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Committee on Freedom of Association

388th Report of the Committee on Freedom of Association

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 14–16 March 2019 and 22 March 2019 under the chairmanship of Professor Evance Kalula.
2. The following members participated in the meeting: Ms Valérie Berset Bircher (Switzerland), Mr Aniefiok Etim Essah (Nigeria), Mr Aurelio Linero Mendoza (Panama), Ms Molebatseng Makhata (Lesotho), Mr Takanobu Teramoto (Japan); Employers' group Vice-Chairperson, Mr Alberto Echavarría and members, Mr Thomas Milton Mackall, Mr Juan Mailhos, Mr Hiroyuki Matsui and Ms Jacqueline Mugo; Workers' group Vice-Chairperson, Mr Yves Veyrier (substituting for Ms Catelene Passchier), and members Ms Amanda Brown, Mr Gerardo Martínez, Mr Ayuba Wabba and Mr Richard Wagstaff. The member of Argentinian nationality was not present during the examination of the cases relating to Argentina (Cases Nos 2817 and 3120).

* * *

3. Currently, there are **172** cases before the Committee in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined **19** cases on the merits, reaching definitive conclusions in **16** cases (**eight** definitive reports and **eight** reports in which the Committee requested to be kept informed of developments) and interim conclusions in **three** cases; the remaining cases were adjourned for the reasons set out in the following paragraphs. The Committee recalls that it issues “definitive reports” when it determines that the matters do not call for further examination by the Committee beyond its recommendations (which may include follow-up by government at national level) and the case is effectively closed for the Committee, “interim” reports where it requires further information from the parties to the complainant and “reports in which it requests to be kept informed of developments” in order to examine later on the follow-up given to its recommendations.

Examination of cases

4. The Committee appreciates the efforts made by governments to provide their observations on time for their examination at the Committee's meeting. This effective cooperation with its procedures has continued to improve the efficiency of the Committee's work and enabled it to carry out its examination in the fullest knowledge of the circumstances in question. The Committee would therefore once again remind governments to send information relating to cases in paragraph 6, and any additional observations in relation to cases in paragraph 8, as soon as possible to enable their treatment in the most effective manner. Communications received after **7 May 2019** will not be able to be taken into account when the Committee examines the case at its next session.

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

5. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2923 (El Salvador) and 3203 (Bangladesh) because of the extreme seriousness and urgency of the matters dealt with therein.

Urgent appeals: Delays in replies

6. As regards Cases Nos 2177 and 2183 (Japan), 3183 (Burundi), 3184 (China), 3201 (Mauritania), 3249 (Haiti), 3275 (Madagascar) and 3314 (Zimbabwe) the Committee observes that, despite the time which has elapsed since the submission of the complaints or the issuance of its recommendations on at least two occasions, 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.

Observations requested from governments

7. The Committee is still awaiting observations or information from the governments concerned in the following cases: 2318 (Cambodia), 3076 (Maldives), 3081 (Liberia), 3113 (Somalia), 3119 (Philippines), 3185 (Philippines), 3269 (Afghanistan), 3312 (Costa Rica), 3316 (Colombia), 3324 and 3325 (Argentina), 3327 (Brazil), 3330 (El Salvador), 3331 (Argentina) and 3333 (Colombia). If these observations are not received by its next meeting, the Committee will be obliged to issue an urgent appeal in these cases.

Partial information received from governments

8. In Cases Nos 2265 (Switzerland), 2508 (Iran), 2609, 2869 and 2967 (Guatemala), 3023 (Switzerland), 3027 (Colombia), 3042 (Guatemala), 3067 (Democratic Republic of the Congo), 3089 (Guatemala), 3115 (Argentina), 3133 (Colombia), 3139 (Guatemala), 3141 (Argentina), 3148 (Ecuador), 3149 (Colombia), 3161 (El Salvador), 3178 (Bolivarian Republic of Venezuela), 3179 (Guatemala), 3192 (Argentina), 3213 (Colombia), 3215 (El Salvador), 3219 (Brazil), 3221 (Guatemala), 3232 (Argentina), 3242 (Paraguay), 3251 and 3252 (Guatemala), 3271 (Cuba), 3277 (Bolivarian Republic of Venezuela), 3279 (Ecuador), 3281 and 3282 (Colombia), 3290 (Gabon), 3293 (Brazil), 3300 (Paraguay), 3313 (Russian Federation), 3315 (Argentina), 3318 (El Salvador), 3323 (Romania), 3326 (Guatemala), 3328 (Panama), 3332 and 3335 (Dominican Republic) and 3337 (Jordan) 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), 2761 and 2830 (Colombia), 3018 (Pakistan), 3062 (Guatemala), 3074, 3091 and 3112 (Colombia), 3135 and 3152 (Honduras), 3157 (Colombia), 3193, 3195, 3197, 3199 and 3200 (Peru), 3207 (Mexico), 3208 (Colombia), 3210 (Algeria), 3211 (Costa Rica), 3216, 3217, 3218 and 3223 (Colombia), 3224 (Peru), 3225 (Argentina), 3228 (Peru), 3230 (Colombia), 3233 (Argentina), 3234 (Colombia), 3239 (Peru), 3243 (Costa Rica), 3245 (Peru), 3250 (Guatemala), 3254 (Colombia), 3258 (El Salvador), 3259 (Brazil), 3260 (Colombia), 3261 (Luxembourg), 3265 (Peru), 3266 (Guatemala), 3267 (Peru), 3280 (Colombia), 3284 (El Salvador), 3291 (Mexico), 3292 (Costa Rica), 3294 (Argentina), 3295 (Colombia), 3298, 3299 and 3301 (Chile), 3302 (Argentina), 3303 (Guatemala), 3306 (Peru), 3307 (Paraguay), 3308 (Argentina), 3309 (Colombia), 3310 (Peru), 3311 (Argentina), 3317 and 3319

(Panama), 3320 (Argentina), 3321 (El Salvador), 3322 (Peru), 3329 (Colombia), 3334 (Malaysia), 3340 (Panama) and 3343 (Myanmar) the Committee has received the governments' observations and intends to examine the substance of these cases as swiftly as possible.

New cases

10. The Committee adjourned until its next meeting the examination of the following new cases which it has received since its last meeting: Nos 3336 (Colombia), 3338 (Argentina), 3339 (Zimbabwe), 3341 (Ukraine), 3342 (Peru), 3344 (Brazil), 3345 (Poland), 3346 (Netherlands), 3347 (Ecuador), 3348 (Canada) and 3349 (El Salvador) 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.

Article 24 representations

11. The Committee has received the governments' observations with respect to the article 24 representations that were referred to it: Argentina (3165), Brazil (3264), Costa Rica (3241) and France (3270) and intends to examine them as swiftly as possible.

Article 26 complaint

12. The Committee is awaiting the observations of the Government of Belarus in respect of its recommendations relating to the measures taken to implement the recommendations of the Commission of Inquiry. In light of the time that has elapsed since its previous examination of this case, the Committee requests the Government to send its observations so that it may examine the follow-up measures taken with respect to the recommendations of the Commission of Inquiry at its next meeting.

Transmission of cases to the Committee of Experts

13. The Committee draws the legislative aspects of Cases Nos 3246 and 3247 (Chile) and 3296 (Mozambique) as a result of the ratification of Conventions Nos 87 and 98, to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

Cases in follow-up

14. The Committee examined **seven** cases in paragraphs **15 to 69** concerning the follow-up given to its recommendations and concluded its examination with respect to and therefore closed, **two** cases: 3124 and 3176 (Indonesia).

Case No. 3058 (Djibouti)

15. The Committee last examined this case, which concerns allegations of harassment and discriminatory measures against trade union leaders and members in the education sector, at its March 2017 meeting [see 381st Report, paras 27–29]. On that occasion, the Committee reiterated its recommendations regarding the allegations pertaining to the death of Mr Mahamoud Elmi Rayaleh, a French teacher at Balbala Public Secondary School, on 29 August 2013 during his detention at Gabode Central Prison, after he was sentenced on

20 August 2013 to two months of imprisonment for “involvement in an illegal protest”. In this regard, the Committee once again requested the Government to send a copy of the ruling of 20 August 2013 as well as a copy of the report of the independent commission that, according to the Government, investigated the circumstances of this death and found that there was no evidence to corroborate anything of a suspicious or criminal nature in this regard.

16. In its communication dated 10 May 2017, the Government indicates that it has provided the forensic report, which concluded that there was no evidence to corroborate the suspicious nature of the death and confirmed that Mr Rayaleh died in his sleep. The Government also indicates that a copy of the ruling of 20 August 2013 will be provided as soon as possible.
17. *The Committee recalls that it previously noted the Government’s indication that an independent commission had conducted an investigation into the circumstances of this death. After having interviewed co-detainees, prison guards and the prison doctor and having examined the forensic report, the commission had concluded that there was no evidence to corroborate the suspicious or criminal nature of the detainee’s death and had indicated that the death did not have any traumatic or pathological cause. In view of these comments, which the Government has merely reiterated, the Committee has since 2015 been requesting a copy of the ruling of 20 August 2013 and of the report of the independent commission, in order to reach a conclusion in full knowledge of the facts on the basis of an examination of the evidence requested. Deploring once again the absence of information from the Government, the Committee is bound to reiterate its recommendation and, considering the seriousness of the allegations, expects that the Government will communicate this information without further delay.*

Case No. 2949 (Eswatini)

18. The Committee last examined this case at its October 2017 meeting [see 383rd Report, paras 609–625]. On that occasion, the Committee took note of a number of initiatives taken by the Government to tackle the issue of interference and intimidation of trade unionists during peaceful trade unions activities and encouraged the Government to continue to take all necessary measures to allow workers’ and employers’ organizations to fully exercise their trade union rights, including the right to engage in protest action and peaceful demonstrations in defence of their members’ occupational interests.
19. In a communication dated 20 September 2018, the International Trade Union Confederation (ITUC) denounced the increasing use of security forces to interfere in peaceful activities organized by the Trade Union Congress of Swaziland (TUCOSWA), the Amalgamated Trade Union of Swaziland (ATUSWA) and the Swaziland National Association of Teachers (SNAT), including the arrest and detention of trade union leaders. According to ITUC, on 19 and 20 September 2018, a peaceful demonstration organized by TUCOSWA which received the approval of the Labour Advisory Board and went through the legal processes under the Public Order Act, was violently attacked by the police firing stun grenades and tear gas to disperse the workers. This crackdown is allegedly the latest of a series of violent interferences by security forces in trade union activities, including an attack by the police of a peaceful gathering organized by ATUSWA outside a textile factory in Nhlengano on 30 August 2018, the arrest of Mr Maxwell Myeni, Secretary of TUCOSWA and Lavumisa Local Shop Stewards Council member of the SNAT on 26 August 2018 and his detention for almost a month after being picked up and illegally charged under the Public Order Act, and earlier in August the shooting by the police at a peaceful meeting of members of the SNAT at the trade union centre.

20. In a communication dated 2 February 2018, the Government informed, with regard to the Committee's recommendation, that the 1963 Public Order Act which was questioned, inter alia, for allowing unwarranted and undue interferences by the security forces during trade union meetings and protest actions was repealed by the newly enacted Public Order Act No. 12 of 2017 which provided a clear regulation of public gatherings in a public place and a protest march or industrial action held at the instance of employees either within the employer's premises or in a public place. Additionally, section 28 of the new Public Order Act provided for consultations between the responsible Ministry responsible for national security and the police service and relevant stakeholders to issue a code of good practice on gatherings to regulate or to provide for the responsibilities of parties prior, during and after the holding of a public gathering. The Government informed that the said Code of good practice was published under Legal Notice No. 201 of 2017. The Government also referred to a number of industrial actions, including strikes, which took place in 2017 indicating that they demonstrated that trade union rights to engage in protest and industrial action in defence of occupational interests are indeed protected, both in law and practice.
21. Furthermore, in relation to the Committee's request to be kept informed of the court ruling in the case of Messrs Mbongwa Earnest Dlamini and Mcolisi Ngcamphalala, members of the SNAT, who were arrested in February 2016 with criminal charges preferred against them for perpetrating criminal and malicious acts in contravention of the 1963 Public Order Act during a protest action, the Government informed that the prosecution was still on course and indicated that the final outcome of the court case would be transmitted to the Committee.
22. *The Committee must express its deep concern over the serious allegations of intimidation against trade union leaders and violent attacks of security forces against peaceful trade union gatherings, this despite the new measures from the Government to improve the handling of trade union gatherings in public places. The Committee firmly recalls that acts of intimidation and physical violence against trade unionists constitute a grave violation of the principles of freedom of association and the failure to protect against such acts amounts to a de facto impunity, which can only reinforce a climate of fear and uncertainty highly detrimental to the exercise of trade union rights. In cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 90 and 104]. Furthermore, in relation to allegations of the arrest and detention of a trade union official, the Committee draws the Government's attention to the fact that it is not possible for a stable industrial relations system to function harmoniously in the country as long as trade unionists are subject to arrests and detentions [see **Compilation**, op. cit., para. 127]. The Committee urges the Government to initiate an independent investigation with a view to determine the justification for the action of the police denounced by ITUC and responsibilities, and to keep it informed of its outcome.*
23. *Observing that the Public Order Act of 1963 has been repealed and replaced in 2017 partially due to its non-conformity with freedom of association, the Committee trusts that the judiciary will bear in mind the principles previously recalled by the Committee when examining the charges against Messrs Mbongwa Earnest Dlamini and Mcolisi Ngcamphalala, members of the SNAT, for acting in contravention of the 1963 Public Order when exercising protest action in 2016. The Committee requests the Government to provide it with a copy of the judgment as soon as it is rendered.*

Case No. 2991 (India)

24. The Committee last examined this case, which concerns allegations of excessively long registration procedures, denial of registration due to imposition of restrictive conditions of eligibility (occupational requirement) for union office and union membership, and minimum membership requirement of 100 workers to establish a union, at its October 2015 meeting [see 376th Report, approved by the Governing Body at its 325th Session, paras 42–46]. On that occasion, the Committee requested the Government to: provide information as to the status of the appellate proceedings concerning the refusal to register the Garment and Allied Workers' Union (GAWU); engage with the social partners to review section 4(1) of the Trade Unions Act, 1926, as amended in 2001 (TU Act), so as to ensure that the minimum membership requirement is fixed in a reasonable manner; and encourage Haryana State to review the implementation of its registration procedures so as to ensure that the period for registration of workers' organizations in practice does not become excessively long.
25. The Government provides its observations in communications dated 26 February 2016 and 14 November 2017. With regard to the appellate proceedings on the refusal to register the GAWU, the Government states that the appeal filed by the union is still pending before the Appellate Court in Gurugram and no interference can thus be made by the administrative authorities in these proceedings. It also states that a date was fixed in January 2018 for evidence and that both the trade union and the Registrar will be bound by the orders of the Court.
26. Regarding the requirements of section 4(1) of the TU Act, pertaining to minimum union membership required for registration, the Government states that if the existing minimum criteria (an application for registration can be made by not less than seven trade union members with the support of at least 10 per cent or 100 workers, whichever is less, employed in the establishment or industry) were removed, it would result in total chaos giving rise to multiplicity of unions and adversely affecting the industrial peace and harmony. The Government further indicates that: (i) the 2001 amendment was adopted after exhaustive consultations with the social partners and aimed at reducing multiplicity of trade unions, orderly growth of trade unions and promoting internal democracy; (ii) the provisions of the TU Act only regulate registration under the Act and do not inhibit the existing and functioning of an unregistered trade union; (iii) registration of a trade union under the TU Act bestows certain rights, protection and responsibilities on trade unions, therefore the restrictions for registration provided by the Act were rightly imposed to prevent workers from being exploited by dummy unions without the support of a minimum reasonable number of workers; (iv) there is no need to amend section 4(1) of the TU Act as its provisions, as well as those of the Constitution, are very liberal and in line with various ILO Conventions; and (v) the complainant's actions are apparently motivated to create extra-judicial pressures to circumvent the law.
27. Concerning the registration procedure in Haryana State, the Government reiterates that administrative orders had been issued to restrict the time limit for disposal of applications for registration of trade unions to not more than four months and all applications are disposed in the prescribed time limit. In the present case, a delay had taken place as the trade union had proposed to include workers from different industrial establishments for whom the application had to be sent to different authorities for verification. The Government adds that in September 2016 the Ministry of Labour and Employment requested all state governments to make the necessary changes in the executive orders and amendments so as to stipulate the time limit of 45 days for disposal of applications for registration, which reflects the consensus reached with the Central Trade Union Organizations. The Ministry is also finalizing the Code on Industrial Relations, which contains a proposal to include provisions of deemed registration if the application for registration is not finalized within 45 days.

28. *The Committee takes note of the information provided by the Government. With regard to the appeal on the refusal to register the complainant union, the Committee observes that the complainant's request for registration dates back to January 2012 and that the appeal now seems to have been pending for several years with no substantial information being provided on the developments. Recalling its previous conclusions that judges should be able to deal with the substance of a case concerning a refusal to register so that they can determine whether the provisions on which the administrative measures in question are based constitute a violation of the rights accorded to occupational organizations [see 376th Report, para. 44], the Committee requests the Government once again to provide updated information as to the progress made in the appellate proceedings and to transmit a copy of the decision once rendered. The Committee trusts that, if this is not yet the case, the Appellate Court will issue a decision on the appeal without further delay.*
29. *Concerning the requirements of section 4(1) of the Trade Unions Act, 1926, as amended in 2001, pertaining to minimum union membership required for registration, the Committee notes that, according to the Government, there is no need to review the provision as it could give rise to multiplicity of trade unions and adversely affect industrial peace. However, the Committee recalls its previous conclusions in which it had repeatedly observed that while a minimum membership requirement is not in itself incompatible with the principles of freedom of association, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered [see 376th Report, para. 45]. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed. A minimum requirement of 100 workers to establish unions by branch of activity, occupation or for various occupations must be reduced in consultation with the workers' and employers' organizations [see **Compilation**, op. cit., para. 436]. In light of the foregoing, the Committee once again requests the Government to engage with the social partners to review section 4(1) of the Trade Unions Act, 1926, as amended in 2001, in line with the above so that the establishment of organizations is not unduly hindered and to keep it informed of the progress made in this regard.*
30. *Finally, the Committee notes the information provided by the Government with regard to the registration procedure in Haryana State, in particular, the request of the Ministry of Labour and Employment for all state governments to make the necessary changes to stipulate the time limit of 45 days for disposal of applications for registration. The Committee trusts that the proposed reduction of the time limit for disposal of applications for registration, together with an efficient implementation of the registration procedure in Haryana State, will contribute to ensuring that the period for registration of workers' organizations in practice does not become excessively long.*

Case No. 3124 (Indonesia)

31. The Committee last examined this case, which concerns allegations of dismissal of trade union leaders, restriction on the exercise of the right to strike by using police and paramilitary force on striking workers, dismissal of trade union members and other workers for having participated in a strike and the employer's interference in trade union affairs by intimidating workers to change their trade union affiliation in favour of a union supported by the management, at its October 2017 meeting [see 383rd Report, approved by the Governing Body at its 331st Session, paras 394–416]. On that occasion, the Committee made the following recommendations [see 383rd Report, para. 416]:
- (a) The Committee requests the Government to provide a copy of the Municipal Regulation No. 2 of 2017 and expects it to take the necessary measures to ensure that all workers may exercise their right to peaceful demonstration in line with the principles of freedom of association.

- (b) The Committee requests the Government once again to take the necessary measures to initiate an independent inquiry to address the allegations of anti-union termination of hundreds of workers following the July 2012 strike and to determine the real motives behind these measures and, should it be found that the workers were terminated for legitimate trade union activities, take the necessary measures to ensure that they are fully compensated. The Committee firmly hopes that the Government will be able to report progress in this regard without further delay. The Committee also invites the parties to present a formal request for mediation in relation to the issue of dismissed workers to the local Manpower Office.
- (c) The Committee invites the complainant to provide to the competent national authorities detailed information concerning the allegations of interference in trade union affairs by forcing workers to change their trade union affiliation in favour of a management-supported trade union, so that they can conduct an investigation and determine whether these allegations are founded, and if so, to take the necessary measures to remedy and sanction these acts. The Committee requests the Government to keep it informed of any developments in this regard.
- (d) Bearing in mind the complex nature of the case, the large numbers of workers concerned, and the multitude and serious nature of interconnected allegations, some of which were not contested either by the Government or the employers' representatives, the Committee requests the Government to take the necessary measures to ensure that all pending matters are dealt with without further delay and in line with the Committee's recommendations and to report in detail on any measures taken or envisaged in this regard.

32. The Government provides its observations in communications dated 2 February and 24 October 2018 and 29 January 2019. With regard to the right of workers to peaceful demonstration, the Government reiterates that the right to express opinion in public is a fundamental right of all Indonesian citizens, including all workers, but it is necessary to have an arrangement to ensure public order, peace and protection of human rights and freedoms of citizens. The Municipal Regulation No. 2 of 2017 is therefore intended as guidance in expressing public opinion in an orderly, ethical and safe manner. The Government provides a copy of the Regulation (in Indonesian).

33. Concerning the allegations of anti-union termination of hundreds of workers following their participation in the July 2012 strike, the Government affirms that in-depth investigation had been conducted seriously, in accordance with the applicable procedures, and that after a number of mediations and negotiations between the PT Panarub Dwi Karya Benoa (the company), the Textile and Footwear Union on Company Level (PTP SBTGS-GSBI PT PDK) and the Federation of Indonesian Trade Unions (GSBI), the parties agreed on several matters and, on 18 October 2018, signed a collective agreement in this regard. Firstly, the agreement clarifies that: in July 2012, the workers went on strike to demand for the execution of normative rights; after the strike, the company terminated the employment of 284 workers on the basis of resignation; each party carried out dispute resolution between 2012 and 2016; negotiations were ongoing since January 2017; and the union demanded a compensation of 20 million Indonesian rupiah (IDR) (equals to US\$1,423) per person but the company did not agree to this demand. Secondly, the parties agreed to: the termination of the working relationship between the company and the 284 workers; the payment of compensation by the company in the amount of IDR1.42 billion (equals to US\$100,745), paid to each worker in the amount of IDR5 million (equals to US\$356); and not to go into dispute against, or sue each other for the termination of their working relationship. According to the Government, the concerned workers have already been compensated. The Government also clarifies that earlier in the negotiations, the union was requesting the company or the Government to take the responsibility to resolve the debt of 62 workers, incurred while awaiting compensation, but that despite two proposals from the company, agreement was not reached in this regard.

34. As regards the allegations of company interference in trade union affairs by forcing workers to change their trade union affiliation in favour of a management-supported trade union, the Government reiterates that it had demanded the Committee to urge the complainant to provide evidence on these matters.
35. *The Committee takes note of the information provided by the Government. It notes, in particular, that, after years of negotiations and mediation, the company and the trade union reached a collective agreement on the issue of massive dismissals of workers following their participation in the July 2012 strike, and that the concerned workers have already been compensated. The Committee observes that the compensation received by each worker amounts to roughly US\$356 (one-quarter of what the union was asking and approximately the equivalent to one-month's minimum wage) after several years of mediation and in circumstances where 62 dismissed workers faced bankruptcy while awaiting compensation. The Committee further observes that the Government has not provided any information as to the outcome of the independent inquiry into the anti-union nature of the dismissals it was called upon to institute and trusts that it will fully assume its responsibility in future cases to ensure protection against anti-union discrimination and effective and dissuasive sanctions and full compensation in cases where it has occurred.*
36. *The Committee also notes that the Government provided a copy of the Municipal Regulation No. 2 of 2017 (in Indonesian). The Committee recalls its previous recommendations in this regard [see 383rd Report, para. 410] and expects the Government to take the necessary measures to ensure that all workers may exercise their right to peaceful demonstration in line with the principles of freedom of association.*
37. *The Committee further understands from the information provided by the Government that, despite the Committee's invitation to do so [see 383rd Report, para. 414], the complainant failed to provide to the competent national authorities information concerning the allegation of interference in trade union affairs so that they could conduct an investigation into these matters. In the absence of further details from the complainant in this regard, the Committee will not pursue the examination of this allegation and closed this case.*

Case No. 3176 (Indonesia)

38. The Committee last examined this case in which the complainant alleged the violation of the right to organize peaceful public demonstrations and a national strike, at its October 2016 meeting [see 380th Report, approved by the Governing Body at its 328th Session, paras 590–634]. On that occasion, the Committee made the following recommendations [see 380th Report, para. 634]:
- (a) The Committee requests the Government to review the situation of the 23 workers in light of the principles set out in its conclusions with a view to dropping any remaining charges and to keep it informed of any developments in this respect.
 - (b) The Committee requests the complainant to provide further information in relation to its allegation that the police occupied the branch office of the KSPI in North Jakarta, in view of the Government's reply.
 - (c) The Committee requests the Government to institute independent inquiries into all alleged acts of violence with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts and to ensure appropriate compensation for any damages suffered. It requests the Government to keep it informed in this respect.
 - (d) Noting the Government's indication that it is currently seeking clarification from the management of the PT. DMCTI in Jababeka, Bekasi, regarding the allegation that workers were forced into signing statements declaring that they will not participate in the strike,

the Committee requests the Government to keep it informed in this respect and further expects that the allegation of dismissal of 75 workers following their participation in the industrial action will be fully investigated and the appropriate remedial action taken.

39. The Government provides its observations in communications dated 7 November 2017 and 24 October 2018. In particular, it informs that the Central Jakarta District Court had decided that the 23 workers against whom criminal charges were pending following the events of October 2015 are now free of charges and that, after verification, the Confederation of Indonesian Trade Unions (KSPI) does not seem to have a branch office in North Jakarta.
40. With regard to the alleged acts of violence by the police in handling protesting workers, the Government states that it had conducted an investigation on the issues raised by the complainant, the results of which were communicated to the Direct Contacts Mission in October 2016. The results show that the procedural steps carried out by the police in handling the demonstrations in front of the Presidential Palace and other locations had been conducted in accordance with the procedures set out in Police Regulation No. 16 of 2006 on guidelines and procedures of mass control and the Head of National Police Regulation No. 7 of 2012 on procedures for organizing service, security and case management of expressing opinion in public. The Government adds that if a report is submitted alleging abuse of authority by police personnel or actions in violation of the applicable procedures, such complaints are processed and the concerned personnel sanctioned. However, so far, no such complaints or reports were submitted to the Division of Professionalism and Security of National Police.
41. As regards the allegation that workers at the PT. DMCTI in Jababeka industrial area in Bekasi were forced into signing statements declaring that they would not participate in the November 2015 strike, the Government indicates that, according to the company, the demonstrations were not directly related to the working relationship between the employees and the management but rather constituted a form of protest against the Government over the issuance of Regulation No. 78 of 2015 concerning wages and that the management had never forced its workers to sign an agreement not to take part in the strike. Furthermore, the Government provides the following clarification obtained from the company: (i) on 23 November 2015, the management issued an appeal to the workers not to participate in the national strike as it was not the kind of strike stipulated in Law No. 13 of 2003 on Manpower and would harm the company; (ii) the Chairperson of the Federation of Indonesian Metal Workers Union (FSPMI) requested permission from the management to take part in the demonstration on 24 November from 8 a.m. to 4 p.m., which was granted to those workers working during the first shift (from 8 a.m. to 4 p.m.), however, workers from the second and third shifts also participated in the demonstration resulting in the inability of the company to operate for four days (on 24 November, the Chairperson and the Secretary of FSPMI did not participate in the demonstration); (iii) on 25–27 November, workers provoked and intimidated colleagues to stop working, as a result of which the management conducted daily calls for workers to return to work; (iv) although some workers were willing to work, they were prevented from doing so by the striking workers; (v) on 28 November, many workers returned to work but 75 workers insisted on not working, they were summoned back to work and told that those who refused would be considered as having resigned and would be paid severance pay according to Law No. 13 of 2003 on Manpower; (vi) on the same day, a meeting was conducted between the company and two representatives of workers – Mr Wismon, Chairman of PUK SPEE FSPMI (union at factory level) and Mr Setiawan, Vice-Chairman of Division III/Legal – to discuss the impact of the strike on the company and the termination of 75 workers; (vii) on 28 and 30 November 2015, the management issued a decision to lay off 75 workers as they had violated section 66(f) and (g) of the Collective Labour Agreement between the company and PUK SPEE FSPMI (section 66(f) stipulates that workers must be in the working area during office hours and section 66(g) states that every worker is prohibited from being in a cooperative, canteen area, mosque (except for praying), kitchen, smoking area and outside of working area during working

hours, unless there is a permission from his/her employer/supervisor); (viii) in 2017, the Industrial Relations Court declared that out of the 75 workers, nine should be reinstated in the same position with payment of their wages and other rights; (ix) according to the latest information, termination of the 75 workers was finally completed through a collective agreement (71 workers including the Chairperson and the Secretary of the FSPMI) and the Industrial Relations Court (4 workers); and (x) those workers who filed a lawsuit to the Industrial Relations Court at the K1 I.A. Bandung are yet to receive their rights as the management is awaiting the decision of the Supreme Court.

42. *The Committee notes the updated information provided by the Government. In particular, it welcomes the Government's indication that the criminal charges pending against 23 workers who had participated in the October 2015 events were dropped.*
43. *In view of the Government's repeated assertion that the KSPI branch office in North Jakarta does not seem to exist, and in the absence of further details from the complainant in relation to its allegation that the police occupied the mentioned branch office (despite the Committee's request to provide such information), the Committee will not pursue the examination of this allegation.*
44. *The Committee further notes the Government's statement that the results of the investigation into the issues raised by the complainant showed that, when handling the demonstrating workers, the police acted in line with the applicable regulations, and that no complaints have so far been submitted concerning abuse of authority by the police. The Committee observes, however, that in its observations, the Government only refers to police actions and does not indicate whether the allegations of threats, violence and intimidation conducted by hired thugs (see 380th Report, paras 595, 597 and 600) were also investigated. The Committee wishes to recall in this regard that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. Facts imputable to individuals bring into play the State's responsibility owing to the State's obligation to prevent violations of human rights. Consequently, governments should endeavour to meet their obligations regarding the respect of individual rights and freedoms, as well as their obligation to guarantee the right to life of trade unionists [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 84 and 91]. In view of the above, the Committee requests the Government to indicate whether the allegations of threats, violence and intimidation of demonstrating workers by hired thugs were thoroughly investigated and any measures taken as a result, and if it is not the case, to institute independent inquiries into the alleged acts of violence, so as to determine responsibility, punish those responsible, prevent the repetition of such acts and ensure appropriate compensation for any damages suffered. The Committee trusts that the Government will take measures to ensure that, in the future, freedom of association can be exercised in conditions in which fundamental human rights are fully respected.*
45. *Finally, the Committee notes the detailed information transmitted by the Government from the company management in Bekasi regarding the allegation that its employees were forced to sign an agreement not to participate in the November 2015 national strike, as well as on the circumstances leading to the termination of 75 workers following their participation in the strike. While recalling that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [see **Compilation**, op. cit., para. 759], the Committee understands, from the information*

provided, that the termination of 71 out of 75 workers, including the Chairperson and the Secretary of the FSPMI, was completed through the conclusion of a collective agreement and that the cases of four more workers are currently pending before the Supreme Court. The Committee trusts that the conclusion of the collective agreement will contribute to ensuring harmonious labour relations in the company and requests the Government to keep it informed of the outcome of the pending cases relating to the termination of four workers. The Committee considered that the case did not call for further examination and closed the case.

Case No. 2566 (Islamic Republic of Iran)

46. The Committee last examined this case which was lodged in May 2007 and concerns allegations of continued repression of teacher unionists, at its October 2017 meeting [see 383rd Report, paras 50–56]. On that occasion, the Committee requested the Government to keep it updated on the status of Messrs Esmaeil Abdi, Abdolreza Ghanbari Chamazakti, Mohammad Reza Niknejad, Mehdi Bohlouli, Ramin Zandnia, Mahmoud Beheshti Langroudi, Ali Akbar Baghani and Ms Parvin Mohammadi, to provide detailed information on the outcome of the proceedings concerning them and to transmit a copy of the sentences issued and once again urged the Government to ensure that the charges against trade unionists relating to their legitimate trade union activities were immediately dropped, that their sentences were annulled and that the detained workers were released and fully compensated for any damages suffered as a result of the convictions. Noting with regret that the Government had not provided any information with regard to its previous recommendations concerning the confiscation of trade unionists' property during the raids on their residences, confiscation of travel documents, the increased prosecution, intimidation and pressure on unionists and violent dispersal of protests, the Committee once again requested the Government to take the recommended measures and to keep it informed of the developments. Finally, in light of the seriousness of the matters raised in this case and the trade union climate in the Islamic Republic of Iran, the Committee once again urged the Government to engage with the ILO in the near future so as to identify the steps necessary to create an environment where trade union rights can be freely exercised.
47. The Government provided information on this case in communications received on 3 February and 1 October 2018. Indicating that it has taken effective measures to settle issues under this case in accordance with the Committee's recommendations, the Government refers to several consultations and correspondences with the competent legal and judicial authorities and adds that the results of these efforts were promising and that the efforts will continue until all the cases are definitely resolved. The Government also reiterates that during the recent years it has taken effective and positive actions to improve the welfare of teachers and increase their pay and that teacher activists and associations have welcomed these measures. It provides a list of recent initiatives for solving the teachers' welfare problems. The list includes the opening of 14 special accommodation centres for incurable and hardly curable patients; the allocation of low-interest and interest-free loans; wage increase; enhancing health insurance and life insurance coverage and payment of special allowances in addition to the teachers' salary.
48. With regard to the right of assembly and demonstration, the Government indicates that workers' organizations enjoy the right to peaceful assembly within the framework of national applicable laws and regulations and adds that on 10 June 2018 the Council of Ministers issued a decision specifying the appropriate locations for public gatherings in Tehran and indicating that in cities other than the capital, the local security council is competent to determine one or two locations in accordance with the criteria defined in the decision of the Council of Ministers. These criteria include accessibility within the urban area, police capability to address disciplinary and security concerns, distance from locations

under special security protection, avoidance of disruption of public sector services to citizens and the daily business of other citizens and avoidance of traffic disruption. The Government further indicates that it has transmitted the Committee's recommendations to the judiciary headquarters for the protection of human rights and other competent authorities, emphasizing that participation of trade unions in peaceful demonstrations and legal activities is not prohibited.

49. With regard to the status of the detained teacher trade unionists the Government indicates that Mr Ali Akbar Baghani has completed his prison term and now lives in Tehran. Mr Rasoul Bodaghi was pardoned on 28 April 2016 and released from prison. Mr Abdolreza Ghanbari Chamazakti's motion for retrial was accepted on 16 March 2016 and he was released on bail.
50. With regard to Mr Ramin Zandnia and Ms Parvin Mohammadi the Government indicates that the couple was charged for membership in and propaganda in favour of the Kurdistan Free Life Party (Pjak), which the Government describes as a terrorist group. They were sentenced to five years' imprisonment for the first charge and one year for the second. However, in view of their clean criminal record these punishments were reduced to eight and four months respectively. The sentences were sent to the enforcement unit but the couple that was free on bail did not appear before the enforcement authorities. The Government indicates that the charges were not related with the trade union activities of Mr Zandnia and Ms Mohammadi. Therefore it requests the Committee to remove their names from the present case.
51. The Government indicates that as per a Tehran Court judgment dated 2 February 2016, Mr Esmaeil Abdi was sentenced to five years' imprisonment on charges of assembly and collusion against national security and propaganda against the State in accordance with sections 610, 500 and 134 of the Islamic Penal Code (IPC). Mr Abdi was incarcerated in Evin Prison on 9 November 2016 and his term ends on 22 December 2020. The Government adds that Mr Abdi has a criminal record and was previously sentenced in the Revolutionary Court to ten and five years' imprisonment on charges of propaganda against the State (section 500 of the IPC) and espionage by collecting news and information aimed at disturbing national security (section 505 of the IPC). The Government further indicates that Mr Abdi has benefits from family visits and furlough and has access to medical services inside and outside prison and can contact the outside world by phone. Therefore the Government requests the Committee to remove his name from the present case.
52. With regard to the cases of Messrs Mohammad Reza Niknejad and Mehdi Bohlouli, the Government indicates that the Tehran Court of Appeal confirmed the Revolutionary Court judgments in a ruling dated 2 September 2017. However, the enforcement of the punishment was suspended for three years and it will only be enforced if they commit any of the crimes enumerated in section 54 of the IPC during the suspension period; otherwise, their punishment will be expunged from criminal records. The Government adds that, as a complementary punishment in accordance with section 23(K) of the IPC, both unionists were also banned from membership in political or social parties and groups for two years. They were free at the time of Government communication.
53. With regard to the case of Mr Mahmoud Beheshti Langroudi, the Government indicates that he was sent on furlough several times and his unauthorized absence from prison exceeded 506 days. His prison sentence ran from 29 September 2015 to 23 May 2020. Following the resumption of his hunger strike, he was granted furlough, however, as he was absent from prison beyond the authorized period, he was sentenced to five more years of imprisonment on charges of assembly and collusion against national security which will run from 1 December 2020 to 23 September 2025. In its last communication the Government indicates

that Mr Langroudi's sentence runs until 2 November 2021. The Government further adds that Mr Beheshti Langroudi is entitled to 42 days of furlough, enjoys family visits, has access to medical services inside prison and has benefited from the services of hospitals and medical centres outside prison on five occasions. He also has access to telephone and freely contact the outside world.

54. With regard to Mr Peyman Nodinian, the Government indicates that he has no criminal record. However an inquiry concerning his status was conducted, the results of which will be provided when available.
55. With regard to its request for technical cooperation, the Government specifies that it seeks to further consider international labour standards in the adoption or amendment of national laws and regulations and to this end intends to organize a tripartite workshop on social dialogue with the participation of ILO experts, members of workers' and employers' organizations, representatives of chambers of commerce, trade associations and cooperatives, members of the social and workers' committees of the Iranian Parliament, academics, directors of labour relations, and experts on workers' and employers' organizations from directorates of the Ministry of cooperatives, labour and social welfare. The Government finally indicates that it is fully ready to support the promotion of the principles of freedom of association and strengthening social dialogue and reiterates that it welcomes any technical cooperation extended by the ILO.
56. *The Committee notes the information submitted by the Government on the latest decision of the Council of Ministers on the right of assembly and demonstration and the updates on the status of the members of teachers' union who were arrested, detained and prosecuted under various charges, mainly in relation to participation in public demonstrations. It notes in particular that Mr Bodaghi was pardoned and released from prison and Mr Baghani lives in Tehran once again since the end of his exile in Zabol; that Mr Ghanbari Chamazakti is free on bail pending retrial. The Committee notes however that the Government does not indicate when Mr Ghanbari Chamazakti's retrial is scheduled. The Committee also notes with regret that the Government does not provide any information on the content of the suspended sentence against Messrs Niknejad and Bohlouli.*
57. *The Committee is bound to note that although these trade unionists are free, the ban on any social or political activity is likely to obstruct their free exercise of trade union rights. The Committee therefore once again requests the Government to transmit copies of the judgments issued in respect of these trade unionists and to take all necessary measures to ensure that they may fully exercise their trade union rights in accordance with the principles of freedom of association.*
58. *The Committee notes with great concern that Messrs Esmail Abdi and Mahmoud Beheshti Langroudi were each twice sentenced to long imprisonment terms, on charges of assembly and collusion against national security, propaganda against the State and espionage. The Committee notes that once again, the Government does not provide any indication as to the specific actions that have given rise to the charges and sentences against Mr Abdi. With regard to Mr Beheshti Langroudi, the Committee notes with deep concern the Government's indication that charges of assembly and collusion against national security were brought against him, entailing an additional five years of imprisonment after he overstayed a leave of absence granted following a hunger strike. Recalling its long-standing observation in cases relating to the Islamic Republic of Iran, that sections 500 and 610 of the IPC seemed to be systematically used to punish trade unionists for engaging in legitimate trade union activities [see 382nd Report, Case No. 2508, para. 420], the Committee is bound to observe that once again the summary information provided by the Government does not allow it to conclude that the charges and convictions of the trade unionists are unrelated to their*

exercise of legitimate trade union activities. The Committee is also bound to note with concern the apparent arbitrary repetition of charges of assembly and collusion against national security merely for overstaying the leave of absence. Considering that the frequent and arbitrary condemnation of trade unionists to long imprisonment sentences under general charges of acting against national security and propaganda against the State has an adverse effect on the free exercise of trade union rights, the Committee once again urges the Government to bring its conclusions to the attention of the judicial authorities with a view to ensuring that trade unionists are not arbitrarily condemned under such vague charges for the peaceful exercise of trade union activities and to take all the measures in its power for the immediate release of those so detained.

