International Labour Organization

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Governing Body

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Institutional Section **INS**

Twelfth item on the agenda

Reports of the Committee on Freedom of Association

393rd Report of the Committee on Freedom of Association

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▶ Introduction

1. The Committee on Freedom of Association (CFA), set up by the Governing Body at its 117th Session (November 1951), met virtually from 8 to 13 and 18 March 2021 under the chairmanship of Professor Evance Kalula.

2. The following members participated in the meeting: Ms Batool Hashim Atrakchi (Iraq), Ms Valérie Berset Bircher (Switzerland), Mr Aniefiok Etim Essah (Nigeria), Mr Aurelio Linero Mendoza (Panama), Mr Takanobu Teramoto (Japan); Employers' group Vice-Chairperson, Mr Alberto Echavarría and members, Ms Renate Hornung-Draus, Mr Thomas 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, Mr Gerardo Martínez, Mr Magnus Norddahl and Mr Ayuba Wabba. The members of Argentinian and Colombian nationalities were not present during the examination of the cases relating to Argentina (Case No 3320) and to Colombia (Cases Nos 2761, 3074, 3112 and 3316).

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3. Currently, there are **152** cases before the Committee in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined **22** cases on the merits, reaching definitive conclusions in **12** cases (**6** definitive reports and **6** reports in which the Committee requested to be kept informed of developments) and interim conclusions in **10** 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 complaint and "reports in which it requests to be kept informed of developments" in order to examine later 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 2021** 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 2761 (Colombia), 2923 (El Salvador) and 3074 (Colombia), because of the extreme seriousness and urgency of the matters dealt with therein.

Urgent appeals: Delays in replies

6. As regards Cases Nos 3067 (Democratic Republic of the Congo) and 3269 (Afghanistan), 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 at its next meeting 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: 3184 (China), 3203 and 3263 (Bangladesh), 3339 (Zimbabwe), 3369 (India), 3370 (Pakistan), 3374 (Bolivarian Republic of Venezuela), 3375 (Panama), 3376 (Sudan), 3377 and 3382 (Panama), 3385 (Bolivarian Republic of Venezuela), 3386 (Kyrgyzstan), 3389 (Argentina), 3391 (South Africa), 3393 (Bahamas) and 3394 (United States of America). 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 and 3023 (Switzerland), 3141 (Argentina), 3161 (El Salvador), 3178 (Bolivarian Republic of Venezuela), 3192 (Argentina), 3221 (Guatemala), 3232 (Argentina), 3242 (Paraguay), 3251 (Guatemala), 3277 (Bolivarian Republic of Venezuela), 3282 (Colombia), 3293 (Brazil), 3300 (Paraguay), 3325 (Argentina), 3335 and 3364 (Dominican Republic), 3366, 3368, 3383 and 3384 (Honduras) and 3399 (Hungary), the Governments have sent partial information on the allegations made. The Committee requests all these Governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

9. As regards Cases Nos 2177 and 2183 (Japan), 2318 (Cambodia), 2508 (Islamic Republic of Iran), 2609 (Guatemala), 3027 (Colombia), 3042 and 3062 (Guatemala), 3076 (Maldives), 3133 (Colombia), 3139 (Guatemala), 3148 (Ecuador), 3149 and 3157 (Colombia), 3185 (Philippines), 3193 and 3199 (Peru), 3207 (Mexico), 3208 (Colombia), 3210 (Algeria), 3213, 3217 and 3218 (Colombia), (3219 (Brazil), 3223 (Colombia), 3225 (Argentina), 3228 (Peru), 3233 (Argentina), 3234 (Colombia), 3239 and 3245 (Peru), 3252 (Guatemala), 3260 (Colombia), 3265 and 3267 (Peru), 3280, 3281 and 3295 (Colombia), 3306 (Peru), 3307 (Paraguay), 3308 (Argentina), 3309 (Colombia), 3310 (Peru), 3311 (Argentina), 3313 (Russian Federation), 3315 (Argentina), 3319 (Panama), 3321 (El Salvador),

3322 (Peru), 3324 (Argentina), 3326 (Guatemala), 3327 (Brazil), 3329 (Colombia), 3331 (Argentina), 3333 and 3336 (Colombia), 3338 (Argentina), 3342 (Peru), 3349 (El Salvador), 3351 (Paraguay), 3352 and 3354 (Costa Rica), 3355 (Brazil), 3356 and 3358 (Argentina), 3359 (Peru), 3360 (Argentina), 3361 (Chile), 3363 (Guatemala), 3365 (Costa Rica), 3373 (Peru), 3378 (Ecuador), 3379 (South Africa), 3380 (El Salvador), 3381 (Hungary), 3387 (Greece), 3388 (Albania), 3390 (Ukraine) and 3392 (Peru), 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: 3396 (Kenya), 3397 (Colombia), 3398 (Netherlands), 3400 (Honduras), 3401 (Malaysia), 3402 (Peru), 3403 (Guinea) and 3404 (Serbia) 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.

11. The Committee has also received three new cases that concern serious and urgent matters as identified in paragraph 54 of its rules of procedures: Case No. 3395 (El Salvador), Case No. 3405 (Myanmar) and Case No. 3406 (China – Hong Kong Special Administrative Region). In accordance with its decision to give priority to such cases, the Committee indicates its intention to examine these cases at its next meeting in May–June 2021 and requests the Governments concerned to provide their observations by 7 May so that it may consider the serious allegations raised in full knowledge. 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 at its next meeting 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.

Article 24 representations

12. The Committee has received certain information from the following Government with respect to the article 24 representation that was referred to it: Costa Rica (3241) and intends to examine it as swiftly as possible. The article 24 representations referred to the CFA concerning the Governments of Brazil (3264) and France (3270) are being finalized by the corresponding tripartite committees. The Committee draws the Governing Body's attention to the report presented by its committee appointed according to the standing orders under article 24 of the Constitution to examine the representation against the Government of Turkey for non-observance of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (GB.341/INS/13/5).

Article 26 complaint

13. The Committee recalls that since 2004 it has been examining serious and urgent violations of freedom of association in respect of a complaint submitted by the International Organisation of Employers (IOE) and the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS) (Case No. 2254). The Committee suspended its examination of this case following its last examination in October 2017 in light of the decision by the Governing Body to appoint a Commission of Inquiry to examine the non-observance of the Freedom of Association

Convention, 1948 (No. 87), among other Conventions. The Report of the Commission of Inquiry was taken note of by the Governing Body at its 337th Session in October–November 2019. The Committee observes that several of the pending recommendations of the Commission of Inquiry concern matters raised in Case No. 2254, the examination of which may now be reactivated. In light of the gravity and persistence of the matters involved in this case, the Committee requests the Government to send its observations in relation to its previous recommendations and in light of the relevant recommendations of the Commission of Inquiry so that it may pursue its examination of this case in full knowledge of the facts at its next meeting.

Transmission of cases to the Committee of Experts

14. The Committee draws the legislative aspects of Cases Nos 2967 and 3089 (Guatemala), 3323 (Romania), 3334 (Malaysia) and 3337 (Jordan) as a result of the ratification of Conventions Nos 87, 98, 151 or 154, to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

Developments in the Committee's procedures and practices

15. The Committee has been working diligently throughout its mandate for the period 2017–2020 to streamline its procedures and working methods and render them more transparent and accessible to the constituents. A significant modification in the Committee's working methods introduced in 2016, the creation of the CFA sub-committee, continued to serve a key purpose in facilitating initial reflections on areas for improvement and possible initiatives to be placed before the Committee for final decision. The CFA subcommittee has thus appreciably strengthened the Committee's governance role with respect to several aspects of its work, including the handling of cases and determination of admissibility, the identification of priority cases for examination and the setting of the Committee's agenda with a high consideration for serious and urgent cases and ensuring an overall relative regional balance. The Governing Body has welcomed the work and the activities of the sub-committee throughout this current mandate and the Committee proposes that the sub-committee continue to meet and pursue its governance role.

16. The Committee wishes to take the opportunity of this penultimate meeting of its mandate to recall the important adjustments it has made to its working methods over the current mandate.

- **CFA Annual report:** In March 2018, the Committee adopted its first annual report covering the year 2017 (approved in a deferred GB session of June 2018 GB.333/INS/6/1(Add.)). Its genesis is linked to the discussions in the Governing Body on the Standards Initiative (GB.332/INS/5, paragraph 68) and emanated from the March 2017 Workers' and Employers' groups Joint Statement. CFA Annual reports are intended to provide useful information on the recourse to and impact of the Committee's procedure throughout the preceding year, supported by statistical data and other details relating to the work undertaken by it. When presenting, in March 2019, the second annual report for 2018, the Committee drew the Governing Body's attention to the decision taken in relation to the Standards Initiative (GB.335/INS/5) as regards the presentation of this report to the Conference Committee on the Application of Standards (CAS). Recalling the complementarity of the two committees and the importance of avoiding duplication of procedures, the report was presented to the CAS at the 108th International Labour Conference in June 2019 and welcomed by the Organization's tripartite constituents. Due to the COVID-19 pandemic and the

cancellation of the March and May–June 2020 Governing Body sessions, the 2019 Annual report was presented to the Governing Body in November 2020 (GB.340/INS/16 (Add.1)). The 2020 Annual Report is before the Governing Body at its present session (GB.341/INS/12(Add.1))

- **Compilation of decisions of the CFA:** Following previous decisions of the Committee and the Governing Body, and emphasizing the principles of universality, continuity, predictability, fairness and equal treatment, which it must ensure in the area of freedom of association, the Committee, in its annual report presented to the June 2018 Session (GB.333/INS/6/1(Add.)), informed the Governing Body that the work of a compilation in concise form of its decisions in more than 3,200 cases over 65 years had been completed, with the full implication of the workers, employers and government members of the Committee. An electronic database with simple search features and easy access to the full context of the cases is accessed via the ILO web page on international labour standards.

- **Handling of article 24 representations concerning freedom of association Conventions:** Following the decision of the Governing Body in November 2018 (GB.334/INS/5) instructing the Committee to ensure that article 24 representations concerning freedom of association conventions referred to it would be examined according to the modalities set out in the Standing Orders for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization, the Committee decided that three persons from amongst its members would be appointed (one person from each group) to examine a representation referred to it (GB.334/INS/10). The designation of these members from the Committee was important to ensure the relevant expertise and coherence in examining representations concerning freedom of association conventions and avoid any misunderstanding that a new additional avenue of complaint was being opened. The entire case file is made available to the concerned members who will meet as many times as considered necessary for the conclusion of their work. Where other Conventions are also raised in the representation, avenues have been explored for ensuring effective communication between the two committees where appropriate to ensure coherence in the factual understanding. The Committee members had their first occasion to explore such modalities in the context of the article 24 representation concerning the application of the Freedom of Association Convention, 1948 (No. 87), and the Termination of Employment Convention, 1982 (No. 158), by Turkey, which gave rise to a decision for the joint presentation to the Governing Body of the two committee's reports in the special closed session at the end of the Governing Body session.

- **Definitive closing of cases in follow-up after 18 months without information:** In its November 2018 report (GB.334/INS/10), the CFA informed the Governing Body that, from that moment onwards, any follow-up cases that have not received information either from the Government or from the complainant for 18 months (or 18 months from the last examination of the case) will be considered closed. This practice would not be used for serious and urgent cases. The Committee further indicated that the closure of inactive follow-up cases concerning countries that have not ratified the freedom of association Conventions would be decided on a case-by-case basis depending upon the nature of the case. Letters were sent to governments and complainants indicating this decision and the importance of furnishing follow-up information in relation to the Committee's recommendations. The Committee wishes to emphasize however that this new procedure aimed at avoiding an important

backlog of follow-up cases that it is not in a position to examine due to the absence of information is not intended to diminish the importance of its recommendations and its expectation to be kept informed by governments of the measures it has taken in their pursuit. In light of the COVID-19 pandemic and the difficulties encountered by ILO constituents in providing timely information, the Committee decided that it would delay the application of this measure to its March 2021 meeting. The cases that have been closed in this manner can be noted at the end of this introduction (paragraph 53) and will have the following indication on the website: In the absence of information from either the complainant or the Government in the last 18 months since the Committee examined this case, this case has been closed.

- **Enhanced engagement of the chairperson of the Committee and its members with constituents, in particular Governments:** The Chairperson of the Committee has made extensive use of his role facilitating contacts with Governments (both individually and through meetings with regional groups), in order to both enhance transparency and understanding of the Committee's procedures and functioning and to discuss with individual governments the situation in the country so as to encourage positive collaboration and enhance appreciation for the challenges faced, while also sharing the Committee's expectations with respect to its conclusions and recommendations. The chairperson has been accompanied on numerous occasions by the spokespersons and members of the three groups of the committee. Additionally, with the aim of obtaining adequate and complete replies from certain governments, the Committee has had more frequent recourse to its procedures for hearing of parties (paragraph 69) by which the Committee invites governments and/or complainants to come before it so as to obtain more complete information on the matters at hand. Notably, the Committee had recourse to this procedure with the Government of Somalia and its members met with the complainant in relation to the long-standing Case No. 3113, which ultimately facilitated a rapprochement of the parties and the Government's agreement to implement all outstanding recommendations (391st report, October 2019, paragraph 12).

- **Visibility to the work of the Committee:** The Committee present and former chairpersons and workers' and employers' spokespersons took special part in the thematic forum on "Freedom of Association and the Effective Recognition of Collective Bargaining: A Foundation of Decent Work" that took place at the 108th ILO Centenary Conference. This event provided an excellent opportunity for the Committee to showcase its work and achievements and demonstrate the constructive commitment of the tripartite partners to the work of the Committee. Several other Centenary events took place around the world with the participation of the Committee's chairperson and other Committee members and members of the Governing Body.

17. Additionally, the Committee wishes to inform the Governing Body of a number of further developments emanating from its working methods meeting at its current session:

- **Admissibility of complaints:** The Committee decided to set out a certain number of criteria to assist in filtering out complaints for which it considered it would not be in a position to provide pertinent recommendations under its mandate. It therefore decided that a certain number of elements that, assessed together on a case-by-case basis, could facilitate its determination that a complaint did not have sufficient merit to support review by the Committee. The considerations include: the time elapsed since the alleged matters occurred; the treatment and follow-up of the matter at national level (i.e. ongoing consideration by independent bodies); insufficient evidence or support of the freedom of association violation alleged and its

consideration at international level or absence of a link to freedom of association or collective bargaining. These considerations would not apply to serious and urgent cases. Where new complaints meet a certain number of these criteria, the subcommittee will consider the appropriateness of opening a case and then submit its considerations to the Committee plenary. The Committee will make a general mention in the introduction of its report to the number of complaints that it may have decided not to examine on the above basis.

- **Voluntary conciliation:** The Committee also decided to adopt a similar approach of optional voluntary conciliation for complaints as has been adopted with respect to representations under article 24 of the ILO constitution. Upon acknowledging a complaint and transmitting it to the government, an additional paragraph will be included pointing to the possibility of optional voluntary conciliation which, if agreed to by both parties, would lead to a temporary suspension of the examination of the complaint for a period of six months. Such cases will be noted in a special paragraph of the introduction of the Committee's report, demonstrating the willingness of the parties to attempt to find appropriate solutions at national level. The Committee will review the impact of this approach after a trial period. To facilitate the complainant's consideration of the possibility of voluntary conciliation, the Office will develop an electronic form for filing complaints including this question.

- **Modernization of case management and internal methods of work of the Office:** The streamlining of procedures and ensuring of greater transparency is being pursued within the framework of the Governing Body's discussion on the Standards Initiative and the agreement to finance an electronic document and information management system for the supervisory bodies. Full files of cases being examined are communicated to CFA members and a more simplified document management system is being finalized for use by the Committee at its next meeting. This simplified system permits easy and rapid access for all CFA members to all communications from the complainant and the government, ensuring confidentiality and full respect for the Committee's procedural rules.

- **Streamlining of the Committee's membership:** The Committee observes that since the decision to change the status of substitute members to that of deputy members in 2002, there is no longer any practical differentiation between the two categories of Committee membership. The Committee therefore recommends that in the future the Governing Body appoint its members without any such distinction, simply referring to the nomination of six government, six worker and six employer members, with its rules updated in due course. Additionally, the Committee has continued its discussions on the manner in which it could replace members that were temporarily unable to attend one of its meetings while assuring Governing Body control in the appointment of its members and the continuing respect of the fundamental tenets on which its work is based (confidentiality, personal capacity, continuity).

Cases in follow-up

18. The Committee examined **7** cases in paragraphs 19 to 49 concerning the follow-up given to its recommendations and concluded its examination with respect to and therefore closed **4** cases**:** Cases Nos 2872 (Guatemala), 3334 (Malaysia), 3177 (Nicaragua) and 2856 (Peru).

Case No. 2872 (Guatemala)

19. The Committee last examined this case at its meeting in November 2012 and, on that occasion, made the following recommendations on the issues that were still pending [see 365th Report, November 2012, para. 1088]:

(a) noting that in its observations the Government has not questioned the representativeness of the General Trade Union of Employees of the Ministry of Labour and Social Welfare (SIGEMITRAB), the Committee expects that the Government will initiate negotiations with the majority union and requests it to keep the Committee informed in this regard. It also asks the Government to send it observations on the allegation that negotiations were held and collective agreements concluded with minority unions, as a result of which, according to the complainant, SIGEMITRAB's position was weakened;

(b) with regard to the setting up of a negotiating committee to discuss a new collective agreement, the Committee expects that the negotiations will be conducted without further delay and asks the Government to keep it informed of the outcome thereof and the settlement of the collective dispute now before the 11th Labour and Social Welfare Court;

(c) with regard to the alleged anti-trade union persecution and practices in the context of the annual inspection plan of the labour inspectorate, the Committee asks the complainant organization to confirm that the claim has been withdrawn following the agreement reached, and

(d) with regard to the disciplinary proceedings and other court proceedings referred to by the complainant organization as reprisals for the trade union activity of the General Secretary of SIGEMITRAB, who is also Secretary of the complainant organization, the Committee regrets that the Government has not responded and requests it to send its observations in this regard.

