since the beginning of the economic crisis, complaints to the labour inspection had doubled. In these circumstances, the number of labour inspectors clearly was insufficient. The majority of current complaints were filed by individual workers, and they concerned the non-payment of wages. Rostrud carries out planned inspections (at the rate of two per month) and unplanned inspections (six to eight per month). Trade unions are invited to take part in such inspections. Rostrud also conducted free preliminary consultations. Up to 80 per cent of the issues raised could be resolved at this stage. In other cases, it took approximately one month to reach a decision on the matter.

21. Mr Selivanov pointed out that the majority of complaints filed by trade unions were unfounded. For example, in the case of denial of registration, unions should file a complaint with the court and not with the labour inspection. In other cases, the competence lied with the Prosecutor's Office. On the other hand, in a situation where a majority union proceeds with collective bargaining without informing minority unions, the labour inspectorate was competent to intervene and remind the larger union that minority unions have the right to participate in the process. According to Mr Selivanov, the major problem was that trade unions did not know their rights. In his opinion, 10 per cent of the complaints filed by the KTR concerned genuine violations, 30-40 per cent were emotional reactions (which often occurred in cases of dismissals), and the remaining 50-60 per cent were without foundation but resulted from the lack of knowledge of the workers' and their trade unions rights. He also pointed out that there had been no recent complaints filed by minority unions against majority unions, which demonstrated that the trade unions had learned to work together.
22. Mr Selivanov summarized the applicable procedure as follows: the Prosecutor's Office and/or the courts were competent to examine complaints of violation of trade union legislation; the Prosecutor's Office was competent to deal with the issues of registration; and Rostrud and/or the courts were competent to examine complaints of violations of the provisions of the Labour Code, including provisions concerning collective labour agreements and discrimination. As it was extremely difficult to prove cases of discrimination in court, trade unions were most likely to file complaints with Rostrud. On the other hand, employers did not hesitate to appeal the decisions of labour inspectors in courts, as the employers had sufficient legal resources to do so. He further explained that in practice, if a complaint was lodged with the court, the labour inspection could not intervene. If a complaint was lodged with the Prosecutor's Office, the latter could request the labour inspection to conduct an inquiry. The decision of the labour inspection could be appealed to the central Labour Inspectorate, the Prosecutor's Office, or the court.
23. With regard to employers, Mr Selivanov explained that the major problem was with small and medium-sized enterprises, where no unplanned labour inspection can take place within the first three years of their establishment, and with multinational enterprises which often ignore the labour legislation in force.
24. With regard to the application of penalties, Mr Selivanov explained that the violation of labour legislation is punishable by a fine of up to 5,000 roubles in the case of a physical person and 50,000 roubles in the case of a legal entity. In 2010, altogether 298 persons were fined for the violation of labour legislation. In general, Mr Selivanov considered that the fines were very small, to the point that some enterprises preferred to pay fines than to comply with the labour legislation. With regard to acts of discrimination, an official found guilty might be prohibited from exercising his or her function for a period of up to three years. In the case of directors of enterprises, they could be transferred from one entity to another.

***Representatives of the Ministry of Interior, Ministry of Justice, General Prosecutor's Office, Ministry of Transport, Federal Air Transport Agency (Rosaviatsia), State Corporation for Air Traffic Management***

25. The mission had a detailed discussion covering different aspects of the complaint with the representatives of the relevant state authorities. A representative of the Prosecutor's Office indicated that all allegations raised in the KTR's complaint had been investigated and that some of the alleged violations had been confirmed. If this was not sufficient, additional investigations could be carried out. It usually took about a month, or a maximum of two months, to investigate a case. He also

explained that at all levels of the Prosecutor's Office, there were officials specialized in dealing with trade unions. There were only a few complaints of violation of freedom of association and almost none of them were lodged by the FNPR or its affiliates.