59. *Further noting the Government's references to hunger strikes by detained unionists, the Committee urges the Government to investigate the claims made by these prisoners and to take any measures in its power to ensure that the judicial and prison authorities respect the rights of imprisoned trade unionists.*
60. *Recalling that Mr Peyman Nodinian was one of the trade unionists whose passports were seized in order to prevent them from attending international union meetings [see 380th Report, Case No. 2566, para. 50], the Committee notes with regret that once again, the Government has not provided any information with regard to its recommendations concerning the confiscation of trade unionists' travel documents, the confiscation of their property during the raids on their residences and the violent dispersal of protests [see 380th Report, paras 49–53]. It hence once again requests the Government to take the recommended measures and to keep it informed of the developments.*
61. *With regard to the Government's indications concerning technical cooperation, the Committee trusts that the required technical assistance will be provided and that it will assist the Government in taking the necessary steps to create an environment where trade union rights can be freely exercised and the issues raised in this case can be fully resolved.*

Case No. 3022 (Thailand)

62. The Committee last examined this case, which concerns allegations of anti-union dismissals, imposition of penalties for conducting an industrial action and a number of failures in the law to protect the rights of workers and trade unions, at its October 2016 meeting [see 380th Report, approved by the Governing Body at its 328th Session, paras 72–76]. On that occasion, the Committee once again urged the Government to take the necessary measures without delay to abrogate section 33 and amend section 77 of the 2000 State Enterprise Labour Relations Act B.E. 2543 (SELRA) so as to bring it fully into conformity with the principles of freedom of association. The Committee also requested the Government to keep it informed of the progress made as regards the negotiations between the State Railway of Thailand (SRT) and the State Railway Workers' Union (SRUT) over a possible request from the former to set aside the order for damages of 15 million Thai baht (THB) imposed against seven national union leaders in response to violations of strike prohibitions, which were themselves contrary to the principles of freedom of association.
63. In communications dated 17 December 2018 and 21 February 2019, two of the complainants – the International Trade Union Confederation (ITUC) and the International Transport Workers' Federation (ITF) – requested the urgent intervention of the ILO in respect of new developments in the present case and provided additional information in this regard. In particular, the complainants allege that on 3 November 2017, the Supreme Court upheld the Central Labour Court (CLC) ruling that had ordered the seven SRUT leaders to pay a fine of THB24 million (approximately US\$770,000) for their role in commencing the Occupational Health and Safety Initiative (the OSH Initiative). Since the workers did not

pay the fine, on 13 July 2018, the CLC issued a writ of execution ordering the seizure and confiscation of property of the seven union leaders. Pursuant to the writ, on 30 October 2018, the Legal Execution Official issued notices of wage garnishment and seizure of the claims of the union leaders on the SRUT Saving and Credit Cooperatives of Thailand, which could, according to the complainants, entail the bankruptcy of the union leaders concerned. For instance, after deductions for the fines and penalties payable to the Legal Execution Office and other expenses, including repayment of loans, Mr Kaewvarn's monthly take-home pay is now THB300 (approximately US\$9). The complainants also argue that it seems from the judgment of the Supreme Court that the Government had failed to transmit the Committee's conclusions to the Court. In addition, they inform that despite positive discussion with the Minister of Labour, concerns expressed over the difficulties faced by the seven trade union leaders and their families and his commitment to find possible solutions to the case as soon as possible, concrete steps are yet to be taken at the ministerial level to resolve the case. The complainants further allege that in January 2019, several SRUT leaders, including Mr Kaewvarn, were asked to appear before the Office of the National Anti-Corruption Commission (NACC) on charges of corruption for having abandoned their duty during the OSH Initiative in 2009. If found guilty, the trade unionists risk a jail term of one to ten years or a fine of THB2,000–20,000 (approximately US\$64–640), or both, which, according to the complainants, constitutes judicial harassment and a clear breach of the principles of freedom of association. Finally, the complainants ask the Committee to request the Government to call on the SRT to: withdraw the fines and reimburse the seven union leaders for monies deducted; ensure that the union leaders receive full compensation for lost wages and benefits which they have not received since their reinstatement; ensure that the NACC charges are dropped; and take the necessary measures to abrogate section 33 and amend section 77 of the SELRA to bring the Act fully into conformity with the principles of freedom of association.

64. The Government provides its observations on the Committee's recommendations in a communication dated 27 September 2017. With regard to the legislative issue, it informs that the Ministry of Labour proposed to delete sections 33 and 77 of the SELRA so as to allow state enterprise labour unions to have the right to strike in line with the procedures prescribed by the law and that the draft is in the process of being submitted to the Cabinet for approval.
65. The Government further provides brief information on the allegations of anti-union dismissals of SRUT members previously examined by the Committee. Concerning the six committee members of the SRUT Hat Yai branch, namely Wirun Sagaekhum, Prachaniwat Buasri, Sorawut Porthongkham, Thawatchai Bunwisut, Saroj Rakchan and Nittinai Chaiphum, who were dismissed in October 2009 for their involvement in the OSH Initiative, the Government indicates that, initially, the State Enterprise Labour Relations Committee (SELRC) ordered their reinstatement but the CLC revoked the order holding that the six dismissed defendants had intentionally committed a criminal offence against the employer and caused damage to the employer under section 37(1) and (2) of the SELRA. The Supreme Court upheld this decision and the case is now considered as final.
66. Regarding the seven SRUT leaders, namely Sawit Kaewvarn, Pinyo Rueanpetch, Banjong Boonnet, Thara Sawangtham, Liem Morkngan, Supichet Suwanchatree and Arun Deerakchat, who were dismissed in 2011 and ordered to pay a fine of THB15 million (approximately US\$500,000) in response to violations of strike prohibitions, the Government states that the Supreme Court confirmed the permission for their dismissal, as well as the order to pay a fine of THB15 million plus an annual interest for damages caused. The case is considered as final.

67. *The Committee takes note of the information provided by the Government and the complainants. In particular, the Committee welcomes the Government's indication that sections 33 and 77 of the SELRA will be deleted so as to allow state enterprise unions to conduct strikes in line with the procedures prescribed by the law and that the draft is in the process of being approved by the Cabinet. The Committee trusts that the draft law will be finalized without delay and will be in full conformity with the principles of freedom of association, in particular as regards penalties imposable for violations of the provisions on the right to strike. In this regard, the Committee wishes to recall to the Government 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. 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. Fines which are equivalent to a maximum amount of 500 or 1,000 minimum wages per day of abusive strike may have an intimidating effect on trade unions and inhibit their legitimate trade union activities, particularly where the cancellation of a fine of this kind is subject to the provision that no further strike considered as abusive is carried out [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 966 and 968]. The Committee requests the Government to keep it informed of any developments concerning the draft law and to provide the text once adopted.*
68. *Concerning the dismissal of 13 members of the SRUT, the Committee recalls that: (i) six committee members of the SRUT Hat Yai branch were dismissed in October 2009 for their participation in the OSH Initiative and although the national tripartite SELRC issued an order for their reinstatement, it was revoked by the CLC and an appeal was filed with the Supreme Court; and (ii) in 2011, after the CLC granted a permission to the employer to do so, seven SRUT leaders were dismissed for organizing the OSH Initiative and an appeal was filed with the Supreme Court. The Committee also recalls that, during its previous examination of the case in October 2016, it had noted with interest that all 13 trade union leaders had been reinstated to their original roles with full back pay and that the union was considering withdrawing its appeals to the Supreme Court. However, the Committee observes from the information provided by the Government that the Supreme Court confirmed the dismissals of the 13 union leaders. The Committee notes this development with regret, especially considering that the decision to dismiss the union officials had been taken as a consequence of their legitimate trade union activities and was wholly or partly based on section 33 of the SELRA prohibiting strikes in the public sector or on other provisions read in conjunction with the above section [see 372nd Report, paras 613–615]. In these circumstances, the Committee is obliged to recall that when trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against [see **Compilation**, op. cit., para. 958]. The Committee requests the Government and the complainants to provide information on any new developments concerning the 13 union members and, in particular, to indicate whether the concerned workers continue to be dismissed or whether any other arrangements in this regard were reached between the employer and the trade union (the complainants in their latest communications mention reinstatement and refer to a monthly take-home pay without, however, providing clear indication as to the actual status of the workers).*
69. *With regard to the sanctions imposed against the seven SRUT leaders in response to violations of strike prohibitions, the Committee recalls that at the time of its previous examination of the case in October 2016, negotiations were ongoing about a possible request from the employer to set aside the order for a fine of THB15 million. The Committee considers that this was an appropriate manner of handling the matter given that it had found that the legislative provisions invoked to sanction these workers were not in conformity with*

freedom of association principles and in light of the Government's indication that it is indeed taking steps to amend the legislation in this respect. Nevertheless, the Committee understands from the information provided that the negotiations were not fruitful and that the Supreme Court finally upheld the CLC ruling ordering the union leaders to pay a fine of THB15 million plus a 7.5 per cent annual interest accrued from the date of filing of the original claim by the employer (which amounts, according to the complainants, to THB24 million). The Committee notes with concern the complainants' allegation that the Committee's conclusions in this regard [see 372nd Report, para. 617 and 380th Report, para. 76] appear not to have been brought to the attention of the Supreme Court. It further notes with concern that a writ of execution was issued ordering the seizure and confiscation of property of the seven union leaders and that, pursuant to the writ, the Legal Execution Official issued notices of wage garnishment and seizure of the claims of the leaders on the SRUT Saving and Credit Cooperatives of Thailand, which could, according to the complainants, entail the bankruptcy of the union leaders concerned. Considering that the fines against the trade union leaders have been imposed in response to violations of strike prohibitions, which are themselves contrary to the principles of freedom of association, and that their excessive amount is likely to have an intimidating effect on the trade union and its leaders and inhibit their legitimate trade union activities [see 372nd Report, para. 617], the Committee wishes to recall that acts of confiscation and occupation of property of leaders of employers' or workers' organizations are contrary to freedom of association if they are taken as a consequence of their activities as representatives of such organizations [see **Compilation**, op. cit., para. 293]. Further noting with concern that in January 2019 several SRUT leaders were asked to appear before the Office of the National Anti-Corruption Commission on charges of corruption for having abandoned their duty during the OSH Initiative in 2009 and that, if found guilty, they risk imprisonment of one to ten years or a fine of THB2,000–20,000, or both, the Committee recalls in this regard that the criminal prosecution and conviction to imprisonment of trade union leaders by reason of their trade union activities are not conducive to a harmonious and stable industrial relations climate [see **Compilation**, op. cit., para. 155]. In light of the above, the Committee requests the Government to endeavour to bring the parties together with a view to resolving the pending issues in this case bearing in mind the interests of all parties concerned while ensuring a climate for the development of harmonious labour relations and full respect for freedom of association. The Committee requests the Government to keep it informed of any measures taken in this regard.

* * *

70. Finally, the Committee requests the governments and/or complainants concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
1787 (Colombia)	March 2010	November 2017
1865 (Republic of Korea)	March 2009	June 2017
2086 (Paraguay)	June 2002	March 2017
2362 (Colombia)	March 2010	November 2012
2512 (India)	November 2007	March 2018
2528 (Philippines)	June 2012	November 2015
2603 (Argentina)	November 2008	November 2012
2637 (Malaysia)	March 2009	November 2017
2652 (Philippines)	March 2010	November 2015
2694 (Mexico)	October 2013	October 2018

Case	Last examination on the merits	Last follow-up examination
2715 (Democratic Republic of the Congo)	November 2011	June 2014
2743 (Argentina)	March 2013	November 2015
2749 (France)	March 2014	–
2756 (Mali)	March 2011	June 2018
2797 (Democratic Republic of the Congo)	March 2014	–
2850 (Malaysia)	March 2012	June 2015
2871 (El Salvador)	June 2014	June 2015
2889 (Pakistan)	March 2016	–
2892 (Turkey)	March 2014	October 2015
2925 (Democratic Republic of the Congo)	March 2013	March 2014
2962 (India)	June 2015	June 2018
2977 (Jordan)	March 2013	November 2015
2988 (Qatar)	March 2014	June 2017
3003 (Canada)	March 2017	–
3011 (Turkey)	June 2014	November 2015
3019 (Paraguay)	March 2017	–
3036 (Bolivarian Republic of Venezuela)	November 2014	–
3041 (Cameroon)	November 2014	–
3046 (Argentina)	November 2015	–
3047 (Republic of Korea)	March 2017	–
3054 (El Salvador)	June 2015	–
3078 (Argentina)	March 2018	–
3083 (Argentina)	November 2015	–
3098 (Turkey)	June 2016	November 2017
3100 (India)	March 2016	–
3101 (Paraguay)	October 2015	June 2018
3107 (Canada)	March 2016	–
3110 (Paraguay)	June 2016	–
3123 (Paraguay)	June 2016	–
3126 (Malaysia)	November 2017	–
3127 (Paraguay)	June 2018	–
3137 (Colombia)	October 2018	–
3150 (Colombia)	October 2018	–
3159 (Philippines)	June 2017	–
3167 (El Salvador)	November 2017	–
3169 (Guinea)	June 2016	–
3182 (Romania)	November 2016	–
3194 (El Salvador)	June 2018	–
3202 (Liberia)	March 2018	–
3209 (Senegal)	March 2018	–

Case	Last examination on the merits	Last follow-up examination
3220 (Argentina)	March 2018	–
3227 (Republic of Korea)	March 2018	–
3229 (Argentina)	March 2018	–
3237 (Republic of Korea)	June 2018	–
3238 (Republic of Korea)	November 2017	–
3240 (Tunisia)	March 2018	–
3244 (Nepal)	March 2018	–
3248 (Argentina)	October 2018	–
3256 (El Salvador)	June 2018	–
3257 (Argentina)	October 2018	–
3268 (Honduras)	June 2018	–
3272 (Argentina)	October 2018	–
3274 (Canada)	October 2018	–
3276 (Cabo Verde)	March 2018	–
3283 (Kazakhstan)	June 2018	–
3289 (Pakistan)	June 2018	–

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

72. In addition, the Committee has received information concerning the follow-up of Cases Nos 2096 (Pakistan), 2153 (Algeria), 2341 and 2445 (Guatemala), 2434 (Colombia), 2488 (Philippines), 2533 (Peru), 2540 (Guatemala), 2583 and 2595 (Colombia), 2656 (Brazil), 2673 (Guatemala), 2679 (Mexico), 2684 (Ecuador), 2699 (Uruguay), 2700 (Guatemala), 2706 (Panama), 2708 (Guatemala), 2710 (Colombia), 2716 (Philippines), 2719 (Colombia), 2723 (Fiji), 2745 (Philippines), 2746 (Costa Rica), 2750 (France), 2751 (Panama), 2752 (Montenegro), 2753 (Djibouti), 2755 (Ecuador), 2758 (Russian Federation), 2763 (Bolivarian Republic of Venezuela), 2768 (Guatemala), 2789 (Turkey), 2793 (Colombia), 2807 (Islamic Republic of Iran), 2816 (Peru), 2840 (Guatemala), 2852 (Colombia), 2854 and 2856 (Peru), 2870 (Argentina), 2872 (Guatemala), 2882 (Bahrain), 2883 (Peru), 2896 (El Salvador), 2900 (Peru), 2916 (Nicaragua), 2924 (Colombia), 2934 (Peru), 2944 (Algeria), 2946 (Colombia), 2948 (Guatemala), 2952 (Lebanon), 2954 and 2960 (Colombia), 2966 (Peru), 2976 (Turkey), 2979 (Argentina), 2980 (El Salvador), 2982 (Peru), 2985 (El Salvador), 2987 (Argentina), 2994 (Tunisia), 2995 (Colombia), 2998 (Peru), 3006 (Bolivarian Republic of Venezuela), 3010 (Paraguay), 3016 (Bolivarian Republic of Venezuela), 3017 (Chile), 3020 (Colombia), 3021 (Turkey), 3024 (Morocco), 3026 (Peru), 3030 (Mali), 3032 (Honduras), 3033 (Peru), 3035 (Guatemala), 3039 (Denmark), 3040 (Guatemala), 3043 (Peru), 3055 (Panama), 3056 (Peru), 3059 (Bolivarian Republic of Venezuela), 3061 (Colombia), 3065, 3066 and 3069 (Peru), 3072 (Portugal), 3075 (Argentina), 3077 (Honduras), 3085 (Algeria), 3087 and 3090 (Colombia), 3093 (Spain), 3095 (Tunisia), 3096 (Peru), 3097 (Colombia), 3102 (Chile), 3103 (Colombia), 3104 (Algeria), 3114 (Colombia), 3121 (Cambodia), 3128 (Zimbabwe), 3131 (Colombia), 3140 (Montenegro), 3142 (Cameroon), 3146 (Paraguay), 3162 (Costa Rica), 3164 (Thailand), 3170 (Peru), 3171 (Myanmar), 3172 (Bolivarian Republic of Venezuela), 3177 (Nicaragua), 3180 (Thailand), 3188 (Guatemala), 3191 (Chile), 3196 (Thailand), 3212 and 3231 (Cameroon), 3236 (Philippines), 3287 (Honduras) and 3297 (Dominican Republic), which it will examine as swiftly as possible.

CASE NO. 2817

DEFINITIVE REPORT

**Complaint against the Government of Argentina
presented by
the Association of Management Staff of the Argentine Railways and
General Ports Administration (APDFA)**

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

73. The Committee last examined this case at its March 2013 meeting, when it presented an interim report to the Governing Body [see 367th Report, paras 163–180].
74. The Government sent its observations in communications dated 31 May 2013, 27 May 2015, 1 April and September 2016, and 5 February 2019.
75. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

76. The Committee recalls that at its March 2013 meeting, when it examined the complaints regarding the refusal of enterprises in the railways sector to engage in collective bargaining, as well as acts of anti-union harassment and persecution, it made the following recommendations [see 367th Report, para. 180]:
 - (a) The Committee firmly expects that the necessary steps will be taken so that the Ministry can, without delay, take an appropriate decision with regard to the requests for recognition of representativeness that it has received, and so that the representative workers’ organizations and companies in the railways sector can regulate conditions of employment by means of collective bargaining.
 - (b) The Committee firmly urges the Government to send its observations without delay on the following recommendations that it made at its meeting in November 2011: (a) the Committee requests the Government to keep it informed of the final outcome of the judicial proceedings with respect to unfair labour practices filed with regard to the alleged threats of dismissal of members of the APDFA and with respect to the sanction imposed on delegate Mr Darío Corbalán in the Ferrovías SA ¹ enterprise; and (b) the Committee regrets the Government’s considerable delay in responding and urges it to carry out an

¹ Hereinafter enterprise “A”.

investigation into the following allegations of anti-union discrimination: (1) pressure on members to leave the union; refusal to recognize the election of delegates and to engage in dialogue with elected delegates; refusal to provide a notice board; prohibition of trade union assemblies and denial of trade union leave at Ferrosur SA; ² (2) denial of the legality of the trade union election procedure and refusal to recognize elected delegates at América Latina Logística Central ³ and at América Latina Logística Mesopotámica ⁴; and (3) threats of dismissal of members at Ferrovías SA. The Committee requests the Government to inform it of the results of the investigation.

B. The Government's reply

77. In its communication of 10 June 2013, and in respect of Committee recommendation (a) (concerning the Ministry making decisions with regard to the requests for recognition of representativeness made by various representative workers' organizations and enterprises in the railways sector to enable them to regulate conditions of employment by means of collective bargaining), the Government stated that the Ministry of Labour's National Directorate of Trade Union Associations made the relevant decisions regarding the requests for recognition of trade union representativeness in decisions dated 4 April 2013. The Government attached a copy of the decisions, in which the trade union representativeness of the senior staff officers in various enterprises, including enterprises "A" and "C", is defined. The Government also attached a copy of a decision dated 12 November 2012 in which the request for the recognition of the trade union representativeness of enterprise "B" was rejected because the enterprise's request involved the reclassification of workers, a matter that it was not for the National Directorate of Trade Union Associations to resolve.
78. In its communication of 27 May 2015 and in respect of Committee recommendation (a) (specifically the possibility for representative workers' organizations and companies in the railways sector to regulate conditions of employment by means of collective bargaining), the Government stated that the Association of Management Staff of the Argentine Railways and General Ports Administration (APDFA) (the complainant organization) had concluded a wage agreement with enterprise (A), which was approved by a decision dated 6 March 2015, and also four other agreements with the same enterprise, which were approved in 2014 and registered as Nos 1835/14, 1836/14, 1837/14 and 1838/14. The Government further states that the APDFA also negotiated agreements with enterprises "C" and "D", which were approved by decision No. 939/12.
79. In its communications dated 1 April and September 2016, the Government stated that while it had been able to locate two judicial proceedings in which the APDFA had been involved, they had been shelved owing to lack of movement since 2008 and 2010, and consequently it had requested that they be reactivated.
80. In its communication dated 4 February 2019, the Government states that the National Labour Court ruled against enterprise "D", overturning the dismissal, ordering the reinstatement of the trade union delegate Mr Ramón Darío Alcaraz, and ordering the enterprise to pay the outstanding wages.

² Hereinafter enterprise "B".

³ Hereinafter enterprise "C".

⁴ Hereinafter enterprise "D".

C. The Committee's conclusions

81. *The Committee recalls that the allegations that were still pending when the Committee examined this case at its meeting in March 2013 related to the decisions to be made by the Ministry in respect of the requests for recognition of representativeness made by various workers' organizations to enable them to regulate terms and conditions of employment by means of collective agreements (recommendation (a)) as well as to acts of harassment and persecution of the members and delegates of the Association of Management Staff of the Argentine Railways and General Ports Administration (APDFA) (the complainant organization) (recommendation (b)).*
82. *The Committee takes note of the various communications sent by the Government relating to recommendation (a) from the previous examination of the case and in respect of which the Government states that: (i) in decisions dated 4 April 2013, the Ministry of Labour's National Directorate of Trade Union Associations made the relevant decisions regarding the requests for recognition of trade union representativeness (the Government attached a copy of the decisions); (ii) the APDFA concluded agreements with three enterprises that were approved by way of ministerial decisions dated 2014 and 2015 (the Government attached copies of the decisions); (iii) while it had been able to locate two judicial proceedings in which the APDFA was involved, they had been shelved owing to lack of movement since 2008 and 2010, and consequently it had requested that they be reactivated; and (iv) the National Labour Court ruled against enterprise "D", overturning the dismissal, ordering the reinstatement of the trade union delegate Mr Ramón Darío Alcaraz, and ordering the enterprise to pay the outstanding wages (which the Government had already reported on and which the Committee had taken note of in its March 2013 report).*
83. *While taking due note of this information, the Committee regrets that the Government has not supplied information regarding recommendation (b) from the previous examination of the case, relating to pressure on members to leave the union, refusal to recognize the election of delegates, threats of dismissal and other anti-union acts. The Committee trusts that the Government will review with the APDFA any matter that may have remained pending in respect of the alleged acts of anti-union discrimination dating back to 2010.*

The Committee's recommendation

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

The Committee trusts that the Government will review with the APDFA any matter that may have remained pending in respect of the alleged acts of anti-union discrimination dating back to 2010.

CASE NO. 3120

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

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

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

***Allegations: restrictions on collective bargaining
and strikes in the province of Mendoza, as well
as discriminatory practices in the health sector***

85. The complaint is contained in a communication from the Mendoza Association of Health Professionals (AMPROS) and the Federation of Health Professionals of the Argentine Republic (FESPROSA) dated 23 February 2015. The complainant organizations provide additional information in communications of June 2015, April and June 2016, and June 2018.
86. The Government sent its observations in communications of October 2015, October 2016 and February 2019.
87. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

88. In a communication dated 23 February 2015, the complainant organizations indicate that, in May 2007, a collective labour agreement was concluded with the government of Mendoza province, which covered all health professionals in the province for whom career-specific legislation was in place. The collective agreement was approved by Decree No. 1630/07. The decree and the collective agreement were then ratified by Act No. 7759, published on 5 October 2007. At the same time, the Regularization Act (No. 7757) was adopted, which provided for the abolition of ad hoc contracts and contracts for the provision of services, with a view to ending precarious employment in the sector. The complainants emphasize that the provisions of the collective agreement recognized the genuine and subjective right of health professionals to be paid in accordance with the established wage structure, including for overtime worked.
89. The complainant organizations allege that, after many years under this system, the government of Mendoza province, supported by its political majority, attempted to undo the abovementioned social progress with a series of regressive regulations, including with regard to the right to strike, removing the possibility for a group of health professionals to jointly negotiate their pay conditions through their trade union representatives. They refer in this respect to: (i) section 126 of Act No. 8701 of 11 October 2014, and its implications for remuneration and the maximum number of overtime hours in emergency activities; (ii) Act No. 8727 of 27 October 2014, which establishes limitations on pay with reference to the statutory remuneration for the post of governor of the province (Wage Ceiling Act) and, according to the complainants, represents a risk of pay cuts with clear discrimination against the most specialized and senior professionals, or those who cover inhospitable areas; and

(iii) Ministry of Health Decision No. 3448 of December 2014, which calls into question the recruitment system set out in the collective agreement and ratified by Act No. 7759.

90. According to the complainants, measures were adopted unilaterally without the necessary negotiation between the parties concerned or even information being made available. They also allege that the government of the province, alongside this violation of collective bargaining, took repressive measures against the trade unions and made personal attacks on union leaders.
91. The complainant organizations also allege that the Labour Reorganization Act (No. 8729 of 12 November 2014) is having an impact on several aspects of freedom of association, in particular: (i) the issue of the classification of direct action measures by the Under-Secretariat of Labour and Employment: under section 79, “the Under-Secretariat of Labour and Employment shall be responsible for declaring whether a direct action measure is illegal. In the event that essential services are affected, the prior decision of the Guarantees Commission is required”; and (ii) the determination of a minimum service in essential services (section 69). This section provides for a hearing to be held before the implementing authority so that the parties can agree on the minimum service to be maintained during the dispute, the arrangements for its implementation and the staff to be assigned to provide it. The complainants indicate, however, that under section 71 of the Act, if the parties do not reach an agreement within the specified time frame, or if the minimum service is insufficient, the implementing authority will refer the case to the Guarantees Commission, which will determine the minimum service. They therefore allege that this provision, in the absence of specified time frames, represents an obstacle to strike action, as it depends solely on the will of a body which is itself answerable to the Government, thus transforming a simple and swift mandatory conciliation procedure into a unending, tortuous process, with the aim of rendering the right to strike indefinitely conditional in the face of any dissent, which is not in conformity with the Labour Regulations Act (No. 25877).
92. Lastly, the complainant organizations allege that the disregard for collective bargaining was accompanied by attacks on trade union representatives, beginning with the calling into question of trade union leave, which had been established for many years through collective agreements. They allege that the principal rationale used by the provincial government for this practice was that the governor of the province had not approved the agreements. They also report attempts to force union leaders to retire and offensive comments made by the Minister of Health regarding the health sector trade unions.
93. In their communication of June 2015, the complainant organizations report that the implementation of Act No. 8727 has led to significant pay cuts for the most qualified and senior workers in the public administration, who also have the longest working hours. They indicate that, in May 2015, on account of the marked increase in inflation in the country, through joint negotiation in the health sector a pay increase of 35 per cent was agreed upon for all workers to offset the loss of purchasing power. However, this increase was not granted to all workers, as the Wage Ceiling Act was implemented, leading to a pay cut of up to 70 per cent for the most qualified workers who earned more than the governor of the province.
94. In their communication of April 2016, the complainant organizations allege a further violation of the right to collective bargaining through the adoption of Act No. 8834, sections 5 and 6 of which, like the provisions of section 126 of Act No. 8701, allow the executive authority to render workers’ employment situation more precarious, leading to a decline in their conditions of work. They reiterate that professional workers are not only excluded from the overtime system, but there are also no statutory limits on their standard working hours. The complainants also allege that the power granted to the Ministry of Health allows it to

transfer health professionals without any restrictions. Furthermore, they allege that collective bargaining is violated by Decree No. 101/2016, which provides for the suspension of the productivity bonus for all providers in the healthcare and assistance network of Mendoza province for 180 days, renewable for the same period or, where applicable, as long as the causes and effects from which it arose persist, in violation of higher-ranking legislation, namely Act No. 7759 of December 2007.

95. In their communication of June 2016, the complainant organizations allege personal attacks on trade union leaders, with attempted dismissals, huge deductions and the abolition of agreements, all aimed at eliminating representation in their workplaces, and draw particular attention to the harassment and discrimination suffered by the AMPROS trade union leader, Ms Gladys Velásquez. They explain that, in the context of pay negotiations between the workers and the employers in 2014, there were demonstrations, assemblies and protests in workplaces and in the city in order to raise public awareness. The provincial government then decided to invoke criminal law and, in response to a demonstration by health workers on 14 March 2014 as part of their call for a wage increase, the judicial authority declared that the demonstrators were violating the Penal Code and charged them under section 194 thereof, which provides as follows: “Anyone who, albeit without endangering the public, impedes, obstructs or hinders the normal operation of land, water or air transport, or of public communication, water, electricity or fuel services, shall be liable to imprisonment of three months to two years.” The provincial judiciary heard that the actions concerned had led to streets being blocked and so they initiated investigations which gave rise to judicial proceedings (case No. FMZ 30096/2015) for the alleged offence of obstructing public services. The complainants report that although the trial began in the ordinary (provincial) courts, it was then transferred to the federal courts, where it remains at present. They also allege that this provision of the Penal Code is being used in a discriminatory manner by the authorities, which is testimony to its sole purpose of social control.
96. In its communication of June 2018, AMPROS requested urgent intervention, indicating that the criminal proceedings against the union leader Ms Gladys Velásquez had not made any progress and that this constituted a permanent threat from the public authorities.

B. The Government’s reply

97. In its communication of October 2015, the Government reported that the present complaint was the subject of judicial proceedings brought before the Supreme Court of Justice of Mendoza by the complainant union. In its communication of October 2016, the Government indicated that it had issued a protective measure preventing the province from implementing Act No. 8727 and that the case concerning Ms Gladys Velásquez for the alleged offence of obstruction of public services was, at that time, before the federal courts.
98. In a communication of February 2019, the Government refers to the decision of the Supreme Court of Justice of Mendoza of 30 November 2015 (case No. 111683), filed under: *AMPROS et al v. Government of the Province of Mendoza re administrative proceedings*, indicating that the filed administrative action was rejected. It also indicates that the following case is currently before the courts:

Humberto Notti Paediatric Hospital v. Gladys Irene Velásquez re lifting of trade union immunity, before the Sixth Labour Division of the First District Court of Mendoza (case No. 154891), proceedings initiated to remove the respondent’s trade union immunity (section 52 of the Trade Unions Act (No. 23551)) to enable receipt of retirement benefits. The Government indicates that, on 24 August 2017, the Sixth Labour Division of the province of Mendoza allowed the lifting of trade union immunity for the purpose of lawfully ordering the union leader, who at that time was 66 years of age and had 30 years of service at the hospital, to initiate the relevant procedures for receipt of retirement

benefits. The Government indicates that the division ruling (in cases *Humberto Notti Paediatric Hospital v. Gladys Irene Velásquez re lifting of trade union immunity* and *Extraordinary plea of unconstitutionality/appeal for judicial review*) was the subject of an extraordinary appeal and, on 10 April 2018, the Supreme Court of the province rejected the appeal. It also notes that, although the plaintiff was elected to full union office and was granted paid trade union leave for a term of four years, by the time the ruling was issued and in view of the time which had elapsed since the original claim, the claim had ceased to have any practical validity.

99. In another communication of February 2019 regarding the alleged offence of obstruction of public services, the Government indicates that in September 2018 the federal courts (Federal Court No. 1 of Mendoza) declared the extinction of the criminal proceedings by prescription.

C. The Committee's conclusions

100. *The Committee notes that the allegations in the present case refer to: (i) the calling into question of collective bargaining and collective agreements in the health sector in the province of Mendoza through the unilateral adoption of new regulations as from 2014; (ii) the calling into question of trade union rights through these regulations, particularly with regard to the classification of direct action measures (section 79 of Act No. 8729 of November 2014) and the definition of minimum services (section 69 of the Act); and (iii) discriminatory practices against union representatives.*
101. *The Committee notes that the complainant organizations allege that the regulations adopted in 2014 in the province of Mendoza endanger the favourable collective agreements that have been in force for some time in relation to wage levels, working time and the staff recruitment system. In particular, it notes the unions' indications regarding: (i) section 126 of Act No. 8701 of 11 October 2014, and its implications for remuneration and the maximum number of overtime hours in emergency activities; (ii) Act No. 8727 of 27 October 2014, which provides for limits on pay with reference to the statutory remuneration for the post of governor of the province (Wage Ceiling Act) and, according to the complainants, represents a risk of wage cuts with clear discrimination against the most specialized and senior professionals, or those who cover inhospitable areas; and (iii) Ministry of Health Decision No. 3448 of December 2014, which modifies the recruitment system provided for in the collective agreement and ratified by Act No. 7759. It notes that the Government provides information regarding Act No. 8727, which is currently the subject of judicial proceedings brought by the complainant union before the Supreme Court of Justice of Mendoza. The Committee further welcomes the efforts in the meantime to issue a protective measure preventing application of Act No. 8727.*
102. *The Committee recalls that it is not competent to give opinions on the above-mentioned matters which were amended by legislation in 2014. However, it considers that legislation that modifies collective agreements that have been in force for some time and tends to restrict the scope of collective bargaining runs counter to voluntary collective negotiation, since it is for the parties concerned to decide on the subjects for negotiation. In this respect it recalls that, with regard to allegations concerning the refusal to bargain collectively on certain matters in the public sector, the Committee previously recalled the view of the Fact-Finding and Conciliation Commission on Freedom of Association that "there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation". It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 1289 and 1300]. The Committee requests the*

Government to keep it informed of the outcome of the plea of unconstitutionality (Act No. 8727) pending before the Supreme Court of Justice of Mendoza and of any measure that may be adopted pursuant to it.

103. *With regard to the Labour Reorganization Act (No. 8729 of 12 November 2014), the Committee notes the complainant organizations' allegations that, under section 71 of this Act, if the parties do not reach an agreement on establishing a minimum service in essential services within the specified time frame, or if the minimum service is insufficient, the implementing authority will refer the case to the Guarantees Commission, which will determine the minimum service. According to the complainants, this would represent an obstacle to strike action, as it depends solely on the will of a body which is itself answerable to the Government.*
104. *The Committee notes in regard to the health sector that the hospital sector may be considered to be an essential service [see **Compilation**, op. cit., para. 840], in which strikes may be restricted. As to the allegations concerning the competent authority to determine the minimum services and its impact on their trade union rights, the Committee wishes to recall that the workers who do not perform duties in essential services in the strict sense of the term should be able to participate in the definition of minimum services and any disagreement between the parties on this matter should be resolved by an independent body.*
105. *Regarding the classification of direct action measures (section 79 of Act No. 8729), the Committee notes that this section provides that "the Under-Secretariat of Labour and Employment shall be responsible for declaring whether a direct action measure is illegal. In the event that essential services are affected, the prior decision of the Guarantees Commission is required". The Committee wishes to recall in this respect that responsibility for declaring a strike illegal should not lie with the government, but with an independent and impartial body [see **Compilation**, op. cit., para. 909]. In view of the above, the Committee requests the Government to ensure that the provincial government takes the necessary measures, including of legislative nature, to ensure that responsibility for declaring a direct action illegal does not lie with the provincial government but with an independent and impartial body.*
106. *As regards the allegations of anti-union discrimination and in particular the pressure exerted on the AMPROS trade union leader Ms Gladys Velásquez, the Committee notes the ruling of 24 August 2017 of the Sixth Labour Division of the province of Mendoza, which allowed the lifting of trade union immunity in order to oblige the union leader (who at that time was 66 years of age and had 30 years of service) to initiate the relevant procedures for receipt of retirement benefits. Regarding the allegations of harassment and discrimination suffered by the union leader, who was prosecuted by the federal authorities for having participated in a social protest in 2014, the Committee notes the Government's indication in its communication of February 2019 that in September 2018 the federal courts (Federal Court No. 1 of Mendoza) declared the extinction of the criminal proceedings by prescription. While noting that for this reason there are no longer any charges against the trade union leader, the Committee trusts that this provision of the Penal Code will not be used in a manner as to stigmatize trade union leaders legitimately exercising their functions.*
107. *With regard to the alleged calling into question of trade union leave which had been established through collective agreements for many years, the Committee notes the complainants' indications that the principal rationale used by the provincial government for this practice was that the governor of the province had not approved the agreements. In the absence of further details from the Government, the Committee considers that collective agreements enter into force at the time of signature, while the requirement for their registration by the competent authorities is valid when they affect the interests of third parties.*

The Committee's recommendations

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

- (a) The Committee requests the Government to keep it informed of the outcome of the plea of unconstitutionality (Act No. 8727) pending before the Supreme Court of Justice of Mendoza and of any measure that may be adopted pursuant to it.*
- (b) The Committee requests the Government to ensure that the provincial government takes the necessary measures, including the adoption of legislative proposals, to ensure that responsibility for declaring a direct action illegal does not lie with the provincial government but with an independent and impartial body.*
- (c) The Committee encourages the competent authorities to seek deeper social dialogue with the associations of health professionals in the interest of promoting harmonious collective relations.*

CASE NO. 3278

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

**Complaint against the Government of Australia
presented by
the Australian Council of Trade Unions (ACTU)
supported by
Building and Wood Workers' International (BWI)**

Allegations: The complainant organization alleges that the legislative reform in the building and construction industry enacted by the Government in 2016 violates the freedom of association and collective bargaining rights of workers and unions in the sector

- 109.** The complaint is contained in a communication dated 28 April 2017, from the Australian Council of Trade Unions (ACTU). In a communication dated 30 May 2017, Building and Wood Workers' International (BWI) associated itself to the complaint.
- 110.** The Government submitted its observations in communications dated 18 May and 5 October 2018, and 3 February 2019.
- 111.** Australia 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

- 112.** In its communication dated 28 April 2017, ACTU indicates that the complaint concerns changes introduced by the Government in 2016 to the industrial laws applying to the Australian construction industry. The complainant refers in particular to the Building and Construction Industry (Improving Productivity) Act 2016 (hereafter the BCIIIP Act), which came into effect on 1 December 2016, and, the Code for the Tendering and Performance of Building Work 2016 (hereafter the Code 2016) which the Minister for Small and Family Business, the Workplace and Deregulation (hereafter the Minister), issued immediately following the passage of the BCIIIP Act and which came into effect on 2 December 2016. The complainant alleges that the Federal Government of Australia has promoted the BCIIIP Act and the Code 2016 as a “package” of industrial “reforms” necessary to improve the productivity and efficiency of the Australian construction industry, while a very recent report concluded that the industry was already highly productive by international standards.
- 113.** The complainant indicates that among other things, the BCIIIP re-establishes a statutory agency known as the Australian Building and Construction Commissioner (hereafter ABCC), that was first created through the enactment of the Building and Construction Industry Improvement Act 2005 (BCII Act). The complainant recalls that the first ABCC legislation was the object of the Committee on the Freedom of Association (CFA), Case No. 2326 and that for several years afterwards the Committee of Experts on the Application of Conventions and Recommendations (CEACR) made numerous adverse findings in relation to laws pertaining to ABCC and commented on their inconsistency with Australia's obligations under ILO fundamental Conventions. The complainant alleges that since the establishment of the original ABCC in 2005, the focus of its operations has been on investigating and prosecuting trade unions, union officials and individual workers for breaches of industrial laws and it has played no real role in the legal enforcement of the conditions of work for workers. The ACTU further recalls that following the election of a new Government in 2007, the BCII Act was eventually amended and renamed the Fair Work (Building Industry) Act 2012. Under the new Act the former ABCC was renamed the Fair Work Building Industry Inspectorate, the separate legal restrictions and higher penalties for unions and workers in the construction industry were removed and various statutory safeguards were introduced to ameliorate the most oppressive aspects of the coercive investigatory powers held by the new Inspectorate. The Federal Government procurement rules were also codified for the first time as a legislative instrument in the Building Code 2013. The complainant alleges, however, that since the re-election of the Liberal-National Party Coalition Government in 2013, the Government campaigned vigorously for the passage of legislation in similar terms to the 2005 BCII Act, which resulted in the adoption of the BCIIIP Act and the Code 2016. The complainant adds that the BCIIIP Act significantly increases monetary penalties for those organizing and engaging in what is termed “unlawful industrial action” and provides the legal basis for the rules relating to the procurement of goods and services in the construction industry by the Federal Government.
- 114.** As regards the allegations that the BCIIIP Act significantly increases the maximum penalties applicable to unlawful industrial action, coercion and the new restriction on “unlawful picketing”, the complainant specifies that Grade A civil penalties, per contravention, have been increased to 180,000 Australian dollars (AUD) for trade unions and AUD36,000 for individuals, while the maximum penalties applying in other industries to industrial action taken within the nominal term of a collective agreement under the Fair Work Act (FWA) 2009 is AUD10,800. The ACTU adds that the only form of industrial action that is exempt from the reach of BCIIIP Act penalties is “protected action” in pursuit of a collective bargaining agreement. However, in the construction industry, the scope of what constitutes “protected action” is further reduced by the introduction of the concept of “protected persons” in section 8 of the BCIIIP Act.