20. In a communication dated 7 February 2013, the complainant organization: (i) denounced the failure to comply with the Committee's recommendations; (ii) indicated that no agreement had been reached concerning the alleged persecution and anti-union practices, and (iii) stated that SIGEMITRAB officials continued to be subject to constant discrimination and restrictions on their activities, for which reason the trade union had been obliged to bring retaliatory proceedings before the 11th Labour and Social Welfare Court.

21. In a communication of 8 December 2017, the Government indicates that in a ruling of 22 July 2016, the 7th Labour and Social Welfare Court: (i) confirmed that the total number of SIGEMITRAB members was not greater than the number of workers who were members of the General Trade Union of Workers of the Ministry of Labour and Social Welfare (SITRAMITRAPS) and the 20 October Trade Union of Workers of the Ministry of Labour and Social Welfare (20 October Trade Union); and (ii) dismissed the application for a declaration of nullity of the Collective Agreement on Working Conditions concluded by the Ministry of Labour and Social Welfare, SITRAMITRAPS and the 20 October Trade Union. The Government also informs that the retaliatory proceedings brought by Mr Néstor Estuardo de León Mazariegos, Secretary General of the SIGEMITRAB, were declared as non-receivable, pursuant to a ruling of 23 August 2012 of the 11th Labour and Social Welfare Court, a decision confirmed by a ruling of 5 June 2013 of the Appeal Court of Labour and Social Welfare.

22. In a communication dated 21 January 2021, the Government states that a Collective Agreement on Working Conditions was concluded on 28 September 2018 between the Ministry of Labour and Social Welfare, on the one hand, and SITRAMITRAPS, SIGEMITRAB

and the 20 October Trade Union, on the other. This agreement was homologated on 9 October 2018 and is still in force. As regards the disciplinary process and other legal actions mentioned by the complainant organization as alleged reprisals for the trade union activity of Mr Néstor Estuardo de León Mazariegos, the Government indicates that: (i) various disciplinary proceedings were indeed brought against Mr De León Mazariegos for breaching duties established in the Regulations under the Civil Service Act; and (ii) as a result of the disciplinary proceedings, Mr de León Mazariegos was punished with five days without pay in August 2019. The Government also informs that Chapter VIII of the new collective agreement signed in 2018 with the three unions present in the institution, establishes the disciplinary regime, which has improved the process with regard to the right of defence, due process, presumption of innocence, as well as the right to review the disciplinary measures imposed on the public servants of the Ministry of Labour and Social Welfare. Finally, the Government emphasizes that no information has been provided during the past 18 months in relation to this case which was examined by the Committee in November 2012.

23. In a communication of 28 January 2021, the Government informs that, as regards the collective dispute brought before the 11th Court of Labour and Social Welfare, on 16 August 2012 a ruling was issued stating the collective dispute was without substance. The Government indicates also that, on 5 February 2013, this ruling was confirmed by the Jurisdictional Chamber following an appeal lodged by SIGEMITRAB.

24. The Committee takes note of this information. In particular, it notes with satisfaction that a new collective agreement has been concluded between the Ministry of Labour and Social Welfare, SIGEMITRAB and the other two trade unions present within the Ministry. *As regards the invocation of the 18-month period without additional information, the Committee observes that, following its last examination of the case in 2012, the complainant organization provided in 2013 additional information on the alleged failure to comply with the recommendations. After having sent a first reply in 2017, the Government sent supplementary information in 2021, for which reason the Committee is now examining the pending issues. Taking into account the conclusion of the above-mentioned collective agreement with all the trade unions present in the Ministry and the court decisions handed down in relation to the pending matters, the Committee notes that all the issues appear to have been resolved. Consequently, the Committee considers that the case is closed and will not pursue its examination of this case.*

Case No. 3334 (Malaysia)

25. The Committee last examined this case, which was submitted in July 2018 and which concerns allegations that a hotel [1] has been exploiting the weaknesses of the industrial relations system to prevent its workers from legally forming and registering a trade union, as well as allegations of systemic violations of freedom of association due to the existing legislation and practice, at its October 2019 meeting [see 391st Report, paras 349–384]. On that occasion, the Committee made the following recommendations [see 391st Report, para. 384]:

(a) The Committee expects that the necessary legislative amendments aimed at ensuring that the definition of managerial and supervisory staff is limited to those persons who genuinely represent the interests of employers, including, for example,

[1] Hilton Kuala Lumpur Hotel.

those who have the authority to appoint or dismiss, will be prepared in consultation with the social partners and adopted without further delay. It requests the Government to keep it informed of the developments in this regard.

(b) The Committee requests the Government to take the necessary measures to ensure that the secret ballot for the recognition of the NUHBRW as the collective bargaining agent of the workers in question is held without delay, either on the basis of an updated employee list or on agreement that the status of the contested employees will be resolved subsequently. It requests the Government to keep it informed in this respect.

(c) The Committee requests the Government to review in the framework of the above-mentioned legislative reform and in consultation with the social partners, the existing secret ballot system. It requests the Government to keep it informed in this regard.

26. The Government provides its observations in a communication dated 31 January 2021. It indicates that, on the basis of consultations with the social partners and views from ILO experts, it has decided to maintain the current provision of the Industrial Relations Act, 1967 (IRA) concerning the definition of managerial and supervisory staff, as it seems sufficient in determining the scope of representation of trade unions.

27. The Government further states that it took the necessary measures to ensure that a secret ballot for the recognition of the National Union of Hotel, Bar and Restaurant Workers (NUHBRW) was held at the hotel. In particular, after the High Court dismissed the hotel's application for judicial review against the decision of the Director General for Industrial Relations who had decided to hold a secret ballot in November 2017, the Department of Industrial Relations informed the parties about the intention to proceed with a secret ballot in June 2020 but the union requested to postpone the ballot. In July 2020, the union informed the Department that its council had decided to withdraw their claim for recognition. According to the Government, as a result of the withdrawal of the claim for recognition, the matter has been resolved.

28. Finally, the Government indicates that the provision on recognition of trade unions, including the secret ballot system, was amended in consultation with the social partners and with guidance from ILO experts. Indeed, the IRA was amended in 2019 and entered into force in January 2021 and the provision on recognition of trade unions will be enforced once amendments to the Trade Unions Act, 1959 are passed by the Parliament.

29. *The Committee takes note of the information provided by the Government. With regard to the definition of managerial and supervisory staff (recommendation (a)), the Committee notes the Government's indication that after consultations with the social partners and the ILO, it has decided to maintain the relevant provision of the IRA. While taking due note of the reported consultations on this issue, the Committee recalls that it had previously requested the Government to amend the IRA in this regard, both in the present case and in Case No. 2717 [see 356th Report, para. 841]. In line with the above, the Committee trusts that the Government will ensure that the legislation concerning union recognition is applied in line with the principle of freedom of association.*

30. *As to the conduct of a secret ballot for the recognition of the NUHBRW as the collective bargaining agent of the workers at the hotel (recommendation (b)), the Committee notes that in June 2020, the Department of Industrial Relations informed the parties about the intention to proceed with a secret ballot but the union first requested to postpone the ballot, before informing the Department that it had decided to withdraw its claim for recognition. The Committee takes due note of this development and trusts that both parties will cooperate in good faith.*

31. *Concerning the review of the existing secret ballot system (recommendation (c)), the Committee notes the Government's indication that the provisions on recognition of trade unions, including the secret ballot system, have been amended in consultation with the social partners and the ILO, that the amendments of the IRA entered into force in January 2021 and that the provisions relating to trade union recognition will be enforced when the amendments to the Trade Unions Act, 1959 are passed by the Parliament. Taking due note of these developments, the Committee understands from the text of the IRA that the amendments aim at expediting dispute resolution processes relating to disputes arising from a claim for recognition of a trade union for collective bargaining purposes, in particular by replacing the power of the Minister of Human Resources with the power of the Director General for Industrial Relations to resolve the dispute. The amended provision also provides that union membership is assessed at the time of the claim and a secret ballot is used to ascertain the percentage of workers who show support for the union seeking recognition. The Committee trusts that these and other amendments to the IRA will effectively address the complainant's concerns and refers the legislative aspect of this case to the Committee of Experts on the Application of Conventions and Recommendations. In view of the above, the Committee considers this case closed and will not pursue its examination.*

Case No. 2756 (Mali)

32. The Committee last examined this case, which concerns the repeated refusal of the Government to appoint representatives of the Trade Union Confederation of Workers of Mali (CSTM) to the Economic, Social and Cultural Council (CESC) and to national tripartite consultation bodies in general, at its June 2018 meeting [see 386th Report, paras 47–50]. On that occasion, the Committee regretted that the Government had still not decided to follow the recommendations concerning the CSTM's participation in the CESC. The Committee also regretted that no tangible progress had been made in organizing the professional elections for which the social partners had called unanimously. It was, however, encouraged by the Government's statements regarding the submission to the Council of Ministers of a road map on the elections.

33. In a communication dated 29 January 2020, the Government reiterated its intention to organize professional elections in full transparency, in collaboration with trade unions, but noted that the unions were unable to agree on a threshold for representation.

34. *The Committee deeply regrets that, ten years since it issued its first recommendations on the matter, and despite a high-level mission in 2015, professional elections for trade union representation have still not been held. The Committee fully expects the Government to take all necessary measures with a view to moving forward on this case, and to keep it informed of any progress made.*

Case No. 3024 (Morocco)

35. The Committee last examined this case at its March 2016 meeting [see 377th Report, paras 37–41]. The Committee took note of information provided with regard to recommendations (a) and (b), on judicial action filed by the Democratic Union of the Judiciary (SDJ) and measures taken to continue peaceful discussions between the Ministry of Justice and the SDJ. Regarding the draft law on trade unions (recommendation (c)), the Committee urged the Government to keep it informed of any new developments in that regard and to send a copy of the law once adopted.

36. In its communication dated 25 October 2017, the Government provided supplementary information on recommendations (a) and (b). With respect to recommendation (c), the Government stated in a communication dated 12 February 2021 that the draft law on trade unions was still at the stage of consultations with the social partners.

37. *Noting the information provided by the Government regarding the adoption of the draft law on trade unions, the Committee requests the Government to keep it informed of any new developments in this regard and to send a copy of the law once it has been adopted.*

Case No. 3177 (Nicaragua)

38. The Committee recalls that this case concerns allegations of refusal by the administrative authority to register a new trade union and dismissals by the public sector employer (the municipal authority) of the workers who formed the union. The Committee last examined this case at its June 2016 meeting, when it made the following recommendations [see 378th Report, para. 505]:

(a) With regard to the allegations of anti-union dismissals, the Committee requests the complainant to transmit to the Government the most detailed information and evidence possible regarding the alleged dismissals and anti-union motives.

(b) The Committee requests the Government to indicate whether the application met the membership requirements at the time of registration and to carry out additional investigations in order to determine whether anti-union dismissals took place and, if so, to impose penalties that constitute a sufficiently dissuasive sanction, to award adequate compensation and to register the union if the workers still desire. The Committee requests the Government to keep it informed in this regard.

39. In a communication of 8 February 2017, the Government provided the following information in response to recommendation (b) of the Committee. In this communication, the Government emphasizes that the refusal to register was due to the failure to meet the essential requirements as regards the minimum number of members needed to establish or form a trade union organization in the country. The Regulations on Trade Union Associations specifically provide that no fewer than 20 members are needed for the creation of a trade union, a requirement that was not met in the present case. The Government states that its actions were entirely in accordance with national law and that no fundamental right related to freedom of association was violated. The Government also states that this was demonstrated through the procedures carried out with a view to protecting the right to freedom of association: (i) on 11 February 2013, the Trade Union Associations Directorate requested the Departmental Labour Inspectorate to carry out an inspection with a view to verifying the legality of the trade union's establishment; (ii) the inspection was carried out on 14 February 2013 and the Departmental Labour Inspectorate found that there was no violation of freedom of association or of the corresponding trade union immunity; (iii) the appeal to verify the legitimacy of the decision to deny registration was declared receivable, leading to Decision No. 76-2013 upholding the decision to refuse registration on the grounds of non-compliance with all the formalities and legal requirements; and (iv) the complainants exhausted each and every one of the procedures without success, since each of the stages was completed and resolved in accordance with the law. The Government emphasizes that it has been and will continue to be a guarantor of freedom of association and states that there have been no anti-union dismissals and that at the time of the application for registration of the trade union the requirements of the law were not met.

40. Furthermore, since the last examination of the case and to date, the Committee has not received any information from the complainant organization, the Confederation of Trade Union Action and Unity (CAUS).

41. *In these circumstances, and taking due note of the information provided by the Government, the Committee considers this case closed and will not pursue its examination.*

Case No. 2856 (Peru)

42. The Committee last examined this case at its October 2020 meeting and on that occasion reiterated the firm expectation that the Government will take all the necessary steps to ensure compliance in the very near future with the 2015 ruling of the Supreme Court of Justice and to ensure that the general secretary of the Callao Regional Government Workers' Union, Ms Clara Tica, can be reinstated in a post similar to the one from which she was dismissed in 2011 as a result of her trade union activity related to the collective dismissal of workers. The Committee requested the Government to keep it informed in this respect [see 392nd Report, October 2020, para. 129].

43. In its communication dated 14 January 2021, the Government states that, on 25 July 2019, Ms Clara Tica was reinstated in the position of telephone switchboard operator in the Information Technology Office of the Regional General Management of the regional government of Callao, in fulfilment of the court decisions handed down in Ms Tica's favour. The Government also indicates that the reinstatement in that position was accepted by the worker and requests the Committee, if it deems it appropriate to do so, to declare the present case definitively closed. *The Committee notes this information with satisfaction. The Committee therefore considers this case closed and will not pursue its examination.*

Case No. 3180 (Thailand)

44. The Committee last examined this case, which was submitted in January 2016 and which concerns allegations of judicial and disciplinary harassment of four trade union leaders and failures in the law to protect workers' and trade union rights, as well as inconsistencies between the law and the principles of freedom of association and the right to collective bargaining, at its June 2019 meeting [see 389th Report, paras 91–95]. On that occasion, the Committee expressed regret at the lack of any information on the decision of the Supreme Court concerning the claim of the airline company [1] for damages over losses allegedly attributable to the January 2013 workers' protest action, as well as on the appeal against the disciplinary measures imposed by the company on several trade union officials. The Committee expressed trust that its conclusions concerning the principles of freedom of association would be brought to the attention of the relevant courts and requested the Government to keep it informed of any developments.

45. The Government provides its observations in communications dated 7 February 2020 and 26 January 2021. It indicates, with regard to the company's claim for damages, that as per the Supreme Court decision No. 5701/2562, the airline company prosecuted four union leaders for damages by reason of gathering other employees to strike illegally and thus bringing about staff deficiency for luggage loading. As a result, some

[1] Thai Airways International.

flights were delayed, the situation directly affected the clients and the company had to pay additional expenditure to hire workers to load the luggage. The Court ruled that the defendants should pay the amount of 3,479,793 Thai baht (THB) instead of the total amount of THB300,940,072 as requested by the company. In December 2019, the Department of Labour Protection and Welfare (DLPW) of the Ministry of Labour officially advised the airline company to consider providing appropriate assistance to the four union leaders and to keep the DLPW informed of any developments. The Government adds that during the COVID-19 pandemic in 2020, the Ministry of Finance sold its shares of the company, which lost its status as a state enterprise, became a private enterprise and applied to the Central Bankruptcy Court for bankruptcy and business reorganization. The company has been in a reorganization procedure since September 2020 and the prosecution process relating to the claim for damages against four unionists has been suspended until the business returns to a normal state. The Government also informs that the former leaders of the company union – Ms Chamsri Sukchotirat, Mr Damrong Waiyakanee and Mr Somsak Manop – have retired and received full benefits and pension according to the laws and work regulations, in the same amount as other retired officers and without any deduction. As a result of their retirement and in line with the enterprise's regulations, the disciplinary measures against these union leaders have been revoked.

46. As to the ongoing legislative review, the Government indicates that the Ministry of Labour proposed amendments to the State Enterprise Labour Relations Act (SELRA) abrogating sections 33 and 77, which stipulate penalties for industrial actions, and adding a new provision to allow employers and workers in state enterprises to lockout and to strike. The Cabinet approved the principle of the draft amendments in September 2020, the draft bill underwent public hearing procedures and is currently being examined by the Council of State, before being submitted to the Cabinet and to the National Assembly for further consideration.

47. *The Committee takes note of the information provided by the Government. In particular, it welcomes the Government's indication that a draft law that abrogates sections 33 and 77 of the SELRA and provides for the possibility to engage in a lockout or a strike in state enterprises underwent public hearings and is in the process of being finalized. Recalling that the legislative review of the SELRA has been ongoing for several years, the Committee trusts that the draft law will be adopted without delay and will be in full conformity with the principles of freedom of association. The Committee will pursue the examination of this legislative aspect of the case in the framework of Case No. 3164.*

48. *The Committee further understands from the Government's information that in 2019, the Supreme Court ordered four trade unionists to pay damages to the airline company in the amount of THB3,479,793 (US$110,800) as a result of the harm inflicted following the protest held by the company's workers back in January 2013. The Committee notes that the amount of the damages ordered by the Supreme Court was considerably reduced compared to the amount originally filed for by the company and that this order has been issued by the highest court in the land. The Committee also observes that the damages order is based on strike prohibitions previously commented by the Committee as being contrary to the principle of freedom of association and which the Government now indicates are in the process of being abrogated. The Committee further observes that the company is presently undergoing bankruptcy proceedings, as a result of which the proceedings relating to the claim for damages were suspended until the business returns to a normal state, and welcomes the initiative of the Ministry of Labour advising the company to consider providing assistance to the four unionists. The Committee also recalls, from its previous examination of the case, that the parties had agreed to await the verdict of the Supreme Court on the company's claim for*

damages, and, whatever the ruling, to submit the issue to the bipartite Relations Affairs Committee at the company. In these circumstances and recalling once again that 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, the Committee expects the Government to endeavour to bring the parties together, as they had previously agreed to do, with a view to negotiating a mutual solution to this issue. The Committee requests the Government to keep it informed of any developments made in this regard.