26. A representative of the Ministry of Interior indicated that between 2008 and 2011 there had been seven complaints lodged by trade unions concerning two regions of the country. None of these complaints had been proven to be related to trade union activities.
27. A representative of the Ministry of Justice explained that the registration of trade unions is carried out by a special department dealing with non-commercial entities. The registration can be denied only if an organization claiming to be a trade union is not a trade union. The more frequent problem is the failure to submit all the documents required by the legislation. The Ministry of Justice has to respond to the applicant within 30 days. While the Ministry can refuse to register a non-commercial entity, it cannot deny registration to a trade union. It will register a trade union even if something is amiss and give the union additional time (sometimes up to one year) to make the necessary amendments. The Prosecutor's Office will then verify that the union conforms to the legislation within the allocated time. While the Prosecutor's Office could request the court to order dissolution of a union, this has never happened. With regard to sanctions in cases of violation of the labour legislation (including cases of discrimination), the mission was told that financial compensation was possible only if an administrative offence had been proven. Criminal liability could be engaged in the case of "abuse of power" if the procedures had been violated.
28. A representative of the Presidential Administration considered that the complaint lodged by the KTR was no longer topical. The KTR had in the past struggled for its recognition which it now had obtained. In fact, the President had met with both the KTR and FNPR. During the latest meeting in July 2011 both trade unions had presented their concerns and proposals, and the President had subsequently issued corresponding instructions to the Government.

### ***RSPP (employers and industrialists)***

29. Mr Prokopov explained that the RSPP was the only union of industrialists and entrepreneurs in the country. It was not possible to give an exact number for its members, but the RSPP represented over 100 sectoral associations, involving nearly 300,000 enterprises. Taken together they produce two-thirds of the GDP and employ between 10 and 12 million workers. The RSPP was a signatory to the national tripartite agreement, but it was not involved in collective bargaining which was carried out by its affiliates. It provided the following services to its members: information sharing (mainly through the database of collective agreements concluded by its affiliates) and consultation (mainly on collective bargaining issues). It did not, however, get involved in the mediation and conciliation of labour disputes between its affiliates and trade unions. The RSPP participated in the legislative process by being a member of the Russian Tripartite Commission.
30. The RSPP considered that while the legislation in force was more or less balanced, the regulation of strikes and the system of collective bargaining were complicated. With regard to strikes, the RSPP explained the difficulty for employers: during the time when the courts were examining the legality of a strike, which could take up to two or three months (or a maximum of 30 days in the case of essential services), the employer had to bear the loss of revenue. With regard to the collective bargaining system, the RSPP affirmed that enterprises had the obligation to conduct collective bargaining and be parties to collective agreements at various levels (enterprise, territory and sectoral levels).
31. The RSPP was aware of the complaint pending before the CFA and the Government's reply to it. While it had not studied the details of the complaint, as this was the task of the relevant employers' organizations, the courts and the state authorities, the RSPP considered that the main problem was the relationship between different trade unions. The issue of access to the workplaces could be resolved between the relevant trade union, the employer and the authorities. The RSPP stated that the existence of the complaint could not lead to conclude that all employers wished to have enterprises free of trade unions.

## **Committee on Labour and Social Policy of the State Duma**

32. Mr Leonov explained that the complaint raised numerous issues, the majority of which fell outside the sphere of competence of Rostrud, which supervised the application of labour legislation. In this respect, he considered that there was room for improvement. While the labour and trade union legislation could be linked more closely with one another, Mr Leonov was not certain about the current financial capacity of the State to do so. Regarding the allegations made in the complaint, he noted that “there is no smoke without fire”. However, the only sustainable way of addressing the issues raised in the complaint is through dialogue, communication, and improvement of the legislation and the work of the authorities.
33. With regard to the legislative issues, Mr Leonov explained that there were no explicit provisions which penalized acts of non-recognition of trade unions and interference in their activities. Furthermore, there was no legislation aimed at the elimination of anti-union discrimination. With regard to section 37<sup>2</sup> of the Labour Code, Mr Leonov explained that the problem raised in the complaint related to its application in practice and is closely linked to the unwillingness of employers to bargain collectively as well as to competition among trade unions. The question therefore was on how to change the practice.
34. With regard to strikes, Mr Leonov explained that a draft amendment has been prepared in order to improve the procedure for regulation of collective labour disputes, including strikes. There had been a proposal to eliminate the current mediation and conciliation procedures, but the State Duma Committee had not agreed with it. The result was that mediation and conciliation procedures remained mandatory while arbitration was voluntary. Other proposals concerned the reduction of various applicable time frames and the removal of the requirement to declare the duration of the strike. It is further proposed to create a permanent arbitration institution.

<sup>2</sup> Section 37 of the Labour Code reads as follows:

### Collective bargaining procedure

The participants in collective bargaining shall be free in choosing the issues of regulating socio-labour relations.

Should two or more primary trade unions operate within an organization, they shall form a unified representative body for engaging in collective bargaining, preparing a single draft collective agreement and concluding it. Formation of a unified representative body shall be based on proportional representation principle depending on the number of the trade union members. Each trade union shall delegate its representative(s).