- 115.** Furthermore, the complainant alleges that the BCIIIP Act introduces a prohibition, unique to the construction industry, of “unlawful picketing”. An unlawful picket includes any industrially motivated action that directly restricts persons from accessing or leaving a building site, or has that purpose and the mere organizing of such action is also deemed to be unlawful, even before persons physically assemble. According to the complainant, it follows from the provisions of the law that for picketing to be unlawful, it does not actually have to restrict or prevent in any material way access or egress to a building site. Conduct such as peaceful assemblies and the conveying of information to persons entering or leaving a building site would fall under these provisions. Even the Statement of Compatibility with Human Rights which was annexed to the Explanatory Memorandum for the Bill conceded that “the right to freedom of peaceful assembly is limited by the prohibition on unlawful picketing that is contained in section 47 of the Bill”.
- 116.** The complainant further indicates that Chapter 6, Part 2, Division 1 of the BCIIIP Act introduces another range of civil penalty measures that largely apply to the act of coercing a party to obtain a particular industrial outcome. It alleges that the relevant sections replicate those of the FWA 2009 that apply to all industries including construction and the only effect of their reproduction in the BCIIIP Act is to apply higher penalties to the construction industry parties than those applicable elsewhere for the same conduct. The complainant considers this difference in penalties to be inconsistent with the most basic principle of equality before the law.
- 117.** The last point raised by the complainant with regard to the BCIIIP Act concerns the coercive investigative powers for the new ABCC set out in Chapter 7, Part 2 of the Act. The complainant alleges that these powers enable the ABCC to issue notices that compel a recipient to attend and answer questions relating to an investigation under oath and/or provide information or documents. The complainant alleges that section 102 of the BCIIIP Act expressly overrides the common law privilege against self-incrimination in this context, and section 62 makes the failure to comply with ABCC notices a criminal offence attracting a penalty for individuals of up to six months imprisonment and/or a fine of AUD5,400. Finally section 63 repeals an earlier provision that allowed an attendee to claim expenses for legal representation during a compulsory interrogation.
- 118.** With regard to Code 2016, the complainant explains that this piece of legislation sets out the requirements that must be met by contractors in order to be eligible to tender for and be awarded construction work on projects funded by the Federal Government. The complainant alleges that the Code 2016 imposes restrictions on the content of collective bargaining agreements that would apply in addition to the limitations in the FWA 2009, and that severely impede the capacity of workers to negotiate terms favourable to them in enterprise bargaining agreements. Section 11 of the Code 2016 lists a range of clauses that constitute prohibited agreement content. The complainant states that the most far-reaching of these restrictions is contained in section 11(1)(a) which prohibits any clause in an agreement which imposes or purports to impose limits on the right of a code covered entity (employer) “to manage its business or to improve productivity”. More specifically, the complainant refers to the examples of prohibited clauses mentioned in its submission dated 19 February 2016 to the Senate Education and Employment Committee that it has annexed to the complaint. These examples include clauses that require that employees of businesses to whom work is contracted out to be paid no less than the rates and conditions of permanent employees; clauses that limit the “cashing-out” of entitlements through the use of “rolled-up” rates of pay, and clauses that try to overcome the prohibitions in section 11 by rendering the offending clauses inoperative.
- 119.** The ACTU further refers to a number of restrictions imposed by the Code 2016 with regard to the content of collective agreements that it alleges are inconsistent with the right to

freedom of association and the right to organize as guaranteed in Convention No. 87. In this regard, the complainant indicates that clauses that allow union representatives to address employees about the benefits of union membership or to promote the benefits of becoming a union member are prohibited as inconsistent with the Code 2016. Furthermore, section 11(3)(k) of the Code does not permit clauses that give trade unions the capacity to monitor collective agreements, for example, for compliance purposes. Finally section 11(3)(d) and (e) prohibit clauses that require an employer to consult with a trade union representative as to the source, number or type of employees to be engaged or the engagement of subcontractors. The complainant indicates that according to section 22 of the Code 2016, the arbiter of whether agreement clauses are inconsistent with the law is the ABCC, a body that, the complainant alleges, has a demonstrable record of hostility to workers' interests.

- 120.** The complainant further alleges that the Code 2016 limits the level at which collective bargaining can be undertaken as section 10 prohibits bargaining for, making or implementing unregistered written agreements which can include site or project agreements, but explicitly excludes common law individual contracts from this prohibition. The complainant alleges that through this provision, the Code 2016 promotes individual contracts but prevents bargaining occurring on a collective basis at the level determined by the parties themselves and considers that these measures are at odds with the obligation of the Government to promote voluntary bargaining in accordance with ILO Convention No. 98.
- 121.** The ACTU further alleges that the Code 2016 includes provisions that inhibit freedom of association and unduly interfere with the right of unions to organize and effectively represent the industrial interests of their members. In this regard, the complainant refers to section 13(2)(p) of the Code according to which workers that are delegates or representatives of a trade union are not permitted to undertake or administer site induction processes. In the same line, it further refers to section 14 of the Code that restricts the workers' access to union representation as its application entails the inability of unions to enter workplaces at the invitation of the employer.

B. The Government's reply

- 122.** In its communication dated 18 May 2018, the Government provides detailed replies to the complainants' allegations. The Government emphasizes that it takes Australia's international obligations very seriously and the right to freedom of association and collective bargaining were considered in drafting the BCIIP Act and the Code 2016. It further affirms that three Royal Commissions and numerous Federal Court decisions against the building and construction union support the need for specific regulation of the building and construction industry, including the need for higher penalties for breaches of workplace relations laws as well as a dedicated workplace relations regulator. Compelling evidence of the need for reform was found in the final reports of both the Cole Royal Commission (2003) and the Heydon Royal Commission (2015) where criminal, unlawful conduct including breaches of the relevant workplace relations and work health and safety legislation, corrupt payments, physical and verbal violence, threats, intimidation and abuse of the right of entry permits were disclosed. The Government cites several cases concerning the Construction, Forestry, Mining and Energy Union (CFMEU) where courts found evidence of disregard for the law within the industry and adds that employers have also been found to have behaved unlawfully, including by forcing subcontractors or individual employees to engage with unions in order to gain employment. It further indicates that cartel arrangements exist between large construction companies and construction unions, which have sought to suppress smaller construction firms and exclude them from major projects, unless they submit to the demands of the cartel. The Government considers that given that the industry comprises over 300,000 small businesses, such behaviour is particularly concerning and affirms that it enacted the BCIIP Act to address persistent unlawful behaviour.

- 123.** With regard to the process of adoption of the new legislative texts, the Government indicates that it consulted employers' and workers' organizations of the industry on the drafts and the feedback from these consultations resulted in amendments to the Code 2016. The Government indicates that the BCIIP Act aims at providing an improved workplace relations framework for building work in order to ensure that this work is carried out fairly, efficiently and productively, without distinction between the interests of building industry participants, and for the benefit of the Australian economy as a whole. It recalls that this industry is Australia's second largest and accounts for 8.1 per cent of gross domestic product and around 9 per cent of employment. Regarding the Code 2016, the Government indicates that it sets out the expected standards of conduct for all building contractors and industry participants that undertake Commonwealth funded building work. The Code requires contractors to comply with the law, including workplace relations laws dealing with pay and entitlements, security of payments and work health and safety.
- 124.** The Government provides a description of the role of the ABCC as the building and construction industry specific regulator. It refutes the complainant's allegation that the ABCC focuses on investigating and prosecuting unions, union officials, and individual workers. The Government indicates in this regard that since the re-establishment of the ABCC in December 2016, until the end of February 2018, there have been 111 complaints made against employers, 76 of which proceeded to investigation and 132 complaints against unions or union representatives, 63 of which proceeded to investigation. The ABCC forms part of a system of labour inspection and is statutorily required to perform its functions without distinction between the interests of unions, employers, or contractors. The Fair Work Ombudsman, Australia's primary workplace regulator for all sectors and industries, addresses initial enquiries from workers in the building and construction industry in relation to wages and entitlements, while matters in the industry that require investigation or other further action are referred to the ABCC. The Government refers to section 16 of the BCIIP Act concerning the functions of the ABCC. Section 16(3) requires the ABCC to perform his or her functions in relation to relevant provisions of the FWA, including wages and entitlements, right of entry, industrial action and general protections provisions. The Government further emphasizes that the BCIIP requires the ABCC not to make distinctions between the interests of building industry participants, and to ensure that the policies and procedures adopted and the resources allocated for protecting and enforcing rights and obligations arising under relevant laws are applied in a reasonable and proportionate manner. The Government indicates that the activities of the ABCC include responding to all inquiries and complaints related to wage and entitlement issues, as well as proactive compliance activities such as audits. Both complaints and audits may entail investigations. According to the Government, the fall in industrial disputes in building and construction industry throughout its time of operation (2005–12 and 2016–18) is evidence of the ABCC's effectiveness. To the contrary, when the ABCC was abolished and replaced by Fair Work Building and Construction - June 2012 to December 2016 - disputes multiplied and returned to five times the average compared to all industries.
- 125.** With regard to the ABCC's "compulsory examination powers" – called "coercive investigative powers" in the complaint – the Government indicates that the Cole Royal Commission (2003) recommended that such powers be granted to the industry regulator, as without them, the industry's well-documented culture of intimidation would prevent reporting of unlawful behaviour. The powers are necessary to ensure compliance with Australia's workplace relations laws and apply equally to employers and unions. The Government indicates that in practice, they have been overwhelmingly used to deal with employers and provides the numbers of "compulsory examinations" conducted each year between 2014 and 2017 in support of this statement. The Government further states that in line with the precept embodied in Article 8 of Convention No. 87, the ABCC enforces the BCIIP Act. It adds that in its view, the obligation of non-interference contained in Article 2

of Convention No. 98 does not preclude state parties from establishing investigative bodies with coercive powers for the purposes of regulating and investigating the conduct of their workers' and employers' organizations. The Government further describes the process of issuing examination notices. The ABCC may apply to a presidential member of the Administrative Appeals Tribunal – who is nominated by the Minister – and request the issuance of an examination notice if he/she has sound reasons to believe that a person has information or documents or is capable of giving evidence relevant to an investigation. Once the notice is issued the ABCC may give it to the person requiring them to give information, produce documents or appear before the ABCC. The Government confirms that the BCIIIP Act excludes reliance on the common law privilege against self-incrimination to refuse to provide information under an examination notice, but states that the Act recognizes the seriousness of abrogating this privilege by providing both use and derivative use immunity in relation to the information obtained in these circumstances. For this reason, the information provided cannot be used against the person in most criminal or civil proceedings and the powers are rarely used to examine a person suspected of contravening the law. Instead, the powers are very often invoked at the request of the victim or witness themselves to avoid reprisals for having cooperated with the ABCC.

- 126.** With regard to the allegation that the BCIIIP Act has introduced penalties, applicable to unlawful industrial action in the construction industry, that are significantly higher than those applicable to similar acts in other industries, the Government indicates that the penalties applicable under FWA to all industries were inadequate to deter unlawful behaviour in the building and construction industry. This is reflected in the evidence received by the Cole Royal Commission (2003) showing that there was a view amongst building industry participants that breaking the law did not have any real consequences. The Government therefore indicates that high penalty levels are a response to the significant and persistent lawlessness in the industry and quotes in this regard an excerpt of the final report of Justice Heydon, Commissioner, Royal Commission into Trade Union Governance and Corruption. The excerpt reads: "... the present penalties are an ineffective deterrent to unlawful conduct on the part of the construction unions, and judicial officers have noted that the CFMEU appear to regard financial penalties as simply a business cost like any other. That suggests that higher maximum penalties could not be considered disproportionate to the harm caused by unlawful industrial action and coercion, particularly when the selection of particular penalties from case to case are subject to the usual judicial discretion." The Government indicates that penalty levels under BCIIIP Act apply equally to all building industry participants, including employers. It also states that since the establishment of the ABCC in 2005, penalties of over A\$14.4 million have been awarded against the CFMEU for breaches of workplace relations laws in cases brought by the ABCC and its predecessors. The Government finally quotes several recent court decisions stating that penalties need to act as a proper deterrent to address persistent unlawful behaviour. In particular, the Government refers to a ruling of the High Court of Australia dated 14 February 2018, confirming that an individual union official can be required to pay their own fines, holding that "... if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect ...".
- 127.** With regard to the introduction of prohibition of unlawful picketing in the BCIIIP Act, the Government indicates that this prohibition is necessary in the interests of public safety, public order, and the protection of the rights and freedoms of others. It emphasizes that this prohibition does not affect in itself the engaging in or taking of protected industrial action under the FWA. The Government indicates that section 47 of the BCIIIP Act prohibits organizing or engaging in action that has the purpose of preventing or restricting a person from accessing or leaving a building or ancillary site. The provision also prohibits action that directly prevents or restricts a person from accessing or leaving the site, or would reasonably be expected to intimidate a person accessing or leaving the site. It further

specifies that the prohibition is limited to picketing action that is motivated by an industrial purpose or is otherwise unlawful and pursues the legitimate aim of prohibiting picketing that is designed to cause economic loss to building industry participants. The Government recalls that the Heydon Royal Commission had found picketing is more frequent in the building industry as compared to other industries and has a disproportionately significant impact on workers and their employers; hence, it should be treated differently in the context of the building industry. According to the Government, section 47 of the BCIIIP Act seeks to address particular behaviour, such as where persons who are not employees of an affected site nevertheless seek to disrupt work at that site. As an example, the Government refers to the blockading of a Melbourne site in 2012 by members of the CFMEU that became violent and resulted in serious disruptions to the community. The Government finally indicates that section 47 of the BCIIIP Act provides access to a quick statutory remedy for affected persons and allows the ABCC to make an application to a court against parties involved in unlawful picketing. The Government expects that this will act as a disincentive and will change the culture of the industry for the better.

128. With regard to the alleged restrictions to collective bargaining and the content of collective agreements under the Code 2016, the Government affirms that they balance the right of employees to negotiate their terms and conditions of employment with the need to ensure that employers, particularly small subcontractors, are able to manage their businesses efficiently and productively. The Government indicates that the Code 2016 prevents clauses that would limit the ability of workers and their employers to determine their day-to-day work arrangements. It expresses concern that restrictive clauses in enterprise agreements, which are often forced onto subcontractors by head contractors that have made agreements with unions, are contributing to costs and delays of projects within the building and construction industry. The Government quotes a Business Council of Australia report published in June 2012 in support of the idea that Australia is a high cost, low productivity environment for building infrastructure projects. It enumerates a number of restrictive clauses commonly found in building and construction industry enterprise agreements including “jump up” clauses which provide that subcontractors cannot be engaged unless they apply wages and conditions at least as favourable as the enterprise agreement that applies to the head contractor. The Government indicates that the direct effect of this clause, which was found in 70 per cent of a random sample of construction agreements studied by the Productivity Commission, is an increase in labour costs and therefore the overall costs of a project. It adds that the common restrictive clauses substantially inhibit the right of subcontractors to freely engage in collective bargaining as the acceptance of deals done by head contractors and unions is a condition of being able to perform work on certain types of building projects. The Government finally indicates that the limitation of bargaining clauses in the Code 2016 only applies to builders who wish to undertake Commonwealth funded building work and rejects the complainant’s allegation that the ABCC is biased against unions in issuing determinations as to whether certain clauses are permissible under the Code 2016.
129. With regard to the alleged limits imposed by the Code 2016 on the level of collective bargaining, the Government indicates that under section 59 of the BCIIIP Act, project agreements are not enforceable. The Government once again invokes the fact that many subcontractors in the industry are forced to accept these arrangements as a condition to work on certain types of projects as the ground for this provision. With regard to the relevant provisions of the Code 2016, the Government explains that they do not encourage individual contracts. Instead the Code 2016 prohibits site and project agreements to deter “side deals”, namely informal agreements and other arrangements that may be made by building contractors and unions seeking to circumvent the Code’s prohibited content provisions for enterprise agreements and to secure standard employment conditions for groups of building employees that have separate and diverse enterprise agreements. According to the

Government, the Code 2016 requires that above award terms and conditions of employment be dealt with in enterprise agreements (or individual flexibility agreements) made under the FWA or in common law agreements between employers and individual employees. The Code discourages the use of agreements outside this framework in order to ensure transparency and guarantee oversight by the Fair Work Commission, Australia's independent national workplace relations tribunal. Finally, the Government emphasizes that the clear intent of this prohibition is to protect genuine collective bargaining in the building and construction industry in line with Australia's national circumstances.

- 130.** With regard to the allegation that various provisions in the Code 2016 inhibit freedom of association and interfere with the rights of unions to organize and represent their members, the Government indicates that the measures in question are reasonable and necessary to protect the safety and rights of all workers. They also ensure that site processes have the appropriate oversight. The Government further indicates that in line with the ILO supervisory mechanisms' finding that it is a matter for each member State to decide whether it is appropriate to guarantee the right not to join a union, part 3-1 of the FWA clearly guarantees this right within Australia. However, this right is not always respected within the building and construction industry where there is evidence that some sites are regarded as "union sites" and on those sites all workers are expected to be union members. In view of this evidence, the Government considers that it is necessary to protect the rights and freedoms of all employees through specific legal provisions.
- 131.** With regard to the alleged restriction of the right of entry of union representatives into building sites, the Government indicates that the Code 2016 simply requires that right of entry be exercised in line with the provisions of the FWA or a relevant work health and safety law. It explains that subject to certain conditions, right of entry can be exercised to investigate suspected contraventions of the FWA or a term of a fair work instrument. It can also be used for the purpose of holding discussions with employees; to exercise a state or territory occupational health and safety right; to inquire into a suspected contravention of the Work Health and Safety Act, 2011, or to consult with or provide advice about work health and safety matters to workers. The Government affirms that subjecting the right of entry to this legal framework is reasonable, necessary and proportionate. To support this point it cites evidence that certain union officials abuse the right of entry provisions by entering a site to disrupt work and cause economic loss to businesses for reasons that are not related to legitimate health and safety concerns or industrial relations matters.
- 132.** With regard to the prohibition of collective agreement clauses that require employers to consult with unions on the source, number or type of employees to be engaged, or the engagement of subcontractors, the Government indicates that given the circumstances within the building and construction industry, this prohibition is necessary to enable effective and productive business management. It further indicates that many enterprise agreements contain clauses that in some way restrict an employer's engagement of subcontractors, including by requiring consultation with unions. These clauses are most prevalent in the building and construction industry, where, as of 30 September 2017, 19.7 per cent of the enterprise agreements contained this type of clause, which amounts to 62.4 per cent of the use of these clauses nationwide. The Government considers that the restrictions enshrined in these clauses have led to coercion being applied to employers by unions to not engage a subcontractor unless the subcontractor has a union enterprise agreement. According to the Government the clauses give unions disproportionate power on building sites, limit the right of the employer to manage and improve its business, and prevent an employer from determining with its workers how work is performed and by whom. In a judgment of the Federal Circuit Court it is established that a CFMEU official told the workers that:

"This is a union job site and everyone who wants to work on the site must be in the union ... if you don't want to join ... I will ... request that you be replaced with workers who are more

team players ... the CFMEU got [the subcontractor] this job by putting their name forward out of a list of contractors. Now [the subcontractor] has got workers onsite who aren't in the union and [the subcontractor] knew that this was a union site".

The Government states that although this judgment did not specifically refer to the consultation clause in the enterprise agreement, the language used by the union official strongly suggests that the union took advantage of the clause to give preference to subcontractors that employ union members. The Government further emphasizes that although the Code 2016 prohibits the inclusion of clauses requiring consultation on specified matters, there is no actual prohibition on unions participating in consultations on the source, number or type of employees to be engaged, or the engagement of subcontractors.

- 133.** As to the prohibition of the collective agreement clauses that give trade unions the capacity to monitor compliance with those agreements, the Government indicates that the workplace relations regulator (in this case the ABCC) and the courts are the appropriate bodies to monitor compliance with enterprise bodies.
- 134.** With regard to the complainant's allegation that the provisions of the Code 2016 that exclude union delegates or representatives from site induction processes are inconsistent with freedom of association and the right to organize, the Government indicates that it respects the right of employees to join or not to join a union. According to the Government, these provisions are only intended to prevent undue pressure to join a union on employees in the early stages of a new job or project, when they are particularly vulnerable to such pressure. Unions can exercise the right to enter to promote union membership at other times consistent with right of entry provisions in the FWA. The provisions of the Code 2016 are only directed to prevent situations where workers are barred from a site because they are not union members. The Government contends that forcing or pressuring workers to join a union does not uphold freedom of association. It considers that given the culture that exists in the industry, which can lead to employees being given misleading information about the need to join a union in order to be allowed to work, these provisions are necessary. The Government indicates that the courts have heard many cases where union officials, as part of induction processes, prevented workers who were not members of the union from working on building sites. In this regard, the Government provides two examples. The first example concerned a case in which a union official, conducting induction at a building site, would not allow workers on site until their membership fees were brought up to date. The second example concerned a case where a union official told two newly inducted workers who were not union members that they were not allowed on site. Furthermore, the Government considers that the responsibility for undertaking induction processes is a non-delegable duty that rests with whoever manages the site, such as the head contractor or the employer.
- 135.** In its communication of 5 October 2018, the Government forwards the observations of the Australian Chamber of Commerce and Industry (ACCI) at their request. The ACCI indicates that it has a very strong coverage throughout Australia's building and construction industry and in particular the on-site construction sector to which the work of the ABCC is directly relevant. The ACCI provides its detailed views on the allegations raised by the complainant, as well as what it considers to be essential background information on the basis on which the ABCC was legislated in 2016.
- 136.** The ACCI maintains that the complainant on the whole does not make any case for its allegation that the BCIIIP Act is inconsistent with equality before the law but proceeds to address the specific allegations that higher penalties are imposed under the Act, that it provides a narrow understanding of protected action and a broad application of the prohibition on unlawful picketing.

137. As regards the provision for higher penalties, the ACCI maintains that given the culture of lawlessness in construction unions uncovered by multiple royal commissions and Australian courts over the years, higher penalties are necessary in order to constitute an effective deterrent. They refer in particular to the 2015 Royal Commission into Trade Union Governance and Corruption whose interim report they state has suggested that case studies associated with one of the powerful unions in the sector “raise fundamental issues about the regulation of the building and construction industry and the culture of wilful defiance of the law”, while the final report refers to widespread and deep-seated misconduct by unions and officials. The ACCI refers to subsequent cases decided against a union in the sector which it maintains are symptomatic of the closed shop practices which see subcontractors and small businesses treated unfavourably or prevented from working on sites because they are not union members or won’t accede to union preferred arrangements. It contends that the FWA and tools available to the courts were insufficient in dealing with such unlawfulness and a stronger response was needed. The ACCI also recalls that the penalties in the Act are prescribed as maximum penalties and the courts act independently in determining the appropriate level and consideration of proportionality.
138. As regards the allegations that there were excessive limitations on industrial action through inclusion of the notion of protected persons, the ACCI states that a protected right to take industrial action subject to reasonable limitations has formally existed since the introduction in 1993 of the Industrial Relations Reform Act. The ACCI also refers to the more recent adoption of the FWA and the conclusions of the CFA in Case No. 2698, which they state recommended the review of certain provisions but did not conclude that the Act was inconsistent with the principles of freedom of association. The ACCI observes that the BCIIIP Act provisions differ from the FWA in that protected industrial action under the FWA will not be protected if it is engaged in concert with persons or is organized by persons who are not connected to bargaining for an enterprise agreement. In the view of the ACCI, the limitations on industrial action are reasonable, necessary and proportionate to legitimate aims as set out in the Explanatory Memorandum to the BCIIIP Act and as is evident in the context of the behaviours and culture of the building and construction industry, which include the need to reinforce recognition of the right for all employees to be able to choose whether they wish to join or not to join an association.
139. As regards the allegation relating to the prohibition on unlawful picketing, the ACCI notes with the interest that the ILO has said that the prohibition of strike pickets is justified only if the strike ceases to be peaceful. The ACCI observes that the CFA has distinguished peaceful picketing from picketing that is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom of work. The provisions in the BCIIIP Act take place in the context of an industry which will often involve actions that are not peaceful, where coercive conduct features and where attempts are made to restrict freedom of access to work for non-union and non-striking workers.
140. As regards the level of collective bargaining, the ACCI asserts that the Code 2016 does not modify the requirements for the level at which collective bargaining can occur under the FWA, nor does it alter the definition of a single enterprise. Section 10 simply provides that side agreements cannot be used to provide for terms and conditions or restrictions that could not be included in an enterprise agreement. Moreover, looking at the practice, it can hardly be said that voluntary collective bargaining does not occur as 203 of 680 collective agreements approved in the September quarter 2017 come from the building and construction industry, while 4,200 agreements in force during that period represent 32.5 per cent of all collective agreements in force at that time in Australia.
141. More generally, the ACCI asserts that the earlier case examined by the CFA in the 2000s in relation to the preceding ABCC legislation should be distinguished from the current case in

a number of aspects, including: (1) the current ABCC Commissioner must, under the 2016 legislation, apply to the Administrative Appeals Tribunal (AAT) to obtain scope to compulsorily examine witnesses, obtain documents, etc.; (2) the Commissioner must now notify the Commonwealth Ombudsman of an issue of examination notice, which provides an additional level of scrutiny and protection; and (3) the Commissioner must ensure that the policies and procedures adopted and resources allocated are to be applied to the greatest extent possible in a reasonable and proportionate manner to each of the categories of building industry participants.

142. According to the ACCI, further circumstances differentiate this case as the social partners were provided with significant and multiple opportunities for input on the legislation recreating the ABCC within the framework of Australia's Committee on Industrial Legislation and directly to the legislators. Moreover, fundamental changes have been made since the earlier complaint which significantly and materially alter Australia's workplace relations law and practice. It contends therefore that the conclusions of the earlier case are not relevant to the examination of the BCIP Act.
143. As regards the Code 2016, the ACCI emphasizes that its core function is to set minimum standards of employer conduct and expectations in the event the employer chooses to tender for government work but in no way regulates either employees or trade unions. The Code 2016 aims to promote an improved workplace relations framework and safe, healthy, fair, lawful and productive building sites for all building industry participants in a manner fully in line with the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84) (not ratified by Australia) but also irrelevant to the mandate of the CFA. The ACCI contests the allegation that the Code 2016 restricts the parties in their collective bargaining rights as demonstrated by the statistics cited above. Furthermore, the Code 2016 places obligations and liabilities on the employers and not directly on workers or trade unions and the sanction is a commercial rather than a criminal or pecuniary one. Finally, the ACCI contests the complainant's allegations that the ABCC has a demonstrable record of hostility to workers' interests, a claim that the ACCI contends is wholly unsubstantiated, while numerous oversight mechanisms exist to protect against any possible biased application of the law. The ACCI adds that in the first six months of its operation, the ABCC had opened 118 investigations, 50 of which concerned the conduct of employers and the protection of workers' interests; a trend which has continued.
144. As regards the specific allegations of restrictions on the subject matter of collective bargaining, the ACCI maintains that: (1) the FWA has adequate right of entry provisions setting out statutory regulation which should not be subject to parallel regulation through collective agreements; (2) the Code 2016 does not limit unions' rights to promote membership but rather prohibits clauses in collective agreements from being used to force businesses to actively promote union membership potentially misleading employees on their freedom of association rights; (3) as regards monitoring of collective agreements, it is proper that unions not be able to force an ongoing role in the management of organizations or the oversight of labour, especially where there is a well-developed inspection and compliance function; and (4) concerns as to compliance of agreements can be raised for investigation and unions can enter sites and ask to inspect records or seek dialogue at the request of a member. As regards negotiating clauses calling for consultation on the engagement of employees, the ACCI maintains that: (1) providing unions with veto power on who is hired would be a misuse of collective bargaining; and (2) section 11 does not prohibit, restrict or impede an employer or employee's right to consult with a trade union on any of these matters; it merely prohibits any mandated requirement to do so.
145. As regards individual flexibility agreements (IFAs) in the Code 2016, the ACCI states that this is a statutory option which has been expressly provided for in the FWA and they coexist

rather than replace collective agreements. The IFAs are poorly used and unions can reduce or specify their scope through collective bargaining. As regards site induction processes, the ACCI contends that mandatory induction meetings with on-site union leaders would create an unacceptable risk of coercion and misrepresentation of workers' right to choose to associate or not with a trade union on-site.

146. The ACCI states that construction unions enjoy statutory rights to enter construction sites and exercise these rights regularly; what is not allowed is a standard term in a proposed collective agreement that would allow a person who has been denied an entry permit on legislative grounds to enter the premises. This ensures minimal disruption of worksites and that safety representatives' right of entry is not misused for improper purposes.
147. The ACCI concludes that there is insufficient evidence to demonstrate that the legislation in question is in any way contrary to the principles of freedom of association and the effective recognition of the right to collective bargaining as the complainant's allegations lack both particularization and substance. Specific regulation and oversight of this industry has existed continuously over 15 years regardless of the government in power.
148. Finally, in its communication dated 3 February 2019, the Government submits a summary of the key findings in an independent review undertaken on the BCIIIP Act, called for by the Act and following a consultation process with the social partners, which was tabled in Parliament on 6 December 2018 along with the Government's response and are publicly available. As regards the allegedly coercive investigative powers of the ABCC, the review finds that the safeguards and public accountability mechanisms incorporated in the current oversight arrangements are adequate and appropriate and further notes that the Government had amended the Bill to include additional safeguards after the ACTU had raised concerns during the initial deliberations. As regards the level of penalties, the review finds that there is little data on their deterrent effect so far therefore no changes should be adopted at this point.

C. The Committee's conclusions

149. *The Committee notes that this case concerns allegations that the BCIIIP Act, which came into effect on 1 December 2016, and its related Code 2016 issued by the Minister for Small and Family Business, the Workplace and Deregulation, violate the freedom of association rights in the construction industry. According to the complainant, the BCIIIP re-establishes the ABCC, a statutory agency that was first created through the enactment of the Building and Construction Industry Improvement Act 2005 (BCII Act) (an Act which had already been commented upon by the Committee).*
150. *The Committee notes the Government's indication that it takes Australia's international obligations very seriously and the right to freedom of association and collective bargaining were considered in drafting the BCIIIP Act and the Code 2016. The Government and the ACCI further affirm that three Royal Commissions and numerous Federal Court decisions against the building and construction union support the need for specific regulation of the building and construction industry, including the need for higher penalties for breaches of workplace relations laws as well as a dedicated workplace relations regulator. The Government adds that employers have also been found to have behaved unlawfully, including by forcing subcontractors or individual employees to engage with unions in order to gain employment and by engaging in cartel arrangements, a particular problem in an industry of over 300,000 small businesses.*
151. *As regards the specific allegations that the Act introduces a prohibition, unique to the construction industry, of "unlawful picketing" which includes any industrially motivated*

action that directly restricts persons from accessing or leaving a building site, or has that purpose including the mere organizing of such action, even before persons physically assemble, the Committee notes the Government's indication that this prohibition is necessary in the interests of public safety, public order, and the protection of the rights and freedoms of others, while the prohibition does not affect in itself the engaging in or taking of protected industrial action under the FWA. While the complainant alleges that conduct such as peaceful assemblies and the conveying of information to persons entering or leaving a building site would fall under these provisions, the ACCI observes that the provisions in the BCIIIP Act take place in the context of an industry which will often involve actions that are not peaceful, where coercive conduct features and where attempts are made to restrict freedom of access to work for non-union and non-striking workers. The Government for its part maintains that the prohibition aims at prohibiting picketing that is designed to cause economic loss to building industry participants for industrial purposes but would not cover action that seeks to draw attention to a social, environmental or community issue. The Government adds that this provision seeks to address particular behaviour such as where persons who are not employees of an affected construction site nevertheless seek to disrupt work there.

152. The Committee recalls that it has considered that the prohibition of strike pickets is justified only if the strike ceases to be peaceful. The Committee has also considered legitimate a legal provision that prohibited pickets from disturbing public order and threatening workers who continued to work [see **Compilation of decisions of the Freedom of Association Committee**, 2018, sixth edition, paras 937–938]. The Committee notes that section 47 of the BCIIIP Act defines an unlawful picket as, among others, an action which has the purpose of preventing or restricting a person accessing or leaving a building site or would reasonably be expected to intimidate a person from so doing. The Committee requests the Government to ensure that the prohibition is applied in a manner consistent with the principles of freedom of association and the effective recognition of the right to collective bargaining and to provide detailed information on the application in practice of this provision across the next three years and copies of any relevant court decisions that might touch upon its interpretation during that period.
153. As regards the complainant's allegation that the significant increases in the maximum penalties applicable to unlawful industrial action, coercion and the new restriction on "unlawful picketing" in the BCIIIP Act violates freedom of association in the construction industry, the Committee notes the Government's explanation that the penalties applicable under the FWA to all industries were inadequate to deter unlawful behaviour in the building and construction industry and that this was clearly reflected in the evidence received by the Cole Royal Commission. The ACCI supports this assertion, underlining that the penalties in the Act are prescribed as maximum penalties and the courts act independently in determining the appropriate level and consideration of proportionality. In the absence of any specific examples of an abusive imposition of such fines, the Committee does not have sufficient information available to it to conclude that the disparity in fines for unlawful industrial action in the construction industry would impede the exercise of freedom of association in the sector but recalls that such fines should not be imposed in cases where the unlawful industrial action as defined would not be in conformity with the principles of freedom of association.
154. Finally, the Committee notes the complainant's allegations that the BCIIIP Act provides for coercive investigative powers for the new ABCC, a body the complainants maintain has a demonstrable record of hostility to workers' interests, which enable it to issue notices that compel a recipient to attend and answer questions relating to an investigation under oath and/or provide information or documents and expressly overrides the common law privilege against self-incrimination. Under section 62, the failure to comply with ABCC notices is a

criminal offence attracting a penalty for individuals of up to six months' imprisonment and/or a fine of AUD5,400. The Government for its part indicates that: (i) ABCC forms part of a system of labour inspection and is statutorily required to perform its functions without distinction between the interests of unions, employers, or contractors; (ii) these powers were granted to the industry regulator upon recommendation by the Cole Royal Commission which considered that, without them, the industry's well-documented culture of intimidation would prevent reporting of unlawful behaviour; (iii) the obligation of non-interference contained in Article 2 of Convention No. 98 does not preclude state parties from establishing investigative bodies with coercive powers for the purposes of regulating and investigating the conduct of their workers' and employers' organizations; and (iv) while the BCIIIP Act excludes reliance on the common law privilege against self-incrimination to refuse to provide information under an examination notice, the Act provides for both use and derivative use immunity in relation to the information obtained in these circumstances.

- 155.** *The ACCI for its part points out that the ABCC Commissioner must, under the 2016 legislation, apply to the Administrative Appeals Tribunal (AAT) to obtain scope to compulsorily examine witnesses, obtain documents, etc., and must notify the Commonwealth Ombudsman of an issue of examination notice, which provides an additional level of scrutiny and protection. The ACCI adds that the Commissioner must ensure that the policies and procedures adopted and resources allocated are applied to the greatest extent possible in a reasonable and proportionate manner to each of the categories of building industry participants.*
- 156.** *The Committee recalls that it had previously examined questions of excessive powers of the ABCC within the framework of the 2005 Building and Construction Industry Improvement Act which was examined by the Committee in its 338th Report (November 2005). At that time, the Committee considered that the expansive powers of the ABCC, without clearly defined limits or judicial control, could give rise to serious interference in the internal affairs of trade unions and requested the Government to introduce sufficient safeguards so as to ensure that the functioning of the ABC Commissioner and inspectors did not lead to such interference [see 338th Report, para. 455]. While taking due note of the specific steps taken to ensure various procedural safeguards in this regard and the independent review's conclusion, following consultations with the stakeholders, that these safeguards and mechanisms are adequate and appropriate, the Committee observes that the penal sanctions of imprisonment set out in the 2016 BCIIIP Act could serve as a serious impediment to the workers' exercise of their trade union rights should the powers of the ABCC be used in a manner that directly affects these rights and invites the complainant organization to provide detailed information to the Government of any such cases so that it may continue to effectively review the matter and consider the necessity of introducing any additional safeguards. Taking due note of the indication that the penal sanctions that may be imposed under the 2016 BCIIIP Act set out the maxima that may be applied and that the judiciary acts independently and adheres to the principles of proportionality, the Committee requests the Government to keep it informed of the use of these penal sanctions against trade unions over a period of three years.*
- 157.** *As regards the 2016 Code, the Committee notes the complainant's allegations that it restricts the contents of collective bargaining agreements and severely impedes the capacity of workers to negotiate terms favourable to them in enterprise bargaining agreements. The complainant highlights section 11(1)(a) that prohibits any clause in an agreement which imposes or purports to impose limits on the right of a code covered entity (employer) "to manage its business or to improve productivity". The Committee notes the complainant's further allegations that other subsections prohibit clauses that would: (i) allow union representatives to address employees about the benefits of union membership or to promote the benefits of becoming a union member; (ii) that give trade unions the capacity to monitor*

collective agreements, for example, for compliance purposes; or (iii) that require an employer to consult with a trade union representative as to the source, number or type of employees to be engaged or the engagement of subcontractors.

158. *The Government for its part affirms that restrictions to collective bargaining and the content of collective agreements under the Code 2016 balance the right of employees to negotiate their terms and conditions of employment with the need to ensure that employers, particularly small subcontractors, are able to manage their businesses efficiently and productively. The Committee notes that the Government refers to a number of restrictive clauses commonly found in building and construction industry enterprise agreements including “jump up” clauses which provide that subcontractors cannot be engaged unless they apply wages and conditions at least as favourable as the enterprise agreement that applies to the head contractor. According to the Government, the direct effect of this clause, which was found in 70 per cent of a random sample of construction agreements studied by the Productivity Commission, is an increase in labour costs and therefore the overall costs of a project. Finally the Government indicates that the limitation of bargaining clauses in the Code 2016 only applies to builders who wish to undertake Commonwealth funded building work.*
159. *The Committee further notes the views of the ACCI that the core function of the Code 2016 is to set minimum standards of employer conduct and expectations in the event the employer chooses to tender for government work but in no way regulates either employees or trade unions. The Code 2016 aims to promote an improved workplace relations framework and safe, healthy, fair, lawful and productive building sites for all building industry participants in a manner fully in line with Convention No. 94 and its accompanying Recommendation No. 84 and is outside of the mandate of the CFA. The ACCI contests the allegation that the Code 2016 restricts the parties in their collective bargaining rights and states that this is shown by the bargaining statistics cited. Finally, the ACCI contests the complainant’s allegations that the ABCC has a demonstrable record of hostility to workers’ interests and emphasizes that numerous oversight mechanisms exist to protect against any possible biased application of the law. As regards the specific allegations of restrictions on the subject matter of collective bargaining, the ACCI maintains that: (1) the FWA has adequate right of entry provisions setting out statutory regulation which should not be subject to parallel regulation through collective agreements; (2) the Code 2016 does not limit unions’ rights to promote membership but rather prohibits clauses in collective agreements from being used to force businesses to actively promote union membership potentially misleading employees on their freedom of association rights; (3) as regards monitoring of collective agreements, it is proper that unions not be able to force an ongoing role in the management of organizations or the oversight of labour, especially where there is a well-developed inspection and compliance function; and (4) concerns as to compliance of agreements can be raised for investigation and unions can enter sites and ask to inspect records or seek dialogue at the request of a member. As regards negotiating clauses calling for consultation on the engagement of employees, the ACCI maintains that: (1) providing unions with veto power on who is hired would be a misuse of collective bargaining; and (2) section 11 does not prohibit, restrict or impede an employer or employee’s right to consult with a trade union on any of these matters; it merely prohibits any mandated requirement to do so.*
160. *While taking due note of the Government’s explanation, echoed by the ACCI, as to the need to restrict certain subjects from negotiation and the clarification that this restriction only concerns builders who wish to undertake Commonwealth funded building work, the Committee is bound to recall that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98; tripartite discussions for the preparations on a voluntary basis of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties [see **Compilation op.***

cit., para. 1290]. The Committee invites the Government, in consultation with the representative organizations of workers and employers concerned, to review section 11 of the Code 2016 to respond to any concerns specific to the industry while privileging the free and voluntary nature of collective bargaining.

- 161.** *As regards the complainant's allegation that the Code 2016 limits the level of collective bargaining by prohibiting bargaining for an unregistered written agreement which can include site or project agreements, the Committee notes the Government's indication and the views of the ACCI that section 59 of the BCIP Act provides that project agreements are not enforceable in order to deter "side deals", namely informal agreements and other arrangements that may be made by building contractors and unions seeking to circumvent the Code's prohibited content provisions for enterprise agreements and to secure standard employment conditions. The Government adds that award terms and conditions of employment are to be dealt with in enterprise agreements (or individual flexibility agreements) made under the FWA or in common law agreements between employers and individual employees in order to ensure transparency and guarantee oversight by the Fair Work Commission, Australia's independent national workplace relations tribunal. Finally, the Committee notes the Government's indication that the clear intent of this prohibition is to protect genuine collective bargaining in the building and construction industry in line with Australia's national circumstances. The Committee notes the ACCI views that: (1) individual flexibility agreements (IFAs) in the Code 2016 represent a statutory option which has been expressly provided for in the FWA and they coexist rather than replace collective agreements; (2) IFAs are poorly used; and (3) unions can reduce or specify their scope through collective bargaining.*
- 162.** *The Committee observes that the effective prohibition of project agreements was a matter raised by the complainants in the previous case concerning the 2005 BCII Act, while the ACCI maintains that the BCIP Act can be differentiated on numerous points in including additional safeguards that have been put in place for its application. The Committee recalls that when examining the BCII Act, it had recalled that according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority. The Committee therefore requested the Government to take the necessary steps with a view to revising the 2005 Act so as to ensure that the determination of the bargaining level was left to the discretion of the parties and not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority [see 338th Report, para. 448]. In light of the complainant's allegations and the Government's reply, the Committee invites the Government to review the Code 2016 and the BCIP Act as appropriate, in consultation with the representative organizations of workers and employers concerned, so as to allow for the possibility of bargaining over project agreements in a manner that fully respects free and voluntary collective bargaining.*
- 163.** *Finally, the Committee notes the complainant's allegation that section 13(2)(p) of the Code 2016 restricts workers that are trade union delegates or representatives from undertaking or administering site induction processes, while section 14 of the Code 2016 restricts the workers' access to union representation as its application entails the inability of unions to enter workplaces at the invitation of the employer. The Committee notes the information provided by the Government and the ACCI that: (i) these provisions are only intended to prevent undue pressure to join a union on employees in the early stages of a new job or project, when they are particularly vulnerable to such pressure; (ii) unions can exercise the right to enter to promote union membership at other times consistent with right of entry provisions in the Fair Work Act; and (iii) given the culture that exists in the industry, which*

can lead to employees being given misleading information about the need to join a union in order to be allowed to work, demonstrated by numerous court cases, these provisions are necessary.