49. *Finally, the Committee notes the Government's indication that following the retirement of three union leaders – Ms Chamsri Sukchotirat, Mr Damrong Waiyakanee and Mr Somsak Manop – the disciplinary proceedings against them have been revoked in line with the company's regulations but observes that no information was provided on the disciplinary proceedings against Mr Suphorn Warakorn, who was the Chairperson of the Union Subcommittee at the time of the protests. The Committee therefore requests the Government to indicate whether any disciplinary measures have been taken against Mr Warakorn or whether any proceedings are still pending against the union leader, and if so, to engage with the company and invite it to consider withdrawing any disciplinary measures imposed or proceedings pending. Recalling that the disciplinary proceedings were engaged in response to violations of strike prohibitions, which were themselves contrary to the principles of freedom of association, the Committee trusts that this issue will be resolved without delay and requests the Government to keep it informed of any developments in this respect.*

* * *

Status of cases in follow-up

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

Case No.	Last examination on the merits	Last follow-up examination
2096 (Pakistan)	March 2004	October 2020
2512 (India)	November 2007	March 2018
2603 (Argentina)	November 2008	November 2012
2715 (Democratic Republic of the Congo)	November 2011	June 2014
2745 (Philippines)	October 2013	October 2019
2749 (France)	March 2014	–
2797 (Democratic Republic of the Congo)	March 2014	–
2807 (Islamic Republic of Iran)	March 2014	June 2019
2869 (Guatemala)	March 2013	October 2020
2871 (El Salvador)	June 2014	June 2015
2889 (Pakistan)	March 2016	October 2020
2902 (Pakistan)	November 2012	October 2020
2925 (Democratic Republic of the Congo)	March 2013	March 2014
2962 (India)	June 2015	June 2018

Case No.	Last examination on the merits	Last follow-up examination
2977 (Jordan)	March 2013	November 2015
2988 (Qatar)	March 2014	June 2017
2991 (India)	June 2013	March 2019
3003 (Canada)	March 2017	–
3011 (Turkey)	June 2014	November 2015
3036 (Bolivarian Republic of Venezuela)	November 2014	–
3046 (Argentina)	November 2015	–
3047 (Republic of Korea)	March 2017	–
3054 (El Salvador)	June 2015	–
3078 (Argentina)	March 2018	–
3081 (Liberia)	October 2018	October 2020
3098 (Turkey)	June 2016	November 2017
3100 (India)	March 2016	–
3107 (Canada)	March 2016	–
3114 (Colombia)	June 2016	October 2020
3121 (Cambodia)	October 2017	October 2020
3128 (Zimbabwe)	March 2016	June 2019
3142 (Cameroon)	June 2016	October 2020
3167 (El Salvador)	November 2017	–
3182 (Romania)	November 2016	–
3183 (Burundi)	June 2019	October 2020
3201 (Mauritania)	June 2019	–
3202 (Liberia)	March 2018	–
3212 (Cameroon)	October 2018	October 2020
3227 (Republic of Korea)	March 2018	–
3237 (Republic of Korea)	June 2018	–
3238 (Republic of Korea)	November 2017	–
3243 (Costa Rica)	October 2019	–
3248 (Argentina)	October 2018	–
3257 (Argentina)	October 2018	–
3285 (Plurinational State of Bolivia)	March 2019	_
3288 (Plurinational State of Bolivia)	March 2019	_
3289 (Pakistan)	June 2018	October 2020

Case No.	Last examination on the merits	Last follow-up examination
3290 (Gabon)	June 2019	–
3314 (Zimbabwe)	October 2019	–
3341 (Ukraine)	October 2020	–

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

52. In addition, the Committee has received information concerning the follow-up of Cases Nos 1787 (Colombia), 1865 (Republic of Korea), 2086 (Paraguay), 2341 (Guatemala), 2362 and 2434 (Colombia), 2445 (Guatemala), 2528 (Philippines), 2533 (Peru), 2540 (Guatemala), 2566 (Islamic Republic of Iran), 2583 and 2595 (Colombia), 2637 (Malaysia), 2652 (Philippines), 2656 (Brazil), 2679 (Mexico), 2684 (Ecuador), 2694 (Mexico), 2699 (Uruguay), 2706 (Panama), 2710 (Colombia), 2716 (Philippines), 2719 (Colombia), 2723 (Fiji), 2745 (Philippines), 2746 (Costa Rica), 2751 (Panama), 2753 (Djibouti), 2755 (Ecuador), 2758 (Russian Federation), 2763 (Bolivarian Republic of Venezuela), 2768 (Guatemala), 2793 (Colombia), 2816 (Peru), 2852 (Colombia), 2854 (Peru), 2870 (Argentina), 2882 (Bahrain), 2883 (Peru), 2896 (El Salvador), 2900 (Peru), 2916 (Nicaragua), 2924 (Colombia), 2934 (Peru), 2946 (Colombia), 2948 (Guatemala), 2949 (Eswatini), 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), 3019 (Paraguay), 3020 (Colombia), 3022 (Thailand), 3026 (Peru), 3030 (Mali), 3032 (Honduras), 3033 (Peru), 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), 3087 and 3090 (Colombia), 3093 (Spain), 3095 (Tunisia), 3096 (Peru), 3097 (Colombia), 3102 (Chile), 3103 (Colombia), 3119 (Philippines), 3131 and 3137 (Colombia), 3146 (Paraguay), 3150 (Colombia), 3162 (Costa Rica), 3164 (Thailand), 3170 (Peru), 3171 (Myanmar), 3172 (Bolivarian Republic of Venezuela), 3188 (Guatemala), 3191 (Chile), 3194 (El Salvador), 3220 (Argentina), 3236 (Philippines), 3240 (Tunisia), 3244 (Nepal), 3253 (Costa Rica), 3272 (Argentina), 3278 (Australia), 3279 (Ecuador), 3283 (Kazakhstan), 3286 (Guatemala), 3287 (Honduras), 3297 (Dominican Republic), 3317 (Panama) and 3343 (Myanmar) which it will examine as swiftly as possible.

Closure of follow-up cases

53. In its November 2018 report (GB.334/INS/10), the Committee informed the Governing Body that, from that moment onwards, any cases in which it was examining the follow-up given to its recommendations, for which no information has been received either from the Government or from the complainant for 18 months (or 18 months from the last examination of the case) would be considered closed. Given the circumstances of the pandemic, which has impeded the effective communication of parties to the special complaints procedure, this rule is being applied for the first time in its present 393rd Report (March 2021) and it is applied to the following cases: 2743 (Argentina), 2892 (Turkey), 2917 (Bolivarian Republic of Venezuela), 3058 (Djibouti), 3083 (Argentina), 3101 and 3110 (Paraguay), 3120 (Argentina), 3123 (Paraguay), 3169 (Guinea), 3209 Senegal, 3229 (Argentina), 3268 (Honduras), 3274 (Canada) and 3276 (Cabo Verde).

Case No. 3320

Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Argentina presented by – the Confederation of Education Workers of the Republic of Argentina (CTERA) and – the Teachers' Association of Santa Cruz (ADOSAC)

Allegations: The complainants allege a series of violations of freedom of association and the right to collective bargaining by Santa Cruz province

54. The complaint is contained in a communication from the Confederation of Education Workers of the Republic of Argentina (CTERA) dated March 2018.

55. The Government provided its observations in communications dated 12 March and 11 October 2019 and 4 March 2021.

56. 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

57. In their communication of March 2018, the complainants allege that the Provincial Education Council (CPE) of Santa Cruz province, in retaining trade union dues, restricting the right to strike, drawing up blacklists, delaying granting trade union leave and unilaterally modifying collective agreements, systematically violated the trade union and collective bargaining rights of the Teachers' Association of Santa Cruz (ADOSAC).

58. First, the complainants allege that, despite the fact that the CPE has continued to deduct agreed trade union dues, since 2011, it has not been depositing the corresponding amounts into the ADOSAC bank account, or it has done so only in part or in a belated manner. They state that in March 2018 teaching staff were owed, in the form of trade union dues, a total of 36,480,713 Argentine pesos (ARS). They state that on an individual level, the undue retention of trade union dues undermines the salary of workers and violates the wishes of workers by denying their ability to join or be a member of the trade union of their choice. At the collective level, the failure to transfer the funds infringes the financial autonomy of the trade union organization, blocking its access to funds to carry out its trade union activities. According to the complainants, this behaviour constitutes interference by the State authorities who have a dual role as both employer and withholding agent. They also allege the CPE's refusal to transmit the relevant documents under their mandate relating to the collection of trade union dues, which would prevent the trade union organization from taking the appropriate legal action.

59. Second, the complainants denounce the limitation of the right to strike through the imposition of a compulsory conciliation and, subsequently, the imposition of a large fine by the labour administration of Santa Cruz province. They indicate that, in March 2017, when faced with the constant retention of trade union dues or the partial payment of those dues, the ADOSAC notified the Ministry of Labour and Social Security (hereafter, Ministry of Labour) of the aforementioned province of the direct action to be taken. They explain that that notification led to resolution No. 294 of 3 April 2017, through which the Ministry of Labour ordered compulsory conciliation between the parties in order to prevent the ADOSAC from exercising the right to strike. The complainants state that the ADOSAC lodged an appeal with the Ministry of Labour to annul resolution No. 294 on the grounds of the violation of due process and conflict of interest, and that the appeal was rejected on 25 April 2017. The complainants state that, faced with ongoing direct action, the Ministry of Labour, on 28 December 2017, issued resolution No. 1271, which ordered the trade union to pay a fine of approximately 8,300,000 pesos, and threatened that the amount would be recovered through legal proceedings if the amount was not paid within three working days. They state that the ADOSAC submitted an administrative appeal claiming that the fine was unconstitutional, and that on 28 February 2018, the Ministry rejected the appeal.

60. The complainants consider that the Ministry of Labour, as a public administrative body of the province, does not have the impartiality required to take on the role of mediator in the dispute. According to the complainants, the compulsory conciliation order was not an independent and impartial procedure, nor did it inspire confidence in the parties. They consider that the labour administration, on the one hand, ignored the persistent claims of the trade union body regarding the retention of trade union dues by the CPE, and, on the other hand, it supported the attitude of the provincial government, fully invalidating the mechanism that orders compulsory conciliation. Similarly, they consider that, while the ILO allows limitations to be placed on the right to strike in public administrations, this right may not be restricted by the actions of an administrative body that is only implementing the wishes of one of the parties. The trade union organizations also highlight the persecutory nature of the behaviour of the administrative authority, which, in their opinion, with the imposition of a fine of more than 8 million pesos, sought to financially choke the ADOSAC, hindering the performance of this trade union organization and preventing it from carrying out its trade union activities. Furthermore, they state that the labour authority is not empowered to issue fines against trade union organizations and that, in addition, the legislative measures used to sanction the complainant organization are intended to be used against employers and not workers.

61. Third, the complainants allege a delay in trade union leave being granted to the elected executive committee of the ADOSAC. They explain that on 2 January 2018, the executive committee took office (they were elected on 19 October 2017), and although one month had elapsed since the notification had been given, the relevant trade union leave had not been granted, and it was only on 7 March 2018 that the elected representatives could begin to work freely. In light of the foregoing, they consider that the delay in granting leave to the legitimate representatives of the workers so that they could carry out their trade union roles constitutes a violation of the protection of trade union representatives and a restriction of the exercise of freedom of association.

62. Fourth, the complainants allege that, as a result of the direct action, on 22 March 2016 the CPE ordered educational establishments to communicate the list of staff involved in the direct action called for by the ADOSAC and the Association of Technical Educators (AMET) on 21 and 22 March 2016. Subsequently, in July 2017, in light of the ongoing measures to exert pressure by the teaching staff, educational establishments were

requested to provide monthly lists of staff members' absences. The complainants allege that, on both occasions, the educational establishments were informed that the failure to comply would lead to administrative and criminal sanctions, and they consider that any such absence records were to be used to create blacklists. They state that the CPE specifically intimidated the directors of the educational establishments warning them that, as a result of their leadership position, they were not able to join the direct action. The complainants point out that the Committee on Freedom of Association has indicated on various occasions that nobody should be penalized or discriminated against for carrying out or attempting to carry out a legitimate strike, and that furthermore, the imposition of criminal penalties as a result of strike action is incompatible with the right to freedom of association.

63. Lastly, the complainants allege the violation of the right to collective bargaining by the employer. They explain that, when faced with the provincial government's refusal to initiate collective bargaining procedures to negotiate wages and working conditions, the ADOSAC called on the national Government to intervene. The national Government, through an agreement dated 22 August 2017, made funds available to the CPE authorities for a proposed wage increase of 5 per cent in August 2017, which would gradually increase, reaching a wage increase of 8 per cent in December 2017. They allege that the national Government, together with the CPE, would have ceased to comply with the wage increase agreed in the collective agreement mentioned above as of December 2017. In addition, they allege that on 28 December 2017, the CPE issued resolution No. 2575/17 which ordered the revocation of resolution No. 038/13. The complainants allege that resolution No. 2575/17 is not only an illegal regression, but also supersedes collective bargaining, as resolution No. 038/13 was the result of the collective bargaining as noted in the reports dated 1 November, 28 November, 7 December and 18 December 2012, and 7 March 2013. Therefore, the complainants consider that the CPE may not unilaterally modify a condition agreed through collective bargaining, and that, by doing so, it violates the principles of collective bargaining.

B. The Government's reply

64. In its communications dated 12 March, 11 October 2019 and 4 March 2021, the Government states, with regard to the alleged retention of trade union dues owed to the ADOSAC, that the payment of amounts of money to the trade union body is usually made in due time and form. However, it admits that a delay may have occurred in some months, particularly during the period in which teaching and administrative staff were carrying out direct actions, and it is investigating the possible debt owed to the trade union body through an assessment carried out by a technical team, and that, once that work is completed, the alleged debt would be credited, if required. It emphasizes that approximately 37 million pesos are transferred on an annual basis in the form of trade union dues, and therefore the possible reclaimed debt is insignificant for the purposes of determining a violation of freedom of association.

65. Concerning the alleged restriction on the right to strike by means of compulsory conciliation, as well as by the imposition of the fine by the provincial Ministry of Labour, the Government points out that the dispute with the ADOSAC is long-standing and that, since 2008, that trade union organization has carried out strikes that have led to the loss of some school periods of more than 100 days for the children. The Government states that there are records of the overreach of the exercise of the right to strike by that trade union organization, such as the seizure of public buildings and oil fields, as well as of the fact that compulsory conciliation measures were not complied with by the trade union

(court case No. 23189/2011). In the Government's opinion, the principles of freedom of association do not protect against overreaches in the exercise of the right to strike that result in criminal actions. Additionally, it states that school establishments operate as canteens, such that their closure for a long period of time causes harm both in terms of education as well as in terms of the psychophysical impact on its users, since the direct-action measures prevent the province's most vulnerable children and adolescents from accessing food that cannot be provided by their families. Furthermore, those actions also have repercussions on the working life of the children's parents and guardians, given that, when they are not able to send the children to school, they are forced to find alternatives in order to reconcile their work and family obligations. The Government states that, in case No. 3257, the Committee on Freedom of Association recognized the importance of school canteens in the order for compulsory conciliation and emphasizes that the situation was even considered by the family courts, which have intervened to order the cessation of direct actions for the benefit of students. In light of the above, the Government considers that the above-mentioned reasons constitute a reasonable restriction on the right to strike and emphasizes that, to date, no trade union organization has questioned the constitutional nature of the administrative laws that regulate labour procedures and of those that establish that the Ministry of Labour is the highest labour authority in Santa Cruz province.

66. With specific reference to the compulsory conciliation order referred to by the complainants (resolution No. 294/2017), the Government states that: (i) the right to strike is not absolute, in particular, when the direct action is of extended duration and infringes other rights, such as the right to education; (ii) provincial Act No. 2987 establishes that the Ministry of Labour is the administrative authority responsible for collective bargaining and has the authority to use compulsory conciliation; and (iii) provincial Act No. 2450 establishes that the parties should report to the administrative authority any dispute that arises between the parties before resorting to direct action, and that in cases where there is an order for compulsory conciliation, the parties are not allowed to take direct action. However, the Government considers that it is unreasonable to suggest, as the complainants do, that the compulsory conciliation ordered under current national legislation may undermine the freedom of association or the exercise of the right to strike, given that that compulsory conciliation process lasts a maximum of 20 days, and once that period has expired, the trade union authorities are legitimately empowered to carry out the actions that they consider to be appropriate. With regard to the fine, which is under the enforcement procedure, the Government considers that the ADOSAC's failure to respect the ordered compulsory conciliation brought consequences in the form of an investigation being opened into the violation of articles 47 and 48 of Act No. 2450 on the grounds of obstruction of the labour authority, and denies that the workers' right to association was impaired at any time. In this regard, it reports that the ADOSAC lodged an appeal under article 66 of the National Code of Civil and Commercial Procedure, which was not successful because the previous provision that establishes the relevant regulation had not been complied with. Subsequently, it submitted an appeal that expired on 21 February 2019 as a result of the inaction of the appellant.

67. With regard to the alleged keeping of blacklists in retaliation for exercising the right to strike, the Government states that the keeping of absence records for teaching and other staff is the responsibility of the CPE and that this is carried out by the directors of each institution and is one of the inherent duties of their position. The Government states that, in the contentious climate between the employer and the trade union, the CPE identified several acts, such as the falsification of attendance records, the submission of incorrect information to the data loading system and other behaviours, which led to

disciplinary actions being issued by that body. Furthermore, the Government considers that the complainants are attempting to make the directors' duty to fulfil a requirement into alleged persecution, which does not have any factual or legal basis, and it categorically denies the existence of blacklists.

68. With regard to the delay in granting leave to members of the executive committee of the ADOSAC, the Government states that this was due to the fact that one of its elected members, Mr Raúl Amancio Viltes, held a position of first majority elected member in the Primary Education Classification Board, and it was necessary for him to resign that position in order to take up the position of administrative secretary of the ADOSAC. In light of that, the Government considers that the delay in granting leave was not the result of a violation of trade union rights but rather an administrative matter that was caused by the irregular situation of one of its members.