Should a unified representative body fail to be formed within five calendar days after the beginning of collective bargaining, interests of all the employees shall be represented by the primary trade union amalgamating over half of the employees.

Should no primary trade union amalgamate over half of the employees, the employees general meeting (conference) shall determine by a secret vote the trade union entrusted with forming the representative body.

In the cases stipulated by paragraphs three and four of this section, other primary trade unions shall retain the right to delegate their representatives to the representative body prior to the moment of signing the collective contract.

The right to engage in collective bargaining, sign agreements on behalf of the employees at the level of the Russian Federation, a subject of the Russian Federation, and industry, a territory shall be granted to the relevant trade unions (and their associations). Should several trade unions (their associations) be in existence at the relevant level, each of them shall be entitled to representation within a unified representative body for collective bargaining formed with account for the number of labour union members they represent. In the absence of an accord on establishing a unified representative body for collective bargaining the right to engage in it shall be granted to the trade union (trade union association) amalgamating the largest number of the labour union (labour unions) members. ...

35. Finally, Mr Leonov recalled that following the decision of the Constitutional Court, which has declared unconstitutional section 374 of the Labour Code, which obliged an employer to consult with a trade union before s/he can dismiss a trade union leader, the Russian Federation had ratified the Workers' Representatives Convention, 1971 (No. 135). Some proposals had since then been made on how to make more effective the protection against anti-union discrimination especially in the case of dismissals, but agreement of the social partners on them had not been attained.

### ***Tripartite meeting***

36. The work of the mission in Moscow concluded with a tripartite meeting involving the main representatives of the Ministry of Health and Social Development, the two trade union bodies and the employers. Prior to the meeting the FNPR and KTR had circulated a joint proposal for addressing the issues raised in the complaint. This proposal is annexed.
37. At the outset of the meeting, Mr Tapiola suggested that the participants reflect on the following questions: Were there real problems? Were the procedures for trade union registration and lodging of complaints with the relevant authorities good enough? Were they user friendly? Did they work well? Were they well explained and well understood? Did the issues raised in the complaint relate to the questions of competence, knowledge, understanding or the way in which authority was exercised? Was there an understanding that freedom of association rights had special characteristics? Would there be need for additional institutional arrangements? He observed that following the discussion with various parties, it appeared that while in Moscow, i.e. at the central level, there was an understanding of the role and rights of trade unions, officials at the local and regional levels were often unaware of the rules of the game or unwilling to observe them. Moreover, it was clear from the complaint that there was insufficient trust between the Government, employers and trade union organizations. It further appeared that all concerned agreed that the complaint pending before the CFA was a symptom which pointed to questions that needed to be addressed. While some of the concrete examples of violations raised therein have been dealt with or no longer were an issue because of the time that has elapsed since their occurrence, the Government could pay special attention to certain allegations. He referred to the imprisonment of Mr Urusov and the case of the declaration of trade union material as extremist by a local court. Mr Tapiola stressed that the International Labour Office is ready to provide assistance with regard to the training of judges and prosecutors and other officials in relevant state bodies.
38. Ms Moskvina, representing the RSPP, considered that a mission by the Office was a good means to assist in problem solving. In her view the legislation adequately protected trade union rights. She called upon the unions to work more at the national level instead of sending complaints to the ILO. The idea of possibly creating a new tripartite body was not very clear to her. There were other available options which could be used to address complaints of violations of trade union rights without establishing additional structures. In addition, the Government had already taken all measures to address the allegations appearing in the complaint.
39. Mr Safonov considered that there were two interrelated issues: the system and its functioning. Social dialogue had been institutionalized in legislation and practice. The registration procedure was simple and based on notification. The Workers' Representatives Convention, 1971 (No. 135) had been ratified. However, the country had insufficient experience in practising social dialogue and consensus building. While at the central level, the law enforcement bodies function fairly well, the knowledge probably was insufficient at the local level. He considered that trade unions should be able to resolve all problems at the national level, through social dialogue. Due to financial restrictions, the creation of additional tripartite bodies was questionable. On the other hand, arbitration in the case of labour conflicts should be developed and more effort should be put into training. With regard to the latter, the Government is ready to initiate discussion with the Supreme Court. Mr Safonov also thought that more explanation and dissemination of information on the available national procedures was needed. The Government was convinced that trade unions were necessary for the social and economic development of the country. At the same time, there should be more dialogue between the unions. The Government was ready to engage in dialogue and examine all allegations and problems in the framework of the Russian Tripartite Commission.
40. Mr Shmakov of the FNPR considered that the main problem was the application of the legislation in practice. He referred, in particular, to cases where a court had declared trade union material to be of extremist nature as well as the declaration of the Constitutional Court that section 374 of the Labour Code was unconstitutional. Since then, the Russian Federation had ratified Convention No. 135 and there were some proposals for the amendment of the legislation, but these proposals were being