- 164.** *The Committee recalls that governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization [see **Compilation**, para. 1590]. While taking due note of the Government's concern for the need to prevent undue pressure on workers and to protect their choices of association, the Committee also observes the importance of ensuring that workers are fully informed of their rights to collective representation. The Committee recalls the compulsory requirement for all new employees to be provided with the Fair Work information statement, which clearly sets out representation rights and rights of entry for union officials and their role in speaking with employees and looking into suspected breaches of employment law. The Committee requests the Government to consult with the representative organizations of workers and employers concerned on the effectiveness of ensuring that workers are fully informed of their rights to collective representation and union rights of access.*

The Committee's recommendations

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

- (a) The Committee requests the Government to ensure that the prohibition of unlawful picketing is applied in a manner consistent with the principles of freedom of association and the effective recognition of the right to collective bargaining set out in the conclusions and to provide detailed information on the manner in which section 47 of the BCIIIP Act is applied in practice across the next three years and copies of any relevant court decisions that might touch on the interpretation of this section during that period.*
- (b) Observing that penal sanctions of imprisonment set out in the 2016 BCIIIP Act could serve as a serious impediment to the workers' exercise of their trade union rights should the powers of the ABCC be used in a manner that directly affects these rights, the Committee invites the complainant organization to provide detailed information to the Government of any such cases so that it may continue to effectively review the matter and consider the necessity of introducing any additional safeguards. Taking due note of the indication that the penal sanctions that may be imposed under the 2016 BCIIIP Act set out the maxima that may be applied and that the judiciary acts independently and adheres to the principles of proportionality, the Committee requests the Government to keep it informed of any use of these penal sanctions against trade unions over a period of three years.*
- (c) The Committee invites the Government, in consultation with the representative organizations of workers and employers concerned, to review section 11 of the Code 2016 to respond to any concerns specific to the industry, while privileging the free and voluntary nature of collective bargaining and to allow for the possibility of bargaining over project agreements in a manner that fully respects free and voluntary collective bargaining.*

- (d) *Taking due note of the access provisions in the FWA, the Committee requests the Government to consult with the representative organizations of workers and employers concerned on the effectiveness of ensuring that workers are fully informed of their rights to collective representation and union rights of access in accordance with the conclusions.*

CASE NO. 3203

INTERIM REPORT

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

Allegations: The complainant organization denounces the systematic violation of freedom of association rights by the Government, including through repeated acts of anti-union violence and other forms of retaliation, arbitrary denial of registration of the most active and independent trade unions and union-busting by factory management. The complainant organization also denounces the lack of law enforcement and the Government's public hostility towards trade unions and alleges that the new draft of the Bangladesh Export Processing Zones Labour Act, 2016 is not in conformity with freedom of association and collective bargaining principles

166. The Committee last examined this case at its March 2018 meeting, when it presented an interim report to the Governing Body [see 384th Report, paras 129–145, approved by the Governing Body at its 332nd Session].
167. The Government sent its observations in communications dated 1 October 2018 and 4 February 2019.
168. Bangladesh 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

169. At its March 2018 meeting, the Committee made the following recommendations [see 384th Report, para. 145]:
- (a) The Committee requests the Government once again to take the necessary measures to ensure that, where this has not yet been done, all anti-union acts alleged in this case, including those allegedly perpetrated by the police, are fully investigated and that any

future allegations of this nature, even when later resolved through bilateral agreements, are systematically and properly investigated and prosecuted so as to avoid their repetition. The Committee also requests the Government once again to provide updated information on the judicial proceedings relating to the alleged anti-union retaliation in the cases of the Sramik Karmochari Union and the union at enterprise (d) ¹ and trusts that these cases will be concluded without delay. The Committee further expects the Government to continue to conduct comprehensive training activities in order to assist the police in better understanding the limits of their role in respect of freedom of association rights and to ensure the full and legitimate exercise by workers of these rights and liberties in a climate free from fear.

- (b) Concerning the ongoing trial for the 2012 murder of a trade unionist, the Committee expects the trial to be conducted without further delay and requests the Government to keep it informed of its outcome.
- (c) The Committee requests the Government once again to provide detailed information on the outcome of the proceedings for cancellation of trade union registration in enterprises (a), ² (l) ³ and (n). ⁴ The Committee also expects the Government to take any necessary measures to ensure that the procedure available to challenge trade union registrations which had been properly granted will not be misused to halt trade union activities in the future.
- (d) The Committee trusts that the measures envisaged and taken by the Government will contribute to an environment conducive to the full development of trade union rights and will prevent any future occurrence of public hostility and antagonism towards trade unionists.
- (e) The Committee will not pursue the examination of the legislative aspects of this case concerning registration of trade unions and freedom of association rights in export processing zones.
- (f) The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of this case.

B. The Government's reply

170. In its communication dated 1 October 2018, the Government provides information with regard to measures taken to investigate allegations of acts of anti-union discrimination, violence and retaliation in several enterprises [see 382nd Report, para. 153].

- With regard to allegations of violence against the acting union president and her husband at enterprise (a), the Government once again indicates that the police investigator found the allegations were unrealistic and nobody had attended before the investigating officer to prove them. The labour officials assigned to investigate the case found that the enterprise had closed due to the lack of orders from the buyer and the closure entailed the retrenchment of all workers as per Bangladesh Labour Act (BLA). All workers including the union leaders received their legal benefits.

¹ Chunji Knit Ltd.

² Global Trousers Ltd. Chittagong.

³ Grameenphone.

⁴ Accenture.

- With regard to the allegations of anti-union dismissal of more than 60 workers, false criminal charges against several union leaders and physical assault against at least one union leader at enterprise (b), ⁵ the Government reiterates its previous indications concerning the complaint lodged by the Sramik Karmochari Union to the Joint Director of Labour (JDL), the ensuing investigation that established that the management deprived workers of their right to a trade union and inhumanely dismissed ten workers, and the case has been filed accordingly at the Second Labour Court, Dhaka in 2014 [see 382nd Report, para. 162]. The Government further adds that the case is still pending and the next – twenty-third – hearing date is 14 February 2019.
- With regard to the allegations of acts of violence against union leaders, the anti-union dismissal of 15 leaders and activists and the deliberate closure of four out of five unionized factories at enterprise (c), ⁶ the Government reiterates that the local police found the allegations were ill-motivated and that the union president had informed the labour officials that the problem was solved through bipartite discussion with the management in the presence of the buyer.
- With regard to the allegations of acts of violence and anti-union dismissals at enterprise (d), in relation to which three cases on charges of unfair labour practice had been filed in the First Labour Court, Dhaka, the Government indicates that as a result of the efforts of the Labour Court Legal Aid Cell, the cases were amicably settled after a few court hearings in 2015 and 2016 and the complainants withdrew their complaints.
- With regard to the allegations of anti-union dismissals, police violence against peaceful protesters, the police refusal to register the workers' complaints and closure of the factory at enterprise (e), ⁷ the Government once again indicates that since September 2014 the factory remains closed due to financial problems. After the workers received their due payment the case was amicably settled and the complainants withdrew their complaints.
- With regard to the allegations of use of an array of retaliatory tactics by the employer including relocation of union leaders, forced resignation of workers under police pressure, threats of violence and physical assault against them and creation of a bogus union at enterprise (f), ⁸ the Government once again indicates that the investigation found that the dismissed workers were reinstated after eight months with payment of wage arrears.
- With regard to the allegations of anti-union dismissal and/or forced resignation of five officers of a union pending its registration procedure at enterprise (g), ⁹ the Government reiterates that it appeared from the inquiry report that the five workers had left their jobs voluntarily and that the complainants received all payments admissible as per law and withdrew their complaints.

⁵ Raaj RMC Washing Plant.

⁶ Global Garments Factory Ltd.

⁷ BEO Apparels Manufacturing Ltd.

⁸ Dress and Dismatic Co. Ltd.

⁹ Panorama Apparels Ltd. Gazipur.

- With regard to the allegations of anti-union dismissal of more than 40 union leaders and members, threats, violent attacks and false charges against them and their arrest and imprisonment because of their involvement with the union at enterprise (h),¹⁰ the Government once again indicates an investigation was made and it was found that agreements were reached between the management and representatives of Biplobi Garments Federation, IndustriALL and the ACCORD pursuant to which due payment was made to 40 workers and the factory was shifted to another place. No involvement of the factory management was found with the case. The Government further adds that the management director of the company filed a civil court case challenging the president and the general secretary of the union and the JDL Office, Dhaka. The case is pending and the next hearing is scheduled for 27 February 2019.
171. With regard to the trial for the murder of Mr Aminul Islam in 2012 [see 382nd Report, para. 159], the Government indicates that the final judgment was delivered and the accused was condemned to death.
 172. With regard to the conducting of comprehensive and continued police training, recommended by the Committee [see 384th Report, para. 145(a)], the Government indicates that the members of the Bangladesh Police are given basic courses and in-service training which include human rights, civil liberties and trade union rights and that 120 courses were arranged for different levels of industrial police between 2011 and 2017. Mid-level and senior police officials assisted 30 more courses during the same period and the total number of participants in the courses of industrial police reached 5,694.
 173. With regard to the proceedings for cancellation of trade unions' registration [see 382nd Report, paras 157–158] the Government indicates that the cases concerning enterprises (l) and (n) are still pending. It further adds that on 30 November 2017 enterprise (n) closed its operation in Bangladesh.
 174. In reply to the Committee's recommendation to ensure that the procedure available to challenge trade union registration will not be misused to halt trade union activities in the future, the Government indicates that pursuant to the provisions of the BLA the registrar may cancel the registration of a trade union on the grounds of unfair labour practice. The Government emphasizes that the provision of an unfair labour practice applies to both the workers and the employers and it has never been misused as there is no precedence of cancellation of registration of any union due to unfair labour practice.

C. The Committee's conclusions

175. *The Committee notes that this case concerns allegations of systematic violation of freedom of association in particular through acts of violence, anti-union discrimination and other retaliatory acts against union leaders and members in numerous enterprises, arbitrary denial of union registration, union busting and misuse of available procedures to challenge union registration, lack of law enforcement and the Government's public hostility towards trade unions. The Committee recalls that it decided in its previous examination of this case not to pursue the examination of the legislative aspects of the complaint concerning registration of trade unions and freedom of association rights in export processing zones that it had referred to the Committee of Experts on the Application of Conventions and Recommendations.*

¹⁰ Prime Sweaters Ltd.

176. *The Committee notes the Government's indications with regard to the allegations of acts of violence, retaliation and anti-union discrimination in enterprises (a)–(h). It notes that in the cases of enterprises (a) and (e), the factory was closed due to alleged financial problems and in the case of enterprise (h) the factory was moved to another place. The Committee further notes that allegations of anti-union dismissal or forced resignation were made in relation to enterprises (b), (c), (d), (e), (f), (g) and (h). The Government indicates that in enterprises (c), (d), (e), (g) and (h) the issues were resolved through discussion or amicable settlement and the complainants withdrew their complaints. At enterprise (f) the dismissed workers were reinstated with payment of arrears. Only the case concerning anti-union dismissals at enterprise (b) remains unsettled as it is pending before the Labour Court since 2014.*
177. *While the Committee does not consider that amicable settlement of disputes concerning anti-union dismissals is per se contrary to the principles of freedom of association, it is bound to recall that the Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which should include sufficiently dissuasive sanctions and prompt means of redress, emphasizing reinstatement as an effective means of redress [see the **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 1165]. The Committee notes that in the present case, from the seven enterprises against which allegations of anti-union dismissal were raised, five were resolved through amicable settlement while one case resulted in the reinstatement of the dismissed workers. The remaining complaint concerning enterprise (b) is still pending before the Labour Court five years after the dispute was first raised with the authorities. In view of the above, the Committee firmly expects the Government to ensure that rapid and effective remedies are available to victims of anti-union discrimination and that the case concerning anti-union dismissals at enterprise (b) will be concluded without further delay. It requests the Government to keep it informed of the measures taken and the developments in this regard.*
178. *The Committee further notes the Government's indication that despite the amicable settlement reached in relation to the dismissed workers in enterprise (h) a civil court case challenging the president and the general secretary of the company union and the JDL Office, Dhaka filed by the management director of the enterprise remains pending. The Committee requests the Government to provide detailed information on developments in this regard.*
179. *The Committee recalls that allegations of threats and violence against workers, in particular union leaders and members, were made regarding all eight enterprises (a) to (h). The Committee notes in this regard the Government's indication that in the cases of enterprises (a) and (c) the police found that the allegations of violence could not be substantiated or were ill-motivated. In the case of enterprise (h) – where it was alleged that the management collaborated with criminal elements in the community to force union leaders to resign or stop union activities through violence and intimidation – the Committee notes the Government's indication that no involvement of factory management was found with the case. The Committee further notes that the Government does not provide information about any investigation being conducted into the allegations of violence targeting union leaders and members in the other enterprises and regrets that it would appear that the Government has failed to fulfil its responsibility in this regard.*
180. *The Committee further notes the Government's indication about the conclusion of the trial for the 2012 murder of Mr Aminul Islam. The Committee understands that the accused, who was tried in absentia, was condemned to death. Recalling the complainant's allegation that Mr Islam's body bore signs of extensive torture and that strong evidence indicated that he was targeted for his work as a labour organizer and human rights advocate and that the*

perpetrators of this crime included members of the government security apparatus [see 382nd Report, paras 157–159], the Committee deplores that the Government does not provide any information in reply to the extremely serious allegations of the involvement of the members of the security forces in this murder. It urges the Government to provide information with regard to any investigation made into these allegations and their outcome.

181. The Committee recalls that acts of intimidation and physical violence against trade unionists constitute a grave violation of the principles of freedom of association and the failure to protect against such acts amounts to a de facto impunity, which can only reinforce a climate of fear and uncertainty highly detrimental to the exercise of trade union rights. 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 responsibility, punishing those responsible and preventing the repetition of such acts [see **Compilation**, sixth edition, 2018, paras 90 and 105]. The Committee also recalls that in its previous examination of this case, it had requested the Government to take the necessary measures to ensure that, where this has not yet been done, all anti-union acts alleged in this case, including those allegedly perpetrated by the police, are fully investigated. The Committee regrets the Government's failure to provide information in respect of this recommendation, in particular with regard to the allegations of acts of violence perpetrated against union members and leaders. It firmly expects the Government to take the necessary measures to ensure that an independent inquiry is immediately instituted in all cases of assault on the physical or moral integrity of workers, so that the facts are clarified, those responsible are identified and punished and such acts are not repeated in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.
182. With regard to cancellation of certain unions' registration, the Committee notes the Government's indication that enterprise (a), has closed while the proceedings for cancellation of trade unions' registration in enterprises (l) and (n) are still pending as well as its assurances that the procedure available to challenge trade union registrations has never been misused as there is no precedence of cancellation of registration of any union due to an unfair labour practice. The Committee, however, recalls the complainant's allegation that besides such cases, injunctive relief is frequently sought from courts to stay union registrations that have been properly granted [see 382nd Report, paras 157–158]. In particular, the Committee recalls the allegations, confirmed by the Government, that after enterprise (l) appealed the registration of two unions, a stay order was issued on the operation of the unions pending the decision of the court, which according to the Government is still pending. The Committee notes with concern that the lengthy court proceedings and the enduring stay order on the operation of the unions pending the final decision have practically deprived the two unions at enterprise (l) from the right to exist and defend their members' interests, although they were lawfully registered in 2014. The Committee therefore once again requests the Government to take the necessary measures to ensure that the procedure available to challenge trade union registrations which had been properly granted will not be misused to halt trade union activities in the future and, expecting that a decision will be reached in this case in the near future, requests the Government to provide detailed information on the outcome of the proceedings for cancellation of union registration in enterprise (l).

The Committee's recommendations

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

- (a) The Committee firmly expects the Government to ensure that rapid and effective remedies are available to victims of anti-union discrimination and that the case concerning anti-union dismissals at enterprise (b) will be concluded without further delay. It requests the Government to keep it informed of the measures taken and the developments in this regard.*
- (b) The Committee requests the Government and the complainants to provide detailed information on developments related to the pending civil court case filed by the management director of enterprise (h) against the president and the general secretary of the company union and the JDL Office, Dhaka.*
- (c) The Committee urges the Government to provide detailed information with regard to any investigations made into the allegations of the involvement of the members of the security forces in Mr Aminul Islam's murder and their outcome.*
- (d) The Committee firmly expects the Government to take the necessary measures to ensure that an independent inquiry is immediately instituted in all cases of assault on the physical or moral integrity of workers, so that the facts are clarified, those responsible are identified and punished and such acts are not repeated in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*
- (e) The Committee once again requests the Government to take the necessary measures to ensure that the procedure available to challenge trade union registrations which had been properly granted will not be misused to halt trade union activities in the future and, expecting that a decision will be reached in this case in the near future, requests the Government to provide detailed information on the outcome of the proceedings for cancellation of union registration in enterprise (l).*
- (f) The Committee draws the special attention of the Governing Body to the extreme seriousness and urgent nature of this case.*

CASE NO. 3263

INTERIM REPORT

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

- the International Trade Union Confederation (ITUC)**
- the IndustriALL Global Union (IndustriALL) and**
- UNI Global Union (UNI)**

Allegations: The complainant organizations denounce serious violations of freedom of association rights by the Government, including arbitrary arrest and detention of trade union leaders and activists, death threats and physical

abuse while in detention, false criminal charges, surveillance, intimidation and interference in union activities, as well as mass dismissals of workers by garment factories following a peaceful protest

184. The Committee last examined this case at its March 2018 meeting, when it presented an interim report to the Governing Body [see 384th Report, paras 146–169, approved by the Governing Body at its 332nd Session].
185. In a communication dated 18 February 2019, the International Trade Union Confederation (ITUC) made new allegations in relation to this case.
186. The Government sent its observations in a communication dated 1 October 2018.
187. Bangladesh has ratified 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

188. At its March 2018 meeting, the Committee made the following recommendations [see 384th Report, para. 169]:
- (a) The Committee requests the Government to take the necessary measures to institute an independent inquiry into the serious allegations of death threats, physical abuse and beatings while in custody and ensure that their perpetrators are held accountable and the persons concerned adequately compensated for any damage suffered, so as to avoid occurrence of such grievous acts in the future. The Committee invites the complainants to provide any further additional information to the relevant national authorities so that they can proceed to an investigation in full knowledge of the facts. The Committee further requests the Government to take the necessary measures to ensure that all pending cases against trade unionists for their alleged involvement in the Ashulia strike, whether filed by the police, garment factories or other private entities, are concluded without delay and to provide detailed information as to the number of cases, the exact charges retained and their outcome. The Committee requests the Government to keep it informed of any developments in the above matters and trusts that all trade unionists imprisoned or detained after the Ashulia strike have been released.
 - (b) The Committee urges the Government to give the necessary instructions and provide mandatory comprehensive training and awareness-raising activities to ensure that any form of intimidation and harassment of trade unionists and activists by the police ceases immediately, that all persons affected can safely and without fear of repression return to their homes and places of work and that incidents of intimidation and harassment by the police are effectively prevented in the future. The Committee further requests the Government to take the necessary measures to initiate an independent inquiry into all alleged instances of intimidation and harassment presented in the complaint in order to ensure that the perpetrators are held accountable and the concerned workers receive adequate compensation for any damages suffered, and to inform it of any developments in this regard.
 - (c) The Committee requests the Government to take the necessary measures to ensure that all trade unions and workers' organizations' offices mentioned in the complaint are able to operate freely and without fear of intimidation and that any confiscated material belonging to these entities is fully returned. In view of the severity and repeated nature of the alleged interference in trade union activities by the police, including forced cancellation of a training activity supported by the ILO, the Committee encourages the Government to

conduct an internal investigation and review so as to determine those responsible and to ensure that appropriate sanctions are taken to avoid repetition of such serious acts in the future.

- (d) The Committee requests the Government to take the necessary measures to ensure that all workers terminated or suspended for anti-union reasons in the aftermath of the Ashulia strike who have not yet been reinstated through the various agreements concluded and who have indicated their willingness to return to work, are reinstated without further delay and to inform it of any developments in this regard. The Committee also requests the Government to provide detailed information on the status of the alleged 1,600 criminal complaints filed following the Ashulia strike, including information on the number of complaints which gave rise to criminal cases, the charges retained and their outcome.
- (e) The Committee trusts that, while criminal offences committed during a strike, such as deliberate violence against persons or property, are legitimately dealt with pursuant to the penal law prohibiting such acts, the Government will ensure that recourse to penal sanctions and the filing of criminal charges are not misused to suppress peaceful trade union activities or to threaten and intimidate trade union members and leaders.

B. The complainant's allegations

189. In its latest communication, the complainant alleges that as a result of violent police intervention in peaceful protests of garment workers on 8, 9 and 10 January, one worker was shot and killed and at least 80 were injured. The complainant adds that the police had recourse to excessive force as it used rubber bullets and water cannons and fired tear gas to break up demonstrations.

C. The Government's reply

190. With regard to the allegations of death threats, physical abuse and beating of trade unionists while in custody, as well as the allegations of intimidation and harassment of the trade unionists, the Government indicates in its communication dated 1 October 2018 that no complaint denouncing such acts has been lodged to the police and the police would investigate if any such claim is made. Physical abuse in custody is rare but if it takes place, the persons at fault are taken to task in accordance with the law.

191. With regard to the pending cases against trade unionists for their alleged involvement in the Ashulia strike and situation of those imprisoned after the strike, the Government indicates that the cases have all been concluded after investigation and no worker was charged in any of them. It further states that no unionist or worker was imprisoned after the strike and those who were in custody were released on bail immediately after the law and order situation in the area went back to normal.

192. In reply to the Committee's recommendation b), the Government indicates that on 10 April 2018, a meeting was held with the industrial police, which was presided by the Minister for Labour and Employment and where necessary instructions were given to the concerned officials. It further adds that the members of the Bangladesh Police are given basic courses and in-service training which include human rights, civil liberties and trade union rights and that 120 courses were arranged for different levels of industrial police between 2011 and 2017. Mid-level and senior police officials attended 30 more courses during the same period and the total number of participants in the courses of industrial police reached 5,694.

193. With regard to the measures recommended by the Committee to ensure the free operation of union offices and conduct an internal investigation with the police to identify and sanction those responsible for interference in union activities, the Government reiterates its previous indication that for security reasons and with a view to protecting the offices and

office-bearers, two organizations in Ashulia were closed amidst a deteriorating law and order situation but were immediately reopened once there was no risk to operations. It further adds that as the offices of the two organizations were closed, the cancellation of the training programme was inevitable to ensure greater engagement of the trade union organizations and to avoid any unexpected security risk for the participants. There is no evidence that any training programme was cancelled in a normal law and order situation.

194. With regard to the allegations of anti-union dismissal or suspension in the aftermath of the Ashulia strike, the Government reiterates that no worker was removed for having taken part in any activities relating to the strike. It adds however that a number of workers voluntarily resigned upon receipt of their due payment in accordance with Bangladesh Labour Act (BLA) and that due to continuous financial losses, two factories stopped their operation by invoking section 13 of the BLA. Finally, the Government specifies with regard to section 13 of the BLA that the provision is applied with caution, its arbitrary use is never encouraged and workers' rights are never infringed.
195. With regard to the 1,600 criminal complaints allegedly filed following the Ashulia strike, the Government reiterates that all cases and issues mentioned in the complaint are resolved and no charge was framed against any worker.
196. With regard to the Committee's recommendation that recourse to penal sanctions and the filing of criminal charges shall not be misused to suppress peaceful trade union activities or to threaten and intimidate trade union members and leaders, the Government indicates that if any criminal offence takes place during a strike, the respective authority institutes legal proceedings as per the Bangladesh Penal Code. It further emphasizes that it is strictly maintained that no action is taken against any trade union activists for peaceful demonstration and therefore there is no scope for misuse of the penal code.

C. The Committee's conclusions

197. *The Committee notes that this case concerns allegations of serious violations of freedom of association rights by the Government, in particular through the action of police forces in the aftermath of a strike in the garment factories in Ashulia in December 2016. The alleged violations include arbitrary arrest and detention of trade union leaders and activists, death threats and physical abuse while in detention, false criminal charges, surveillance of trade unionists, intimidation and interference in union activities. The allegations also refer to the mass dismissal of workers by garment factories following a peaceful protest.*
198. *The Committee notes the Government's indication that the unionists who were in custody were released on bail as soon as the law and order situation in the area went back to normal and that all cases filed against workers were concluded and no worker was charged after the investigation. It notes however, that pursuant to the Government's indication a number of unionists/workers were arrested and remained in custody during what the Government refers to as the period of deterioration of the law and order situation in the area of Ashulia and that at the end no charges were brought against these individuals. Noting that beyond the reference to the "law and order situation" the Government does not provide any justification for the arrest and detention of these persons, the Committee is bound to recall that the arrest and detention of trade unionists, even for reasons of internal security, may constitute a serious interference with trade union rights unless attended by appropriate judicial safeguards and that it is not possible for a stable industrial relations system to function harmoniously in the country as long as trade unionists are subject to arrests and detentions [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 136 and 127]. Considering that the arbitrary arrest and detention of trade unionists involves a danger of abuse and is detrimental to the exercise of the right*

to freedom of association, the Committee requests the Government to take the necessary measures to strengthen accountability of the police for arbitrary deprivation of liberty and to continue to provide the security forces with the appropriate instructions and training in order to ensure that in the future trade unionists are not arbitrarily arrested and detained. It requests the Government to provide information on developments in this regard.

199. In its previous examination of the present case, the Committee had requested the Government to institute an independent inquiry into the allegations of death threats, physical abuse and beatings while in custody, and into all alleged instances of intimidation and harassment of trade unionists in the aftermath of the Ashulia strike [see 384th Report, para. 169(a) and (b)]. It notes with deep concern that the Government simply responds that no denunciations were made but that the police will conduct an investigation if it receives a complaint. With regard to the allegations of the physical ill-treatment and torture of trade unionists, the Committee has recalled that governments should give precise instructions and apply effective sanctions where cases of ill-treatment are found, so as to ensure that no detainee is subjected to such treatment [see **Compilation**, op. cit., para. 111]. An independent inquiry into allegations of torture and ill-treatment is the first step for effectively protecting individuals against such serious violations of their fundamental rights. The Committee observes that requiring the victims of police ill-treatment to present a complaint to the police in the circumstances of this case is likely not to create a climate in which workers feel secure to engage and may therefore leave such grave allegations without response. It therefore urges the Government to institute an independent inquiry – to be carried out by an institution that is independent from the one allegedly implicated – into the allegations of death threats, physical abuse and beatings of trade unionists arrested and detained in the aftermath of the Ashulia strike, as well as into all other alleged incidents of intimidation and harassment by the police during the same period and to keep it informed of the steps taken in this regard. The Committee invites the complainant to provide any further relevant information to the appropriate national authority so that it can proceed to an investigation in full knowledge.
200. The Committee had also previously noted the complainants' allegations of police interference in trade union activities in the aftermath of the Ashulia strike, including spontaneous visits to union offices, disruption of training sessions and confiscation of training materials, forced cancellation of a health and training activity supported by the ILO, inquiries about previous and future meetings, confiscation of union office keys and police-ordered closure of organizations and requested the Government to ensure that the union offices concerned are able to operate freely. It had further encouraged the Government to conduct an internal investigation and review so as to identify and sanction those responsible and to avoid the repetition of such acts. The Committee notes in this regard the Government's indication that the closure of two union offices was temporary and justified in view of the deteriorating law and order situation and that the cancellation of the training was inevitable to ensure greater engagement of the trade union organizations and avoid unexpected security risks for the participants.
201. The Committee notes with regret that the Government does not provide any information on the conducting of an internal investigation and review into the allegations of repeated police interference in union activities. The Committee once again recalls that the entry by police or military forces into trade union premises without a judicial warrant constitutes a serious and unjustifiable interference in trade union activities. Furthermore, the right of occupational organizations to hold meetings on their premises to discuss occupational questions, without prior authorization and interference by the authorities, is an essential element of freedom of association and the public authorities should refrain from any interference which would restrict this right or impede its exercise, unless public order is disturbed thereby or its maintenance seriously and imminently endangered [see

Compilation, op. cit., paras 280 and 203]. The Committee firmly expects the Government to ensure that appropriate instructions are given to the police so as to prevent the repetition of such practices in the future and requests to be kept informed of the measures taken in this regard.

- 202.** *With regard to the allegations of anti-union dismissal and suspension, the Committee notes that the Government once again indicates that no worker was removed for participation in activities related to the Ashulia strike, but a number of workers resigned upon receipt of their due payments and two factories had closed due to continuous financial losses. Considering that no contradictory or additional information in this regard has been received from the complainants, the Committee will not pursue the examination of this question.*
- 203.** *The Committee notes the serious new allegations submitted by the complainant in its latest communication concerning violent police repression of peaceful demonstrations of garment workers entailing the death of one worker and the injury of many more. In view of the seriousness of these allegations, the Committee requests the Government to provide detailed observations in response without delay so that it may examine these matters in full knowledge of the facts. It also invites the complainant to provide any further relevant information to the appropriate national authority so that it can proceed to an investigation in full knowledge.*

The Committee's recommendations

- 204.** *In light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Considering that the arbitrary arrest and detention of trade unionists involves a danger of abuse and is detrimental to the exercise of the right to freedom of association, the Committee requests the Government to take the necessary measures to strengthen accountability of the police for arbitrary deprivation of liberty and continuously provide the security forces with the appropriate instructions and training in order to ensure that in the future trade unionists are not arbitrarily arrested and detained. It requests the Government to provide information on developments in this regard.*
 - (b) The Committee urges the Government to institute an independent inquiry – to be carried out by an institution that is independent from the one allegedly implicated – into the allegations of death threats, physical abuse and beatings of trade unionists arrested and detained in the aftermath of the Ashulia strike, as well as into all other alleged incidents of intimidation and harassment by the police during the same period and to keep it informed of the steps taken in this regard. The Committee invites the complainant to provide any further relevant information to the appropriate national authority so that it can proceed to an investigation in full knowledge.*
 - (c) The Committee firmly expects the Government to ensure that appropriate instructions are given to the police so as to prevent the repetition of unauthorized entry of police forces on union premises and their undue interference in legitimate trade union activities in the future and requests to be kept informed of the measures taken in this regard.*

- (d) *In view of the seriousness of the allegations set out in the recent communication of the complainant concerning violent police repression of garment workers' protests entailing the death of one and the injury of at least 80 workers, the Committee requests the Government to provide detailed observations without delay in response to these matters. It also invites the complainant to provide any further relevant information to the appropriate national authority so that it can proceed to an investigation in full knowledge.*

CASES NOS 3285 AND 3288

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

**Complaint against the Government of Plurinational State of Bolivia
presented by**

- **the Federation of Medical and Allied Trade Unions (FESIMRAS) and**
- **the Bolivian Workers' Federation (COB)**

Allegations: The complainant organizations allege restrictions on the right to strike in the public health sector, the issuing of social security regulations without prior consultation of the trade union organizations concerned, and acts of interference by the public authorities

- 205.** The complaint covered by Case No. 3285 is contained in three communications from the Federation of Medical and Allied Trade Unions (FESIMRAS) dated 28 April, 19 May and 14 July 2017. The complaint covered by Case No. 3288 is contained in two communications from the Bolivian Workers' Federation (COB) dated 1 and 2 June 2017. Since the complaints are concerned with identical issues, the Committee decided to examine Cases Nos 3285 and 3288 together.
- 206.** The Government sent its observations in two communications, both dated 25 May 2018.
- 207.** The Plurinational State of Bolivia 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

Case No. 3285

- 208.** In its communication of 28 April 2017, the Federation of Medical and Allied Trade Unions (FESIMRAS) indicates that on 21 December 2015 it presented a set of 14 demands to the Ministry of Health, including a point relating to the institutionalization of basic posts. The complainant organization indicates that, under section 151 of the regulations implementing the General Labour Act, the employer had ten days in which to reply and, on 4 April 2016, since there had been no reply from the Ministry of Health, FESIMRAS presented its list of

demands to the Ministry of Labour and asked for a conciliation board to be set up. This request was repeated on 10 August 2016 but there was still no reply from the aforementioned Ministry.

209. The complainant federation states that the Ministry of Labour's failure to reply to its list of demands, combined with the discontent caused by the appointment of a new chief administrator for the National Health Fund who did not meet the professional profile requirements for holding that post, obliged the complainant to take industrial action, which resulted in a series of graduated strikes lasting 24, 48 and 72 hours and an undefined strike, from December 2016 to February 2017, during which emergency services were reinforced. The complainant indicates that the Ministry of Health filed a request with the Ministry of Labour to have each of the strikes declared illegal, which was accepted on the grounds that the provision of health services should not be interrupted (article 38 of the Constitution), that the General Labour Act prohibited work stoppages in public services (section 118), that Supreme Decree No. 1958 of 16 March 1950 prohibited strikes in health services, and that conciliation and arbitration procedures had not been exhausted.
210. The complainant federation emphasizes that all the administrative decisions were challenged by a series of appeals for administrative review but it considers that its arguments were disregarded, since the Government had used political rhetoric to confirm that the strikes were illegal, and the complainant questions the impartiality of the administrative authority, which, in its opinion, played the role of both judge and party. In addition, the complainant considers that these decisions are incompatible with the current constitutional context in Bolivia, since the Constitution guarantees strike action as a means of defending workers' rights, and that the administrative authority based itself on an already repealed former Constitution, which made the right to strike dependent on "prior compliance with legal procedures". Lastly, the complainant emphasizes that there has been no response to its list of demands to date.
211. In its communication of 19 May 2017, the complainant federation indicates that, as reprisals for its previous actions, the Government issued Supreme Decrees Nos 3091 and 3092 (of 15 February 2017) and promulgated Act No. 922 (of 29 March 2017). The complainant considers that these pieces of legislation contain references which discriminate against the right to strike and are contrary to the Social Security (Minimum Standards) Convention, 1952 (No. 102), since they jeopardize the fundamental right to short-term social security, modify regulations concerning free affiliation, disaffiliation and reaffiliation in relation to social security schemes and could make medical services more precarious. In addition, the complainant organization emphasizes that the Government failed to hold any prior consultations with the trade unions as regards adopting the above-mentioned legislation and indicates that in view of the lack of guarantees of good-faith dialogue, the Medical College of Bolivia and the National Health Commission carried out further strikes on 17 and 18 May 2017, calling for the repeal of the above-mentioned items of legislation.
212. According to FESIMRAS, after the announcement of a third strike due to last 72 hours, the Ombudsperson brought a class action (similar to *amparo* (for the protection of constitutional rights)) with a view to obtaining a judicial prohibition of the right to strike. The complainant denounces the action of the Ombudsperson since, in its opinion, far from playing an autonomous role with regard to the public authorities, he used the judicial action for political purposes, and the complainant questioned the ruling of the Constitutional Guarantees Tribunal, which granted partial protection of rights to the Ombudsperson. In this respect, the complainant federation claims that: (i) the Ombudsperson merely summoned the Ministry of Labour and the Ministry of Health as interested third parties to a hearing, excluding the trade unions which had a particular interest in the matter; (ii) during the strikes there was no risk to human life, since all emergency services were reinforced, in line with the principle established by the Committee on Freedom of Association of providing a minimum service

in the event of a strike; (iii) both the court and the Ombudsperson disregarded the fact that the right to strike plays a pivotal role since better observance of the right to health depends on it; (iv) if the restriction on the Medical College of Bolivia's right to strike is upheld in the pending review of the class action, a precedent could be set for the penalization of strikes, which could be extended to other sectors and would place trade union leaders in a vulnerable situation with regard to criminal prosecution; (v) in a previous case, the Committee on Freedom of Association asked the Government of Bolivia to take steps to ensure that responsibility for declaring a strike illegal lies with an independent body which has the confidence of the parties; and (vi) some of the arguments of the Constitutional Guarantees Tribunal were based on sub-constitutional legislation, since it took account of principles from the repealed Constitution of 1967 concerning prior compliance with legal formalities, and mistakenly also assumed the sub-constitutional provisions relating to section 118 of the General Labour Act, Supreme Decree No. 1958 and Decree-Law No. 2565, promulgated by a military junta, to be applicable.

Case No. 3288

213. In its communications dated 1 and 2 June 2017, the Bolivian Workers' Federation (COB) states that the entry into force of Supreme Decrees Nos 3091 and 3092 and the promulgation of Act No. 922 sparked protests in the medical sector, which took the form of strikes calling for the repeal of these items of legislation on account of the alleged risk to the survival of the health funds. The complainant states, with regard to the issuing and promulgation of the above-mentioned legislation, that: (i) with the setting up of the National Health System Inspection and Monitoring Authority, established by Supreme Decree No. 3091, the Government is arbitrarily deciding on the disappearance of the health funds, giving employers the freedom to disaffiliate their workers, without consulting them and without the obligation to reaffiliate them to a similar body; (ii) after a 72-hour stoppage in the health sector was announced, the Ombudsperson filed a class action with the purpose of securing a judicial prohibition of the right to strike to the Medical College of Bolivia; (iii) with regard to the class action filed by the Ombudsperson, the Constitutional Guarantees Tribunal granted partial protection of rights to the plaintiff, prohibiting the right to strike at the Medical College of Bolivia on the simplistic grounds of the right to health prevailing over the right to strike; (iv) the strikes of the Medical College of Bolivia would not have constituted a danger to life since the medical services had been reinforced in line with the principle of the Committee on Freedom of Association concerning the provision of a minimum service; (v) both the Ombudsperson and the Constitutional Guarantees Tribunal deliberately disregarded the fact that the Medical College of Bolivia only sought to defend the short-term social security health funds and the right to health of workers and their families affiliated to such entities, who account for 30 per cent of the Bolivian population; and (vi) if the ruling is upheld, it could signify a harmful legal precedent involving the penalization of strikes, in particular for manual workers employed by the health funds.

214. In addition, the COB makes allegations of favouritism and interference in union matters and the creation of parallel unions. The complainant states that the Ministry of Labour recognizes parallel trade unions, supposedly affiliated to the federation, and that recognition is granted to them by the ministry extremely quickly, by comparison with the legitimate organizations affiliated to the COB. The complainant refers specifically to the situation of the La Paz Departmental Central of Workers, where a former leader of the organization organized ordinary congresses without authorization from the federation, as a result of which he was expelled from the organization. The complainant objects to the fact that, even though not all requirements for recognition, including approval by the COB, had been met, the Ministry of Labour issued a ministerial decision granting recognition to the parallel executive committee just six hours after the application was made. Nevertheless, the COB states that when the new executive committee of the La Paz Departmental Central of Workers, which had been

legitimately elected at an ordinary congress held on 29 and 30 March 2017, requested recognition from the Ministry of Labour and asked for the parallel executive committee to be invalidated, the ministry reportedly failed to rectify the situation in favour of the legitimate union.

B. The Government's reply

Case No. 3285

215. In its communication of 25 May 2018, the Government indicates with regard to the allegations made by FESIMRAS concerning violations of the right to strike that: (i) freedom of association is a right of workers and trade unions to assemble and defend their common interests; (ii) although the National Constitution guarantees the right to strike as a statutory right, it also guarantees the right to health and stipulates that the “provision of health services shall not be interrupted”; (iii) due procedures for exercising the right to strike are laid down in chapter I of title X of the General Labour Act, and also in chapter X of the regulations implementing the General Labour Act; (iv) Constitutional Ruling No. 04/2001 of 5 January 2001 established that “fundamental rights are not absolute but encounter limits and restrictions in the form of the rights of others, the prevalence of the general interest, the primacy of the legal system and factors of public safety, morality and health, which cannot be sacrificed to the arbitrary exercise or misuse of individual prerogatives; in other words, fundamental rights may be limited in relation to the social interest”; (v) Constitutional Ruling No. 429/2002-R of 15 April 2002 established that “persons may not exercise their rights in an unrestricted and arbitrary manner to the detriment of the rights of others and so the exercise thereof must be regulated”; (vi) in the present case, since there was no reply from the ministry which was competent to respond to its list of demands or convene the conciliation board, FESIMRAS took industrial action without taking into consideration that there were other appropriate means of challenging the lack of a timely reply to the requests made by the public servants and that they might even incur penalties; (vii) the strikes were analysed by the La Paz Departmental Labour Office and the Directorate-General of Labour, Occupational Safety and Health, which are answerable to the Ministry of Labour, and were declared illegal for not meeting regulatory requirements; and (viii) subsequently, FESIMRAS once again had recourse to industrial action, finding that Supreme Decrees Nos 3091 and 3092 and Act No. 922 made references which discriminated against the right to strike and undermined the right to health, and once again these measures were declared illegal since due procedures had not been followed.

216. Consequently, the Government considers that international instruments for the protection of human rights which form part of the constitutional bloc do not merely proclaim the whole range of rights, freedoms and guarantees but also serve to establish the particular conditions in which the State may restrict or limit rights and define violations. In the present case, the Bolivian people's right to health and life should prevail over the complainant federation's right to strike.

Case No. 3288

217. As regards the allegations made by the COB concerning the content of Supreme Decrees Nos 3091 and 3092 and also Act No. 922, the Government indicates that the legal foundation of these pieces of legislation, far from being aimed at the abolition or disappearance of the health funds, is based on the constitutional recognition of the right to health, which the State has the obligation to guarantee. Furthermore, the Government considers that the purpose of issuing Supreme Decree No. 3091 was to improve the health services; nevertheless, after a number of observations made by various parties, a process to amend that decree has been

launched and that process is being handled by the Social and Economic Policy Analysis Unit.