69. With regard to the alleged infringement on collective bargaining, the Government explains that, given the extensive dispute between the province and the teaching sector, which resulted from the demands for wage increases that Santa Cruz province was not in a financial position to accept, the national Government agreed to provide funds. It explains that the 8 per cent that had been agreed initially was paid using national funds in the period from December 2017 to March 2018. Subsequently, and with the interruption in the remittance of funds by the national Government, the province had no choice but to interrupt its compliance with the previously agreed obligation. In this context, and in order to resolve the non-compliance, Act No. 15/18 of 17 December 2018 established that the debt, which resulted from the national Government's failure to provide funds, would begin to be paid alongside the salary corresponding to the month of December 2018, such that the 8 per cent corresponding to the month of April 2018 would be paid together with the 8 per cent corresponding to the month of December 2018, and so forth, until the entire debt was paid. The Government explains that the failure to send funds was a result of the economic crisis being faced by the country, and even though this claim is no longer relevant since an agreement has been reached between the bodies involved, it considers that the trade union representatives had an abusive attitude.

70. With regard to resolution No. 2575/17, the Government states that the issuance of the aforementioned resolution meant for the CPE the reestablishment of the legal order that had been broken with the issue of resolution No. 038/13. According to the Government, the resolution in question only benefited seven teachers, who, when they were informed of the issue of resolution No. 2575, filed *amparo* actions. The Government indicates that, despite the fact that the courts of first and second instance declared that resolution to be invalid, they ruled in favour of maintaining the fictitious employment situation on the grounds that the CPE does not have the authority to revoke its own actions; thus, the salaries earned by these workers under resolution No. 038/13 were protected and the CPE would only be able to re-establish the previous legal order through a revocation order. Therefore, the Government considers that since this matter has been resolved by the courts, it is considered to be res judicata, and it states that, in December 2018, the CPE filed a revocation order with the High Court of Justice. Lastly, the Government considers that this complaint is a victimization attempt by the ADOSAC and an attempt to avoid paying the fine for not complying with the administrative resolutions that were issued, which, as of October 2019, remains pending.

C. The Committee's conclusions

71. *The Committee notes that, in the present case, the complainants allege a series of violations of freedom of association and the right to collective bargaining in the public education sector of Santa Cruz province (retention of trade union dues, restrictions on the right to strike through the imposition of compulsory conciliation and a fine, alleged keeping of blacklists, delay in granting trade union leave and restrictions on the right to collective bargaining).*

72. *Regarding the alleged retention of trade union dues, the Committee takes note of the fact that the complainants contend that, despite the fact that the provincial Government has continued to deduct trade union dues, since 2011, it has not deposited the corresponding amounts in the ADOSAC bank account, or it has done so only in part or in a belated manner, and that until March 2018 teaching staff were owed more than 36 million Argentine pesos (ARS) in the form of trade union dues. Alongside this, the complainants allege that the CPE refuses to transmit certain documents under their mandate relating to the retention of trade union dues, which would prevent the trade union organizations from taking the appropriate legal action. The Committee observes that the Government, for its part, recognizes that there may have been a delay in the payment of some amounts, particularly during the months in which the teachers carried out direct action. It indicates that it is investigating the possible debt with the body, and that that the amount will be credited if required, and it emphasizes that approximately 37 million pesos are transferred on an annual basis in the form of trade union dues, and therefore the possible reclaimed debt is insignificant compared to determining whether there has been a violation of freedom of association. The Committee recalls that in a case in which the authorities had not transferred to the trade union concerned the dues that had been deducted from the wages of public officials, the Committee considered that trade union dues did not belong to the authorities, nor were they public funds, but rather they were an amount on deposit that the authorities may not use for any reason other than to remit them to the organization concerned without delay [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 699]. Taking note of the Government's indications that it is investigating the possible debt to the ADOSAC, the Committee requests the Government to take the necessary measures to clarify, as soon as possible, whether there is a debt, and that, if so, to remit the amounts owed immediately.*

73. *With regard to the restriction on the right to strike through compulsory conciliation and the subsequent imposition of a fine by the provincial labour administration, the Committee notes that both the complainants and the Government stated that, after the ADOSAC informed of its intention to carry out direct action, the Ministry of Labour of the province, by means of resolution No. 294 of 3 April 2017, ordered compulsory conciliation and that when the direct action continued, the provincial labour administration ordered the ADOSAC to pay a fine of approximately 8.3 million pesos. The Committee notes the allegations of the complainant organizations that: (i) the Ministry of Labour, as a public administrative body of the province, does not have the impartiality required to take on the role of mediator in the dispute; (ii) while the Committee on Freedom of Association accepts restrictions on the exercise of the right to strike, this right may not be restricted by the actions of an administrative body that only acts on behalf of one of the parties; (iii) the Ministry of Labour is not empowered to issue fines; and (iv) the excessive amount of the fine that was issued seeks to financially choke the ADOSAC and prevent it from carrying out its trade union activities. The Committee notes that the Government states, for its part, that: (i) the dispute with the ADOSAC is long-standing; (ii) there are records of the overreach of the exercise of the right to strike and the failure to comply with compulsory conciliation measures by this union; (iii) the right to strike is not absolute, in particular when the direct action is of extended duration, infringing other rights, and that since 2008, the trade union organization has carried out strikes that have led to the loss of*

some school periods of more than 100 days; (iv) schools in the province operate as canteens, such that their closure causes harm in terms of education and the psychophysical impact on its users; (v) the Committee on Freedom of Association has recognized the importance of school canteens in the compulsory conciliation order and the family courts even intervened to rule that direct action should be terminated; (vi) no trade union organization has questioned the constitutional nature of the administrative laws that regulate labour procedures and of those that establish that the Ministry of Labour is the highest labour authority in Santa Cruz province; (vii) provincial Act No. 2450 on Administrative Procedure establishes that, during the period of compulsory conciliation, no direct action may be carried out; (viii) it was the failure to comply with this measure that led to the issue of a fine for obstructing the labour authority; (ix) it would not seem reasonable to suggest, as the complainants do, that the compulsory conciliation ordered under current national legislation may undermine freedom of association or the exercise of the right to strike, given that the compulsory conciliation process lasts a maximum of 20 days, and once that period has expired, the trade union authorities are legitimately empowered to carry out the actions that they consider to be appropriate; and (x) the appeal filed by the ADOSAC against the fine was unsuccessful because the previous provision that establishes the relevant regulation had not been complied with and the appeal submitted by the union had expired as a result of the inaction of the appellant.

74. *While noting that the provision of food to school-age children can be considered to be an essential service [see **Compilation**, para. 840], the Committee recalls that the allegations in this case refer to restrictions on the right to strike in the education sector in general, and not only to the provision of food. In this regard, while noting the concerns expressed by the Government regarding the extended duration of the strike in the education sector and the possible impact that those measures may have on the education or the psychophysical health of children and adolescents, given that schools in the province operate as canteens, the Committee also recalls that, on previous occasions, it has previously pointed out that minimum services may be established in the education sector, in full consultation with the social partners, in cases of strikes of long duration [see **Compilation**, para. 898]. Furthermore, the Committee recalls that in recent years, it has examined several cases from Argentina involving objections to orders for compulsory conciliation between the parties to a dispute in the public education sector by the administrative authority, when the latter was a party in the dispute, and that it has considered that it would be desirable to entrust the decision of initiating the conciliation procedure in collective disputes to a body which is independent of the parties to the dispute [see **Compilation**, para. 796; 336th Report, Case No. 2369, para. 213]. The Committee further recalls that conciliation and mediation machinery should have the sole purpose of facilitating bargaining and should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness [see **Compilation**, para. 795]. The Committee, while observing that the stoppages of activities of the complainant organization of Santa Cruz have been long standing and of long duration, which has affected the level of education and the provision of food in schools to minors, considers that in this case the education service is essential. In this regard, the Committee considers that the call made by the administrative authority to put forward a compulsory conciliation procedure between the parties, prior to the strike, is reasonable with the superior protection of minors in their school meals and timely education. It is also proportionate to the claims pursued by the complainant organization of Santa Cruz, inasmuch as it pursues the resolution of the dispute through social dialogue, without undermining the possibility of the exercise of the strike. With regard to the imposition of a fine, while considering that the fines must be proportionate to the events that led to their imposition, the Committee notes that it was due to the failure of the complainant organization to comply with an order of the administrative authority, derived from the application of the legislation in force in the province of Santa Cruz,*

and that the decision was appealed by the union, which by not complying with the procedural requirements and by failing in its procedural activity, led to the failure of the appeal. In light of the above circumstances, the Committee will not pursue its examination of this matter.

75. *With regard to the allegation that blacklists were being kept subsequent to the strike action, the Committee notes that the complainants allege that in March 2016 and July 2017 the CPE ordered educational establishments to provide the list of staff members participating in the direct action or staff absence records, indicating that any non-compliance would carry administrative and criminal sanctions. The Committee notes that, according to the complainants, those absence records were used to create blacklists and were therefore inconsistent with freedom of association. They further allege that the CPE specifically intimidated the directors of administrative establishments, warning them that they were not able to participate in the direct action because of their positions. The Committee also takes note of the observations of the Government which state that: (i) recording attendance of teachers and administrative staff is one of the duties of the CPE, which is implemented through the directors of each institution; (ii) while the direct action measures were ongoing, the CPE recorded several acts, including the falsification of absence records and the submission of incorrect information to the attendance system, which triggered a series of disciplinary actions; and (iii) it categorically denies the allegations of persecution and elaboration of blacklists. Observing that an employer's determination of which workers have exercised their right to strike and which have performed their roles could be legitimate and does not constitute in itself an anti-union act, and noting in addition that the complainants have not provided specific points relating to the use of this information for anti-union purposes, the Committee will not pursue its examination of this allegation any further.*

76. *With regard to the alleged delay in granting trade union leave to the executive committee of the ADOSAC, which took office on 2 January 2018, the Committee notes that the complainants allege that the delay of two months in granting leave constituted a violation of the protection of trade union immunity. The Committee notes that the Government, for its part, indicates that the delay was due to the fact that one of the elected members held a position of first majority elected member in the Primary Education Classification Board, and it was necessary for him to resign that position in order to join the executive committee of the ADOSAC. Noting that the complainants do not refer in their allegations to specific actions that are anti-union in nature against the members of the executive committee of the ADOSAC, the Committee will not pursue its examination of this allegation.*

77. *As regards the allegation of infringements on the right to collective bargaining, the Committee notes that the complainants allege, first, that the CPE had failed to comply, from December 2017, with the wage increases agreed in the agreement dated 22 August 2017, which provided for a wage increase of 5 per cent in August 2017, gradually increasing until a wage increase of 8 per cent was reached in December 2017. The Committee notes that the Government states that the interruption in funds was a result of the economic crisis being faced by the country and that it established, by means of Act No. 15/18 of 17 December 2018, that the debt resulting from the failure to remit funds by the national Government would be paid back from December 2018. Taking note of the Government's observation that Act No. 15/18 provided for the payment of the debt resulting from the failure to remit funds, the Committee will not pursue its examination of this allegation any further.*

78. *With regard to the allegation of infringements on the right to collective bargaining caused by the issue of resolution No. 2575/17, the Committee notes that the complainants allege that the action of the CPE, by issuing that resolution and revoking resolution No. 038/13, the content of which had been negotiated through collective bargaining, had constituted an unlawful regression and that the CPE had unilaterally modified previously negotiated*

*agreements, threatening the principles of collective bargaining. The Committee understands, according to publicly available information, that as part of the reorganization of the public education system in Santa Cruz province, the provincial Government had issued resolution No. 038/13, which committed to paying the salary of those teachers who, as a result of the reorganization had lost their positions and to placing them in technical pedagogical positions until they could be effectively relocated. It also understands that resolution No. 2575/17 sought to revoke resolution No. 038/13 and discharge the teachers who were benefiting from that resolution. The Committee notes that the Government states that: (i) resolution No. 2575/17 is limited to re-establishing the previous legal order; (ii) resolution No. 038/13 only benefited seven teachers; (iii) the teachers affected by the resolution submitted an amparo action; (iv) the court of second instance, despite the fact that resolution No. 038/13 was declared to be invalid, ruled in favour of maintaining the fictitious employment situation created by that resolution on the grounds that the CPE does not have the authority to revoke its own actions, and that that body could only re-establish the previous legal order through a revocation order; and (v) in December 2018, the CPE submitted an request for a revocation order with the High Court of Justice. The Committee also recalls that mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see **Compilation**, para. 1336]. Noting that the CPE filed a revocation order with the High Court of Justice, and that that action is pending, the Committee requests that the Government inform it of the decision that is handed down in this regard.*

The Committee's recommendations

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

(a) With regard to the alleged retention of trade union dues, the Committee requests that the Government should determine the trade union dues owed and take the necessary measures to return the trade union dues to the trade union organization and to keep it informed in that regard.

(b) With regard to the alleged infringements on the right to collective bargaining arising from the issue of resolution No. 2575/17, the Committee requests the Government to keep it informed of the decision that is handed down relating to the revocation order filed by the Provincial Education Council (CPE) with the High Court of Justice.

Cases Nos 2761 and 3074

Interim report

Complaint against the Government of Colombia presented by
– the International Trade Union Confederation (ITUC)
– the World Federation of Trade Unions (WFTU)
– the Single Confederation of Workers of Colombia (CUT)
– the General Confederation of Labour (CGT)
– the Confederation of Workers of Colombia (CTC)
– the National Union of Workers in the Food System (SINALTRAINAL)
– the Union of Energy Workers of Colombia (SINTRAELECOL)
– the Union of Cali Municipal Enterprise Workers (SINTRAEMCALI) and
– the Single Trade Union Association of Public Employees in the Colombian Prison System (UTP)

Allegations: The complainant organizations allege acts of violence (murders, attempted murders and death threats) against trade union leaders and members

80. The Committee has examined the substance of Case No. 2761 on five occasions [see 363rd, 367th, 380th, 383rd and 389th Reports], most recently at its meeting of June 2019, when it examined Case No. 2761 together with Case No. 3074 and submitted an interim report on both cases to the Governing Body [see 389th Report, paras 262–296, approved by the Governing Body at its 336th Session].

81. The Confederation of Workers of Colombia (CTC) sent additional allegations in a communication dated 18 June 2019.

82. The Government sent its observations in communications of February and August 2020, and 24 February 2021.

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

A. Previous examination of the cases

84. At its meeting in June 2019, the Committee formulated the following interim recommendations concerning the allegations presented by the complainant organizations [see 389th Report, para. 296]:

(a) While taking due note of and appreciating the significant efforts made and the evolution of the results obtained, the Committee urges the Government to continue strengthening its efforts to ensure that all the acts of anti-union violence, murders and other acts reported in the country are cleared up and that the perpetrators and instigators are convicted;

(b) The Committee requests the Government to inform it of the impact exerted by the special summary criminal procedure established under Act No. 1826 on the investigations into acts of anti-union violence;

(c) The Committee requests the Government to continue providing information concerning, in general, the consultation of the social partners in the framework of investigation procedures relating to acts of anti-union violence and in particular relating to the functioning of the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights;

(d) The Committee takes due note of the information provided in respect of 114 cases of murder and 58 acts of anti-union violence and requests the Government to continue providing information in this regard;

(e) The Committee again requests the Government to inform it of any examination of a case of anti-union violence by the bodies created as part of the peace process;

(f) While taking due note of the significant efforts made in this regard, the Committee urges the Government to continue strengthening its efforts to afford adequate protection to all union leaders and members at risk. The Committee especially requests the Government: (i) in the framework of the Timely Action Plan (PAO) to give its full attention to protecting trade unionists and to ensuring that the trade unions and the Ministry of Labour are effectively involved in this mechanism, and (ii) in the framework of the PAO and the appropriate tripartite forums, to identify, in close consultation with the social partners, the main causes of anti-union violence so that policies to prevent anti-union violence can achieve greater impact. The Committee requests the Government to keep it informed in this regard;

(g) The Committee expresses the strong hope that the investigations and procedures still under way will lead to the speedy resolution of the allegations made by the Union of Energy Workers of Colombia (SINTRAELECOL) and the Union of Cali Municipal Enterprise Workers (SINTRAEMCALI), and to the conviction of the perpetrators and instigators. The Committee requests the Government to keep it informed in this regard;

(h) The Committee urges the Government to take steps to ensure that the Public Prosecutor's Office conducts the necessary investigations as soon as possible to ensure that all the murders and the attempted murder of leaders and members of the Single Trade Union Association of Public Employees in the Colombian Prison System (UTP) reported in this case are cleared up and that the perpetrators and instigators are convicted. In this regard, the Committee especially urges that the planning and implementation of the investigations: (i) give full and systematic consideration to possible links between the murders and the victims' trade union activities, including any complaints of acts of corruption that they may have lodged; (ii) examine possible links between separately reported murders, and (iii) establish the necessary contacts with the trade union to gather all available information;

(i) The Committee requests the Government to provide information on the alleged murder of the UTP member, Mr Diego Rodríguez González, and also requests the UTP to provide details of the alleged murder of Mr Manuel Alfonso;

(j) The Committee urges the Government to take steps to ensure that the risk status of the UTP leaders, Messrs Eleasid Durán Sánchez, Cindy Yuliana Rodríguez Layos, Franklin Excenover Gómez Suárez, Jhony Javier Pabón Martínez and Mauricio Paz Jojoa is assessed immediately and that they are afforded the necessary protection as soon as possible;

(k) The Committee invites the UTP to contact the competent authorities in order to clarify the situation of the union leaders, Messrs Julio César García Salazar, Roberto Carlos Correa Aparicio, Gerson Méndez, Carlos Fabián Velazco Virama, Rafael Gómez Mejía, Helkin Duarte Cristancho, Óscar Tulio Rodríguez Mesa and Mauricio Olarte Mahecha; and

(l) The Committee draws the particular attention of the Governing Body to the extreme seriousness and urgency of this case.