blocked, which did not lead to increased trust between the social partners. He also stated that trade unions affiliated to both the FNPR and KTR had experienced problems with registration. This was due to the fact that trade unions were not recognized to be organizations in a special category. With regard to the circulated proposals, Mr Shmakov explained that they were general and systemic in nature. The aim was to develop a plan of action and not exclusively to resolve the cases raised in the complaint. In fact, the complaint was just an illustration of a systemic problem. While some of the concrete cases were no longer pressing issues, the problems and trends remained and had to be addressed.

41. Mr Kravchenko of the KTR disagreed with the RSPP and considered that trade union rights were not sufficiently protected in the country and their realization in practice had deteriorated. He noted the efforts carried out by the Ministry of Health and Social Development but considered that it was impossible to protect trade unions against acts of interference on the basis of the existing legislation. Moreover, while Rostrud, at least in some way, reacted to the trade unions' complaints, the Prosecutor's Office systematically refused to consider them. There also was a lack of understanding among the authorities of the special nature of trade union organizations.
42. At the end of the tripartite meeting the parties agreed that the trade unions' joint proposal would be examined in the framework of the Russian Tripartite Commission.

### **Concluding remarks**

43. The mission wishes to express its appreciation for the open and constructive discussions it could have with all the authorities and the social partners. The aim was not to propose any conclusions or action, as the complaint had been addressed to the CFA. Rather the question was of assisting in a process of clarifying and better understanding the issues raised in the complaint. The complaint had been examined by all the authorities concerned and thus the issues raised in it, including specific cases, had received a considerable degree of attention. In the view of the mission, this in itself was both useful and encouraging.
44. Certain issues came up in most of the discussions, and they pointed out to the desirability of further action for strengthening the application of freedom of association and the right to collective bargaining both in law and in practice. The International Labour Office remains at the disposal of the tripartite constituents and the Committee of the State Duma on Labour and Social Policy for consultations and advice and, in the case of state and judicial authorities, for relevant training. Legislative issues can, of course, be further examined, as needed, by the Committee of Experts on the Application of Conventions and Recommendations. Better knowledge of available procedures and further clarification of the practices would help both the social partners and the different state bodies to navigate in a context where responsibilities are not always clear. This applies in particular to the relationship between Rostrud, the Prosecutor's Offices and the courts. While mechanisms to deal with labour conflicts are relatively clear, the same is not necessarily true for issues related to the fundamental questions of freedom of association. There is a strong case for further confidence building so that different groups of workers and their elected leaders do not run the risk of being lost and without support in a large country, which continues to build up its civil society and representative institutions against long-standing authoritarian traditions and practices.
45. The mission wishes to express its sincere gratitude to the confidence placed in it by the Government, the trade unions and the employers' representatives. It appreciates the willingness of both the Government and the complainant to engage further in a process of dialogue. It notes with appreciation the cooperation between the two trade union organizations on the questions raised by the complaint.



46. Finally, the mission wishes to express its particular gratitude to Mr E. Davydov, Director of the ILO Decent Work Technical Support Team and Country Office for Eastern Europe and Central Asia in Moscow. His profound knowledge of the complex issues involved served the mission to have a clearer and more complete view of the questions at hand. The mission equally thanks Mr S. Glovackas, Workers' Activities Senior Specialist, and Ms L. Ouskova, Programme Assistant, for their knowledge sharing, administrative and organizational support and assistance.