- 218.** With regard to the complainant's allegations of restrictions on the right to strike in the public health sector, the Government states that: (i) section 118 of the General Labour Act prohibits work stoppages in public services; (ii) section 1 of Supreme Decree No. 1958 provides that health services form part of public services for the purposes of section 118 of the General Labour Act; (iii) Constitutional Ruling No. 004/2001 states that fundamental rights may be limited in relation to the public interest; (iv) essential services are defined by the ILO Committee of Experts as "services the interruption of which might endanger the life, safety or health of the whole or part of the population"; (v) according to the report issued by the Directorate-General of Health, during the stoppage in the sector on 17 and 18 May 2017, the right to health of at least 6,000 people across the country was violated, 850 planned surgical operations were suspended and 2,100 external consultations were postponed in third-level hospitals (referral or highly specialized hospitals); (vi) according to Administrative Decision No. 097-17 of 19 May 2017, issued by the Director-General of Labour, Occupational Safety and Health at the Ministry of Labour, conciliation procedures have not been exhausted; and (vii) in its ruling on the class action, the Constitutional Guarantees Tribunal granted partial protection of rights to the Ombudsperson, on the grounds that the Medical College of Bolivia had the duty to guarantee the right to health under normal conditions to all users and that these conditions had to be guaranteed by the Ministry of Health and the Ministry of Labour under the powers conferred on them by the Constitution and the legislation.

C. The Committee's conclusions

- 219.** *The Committee observes that in the present case the Federation of Medical and Allied Trade Unions (FESIMRAS) and the Bolivian Workers' Federation (COB) denounce restrictions on the right to strike in the public health sector. The Committee also observes that FESIMRAS alleges that the trade unions were not consulted prior to the adoption of legislation affecting their interests and that the COB denounces the creation of parallel unions and favouritism and interference in union matters on the part of the Ministry of Labour.*
- 220.** *The Committee notes that, according to FESIMRAS, after an initial series of strikes in the public health sector in protest at lack of action by the Ministry of Labour as regards the setting up of a conciliation board and the controversial appointment of a chief administrator for the National Health Fund, the Ministry of Health instituted various administrative proceedings to declare the strikes illegal, and these proceedings were decided in favour of the Ministry, as were the appeals subsequently filed by FESIMRAS for administrative review of those decisions. In addition, both complainant organizations indicate that, on account of the issuing of Supreme Decrees Nos 3091 and 3092 and the enactment of Act No. 922, two further strikes were held and that, after a third strike due to last 72 hours was announced, the Ombudsperson filed a class action (similar to amparo (for the protection of constitutional rights)) with the Constitutional Guarantees Tribunal, which ruled partly in favour of the plaintiff, prohibiting the continuation of the strikes.*
- 221.** *As regards the first series of strikes declared illegal by the administrative authority, the Committee observes that the complainant organization alleges that: (i) legislative provisions of sub-constitutional status were applied, supposedly with reference to a former Constitution; (ii) the above-mentioned administrative decisions declaring the strikes illegal are incompatible with the current constitutional context in Bolivia; (iii) these administrative decisions could lead to criminal prosecution for the leaders of the striking organizations; and (iv) the Government acted as both judge and party in the proceedings for declaring the strikes illegal and also in the complainant's appeals for administrative review.*

222. *With regard to the second series of strikes and the class action filed by the Ombudsperson, the Committee notes that both complainant organizations claim that: (i) the Ombudsperson used the class action for political purposes; (ii) the operations of the emergency services were reinforced, fulfilling the requirements of a minimum service; (iii) the ruling of the Constitutional Guarantees Tribunal was challenged and if the restriction was upheld, an important precedent would be set regarding the exercise of strike action; (iv) in a previous case concerning a declaration of a strike as illegal by the administrative authority, the Committee asked the Government to take steps to ensure that responsibility for declaring a strike illegal lies with an independent and impartial body; and (v) in the present case the Government gave the right to health precedence over the right to strike.*
223. *With regard to both complainants' allegations of restrictions on strike action, the Committee notes the Government's statement that: (i) the Directorate-General of Labour and Occupational Safety and Health has the duty to declare by an administrative decision whether a national strike is legal or illegal; (ii) due procedures relating to strike action, including conciliation, were not followed; (iii) other suitable measures exist for the complainants to challenge the lack of a reply to their requests; (iv) the National Constitution stipulates that the provision of health services must not be interrupted; (v) the Constitutional Court has considered that fundamental rights are not absolute but are subject to limits and restrictions in accordance with the public interest and public health factors; (vi) section 118 of the General Labour Act prohibits the suspension of work in public services, including health services; and (vii) the health service is an essential service.*
224. *The Committee underlines that the right to strike is not an absolute right and, in specific circumstances, provision may be made to restrict or even prohibit it. The Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 830]. Furthermore, the Committee recalls that what is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population and that the Committee has previously stated that the hospital sector may be considered an essential service [see **Compilation**, op. cit., paras 837 and 840].*
225. *The Committee reminds the Government that responsibility for declaring a strike illegal should not lie with the government but with an independent and impartial body [see **Compilation**, op. cit., para. 909]. While noting that responsibility still lies with the administrative authority to determine the legality of a strike, the Committee considers that although restrictions may exist on strike action in the cases referred to above, it would be necessary for an independent body to have previously determined the scope of such a restriction and therefore once again requests the Government to take measures, including legislative measures, to ensure that if it is necessary for a strike to be declared illegal, responsibility for that declaration lies with an independent and impartial body.*
226. *With regard to the alleged inadequate functioning of compensatory guarantees, the Committee recalls that as regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented [see*

Compilation, op. cit., para. 856]. While noting the contradictory versions from the complainants and the Government regarding effective access to conciliation and arbitration, the Committee trusts that the Government will ensure the adequate, impartial and speedy functioning of conciliation and arbitration proceedings in order to restore the unions' confidence in compensatory guarantees and consequently will not pursue the examination of this allegation.

227. *As regards the alleged adoption of social security regulations without prior consultation of the trade unions and also the lack of guarantees concerning good-faith dialogue, the Committee notes the Government's indication, regarding Supreme Decree No. 3091, that following certain observations made by various parties, steps were taken towards amending the aforementioned decree. In this regard, the Committee has emphasized the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests and has drawn the attention of governments to the importance of prior consultation of employers' and workers' organizations before the adoption of any legislation in the field of labour law [see *Compilation*, op. cit., paras 1536 and 1540]. Observing that in the present case Decrees Nos 3091 and 3092 were replaced by Supreme Decree No. 3453 of 10 January 2018, the Committee hopes that in future full consultations will be held with the most representative workers' and employers' organizations on draft labour or social legislation which affects their interests or those of their members and consequently will not pursue the examination of this allegation.*

228. *As regards the favouritism and interference in union matters by the public authorities and the creation of parallel unions alleged by the COB, and specifically the situation of the La Paz Departmental Central of Workers, where the Ministry of Labour reportedly recognized an executive committee which had not been democratically elected, the Committee recalls that when two executive committees each proclaim themselves to be the legitimate one, the dispute should be settled by the judicial authority or an independent arbitrator, and not by the administrative authority [see *Compilation*, op. cit., para. 1620]. Observing that the Government has not sent its observations on these allegations, the Committee requests the Government to provide detailed information on this matter.*

The Committee's recommendations

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

- (a) The Committee once again requests the Government to take measures, including legislative measures, to ensure that if it is necessary for a strike to be declared illegal, responsibility for that declaration lies with an independent and impartial body.*
- (b) With regard to the favouritism and interference in union matters and the creation of parallel unions alleged by the Bolivian Workers' Federation, the Committee requests the Government to provide detailed information on this matter.*

CASE NO. 3206

DEFINITIVE REPORT

Complaint against the Government of Chile
presented by
the National Trade Union Federation of List A Supervisors and Professionals of CODELCO (FESUC)

Allegations: the complainant organization alleges that a national copper enterprise discourages supervisors from union membership; that the law discriminates against the complainant organization in the systems for representation on the enterprise's board; that the functioning of the complainant's trade unions has been hindered by the dismissal of hundreds of members; that the right to strike was violated through an eviction decree issued by the provincial governor; and that several union leaders were called in for questioning by the police, even though the strike in question was peaceful

230. The complaint is contained in a communication from the National Trade Union Federation of List A Supervisors and Professionals of CODELCO (FESUC) dated 17 March 2016. FESUC sent additional information in a communication dated 15 November 2016.
231. The Government sent its observations in a communication dated 15 May 2017.
232. 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

233. In its communication of 17 March 2016, the National Trade Union Federation of List A Supervisors and Professionals of CODELCO (FESUC) reports that it has affiliated six unions and some 1,800 professionals working for the enterprise CODELCO (hereinafter "the enterprise"). The complainant organization alleges that the enterprise discourages supervisors from union membership; that the enterprise's Corporate Governance Act discriminates against the complainant in the systems for representation on the enterprise's board; that the functioning of the complainant's trade unions has been hindered by the dismissal of hundreds of members; that the right to strike was violated through an eviction decree issued by the provincial governor; and that several union leaders were called in for questioning by the police, even though the strike was peaceful.
234. The complainant adds some allegations that were already examined by the Committee in a complaint presented on 14 June 2012 (Case No. 2963) and emphasizes that, not only have the recommendations of the Committee in its report of March 2014 not been taken into account in any way by the Government, but that on 29 December 2014 the Government presented a draft labour reform that runs counter to those recommendations. The complainant refers, in particular, to the following allegations:

- the allegation that, by invoking the provisions of article 305 of the Labour Code, workers with temporary contracts for work or services, as well as those serving as directors or superintendents in some establishments, have been excluded from the collective bargaining process;
- the allegation that, applying article 346 of the Labour Code, which requires non-union workers who are the recipients of benefits under a collective instrument to pay 75 per cent of the regular monthly union dues, discourages individuals from exercising their right to organize; and
- the allegation that the enterprise used articles 369 et seq. of the Labour Code to outlaw a work stoppage called in protest against the policy that the state enterprise was implementing, with a view to pushing through its transformation plans, because they were being developed outside the collective bargaining process.

235. The complainant states that there has always been a strong belief within the enterprise that supervisors have fewer trade union rights than operators, who are List B workers and belong to trade unions affiliated to the Federation of Copper Workers (FTC). The complainant alleges that the enterprise's management subscribed to the doctrine that supervisors must not join a union since they are in positions of trust, a situation that is clearly reflected in the union membership percentage of both categories, given that List B workers have a membership rate of 98 per cent, and List A supervisors a rate of 52.1 per cent. The complainant also alleges that it does not have the same level of influence as the FTC in the appointment of representatives to the enterprise's board. According to the complainant, the enterprise's Corporate Governance Act No. 20392 of 2009, which regulates the composition of the board, discriminates between FESUC and the FTC. While List B workers standing for the board are selected solely by the FTC, in the case of List A supervisors and professionals, FESUC must submit a proposal jointly with the National Association of Supervisors in the Copper Industry (ANSCO) nominating a representative from both organizations to the board.

236. The complainant also alleges that the enterprise has hindered the functioning of the trade union through dismissals and threats of dismissals. It alleges, specifically, that throughout 2015 the enterprise's management publicly stated its concern at the high production costs and low price of copper, and indicated that dismissals of the enterprise's List A supervisors were inevitable. On 29 October 2015, the Vice-President for Human Resources stated that the enterprise had to terminate the services of 350 supervisors and, subsequent to this mass dismissal (which represents 8 per cent of all supervisors, most of whom were FESUC members), indicated that there would be further dismissals given the copper price crisis. It was also stated that the enterprise could limit or reduce the use of redundancy packages, which is the system generally used to terminate the services of its workers and which sets out a more generous series of employment benefits and compensation than those provided for in law in the case of dismissals owing to the need to adjust staff numbers to respond to the enterprise's requirements. At the same time, on 11 December 2015, the Vice-President for Human Resources stated in an interview that List B workers affiliated to the FTC were not going to be dismissed, and even referred to the need to guarantee the employability of those workers.

237. The complainant also alleges the anti-union dismissal of 31 members of the List A Supervisors Trade Union of Andina (affiliated to FESUC) on 29 October 2015. The dismissals took place one month and 17 days prior to the full renewal of the trade union's board, thus determining the results of the election and the composition of the board. While at first the dismissals had been justified on the grounds of having to adjust staff numbers to respond to the enterprise's requirements, the grounds for termination were ultimately

changed and the workers accepted the so-called “redundancy packages”. These packages provided for the workers who voluntarily left the enterprise and fulfilled certain requirements related to age and period of service to receive compensation for years of service for each year worked for the enterprise, as well as an allowance and additional support linked to social security and health.

- 238.** Lastly, the complainant alleges that the right to strike was violated through a decree issued by the provincial governor of El Loa, ordering the eviction of striking workers from the premises they were peacefully occupying. It is alleged that, on 10 October 2015, the special forces unit of the Chilean police appeared at the premises of the Radomiro Tomic division with a decree issued by the provincial governor, which ordered the restitution of state property. The complainant alleges that, when threatened by the police, the strikers left the premises. It also alleges that, on 8 January 2016, the police filed a police report regarding the strike against the ten trade union leaders, all of whom were members of FESUC, and made them undergo a police identity check, even though they had not committed any crime as they had participated in a peaceful strike. This situation seriously affected the public image of the trade union leaders and caused psychological damage.

B. The Government's reply

- 239.** In a communication dated 15 May 2017, the Government sent its observations, as well as those of the enterprise. The Government indicates that this is an autonomous state enterprise, primarily engaged in the exploration, development, exploitation, processing and marketing of copper mineral resources and by-products, through seven divisions. The enterprise has 18,030 workers in total, 3,858 of whom are in the category of supervisor. Around 90 per cent of workers are union members, and 72.1 per cent of supervisors are union members, within nine unions affiliated to FESUC and ANSCO. List B operators are grouped into 24 unions, all affiliated to the FTC.
- 240.** The Government emphasizes that it has implemented the Committee's recommendations with respect to Case No. 2963 through Act No. 20940, which modernizes the labour relations system and entered into force on 1 April 2017. The Government indicates that, under this Act, chapter IV of the Labour Code was reformed in line with the Committee's recommendations concerning Case No. 2963 and the comments of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The Government highlights that in its latest observations published in 2017 concerning the application of Conventions Nos 87 and 98, the CEACR noted with satisfaction the derogation of articles 305, 346 and 369 of the former text of chapter IV of the Labour Code, which were the subject of Case No. 2963.
- 241.** The enterprise denies carrying out acts of arbitrary discrimination against FESUC, showing favouritism towards the FTC; on the contrary, it has always respected its trade union organizations and has maintained cordial labour relations with both federations. The enterprise indicates that it has signed a number of agreements with both the FTC and FESUC and that it does not distinguish between trade union organizations. It states that it fully respects the exercise of freedom of association in its various forms for all workers, operators and supervisors alike, who are free to join the trade union of their choice. This is demonstrated by the high percentage of unionized workers, which is around 90 per cent of all its workers. If the rate of union membership among supervisors is not similar to that of List B workers (operators), this is due solely and exclusively to the personal decision of the workers who carry out those functions. There is no interference by the enterprise in that decision-making process.

242. The enterprise states that it has signed agreements with the complainant on a number of occasions, which is why it cannot understand the claim of discriminatory treatment between FESUC and the FTC. The courts also reached this same conclusion in two of the four judicial proceedings initiated by FESUC against the enterprise in which very similar allegations to those in this case were made. In two of the proceedings, the claim was rejected, dismissing the existence of discrimination between trade unions, and the other two proceedings are still ongoing.
243. With respect to the allegation that FESUC does not have the same level of influence as the FTC in the appointment of representatives to the enterprise's board, the enterprise indicates that, under its Corporate Governance Act No. 20392, one of the two worker representatives on the board is appointed from a shortlist presented by the FTC (as the only organization representing List B workers) and one member is appointed from a shortlist put forward by ANSCO together with FESUC (both have to agree because both represent the enterprise's supervisors).
244. With regard to the alleged threats of dismissal, the enterprise states that, while its senior management publicly expressed the need to adjust its costs and number of supervisors as part of measures to respond to the period of economic difficulty it is facing, those statements were made against the backdrop of a depreciation in the price of copper, which is public knowledge and in no way represents anti-union conduct. In the circumstances, the mining companies have had to reduce their costs to optimize their operations. The enterprise's divisions agreed, in their collective instruments, on the so-called "redundancy packages", which include a series of benefits well above the level of those that workers would be legally entitled to receive on termination of service, as an incentive for them to leave.
245. The enterprise states that there were no threats of job losses because of worker participation in trade unions or in activities organized by them, and that the reasons for adjusting staff numbers are related to market changes and to the difficult economic situation the enterprise is facing, and thus in no way constitute threats of job losses associated with the exercise of freedom of association by List A workers. The termination of 350 unionized workers at the national level can in no way be qualified as arbitrary and was never intended to affect the freedom of association of FESUC or the trade unions affiliated to it. In that context, in October 2015, each division began reducing its numbers of supervisors, which in some cases involved supervisor redundancies or, in others, dismissals owing to the enterprise's need to adjust staff numbers to respond to requirements. The enterprise highlights that the numbers of workers carrying out supervisor tasks at the national level actually rose by 49 per cent from 2010 to date, increasing from 2,620 to 3,907. On the other hand, the total number of workers carrying out operator tasks fell by 9 per cent in the same period, as at the beginning of 2010 the total number of operators was 15,306 and by the end of 2015 it was 13,930. This situation, in addition to the fact that greater numbers of List B workers agreed to the redundancy packages, justified the fact that the reduction in staff numbers affected the supervisor category and not the operator category. Furthermore, the cost-reduction measures (with respect to reducing worker numbers) also affected another category in the enterprise, namely List E, which includes the enterprise's managers, who were affected by management restructuring in some of the divisions. Therefore, these measures were not centred solely on workers in the supervisor category.
246. The enterprise states that it did not engage in anti-union practices aimed at hindering the functioning of FESUC by changing its quorum at the time of the dismissal of 31 supervisors in October 2015. It reports that the Andina division did not know which workers were going to stand as candidates in the election and that ultimately the termination of the employment contracts of 31 workers affiliated to the List A Supervisors Trade Union of Andina was made through voluntary redundancies. The workers opted for the redundancy package provided

for in the collective agreement in force and agreed to change the grounds for termination to voluntary redundancy. The redundancy package was the workers' preferred option because it gave them access to greater benefits than the option of termination of services owing to the need to adjust staff numbers to the enterprise's requirements. Consequently, in accepting the redundancy package, the workers received, thanks to compensation calculated on years of service, sums of money greater than those agreed. The enterprise states that the workers, individually and after consultation with their trade union representatives, agreed to change the grounds for termination to voluntary redundancy. The enterprise also states that there has always been a high proportion of List A workers of the Andina division affiliated to trade union organizations of FESUC, which stands at 85 per cent. This is why 31 of these workers were affected.

247. With respect to the allegation of police intervention in the strike, the Government and the enterprise state that the eviction decree was issued by the provincial governor of El Loa to stop the trucks blocking access to the Radomiro Tomic division as part of a legal strike held by the List A Supervisors Trade Union of that workplace, in the context of a collective bargaining process at the end of 2015. The enterprise indicates that the strikers prevented non-striking workers from entering the division, including workers from contracting and subcontracting enterprises. While the enterprise recognizes the right to strike, any strikes held must respect the rights of other workers of the enterprise and/or of contracting and subcontracting enterprises who, as they were not involved in the collective bargaining in question, had to provide the services for which they had been hired.

C. The Committee's conclusions

248. *The Committee observes that, in the present case, the complainant alleges that a national copper enterprise discourages supervisors from union membership; that the law discriminates against the complainant in the systems for representation on the enterprise's board; that the functioning of the complainant's trade unions has been hindered by the dismissal of hundreds of members; that the right to strike was violated through an eviction decree issued by the provincial governor; and that several trade union leaders were called in for questioning by the police in relation to their participation in a peaceful strike.*
249. *The Committee also observes that, in addition to those allegations, in the present complaint the complainant recalls allegations that were examined by the Committee in Case No. 2963 presented by the same complainant organization in 2012 [see 371st report of the Committee of March 2014, paras 222–238]. The Committee notes that, according to the complainant, the Government has not implemented the recommendations made by the Committee in that case, which referred to the need to take legislative measures in relation to articles 305, 346 and 369 of the Labour Code. In this respect, the Committee notes the Government's statement that, on 1 April 2017, that is to say after the presentation of the complaint, Act No. 20940 entered into force, modernizing the labour relations system and reforming chapter IV of the Labour Code, and implementing the recommendations made by the Committee in Case No. 2963, derogating, inter alia, articles 305, 346 and 369 of the former text of chapter IV of the Labour Code. The Committee observes that, according to the Government, in its latest observations published in 2017 in relation to the application of Conventions Nos 87 and 98, the CEACR noted with satisfaction the derogations of the provisions mentioned. The Committee welcomes the legislative changes derogating the provisions in line with its recommendations in Case No. 2963.*
250. *With regard to the allegation that the enterprise discourages supervisors from union membership since they are in positions of trust (the complainant indicates that while List B workers (operators) have a union membership rate of 98 per cent, List A supervisors have a rate of 52.1 per cent), the Committee notes the enterprise's statement that: (i) it respects the*

exercise of freedom of association of all its workers, operators and supervisors alike, who are free to join a trade union organization of their choice, which is demonstrated by the high percentage of unionized workers in the enterprise of around 90 per cent of all its workers; (ii) it does not distinguish between trade union organizations, and FESUC (supervisors) and the FTC (operators) have participated in the various collective bargaining opportunities that have arisen over time; (iii) if the rate of union membership among supervisors is not similar to that of operators, this is due to a personal decision of the workers themselves, and there is no interference by the enterprise in that decision-making process; (iv) there are two organizations in the enterprise that affiliate supervisors (FESUC and ANSCO), which jointly represent a trade union membership rate of 72.1; and (v) the enterprise has signed agreements with the complainant organization on a number of occasions, which is why it cannot understand the claim of discriminatory treatment between FESUC and the FTC.

- 251.** *The Committee also notes that, according to the Government, the complainant has brought various judicial proceedings against the enterprise in which very similar allegations to those in this case were made: two of the four proceedings are still ongoing and in the other two a ruling was issued dismissing the existence of discrimination between the trade union organizations and rejecting the claim of anti-union practices. While the Committee notes that the rate of union membership of supervisors is lower than that of operators, in the present complaint the complainant has not provided information on specific acts that the enterprise reportedly carried out that had a direct impact on membership of or withdrawal from a trade union by its members, and neither does it allege that it was not able to negotiate agreements with the enterprise. Noting that, to date, two of the proceedings are still ongoing, the Committee trusts that, if cases of anti-union discrimination are found, appropriate steps will be taken to remedy them.*
- 252.** *With regard to the allegation that FESUC does not have the same level of influence as the FTC in the appointment of representatives to the enterprise's board, the Committee notes the enterprise's statement that, under its Corporate Governance Act No. 20392, one of the two worker representatives of the board is appointed from a shortlist presented by the FTC (as the only organization representing List B workers) and one member is appointed from a shortlist put forward by ANSCO together with FESUC (the Government indicates that both have to agree because both represent the enterprise's supervisors). In this respect, the Committee observes that the complainant has not provided evidence to suggest anti-union discrimination or animus against FESUC and further observes that, as is public knowledge, on 30 December 2016, that is to say after the presentation of the complaint, FESUC and ANSCO reached agreement on a shortlist of nominations for their representative to the board (a post that had been vacant for a year and a half).*
- 253.** *The Committee notes that the complainant also alleges that the enterprise has hindered the functioning of the trade union through dismissals and threats of dismissals: (i) the enterprise's senior management made public statements to the effect that the copper price crisis made inevitable the dismissal of the enterprise's List A supervisors at the national level (and thus not List B operators), which led to the dismissal of 350 supervisors, that is to say 8 per cent of the total number of supervisors, most of whom were members of FESUC, and all of whom were dismissed on the same day, affecting FESUC's image, resources and bargaining capacity; and (ii) the enterprise dismissed 31 supervisors affiliated to the List A Supervisors Trade Union of Andina (affiliated to FESUC) one month and 17 days prior to the full renewal of the trade union board.*
- 254.** *In this respect, the Committee notes the enterprise's statement that: (i) the difficult economic situation the copper mining market is facing is public knowledge and the enterprise is aware of this situation; indeed, the enterprise's senior management had alluded to this in their statements; (ii) in that context, in October 2015, each of the enterprise's divisions began*

reducing worker numbers, which led to supervisor and operator redundancies in some cases or, in other cases, to dismissals owing to the need to adjust staff numbers to respond to the enterprise's requirements; (iii) the aim of terminating the services of 350 unionized supervisors at the national level had never been to affect freedom of association; in fact, the number of supervisors at the national level had risen by 49 per cent from 2010 to date, increasing from 2,620 to 3,907; and, on the other hand, the total number of operators had fallen by 9 per cent in the same period, as at the beginning of 2010 their total number was 15,306 and by the end of 2015 it was 13,930; (iv) greater numbers of List B workers agreed to the redundancy packages, which justified the fact that the reduction in staff numbers affected the supervisor category and not the operator category; and (v) the cost-reduction measures also affected another category in the enterprise, namely List E, which consisted of the enterprise's managers, who were affected by management restructuring in some of the divisions. The enterprise also states that 31 supervisors from the Andina division accepted the redundancy package, as it gave them access to greater benefits than the option of termination of services linked to the need to adjust staff numbers to respond to the enterprise's requirements. The enterprise also states that it was not aware that the termination of the workers was carried out one month and 17 days prior to the full renewal of the trade union board. It emphasizes that, in any case, there has always been a high proportion of List A workers of the Andina division affiliated to FESUC trade union organizations, which stands at 85 per cent, and this is why 31 of these workers were affected.

255. The Committee notes that, while the complainant alleges that the dismissal of 350 supervisors, that is to say 8 per cent of the total number of supervisors, most of whom were members of FESUC and all of whom were dismissed on the same day, affected FESUC's image, resources and bargaining capacity, the complainant has not provided any information that would lead to the conclusion that the dismissals were due to union membership or to carrying out union activities, or in order to hinder the functioning of FESUC. The Committee notes, however, that while both the complainant and the Government refer to the figure of 350 supervisors, the Committee does not have other data (the total number of dismissals in the enterprise at the national level – among both supervisors and operators – as well as the total number of workers who accepted the termination package). Therefore, unless the complainant can provide specific information on the anti-union nature of the dismissals, the Committee will not pursue its examination of this allegation any further.
256. With regard to the allegation that the dismissal of 31 supervisors affiliated to the List A Supervisors Trade Union of Andina, one month and 17 days before the election of its new board, had an impact on the composition of the new board, the Committee notes that the complainant has not provided any information that would lead to the conclusion that there had been interference in the trade union or in its elections considering, in particular, that the rate of union membership of List A workers of the Andina division stands at 85 per cent, and it was therefore highly likely that the terminated workers were members of the trade union. In addition, the Committee notes that, according to the complainant and the Government, 31 workers ultimately accepted the redundancy package and that this gave them access to greater benefits.
257. Lastly, the Committee notes the allegations that the right to strike was violated through a decree issued by the governor, who ordered the eviction of workers from the premises they were peacefully occupying and that, after the strike, several trade union leaders were called in for questioning by the police, which seriously affected their public image. In this respect, the Committee observes that, according to information from the Government and the enterprise, the eviction decree was issued by the governor to stop the trucks blocking access to the Radomiro Tomic division, preventing non-striking workers from entering the building, including workers from contracting and subcontracting enterprises. While it notes that the

*strike in question was peaceful (as stated in the police report included by the complainant), the Committee recalls that the exercise of the right to strike should respect the freedom to work of non-strikers, as established by the legislation, as well as the right of the management to enter the premises of the enterprise [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 940).*

The Committee's recommendation

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

CASES NOS 3246 AND 3247

DEFINITIVE REPORT

Complaint against the Government of Chile presented by

Case No. 3246

**Union Assistants' National Federation for Municipal Education
Corporation Workers in Chile (FENASICOM)**

Case No. 3247

National Federation of Education Workers (SUTE CHILE)

Allegations: The draft act establishing the public education system would violate freedom of association by not explicitly regulating the situation of trade unions; it would be a step backwards for workers, who currently have, thanks to an exceptional legal provision, the right to bargain collectively and to strike, rights not included in the national legislation for civil servants

259. The complaints are contained in two communications from the Union Assistants' National Federation for Municipal Education Corporation Workers in Chile (FENASICOM) and the National Federation of Education Workers (SUTE CHILE), dated 2 August 2016 and 17 September 2016, respectively. SUTE CHILE sent additional information in communications dated 21 February 2017 and 24 January 2018.

260. The Government sent its observations in communications dated 31 July 2017 and 12 December 2017.

261. In view of the nature of the issues raised in the complaints, Cases Nos 3246 (FENASICOM) and 3247 (SUTE CHILE) will be examined together by the Committee on Freedom of Association.

262. 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 organization's allegations

Case No. 3246

263. In a communication dated 2 August 2016, the Union Assistants' National Federation for Municipal Education Corporation Workers in Chile (FENASICOM) alleges that the draft Act establishing a public education system and amending various legal texts, which was submitted to the Chamber of Deputies in November 2015, does not include the right to organize of non-teaching personnel in educational establishments, their right to bargain collectively, nor their resulting right to strike. The complainant organization explains that, in accordance with Act No. 19464 of 24 July 1996, education assistant personnel who work in educational establishments under the authority of private, non-profit corporations created by councils to manage municipal education have a right to bargain collectively to establish working conditions and terms of employment and remuneration, thanks to an exceptional legal provision. Such right is not extended to teaching assistant personnel working in educational establishments under the authority of education administration departments, who are subject to the provisions of Act No. 19296 on civil servants' associations.
264. FENASICOM alleges that the draft act – which aims to create a single system managed by decentralized public bodies by transferring personnel who work for the private corporations mentioned – violates the right to freedom of association, since section 39 prescribes that “starting from the date of education service transfer, a period of two years shall be granted for the trade unions representing the transferred personnel to merge, amend their statutes in accordance with Act No. 19296 and switch to being governed by such provisions for all legal purposes following the submission of the amended statutes to the Labour Inspectorate”. According to the trade union organization, this means that trade unions have two years to dissolve their organizations and become civil servants' associations or else they will cease to function, in violation of Article 4 of Convention No. 87.

Case No. 3247

265. In a communication dated 17 September 2016, the National Federation of Education Workers (SUTE CHILE) indicates that the draft act establishing the public education system (*Official Gazette* No. 10368-04) seeks to give the public education system a new institutional structure. The complainant organization explains that the legislative reform will mean that the public education system has three levels: (i) the Directorate of Public Education, a centralized public service under the authority of the Ministry of Education; (ii) local public education services, which will be decentralized public services with a legal personality and their own assets, and (iii) educational establishments (education professionals and assistants). In that regard, it explains that the existing educational establishments report to the municipalities either directly, through the Municipal Education Administration Department (DAEM – a public body), or indirectly, through its municipal corporations (private law corporations), employees of which will, with the entry into force of the law, be transferred to local services. On that basis, education professionals and assistants organize either as civil servants' associations or as trade unions, depending on whether their contractual ties are with the municipality through the DAEM or with a municipal corporation. According to the draft act, the legal successor to the DAEM or the municipal corporation will be the respective local service.

- 266.** With respect to the transfer of personnel, the complainant organization explains that the transitional provisions of the draft act regulate three different situations: (i) the transfer of municipal personnel; (ii) the transfer of municipal personnel governed by the Teacher's Statute to posts within local services; and (iii) the transfer of educational establishment personnel. The complainant organization stresses that the third type of transfer will be carried out "with no break in service", as, owing to a legal fiction, the transfer of education professionals and assistants from the municipality or municipal corporation to local services will not affect the seniority of workers or the legal provisions applicable to them. Thus, education professionals will continue to be governed by Act No. 19070 on the statute of education professionals, as well as the Teacher's Statute, and education assistants will continue to be governed by Act No. 19464, which establishes that the legal regime for such workers is the Labour Code.
- 267.** The complainant organization indicates that the abovementioned draft act contains no provisions on the freedom of association of education workers with respect to either existing or future trade union relations; it therefore expresses concern about the uncertain future of trade unions following the transfers. In addition, the complainant organization expresses concern about the fact that education professionals and assistants will, following their transfer to local services, report to a public institution, meaning that they will, without exception, only be able to organize in accordance with the provisions of Act No. 19296 on public sector workers, which does not provide for the right to bargain collectively or the right to strike. Accordingly, education sector workers will have only one aspect of freedom of association recognized (the organizational aspect). The complainant organization therefore alleges that the draft act will prohibit such workers from exercising the rights to bargain collectively and to strike.
- 268.** The complainant organization explains that, according to the principle of continuity enshrined in section 4 of the Labour Code, existing trade union organizations will remain operational. However, the application of the principle of the continuity of collective rights will be in conflict with the public nature of the new employing entity – the local services – which means that workers affiliated to trade unions will have to transfer to a civil servants' association. This raises questions with respect to: (i) the recognition by the employer of the rights acquired through collective bargaining; (ii) the right to bargain collectively formerly enjoyed under the previous legislation by education assistants reporting to municipal corporations; and (iii) the collective bargaining carried out by education professionals reporting to municipal corporations.
- 269.** The complainant organization refers to section 39 of the draft act (section 43 of Act No. 21040), on civil servants' associations, indicating that all workers transferred to a public service will only be able to form associations in accordance with Act No. 19296 (regulations applicable to public sector workers), that existing trade union organizations will have two years to amend their statutes and become civil servants' associations, and that those associations will, in turn, have one year to meet the quorum set out in section 13 of Act No. 19296.
- 270.** According to the complainant organization, the abovementioned draft act constitutes a step backwards because: (i) education sector workers, who have historically exercised the right to bargain collectively, will be deprived of a right recognized and guaranteed by the Constitution and various ratified international treaties; (ii) it does not guarantee the continuity of existing trade union organizations after the change in employer; and (iii) such organizations must not only become civil servants' associations but also meet the quorums regulated by the Civil Servants' Associations Act, in the knowledge that the transfer to a local service will increase the total number of workers and thus the quorum requirement.

- 271.** In a communication dated 21 February 2017 referring to the “Position of the Ministry of Education regarding the labour situation of education assistants reporting to municipal corporations in the context of the draft act establishing the public education system” (May 2016, *Official Gazette* No. 10368-04), SUTE CHILE notes that, as a result of the move to the new public institutional structure, workers affiliated to trade unions are obliged to dissolve their trade union organizations and lose the right to bargain collectively. It also alleges that the draft act denies assistants (as well as professionals) the status of civil servants, making them workers with duties of a public nature but no public sector guarantees as civil servants.
- 272.** In a communication dated 24 January 2018, SUTE CHILE reiterated its criticisms of Act No. 21040, as promulgated on 24 November 2017, on the grounds that: (i) it violates the principle of continuity and labour stability (transitional sections 36, 37 and 38); (ii) it violates the right to freedom of association (transitional section 43), as it gives new grounds for dissolving trade union organizations; it does not recognize the rights to bargain collectively and to strike of civil servants’ associations from the education sector, whether they be existing civil servants’ associations or trade unions that will become civil servants’ associations after the transfer of workers to local education services; and (iii) there is no recognition of the rights that education workers’ trade unions have acquired through collective bargaining. SUTE CHILE reiterates that the Act does not respect current regulations for education assistant personnel, which recognize their rights to bargain collectively and to strike. Lastly, the organization alleges that, since the adoption of Act No. 21040, many complaints have been received from education workers in relation to mass dismissals.

B. The Government’s response

- 273.** In its communications dated 31 July 2017 and 12 December 2017, which refer to both cases, the Government provides information about: (i) the Chilean school system and the reasons for improving the municipal system of public education; (ii) the situation of education assistants in the municipal sector, which is the subject of the current complaints; and (iii) the protection of the personnel concerned with respect to trade union rights and collective bargaining. It appends to its response a document from May 2016 entitled “Position of the Ministry of Education regarding the labour situation of education assistants reporting to municipal corporations in the context of the draft act establishing the public education system” (May 2016, *Official Gazette* No. 10368-04).
- 274.** The Government explains that the country’s school system is a mixed, public–private system of provision composed of four types of establishment that report to different entities: municipal (public) establishments, subsidized private establishments, unsubsidized private establishments and establishments with delegated administration. The municipal establishments to which the present case refers are administered by two types of management structure: Municipal Education Administration Departments or Municipal Education Directorates (DAEMs or DEMs), on the one hand, and municipal corporations on the other. DAEMs and DEMs are bodies that belong directly to the municipality; their functions are restricted to the administration of municipal educational establishments, which includes human and pedagogical resource management and administrative management. Municipal corporations are non-profit, private law entities with their own legal personality. Each has a board of directors presided over by the mayor of the respective commune. The general aim of municipal corporations is to administer the education, health and social development of the commune, carrying out functions in different areas of municipal life (education, health, children’s services, etc.). On the basis of various studies on the topic, the Government considers that the municipal public education sector is not in a position to permanently ensure terms of administration and resource management that would guarantee the quality,

improvement and future protection of public education across the entire country. Accordingly, the proposal contained in the draft act – which was adopted on 24 November 2017 (Act No. 21040) – envisages the creation of a national system of public education structured around local public education services. These entities belong to the State Administration and assume the form of decentralized public services specialized in education management, which provide administrative, technical and pedagogical support to the school establishments under them. Lastly, the Government declares that it has held a permanent dialogue with almost all stakeholders and unions in school education, in particular, in relation to the draft act establishing the public education system. The unions consulted include the National Council of Education Assistants, the main representative of that segment of workers in municipalized education, which is composed of various federations and confederations of education assistants' associations and unions from the whole Chilean municipal sector (including FENASICOM).

- 275.** Regarding the situation of education assistants (prior to the reform), the Government indicates that they work in one or more educational establishments and carry out functions other than teaching, which might be professional, technical, administrative, auxiliary or service tasks. Education assistants across the municipal sector are governed by Act No. 19464 and also by the Labour Code. The legislation distinguishes their right to association on the basis of the employing entity. For education assistants contracted by DAEMs or DEMs – i.e. directly by municipalities – section 60 of Act No. 19464 establishes that they are subject to Act No. 19296 on civil servants' associations. In the case of municipal corporations, section 14 of the same Act No. 19464 grants education assistants the right to bargain collectively in accordance with the Labour Code, permitting an exception for this group of workers to the prohibition set out in section 304 of the Code. According to the Government, the new public education system provided for by the law does not alter the contractual and labour regime of education assistants who work in educational establishments under the authority of municipal corporations or directly for municipalities. In addition, it does not establish requirements or selection processes for transferring all education assistants from municipalities and corporations to future local public education services. The Government asserts that the main modification proposed by the draft act in relation to that sector of workers is to change the employer responsible for contracting education assistants: such employers will assume a single (public) nature, ending the current dichotomy between municipal corporations and municipalities. The Government emphasizes that a key focus of the draft act is ensuring the employment continuity of all workers associated with the provision of public education, meaning that transferred employees will have no break in their employment and will keep their wages and welfare rights. The Government stresses that the “no break in service” transfer model, established in the draft act, means that workers will lose neither their legal rights nor any rights acquired under agreement with the respective municipality or municipal corporation prior to their transfer, including those acquired by tacit agreement. The Government specifies that, in addition to the Administrative Statute, various statutes or specific provisions are applicable to public sector workers according to the nature of their activity. This is true of education assistants, who have their own regulations and statute.
- 276.** Regarding the protection of the union rights of the personnel concerned, the Government states that, firstly, workers have the right to join unions under article 19(19) of the national Constitution. However, the legislation on the public sector establishes a relevant exception in article 84 of the Administrative Statute, which prohibits civil servants from joining or belonging to trade unions in the field of the State Administration. Notwithstanding the above, the Government considers that the State recognizes and respects the freedom of association of State Administration workers, who have their right to form civil servants' associations recognized, the only condition being that they abide by the law and the statutes of the associations, in accordance with Act No. 19296 on civil servants' associations.

According to the Government, these associations have, in practice, operated in a similar way to trade unions, meaning that the right to organize of workers has also been respected in the public sector. The Government indicates that freedom of association and the representation of labour interests are exercised differently by public sector workers than by private sector workers, but that that does not mean that the rights do not exist or that there are no mechanisms in place for their enjoyment. Moreover, based on the variant regulations and characteristics of the public employment system, the new Act provides that workers should, pursuant to the reform and the resulting change in labour law, transform their trade unions and form civil servants' associations. The Act grants a period of two years starting from the date of education service transfer for the trade unions representing the transferred personnel to merge, amend their statutes in accordance with Act No. 19296 on civil servants' associations and switch to being governed by such provisions for all legal purposes following the submission of the amended statutes to the Labour Inspectorate. In that regard, the Government underscores that the Act grants existing trade unions the opportunity to adapt to public sector regulations. It thus guarantees that educational assistant workers will not, at any point during the transfer process, be unprotected with respect to their right to organize and right to representation before the authorities and their employer. The Government stresses that trade unions that do not make use of their right to adapt will remain as such and will not lose their legal personality or forego their legal existence in so far as national legislation does not permit the dissolution of unions by a decision of the administrative authority. According to the Government, the reform affects not the trade union rights themselves, but rather the way in which they are guaranteed. Once the assistants become State employees, their right to organize starts being governed by Act No. 19296 establishing regulations on State Administration civil servants' associations. In fact, section 7(a) of the Act explicitly indicates that one of the main purposes of civil servants' associations will be to promote the advancement of their members' economic, living and working conditions.