B. New allegations

85. In a communication dated 18 June 2019, the CTC reported that on 22 March 2018 an attempt was made on the life of Mr Gustavo Adolfo Aguilar, President of the Union of Public Officials and Employees in the Government and Municipalities of Colombia (SINTRASERPUVAL). The complainant organization states in this regard that: (i) Mr Aguilar was attacked by several individuals while riding his motorcycle on the highway; (ii) one of the attackers activated a weapon which failed to fire and the victim managed to escape and place himself under police protection; and (iii) prior to the attack, Mr Aguilar had reported violations of labour agreements and other administrative irregularities in the town of Riofrío (Valle del Cauca).

C. The Government's reply

General information regarding acts of anti-union violence and the State's response

86. In a communication of February 2020, the Government reiterates its emphatic rejection of all acts of violence, whatever the source, and states its intention to move forward with the investigations to clarify the facts and to protect workers, in particular union leaders. It states that every State institution charged with the defence of human rights has made considerable efforts to protect the life and integrity of Colombia's inhabitants, especially social leaders, including trade unionists.

87. The Government states that Objective 5 of the National Development Plan for 2018–22 provides for the development and implementation of a national government policy of prevention and protection concerned with social and community leaders, journalists and human rights defenders, and that, in accordance with this commitment, on 10 December 2019 the President of the Republic presented guidelines on a comprehensive government policy to uphold and safeguard the work of defending human rights. The Government points out that the development of this policy paid particular attention to an intersectoral approach to State action and to the concentration of violence against social leaders found in rural areas. The Government also states that the Public Prosecutor's Office is maintaining its strategy of investigating and prosecuting offences against trade unionists, through the prioritization and follow-up of such cases by the elite group formed for this purpose in 2016.

88. In a communication dated 24 February 2021, the Government states that the impunity gap with respect to anti-union violence has been broken, as more than 960 court convictions have been handed down and the number of homicides of trade unionists in the country has been drastically reduced since 2001. The Government indicates in this regard that: (i) from the year 2001 to the year 2017 the reduction in the number of cases of homicides of trade unionists was 94 per cent, from 205 cases in the year 2001 to 15 cases during the year 2017; (ii) 24 cases of homicides of trade unionists were recorded in 2018, 17 in 2019, 14 in 2020 and, to date, one in 2021; and (iii) the number of homicides of trade unionists has, therefore, decreased significantly and it is important to make a distinction in this regard between social leaders and trade union leaders which are two distinct categories, although in some cases the same person may have this dual status.

89. In its different communications, the Government provides detailed information on the results of the investigations and criminal proceedings relating to cases of anti-union violence. Some of these data have also been updated in communications of October and November 2020 addressed to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and containing material relating specifically to Case No. 2761.

90. The Government refers first to the 84 cases of anti-union violence (79 of them involving homicides) reported in that case, stating that it has made significant progress in 23 cases, to the extent that: (i) 19 cases have already resulted in convictions (a total of 37 sentences handed down); (ii) one case is at the trial stage; (iii) one case is at the enquiry stage with an arrest warrant issued; and (iv) two cases under investigation are showing significant progress. The Government adds that the above-mentioned investigations have been linked to 145 persons, of whom 112 have been deprived of their liberty. In its 2020 communications, the Government also refers to the number of homicides of union leaders (216) investigated by the Public Prosecutor's Office between 2011 and 2020. The Government states that 42.59 per cent of those investigations have been cleared up: (i) 44 cases have already led to convictions (a total of 60 sentences handed down); (ii) 30cases are at the trial stage; (iii) charges have been brought in ten cases; (iv) six cases are at the enquiry stage with arrest warrants issued; and (v) two cases have been closed. The Government emphasizes that this clear-up rate is far higher than that for homicides in general (30 per cent). The Government states finally that: (i) a total of 815 sentences have been handed down for homicides of trade union members, an increase of 100 sentences with respect to its previous report; (ii) a total of 960 court convictions have been handed down for crimes against trade unionists, with the decongestion courts having handed down 70 such judgments during 2020; and (iii) as of 22 January 2021, of the 14 homicides of trade unionists registered in 2020, three were already at the trial stage while the other 11, as well as the homicide registered in 2021, were the subject of thorough investigations by the Public Prosecutor's Office.

91. The Government then refers to the response of the public authorities to cases of threats against members of the trade union movement. In this regard, the Government states that the strengthening of investigative capacities to deal with the crime of threats against human rights defenders is an objective defined within the framework of the Public Prosecutor's Office's Strategy for the Investigation and Prosecution of Crimes against Human Rights Defenders. The Government indicates that the investigation of this crime represents a real challenge for the work team of the Institution, which is why the following actions have been taken: (i) creation of a National Working Group for the support, promotion and coordination of the analysis, investigation and prosecution of cases of threats against human rights defenders, currently made up of six specialized offices attached to the National Specialised Directorate against Human Rights Violations; (ii) creation of mechanisms (telephone, email) for the reception of threats against human rights defenders that operate 24 hours a day; (iii) creation, thanks to the contributions of the Public Prosecutor's Office, of the specific criminal offence of threats against human rights defenders, regulated in article 188E of the Penal Code, Law 1908 of July 2018; and (iv) for unionized persons who do not carry out advocacy work for the defence of human rights, existence of article 347 of the Penal Code, relating to threats or intimidation which provides that if the threat or intimidation is made against a member of a trade union organization, a journalist or their family members, because of or on the occasion of the position or function they hold, the penalty shall be increased by one third.

92. The Government adds that the Public Prosecutor's Office's objective in terms of threats is not reduced to clarifying a specific case, but rather the institution seeks to associate

cases by common criteria to build situations and, as a result, generate greater effectiveness in the use of available institutional resources. To this end, based on a quantitative analysis, priority situations were identified for the investigation of crimes of threats against trade unionists (covering crimes under both articles 188 and 347 of the Penal Code) committed between 1 January 2018 and 31 December 2020, having selected in particular the following criteria: (i) threats related to the exercise of the work of defending human rights; (ii) cases in which the responsibility of a criminal organization is noted; and (iii) the existence of an extreme risk to the life, integrity or security of the persons threatened.

93. The Government indicates that the use of the above criteria made it possible to identify that trade unions in the natural resource extraction sector and those in the education sector are the ones that concentrate the highest number of threats. Geographically, trade union organizations in the Department of Valle del Cauca are particularly affected. In relation to the natural resource extraction sector, the aforementioned prioritization of investigations will allow for the identification of patterns of behaviour that will facilitate the individualization of the perpetrators of threats. As of February 2021, one person has already been arrested for threats against a member of a trade union in the extractive sector. In the education sector, the highest percentage of threats were made against the Executive Committee of the Colombian Federation of Education Workers (FECODE) and some affiliated organizations, with teachers working in rural areas particularly affected. These situations will be taken up by the National Working Group which will support the work of the prosecutors of the Sectional Directorates currently dealing with the cases.

94. Concerning the impact of the summary criminal procedure established by Act No. 1826 of 2017 on the investigations into acts of anti-union violence (Committee recommendation (b)), the Government states that the procedure (which shortens the time frames through a simplified criminal procedure that respects due process, and also establishes the status of private complainant) applies to crimes covered under article 200 of the Penal Code in relation to violation of the rights of assembly and association (article 200 provides for the imposition of fines and, in certain cases, three to five years' imprisonment). The Government states that, out of the 2,727 cases involving possible violation of article 200 logged with the Public Prosecutor's Office between 2011 and 20 October 2020, some 91.02 per cent have been concluded and only 8.98 per cent are still under investigation. The Government states the following reasons for the conclusion of these cases: (i) the dismissal of criminal proceedings (1,363 cases); (ii) the halting of criminal proceedings on grounds of either preclusion or the extinguishment of the complaint (520 cases); (iii) withdrawal by the worker or trade union (441 cases); and (iv) conciliation (158 cases).

95. The Government further refers to the consultation of social partners in relation to acts of anti-union violence, and, in particular, to the functioning of the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights (Committee recommendation (c)). In this regard, the Government indicates that: (i) the Inter-Institutional Commission, whose membership includes the country's three most representative main workers' unions and the Employers Association of Colombia, met on four occasions in 2019, including twice in a regional setting (Pasto and Popayán); (ii) in March 2020, the Commission held a virtual meeting pursuant to the agreements signed in the town of Pasto; (iii) in July 2020, the Commission held its first virtual national meeting, endorsing a series of specific commitments including the holding of meetings between the trade union, the National Police and the National Protection Unit (UNP) and, with the support of the ILO, the systematization of the sentences handed down by the

Colombian courts for crimes against trade unionists over the period 2011–20; (iv) the next meeting of the Inter-Institutional Commission is scheduled for September 2020; (v) the Ministry of the Interior shares information on the progress made under the government policy on protection and holds workshops for trade unionists to indicate what they would like the policy to cover; and (vi) in accordance with the guidelines adopted by the Inter-Institutional Commission, the Ministry of Labour organizes round tables and training events on human rights and international labour standards in collaboration with the UNP.

96. Concerning the examination of cases of anti-union violence by the bodies created as part of the peace process (Committee recommendation (e)), the Government forwards a reply given by the Truth Commission which states that: (i) owing to its extrajudicial nature, the Commission does not administer justice and thus lacks the judicial powers to clarify the truth of individual cases and cannot try or sentence anyone; (ii) the Commission cannot pass on any information it receives or produces to the judicial authorities for use in attributing liability in judicial proceedings or as proof, and neither may the judicial authorities request such information; (iii) to date, no information is available on any examination of cases of anti-union violence by the bodies created as part of the peace process; and (iv) the process of clarifying the truth concerning practices and acts constituting gross human rights violations and serious breaches of international humanitarian law, in particular those which are systematic or widespread and perpetrated during the conflict, as well as the complexity of their contexts and the local conditions in which they occurred, as stipulated in article 13(1) of Decree Law 588 of 2017, will be reflected in the final report which the Commission will present to the Colombian public on the completion of its work in November 2021. The Government also forwards the reply given by the Special Jurisdiction for Peace (SJP), which states that: (i) following the request for information, no evidence of a direct or indirect link with the armed conflict was found, and the request goes beyond the remit of the SJP; and (ii) the Chamber for the Acknowledgement of Truth, Responsibility and the Determination of Facts and Conduct, which is charged with prioritizing cases currently known to the SJP, has opened seven cases involving violations of human rights in general.

97. With regard to the protective measures implemented by the Colombian State against anti-union violence, the Government indicates in its communications that: (i) since the launch of the UNP protection programme in 2012, it has carried out 4,262 risk studies involving trade union leaders and activists: (ii) 447 risk assessments were conducted in 2018, with 282 given high-risk status and 168 normal-risk status; (iii) in 2019 the number of assessments fell to 332, with 206 classified as high risk, one as extreme and 125 as normal; (iv) from 1 January to 31 August 2020, the total number of risk assessments conducted was 190, of which 109 were classified as high risk, three as extreme and 111 as normal; (v) in the month of January 2021, 35 risk assessments were carried out with the establishment of 19 extraordinary risk situations and 16 ordinary risk situations; (vi) currently, 296 trade unionists are afforded strict protective measures ranging from a single protection officer to substantial individual and collective arrangements involving armoured vehicles, conventional vehicles and armed protection officers, and (vii) in 2018 the estimated cost of protective measures for trade union leaders was 42,889,000,054 Colombian pesos; in 2019 it was 39,986,188,070 pesos.

98. The Government adds that the departments with the greatest concentrations of protective measures for trade unionists are: (i) Bogotá, where there is a convergence of union head offices, federations and the national executive committees of the main unions, and (ii) Atlántico, Santander, Norte de Santander, Cesar, Antioquia and Valle del Cauca, owing to the public order situation they have experienced over time and the large

number of trade unions they accommodate. Concerning the alleged originators of threats received by trade union members, the Government reports that: (i) in 2018, the greatest number of threats were made by the criminal gang, *Autodefensas Gaitanistas de Colombia*; (ii) in 2019, the primary perpetrators were another criminal gang, *Águilas Negras*; and (iii) in 2020, the emergence of new agents of threat resulted in the need to strengthen the systems and strategies for protecting social leaders and human rights defenders. The Government adds in its February 2021 communication that, for 2020, out of 196 registered threats against members of the trade union movement, 160 are of unknown origin, 29 are from illegal armed groups, 3 from subversion, one from common crime and 3 from organized crime.

99. With regard to the above-mentioned protective measures, the Government notes, finally, that: (i) the Timely Action Plan has proved an effective mechanism for linking institutions, bringing together territorial actors at all levels of government and facilitating understanding of people's situations at first hand, especially those of leaders, in order to forge institutional commitments; (ii) the UNP, which is a standing member of the Timely Action Plan and records the risk situations that arise, joins in the activities of the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights of the National Committee for monitoring transfers of teachers for security reasons with the Ministry of National Education and FECODE and of the Committee for monitoring teachers under threat with the Secretary of Education of Bogota; and (iii) at the meetings of the Inter-Institutional Commission held in Pasto and Popayán, the issues of possible threats and situations that place trade union members at risk were discussed.

Allegations of anti-union violence made by the Union of Energy Workers of Colombia and the Cali Municipal Enterprises Union

100. Concerning the allegations of anti-union violence made by SINTRAELECOL and SINTRAEMCALI, the Government notes first that, on 30 January 2020: (i) 37 investigations were reported in which the victim of the crime is identified as belonging to SINTRAELECOL (24 investigations of homicide, nine of threats, one of extortion, two of kidnapping and one of attempted homicide), and (ii) nine of these 37 cases are at the sentencing stage, with 21 guilty verdicts handed down involving 27 individuals. Second, the Government notes that: (i) 53 investigations were reported in which the victim of the crime is identified as belonging to SINTRAEMCALI (13 investigations of homicide, 29 of threats, one of criminal conspiracy, one of displacement, one of wounding, one of kidnapping, five of attempted homicide, two of terrorism); and (ii) ten of the 53 investigations are at the sentencing stage, with 24 guilty verdicts handed down involving 28 individuals.

Murders and death threats in the prison sector

101. The Government states that, as of 30 January 2020, there were 43 reported investigations relating to acts of violence (42 involving homicide and one threats) committed against members and leaders of the Single Trade Union Association of Public Employees in the Colombian Prison System (UTP). The Government notes that: (i) 12 cases are at the sentencing stage, with 17 convictions against 23 individuals; and (ii) 29 of the remaining 31 cases are active (four at the trial stage, six at the pre-trial or investigation stage and 19 at the preliminary or enquiry stage).

102. Concerning the alleged homicides of UTP members, Messrs Diego Rodríguez González and Manuel Alfonso (Committee recommendation (i)), the Government states that the Public Prosecutor's Office, having checked its information systems, was unable to fully

identify the persons in question. The Government is requesting to be sent their national identity card numbers in order to identify them with certainty. Concerning assessments of the risk status of the UTP leaders, Eleasid Durán Sánchez, Cindy Yuliana Rodríguez Layos, Franklin Excenover Gómez Suárez, Jhony Javier Pabón Martínez and Mauricio Paz Jojoa (Committee recommendation (j)), the Government states that the UNP reports the following: (i) Mr Eleasid Durán Sánchez is receiving protection from the UNP; (ii) the status of Messrs Jhony Javier Pabón Martínez and Franklin Excenover Gómez Suárez was addressed by the UNP in 2015, but no information was received of any risk to and/or direct threats made against the persons concerned; and (iii) after checking its databases and information resources, the UNP could find no request relating to Ms Cindy Yuliana Rodríguez Layos, and thus identity card numbers need to be forwarded in order to rule out namesakes.

103. Finally, concerning the eight UTP union leaders allegedly subjected to threats, in respect of whom the Committee invited the complainant organization to contact the Government in order to clarify their situation (Committee recommendation (k)), the Government forwards the reply of the UNP in which it states that: (i) it is reassessing the risk to Mr Julio César García Salazar, and (ii) checks on the organization's databases and information resources have revealed no request relating to the other seven persons.

D. The Committee's conclusions

104. *The Committee recalls that Cases Nos 2761 and 3074 relate to numerous allegations of murders of trade union leaders and members and to numerous other acts of anti-union violence.*

General information regarding acts of anti-union violence and the State's response

105. *The Committee notes first of all the Government's statement that the impunity gap with respect to anti-union violence has been broken, with more than 960 court convictions and that the number of homicides of trade unionists in the country has been drastically reduced since 2001. The Committee notes in this respect that the Government indicates that: (i) from 2001 to 2017, the reduction in the number of cases of homicides of trade unionists was 94 per cent, from 205 cases in 2001 to 15 cases in 2017; and (ii) 24 cases of homicides of trade unionists were recorded in 2018, 17 in 2019, 14 in 2020 and, to date, one in 2021.*

106. *The Committee notes the general information presented by the Government concerning the institutional initiatives taken to clarify acts of anti-union violence and punish the perpetrators. The Committee notes that the Government states that every State institution charged with the defence of human rights has made considerable efforts to protect the life and integrity of all Colombia's inhabitants, especially social leaders and trade unionists. The Committee notes that the Government emphasizes in particular that, in accordance with the 2018–2022 National Development Plan, on 10 December 2019 the President of the Republic presented guidelines on a comprehensive government policy to uphold and safeguard the work of defending human rights and that the development of this policy paid particular attention to an intersectoral approach to State action and to the concentration of violence against social leaders in rural areas. The Committee also notes that the Government states that the Public Prosecutor's Office is maintaining its strategy of investigating and prosecuting offences against trade unionists through the prioritization and follow-up of such cases by the elite group formed for this purpose in 2016. The Committee notes further the information provided by the Government concerning meetings held at both regional and national level by the Inter-Institutional Commission for the Protection and Promotion of Workers' Human Rights, in*

which the representative workers' and employers' organizations and the various public authorities charged with protecting human rights in Colombia worked actively together.