Kari Tapiola

Oksana Wolfson

4 April 2012

## Proposals for the resolution of the issues raised in the complaint

1. **State registration of trade unions.**
  - 1.1. Exempt unions from the scope of the administrative regulations for the registration of non-commercial organizations.
  - 1.2. Prepare a succinct and unambiguous explanatory note (the precise form of such a document to be determined), *agreed with the trade unions*, concerning the procedures for state registration of trade unions including a description of the specific types of state registration including in particular the concept of “notifying” registration (meaning notification which *does not permit refusal to register*, a request to amend by-laws, etc.).
  - 1.3. Introduce the relevant specialization among staff in the state authorities responsible for “registration upon notification” of unions; train specialists dealing with registration, so that they are familiar with the legal position and status of unions.
2. **Examination of cases relating to freedom of association in Russian courts.**
  - 2.1. With the help of ILO experts, train judges on questions pertaining to freedom of association and opportunities for applying international freedom of association standards.
  - 2.2. With the senior members of the Russian Federation’s Supreme Court, examine the possibility of drawing up explanatory guidelines for courts on the examination of cases relating to freedom of association and protection from discrimination on grounds of union membership.
  - 2.3. Draw up commentaries and other material on international principles applicable in the regulation of freedom of association.
3. Analogous measures for specialist training on freedom of association are needed for **state labour inspectors and prosecution service officials.**
4. **In order to give effect to the provisions of trade union legislation prohibiting interference by state authorities in trade union activities, draw up with the relevant ministries, explanatory guidelines and instructions, *agreed with the trade unions*, regarding the actions that are deemed to constitute interference and therefore inadmissible. In particular, resolve the issue of the inadmissibility of tax inspections by the State Tax Inspection Service (GNI).**
  - 4.1. Establish in legislation a definitive list of cases in which trade unions may be required to provide information and documents, and establish the list of documents which may be required from unions by various state authorities responsible for monitoring trade union activities.
  - 4.2. Prohibit the dissemination by state authorities of information revealed to them in union documents (in particular, prohibit the transmission of information containing individual union membership data), including the transmission of such information to employers or state and local authorities.
5. **Steps to draw up legislation to protect the right to freedom of association.**
  - 5.1. Draw up and adopt legislation to give effect to the principle that discrimination is prohibited.
  - 5.2. Draw up and adopt legislation to ensure effective protection of trade union rights.
  - 5.3. Establish administrative (and criminal) liability for violations of trade union rights and of the right to form unions. Such measures must be such as to constitute a significant penalty for those responsible. Increase the period allowed for taking administrative measures.
  - 5.4. Draw up draft legislation to give effect to the recommendations made by the ILO in Cases Nos 2251 and 2199.

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**Guarantees to allow trade union activities in the case of workers not released from normal work duties.**

In order to give effect to the provisions of the Workers' Representatives Convention, 1971 (No. 135), which the Russian Federation has ratified, work with trade unions on amendments to the Labour Code and to the Law on Trade Unions and submit them as quickly as possible to the State Duma; these will concern in particular the establishment of special guarantees to allow workers who are elected to trade union office but not released from their normal work duties to carry on their trade union activities and protect them from unjustified dismissals or disciplinary action.

**6. Creation of a body with a specific mandate including examination of questions relating to freedom of association.**

- Create a tripartite body under the auspices of the state labour authority *Rostrud* which will examine cases of violations of trade union rights and discrimination on grounds of trade union activity. The aim of this would be to allow high-level discussion of cases of serious and systemic violations of rights on the grounds of workers' trade union activities, and to publicize and raise awareness of such cases.
- Empower that body to conduct its own investigations and submit representations (based on its investigations or independently thereof) to the general prosecution service; the prosecution service would be required to investigate any such complaints diligently.

*Option:* Set up a body or committee under the Russian Tripartite Commission for the Regulation of Social and Labour Relations to allow operational response to complaints from trade unions. This body would include representatives of the social partners and operate on a voluntary basis; it would publish its recommendations and reports on the outcomes of its examination of any complaints.

Geneva, 9 November 2012

(Signed) Professor Paul van der Heijden  
Chairperson

*Points for decision:* Paragraph 215  
Paragraph 235  
Paragraph 261  
Paragraph 281  
Paragraph 290  
Paragraph 301  
Paragraph 314  
Paragraph 356  
Paragraph 408  
Paragraph 429  
Paragraph 582  
Paragraph 602  
Paragraph 623  
Paragraph 634  
Paragraph 646  
Paragraph 667  
Paragraph 692  
Paragraph 783  
Paragraph 1003  
Paragraph 1024  
Paragraph 1063  
Paragraph 1088  
Paragraph 1100  
Paragraph 1109  
Paragraph 1123  
Paragraph 1132  
Paragraph 1227  
Paragraph 1258  
Paragraph 1278  
Paragraph 1289  
Paragraph 1300  
Paragraph 1401