277. Regarding the right to bargain collectively, the Government makes a distinction between the right to bargain, on the one hand, and collective bargaining regulated by the Labour Code, on the other. Public sector workers bargain centrally in some cases and on a sectorial basis in others. It is reasonable that general working conditions – which are established by law – tend to be bargained centrally. The Government emphasizes that, unlike in the private sector, the vast majority of working conditions in the public sector are governed by law, which means that wages or general conditions of employment are negotiated, in a manner of speaking, *erga omnes*. According to the Government, this point is extremely important for avoiding inequality between workers in matters such as wages. This equality principle could be infringed in the case of fragmented bargaining. Therefore, the statutory regime ensures a certain employment stability that must be maintained, and which is not guaranteed by the private law regime. Further still, the Government recalls that, in 2000, Chile ratified Convention No. 151 and that *de facto* bargaining is carried out with public sector workers within a well-established framework. Lastly, the Government considers that the process of institutional change at the heart of the Act respects the outcomes of the agreements reached by the personnel concerned and their current employers at the time of the transfer of the education service from municipalities and municipal corporations to the future local public education services.

C. The Committee's conclusions

278. *The Committee observes that the present case refers to the establishment by law of a new national system of public education, which implies structural changes. The reform entails a move from a mixed and municipalized education system – where (public) Municipal Education Administration Departments or Municipal Education Directorates (DAEMs or DEMs) and municipal corporations (non-profit, private law entities with their own legal*

personality) coexist – to a national system of public education structured around local public education services. These entities belong to the State Administration and function as decentralized public services. The complaint refers, in particular, to education assistants from the municipal sector who will continue to be governed by the Labour Code despite the fact that they will have a public employer.

- 279.** *The Committee notes that both the initial complaints and the Government's response refer to the draft act on the public education system. It should be noted that it was adopted on 24 November 2017 (Act No. 21040) and that SUTE CHILE, in a communication dated 24 January 2018, reiterated its criticisms and claims alleging that the Act violated the right to freedom of association.*
- 280.** *The Committee notes the complainant organizations' claims that the draft act – and the subsequent Act – would constitute a violation of freedom of association by not explicitly regulating the situation of trade unions, which would respect neither the continuity of trade union organizations nor the agreements that they had reached with workers' current employers. According to the complainant organizations, the draft act would be a step backwards for workers, who currently have, thanks to an exceptional legal provision, the right to bargain collectively and to strike, rights not included in the national legislation for public sector workers.*
- 281.** *The Committee observes that the main aim of the Act in question is to provide a single institutional basis for public education across the entire national territory and that, in particular, it aims to harmonize the contractual relations of education assistants and accord them a statutory regime. Such employers will assume a single (public) nature, ending the current dichotomy between municipal corporations and municipalities, without that affecting the assistants' labour regime. The Committee also observes that the Government indicates that a key aim of the Act is to ensure the employment continuity of all workers associated with the provision of public education, meaning that transferred employees will have no break in their employment and keep their wages and welfare rights.*
- 282.** *In relation to rights to organize, the Committee observes that transitional section 43 of Act No. 21040 allows trade unions the possibility to change/adapt their statutes to the new situation so that they can defend their members who are now employed by a public entity (local services). It notes that when the education personnel concerned [professionals and assistants working for (private law) municipal corporations] become State employees, their right to organize will begin to be governed by Act No. 19296, which establishes regulations on State Administration civil servants' associations. In fact, section 7(a) of the Act explicitly indicates that one of the main purposes of civil servants' associations will be to promote the advancement of their members' economic, living and working conditions. In view of the above, and regarding the right to organize, the Committee considers that a legislative provision inviting trade unions in the sphere of private sector education to modify their statutes with the aim of affiliating and being able to defend workers from public entities, is not incompatible with the right of workers to establish the organizations of their own choosing, provided that merely declaring the required change is sufficient, without prior authorization. The Committee expects that the rights to collective representation of such workers should be fully assured.*
- 283.** *The Committee observes that, under the previous education system, the right to bargain collectively constituted an exceptional provision. The Committee further observes that, according to the Government, that situation was only justifiable while the condition that had given rise to the differential treatment persisted – namely, the differing legal nature of the DAEMs/DEMs and the corporations – and that, once workers were transferred to a public service (the local public education service), differentiating between workers who carried out*

the same duties would no longer be justified, in recognition of the Constitutional principle of equality before the law.

- 284.** *While recognizing that it is not competent to form an opinion on the nature of the country's education system or the legal regime applicable to education sector personnel who are transferred as part of the institutional reform (given that the assistants are not civil servants but rather public agents with a particular status), the Committee notes that the adopted Act establishes a new – public – structure for education, which is the main subject of the complaints as regards its effect on trade union rights. On the one hand, the complainants regret having lost the possibility to bargain collectively and directly with the employer within the municipalized system. On the other hand, the Government considers that in the public sector, unlike in the private sector, the majority of the working conditions of workers are governed by law, without collective bargaining being excluded, although it recognizes that one of the particularities of the civil service in Chile is that it lacks regulated bargaining.*
- 285.** *In view of the above, while it notes the need to establish a coherent national system of public education under the auspices of one common entity and its consequences in relation to the transfer of the personnel concerned, the Committee observes that, from now on, the trade union rights of education assistants will be determined in accordance with the system in force for civil servants. In that regard, the Committee wishes to recall that it has, on several occasions, drawn attention to the importance of promoting collective bargaining, as set out in Article 4 of Convention No. 98, in the education sector [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 1265]. Observing that Chile has ratified Conventions Nos 98 and 151, the Committee refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations (CEACR).*
- 286.** *Regarding the allegation that neither the right to bargain collectively nor the subsequent right to strike of civil servant organizations from the education sector are recognized, the Committee notes that the Government has not provided information on the issue of strikes. Recalling that the right to strike may be restricted or prohibited only for public servants exercising authority in the name of the State [see **Compilation**, op. cit., para. 828], the Committee requests the Government to take measures to ensure that the restrictions on the right to strike are in conformity with this decision.*

The Committee's recommendations

- 287.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations..*
 - (b) The Committee requests the Government to take measures to ensure that the restrictions on the right to strike are in conformity with the decision referred to in the above conclusions.*

CASE NO. 3253

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

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

- **the Costa Rican Confederation of Democratic Workers (CCTD) and**
- **the Union of Workers of the G Four Group (SINTRAGFOUR)**

Allegations: The complainant organizations allege anti-union dismissals and anti-union persecution (blacklisting) in the private security sector

- 288.** The complaint is contained in communications from the Trade Union of Workers of the G Four Group (SINTRAGFOUR) and the Costa Rican Confederation of Democratic Workers (CCTD) dated 7 June and 1 December 2016.
- 289.** The Government sent its reply in a communication dated 24 October 2017.
- 290.** Costa Rica 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

- 291.** In its communication dated 7 June 2016, SINTRAGFOUR alleges that several members of its executive committee and 92 of its members were subject to anti-union dismissals and anti-union discrimination on behalf of the company GFOURS SA (hereinafter the private security firm). Furthermore, in a communication dated 1 December 2016, the CCTD adds that more than 150 members have been subject to anti-union dismissal since the establishment of SINTRAGFOUR, and that the real reason for these dismissals was their trade union membership and not disciplinary offences, which had been fabricated by the firm.
- 292.** The complainant organizations indicate that the trade union SINTRAGFOUR was established on 10 August 2013, and on 4 December 2013 it sent a letter to the legal representative of the firm with the aim of informing the firm of: (i) the establishment of the trade union; (ii) the workers who were members of the executive committee; and (iii) the deduction of trade union dues. Following this communication, the employment relationship between representatives of the firm and members of SINTRAGFOUR changed, and anti-union harassment of the members of the executive committee began, in which they were implicated in arbitrary disciplinary offences that led to the dismissal of the majority of the members of the executive committee.
- 293.** The complainant organizations state that all of the members of the SINTRAGFOUR executive committee were dismissed as a result of anti-union discrimination and without recognition of their trade union immunity. After having sought recourse to the administrative authority of the Ministry of Labour and Social Security to no avail, they initiated legal action. The trade union leaders included: (1) Ms Graciela Reyes Umaña, who served as legal counsel, dismissed without employer liability on 30 August 2013; (2) Mr Vladimir Torres Montiel, general secretary, dismissed without employer liability on 23 April 2014; (3) Mr Jeffrey Duran Mora, finance secretary, dismissed in November 2014; (4) Mr Rigoberto Cruz Vásquez, treasurer, dismissed with employer liability on 23 January 2015; (5) Mr José Andrés Chevez Luna, training secretary, dismissed with employer liability on 2 February 2015; (6) Mr Wagner Cubillo Palacios, secretary, dismissed with employer

liability on 3 February 2015; (7) Mr Félix Andino Munguía, records secretary, dismissed with employer liability on 1 March 2015; (8) Mr Carlos José Padilla Aviles, records secretary, dismissed with employer liability on 6 July 2015; and (9) Mr Jonás Arias Molina, president, also dismissed with employer liability on 6 July 2015.

294. The trade union organizations emphasize that four members of the executive committee were able to prove in court the existence of anti-union harassment. The complainant organizations also indicate that, on three occasions, the defendant suspended the hearing in the labour tribunal, with the sole aim of delaying the proceedings. The case is now in the appeals phase, as the defendant brought an appeal against the judgment of the San José Labour Tribunal.
295. The complainant organizations allege that the members of the executive committee who were subject to anti-union dismissals have not been able to find new jobs because they have been blacklisted. They state that a clear example is the case of Mr Carlos José Padilla Aviles, records secretary, who was dismissed with employer liability on 6 July 2015, but who, due to the nature of the events, cannot prove that this was the case.
296. Lastly, the trade union organizations assert that the specific events reported in this case are a manifestation of the prevailing anti-union policies in both the public and private sectors in Costa Rica, which take the form of anti-union dismissals and a lack of will among the competent authorities, particularly the Ministry of Labour and Social Security, to expedite the procedures available to workers.

B. The Government's reply

297. In its communication dated 24 October 2017, the Government refers first of all to the report of the private security firm, which indicates that: (i) the dismissals are not attributable to workplace harassment, but to the closure of several large contracts, which led to the loss of 500 positions between 2014 and 2016; (ii) the firm's business is private security services and the majority of its workers provide services in its clients' facilities in different areas of the country; (iii) workers were designated for dismissal not owing to trade union membership, but to the type of contract to which they were assigned and the possibility of transferring them; (iv) the firm cannot be accused of unfair labour practices, given that, since 2008, it has permitted the existence of several trade unions and, at the time of the presentation of the communication, the following were present in the firm: the Union of Public and Private Enterprise Workers (SITEPP) with 75 members, SINTRAP with 15 members, the National Association of Public and Private Employees (ANEP) with 40 members, and SINTRAGFOUR with 53 members; and (v) there were justifiable grounds for the dismissals and, in many cases, conciliation was reached with the workers concerned.
298. Regarding the anti-union dismissals of the members of the executive committee of SINTRAGFOUR of which it is accused, the private security firm indicates that: (i) Ms Graciela Reyes Umaña, Mr Rigoberto Cruz Vásquez, Mr José Andrés Chevez Luna and Mr Wagner Cubillo Palacios were dismissed with employer liability as a result of necessary restructuring processes following the closure of several large contracts; and (ii) Mr Vladimir Torres Montiel was dismissed without employer liability for repeatedly abandoning his post. The worker filed a claim, but an agreement was subsequently reached between the parties, thus ending the proceedings.
299. Furthermore, the firm indicates that the real problem between the parties was the fact that the representatives of SINTRAGFOUR did not participate in the Labour Relations Board, a body established by collective agreement that has the authority to decide on all matters of dismissal without employer liability. In this regard, the security firm states that the Labour Relations Board is currently comprised of two trade union representatives from SITEPP and

two employer representatives, and that it does not oppose members of the other trade unions participating in the Labour Relations Board, but that this must be agreed upon by the trade unions and not imposed by the firm. The security firm also indicates that an agreement is still in force that was concluded in 2013 with SITEPP, a trade union that is more strongly represented in the firm. The agreement was concluded before the conciliation tribunal established by the Labour Court and was in force until 22 November 2017. The private security firm adds that, in a decision of 14 July 2014, the Labour Court urged SINTRAGFOUR to negotiate before the Ministry of Labour and Social Security the possibility of SITEPP sharing its participation in the Labour Relations Board. The firm also indicates that it repeatedly attended hearings convened by the Ministry of Labour and Social Security, as recorded in the minutes provided by the complainant, with the aim of reaching an agreement with the trade unions, but the unions were not able to reach an agreement, and SINTRAGFOUR took this opportunity to accuse the firm of anti-union dismissals. Lastly, the firm states that, based on the foregoing, any accusation of anti-union harassment made against it must be disregarded, and that it remains open to dialogue and finding solutions that allow the firm and the trade unions to coexist harmoniously.

- 300.** The Government goes on to provide its own observations and begins by indicating that the National Directorate of Labour Inspection (DNI), which is the administrative authority responsible for monitoring compliance with trade union rights, indicates that: (i) it was aware of complaint No. SJ-PL-7072-14 of 2014 regarding harassment and unfair labour practices, lodged by the National Federation of Industrial Workers (FENATI), to which SINTRAGFOUR is affiliated; (ii) on that occasion, it reviewed the dismissals without employer liability of Mr Vladimir Torres Montiel and Ms Graciela Reyes Umaña, both trade union leaders of SINTRAGFOUR and, in February 2015, Mr Vladimir Torres Montiel stated his intention to have recourse to the courts, in the absence of an agreement with the firm before the DNI; and (iii) the DNI was not aware of any other complaints related to the other anti-union dismissals alleged in this case. The Government then indicates that the Directorate General of Labour Affairs, the body responsible for amicable intervention in labour disputes, reported that, between 2013 and 2016, a series of hearings were held in relation to alleged cases of anti-union harassment involving the union representatives of SINTRAGFOUR and the defendant firm.
- 301.** With regard to the allegations made by the CCTD in relation to the anti-union policies applied in Costa Rica, the Government responded that the allegations were unfounded, given that the Act on labour procedure reform came into force on 25 July 2017, and that this Act has, inter alia, streamlined judicial proceedings, reduced delays and strengthened protections for workers who enjoy special immunities and freedom from discrimination. Moreover, this Act allows for, by means of a summary procedure known as a labour safeguard, the issuance of a pre-sentence decision, which suspends the effects of the proceedings and orders the interim reinstatement of the worker concerned in his or her post. Lastly, this Act will allow, in cases in which the employment relationship is terminated, the worker to obtain a settlement of the sums owed more quickly than is currently possible, through the arbitration and conflict resolution services of the Ministry of Labour and Social Security.

C. The Committee's conclusions

- 302.** *The Committee notes that, in the present complaint, the complainant organizations allege that, as a result of the establishment of the trade union SINTRAGFOUR in August 2013, all of the members of the executive committee of this company union and a large number of its members were subject to anti-union dismissals and anti-union harassment on behalf of a private security firm.*

303. *With regard to the alleged anti-union dismissals and the anti-union harassment, the Committee notes the complainant organizations' allegations that, following the establishment of the trade union, all the members of the executive committee: Ms Graciela Reyes Umaña, Mr Vladimir Torres Montiel, Mr Jeffrey Duran Mora, Mr Rigoberto Cruz Vásquez, Mr José Andrés Chevez Luna, Mr Wagner Cubillo Palacios, Mr Félix Andino Munguía, Mr Carlos José Padilla Aviles and Mr Jonás Arias Molina, were dismissed with no respect for their trade union immunity. In the absence of an agreement before the administrative authority of the Ministry of Labour and Social Security, the union leaders filed complaints with the courts and four of them were able to prove the existence of anti-union harassment. In addition, 150 members were allegedly dismissed for anti-union reasons since its establishment.*
304. *The Committee also notes the firm's indication that there were sound reasons for the dismissals, more specifically, that they were the result of the closure of several large contracts and, furthermore, in many cases conciliation was reached with those concerned. The firm also indicates that the real issue lies in the absence of SINTRAGFOUR representatives on the Labour Relations Board, the body that examines and takes decisions regarding all dismissals without employer liability, and adds that it does not oppose representatives of other trade unions sitting on this board, but that this must be agreed upon by the trade unions. The Committee also notes that the Government's indication in its response that two cases of harassment and unfair labour practices were heard before the DNI and that a series of hearings in relation to alleged cases of anti-union harassment were held in the Directorate General of Labour Affairs, the body responsible for amicable intervention in labour disputes.*
305. *The Committee notes all these factors and observes that the complaint refers, on the one hand, to the dismissal of nine SINTRAGFOUR union leaders and, on the other, to the alleged dismissal of a large number of its members.*
306. *With regard to the dismissal of the nine union leaders, while noting the complainants' affirmation that four union leaders could prove the anti-union nature of their dismissal before judicial authorities, the Committee observes that the information included in the annexes provided by the complainant organizations shows that: (i) three trade union leaders, Mr Rigoberto Cruz Vásquez, Mr José Andrés Chevez Luna and Mr Wagner Cubillo Palacios, obtained a favourable judgment in the first instance, which was appealed by the firm and, at the time of the presentation of the communication, was still in the appeals process; (ii) the employment relationships of three trade union leaders were terminated by mutual agreement, Mr Jeffrey Duran Mora, Mr Félix Andino Munguía and Mr Jonás Arias Molina; and (iii) specific information was not provided with regard to the other trade union leaders.*
307. *The Committee recalls that, in cases of the dismissal of trade unionists on the grounds of their trade union membership or activities, the Committee has requested the Government to take the necessary measures to enable trade union leaders and members who had been dismissed due to their legitimate trade union activities to secure reinstatement in their jobs and to ensure the application against the enterprises concerned of the corresponding legal sanctions. The Committee also recalls that if the judicial authority – or an independent competent body – determines that reinstatement of trade union members is not possible for objective and compelling reasons, adequate compensation should be awarded to remedy all damages suffered and prevent any repetition of such acts in the future, so as to constitute a sufficiently dissuasive sanction against acts of anti-union discrimination [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 1167 and 1175]. On this basis, the Committee requests the Government to provide*

information on developments in the pending cases and also those on which information is not available, and expects that these cases will be addressed in the near future.

- 308.** *Regarding the alleged 150 anti-union dismissals of workers affiliated to SINTRAGFOUR, the Committee observes in the first place that the complainants allege that those dismissals took place following the dismissal of all the members of the executive committee of the trade union and that the true reason behind these dismissals was the union affiliation of its members. The Committee also notes that the complainants provide an incomplete list of the 150 dismissed workers affiliated to the union in the annexes to the complaint. Secondly, the Committee observes that the company informs it that those dismissals were based on objective grounds, as a result of the closure of several large contracts and, in many cases, conciliation was reached with the workers concerned. The company indicates that the real problem is that, unlike the most representative union, SINTRAGFOUR does not participate in the Labour Relations Board of the company, an internal body established by collective agreement that examines and takes decisions regarding dismissals without employer liability. The company indicates that this problem should be resolved by the unions concerned. Lastly, the Committee observes that besides the judicial proceedings concerning anti-union dismissals referred to previously, the Ministry of Labour and Social Security indicates that it has received several reports of anti-union dismissals that are being treated either by the National Directorate of Labour Inspection or by the General Directorate of Labour Affairs.*
- 309.** *Faced with divergent versions regarding the reasons for the dismissals and recalling that in cases involving a large number of dismissals of trade union leaders and other trade unionists, the Committee considered that it would be particularly desirable for the Government to carry out an inquiry in order to establish the true reasons for the measures taken [see **Compilation**, op. cit., para. 1133], the Committee requests the Government to conduct a comprehensive investigation of the alleged dismissals and to keep it informed of the outcomes. The Committee also requests the complainants to provide further information on the alleged anti-union dismissal of 150 members of SINTRAGFOUR.*

The Committee's recommendations

- 310.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to provide information on developments in the cases that are pending and also those on which information is not available, and expects that those cases will be addressed in the near future, in accordance with the Committee's decisions in the above conclusions.*
 - (b) With regard to the alleged anti-union dismissals of the members of the executive committee of the Union of Workers of the G Four Group (SINTRAGFOUR) and 150 of its members, which is alleged to have taken place following its establishment, the Committee requests the Government to conduct a comprehensive investigation with respect to those dismissals and to keep it informed of the outcomes.*
 - (c) The Committee requests the complainants to provide further information on the alleged anti-union dismissal of 150 members of SINTRAGFOUR.*

CASE NO. 3304

DEFINITIVE REPORT

Complaint against the Government of the Dominican Republic presented by

- the National Confederation of Trade Union Unity (CNUS)
- the National Union of Nursing Workers (SINATRE) and
- the National Union of Health Technicians and Employees (SINATESA)

Allegations: The complainants report violations of the right to collective bargaining and antiunion practices by an official body attached to the Ministry of Health in retaliation for protests carried out by the National Union of Nursing Workers (SINATRAE) and the National Union of Health Technicians and Employees (SINATESA)

311. The complaint is contained in a communication of the National Confederation of Trade Union Unity (CNUS), the National Union of Nursing Workers (SINATRAE) and the National Union of Health Technicians and Employees (SINATESA) dated 7 June 2017.
312. The Government sent observations in a communication dated 21 February 2018.
313. The Dominican Republic has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

314. In their communication of 7 June 2017, the complainants allege that the Government of the Dominican Republic, through the National Council on Aging (hereinafter “the health body”), an official body attached to the Ministry of Health, has committed a series of violations of the principles of freedom of association and collective bargaining.
315. The complainants indicate that on 12 August 2016, SINATRAE, SINATESA and other trade unions from the health sector of the Dominican Republic signed an agreement with the Ministry of Health awarding nurses, bioanalysts, psychologists, dental surgeons and pharmacists a salary increase from January 2017, pension calculation based on the last full salary, and incentives based on performance and seniority. The complainants state, however, that the health body refused to apply the agreement, including the negotiated salary increases, to nurses, technicians and employees providing services in the old people’s homes and centres that are under its management. This led to a series of peaceful protests that, according to the allegations, resulted in the following retaliatory action: (i) Mr Julio Cesar García Cruceta and Ms Argentina Abreu, directors of the complainant organizations, were prevented from accessing the facilities of the health body and the old people’s homes and centres; and (ii) among others, Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia, nurses who are members of SINATRAE, were prevented from returning

to work and have not received their salaries since April 2017, despite the fact that no disciplinary proceedings had been instituted against them.

- 316.** As the health body declined to meet with the directors of SINATRAE and SINATESA, the complainants indicate that efforts to resolve the conflict and restore the rights that had been breached were unsuccessful. Consequently, the complainants allege that the practices of the health body, implemented by its director, violated the principles of freedom of association and the right to due process in accordance with the Constitution of the Republic and Act No. 41-08 on the Public Service, as well as ILO Conventions Nos 87 and 98. On that basis, the complainants seek an end to the antiunion practices, and in particular: (i) recognition of SINATRAE and SINATESA as legitimate representatives of nurses and the technicians and employees, respectively, who provide services in the old people's homes and centres that are under the responsibility of the health body, and access for their directors to the facilities of the health body; (ii) application of the terms of the agreement signed in August 2016 by SINATRAE, SINATESA and other trade unions with the Ministry of Health to the workers of the health body, in particular with regard to the negotiated salary increase; and (iii) the return of Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia to their usual tasks and payment of the salaries due to them until they are reinstated in their respective posts.

B. The Government's reply

- 317.** In its communication of 21 February 2018, the Government indicates that SINATRAE and SINATESA are duly registered, and that there had never been any reports of their being prevented from representing nurses and the technicians and employees who provide services in old people's homes and centres. As to the alleged refusal of the health body to meet with representatives of SINATRAE and SINATESA, the Government states that on 20 April 2016, Mr Julio Cesar García Cruceta and Ms Argentina Abreu were received at the facilities of the health body. According to the executive director of the health body, on that occasion SINATRAE demanded that the union dues of the nurses affiliated to it be remitted to it, which in accordance with Act No. 41-08 on the Public Service was not possible without the explicit authorization of the nurses. The director of the health body alleges that because the demand to automatically remit the union dues to SINATRAE was denied, this led to the trade union accusing her of irregular management of funds.
- 318.** With regard to the alleged obstruction of access to the facilities of the health body and the old people's homes and centres, the Government states that on 8 June 2016, as on other occasions, members of SINATRAE and SINATESA, including Mr Julio Cesar García Cruceta and Ms Argentina Abreu, were present in the San Francisco de Asís old people's home, where they promoted strikes and stoppages, despite the fact that Act No. 41-08 on the Public Service prohibits organizations of public servants from encouraging, initiating and supporting strikes in those public services whose disruption may endanger the life, health or safety of citizens. The Government indicates that persons providing this category of service are entitled to submit the labour dispute for the consideration of the human resources committee of the corresponding body, but that the said trade union organizations did not exhaust that process.
- 319.** Concerning the alleged non-application of the salary increase agreed upon with the Ministry of Health to the nurses who provide services in the various old people's homes and centres of the health body, the Government indicates that since the issuance of Decree No. 83-15 on 6 April 2015, said nurses have been part of the health body's workforce, and no longer that of the Ministry of Health, which is why they are excluded from the application of the agreement with the Ministry. However, the Government indicates that annual performance reviews have awarded a salary increase for all staff working in the health body.

320. Lastly, with respect to the alleged prevention from returning to work, specifically concerning Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia, the Government reports that both were dismissed from their posts for having committed, respectively, the following third-degree offences under article 84 of Act No. 41-08 on the Public Service: “3. Failing to be present at work for three (3) consecutive working days, or three (3) days in the same month, without authorization from the competent authority, or without good cause, thereby constituting job abandonment” and “20. Committing any other offences similar in nature or seriousness to the foregoing in the judgement of the authority that applies sanctions”.

C. The Committee’s conclusions

321. *The Committee observes that this case refers, firstly, to the non-application of the Agreement between the National Government and the Workers’ Organizations of the Health Sector, signed on 12 August 2016, to the nurses, technicians and employees who provide services in the old people’s homes and care centres managed by the health body and, secondly, to alleged antiunion acts following protests conducted by the trade union organizations with a view to obtaining the application of the said agreement.*
322. *With regard to the non-application of the collective agreement of 12 August 2016 to the workers of the health body, the Committee notes that the Government states that, under Decree No. 83-15, since 6 April 2015, the nurses under the direction of the health body report to that body for administrative purposes and no longer to the Ministry of Health, and therefore the Committee observes that there is a discrepancy between the parties on the scope of the aforementioned agreement. The Committee emphasizes, firstly, that it is not for the Committee to resolve disputes over the interpretation of the scope of clauses in collective agreements, as that is the responsibility of the national judicial organs or the specific bodies designated for that purpose by the same collective agreement. In this respect, the Committee recalls that, in the event of conflicting interpretations of a collective agreement in the public sector, the definitive interpretation should not be that of the public administration, which would be acting as judge as well as party in the case, but rather that of an independent authority [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 1476].*
323. *In the light of the foregoing, and observing that the parties make no reference to the existence of any judicial proceedings concerning the interpretation of the 2016 collective agreement or to a process of dialogue to determine the arrangements for the exercise of the right to collective bargaining for the workers of the health body, the Committee trusts that the dispute over the scope of the 2016 collective agreement will be resolved rapidly, whether through dialogue between the parties or through a decision of an independent authority. The Committee also emphasizes that, whatever the decision on the applicability of the collective agreement of 12 August 2016 to the workers of the health body, the Government must ensure that those workers can exercise their right to collective bargaining.*
324. *With regard to the alleged antiunion acts in response to the protests conducted by SINATRAE and SINATESA to obtain the application of the agreement, the Committee notes that the complainants allege that, despite being peaceful, the protests resulted in the following retaliatory action: (i) the health body’s lack of recognition of SINATRAE and SINATESA as legitimate representatives of the workers of the body, and the directors of those trade unions being prevented from accessing the facilities of the health body; and (ii) the exclusion of Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia, nurses who are members of SINATRAE, from their respective jobs, who have not received their salary since April 2017, despite the fact that no disciplinary proceedings were initiated against them.*

- 325.** *The Committee notes that the Government states that there have never been any reports of the directors of SINATRAE and SINATESA having been prevented from representing nurses and the technicians and employees who provide services in the old people's homes and centres, and that on various occasions, the most senior directors of both unions accessed the health body's facilities, including to promote strikes and stoppages, despite a statutory prohibition on encouraging, initiating and supporting strikes in those public services whose disruption may endanger the life, health or safety of citizens. The Committee notes that the Government adds that the workers who provide this category of service are entitled to submit the labour dispute for the consideration of the human resources committee of the corresponding body but that the said trade union organizations did not use that process. Lastly, the Committee notes the documents provided by the Government showing that the nurses, Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia, were dismissed as a result of third-degree offences, in accordance with article 84 of Act No. 41-08 on the Public Service. According to the copies of the communications sent by the Government, Ms María Teresa Valladares Curro breached paragraph 3 of article 84: "Failing to be present at work for three (3) consecutive working days, or three days in the same month, without authorization from the competent authority, or without good cause, thereby constituting job abandonment", and Ms Francia Ybelice Rodríguez Heredia breached paragraph 20 of article 84: "Committing any other offences similar in nature or seriousness to the foregoing in the judgement of the authority that applies sanctions".*
- 326.** *As to the alleged non-recognition of SINATRAE and SINATESA as legitimate representatives of the workers of the health body, and the alleged denial of access of their directors to its facilities, the Committee observes that the Government denies these claims. In view of the differing versions of the Government and the complainant organizations, the Committee trusts that within the health body the right of the mentioned trade union organizations to access the working place of their members is fully respected .*
- 327.** *As to the situation of the nurses, Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia, while duly noting the documents provided by the Government on the dismissal of the two workers, the Committee observes that the Government does not respond to the allegation that the workers had not been subject to the disciplinary proceedings provided for in Act No. 41-08 on the Public Service, and that the offence that resulted in the dismissal of Ms Rodríguez is not specified. With a view to ensuring that the mechanisms affording appropriate protection against antiunion discrimination have been applied, the Committee requests the Government to take the requisite measures to verify that the disciplinary proceedings provided for in the legislation have been duly applied to both workers and to ensure that the grounds for the dismissals are not contrary to the principles of freedom of association.*

The Committee's recommendations

- 328.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee trusts that the dispute over the scope of the 2016 collective agreement will be resolved rapidly, whether through dialogue between the parties or through a decision of an independent authority. The Committee also requests the Government to ensure that, whatever the decision on the aforementioned dispute over interpretation, the workers of the health body can exercise their right to collective bargaining.*

- (b) The Committee requests the Government to take the requisite measures to ensure that the disciplinary proceedings provided for in the legislation have been duly applied to Ms María Teresa Valladares Curro and Ms Francia Ybelice Rodríguez Heredia and to ensure that the grounds for the dismissals are not contrary to the principles of freedom of association.*

CASE NO. 2923

INTERIM REPORT

Complaint against the Government of El Salvador

presented by

- **the Union of Municipal Workers of Santa Ana (SITRAMSA) and**
- **the Autonomous Confederation of Salvadorian Workers (CATS)**

Allegation: Murder of a trade union leader

- 329.** The Committee last examined this case at its March 2017 meeting, when it presented an interim report to the Governing Body [see 381st Report, paras 386–398, approved by the Governing Body at its 329th Session (March 2017)].
- 330.** The Government sent new observations in communications dated 27 April 2018 and 28 January 2019.
- 331.** El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. Previous examination of the case

- 332.** In its previous examination of the case in March 2017, the Committee made the following recommendations [see 381st Report, para. 398]:
- (a) The Committee, deeply deploring and condemning the murder of trade union leader Mr Victoriano Abel Vega, once again firmly urges the Government to keep it informed of developments relating to the criminal proceedings initiated, and trusts that tangible progress will be made without delay regarding clarification of the facts, identification of the guilty parties and the imposition of commensurate punishment in accordance with the law, with a view to preventing such types of criminal offences. The Committee once again urges the Government and all the competent authorities to take all possible steps in accordance with the law to identify the perpetrators of this murder without delay and to ensure that the alleged anti-union motives behind it also keep on being investigated in depth.
 - (b) The Committee once again requests the Government and the complainant organizations to keep it informed of any pending issues relating to the allegations of dismissal of the union's founding members, including referring the allegations to the competent authorities.
 - (c) Lastly, the Committee draws the Governing Body's attention to the extremely serious and urgent nature of this case.

B. The Government's reply

333. In its communication of 27 April 2018, the Government reiterates that the murder of Mr Victoriano Abel Vega is considered a serious case by the competent authorities and the Ministry of Labour, and that appropriate steps are being taken to shed light on the murder. In this respect, the Government indicates that, during the direct contacts mission concerning the application of Convention No. 87 that took place in July 2017 as follow-up to the 2016 conclusions of the Committee on the Application of Standards of the International Labour Conference, the Office of the Public Prosecutor said that “four lines of investigation were being examined, including possible anti-union motives, but they did not seem to be the most likely motives”. The Government then states that, in March 2018, the Minister of Labour sent an official communication to the Public Prosecutor, requesting that he send her an updated report on the investigation of the case. The Government adds that, on 18 April 2018, the Public Prosecutor responded to her request, indicating that: (i) the investigation remains open and is being handled by the Special Investigation Unit against Organized Crime; (ii) certain proceedings that were pending have been conducted by the Elite Division against Organized Crime of the National Civil Police; (iii) the investigation still has not produced concrete material evidence on the perpetrators or the involvement of any persons in the events concerned; and (iv) once such evidence has been obtained, the appropriate criminal proceedings will be launched and reported in detail. Lastly, the Government states that the Ministry of Labour is taking all steps at its disposal to shed light on the murder of Mr Vega; however, the Ministry notes with regret that, despite all its requests to expedite the investigation, it has not yet been completed. In its second communication dated 28 January 2019, the Government indicates that on 17 January 2019, the Ministry of Labour sent a note to the new National Public Prosecutor in order to inform him of the importance of the investigation into the assassination of Mr Vega to the ILO supervisory bodies and in order to once again request the submission of an updated report on the process undertaken by the Office of the General Prosecutor's Special Unit on Organized Crimes.

C. The Committee's conclusions

334. *The Committee recalls that the present case refers to the murder, on 16 January 2010, of Mr Victoriano Abel Vega, general secretary of the Union of Municipal Workers of Santa Ana (SITRAMSA), who, according to the complainant organizations, had already received death threats for his union activities.*

335. *In its last examination of the case, after highlighting once again the extremely serious nature of the allegations, the Committee noted the Government's statement that meetings and communication with the competent bodies had continued in order to expedite the investigation but that, despite such measures, it had not yet been possible to identify the perpetrators. The Government also indicated that the possibility of a link between Mr Victoriano Abel Vega's trade union activities and his murder had been included in the lines of investigation. The Committee notes the Government's observations of April 2018 and January 2019, according to which: (i) in 2017, the Office of the Public Prosecutor indicated that four lines of investigation were being examined, including possible anti-union motives, but they did not seem to be the most likely motives; (ii) according to the information provided by the Office of the Public Prosecutor in 2018, the investigation remains open and is being handled by the Special Investigation Unit against Organized Crime, with various proceedings conducted by the Elite Division against Organized Crime of the National Civil Police; (iii) the investigation still has not produced concrete material evidence on the perpetrators or the involvement of any persons in the events concerned; and (iv) the Minister of Labour sent a note to the new National Public Prosecutor in January 2019 in order to inform him of the importance of the investigation into the assassination of Mr Vega to the ILO supervisory bodies and in order to once again request the submission of an updated*

report on the process undertaken by the Office of the General Prosecutor's Special Unit on Organized Crimes.

336. *While noting the information provided and the Government's reiterated commitment to ensuring that crime does not go unpunished, the Committee notes with deep concern that, nine years after the events, the authorities have still not identified the perpetrators of this murder or any accomplices, and that no tangible progress has been reported regarding the investigation. Moreover, the Committee notes with regret that it has not received specific information on the investigative measures taken to date by the competent authorities and, in particular, on the contact made by the Office of the Public Prosecutor with the trade union organization of which the victim was general secretary in order to gather any available evidence on the possible anti-union motives of the murder. Lastly, the Committee observes that the Ministry of Labour notes with regret that its various requests to expedite the investigation have not resulted in its completion.*
337. *In this respect, the Committee recalls that acts of intimidation and physical violence against trade unionists constitute a grave violation of the principles of freedom of association and the failure to protect against such acts amounts to a de facto impunity, which can only reinforce a climate of fear and uncertainty highly detrimental to the exercise of trade union rights. The Committee also emphasizes that it is important that all instances of violence against trade union members, whether these be murders, disappearances or threats, are properly investigated and that the mere fact of initiating an investigation does not mark the end of the Government's work; rather, the Government must do all within its power to ensure that such investigations lead to the identification and punishment of the perpetrators [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 90 and 102]. In the light of the foregoing, recalling that the obligation to comply with the principles of freedom of association falls not only on the Ministry of Labour but also on the Government and on all the public authorities in the country, the Committee once again urges the Government and all the competent authorities to make, in a coordinated manner and as a matter of urgency and priority, all the necessary efforts, including the provision of the required human and financial resources, to expedite the investigations under way in order to identify and punish without delay both the instigators and the perpetrators of the murder of Mr Victoriano Abel Vega. In particular, the Committee urges the Government to take the necessary measures so that the competent authorities (especially the Office of the Public Prosecutor, the police and the judiciary) ensure that when conducting the investigations, special attention is paid to exchanging information with the complainant organizations in the present case with a view to clarifying whether this crime has had an anti-union nature. Firmly hoping that tangible progress will be made in this regard, the Committee requests the Government to ensure that the Office of the Public Prosecutor of the Republic will provide detailed information on the status and findings of the investigations and the relevant criminal proceedings without delay.*
338. *As regards the alleged dismissals of founding members of the Union of Municipal Workers of San Sebastián Salitrillo (SITMASSS), the establishment of which had been supported by Mr Victoriano Abel Vega, and the Committee's reiterated request to the Government and the complainant organizations to keep it informed of any pending issues relating to these allegations, including the referral of the cases of dismissals to the competent authorities, the Committee observes that neither the Government nor the complainant organizations have provided the information requested in recommendation (b) of its previous examination of this case and therefore is not in a position to pursue its examination of this aspect of the case.*

The Committee's recommendations

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

- (a) *The Committee once again urges the Government and all the competent authorities to make in a coordinated manner, as a matter of urgency and priority, all the necessary efforts including the provision of the required human and financial resources to expedite the investigations under way, in order to identify and punish without delay both the instigators and the perpetrators of the murder of Mr Victoriano Abel Vega. In particular, the Committee urges the Government to take the necessary measures to ensure that the competent authorities pay special attention to exchanging information with the complainant organizations in the present case with a view to clarifying whether this crime has had an anti-union nature. Firmly hoping that tangible progress will be made in this regard, the Committee requests the Government to ensure that the Office of the Public Prosecutor of the Republic will provide detailed information on the status and findings of the investigations and the relevant criminal proceedings without delay.***
- (b) *The Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.***

CASE NO. 3222

DEFINITIVE REPORT

Complaint against the Government of Guatemala presented by the National Federation of Public Employee Unions (FENASSEP)

Allegations: The complainant organization alleges that leaders and members of the FENASSEP and SITRAME trade union organizations were the subject of anti-union acts and reprisals on the part of the Ministry of Economic Affairs

- 340.** The complaint is contained in a communication from the National Federation of Public Employee Unions (FENASSEP) dated 1 March 2016.
- 341.** The Government sent its reply in communications dated 21 February, 20 April and 21 December 2017, and 29 January 2019.
- 342.** 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

343. In its communication dated 1 March 2016, the complainant organization reports that both it and the Union of the Ministry of Economic Affairs (SITRAME) were subjected to acts of intimidation and reprisals on the part of the Ministry of Economic Affairs and the then chief administrator at that Ministry, Mr Joel Arriaza Ríos.
344. The complainant organization denounces, firstly, acts of intimidation and reprisals against FENASSEP and SITRAME leaders and members by the authorities of the Ministry of Economic Affairs and its then chief administrator. In this regard, the complainant federation and SITRAME requested the Ministry of Economic Affairs and the Human Resources Directorate on several occasions to immediately revoke the appointment of the chief administrator because there were “legal impediments” to him holding this post since he reportedly filed a complaint through ordinary channels against his previous employer, the Telecommunications Supervisory Authority, while he was working for the Ministry of Economic Affairs. Furthermore, SITRAME made allegations to the Comptroller-General’s Office of misuse of resources by the Ministry of Economic Affairs during procurement procedures, and reported irregularities in the appointment of officials, payment of salaries and also acts of corruption. In addition, the complainant refers to two collective disputes initiated by SITRAME on account of the expiry of the collective agreement and non-compliance with it. The complainant explains that all the previous actions stemmed from the duty of trade union organizations to monitor the stability of employment and finances in institutions where unions affiliated to the federation exist, making use of freedom of expression pursuant to section 35(2) of the Political Constitution, which provides that no crime or offence attaches to publications containing denunciations, criticisms or accusations against public officials or employees for acts committed in the course of their duties.
345. The complainant indicates that further to the above-mentioned series of complaints from the union, the Ministry of Economic Affairs began, through its chief administrator, to obstruct the activities of SITRAME and to make various demands, including the return of vehicles assigned to the union’s executive committee under section 67(b) of the collective agreement on conditions of work signed by SITRAME and the Ministry of Economic Affairs.
346. The complainant organization adds that the chief administrator sent internal messages on several occasions prohibiting staff from entering the Ministry of Economic Affairs before 8 a.m. and from remaining in the building after 4 p.m., despite being aware that union meetings were held before 8 a.m. and that union leaders finished their union activities after 4 p.m.
347. Moreover, the complainant alleges that the general secretary of both organizations, Mr Danilo Aguilar García, was the victim of reprisals, of a government conspiracy and of criminal prosecution. In this regard, it indicates that: (i) in early 2016, on the instructions of the Deputy Minister of Security at the Ministry of Home Affairs, his personal protection was withdrawn; (ii) subsequently, the then chief administrator at the Ministry of Economic Affairs deprived him of the vehicle assigned to him under the collective agreement in force; (iii) on 29 January 2016, without knowing the reasons why, Mr Aguilar García was taken into custody by the National Civil Police for misappropriation and other offences but, according to the complainant, the latter charges were so implausible that the judge dismissed them as baseless; (iv) on 3 February 2016, Mr Aguilar García made his first statement to the judge and was apprised of the charges against him and of the source of the legal action, namely the then chief administrator at the Ministry of Economic Affairs; (v) on 1 February 2016, after an extraordinary general assembly, SITRAME held a peaceful protest on the premises of the Ministry of Economic Affairs; and (vi) criminal complaints for reprisals were filed against the Ministry of Economic Affairs and the chief administrator.