107. *The Committee further notes that the Government forwards the comments of the Truth Commission and the SJP concerning possible examination of cases by the bodies created as part of the peace process. The Committee observes that these reveal the following: (i) the Truth Commission has no information to date on any examination of cases of anti-union violence by the bodies created as part of the peace process; (ii) the Commission will make present its final report to the Colombian public at the completion of its work in November 2021; and (iii) the subject matter of the information request goes beyond the remit of the SJP.*

108. *The Committee further notes the information provided by the Government concerning progress made in clarifying and prosecuting the acts of anti-union violence committed in Colombia. With regard to 84 cases of anti-union violence (79 of which were homicides) reported between 2010 and 2012 in the present case, the Committee notes the information from the Government that: (i) 19 cases have resulted in 37 convictions; (ii) one case is at the trial stage; (iii) one case is at the enquiry stage with an arrest warrant issued, and (iv) two cases under investigation are showing significant progress. The Government adds that the above-mentioned investigations have been linked to 145 persons, of whom 112 have been deprived of their liberty. The Committee also notes the material provided by the Government concerning a total of 216 investigations relating to homicides of trade union members, conducted by the Public Prosecutor's Office between 2011 and 2020. The Committee notes the indication by the Government that 60 sentences have been handed down in 44 cases and that 42.59 per cent of the investigations have been cleared up, a rate which exceeds the average for homicides in general (30 per cent). The Committee notes, finally, the information provided by the Government in 2021 on the results of the investigations into all acts of anti-union violence committed across the country. The Committee observes that the Government states that: (i) 815 sentences have been handed down for homicides of trade union members, representing an increase of 100 cases since the Government reported in February 2019; and (ii) a total of 960 court convictions have been handed down for crimes against trade unionists, with the decongestion courts having handed down 70 rulings in this regard during 2020.*

109. *The Committee also notes the detailed information provided by the Government on the measures taken to increase the effectiveness of investigations into threats against members of the trade union movement. In this respect, the Committee takes particular note of: (i) the creation of a National Working Group for the support, promotion and coordination of the analysis, investigation and prosecution of cases of threats against human rights defenders; (ii) the creation in July 2018 of the specific criminal offence of threats against human rights defenders, regulated in article 188E of the Penal Code and the existence in article 347 of the Penal Code, relating to threats or intimidation of an aggravating circumstance in the event that the victim is a member of a trade union organization or journalist; and (iii) the prioritization, based on a series of criteria (in particular the relationship between the threats and the human rights activities of the affected trade unionists , indications of the involvement of a criminal organization in the threats, extreme risk to the life, integrity or security of the persons threatened) of the investigation of certain crimes of threats against trade unionists committed between 2018 and 2020 with a view to linking cases and, as a result, generating greater effectiveness in the use of available institutional resources.*

110. *The Committee notes that it stems from the initiatives described above that: (i) trade unions in the natural resource extraction sector and the education sector are the most affected by crimes of threats; and (ii) the prioritization of investigations will make it possible to identify patterns of behaviour that will facilitate the identification of the perpetrators of threats, and*

that by February 2021, one person had been arrested for threats against a member of a trade union in the extractive sector.

111. *The Committee also notes the indication by the Government that the summary criminal procedure established by Act No. 1826 of 2017 (which shortens the time frames through a simplified criminal procedure that respects due process, and also establishes the status of private complainant) applies to crimes covered under article 200 of the Penal Code in relation to violation of the rights of assembly and association (article 200 provides for the imposition of fines and, in certain cases, three to five years' imprisonment). While noting that the Government indicates that 91.02 per cent of 2,727 possible cases of violation of article 200 of the Penal Code logged with the Public Prosecutor's office have been concluded, the Committee observes that it has no information available on the number of sentences handed down in this respect.*

112. *While noting with concern that the majority of the many cases of homicide and other acts of anti-union violence that have occurred across the country in general, and those reported in this case in particular, remain unpunished, the Committee welcomes the significant increase in sentences handed down for homicides of trade unionists. It notes especially that, regarding the 84 cases of homicide and attempted homicide reported in this case between 2010 and 2012, since the previous examination of the case, 12 new sentences have been handed down and three additional homicides are at the sentencing stage. Welcoming the various initiatives taken to increase the effectiveness of investigations into threats against trade unionists and noting that the criteria for prioritization of investigations focus on cases in which the victims are engaged in human rights activities, the Committee trusts that the Government will ensure that trade unionists are fully included in this priority and that it will be able to report significant progress in the results of such investigations. While aware of the complex challenges facing the bodies responsible for criminal investigations, the Committee is, moreover, once again bound to note the absence of data on the number of convictions of perpetrators and instigators of acts of anti-union violence. The Committee emphasizes in this regard that the investigations should focus not only on the individual perpetrator of the crime but also its instigators, with the aim of ensuring that justice is fully done and significantly preventing future acts of violence against trade union members.*

113. *While welcoming the significant action taken by the public authorities and the growing number of sentences handed down, the Committee, given the extent of the challenges facing the country in dealing with anti-union violence and impunity, urges the Government to continue strengthening its efforts to ensure that all the acts of anti-union violence, homicides, threats and other acts reported in the country are cleared up and that the perpetrators and instigators are convicted. The Committee particularly hopes that all further steps will be taken and all necessary resources committed in order to ensure that the investigations and criminal procedures relating to the acts of anti-union violence reported in this case are made significantly more effective in identifying and punishing the instigators. The Committee requests the Government to provide detailed information in this regard.*

114. *Concerning the steps taken by the public authorities to prevent acts of anti-union violence and protect trade union members at risk, the Committee takes due note, first, of the institutional initiatives taken in the framework of the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights and the Timely Action Plan to facilitate dialogue between the competent authorities and the trade unions concerning the acts and risks of violence to which the latter are exposed. The Committee also duly notes the detailed information from the Government concerning the work of the UNP, according to which: (i) from 1 January 2019 to 31 January 2021, the UNP conducted 649 risk assessments of union leaders and members; (ii) currently, 296 union leaders and members are afforded strict protective measures, and*

(iii) in 2019, the cost of the measures taken by the UNP to protect union leaders and members amounted to 39,986,188,070 pesos. The Committee notes in addition the detailed information provided by the Government concerning the geographic distribution of the risk assessments made and the various perpetrators of the threats received. In this regard, the Committee notes in particular the statement by the Government that the emergence of new agents of threat in 2020 has necessitated the strengthening of the systems and strategies for protecting social leaders and human rights defenders. In this connection the Committee also notes that, although a significant decrease in the number of victims has been seen since 2001, the Government is still reporting new homicides of trade unionists across the country.

115. *While welcoming the significant efforts of the public authorities to protect against anti-union violence and the consultations held with the social partners by the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights, the Committee cannot but observe with deep concern the persistently high number of homicides and other acts of anti-union violence in the country and the emergence, pointed out by the Government, of new agents of threat. The Committee recalls, in this regard, that freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed [see* ***Compilation of decisions of the Freedom of Association Committee****, sixth edition (2018), para. 82]. In these circumstances, the Committee urges the Government to continue strengthening its efforts to afford adequate protection to all the trade union leaders and members exposed to risk. With a view to ensuring that the policies to prevent anti-union violence achieve greater impact, the Committee especially urges the Government to continue to encourage, in the framework of both the Timely Action Plan and the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights, as well as the appropriate tripartite forums, close dialogue between the unions and the various competent authorities. The Committee requests the Government to keep it informed in this regard.*

Allegations of violence presented in 2014 by the Union of Energy Workers of Colombia and the Cali Municipal Enterprises Union

116. *The Committee takes note of the information provided by the Government concerning all investigations relating to cases of violence in which the victims were either members of SINTRAELECOL or members of SINTRAEMCALI. While taking due note of this information, in particular the number of convictions achieved in this regard (21 and 24 respectively), the Committee recalls that: (i) the allegations of anti-union violence presented by those organizations in Cases Nos 2761 and 3074 refer to specific acts of anti-union violence (in respect of SINTRAELECOL the wounds suffered in 2014 by Mr Oscar Arturo Orozco and the death threats to which Mr Oscar Lema Vega was subjected and, in respect of SINTRAEMCALI, the attack of April 2014 on the headquarters of the organization and the vehicle of one of its leaders); and (ii) in its previous examination of these cases, the Committee expressed the strong hope that the investigations and proceedings under way would lead to a speedy determination of the facts and the conviction of the perpetrators and instigators, and requested the Government to keep it informed in that regard. Based on the foregoing, the Committee again requests the Government to inform it of the progress of the investigations and proceedings under way in connection with the specific events reported in 2014 by SINTRAELECOL and SINTRAEMCALI.*

Allegations of anti-union violence in the prison sector

117. *In connection with the reported murders of 21 UTP members, including three union leaders, between 5 June 2012 and 24 October 2016 and the attempted homicide of another UTP leader*

on 4 June 2015, the Committee notes the general information provided by the Government on the situation as of 30 January 2020 and on all the investigations relating to cases of violence against UTP members and leaders, and its report of the existence of 43 investigations in this regard (42 involving homicide and one threats). The Committee notes the information from the Government that, in this connection: (i) 12 cases are at the sentencing stage, with 17 convictions handed down to 23 persons; and (ii) a further 29 cases are active (four at the trial stage, six at the pre-trial or investigation stage and 19 at the preliminary or enquiry stage).

118. *The Committee takes due note of this information, in particular the handing down of 17 convictions. The Committee observes at the same time that it has no information on the motives behind the homicides for which convictions were handed down, or on whether the convicted persons were both instigators and perpetrators of the acts and whether the sentencing process identified any links between the individual murders of UTP members. The Committee therefore urges the Government to continue making all necessary efforts to ensure that all the homicides and the attempted homicide of UTP leaders and members reported in this case are cleared up and that the perpetrators and instigators are convicted. The Committee also requests the Government, in relation to the incidents reported in this case, to provide detailed information on the progress of the investigations underway and on the content of the sentences handed down.*

119. *Concerning the alleged homicide of the UTP members, Messrs Diego Rodríguez González and Manuel Alfonso, the Committee notes that the Government states that the Public Prosecutor's Office, having checked its information systems, was unable to fully identify the persons in question and requests that it be sent their national identity card numbers so that they can be identified with certainty. Based on the above, the Committee invites the UTP and the Government to come into contact and complete the identification process.*

120. *Concerning the alleged death threats made against various UTP leaders and the corresponding protective measures taken by the UNP, the Committee notes the information provided by the Government in respect of Messrs Julio César García Salazar, Eleasid Durán Sánchez, Jhony Javier Pabón Martínez and Franklin Excenover Gómez Suárez. The Committee also notes that the Government states that, for Ms Cindy Yuliana Rodríguez Layos, identity card numbers are needed in order to rule out namesakes. The Committee further notes that: (i) the Government has not provided the requested information on the risk status of Mr Mauricio Paz Jojoa, and (ii) the complainant organization has not provided the requested information on Messrs Roberto Carlos Correa Aparicio, Gerson Méndez, Carlos Fabián Velazco Virama, Rafael Gómez Mejía, Helkin Duarte Cristancho, Óscar Tulio Rodríguez Mesa and Mauricio Olarte Mahecha (for all of whom the UNP states that it has not received any request for protective measures). In these circumstances, the Committee requests the Government to provide the requested information concerning the risk assessment for Mr Mauricio Paz Jojoa. The Committee also invites the UTP and the Government to come into contact to complete the definitive identification of Ms Cindy Yuliana Rodríguez Layos.*

121. *Observing finally that the Government, in connection with the UTP members, reports one case of threats under investigation, whereas, in its initial complaint, the UTP cites 31 members and leaders as having been subjected to death threats, the Committee requests the Government to ascertain that all the allegations of threats against UTP members or leaders have led to investigations intended to identify and punish the perpetrators.*

New allegations

122. *The Committee notes the allegations presented by the Confederation of Workers of Colombia (CTC) in a communication dated 18 June 2019 concerning an attack on Mr Gustavo Adolfo*

Aguilar, President of SINTRASERPUVAL, on 22 March 2018. The Committee notes that the complainant organization states that Mr Aguilar was attacked by assailants whose weapon failed to fire and that the victim, prior to the attack, had reported violations of labour rights by the municipal council in Riofrío (Valle del Cauca). The Committee recalls, in this regard, that freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed, that the exercise of trade union rights is incompatible with violence or threats of any kind and that it is for the authorities to investigate without delay and, if necessary, penalize any act of this kind [see ***Compilation****, paras 82 and 88]. The Committee therefore requests the Government to take all necessary steps to afford protection to Mr Aguilar and to ensure that the necessary investigations are carried out to promptly identify and punish the perpetrators and instigators of the attack which took place in March 2018. The Committee requests the Government to keep it informed in this regard.*

The Committee's recommendations

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

(a) While welcoming the significant efforts made by the public authorities and the growing number of sentences handed down, the Committee, given the scale of the challenges which face the country in dealing with anti-union violence and impunity, urges the Government to further strengthen its efforts to ensure that all acts of anti-union violence, homicides, threats and other acts reported in the country are cleared up and that the perpetrators and instigators are convicted. The Committee particularly hopes that all further steps will be taken and all necessary resources committed in order to ensure that the investigations and criminal proceedings conducted in connection with the acts of anti-union violence reported in this case are made significantly more effective in identifying and punishing the instigators. The Committee requests the Government to provide detailed information in this respect.

(b) While welcoming the significant efforts made by the public authorities in this regard, and the consultations held with the social partners within the framework of the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights, the Committee urges the Government to continue strengthening its efforts to afford adequate protection to all trade union leaders and members at risk. With a view to increasing the impact of the policies for preventing anti-union violence, the Committee especially requests the Government to continue encouraging, in the framework of the Timely Action Plan and the Inter-Institutional Commission for the Promotion and Protection of Workers' Human Rights as well as the appropriate tripartite forums, close dialogue between the trade unions and the various competent authorities. The Committee requests the Government to keep it informed in this regard.

(c) The Committee again requests the Government to inform it of the progress of the ongoing investigations and proceedings concerning the specific events reported in 2014 by the Union of Energy Workers of Colombia (SINTRAELECOL) and the Union of Cali Municipal Enterprise Workers (SINTRAEMCALI).

(d) The Committee urges the Government to continue making all necessary efforts to ensure that all the homicides and the attempted homicide of UTP leaders and members reported in this case are cleared up and that the

perpetrators and instigators are convicted. The Committee also requests the Government, in connection with the incidents reported in this case, to provide detailed information on the progress of the ongoing investigations and on the content of the sentences handed down. The Committee also invites the UTP and the Government to come into contact to complete the identification of Messrs Diego Rodríguez González and Manuel Alfonso.

(e) The Committee requests the Government to provide the requested information concerning the risk status of Mr Mauricio Paz Jojoa. The Committee also invites the Single Trade Union Association of Public Employees in the Colombian Prison System (UTP) and the Government to come into contact concerning the definitive identification of Ms Cindy Yuliana Rodríguez Layos. The Committee further requests the Government to ascertain that all the threats against UTP members or leaders have resulted in investigations intended to identify and punish the perpetrators.

(f) The Committee requests the Government to take all necessary steps to ensure protection for Mr Aguilar, President of the Union of Public Officials and Employees in the Government and Municipalities of Colombia (SINTRASERPUVAL) and that the necessary investigations are carried out to identify and punish the perpetrators and instigators of the attack which took place in March 2018. The Committee requests the Government to keep it informed in this regard.

(g) The Committee draws the particular attention of the Governing Body to the extreme seriousness and urgency of this case.

Case No. 3112

Definitive report

Complaint against the Government of Colombia presented by
- the Single Confederation of Workers of Colombia (CUT) and
- the National Union of Workers of the mechanical and metal sector, metal industry, metallurgy, railways and marketing undertakings in the sector (SINTRAIME)

Allegations: The complainant organizations allege a series of violations of freedom of association and the right to collective bargaining within an enterprise in the mining sector and several of its contracting enterprises

124. The complaint is contained in the communications of the Single Confederation of Workers of Colombia (CUT) and the National Union of Workers of the mechanical and metal sector, metal industry, metallurgy, railways and marketing undertakings in the sector (SINTRAIME) dated 9 December 2014 and 2 June 2016.

125. The Government sent its observations in communications dated 26 October 2015, 13 February 2018, 12 February 2019, 14 August 2020 and 17 and 23 February 2021.

126. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

127. In their first communication of 9 December 2014, the complainant organizations allege the existence of a series of violations against the exercise of freedom of association within the enterprise Drummond Company, Inc., a multinational enterprise in the mining sector (hereinafter referred to as "main enterprise"), and several of its contracting enterprises. The complainant organizations state that: (i) the main enterprise exploits coal in the Pribbenow and El Descanso mines, which are located in the Department of Cesar; (ii) the enterprise General Equipos de Colombia S.A. GECOLSA (hereinafter "contracting enterprise A") performs equipment maintenance and provides support for mining operations in the mines of the main enterprise; and (iii) the enterprise DIMANTEC LTDA (hereinafter "contracting enterprise B") performs equipment maintenance and provides support for operations in the main enterprise, but through a commercial contract with contracting enterprise A. The complainant organizations explain that SINTRAIME has a large number of members in contracting enterprise B and, at the time the events took place, there was a collective agreement that had been signed by SINTRAIME and contracting enterprise B that was valid from 1 January 2012 to 31 December 2013 (hereinafter "2012 collective labour agreement").

128. The complainant organizations state that SINTRAIME submitted a list of demands to contracting enterprise B on 13 December 2013 and allege the initial refusal by contracting enterprise B to negotiate with the union, which led the complainant organizations to submit a complaint to the Ministry of Labour to request its intervention. According to the complainants, from 9 July 2014, after the direct settlement phase had ended, SINTRAIME exercised its right to strike in the various regions of Colombia where it holds a presence. They allege that, after the strike was declared, contracting enterprise B: (i) did not allow trade union leaders to enter to inspect the stamps placed by labour inspectors on the machines and tools used by the striking workers; (ii) brought in workers from other contracting enterprises to replace the striking workers; (iii) impeded the striking workers who worked in the city of Soledad from congregating in front of its premises by continually trying to move them on; (iv) the enterprise, through certain non-unionized supervisors, spread false information on the status of the negotiations between the enterprise and the union and collected signatures calling for an end to the strike; and (v) during the week of 4 to 9 August 2014, the management of the enterprise unlawfully exerted pressure on the workers to vote in favour of ending the strike and convening an arbitration tribunal. Moreover, the complainant organizations state that the vote in favour of ending the strike was characterized by the absence of checks, the participation of staff who were not employed by contracting enterprise B, and the provision of vehicles by the employer to transport voters; furthermore, after the order to resume work had been issued, in August 2014, the employer prohibited SINTRAIME leaders and striking workers from accessing the El Cerrejón worksite.