348. Lastly, the complainant indicates that SITRAME and the trade union leaders continue to be subjected to discrimination, harassment and anti-union intimidation and requests that the Committee guarantee the right to organize freely, in order to protect the above-mentioned trade union organizations from acts of reprisal, that Mr Danilo Aguilar García be released and that the criminal prosecution to which he has been subjected be stopped.

B. The Government's reply

349. The Government sent its reply in communications dated 21 February, 20 April and 21 December 2017, and 29 January 2019. The Government states that its task was made more difficult by the fact that the complainants did not make precise allegations or provide specific information on the complaints or indicate the numbers of the cases to which they refer. The Government indicates that reference is made to multiple complaints and disputes which are unrelated to the matters within the Committee's competence and requests the complainants to submit more detailed complaints in future in order to facilitate the Government's work.
350. With regard to the general allegations of reprisals against SITRAME leaders and members, the Government indicates that: (i) SITRAME brought a number of collective disputes of a socio-economic nature before the labour courts (Nos 01173-2013-06637; 01173-2014-08092; and 01173-2015-00791); (ii) without any prior assembly or instruction from the union hierarchy, the general secretary, Mr Danilo Aguilar García, gave himself the authority to file a complaint for reprisals in the Eighth Labour and Social Welfare Court in the context of socio-economic collective dispute No. 01173-2013-06637, and on 22 August 2014 the court dismissed the plaintiff's claims (threats to trade union leaders, lack of recognition of the right to organize, interference, acts of anti-union discrimination, reprisals, intended administrative dissolution or suspension of the union, restrictions on collective bargaining) on the grounds that the plaintiff failed to provide any supporting evidence; (iii) the Economic, Social and Cultural Rights Unit at the Human Rights Ombudsperson's Office launched an investigation into alleged restrictions on freedom of association, and this unit issued a final decision on 18 November 2016 which stated that, further to analysis of the complaint and the measures taken, there were insufficient grounds for declaring that the matters reported by the union's administrative committee (including: restrictions on the use of vehicles assigned for the performance of union duties; interference; use of union premises; public demonstrations; lack of legal representation; and restrictions on collective bargaining) had involved human rights violations; (iv) a mediation process was launched in the Committee for the Settlement of Disputes before the ILO relating to Freedom of Association and Collective Bargaining for supposed interference and reprisals against the SITRAME leaders but neither party showed any interest in participating: neither SITRAME nor the Ministry of Economic Affairs attended the mediation meetings to which they were invited in March and May 2017.
351. As regards the specific allegations of reprisals against the SITRAME general secretary, in relation to his being deprived of the 2005 Toyota Corolla, the vehicle which had been assigned for his union duties, and also the criminal prosecution to which he was reportedly subjected, the Government indicates that: (i) the above-mentioned union leader did not use the vehicle solely for his union activities but also for personal purposes; (ii) on 22 August 2014, the Eighth Labour and Social Welfare Court concluded, with regard to the complaint of reprisals filed by the union's executive committee, that the requisitioning of the vehicles used by executive committee members had been carried out in full conformity with Ministerial Decision No. 438, Ministry of Economic Affairs regulations governing the use and monitoring of vehicles, Ministry of Economic Affairs regulations governing the use and monitoring of fuel, and the Public Officials and Employees Integrity Act; that the union had not provided any evidence that the vehicles had been requested for the purposes of trade

union activities or that the employer had denied the use of these vehicles; and the court therefore imposed on the SITRAME general secretary a deadline of three days in which to return the vehicle, a deadline which was not met; (iii) the Fifth Criminal Court for Drug Trafficking Offences and Environmental Crimes sentenced Mr Aguilar García to three years' imprisonment, with an injunction barring him from the vicinity of the Ministry of Economic Affairs; (iv) the aforementioned ruling was referred to the Office of the Appeals Prosecutor and is the subject of an appeal; (v) Mr Aguilar García filed a complaint (No. R-0101-15955-2016) before the Labour Inspectorate against the Ministry of Economic Affairs, requesting his reinstatement and salary payments which were outstanding on account of his involvement in criminal proceedings and being held in custody; (vi) the Labour Inspectorate requested the legal opinion of the Attorney-General's Office, which stated that there were no grounds for meeting the plaintiff's requests and, since the administrative remedies were thus exhausted, the parties were at liberty to assert their rights through judicial channels.

C. The Committee's conclusions

352. *The Committee notes that in the present case the complainant organization alleges that leaders and members of the FENASSEP and SITRAME trade union organizations were subjected to acts of intimidation and reprisals on the part of the Ministry of Economic Affairs and that Mr Danilo Aguilar García, the general secretary of both organizations, was subjected to criminal prosecution on account of his trade union activities.*
353. *With regard to the alleged prosecution process and reprisals on the part of the Ministry of Economic Affairs against SITRAME and FENASSEP leaders and members, the Committee notes that the complainant alleges, in its communication of 1 March 2016, that: (i) after a series of complaints against the Ministry of Economic Affairs and its chief administrator for misuse of resources, FENASSEP and SITRAME were subjected to reprisals; (ii) from the time the chief administrator took up his duties, he obstructed the work of the trade unions and sent internal messages prohibiting staff from entering the building before 8 a.m. and from remaining in the building after 4 p.m., despite being fully aware that the trade unions often held meetings before or after normal working hours; (iii) in violation of the collective agreement between the parties, the trade union leaders were deprived of the vehicles which had been put at their disposal; (iv) both trade union organizations filed criminal complaints for reprisals and intimidation on the part of the Ministry of Economic Affairs, its chief administrator and his advisers; and (v) the acts of intimidation and reprisals are said to have continued.*
354. *Furthermore, the Committee notes the Government's indication with regard to these allegations that: (i) reference is made in the present case to complaints and disputes which are unrelated to freedom of association and are imprecise; (ii) the general secretary of the union filed a complaint for reprisals before the Eighth Labour and Social Welfare Court, which dismissed the plaintiff's allegations on the grounds that the union had not provided any supporting evidence; (iii) the Economic, Social and Cultural Rights Unit at the Human Rights Ombudsperson's Office launched an investigation into alleged restrictions on freedom of association and decided that there were insufficient grounds for declaring that violations had occurred; and (iv) the Committee for the Settlement of Disputes before the ILO relating to Freedom of Association launched a mediation process but neither party showed any interest in participating.*
355. *In the light of the foregoing, the Committee observes that although the complainant describes in detail the FENASSEP and SITRAME initiatives that supposedly antagonized the authorities of the Ministry of Economic Affairs, its allegations are brief in terms of specific details of the reported reprisals against FENASSEP and SITRAME members and*

leaders and in terms of the supporting evidence supplied. The Committee notes that both the labour courts and the Human Rights Ombudsperson's Office dismissed the actions brought by the trade unions on the grounds that they lacked the necessary supporting evidence.

356. As regards the allegations that the then chief administrator at the Ministry of Economic Affairs restricted the times when staff could enter and leave the building, thereby obstructing the work of the trade union leaders and members, the Committee, while recalling that workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paragraph 1591], observes that the complainant has not provided any evidence in this regard.
357. With regard to the allegations concerning the supposed withdrawal of vehicles placed at the disposal of SITRAME, the Committee observes that the ruling of 22 August 2014 of the Eighth Labour and Social Welfare Court, communicated by the Government, reveals that: (i) the Ministry of Economic Affairs provided three vehicles for members of the SITRAME executive committee for trade union purposes, in accordance with the terms of the collective agreement in force at the Ministry; (ii) under the terms of section 67(b) of the collective agreement, the use of vehicles is governed by the Ministry's transport regulations; (iii) under these regulations, the interested parties must submit a form requesting the vehicle concerned, which will be provided subject to availability; (iv) by official letters of 3 April and 2 May 2014, the administrator at the Ministry of Economic Affairs requested the members of the executive committee to return the vehicles; and (v) SITRAME did not provide any evidence that it had requested the vehicles in order to carry out trade union tasks or that the employer had refused the use thereof for trade union purposes. In the light of this information, the Committee notes that the withdrawal of the vehicles placed at the disposal of SITRAME appears to have complied with the regulatory procedures referred to in the Ministry's collective agreement. In view of the above, the Committee considers that the allegations of reprisals and anti-union acts against FENASSEP and SITRAME leaders and members in general do not warrant a more detailed examination.
358. As regards the alleged criminal prosecution of the FENASSEP and SITRAME general secretary on anti-union grounds, the Committee notes that the complainant specifically reports that: (i) Mr Danilo Aguilar García was deprived of his personal protection; (ii) he was requested to return the vehicle assigned to him in accordance with the collective agreement in force; (iii) on 29 January 2016, the above-mentioned union leader was taken into custody for misappropriation and on other charges which the judge dismissed as being implausible; and (iv) at the time he was taken into custody, the union leader was unaware of the reasons for his detention and it was not until 3 February 2016, at the time of making his first court statement, that he found out the charge against him and which person was the source of the complaint against him.
359. Furthermore, the Committee notes the Government's statement that: (i) as referred to in the examination of the first allegation in this case, the Ministry of Economic Affairs, in accordance with its collective agreement, assigned vehicles to Mr Danilo Aguilar García and two other SITRAME leaders to be used solely in their trade union activities but they allegedly used the vehicles for their own personal purposes; (ii) on 22 August 2014, the Eighth Labour and Social Welfare Court considered that the requisitioning of the vehicles by the Ministry of Economic Affairs had occurred in conformity with the decision and regulations in force and set a deadline of three days for the return of the vehicles; (iii) unlike the other two members of the SITRAME executive committee, Mr Aguilar García did not return the vehicle, thereby failing to comply with the ruling of the Eighth Labour and Social Welfare Court; (iv) because of this non-compliance, the Fifth Criminal Court for Drug

Trafficking Offences and Environmental Crimes sentenced Mr Aguilar García to three years' imprisonment for misappropriation, pursuant to section 445bis of the Penal Code, which establishes penalties of three to five years' imprisonment for misappropriation; (v) the judgment was referred to the Office of the Appeals Prosecutor and is the subject of an appeal; (vi) the union leader filed a complaint with the Labour Inspectorate requesting his reinstatement and salary payments which were outstanding on account of his involvement in criminal proceedings; and (vii) in accordance with the legal opinion of the Attorney-General's Office requested by the Labour Inspectorate, the administrative remedies were deemed to have been exhausted and the interested parties were at liberty to assert their rights through judicial channels.

- 360.** *Recalling that there should be no unauthorized use of official vehicles in the context of the exercise of freedom of association [see **Compilation**, op. cit., paragraph 1602], especially when this results from non-compliance with a judicial order, the Committee observes that, even though the information brought to its attention indicate the existence of conflict between SITRAME and the public institution, no particulars have been supplied showing that the prosecution that resulted in the union leader's court conviction was anti-union in nature. Observing that the appeal court decision relating to the conviction of Mr Aguilar García is still pending, the Committee hopes that this court will issue its ruling in the very near future. Lastly, the Committee notes with regret that neither of the parties attended the mediation meeting convened by the Committee for the Settlement of Disputes before the ILO relating to Freedom of Association and hopes that in the future, with a view to fully restoring harmony in labour relations, recourse will be had to the social dialogue mechanisms existing in the country, especially the recently established National Tripartite Committee on Labour Relations and Freedom of Association, rather than to judicial proceedings. In view of the foregoing, the Committee considers that this case does not call for further examination.*

The Committee's recommendation

- 361.** *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. 3286

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

Complaint against the Government of Guatemala presented by the Guatemalan Union, Indigenous and Peasant Movement (MSICG)

Allegations: The complainant alleges acts of interference, harassment and coercion by the enterprise, obstruction of the right to organize, criminal prosecution of union leaders, bias on the part of the Public Prosecutor's Office and violations of due process

- 362.** The complaint is contained in three communications from the Guatemalan Union, Indigenous and Peasant Movement (MSICG) dated 3 June and 18 September 2017 and 31 January 2018.

- 363.** The Government sent its reply in four communications dated 21 August and 8 December 2017, 29 May 2018 and 28 January 2019.
- 364.** 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

- 365.** In its three communications dated 3 June and 18 September 2017 and 31 January 2018, the MSICG alleges acts of interference, harassment and coercion by the enterprise, and to some extent by a trade union under the employer's control, obstruction of the right to organize, criminal prosecution of union leaders, bias on the part of the Public Prosecutor's Office and violations of due process.
- 366.** In its communication of 3 June 2017, the complainant organization states that on 20 October 2015 the Workers' Union of the Santo Tomás de Castilla Free Industry and Trade Zone (SINTRAFE) was established, with its support. It points out that before SINTRAFE was established, the only union operating in the Santo Tomás de Castilla Free Industry and Trade Zone (hereinafter: the enterprise) was a union under the employer's control, which had full freedom to oblige other workers to join it.
- 367.** The complainant indicates that on 5 January 2016 the Ministry of Labour and Social Welfare (hereinafter: Ministry of Labour) granted official registration to SINTRAFE and that from about 3 March 2016 a document began to circulate at the enterprise reportedly containing an appeal against the registration of SINTRAFE on the grounds that: (i) the union members had provided false documentation for establishing the union; (ii) Mr Exon Eduardo Lainfiesta Perdomo and Mr Jonnathan Christian Heimen Benítez, two workers at the enterprise whose names and signatures appear in the union's act of constitution, claimed not to have signed the act or given their consent, and so they filed a complaint with the Public Prosecutor's Office; (iii) after learning of these irregularities, Mr Juan José Merlo Llanes, a SINTRAFE member whose name also reportedly appeared in the act of constitution, resigned definitively from the union; and (iv) the consent of other SINTRAFE founder members was vitiated.
- 368.** The complainant organization indicates that the appeal against the registration was devised by the legal representative of the enterprise in order to prevent the establishment of a new trade union at the enterprise. Moreover, it objects that since the registration of SINTRAFE, the enterprise, and to some extent the union under the employer's control, launched a campaign of harassment against the workers at the enterprise, seeking to discourage them from joining the new union; and that the enterprise engaged in coercion and harassment of SINTRAFE leaders and members, threatening them with criminal prosecution to make them resign from the union and declare that they did not sign the union's act of constitution. Furthermore, the complainant alleges that Mr Lainfiesta Perdomo, Mr Merlo Llanes and Mr Heimen Benítez joined the union and took part in union training, in collusion with the enterprise, with the sole objective of destroying the new union; that the other union members, by sworn statements, contradicted those workers' statements; and that neither Mr Lainfiesta Perdomo nor Mr Merlo Llanes made any reference in their resignation to supposedly illegal action by the union.
- 369.** The complainant organization states that on 10 June 2016 the Ministry of Labour, in Administrative Decision No. 160-2016, dismissed the appeal filed by the enterprise, and this decision was challenged by the enterprise on 29 September 2016 in the Labour and Social Welfare Court of First Instance (hereinafter: Labour Court) in the department of Izabal. Firstly, the complainant indicates, in response to the appeal filed by the enterprise on

22 March 2016, that SINTRAPE filed a criminal complaint with the Public Prosecutor's Office against the legal representative of the enterprise and the above-mentioned workers for offences of falsification and coercion. Secondly, it denounces the criminal prosecution to which four SINTRAPE leaders were subjected: on 18 October 2016 – seven months after the criminal complaint filed by the union against the legal representative of the enterprise and the two workers referred to above – the enterprise filed a complaint against union leaders Mr Raúl Chávez Sánchez (SINTRAPE general secretary), Mr Tomás Lares López (labour and disputes secretary), Ms Nora Baibely Aquino López (records and agreements secretary) and Mr Elvin Antonio Godoy Berganza (organization and publicity secretary), accusing them of falsification with regard to the act of constitution, despite the fact that the authority to establish such a deed lay with a person other than the union leaders.

- 370.** As regards the union's complaint against the legal representative and the two workers referred to above, the complainant organization indicates that: (i) it specifically stated that the complaint should not be referred to the Special Investigation Unit for Crimes against Trade Unionists because it considered that the unit's prosecutor was biased against complaints filed by the MSICG; (ii) the Public Prosecutor's Office, disregarding the complainant's request, referred the complaint to the above-mentioned unit; (iii) the unit's prosecutor held onto the complaint until 12 December 2016 without taking any action, thereby giving time for the criminal complaint filed by the enterprise on 18 October 2016 against four SINTRAPE leaders to be admitted for processing; (iv) when the complaint was referred to the Investigation Unit for Discrimination Offences, the plaintiffs, because of the court orders preventing them from leaving their area resulting from the criminal prosecution filed by the enterprise against four SINTRAPE leaders, could not travel to Guatemala City to submit their statements; and (v) they allege unlawful action by the prosecutor in covering up and ensuring impunity for the perpetrators and instigators of the offences committed against the trade unionists.
- 371.** The complainant organization also reports irregularities in the judicial proceedings for the four SINTRAPE leaders, making the following allegations: (i) that the complaint filed by the enterprise was processed extremely quickly, by comparison with the complaint filed by the union, in that the courts usually take over a year to grant a hearing and in the present case there was only one month between the date the hearing was requested (18 August 2017) and the date the hearing was held (18 September 2017); (ii) that during the hearing of 18 September 2017 at the Criminal Court (of First Instance) for Drug Trafficking Offences and Environmental Crimes in the department of Izabal, the judge interrupted and prevented the defence counsel, in a totally biased manner, from presenting his arguments and conducting his technical defence, and ordered that the union leaders be placed in temporary custody; (iii) that the judge also considered it lawful that the Public Prosecutor's Office had not previously informed the union leaders of the existence of criminal proceedings against them and that they had not been summoned to submit a statement, a situation which is contrary to section 334 of the Code of Criminal Procedure, which establishes that on no account shall the Public Prosecutor's Office bring charges before giving the accused the opportunity to make a statement; (iv) that the accused were not given a copy of the case file, and this affected their right of defence; and (v) that the judge allegedly allowed the enterprise to intervene as a joint plaintiff with the Public Prosecutor's Office, on the grounds that the enterprise had suffered serious financial losses – amounting to more than 500,000 quetzales (GTQ) – as a result of the union being established.
- 372.** Alongside these actions, the enterprise allegedly called for the termination of the employment contract of the SINTRAPE labour and disputes secretary, Mr Tomás Lares López, despite the fact that his union term of office ended on 28 February 2018, which meant that he could not be dismissed without a valid reason. This case is pending in the Labour Court in the context of socio-economic collective dispute No. 132-2002. In addition, the

legal representative of the enterprise reportedly brought criminal proceedings against the same leader for defamation, on account of statements made in the social media, and the complainant organization indicates that the complaint was admitted for processing by the Criminal Court for Drug Trafficking Offences and Environmental Crimes, even though the conditions for instituting legal proceedings had not been met.

- 373.** Furthermore, the complainant alleges to have been the victim of extortion, in that, just after the four leaders had gone to the Criminal Rehabilitation Centre in Puerto Barrios on 18 September 2017, the MSICG office began to receive calls from a person identified as a representative of the prison sector to which Mr Lares López had been transferred, demanding a deposit of GTQ75,000, otherwise the union leader would be “dispatched to the other side”, in other words, he would be murdered, and so the complainant was obliged to make this payment. This incident was reported to the International Commission against Impunity in Guatemala that same day but no investigation into these events has been conducted so far.
- 374.** On 26 September 2017, noting violations of the fundamental rights of the trade union leaders, the Office of the High Commissioner for Human Rights in Guatemala managed to arrange a review hearing and for temporary custody to be replaced by the following measures: (i) obligation to appear every 30 days before the local magistrate in order to sign the register of attendance; (ii) prohibition on leaving the country; (iii) prohibition on the consumption of alcoholic beverages; (iv) prohibition on frequenting locations dispensing alcoholic beverages; (v) house arrest, with movement restricted to the department of Izabal; and (vi) prohibition on interaction with witnesses and plaintiffs.
- 375.** According to the complainant, these restrictive measures resulted since 26 September 2017 in the four union leaders being barred from the enterprise, on the pretext that Mr Lainfiesta Perdomo and Mr Heimen Benítez were working there and that the court had forbidden the leaders to have any contact with witnesses. Furthermore, the complainant reports that since 18 September 2017 the four union founder members have not been paid their wages and other benefits and that other SINTRAPE leaders and members have been subjected to constant harassment by the employer, who has been threatening to dismiss them if they do not go to the Public Prosecutor’s Office and make statements against the union, with the enterprise even driving them to the Public Prosecutor’s Office in its own vehicles.
- 376.** Lastly, the complainant states that in view of the refusal of the Public Prosecutor’s Office to supply a copy of the criminal complaint and all file material against them so that the four union leaders could exercise their right of defence, the union leaders submitted a memorandum to the Public Prosecutor’s Office on 24 October 2017 denouncing all the violations which it claimed this authority had committed, including obstacles to the right of defence and violations of due process, and indicating that the supposedly biased action of the Public Prosecutor’s Office was aimed at securing the imprisonment of the union leaders. According to the complainant, no reply has been received to date from the Public Prosecutor’s Office, nor has a copy of the criminal complaint been received. Since it considers that the present case constitutes clear criminalization by the Government of the exercise of freedom of association, the complainant draws the Committee’s attention to the serious and urgent nature of the present case.

B. The Government’s reply

- 377.** The Government sent its reply in communications dated 21 August and 8 December 2017, 29 May 2018 and 28 January 2019.
- 378.** The Government indicates with regard to the application to overturn Ministry of Labour Administrative Decision No. 160-2016, which dismisses the appeal filed by the enterprise,

that: (i) the legal representative of the enterprise filed the above-mentioned appeal with the Labour Court on 29 September 2016; (ii) the Labour Court admitted the application and fixed a hearing for the purpose of oral proceedings on 21 June 2017; (iii) this hearing was suspended three times at the request of the parties; (iv) at the hearing of 25 May 2018, the Labour Court noted the non-appearance of SINTRAFE, through its legal representative, the State of Guatemala, the Ministry of Labour and the Labour Inspectorate, despite the fact that they had been legally notified, and at the hearing the order was given to proceed with the evidentiary report; and (v) the Government of Guatemala indicates that the Labour Court will issue a ruling after notification of the decisions concerning the evidence on behalf of the trade union.

379. The Government indicates, with regard to the complaint made by SINTRAFE against the representative of the enterprise and the two above-mentioned workers for document falsification and coercion, that: (i) the complaint was originally due to be examined by the Special Investigation Unit for Crimes against Trade Unionists but on account of the objection from the plaintiffs the case was transferred to the Investigation Unit for Discrimination Offences; (ii) the aforementioned unit conducted a preliminary analysis of the file to establish whether the material facts would be liable to “own motion” prosecution or to prosecution on application, given that only the latter would apply to certain material facts; (iii) the plaintiffs did not attend in order to present their witness statement, having indicated that they were party to criminal proceedings and, since they were subject to house arrest in lieu of custody, were prevented from leaving the department of Izabal; (iv) the above-mentioned investigation unit planned to travel on 6 and 7 December 2017 to Puerto Barrios in Izabal in order to take the plaintiffs’ witness statement; and (v) the prosecutor in Puerto Barrios in Izabal was requested to provide a detailed report on case No. MP282-2016-5254 to determine whether Mr Lares López and Mr Godoy Berganza were indeed restricted in their freedom of movement and to establish whether there was a connection between the criminal prosecution against them and the present case.

380. As regards the criminal proceedings against the four trade union leaders, the Government indicates that: (i) the enterprise filed a complaint for falsification with the Criminal Court for Drug Trafficking Offences and Environmental Crimes in the department of Izabal; (ii) the first hearing was fixed for 18 September 2017 and the union leaders were made party to the proceedings for falsification of documents; (iii) during the hearing, an order was issued to place the four leaders in temporary custody since they were considered a flight risk, whereupon they were sent to the Criminal Rehabilitation Centre in Puerto Barrios in the department of Izabal; (iv) on 26 September 2017, the review hearing was held and it was decided to replace temporary custody with five restriction orders (obligation to appear every 30 days before the local magistrate in order to sign the register of attendance; prohibition on leaving the country; prohibition on the consumption of alcoholic beverages and on frequenting locations dispensing alcoholic beverages; house arrest, with movement restricted to the department of Izabal; and prohibition on interaction with witnesses and plaintiffs); (v) on 15 January 2018, the intermediate hearing was held and an informal disposition was established in favour of the leaders Mr Chávez Sánchez, Mr Godoy Berganza and Ms Aquino López (a release from the judicial process whereby the Public Prosecutor’s Office is authorized to refrain from conducting criminal proceedings on the grounds that the public interest or public safety is not seriously affected and after one year the criminal proceedings are dropped), thereby removing all restriction orders imposed on 26 September 2017; (vi) with regard to Mr Lares López, the intermediate hearing was held on 10 July 2018 and the order was given to commence proceedings for falsification of documents or, alternatively, for falsification of facts; and (vi) on 2 August 2018, an evidentiary hearing was held and a subsequent hearing was fixed for 8 March 2019 in the Criminal Court for Drug Trafficking Offences and Environmental Crimes in the department of Izabal.

381. As regards the allegation that the four union leaders who were the subject of criminal proceedings for falsification of documentation were barred from the enterprise and that the enterprise refused to pay wages or other benefits to the leaders, the Government forwards the enterprise's reply, which states that: (i) Ms Aquino López no longer works at the enterprise, having voluntarily submitted her resignation, which took effect on 2 November 2018, and she has received the appropriate wages and benefits; (ii) Mr Chávez Sánchez and Mr Godoy Berganza are still employed at the enterprise; and (iii) Mr Tomás Lares López is legally barred from the enterprise on the grounds that he is still the subject of criminal proceedings for falsification of documents, and since he is subject to restriction orders he is forbidden to have any contact with Mr Lainfiesta Perdomo and Mr Heimen Benítez, who are working at the enterprise.
382. Lastly, as regards the judicial authorization requested by the enterprise to terminate the employment contract of Mr Tomás Lares López, the Government indicates that this application was dismissed on 18 April 2016 by the Labour Court and ordered to be shelved.

C. The Committee's conclusions

383. *The Committee observes that the present case is concerned with acts of interference, harassment and coercion by the enterprise (and to some extent by a trade union under the employer's control), obstruction of the right to organize, criminal prosecution of four union leaders, bias on the part of the Public Prosecutor's Office and violations of due process.*
384. *The Committee notes that, on 20 October 2015, the Workers' Union of the Santo Tomás de Castilla Free Industry and Trade Zone (SINTRAFE), a union affiliated to the complainant organization, was established. It also notes the complainant's indications that: (i) before SINTRAFE was established, a union under the employer's control was the only union at the enterprise; (ii) after SINTRAFE was established, the enterprise began to circulate a document citing the existence of an appeal against the union's registration on account of the alleged forgery of signatures in the act of constitution; and (iii) this judicial action was followed by acts of interference, coercion and threats of criminal prosecution against SINTRAFE leaders and members aimed at forcing them to resign from the union.*
385. *The Committee also observes the complainant's allegations concerning the above-mentioned appeal that: (i) the latter was devised by the legal representative of the enterprise on 7 March 2016 in order to discourage workers from joining SINTRAFE; (ii) Mr Lainfiesta Perdomo, Mr Merlo Llanes and Mr Heimen Benítez joined the above-mentioned trade union and took part in union training with the purpose of destroying the new union; (iii) on 10 June 2016, the Ministry of Labour and Social Welfare (Ministry of Labour), in Administrative Decision No. 160-2016, dismissed the appeal filed by the enterprise; (iv) on 29 September 2016, the enterprise challenged the administrative decision in the Labour and Social Welfare Court of First Instance (Labour Court); and (v) a ruling on the challenge is pending.*
386. *As regards the application to overturn Administrative Decision No. 160-2016 of the Ministry of Labour, which dismissed the appeal filed by the enterprise against the registration of the trade union, the Committee observes that, according to updated information from the Government, the Labour Court admitted the application, issued instructions at the hearing of 25 May 2018, which was attended only by the enterprise, to proceed with the evidentiary report and once the evidentiary phase was completed the court would issue a ruling. While noting that the court's decision is still pending, the Committee notes with concern that the Government has not sent its observations on the allegations of interference, coercion and threats of criminal prosecution directed at SINTRAFE leaders and members working at the enterprise. Recalling that any coercion of workers or trade union officers to revoke their union membership constitutes a violation of the principle of freedom of association, in*

violation of Convention No. 87 [see *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018, para. 1198], ratified by Guatemala, the Committee hopes that the Government will conduct an impartial investigation into the reported occurrences and will inform the Committee of its findings. It also requests the Government to inform it of the final ruling on the application to overturn Administrative Decision No. 160-2016.

387. *As regards the allegations concerning the violation of due process and bias shown by the Public Prosecutor's Office, the Committee observes that these related to the complaint filed by the trade union against the legal representative of the enterprise and two workers for coercion and falsification of documents; and also to the complaint filed by the legal representative of the enterprise against four SINTRAFE leaders for falsification of documents.*

388. *The Committee notes, with regard to the criminal complaint filed by the trade union on 22 March 2016 for falsification of documents and coercion, that the complainant considers that: (i) even though the union asked for the complaint not to be referred to the Special Investigation Unit for Crimes against Trade Unionists, since it considered that its prosecutor was not impartial, the complaint was nonetheless referred to that unit, which held onto it until 12 December 2016; (ii) this course of action enabled the criminal complaint filed by the enterprise to be admitted for processing; and (iii) when the complaint was referred to the Investigation Unit for Discrimination Offences seven months later, the four SINTRAFE leaders were unable to go to Guatemala City to present their statements on account of the restrictions on movement resulting from the complaint filed by the enterprise.*

389. *As regards the criminal complaint filed by the enterprise against the four trade union leaders, the Committee observes that the complainant organization alleges that: (i) this criminal complaint was processed extremely quickly, by comparison with the complaint filed by the union; (ii) during the hearing of 18 September 2017 at the Criminal Court (of First Instance) for Drug Trafficking Offences and Environmental Crimes in the department of Izabal, the judge interrupted and prevented the defence counsel, in a totally biased manner, from presenting his arguments and conducting his technical defence, and on the same day ordered that the union leaders be placed in temporary custody; (iii) the union leaders were not informed of the existence of criminal proceedings against them, they were not summoned to submit a statement before the hearing was held, and they were not provided with a copy of their case file; and (iv) the judge reportedly allowed the enterprise to intervene as a joint plaintiff.*

390. *The Committee notes the Government's indication regarding the criminal complaint filed by the trade union that the Investigation Unit for Discrimination Offences has already conducted a preliminary analysis of the complaint so as to establish whether the material facts would be liable to "own motion" prosecution or to prosecution on application; the investigation unit planned to go to the department of Izabal on 6 and 7 December 2017 to take the plaintiffs' statements; and the prosecutor in Puerto Barrios was requested to provide a detailed report on the case to determine whether the plaintiffs' freedom of movement was restricted and whether there was a connection between the criminal prosecution and the case.*

391. *The Committee further notes, with respect to the criminal proceedings brought by the enterprise against the four SINTRAFE leaders, that: (i) at the first hearing, fixed for 18 September 2017, proceedings were instituted against the leaders for falsification of documents and they were placed in temporary custody since they were considered a flight risk; (ii) on 26 September 2017, during the review hearing relating to restriction orders, it was decided to replace temporary custody with five restriction orders, including house arrest; (iii) on 15 January 2018, an order was issued to release Mr Chávez Sánchez,*

Mr Godoy Berganza and Ms Aquino López from the judicial process, thereby lifting all applicable restriction orders; (iv) with regard to Mr Lares López, on 10 July 2018 an order was issued to institute proceedings for falsification of documents or, alternatively, for falsification of facts; (v) on 2 August 2018, an evidentiary hearing was fixed, with the next hearing in the Criminal Court for Drug Trafficking Offences and Environmental Crimes in the department of Izabal due on 8 March 2019; and (vi) in a memorandum of 24 October 2017 addressed to the Public Prosecutor's Office, the union leaders denounced all the violations allegedly committed by that Office, they requested a copy of the criminal complaint filed by the enterprise and requested an investigation into the allegedly biased action of the Public Prosecutor's Office in the case.

392. In the light of the foregoing, the Committee notes that: (i) the criminal complaint filed by SINTRAFE on 22 March 2016 is still at the investigation stage; (ii) the criminal complaint filed by the enterprise on 18 October 2016 is at the final stage of the criminal proceedings; (iii) the Government has not provided any information on the alleged violations of due process and of the right of defence; (iv) the Public Prosecutor's Office has not conducted any investigation into its biased action in the present case, despite the union's written request of 24 October 2017; and (v) to date, over 15 months after Mr Tomás Lares López was placed in temporary custody for the first time, the judicial status of this union leader has not been defined. The Committee recalls that detained trade unionists, like anyone else, should benefit from normal judicial proceedings and have the right to due process, in particular, the right to be informed of the charges brought against them, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing, and the right to a prompt trial by an impartial and independent judicial authority [see **Compilation**, op. cit., para. 167]. The Committee therefore requests the Government to send a detailed reply as soon as possible regarding the alleged violations of due process and of the right of defence, to ensure that Mr Tomás Lares López enjoys all judicial guarantees and his full right of defence in the criminal proceedings against him, and to inform the Committee of the final ruling of the Criminal Court for Drug Trafficking Offences and Environmental Crimes in the department of Izabal relating to the above-mentioned union leader. In addition, the Committee requests the Government to ensure that the investigation into the criminal complaint filed by the union, relating to alleged falsification and coercion, is conducted promptly and, if anti-union motives are established, that appropriate compensation is awarded.
393. As regards the alleged acts of extortion and threats against the union leaders during their detention, the Committee notes that the MSICG filed a complaint with the International Commission against Impunity in Guatemala but this has not given rise to any investigation. Observing that the Government has not sent its observations on this matter, and since it does not know whether the union or the complainant has filed any other complaints, the Committee invites the complainant to send its detailed observations on this matter and requests the Government to provide information on any criminal complaint filed in relation to the reported occurrences.
394. As regards the judicial authorization requested by the enterprise to terminate the employment contract of the union leader Mr Tomás Lares López, the Committee observes that this was dismissed by the Labour Court on 18 April 2016 and was shelved, and so the Committee will not pursue its examination of this allegation. As regards the criminal complaint for defamation alleged by the complainant to have been filed with the Criminal Court for Drug Trafficking Offences and Environmental Crimes against the same union leader, the Committee, observing that the Government has not provided any information on this matter, requests the Government to send information as soon as possible on the charges brought against Mr Lares López and on the status of the complaint.

The Committee's recommendations

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

- (a) *With regard to the registration of the trade union and the alleged acts of interference, coercion and threats, the Committee hopes that the Government will conduct an impartial investigation into the reported occurrences and will inform the Committee of its findings. It also requests the Government to inform it of the final ruling on the application to overturn Administrative Decision No. 160-2016.*
- (b) *With regard to the alleged violation of due process and bias on the part of the Public Prosecutor's Office, the Committee requests the Government to send a detailed reply as soon as possible regarding the alleged violations of due process and of the right of defence, to ensure that Mr Tomás Lares López enjoys all judicial guarantees and his full right of defence in the criminal proceedings against him, and to inform the Committee of the final ruling of the Criminal Court for Drug Trafficking Offences and Environmental Crimes in the department of Izabal relating to the above-mentioned union leader.*
- (c) *The Committee requests the Government to ensure that the investigation into the criminal complaint filed by the union, relating to alleged falsification and coercion, is conducted promptly and, if anti-union motives are established, that appropriate compensation is awarded.*
- (d) *With regard to the alleged acts of extortion and threats against the union leaders during their detention, the Committee invites the complainant organization to send its detailed observations on this matter and requests the Government to provide information on any criminal complaint filed in relation to the reported occurrences.*
- (e) *With regard to the criminal complaint for defamation against the union leader Mr Tomás Lares López, the Committee requests the Government to send information as soon as possible on the charges brought against this union leader and on the status of the complaint.*

CASE NO. 3305

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

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

Allegations: anti-union practices carried out by the management of a restaurant chain, in particular unilateral transfers of trade union members and representatives, intimidation, mass dismissals of workers following a peaceful protest and refusal to implement recommendations of the Labour Department to reinstate the dismissed trade unionists, as well as the Government's failure to ensure respect for trade union rights

396. The complaint is contained in a communication dated 27 February 2018 from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF).
397. The Government sent its observations in communications dated 24 September 2018 and 31 January 2019.
398. Indonesia 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

399. By its communication dated 27 February 2018, the IUF lodges a complaint against the Government of Indonesia in connection with the alleged anti-union practices by the management of PT Champ Resto Indonesia (hereafter "the company"), a restaurant chain with over 100 outlets.
400. The complainant explains that the workers of the company formed a union which was officially registered as Serikat Pekerja Mandiri Champ Resto Indonesia (SPM CRI) by the Labour Office of Tangerang on 24 March 2014. The union is a member of the Federation of Hotel, Restaurant, Plaza, Apartment, Catering and Tourism Workers' Free Union (FSPM), affiliated to the IUF. According to the complainant, the management responded to the establishment of the union with anti-union practices, common in Indonesia, due to a lax legal environment. On 8 May 2014, the union General Secretary, Chairperson, Treasurer and a committee member were unilaterally transferred to new locations, far from their residences and trade union members. Three days later, the management had circulated a letter containing the names of union members who, it had claimed, had resigned from the union. The complainant considers that this was intended to intimidate workers. Despite these difficulties, a collective agreement was nonetheless signed on 24 December 2014 in which the company committed to respect the union and the workers' right to join it. The IUF alleges that this agreement has been consistently and egregiously violated by the company.
401. In January 2015, a woman worker at one of the company's outlets requested information on maternity leave. In February, the management replied by telling her to resign as the company's policy on paid maternity leave did not apply to restaurant workers but was limited to back office employees. When the union took up her case, it received the same response. After eight months of pregnancy, the worker submitted a request to take leave as from 6 March 2015 in accordance with the legislation in force, which entitles women workers to 45 days paid maternity leave before the expected date of birth. The management ignored her request and that of the union, and treated her absence as voluntary resignation. On 9 March

2015, the FSPM held a rally at the company's head office in Jakarta in support of the worker's right to return to work after giving birth. The union action succeeded in allowing her return to work in June 2015 but the company resumed its pressure on the union and its members.

402. In May 2015, 14 union members were transferred from their jobs in Bandung to the company's outlets in three other cities. Workers were informed of their transfers, which were ostensibly a response to the closure of an outlet in Bandung, by email, in lieu of transfer letters. According to the complainant, however, ten other outlets remained operating in the city. In August 2015, a trade union officer was informed by email that he was being transferred from an outlet in Bandung to Jakarta.
403. On 11 November 2015, the FSPM filed a complaint with the Ministry of Manpower detailing violations of Indonesian legislation, including anti-union practices designed to intimidate members and prevent the functioning of the union (transfers of union members and officers), discrimination against women workers (failure to provide maternity leave and protection to all company employees), failure to properly compensate overtime, and failure to enrol all employees in the government's mandatory health insurance scheme for workers and their families (the BPJS). The full extent of the company's failure to enrol employees and their families in the BPJS became apparent in November 2015 when a newborn baby of another worker, Mr. Kemal, died after essential treatment was refused by the hospital because he could not pay. Union members held a public protest in Bandung on 2 December 2015, demanding that the company register all workers for family coverage. The protest involved only workers who were not on duty. Between 15 December 2015 and 12 January 2016, 83 workers were terminated solely as a consequence of protesting the tragic consequences of the company's failure to meet its legal obligations. Among the 83 dismissed were the union Chairperson, General Secretary, Treasurer and committee members.
404. On 12 January 2016, the FSPM sent a letter to the BPJS Director regarding the company's failure to enrol all workers and their families. It received no reply. The FSPM sent a follow-up letter on 17 February 2016, to which there has been no response. On 22 January 2016, the FSPM filed a second complaint with the Ministry of Manpower, informing the Ministry of the mass anti-union dismissals and the ongoing harassment of union members and officers through punitive transfers. The Ministry did not reply. On 28 January 2016, the FSPM sent a formal request to the Ministry of Manpower asking it to mediate the union's dispute with the company concerning dismissal of 83 union members and leaders following a protest over the death of the child and the company's failure to enrol employees in the BPJS. In April 2016, the Ministry of Manpower finally responded to the request for mediation by authorizing the Labour Department to mediate the dispute over the dismissals in three provinces: Jakarta, West Java and Banten. On 22 August, the Labour Department in Jakarta issued a recommendation to the company to reinstate five dismissed workers with back wages. On 9 September 2016, the Labour Department in West Java recommended that the company reinstate 32 dismissed workers with back wages. And on 26 September 2016, the Labour Department in Banten recommended that the company reinstate ten dismissed workers with back wages. When the company refused to implement these recommendations, the FSPM filed cases against the company in the Industrial Relations Courts in Jakarta (on 28 November 2016), Serang (Banten) (on 21 December 2016) and Bandung (West Java) (on 5 January 2017).
405. On 30 March 2017, the Jakarta Industrial Relations Court upheld the legality of the five dismissals. The court decision first declared the terminations null and void, but then proceeded to justify the dismissals by considering that the dismissed workers breached the company rules, which provide for immediate dismissal without a termination letter in the event that an employee "undertakes to invite or persuade fellow employees or other parties

to take action that may disturb or create an adverse situation at work”. In its ruling, the Jakarta Industrial Relations Court determined that company rules, and thus, according to the complainant, can be arbitrarily interpreted by an employer, take precedence over the Government’s commitments under Convention No. 87. On 26 April 2017, the FSPM appealed this decision to the Supreme Court. On 31 October 2017, the Supreme Court rejected the union’s appeal and upheld the legality of the dismissal of five union members. Faced with the oppressive length and arbitrary nature of a legal procedure which discourages workers from attempting to access their rights, the five workers accepted the severance pay.