129. The complainants add that, between 31 July and 5 August 2014, during the work stoppage, flyers were circulated by a criminal organization named "Los Rastrojos" demanding that the union leaders end the strike and resign from the enterprise, in exchange for which no attempt would be made on their lives. They state that, while they

reported these acts to the Ministry of Labour, the Office of the Deputy Public Prosecutor for Labour and Social Security Affairs, and the Offices of the Vice President and President of Colombia, the individuals concerned received no State protection.

130. In their communication of 2 June 2016, the complainants allege that the main enterprise engaged in acts of illegal labour intermediation in order to reduce the cost of labour and annul the workers' trade union rights in relation to the main enterprise. The complainant organizations explain that the Ministry of Labour, through a resolution dated 28 April 2014, imposed a total fine of 3,696,000 Colombian pesos on contracting enterprises A and B for illegal outsourcing of labour; in response, the enterprises concerned lodged an appeal for review. The complainants state that, faced with the penalty, contracting enterprise A changed its corporate purpose and divided its core purposes in December 2014 to create a new enterprise in the mining sector, Relianz Mining Solutions S.A.S. (hereinafter referred to as "contracting enterprise C"), which was thenceforth responsible for assigning contracts to contracting enterprise B. In relation to the appeal for review lodged by the enterprises, the complainant organizations state that, on 3 June 2015, the Ministry of Labour revoked its decision of 28 April 2014 because, while it did recognize the existence of illegal labour intermediation, it ruled that there had been a violation of due process against the enterprises and ordered that the administrative action be redone in its entirety, including the related investigations. The complainant organizations state that, on 3 December 2014, SINTRAIME submitted three complaints of illegal labour intermediation against the main enterprise and contracting enterprises B and C, which were later included in the illegal intermediation investigation. On 20 January 2016, the Ministry of Labour once again brought charges against the main enterprise and contracting enterprises A and B for alleged irregular outsourcing of labour under section 63 of Act No. 1429 of 2010.

131. The complainant organizations also denounce the collective dismissal of workers of contracting enterprise B. They explain that contracting enterprise B announced publicly on 20 October 2015 that contracting enterprise C would terminate the contracts for machine maintenance activities as of 31 December 2015, as the main enterprise had not selected contracting enterprise C in the bidding process for the provision of services and, as a result, the contracts of the workers in contracting enterprise B, including members of SINTRAIME, would be rescinded. It also announced that it would begin a process of transition from contracting enterprise A to the enterprise that had won the bidding process, CHM Minería S.A.S. (hereinafter "contracting enterprise D"). They state that during a meeting held on 14 December 2015 by the Ministry of Labour on the occasion of the collective dismissal, which was attended by leaders of SINTRAIME, contracting enterprise B stated that the non-renewal of contracts was due to the union activities in the enterprise and invited the leaders of SINTRAIME to encourage workers to resign from the enterprise, while contracting enterprise C stated that it was not connected to the issue in any way and that the issue was merely a commercial matter. The complainant organizations denounce that the events described above, although witnessed by the Ministry of Labour, were not recorded in the minutes sent to the central office in Bogotá, in the light of which, on 16 December 2015, SINTRAIME submitted a letter to the Ministry of Labour denouncing the dismissals and anti-union persecution in contracting enterprise B.

132. The complainant organizations maintain that the non-renewal of the commercial contract was motivated by anti-union sentiment, as this action legally ruled out the possibility of carrying over the collective agreement into contracting enterprise D and of members of SINTRAIME being hired by that same enterprise with their labour rights intact. In addition, they state that the Ministry of Labour failed to carry out its inspection

and monitoring obligations. The complainant organizations state that, as of 27 May 2016, 360 workers hired by contracting enterprise B had been pressured into signing "voluntary retirement letters", 185 workers had been dismissed and 135 workers had been hired by contracting enterprise D. They state that, given the seriousness of the facts, the trade union organization submitted a *tutela* action (writ for the protection of constitutional rights) against the Ministry of Labour for its lack of due diligence in the investigations into the alleged illegal labour intermediation and against contracting enterprise B for its violation of due *process* with respect to the union members that had been dismissed as part of the collective dismissal. They state that the employment contracts were cancelled without authorization from the Ministry of Labour to proceed with the collective dismissal, which would indicate an anti-union and retaliatory strategy on the part of the enterprise. According to the complainant organizations, the first penalty issued by the Ministry of Labour to contracting enterprises B and C for illegal outsourcing of labour created a climate of anti-union discrimination against members of SINTRAIME. However, the revocation by the Ministry of Labour of that same penalty served as an excuse to carry out collective dismissals that directly affected SINTRAIME members. The complainant organizations assert that the State had a clear obligation to investigate in a diligent manner and to penalize the acts of anti-union discrimination, and emphasize that, despite the fact that the complainant trade union organization submitted several labour complaints, the Ministry of Labour did not penalize any of the actions described.

133. Finally, the complainant organizations state that, in parallel to the above-mentioned facts, on 11 December 2015, contracting enterprise B initiated a process for the dismissal of the workers that had participated in a collective work stoppage between 14 March and 3 April 2013 at the enterprise Trateccol Ltd (hereinafter "enterprise E"). They explain that enterprise E merged with contracting enterprise B on 27 November 2013. As a result of the merger, the 2012 collective labour agreement between SINTRAIME and contracting enterprise B was extended to workers of enterprise E (the agreement in question was valid at that point as the arbitration tribunal had not yet issued the arbitration award). They add that, even though the Labour Appeals Chamber of the Supreme Court of Justice declared the 2013 strike at enterprise E to be illegal on 9 April 2014, contracting enterprise B should nonetheless have respected the dismissal procedure provided for under the 2012 collective labour agreement. According to article 5 of the 2012 collective labour agreement, the enterprise must, in the case of dismissal with just cause, hear the statements within three working days and ensure that the dismissed workers benefit from the minimum guarantees, including due union assistance. They emphasize that: (i) the statement hearings were initiated at least ten days after the Supreme Court of Justice had declared the strike illegal; (ii) the statement hearings were convened in such a way as to prevent the workers from benefiting from the minimum guarantees established under the collective labour agreement, as they were not given enough time to present their defences, familiarize themselves with the accusations, or convene a union committee to support them during the proceedings; (iii) contracting enterprise B did not request immediate intervention from the Ministry of Labour in order to identify the workers that were to be dismissed; and (iv) the enterprise took advantage of the situation to carry out other types of dismissals of unionized workers on such grounds as alleged breach of industrial safety rules and alleged false claims of medical incapacity.

B. The Government's reply

134. In its communications of 26 October 2015, 13 February 2018, 12 February 2019 and 14 August 2020, the Government conveys its own observations and forwards those of

the main enterprise and contracting enterprises A and B. First, in relation to the alleged refusal of contracting enterprise B to negotiate with the union regarding a list of demands, the Government forwards the observations from this same enterprise, which denies the allegation that it refused to negotiate with SINTRAIME regarding a list of demands. According to the enterprise concerned, SINTRAIME submitted a first list of demands on 1 November 2013, which was then withdrawn by the trade union organization on 10 December 2013 following the workers' decision to convene an arbitration tribunal. That same day, SINTRAIME submitted a new list of demands with minimal changes, and the enterprise informed the Ministry of Labour of this fact in writing so that the Ministry could determine the correct way to proceed and whether the enterprise was obliged to enter into negotiations with respect to the second list. The Government, for its part, maintains that there was no refusal on the part of contracting enterprise B to negotiate with the trade union organization, nor did the enterprise act in bad faith, as the enterprise had just completed a direct settlement phase and was under the false impression that it had no obligation to negotiate anew.

135. Second, the Government forwards the observations of contracting enterprise B in relation to the alleged acts of interference during the strike called by SINTRAIME in July 2014. The enterprise asserts that: (i) the vote held between 26 and 28 June 2014 to determine whether the collective dispute with SINTRAIME should lead to a strike or an arbitration tribunal was flawed: the trade union organization did not allow the Ministry of Labour to provide support for the holding of the vote; an independent and secret location for casting votes was not determined; the ballot box was not sealed at the start of the voting day; and some of the enterprise's workers were not called to vote; (ii) it can be discerned from the records of the Ministry of Labour that, during the series of votes that were held in June 2014, members of SINTRAIME exerted pressure on, issued threats against and engaged in acts of violence towards workers intending to vote in favour of referring the collective dispute to an arbitration tribunal; (iii) from the initiation of the strike on 9 July 2014, leaders of SINTRAIME prevented unionized and non-unionized staff members from entering the premises of the main enterprise and of contracting enterprises A and B; (iv) members of SINTRAIME prevented the staff members of other contracting enterprises from carrying out work, blocked access to the mining projects and premises of the enterprises, and attacked and threatened workers that wanted to work; (v) in the light of the multiple irregularities described, the enterprise submitted a request to declare the strike illegal and, on 16 November 2016, the Labour Appeals Chamber of the Supreme Court of Justice ruled in favour of contracting enterprise B; (vi) at no point were the striking workers replaced; the enterprises using the services of enterprise B simply contracted other enterprises; (vii) with regard to the ending of the strike, the relevant process was undertaken by a group of non-unionized workers that had not been called to vote; (viii) as to the allegations that contracting enterprise B had not granted the majority of workers access to the El Cerrejón worksite after the strike had ended, it denies the complainant organizations' allegations and states that the persons under valid commercial contracts gained access without issue to complete their work; and (ix) the delay in the convening of the arbitration tribunal was due to the delayed notification by SINTRAIME of its designated arbitrator.

136. The Government also conveys the observations of the Territorial Directorate of the Ministry of Labour of the Department of Atlántico, which states that: (i) from 9 July 2014, the Ministry of Labour sent inspectors with the aim of investigating the dismissals reported by the trade union organization and, in finding that there were no violations of the right to strike, closed the investigation; (ii) as to the allegation that contracting enterprise B had refused to allow the striking workers to congregate in front of the

premises of contracting enterprise A, it states that the tents were indeed located on the property of contracting enterprise A and contracting enterprise A asked them to move on because they were preventing access for its workers, but the authorities intervened to ensure that the workers remained on the aforementioned site; and (iii) as to the allegations that the management of contracting enterprise B unlawfully exerted pressure on workers to vote in favour of ending the strike, a resolution dated 15 August 2014 states that labour inspectors were present and had ensured that workers were voting freely and spontaneously and, once it became clear that the workers in contracting enterprise B had voted in favour of ending the strike, the seals were removed, an action of which the leaders of SINTRAIME were informed. The Government maintains that the Ministry of Labour completed the administrative actions requested by SINTRAIME in relation to the alleged refusal to negotiate, proceeded to close down the premises once the strike had been called and formed the arbitration tribunal once the workers had decided to proceed with this option. It also states that the trade union organization concerned did not provide appropriate evidence of the alleged irregularities in the ending of the strike, the formation of the arbitration tribunal, or the alleged violation of the rights to association or collective bargaining.

137. As regards the process of negotiating the second list of demands, the Government states that the Deputy Minister for Labour Relations, through a resolution dated 15 August 2014, ordered the convening of an arbitration tribunal to resolve the dispute between SINTRAIME and contracting enterprise B and, while recognizing the existence of delays, also states that these were due to the resignation of one of the arbitrators and disagreement between the parties on the nomination of a third arbitrator. It further states that, in the ruling dated 8 February 2017, the Supreme Court of Justice dismissed the appeal lodged by the parties against the arbitration award issued by the compulsory arbitration tribunal; and, as a result of this ruling, the enterprise made the payments ordered in the award to workers who were members of SINTRAIME. The Government highlights the fact that, on 22 March 2019, a new two-year collective labour agreement between contracting enterprise B and SINTRAIME was signed and was valid from 1 January 2018 to 31 December 2019.

138. Third, in relation to the alleged threats from the criminal organization named "Los Rastrojos", the Government forwards the observations of contracting enterprise B, which denies having any involvement with any criminal organization. It also conveys the observations of the National Protection Unit. The National Protection Unit states that it performed a number of actions in favour of SINTRAIME leaders and members: (i) Mr William Eduardo Kerguelen González did not provide the documentation necessary to initiate a protection process, and yet requested the head of the Department of Cesar to perform preventive patrols at his place of residence for a period of four months; (ii) measures were taken to support Mr Rafael Ojeda Castro, Mr Sergio Becerra Moreno and Mr Ismael Avedaño, who were contacted by the Committee of Risk Assessment and Recommendation of Measures (CERREM); (iii) as for Mr Rafael de la Hoz Fontalvo, upon reassessment, his case was found to be pending revision and signature by the director of the CERREM; and (iv) no protective measures were taken for Mr Nelson Enrique Mendoza Jiménez given the assessed level of risk.

139. Fourth, the Government forwards the observations of the main enterprise and contracting enterprises A and B in relation to the allegations of illegal labour intermediation on the part of the aforementioned enterprises in order to evade compliance with labour standards and union rights. The main enterprise states that: (i) the contracting and subcontracting enterprises referenced by the complainants were not formed for the specific purpose of entering into contracts with the main enterprise,

these enterprises had an established presence on the market and a robust network of different clients in various areas of activity; (ii) the corporate purpose of the main enterprise is different from those of the contracting enterprises; (iii) the complainant organizations, in stating that SINTRAIME signed a collective agreement with contracting enterprise B, explicitly recognize the quality of the enterprise as an employer and provide evidence that the enterprise's workers enjoyed the rights to freedom of association and collective bargaining; (iv) the main enterprise does not outsource its core activities, but rather contracts enterprises to maintain and repair some equipment that it uses given the extremely high level of specialization and the particular experience required to perform such work; (v) the contracting enterprises conducted their operations with complete administrative, technical and financial independence without interference from the main enterprise in the hiring of staff for those enterprises; (vi) in 2012, the main enterprise and contracting enterprises A and B were investigated for the first time at the request of SINTRAIME for alleged illegal labour intermediation and, in 2013, the Ministry of Labour ruled for the case to be closed due to lack of grounds for imposing penalties; (vii) in 2014, another investigation was launched for the same reason against the same enterprises as a result of the same complainant, and the Territorial Directorate of Atlántico issued a resolution on 19 October 2015 which absolved the enterprises concerned; (viii) in 2017, unusually, the Ministry of Labour launched another investigation against the main enterprise and, through a new ruling, the enterprise was penalized; (ix) the enterprise submitted appeals and appeals for review to the Ministry of Labour and subsequently submitted an action for annulment and restoration of law to the administrative tribunal against the various rulings issued by the Ministry of Labour; (x) the Administrative Tribunal of Cesar accepted the action in May 2017 and has yet to issue a ruling; and (xi) to date, eight trade unions are active in the enterprise and several collective agreements are valid, which is proof of the enterprise's respect for freedom of association.

140. In relation to the allegations of illegal labour intermediation, contracting enterprise A states that: (i) the spin-off process that led to the creation of contracting enterprise C had no anti-union purpose, but rather sought to adapt the enterprise to the realities and needs of each of the markets of which it was part, leaving contracting enterprise A with the role of importing machinery and dividing its other core purposes into companies to allow for a simpler, more efficient and better managed operational structure; (ii) since 1 January 2015, all of the enterprises created have been fulfilling their corporate purposes autonomously and independently and have been undertaking their commercial, labour and administrative endeavours as entirely independent legal entities; (iii) contracting enterprise A has not contracted and does not contract activities relating to the permanent core activities of the main enterprise, its role in the value chain is clearly defined, its commercial relations with the main enterprise are limited to the maintenance and repair of certain equipment and machinery that require specialized staff or equipment; (iv) the Territorial Directorate of the Ministry of Labour of Atlántico investigated the facts at the time and released contracting enterprise A and the other defendant enterprises of the charges described; (v) the enterprise has a long and successful history of trade union relations, several trade unions operate within the enterprise and it has excellent worker-employer relations with all of them; and (vi) since 2016, efforts have been made to implement the arbitration award with SINTRAIME, and the trade union has, to date, submitted no claims or complaints to the judicial or labour authorities.

141. Contracting enterprise B indicates, for its part, that SINTRAIME, by explicitly recognizing the content of article 3 of the 2012 collective labour agreement, which states that this

enterprise enters into and implements commercial contracts as a regular part of its operations, and having made no observation regarding the impact of that practice on freedom of association, implicitly accepted that those contracts did not violate workers' rights and recognized the quality of contracting enterprise B as an employer, as well as the inherently entrepreneurial nature of the company. Moreover, it emphasizes that, in a resolution dated 12 October 2017, the Ministry of Labour absolved contracting enterprise B of the penalty imposed in the first instance.

142. In its observations, the Government states that the corporate purposes of the enterprises referred to are completely different, such that the decision by the main enterprise to contract other contracting enterprises did not include any permanent core activities of the main enterprise: (i) the corporate purpose of the main firm is the exploration, transport and mining of coal; (ii) contracting enterprise A is primarily engaged in the marketing and representation of brands of heavy machinery for different sectors; activities carried out directly, with its own organization and administrative and commercial resources, within direct formal employment relationships through the various contractual modalities provided for in labour legislation; (iii) contracting enterprise C specializes in providing services for the maintenance, repair, reconstruction, manufacture, installation and assembly of all types of machinery. The Government indicates that, according to the provisions of article 34 of the Substantive Labour Code, independent contractors are natural or legal persons who are contracted to perform one or several tasks or provide services to benefit third parties for an agreed price, assuming all the risks, using their own means, and with technical and managerial freedom and independence. In addition, it emphasizes that entrepreneurs in Colombia, under article 333 of the Political Constitution, have the right to freedom of enterprise, and entrepreneurs therefore may freely carry out their activity within the limits of the common good. Therefore, enterprises have the authority to work towards fully achieving their corporate purpose and have contractual freedom, as long as they comply with standards that govern decent work, that is, providing all legal guarantees.