- 406.** On 3 May 2017, the Industrial Relations Court in Serang (Banten) determined that the ten dismissals brought before the Labour Department were in fact illegal and the workers should be fully reinstated. On 18 May 2017, the company appealed this decision to the Supreme Court (as of the time of the complaint, there has been no decision in this case).
- 407.** On 8 May 2017, the Industrial Relations Court in Bandung upheld the legality of the dismissals and the workers’ entitlement to separation pay only. The Court, after first stating that the terminations were invalid, null and void, upheld the legality of the dismissals on the grounds that the participation of the workers in the peaceful protest on 2 December 2015 and subsequent protest actions were not in accordance with Law No. 2 (2004) on Industrial Relations Disputes Settlement. This Law stipulates that industrial disputes are to be settled through bipartite meetings between the parties, through mediation under the auspices of the Labour Department or by the Industrial Relations Court. The Court concluded on this basis that the working relationship between the two (parties) will unlikely bring benefits and thus should be duly ended and terminated. Thus, the complainant considers that in its decision sanctioning the dismissal of 32 workers for their peaceful protests, the Industrial Relations Court effectively declared that the right of workers to protest, which forms part of the right to freedom of association, is not protected under Indonesian law and constitutes grounds for dismissal. The FSPM appealed this decision to the Supreme Court on 5 June. The appeal is currently pending.
- 408.** The IUF alleges that while these cases were winding their way through a clearly dysfunctional legal system, the company continued its anti-union aggression. On 29 April 2017, 11 more union leaders and members were unilaterally transferred to outlets in cities far from their residence and other union members.
- 409.** The complainant considers that the events described above testify to the Government’s ongoing failure to ensure respect for its international obligations under Conventions Nos 87 and 98. They also illustrate the indivisibility of rights set out in the ILO Conventions, demonstrating that the right to freedom from discrimination and the right to adequate social security are intrinsically linked to the right to freedom of association. Workers are denied their right to statutory health insurance with tragic consequences and are victimized for bringing these illegal practices and criminal negligence to the attention of the company and the public. Inconsistent actions by various legal bodies responsible for ensuring respect for workers’ rights encourages continued violations by the employer. Labour Department recommendations can be discarded by the employer even when those recommendations uphold basic rights. The system of industrial relations courts produces widely different rulings when confronted with the same events and legal issues.

B. The Government’s reply

- 410.** In its communications dated 24 September 2018 and 31 January 2019, the Government provides its observations on the allegations submitted by the IUF.

411. At the outset, the Government indicates that it is committed to guaranteeing freedom of association in law, which, in Indonesia, refers to Conventions Nos 87 and 98, and that in this respect, it has made efforts to enforce the law through a preventive–educative and conflict resolution system.
412. As concerns the allegation of intimidation of workers, the Government indicates that the management stated that it had never issued a letter containing the names of members of the trade union who resigned from it. In addition, a collective agreement was concluded on 24 December 2014 between the management and the FSPM, which contains a clause guaranteeing the existence of a trade union at the company.
413. The Government indicates that the company refutes the allegation of dismissal of a female worker who applied for maternity leave. In this respect, it indicates that the company ensures this right in accordance with section 82(1) Act No. 13 of 2013 concerning Manpower. The female worker who applied for maternity leave was granted leave for the period between 7 March and 5 June 2015, during which she received her salary. The worker in question returned to work in the same place and position she had before the maternity leave. The Government submits the relevant documents.
414. Regarding the absence of the BPJS health insurance scheme, the Government indicates that the membership in the national health insurance scheme is mandatory and is carried out gradually (in two stages) until it includes all residents of Indonesia. The first began on 1 January 2014 and the second was to be completed by 1 January 2019. During the first stage, the members of the Indonesia National Armed Forces, civil servants of the Ministry of Defense and their family members, members of the Indonesian National Police and civil servants within the Indonesian National Police and their family members, became premium assistance beneficiaries of health insurance. Further, employers of state-owned enterprises, large enterprises, medium enterprises, and small enterprises should have insured their employees by no later than 1 January 2015, followed by employers of microenterprises (by no later than 1 January 2016). Finally, non-wage recipients and non-workers should be insured by no later than 1 January 2019.
415. Previously, the health insurance for the employees of the company in question was organized independently by the management through a partnership with some hospitals. The independent implementation had been approved by the Government through the issuance of a recommendation from the Manpower and Transmigration Agency of West Bandung Regency, West Java. In 2015, the company began to register its workers in the health social security scheme, including Mr Kemal and his family members. The Government explains that Mr Kemal’s two-month-old child required hospital treatment due to leukaemia. The company referred the child to a hospital with which it had a partnership agreement. Despite receiving the treatment, the child passed away. The Government submits the relevant documents regarding the treatment received in Santo Yusuf Hospital. The Government adds that on 18 December 2015, the company was requested by the Manpower Supervisor of Bandung City to register all workers to the BPJS.
416. Regarding the alleged dismissal of workers who conducted the protest and demonstration, the Government indicates that the 89 dismissed workers violated article 51(21) of the company’s rules and regulations on “inviting or appealing fellow employees or other parties to take an action that could cause unrest at work”. The Government explains that the settlement process involving these 89 dismissed workers included bipartite negotiations, mediation, and the recourse to the Industrial Relations Court and the Supreme Court. In issuing a decision in the same case, it is possible that judges issue different decisions, as all depends on the judge’s perspective and interpretation. The Industrial Relations Court and

Supreme Court are independent judicial institutions in the processes of which the Government cannot intervene.

417. The Government refers to the settlement process in each region as follows:

- West Java Province:
 - The dismissal of 42 workers had been settled by an agreement.
 - The dismissal of 32 workers had been initially settled through mediation by the West Java Province Manpower and Transmigration Agency, which, on 9 September 2016, recommended that the company re-employ and pay for the workers' rights that had not been fulfilled. The company rejected the recommendation and filed a lawsuit in the Industrial Relations Court in Bandung (31 workers). One worker has reached a settlement with the company. By its decision dated 8 May 2017, the Industrial Relations Court agreed to the dismissal of workers with a one-time severance pay, pursuant to section 156(2), reward-for-years-of-service pay, pursuant to section 156(3), and compensation pay for rights, pursuant to section 156(4) of Act No. 13 of 2003 concerning Manpower. The union appealed this decision to the Supreme Court, which rejected it on 19 October 2017. Accordingly, the payment of compensation (severance pay, a sum of money as a reward for service rendered during the term of employment, and compensation pay for rights or entitlements) to 25 employees was completed on 25 October and 1 November 2018. Six remaining workers plan to propose a judicial review of the Supreme Court decision. The management of the company has nevertheless indicated that it would pay all severance pay in accordance with the Court decision.
- Jakarta Province:
 - The dismissal of five workers was examined by the mediation of the Jakarta Province Manpower and Transmigration Agency, which recommended, on 22 August 2016, their reinstatement. The company rejected the recommendation and filed a lawsuit in the Industrial Relations Court. The latter ordered the termination of employment with severance pay, reward-for-years-of-service pay, compensation for rights, termination of employment process wage and religious holiday allowance for 2016. The five workers in question filed an appeal to the Supreme Court. The latter rejected the appeal on 6 October 2017. On 11 January 2018, both parties agreed on the termination of employment in accordance with the decision of the Supreme Court and had signed an agreement to that effect (enclosed with the Government's reply). On the same day, the workers received compensation (severance pay and compensation pay).
- Banten Province:
 - The dismissal of ten workers was examined by the mediation of the Banten Province Manpower and Transmigration Agency, which recommended, on 26 September 2016, workers' reinstatement. The company rejected the recommendation and filed a lawsuit with the Industrial Relations Court. In its decision dated 3 May 2017, the Industrial Relations Court ordered the workers' reinstatement and imposed a fine on the company. The latter filed an appeal to the Supreme Court. On 20 November 2017, the Supreme Court revoked the decision of the Industrial Relations Court of 3 May 2017. The plaintiff (employees) proposed a judicial review.

418. Regarding the alleged transfer of trade union leaders and members, the Government points out that according to section 12 of the company rules and regulations of 27 October 2014, the company may transfer an employee if such are the needs of the company. According to the Government, all employees, whether they are union members or not, are treated equally when transfers are considered necessary. The Government points out that the transfer of employees from the outlet at Piset Square, Bandung was the result of its closure.

C. The Committee's conclusions

419. *The Committee notes that in the present case the complainant alleges anti-union practices carried out by the management of a restaurant chain, in particular, unilateral transfers of trade union members and representatives, intimidation, mass dismissals of workers following a peaceful protest and refusal to implement recommendations of the Labour Department to reinstate the dismissed trade unionists, as well as the Government's failure to ensure respect for trade union rights.*
420. *The Committee notes that the questions of denial by the company to provide health insurance and maternity protection benefits to its workers fall outside its competence and therefore will not be the subject of its examination.*
421. *As concerns the dismissal of 89 workers (83 according to the complainant), the Committee notes that neither the Government nor the company refute that the dismissals were the consequence of the workers' participation in peaceful protests or demonstrations. The Committee further notes that the peaceful nature thereof is not refuted. While noting that all but 16 workers have already signed settlement agreements with the company and received agreed compensation packages, the Committee nevertheless wishes to make the following observations.*
422. *The Committee recalls that workers should enjoy the right to peaceful demonstration to defend their occupational interests [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 208]. It further considers that respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a protest action. The Committee recalls that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government. It further recalls that it is the responsibility of the Government to ensure the application of international labour Conventions concerning freedom of association which have been freely ratified and which must be respected by all state authorities, including the judicial authorities [see **Compilation**, op. cit., paras 46 and 49]. The Committee notes that in the present case, the company rules and regulations, as interpreted by the courts, would appear to prohibit any industrial action at the company, in violation of the workers' right to peaceful protest and demonstration. It would further appear that such rules and regulations in practice take precedence over national law and international obligations. Recalling that the Government has previously indicated that freedom of association, the right to organize and freedom to express opinions in public, including through demonstrations and protests are protected in Indonesia by various pieces of legislation, including the Constitution, Law No. 9 of 1998 on Freedom of Expression in Public, Law No. 21 of 2000 on Trade Unions and Act No. 13 on Manpower [see Case No. 3176, Report No. 380, para. 602], the Committee requests the Government to take the necessary measures, including legislative if necessary, in consultation with the social partners, in order to ensure the full protection of workers' fundamental rights to freedom of association and the invalidation of any company rules or regulations that might provide to the contrary. It requests the Government to keep it informed of the measures taken to that end.*

423. *Noting that 16 workers are, according to the Government, seeking judicial review of the Supreme Court decision, the Committee requests the Government to bring the conclusions in this case to the attention of the relevant judicial authorities and to provide information on the outcome of the reviews.*
424. *Regarding the alleged instances of transfer of trade unionists to other cities, the Committee notes the Government's indication that the transfers were in conformity with the company's rules and regulations and were caused by the closure of an outlet in Bandung. The Committee notes that the complainant indicates that there remained ten other outlets operating in Bandung. In this respect, the Committee, while considering that transfers of employees for reasons unconnected with their trade union affiliation or activities are not covered by Article 1 of Convention No. 98 [see **Compilation**, op. cit., para. 1103], recalls 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. The Committee requests the Government to engage with the social partners concerned with a view to achieving agreement on policy to recognize the company's needs while assuring that transfers do not interfere with workers' right to freedom of association.*

The Committee's recommendations

425. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to take the necessary measures, including legislative if necessary, in consultation with the social partners, in order to ensure the full protection of workers' fundamental freedom of association rights and the invalidation of any private company rules or regulations that may provide to the contrary. It requests the Government to keep it informed of the measures taken to that end.*
 - (b) *Noting that 16 workers are, according to the Government, seeking judicial review of the Supreme Court decision, the Committee requests the Government to bring the conclusions in this case to the attention of the relevant judicial authorities and to provide information on the outcome of the reviews.*
 - (c) *The Committee requests the Government to engage with the social partners concerned with a view to achieving agreement on policy to recognize the company's needs while assuring that transfers do not interfere with workers' right to freedom of association.*

CASE NO. 3296

DEFINITIVE REPORT

**Complaint against the Government of Mozambique
presented by
Public Services International (PSI)**

Allegations: legal requirements that prevent the registration of the National Union of the Public Service (SINAFP)

- 426. The complaint is contained in a communication from Public Services International (PSI) dated 28 August 2017.
- 427. The Government sent its observations in a communication dated 30 October 2018.
- 428. Mozambique has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 429. In its communication dated 28 August 2017, Public Services International (PSI), on behalf of its affiliate the National Union of the Public Service (SINAFP), indicated that the SINAFP had been established at a meeting of constituents held in Maputo in August 2001. The complainant organization recalled that at the time of the establishment of the SINAFP, although the 1990 Constitution of Mozambique protected the right to organize, the country did not yet have a specific law regulating the organization, functioning and exercise of trade union rights in the public service. Consequently, the Government and the Workers' Organization of Mozambique – Union Federation (OTM-CS) signed a statement of understanding on 28 August 2001, recognizing the functioning of the SINAFP and agreeing to establish a technical labour committee to develop a bill establishing a legal basis for the exercise of trade union rights in the public service.
- 430. PSI emphasizes that: (i) this legal basis only came into force on 27 August 2014, with the promulgation of Act No. 18/2014, which establishes the legal framework for the exercise of the right to freedom of association in the public service, exactly 16 years after the establishment of SINAFP and the abovementioned statement of understanding; and that (ii) throughout that period and until now, the SINAFP has been actively representing the workers of the public service.
- 431. The complainant organization also alleges that Act No. 18/2014, which sets out, inter alia, the procedures for the establishment of trade union organizations for the public service, does not recognize the prior existence of the SINAFP. Consequently, after 16 years of operation, the Government demanded that the SINAFP re-register in order to gain the legal personality that would allow it to operate as a trade union.
- 432. The complainant organization indicates that the SINAFP had to submit a new application for registration on 16 November 2016, which had 4,537 signatures, but on 9 August 2017 the National Directorate for the Strategic Management of Human Resources of the State rejected that request citing an insufficient number of signatures.

- 433.** The complainant organization alleges that the requirements established in Act No. 18/2014 are excessive and that the Government's interpretation of that Act hinders the free exercise of freedom of association of public service employees in the country, insofar as: (i) under section 37.1, a trade union association can establish itself as a trade union when it represents at least 5 per cent of all state officials and employees. In that respect, the complainant organization indicates that it is estimated that there are approximately 325,000 public officials in Mozambique – in other words, if this figure is correct, at least 16,250 members would be needed to fulfil this requirement – and that this 5 per cent is calculated using the total number of public officials, including those that need special laws to enjoy their right to organize (which is the case for a third of public officials), such laws have not been adopted, thus, in practice, the percentage required to register a trade union is much higher than 5 per cent; and (ii) under section 10.2(d), a nominal list of all the members with their notarized signatures is required. The organization considers that, in practice, this creates a significant financial barrier, as notarizing each signature costs the trade union 25 Mozambican meticaís (MZN) (US\$0.37), which would bring the cost of registration to more than US\$6,012.50, considering that 16,250 members are needed to register a trade union.
- 434.** The complainant organization therefore alleges that the free exercise of the right to freedom of association of officials and employees of the public administration in the country is being hindered, and that this argument is borne out by the fact that the prior existence of the SINAFP has not been recognized, unlike private sector trade unions, which were recognized through Act No. 23/91.

B. The Government's reply

- 435.** In a communication of 30 October 2018, the Government merely indicated that Act No. 18/2014 was in the process being revised to simplify the recognition process for the SINAFP, and to bring it into line with the other institutions of the public service.

C. The Committee's conclusions

- 436.** *The Committee notes that the main focus of the present complaint is the impossibility of the SINAFP obtaining official registration, as a consequence of Act No. 18/2014, which establishes a threshold of 5 per cent of the total number of public officials in order to enjoy the right to organize, despite the fact that the SINAFP has been active in the country for 16 years.*
- 437.** *The Committee notes the Government's indication that the legal requirements in question are currently being revised, but regrets that it has not provided more information in response to the allegations of the complainant organization. In this respect, 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 remains 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].*
- 438.** *The Committee notes the complainant organization's indication that it made a registration request with 4,537 signatures on 16 November 2016, which was rejected by the National Directorate for the Strategic Management of Human Resources of the State due to an insufficient number of signatures (decision of 9 August 2017, annexed to the complaint). The Committee notes that, under section 37.1 of Act No. 18/2014, a trade union association can*

establish itself as a trade union when it represents at least 5 per cent of all public officials and employees. The Committee also observes that, according to data provided by PSI, and if the total number of public officials in the country is correct, around 16,250 members would be required to comply with this condition, and that even if that figure was revised on the basis of the categories of public officials that currently enjoy the right to organize, it would still amount to a threshold of approximately 10,000 members.

- 439.** *The Committee wishes to recall 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 **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 449]. Regarding the required number of members, and irrespective of any economic consideration that might arise out of section 10.2(d), and the cost of a notarized signature, the Committee wishes to recall that the legally required minimum number of members must not be so high as to hinder in practice the establishment of trade union organizations [see **Compilation**, op. cit., para. 435). The Committee considers that the establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes the minimum number of members of a trade union at obviously too high a figure, as in this case. In view of the above, and given that the SINAFP has a significant number of members, the Committee requests the Government to take the necessary measures, including legislative measures, in order that this trade union can be registered in the near future, and refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.*
- 440.** *The Committee also notes that the National Directorate for the Strategic Management of Human Resources of the State gave its negative response almost nine months after the registration request; such a period of time is excessive and not conducive to harmonious industrial relations.*

The Committee's recommendations

- 441.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to take the necessary measures, including legislative measures, in order that the SINAFP can be registered in the near future.*
 - (b) The Committee refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.*

CASE NO. 2902

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

**Complaint against the Government of Pakistan
presented by
the Karachi Electric Supply Corporation (KESC) Labour Union**

Allegations: The complainant organization alleges refusal by the management of the KESC to implement a tripartite agreement to which it is a party. It further alleges that the enterprise management ordered to open fire on the protesting workers, injuring nine, and filed criminal cases against 30 trade union office bearers

- 442.** The Committee last examined this case at its June 2018 meeting, when it presented an interim report to the Governing Body [see 386th Report, paras 502–513, approved by the Governing Body at its 333rd Session].
- 443.** The Karachi Electric Supply Corporation (KESC) Labour Union submitted additional information in communications dated 8 June and 30 September 2018.
- 444.** The Government provided its observations in communications dated 2 October 2018, and 31 January and 1 February 2019.
- 445.** 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. Previous examination of the case

- 446.** At its June 2018 meeting, the Committee made the following recommendations [see 386th Report, para. 513]:
- (a) The Committee requests the Government to take the necessary measures to ensure that the July 2011 tripartite agreement is implemented, in particular that workers who refused the voluntary separation scheme are reassigned without delay, or, if reassignment is not possible for objective and compelling reasons, the concerned workers are paid adequate compensation. The Committee requests the Government to inform it of any developments in this regard.
 - (b) The Committee expects the National Industrial Relations Commission to examine the pending claims of anti-union discrimination filed by the Karachi Electric Supply Corporation Labour Union workers without delay so that, where applicable, adequate remedy can be ordered and urges the Government once again to promote negotiation between the complainant and the company with a view to solving any pending issues. The Committee requests the Government to inform it of any developments in this regard.
 - (c) In view of the gravity of the matters raised in this case, the Committee urges the Government to take the necessary measures to institute an independent investigation into the allegations that: (i) violence was used against trade union members during the August

2011 demonstration against the refusal of the company to implement the July 2011 tripartite agreement, injuring nine; and (ii) 30 trade union office 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. It expects such investigation to be undertaken without delay and further 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.

B. Additional information from the complainant

447. In its communications dated 8 June and 30 October 2018, the KESC Labour Union alleges the lack of action by the Government in this case and, in particular, that none of the terminated/dismissed employees have been reinstated and that the referendum which was to be held in 2011 had been so far delayed due to bad faith intentions of the management of the company.

C. The Government's reply

448. In its communications dated 2 October 2018, 31 January and 1 February 2019, the Government informs that the Ministry of Overseas Pakistanis and Human Resource Development (OPHRD) designated a Senior Joint Secretary (Admin.)/Registrar (Trade Unions) to conduct an independent inquiry into the allegations levelled by the KESK Labour Union against the Corporation. Two meetings under the chairmanship of the Secretary of the Ministry of OPHRD were held in April and July 2018 to discuss the way forward for an amicable solution to the long-standing dispute. The Government indicates that the meetings were attended by employers' and workers' organizations, the complainant and the management of the company.

449. Regarding the Committee's recommendation (a), the Government indicates that the July 2018 tripartite meeting (with the participation of the Pakistan Workers' Federation and Employers' Federation of Pakistan) recommended the following:

- (i) Since the Registrar has issued orders for holding a referendum for the determination of a collective bargaining agent (CBA) and an election officer has been accordingly appointed, it is hoped that many of the issues will be resolved through dialogue between the newly elected CBA and the management.
- (ii) As the agreement dated 26 July 2011 was ignored by the KESC Labour Union when filing a case in the National Industrial Relations Commission (NIRC) on the retrenchment matter, which is still in adjudication, it is recommended that the newly elected CBA and the management enter a new CBA at the earliest to address all pending issues.
- (iii) Both parties should negotiate with each other and reach an amicable solution through social dialogue rather than litigation. The Federal Government will extend its cooperation at all levels.
- (iv) As the company has informed that reinstatement/reassignment of retrenched workers is not possible, the management should make immediate arrangements to pay dues to workers who have not opted for the voluntary separation scheme (VSS) so far, as agreed

in the meeting. The KESC Labour Union should facilitate the process for benefits of workers.

- 450.** Regarding the Committee's recommendation (b), the Government indicates that the Ministry of OPHRD had already requested the NIRC Karachi to take up this case as a matter of priority. The cases are being expeditiously disposed of.
- 451.** As concerns the Committee's recommendation (c), the Government indicates that after hearing both parties during the July 2018 tripartite meeting, it transpired that in August 2011, a protest was launched by the union outside the office of the company which later became violent. When the protesting workers started ransacking the private and public property, the police tried to stop them, which resulted in clashes between the law enforcement agents and protesters. The meeting further observed that the union had levelled charges for firing on workers and injuring several of them during the protest. The matter was re-investigated on the orders of a Civil Judge on 24 November 2011 and was disposed of by the judgment dated 19 January 2012. The KESK Labour Union did not appeal against this decision and the matter has attained finality. The meeting recommended that both parties negotiate with each other and reach an amicable solution through social dialogue rather than through litigation. The Federal Government will extend its cooperation at all levels. The Government indicates that the company is of the view that the reinstatement of dismissed workers is not possible as the company had outsourced all of the non-technical jobs. More than 4,000 out of 4,500 non-technical workers had availed of the VSS and had received their dues and amicably settled their accounts. The Ministry of OPHRD is also pursuing the company to withdraw cases against dismissed workers and compensate them similarly to the VSS.
- 452.** The Government indicates that the management of the company has assured to resolve the issues as per the above-mentioned recommendations of the inquiry. The referendum proceedings are ongoing and expected to be concluded in the near future. The management is extending all the required support within its resources and has issued letters to all the ex-workers to receive the VSS dues at the earliest. The Government concludes by stating that the amicable resolution of the issues is expected in the near future.

D. The Committee's conclusions

- 453.** *The Committee recalls that the complaint in this case was lodged in 2011 and concerned allegations that the management of an electricity enterprise in Karachi refused to implement a tripartite agreement to which it was a party, as well as allegations of violence against protesting workers, dismissals and the filing of criminal charges against trade union office bearers.*
- 454.** *The Committee welcomes the information provided by the Government on the appointment of a Senior Joint Secretary (Admin.)/Registrar (Trade Unions) to conduct an independent inquiry into the allegations levelled by the KESK Labour Union against the Corporation and that to that effect, two tripartite meetings took place in 2018 (with the participation of the Pakistan Workers' Federation and Employers' Federation of Pakistan, the complainant and the management) to discuss the Committee's recommendations in this case.*
- 455.** *As concerns the Committee's recommendation (a), the Committee notes that the July 2018 tripartite meeting took note of the company's indication that the reinstatement/reassignment of retrenched workers was not possible as the company had outsourced all non-technical jobs; that more than 4,000 out of 4,500 non-technical workers had availed of the voluntary separation scheme (VSS) and had received their dues and amicably settled their accounts. The Committee further notes that the tripartite meeting concluded that the management should make immediate arrangements to pay dues to workers who have not opted for the*

VSS so far and that the KESC Labour Union should facilitate the process for benefits of workers. The Committee also notes the Government's indication that the management is extending all the required support within its resources and has issued letters to all the ex-workers to receive the VSS dues at the earliest. The Committee observes, however, that the complainant organization alleges the lack of progress in this regard. The Committee therefore requests the Government to step up its efforts in ensuring that the concerned workers are paid adequate compensation and to further engage with the KESC Labour Union in this respect. The Committee requests the Government to inform it of any developments in this regard.

- 456.** *The Committee notes that the Government reiterates that it had requested the NIRC to take up the cases relating to the enterprise as a priority. The Committee regrets that, despite the time that has elapsed since the submission of the claims by members of the KESC Labour Union, these claims are still pending and workers thus continue to lack access to effective means of redress for alleged prejudice based on trade union membership or activities. Recalling once again that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Compilation of decisions of the Committee on Freedom of Association, sixth edition**, 2018, para. 1142], the Committee expects the NIRC to examine the pending claims of anti-union discrimination without delay so that, where applicable, adequate remedy can be ordered and urges the Government once again to continue promoting negotiation between the complainant and the enterprise with a view to solving any pending issues. The Committee requests the Government to inform it of any developments in this regard.*
- 457.** *In relation to the allegations that violence was used against trade union members during the August 2011 demonstration, following the refusal of the enterprise to implement the July 2011 agreement, injuring nine, and that as the result of the demonstration, 30 trade union office bearers were dismissed and/or criminal charges were brought against them, the Committee notes the Government's indication that the July 2018 tripartite meeting observed that: (1) when the protesting workers started ransacking the private and public property, the police tried to stop them, which resulted in clashes between the law enforcement agents and protesters; (2) the union had levelled charges for firing on workers and injuring several of them during the protest; (3) the matter was re-investigated on the orders of a Civil Judge on 24 November 2011 and was disposed of by the judgment dated 19 January 2012; and (4) the KESC Labour Union did not appeal against this decision and the matter has attained finality. The Committee further notes that the tripartite meeting recommended that both parties negotiate with each other in order to reach an amicable solution and that the Ministry of OPHRD is pursuing the company to withdraw cases against dismissed workers and compensate them similarly to the VSS. The Committee requests the Government to expedite its efforts in this regard and to keep it informed of all developments.*

The Committee's recommendations

- 458.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to step up its efforts in ensuring that the July 2011 tripartite agreement is implemented and, in particular, that workers who had refused the voluntary separation scheme and had not been reassigned are paid adequate compensation, and to engage with the KESC*

Labour Union in this respect. The Committee requests the Government to inform it of any developments in this regard.

- (b) *The Committee expects the National Industrial Relations Commission to examine the pending claims of anti-union discrimination filed by the KESC Labour Union workers without delay so that, where applicable, adequate remedy can be ordered, and urges the Government once again to continue promoting negotiation between the complainant and the company with a view to solving any pending issues. The Committee requests the Government to inform it of any developments in this regard.*
- (c) *Noting the Government's indication that it is pursuing the company to withdraw cases against dismissed workers and compensate them, the Committee requests the Government to expedite its efforts and to keep it informed of all developments in this regard.*

CASE No. 3158

DEFINITIVE REPORT

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

- **the United Workers' Federation (Authentic) (CUT-A)**
- **the National Workers' Union of Yacyretá (SINATRAY)**
- **the Paraguayan Workers' Union of Yacyretá –
Technical Department (SITPAY-DT)**
- **the Union of Officials (Authentic) of the Yacyretá Binational Entity –
Paraguayan Sector (SIFEBY-A) and**
- **the Union of Safety and Information Sector Officials of the
Yacyretá Binational Entity (SIFUSEBY)**

***Allegations: the complainant organizations
allege the absence of collective bargaining at a
binational electrical power plant, and transfers
and dismissals of workers as a result of a strike
and non-registration of their executive
committees***

459. The complaint is contained in a communication dated 18 June 2015 from the United Workers' Federation (Authentic) (CUT-A), the National Workers' Union of Yacyretá (SINATRAY), the Paraguayan Workers' Union of Yacyretá – Technical Department (SITPAY-DT), the Union of Officials (Authentic) of the Yacyretá Binational Entity – Paraguayan Sector (SIFEBY-A) and the Union of Safety and Information Sector Officials of the Yacyretá Binational Entity (SIFUSEBY).

460. The Government sent its partial observations in communications dated 6 May 2016, 4 February and 7 March 2019.

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

A. The complainants' allegations

462. In their communication of 18 June 2015, the complainant organizations allege that, since its establishment in 1973, the Argentine-Paraguayan Yacyretá electrical power plant (hereinafter: binational entity) has not concluded any collective agreement on conditions of work with the trade unions, despite having an obligation to do so under the terms of section 334 of the Paraguayan Labour Code, which provides that: "Any enterprise that employs 20 or more workers shall have the obligation to conclude a collective agreement on conditions of work. The general conditions shall be negotiated with any organized trade union that exists there". The complainants also allege that although the management of the binational entity, by Decision No. 15802 of 22 April 2014, awarded a 30 per cent wage increase to workers in the Argentine sector, workers in the Paraguayan sector were granted a 10 per cent wage increase, which was never implemented in practice. They also allege that although the management, by Decision No. 15714 of 7 April 2014, granted the payment of special ex gratia compensation to workers in both sectors, the binational entity has refused to implement the terms of the decision for workers in the Paraguayan sector.
463. The complainant organizations indicate that although two tripartite meetings were held with the labour administrative authority on 20 and 30 June 2014, the binational entity refused to examine the grievances on the grounds that they were the subject of legal proceedings and that, instead of accepting the claims, it decided by a decision of 17 December 2014 to make Decision No. 15802 null and void, thus depriving the workers in both the Paraguayan and Argentine sectors of the wage increase which had been awarded. According to the complainants, it was because of these circumstances and the binational entity's refusal to engage in collective bargaining that they informed the management on 15 January 2015 that a strike would be held from 2 February 2015 for 30 days in support of the call for a collective agreement on conditions of work and for payment of the wage increase and the special ex gratia compensation.
464. According to the complainants, on 5 February 2015, and as a result of mediation by the governor of the department of Misiones, it was agreed to end the strike (which had been under way since 2 February) and to set up a dialogue round table. On 20 and 26 February 2015, a series of agreements were signed by the binational entity and the complainant organizations, in which the management of the binational entity agreed, inter alia, to begin negotiations for a collective agreement on conditions of work. The complainants object that these agreements were never implemented and that, on the contrary, workers were transferred or dismissed as a result of the strike. The complainants also allege that the labour administrative authority also conducted reprisals against them, by not recording and validating the unions' documents for registration of their new executive committees.

B. The Government's reply

465. In its communications of 6 May 2016, 4 February and 7 March 2019, the Government sends its observations and the binational entity's reply. The Government indicates that the binational entity is an undertaking which was established under a treaty signed by the Republic of Paraguay and the Argentine Republic on 3 December 1973 and is governed by the provisions of the treaty and its annexes and that, with regard to labour matters, is governed by the "labour and social security protocol" adopted in Paraguay through Act No. 606 of 19 November 1976. The Government states that the issue of the signature of a

collective agreement on conditions of work was the subject of a labour court action brought by several employee unions at the binational entity, under the title *Union of professional officials of the Yacyretá Binational Entity et al v Yacyretá Binational Entity re obligation to conclude collective agreement on conditions of work*. In this regard, the Government states that, although the First-Instance Civil and Labour Court (First Rota) of the Capital, Secretariat No. 1, decided in a ruling of 28 October 2013 to accept the complaint filed by the trade unions with the award of costs and ordered the enterprise to conclude and sign a collective agreement on conditions of work within 90 days, the Labour Appeals Court of the Capital (Second Chamber), in Judgment No. 83 dated 26 August 2014, overturned the first-instance ruling (the Government has provided the text of the said rulings).

466. With respect to the dismissals allegedly made as a result of the strike held from 2 to 5 February 2015, the Government indicates that these were due to the fact that many working projects had finalized and that all dismissals were done in accordance with the Labour Code and the entity's internal regulations.
467. As regards Decision No. 15802 of April 2014, whereby a wage increase was agreed, the binational entity indicates that this was made null and void in December 2014 because the increase had been awarded on account of the situation of high inflation in Argentina, which directly affected the purchasing power of officials in the Argentine sector, an issue which, in any case, is being examined by the courts. The binational entity emphasizes the validity of Decision No. 15714 of 7 April 2014, providing for the payment of special ex gratia compensation, with due and effective implementation without discrimination in both sectors and an extension of its application until 2017 by Executive Board Decisions Nos 16438/15 and 16591/15.
468. According to the binational entity, the tripartite meeting convened by the Labour Directorate-General on 30 June 2014 was not successful because the trade unions had filed a judicial complaint prior to the meeting and since this was still pending, the substantive issue had first to be elucidated by the judicial authorities. As regards the second tripartite meeting convened for 13 August 2015 at the request of the complainants, the Collective Dispute Mediation Department indicated in a note to the binational entity that it had not taken place because of lack of interest on the part of the plaintiff.
469. The Government also affirms that the processes for registration of the union executive committees have not been obstructed and that, as revealed by a note drawn up on 3 August 2018 by the Technical Office of the Collective Relations and Union Registration Department at the Ministry of Labour, Employment and Social Security (attached by the Government), the executive committees of the following unions, inter alia, at the binational entity were registered: SINATRAY (latest executive committee as from 11 May 2015), SITPAY-DT (latest executive committee as from 24 August 2016), SIFEBY-A (latest executive committee as from 21 July 2015) and SIFUSEBY (latest executive committee as from 10 August 2017).

C. The Committee's conclusions

470. *The Committee observes that the complainant organizations in the present case allege that a binational electrical power plant (hereinafter: binational entity) established more than 40 years ago has not negotiated any collective agreement on conditions of work. The complainants also allege that workers were dismissed or transferred following a strike held from 2 to 5 February 2015 and that the labour administrative authority conducted reprisals against the above-mentioned organizations by not recording or validating the documents for registration of their new executive committees.*

471. *With regard to collective bargaining, the Committee notes the complainants' allegations that: (i) ever since it was established, the binational entity has not negotiated a single collective agreement on conditions of work, despite its obligation to do so under section 334 of the Paraguayan Labour Code; (ii) a strike was held from 2 to 5 February 2015 in support, inter alia, of the call for a collective agreement on conditions of work; and (iii) on 26 February 2015, in the context of a dialogue round table set up after the end of the strike, the management of the binational entity signed an agreement with the complainants in which, inter alia, an undertaking was given to start negotiations for a collective agreement on conditions of work but an agreement was never adopted. In this regard, the Committee notes the Government's indications that: (i) with regard to labour matters, the binational entity is governed by the "labour and social security protocol" adopted in Paraguay through Act No. 606 of 19 November 1976 (the Committee has noted that, under section 4 of the protocol, the trade union rights of workers at the binational entity are determined by the laws of the country in which the workers are hired); and (ii) the issue of the adoption of the collective agreement on conditions of work was the subject of a labour court action brought by several employee unions at the binational entity, with the title Union of professional officials of the Yacyretá Binational Entity et al v Yacyretá Binational Entity re obligation to conclude collective agreement on conditions of work, and although in a ruling issued on 28 October 2013, the First-Instance Civil and Labour Court (First Rota) of the Capital, Secretariat No. 1, accepted the complaint filed by the trade unions and ordered the enterprise to conclude and sign a collective agreement on conditions of work within 90 days, the Labour Appeals Court of the Capital (Second Chamber), in Judgment No. 83 of 26 August 2014, overturned the first-instance ruling.*
472. *The Committee observes that the allegation relating to the absence of collective bargaining at the binational entity was examined recently by the Committee in the context of another case concerning that entity. On that occasion, the Committee recalled that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements, and it asked the Government to take the necessary steps to promote collective negotiation in good faith within the binational entity on conditions of work [see Case No. 3127, 386th Report, June 2018, paras 546–551]. Furthermore, the Committee observes that, according to the Government, in 2014 the Appeals Court overturned a first-instance ruling which obliged the enterprise to conclude and sign a collective agreement on conditions of work within 90 days. The Committee notes that the Government has provided the text of the said rulings and observes that in its conclusions, the Appeals Court emphasized that at issue was not a collective agreement fully agreed by the parties and ready for signature, but rather a draft collective agreement which still needed to be examined and approved by the entity's competent authorities. The Appeals Court also stressed that, as set out in the entity's internal regulations, any decision that would create an obligation to the entity had to be taken by both directors and not only by one of them (in the present case only one of the two directors had been involved in the negotiation of the draft collective agreement). The Appeals Court concluded that the entity was therefore not obliged to sign the draft collective agreement and that the draft could only be binding to the entity after having been accepted and approved by it. The Committee takes due note of the said ruling and, recalling that it is following up this issue in Case No. 3127, invites the Government to examine, within the framework of the entity's regulations, the conditions under which collective bargaining can be fully exercised.*
473. *With respect to the dismissals allegedly made as a result of the strike held from 2 to 5 February 2015, the Committee notes the Government's indication that these were due to the fact that many projects had been finalized and that all dismissals were done in accordance with the Labour Code and the entity's internal regulations. The Committee also observes*

that the complainants do not identify any particular worker who was supposedly dismissed as a result of the strike. Although the complainants attached a letter dated 2 March 2015 signed by the legal adviser of the binational entity indicating that the dismissal of Mr Alberto Andrés Bernal Ruíz was due to policies implemented by the binational entity as part of a human resources optimization programme, there is no indication in this letter or in any other attached document of the date when the worker was dismissed or whether the dismissal was due to his trade union activities or his participation in the strike. Nor do the complainants indicate whether any judicial appeal was made against the dismissal. Under these circumstances, and in the absence of substantial information on the dismissals, the Committee will not pursue its examination of these allegations but invites the Government to engage with the social partners concerned with a view to ensuring that they were not based on anti-union motives.

474. *The Committee observes that the Government has not sent its observations concerning the transfers allegedly made as a result of the strike held from 2 to 5 February 2015. The Committee also observes that the complainants do not identify any particular worker who was supposedly transferred as a result of the strike. The Committee observes that the documents attached by the complainants show that: (i) on 15 January 2015, the trade unions sent a letter to the management of the binational entity informing it of the decision to hold a 30-day strike from 2 February; (ii) by Decision No. 1047 of 19 January 2015, the director of the binational entity ordered the transfer of six officials who would remain available to the human resources sector; and (iii) in the agreement concluded on 26 February 2015 between the complainants and the binational entity, in the context of a dialogue round table set up after the end of the strike, the binational entity undertook to review the transfer of one of the workers, Mr Ramón Rodríguez, and indicated that the other officials who had been transferred were the subject of an administrative investigation. The Committee invites the Government to engage with the social partners concerned with a view to ensuring that these transfers were not based on anti-union motives.*

475. *Lastly, as regards the allegation that the labour administrative authority conducted reprisals against the complainants, by not recording or validating the documents for registration of the new executive committees, the Committee notes that, as shown by a note dated 11 December 2015 from the Technical Office of the Collective Relations and Union Registration Department at the Ministry of Labour, Employment and Social Security (attached by the Government), the executive committees of the following complainant unions were registered as follows: SINATRAY (latest executive committee as from 11 May 2015), SITPAY-DT (latest executive committee as from 13 August 2015), SIFEBY-A (latest executive committee as from 21 July 2015) and SIFUSEBY (latest executive committee as from 25 August 2015).*

The Committee's recommendations

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

- (a) Recalling that the Committee is following up on the issue of collective bargaining in this specific context in Case No. 3127, it invites the Government to examine, within the framework of the entity's regulations, the conditions under which collective bargaining can be fully exercised.*
- (b) The Committee invites the Government to engage with the social partners concerned with a view to ensuring that the dismissals and transfers referred to in this case were not based on anti-union motives.*

Geneva, 22 March 2019

(Signed) Professor Evance Kalula
Chairperson

Points for decision:

paragraph 84	paragraph 328
paragraph 108	paragraph 339
paragraph 165	paragraph 361
paragraph 183	paragraph 395
paragraph 204	paragraph 425
paragraph 229	paragraph 441
paragraph 258	paragraph 458
paragraph 287	paragraph 476
paragraph 310	