143. The Government states, concerning the procedures carried out by the Ministry of Labour with regard to the allegations of illegal labour intermediation, that: (i) on 21 November 2013, the Deputy Minister of Labour Relations and Inspection ordered the Special Investigations Unit to begin a preliminary inquiry into the alleged illegal labour intermediation; (ii) in a resolution dated 27 April 2015, the Coordination of the Special Investigations Unit ordered that contracting enterprises A and B should be penalized for conducting prohibited labour intermediation, a decision that was subsequently challenged by the enterprises; (iii) in a resolution dated 3 June 2015, the Coordination of the Special Investigations Unit rescinded the administrative act, and in its place stipulated that the investigation should be redone in both contracting enterprises; (iv) SINTRAIME submitted administrative complaints to the Ministry of Labour against the main enterprise and contracting enterprises A and B, which were subsequently included in the investigation against the various enterprises; (v) on 8 March 2016, charges were brought once again against the three enterprises under investigation and the administrative procedure for the imposition of penalties was initiated for the enterprises' alleged use of illegal outsourcing of labour and improper contracting of temporary services; (vi) in a resolution dated 23 September 2016, the administrative authority penalized the main enterprise and contracting enterprises A and B; subsequently the enterprises concerned submitted their respective statements; (vii) in a resolution dated 19 September 2017, the administrative authority settled the appeal for review and ordered the file to be sent to the Directorate of Inspection, Supervision, Monitoring and Territorial Management in order to settle the additional appeal that had

been submitted; and (viii) in a resolution dated 12 October 2017, the Ministry of Labour absolved contracting enterprise B from the penalty imposed in the first instance, and that enterprise was absolved of all the complaints relating to the alleged illegal labour intermediation.

144. Fifth, the Government forwards the observations of contracting enterprise B in relation to the alleged anti-union dismissal of workers from this enterprise, from 11 December 2015, as a result of the cancellation of the commercial contract signed between contracting enterprises B and C. In that regard, it states that: (i) the decision of contracting enterprise C to cease to use the services of enterprise B had a serious effect on that enterprise and brought with it financial and administrative difficulties, which disrupted the economic and financial balance of the company and had an impact on the demographic composition of the enterprise's workforce; (ii) both unionized and non-unionized workers were affected by the cancellation of the commercial contract, which confirms that it was not an act of anti-union discrimination; and (iii) it was a legal cause for termination of employment contracts, insofar as the termination was not based on a unilateral decision of the employer but rather the acceptance of objective facts, outside the enterprise's control. For its part, the Government states that, as reflected in the different decisions relating to the *tutela* actions submitted by the workers affected by the termination of employment contracts, the courts considered that the *tutela* action was not an appropriate mechanism and that the workers should access the ordinary courts; and emphasizes that the complainants did not provide proof that they had resorted to this instance.

145. Sixth, the Government forwards the observations of contracting enterprise B in relation to the dismissal of workers from enterprise E, which later merged with contracting enterprise B; dismissals which, according to the allegations of the complainant organizations, had violated the agreed provisions of the 2012 collective labour agreement and had been anti-union in nature. Contracting enterprise B states that: (i) the ruling handed down by the Supreme Court of Justice declaring the work stoppage that took place between 14 March and 3 April 2013 to be illegal was finalized on 7 December 2015; (ii) the enterprise complied with the obligation set out in Decree No. 2164 of 1959, presenting the labour inspector, in the context of a strike declared to be illegal, with a list of workers who it considered necessary to dismiss for having participated or intervened in the work stoppage; (iii) the procedure set out in the collective labour agreement to arrange statement hearings was complied with for all workers, who were guaranteed their right to defence and to due process; (iv) article 5 of the 2012 collective labour agreement specifies that the statements should be made by the worker within the following three working days, and this timeline was met given that the agreement referred to did not establish a minimum time period in which a hearing was to take place and thus there was nothing to prevent the respective proceedings from being carried out on the same day on which the workers and SINTRAIME were notified; (v) contrary to the allegation made by the complainant organizations, it is reflected in the records of the statement hearings that the workers concerned benefited from the presence, participation and support of trade union leaders; (vi) the alleged facts were presented to the *tutela* judges, and resolved in favour of contracting enterprise B in both the first and second instance; and (vii) with regard to the claims initiated by some of the workers to demand their reinstatement, contracting enterprise B states that the cases remain pending. For its part, the Government states that, as part of a *tutela* action being considered by the First Criminal Court which supervises compliance of the municipality of Soledad (Atlántico), that court considered that the trade union body had not been subject to a persecutory attitude, that no proof had been provided of the fact that the

dismissed workers had a particularly active role or a leadership role in the trade union, and that the trade union had other appropriate and adequate methods of judicial defence in the ordinary labour courts. With regard to the above, the Government states that the trade union organization did not provide any proof, nor did it have knowledge in this instance, of the fact that the dismissed workers had accessed the ordinary courts, nor did it specify which workers had been dismissed. The Government recalls that the Committee on Freedom of Association has indicated that it is not within its competence to rule on the termination of employment contracts, except where they are alleged to be the result of anti-union discrimination. Regarding the allegation that contracting enterprise B did not request the Ministry of Labour to intervene in order to identify the workers that participated in the work stoppage that has been declared to be illegal, the Government states that the Constitutional Court has ruled that, in order to dismiss a worker who has participated in a work stoppage that has been declared to be illegal, it is not necessary to have followed a prior procedure with the Ministry of Labour. The employer must only complete a prior procedure in order to analyse the behaviour of the employee, guarantee the right to defence and due process, and the Government emphasizes that it is not necessary that that procedure be carried out by the Ministry of Labour. The Government states that contracting enterprise B followed a procedure to dismiss the workers that had participated in the work stoppage, and that, as stated by the trade union organizations in their allegations, the workers were individually notified of their statement hearings and they were individually provided with a date for their hearing, and thus it is proven that the enterprise complied with the prior procedure referred to by the Constitutional Court.

146. By means of additional communications received on 17 and 23 February 2021, the Government first submits updated comments from the contracting enterprises A and B and the main enterprise. The contracting enterprise A, while reiterating its commitment to freedom of association, points out in particular that: (i) it has employees associated with four different trade union organizations, three of them being industrial trade unions and one being a trade union at the enterprise level; (ii) the arbitration award issued on October 1, 2015, following the negotiations with SINTRAIME, which is currently a source of benefits for an employee of the enterprise, remains in force; (iii) the negotiations with SINTRAINDUSTRIA, on the one hand, and SINTRAMETAL, on the other hand, are giving rise to the establishment of arbitration tribunals ; and iv) the trade union of workers of GECOLSA-SEGECSA was founded in October 2019 and its first collective agreement was signed in September 2020. The contracting enterprise B, while reaffirming the full compliance of Conventions Nos 87 and 98, indicates that: (i) it signed a new collective agreement with SINTRAIME for the period from 1 January to 31 December 2020; (ii) the negotiations for the renewal of such agreement were opened on February 11, 2021; (iii) it also signed a collective agreement with the trade union organization SINTRAPCA for the period from April 1, 2017 to March 31, 2020; and (iv) given that the negotiations with SINTRAPCA have not led to a new collective agreement, following SINTRAPCA's decision in this regard and in accordance with the legislation in force, the Ministry of Labour is expected to complete the formation of an arbitration tribunal. The main enterprise states that: (i) there are currently nine union organizations within the enterprise with a unionization rate of 63.86 per cent, which is well above the national average (5 per cent), which demonstrates full respect for freedom of association within the enterprise; (ii) the enterprise has signed collective bargaining agreements with 8 of these organizations.

147. The Government goes on to state that there have been no violations of ILO conventions and principles on freedom of association in the present case, that the various enterprises

mentioned-above have collective bargaining agreements in force and that, with respect to the alleged facts, the Ministry of Labour acted diligently in order to ensure respect for labour legislation.

C. The Committee's conclusions

148. *The Committee observes that the present case refers to the allegation of violations of freedom of association in a main enterprise and several of its contracting enterprises operating in the mining sector: contracting enterprise A (mainly, according to the Government, engaged in the marketing and representation of brands of heavy machinery for different sectors and responsible for equipment maintenance and providing support for mining operations in the mines of the main enterprise), contracting enterprise B (responsible for maintenance, repair and construction in the main enterprise, by means of a commercial contract with contracting enterprise A, and subsequently with contracting enterprise C), and contracting enterprise C (which emerged as a result of a spin-off within contracting enterprise A in December 2014). In that context, the Committee observes that the complainants allege the following violations: (i) the refusal of contracting enterprise B to negotiate a new collective labour agreement with SINTRAIME; (ii) as part of a strike action, various acts of interference by contracting enterprise B, including contracting workers to replace striking workers and acts of coercion; (iii) death threats made by a criminal organization against members and leaders of SINTRAIME aimed at putting an end to the strike, and indifference on the part of the public authorities when confronted with this fact; (iv) illegal labour intermediation aimed at reducing the cost of the workforce and preventing the full exercise of trade union rights of workers in the contracting enterprises in relation to the main enterprise; (v) as part of the restructure and cancellation of the commercial contract between contracting enterprises B and C, the massive anti-union dismissal of workers from contracting enterprise B; and (vi) the anti-union dismissal by contracting enterprise B of the trade union members that had participated in a strike in an enterprise that later merged with contracting enterprise B and the violation of the due disciplinary process established in the collective labour agreement of the enterprise.*

149. *With regard to the alleged refusal by contracting enterprise B to negotiate a new collective labour agreement, the Committee observes that it appears from the information submitted by the parties that, at the time the events took place, there was a collective labour agreement in force that had been signed between SINTRAIME and contracting enterprise B, which was valid from 1 January 2012 to 31 December 2013. It observes that both the complainant organizations and the Government state that: (i) following a first unsuccessful attempt on the part of SINTRAIME to negotiate a first list of demands, the trade union organization submitted a second list of demands to contracting enterprise B in order to negotiate a new collective labour agreement; (ii) between 28 and 30 June 2014, SINTRAIME organized a vote to decide whether the dispute should lead to a strike or an arbitration tribunal; (iii) on 9 July 2014, once all the stages of the direct settlement phase had been exhausted, SINTRAIME initiated a strike; (iv) subsequently, a group of workers voted to end the strike and establish an arbitration tribunal; (v) on 15 August 2015, the Deputy Minister of Labour Relations and Inspection ordered an arbitration tribunal to be convened and, despite various delays attributed to both parties, on 15 February 2016 the arbitration tribunal handed down an arbitration award that would be valid until 31 December 2017. The Committee observes that, subsequently, two collective labour agreements were signed between contracting enterprise B and SINTRAIME, the first was valid from 1 January 2018 to 31 December 2019, the second from 1 January to 31 December 2020, and negotiations are underway to renew it. Since the list of demands referred to in this case led to an arbitration award, the implementation of which was not questioned by the complainant organizations, and that subsequently, new collective labour agreements were signed between the parties, and in the absence of any additional*

information on the part of the complainants, the Committee will not pursue its examination of this allegation any further.

150. *With regard to the allegations of interference by contracting enterprise B in the strike carried out by SINTRAIME between 9 July and 15 August 2014, the Committee observes that: (i) on the one hand, the complainant organizations denounce acts of interference and intimidation following the declaration of a strike on 9 July 2014 (prohibiting representatives of SINTRAIME from accessing the premises of the enterprise, replacing striking workers, and harassing striking workers), as well as during actions aimed at ending the strike (spreading false information about the status of the negotiations between the enterprise and the trade union, collecting signatures to request that the strike should be ended, the management of the enterprise intimidating workers so that they would vote in favour of ending the strike, irregularities during the vote to end the strike, and the employer providing vehicles to transport voters; and when the order was given to resume work, prohibiting striking workers and trade union leaders from accessing the worksite); (ii) on the other hand, contracting enterprise B states that there were irregularities in the vote held between 26 and 28 June 2014 for the workers to decide whether the dispute should lead to an arbitration tribunal or a strike (the fact that the Ministry of Labour did not provide support for the vote, the failure to convene all the workers, and acts of pressure, threats and violence against the workers that wanted to vote for the collective dispute that were all referred to the arbitration tribunal) and that there was an overreach in the exercise of the right to strike (the strikers blocked the access to mining projects and premises of the contracting enterprises for non-unionized workers, threatening the workers that wanted to work); and (iii) the Government states that, at the start of the strike, the Ministry of Labour sent inspectors in order to investigate the allegations submitted by the trade union organization and, on not finding any irregularity, closed the investigation; furthermore, it states that, as reflected in a resolution of the Ministry of Labour dated 15 August 2014, inspectors were present during the vote that ended the strike and were assured that the workers were voting freely and voluntarily. The Committee takes note of the contradictory versions given by the parties regarding the alleged commission of acts of interference and violence during the votes for declaring and ending the strike, as well as during the work stoppage. In addition, the Committee observes that, at the request of contracting enterprise B and in its ruling dated 16 November 2016, the Labour Appeals Chamber of the Supreme Court of Justice declared the strike to be illegal, having considered that, according to the provisions of article 444 of the Substantive Labour Code, the trade union organization, as a minority, should have obtained a majority vote from the workers of the aforementioned enterprise prior to the blockade of operations. Under these circumstances, the Committee will not pursue its examination of this allegation.*

151. *With regard to the allegation of death threats by a criminal organization named "Los Rastrojos", the Committee notes the allegations of the complainant organizations, according to which, during the work stoppage that took place between 31 July and 5 August 2014, flyers were circulated demanding that the trade union leaders end the strike and that, despite the fact that those acts were reported to the competent authorities, the threatened leaders had not, as of December 2014, received any protection from the State. The Committee takes note of the list of acts carried out by the National Protection Unit, which was provided by the Government, to benefit Mr Rafael Ojeda Castro, Mr Sergio Becerra Moreno and Mr Ismael Avedaño. In addition, it takes note of the indication that Mr William Eduardo Kerguelen did not provide the documentation required to reactivate the protection and that, with respect to Mr Nelson Enrique, no protection measures had been implemented given the assessed level of risk. Observing that the Government has not provided information regarding whether an investigation was initiated with regard to these death threats, the Committee recalls that the exercise of trade union rights is incompatible with violence or threats of any kind and it is for*

*the authorities to investigate without delay and, if necessary, penalize any act of this kind [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, para. 88].*

152. *In respect of the allegations concerning illegal labour intermediation, the Committee understands, based on the information provided by the complainant organizations and the Government, that: (i) the contracting enterprises were penalized once on 27 April 2014 for acts of illegal labour intermediation, and the enterprises concerned submitted an appeal for review against that penalty; (ii) in December of that same year, contracting enterprise A changed its corporate purpose and divided its core objectives, creating contracting enterprise C; (iii) in a resolution dated 3 June 2015, the Ministry of Labour ruled on the appeal for review in favour of the enterprises and ordered the corresponding investigations to be redone; (iv) on 20 January 2016, the Ministry of Labour once again brought charges against the main enterprise and the contracting enterprises for illegal labour intermediation; and (v) while a new penalty was initially imposed by the Ministry of Labour (resolution dated 23 September 2016), contracting enterprise B was subsequently absolved (resolution dated 12 October 2017). In the light of the above, the Committee considers it necessary to emphasize that, from the resolutions of the Ministry of Labour and the administrative labour inspection reports submitted by the parties, it is not clear that the actions initiated by SINTRAIME in order to declare the labour intermediation processes to be irregular in nature mean that the alleged anti-union motivation behind those actions exists. The Committee recalls that its competence relates to violations of freedom of association, and not cases of abuse of labour intermediation or the abusive use of temporary contracts, even though many workers may be affected, and that it is only competent to examine allegations made by the complainant union where a connection is established between such cases and the trade union membership or activities of the persons concerned [see **Compilation**, para. 37]. In view of the above, the Committee will not pursue its examination of this allegation.*

153. *With regard to the alleged anti-union motivation of the cancellation of the commercial contract signed between enterprises B and C, as well as the anti-union nature of the dismissals that occurred subsequently in enterprise B, the Committee notes that the complainant organizations denounce that, from December 2015, a large number of workers from contracting enterprise B, which had a strong union presence, were dismissed. In addition, it notes that, according to the complainants, the cancellation of the commercial contract sought to remove the legal possibility of the collective labour agreement being carried over to the enterprise that won the bidding process and to prevent members of SINTRAIME from being contracted by the new enterprise with their labour rights intact. The Committee notes that the complainant organizations also allege that: (i) the cancellation of employment contracts took place without the authorization of the Ministry of Labour; (ii) the procedure agreed in the collective labour agreement signed between SINTRAIME and contracting enterprise B was not respected; (iii) the Ministry of Labour's first decision to issue a penalty for illegal outsourcing of labour had generated a climate of anti-union discrimination against the members of SINTRAIME; and (iv) the Ministry of Labour failed to carry out its inspection and monitoring obligations, having not dealt with the allegation made to that institution on 16 December 2015 concerning anti-union dismissals and persecution as part of the cancellation of the commercial contract signed between contracting enterprises B and C. The Committee takes note of the fact that, for its part, contracting enterprise B states in its observations that the decision made by contracting enterprise C to cancel the commercial contract with enterprise B brought with it significant financial repercussions and that this action affected both its unionized and non-unionized workers. The Committee also takes note that the Government states that: (i) as reflected in the various decisions relating to the tutela actions submitted by the workers affected by the termination of their employment contracts, the courts considered*

that a tutela action was not the appropriate mechanism, and that the workers should have resorted to ordinary justice; and (ii) the complainants did not provide proof of the fact that they had done so in this case.

154. *The Committee takes due note of the various pieces of information provided by the parties. The Committee observes that it appears from a document submitted by contracting enterprise B that: of the 523 workers from that enterprise who took advantage of the voluntary retirement plan, 53 per cent were union members; of the 137 workers who were transferred internally to other operations, 40 per cent were union members; and of the 77 workers who did not take voluntary retirement, 87 per cent were union members. The Committee also takes note that, of the tutela actions submitted by the dismissed workers and conveyed by the parties, there is no evidence of the alleged effect on trade union rights. In the light of this information, the Committee will not pursue its examination of this allegation further.*

155. *Without prejudice to the foregoing, the Committee observes that SINTRAIME alleges that the Ministry of Labour did not deal with the complaint it submitted on 16 December 2015 concerning anti-union dismissals and persecution as part of the cancellation of the commercial contract signed between contracting enterprises B and C, and that the Government does not state that it has carried out an investigation into those allegations. In this regard, the Committee recalls that, where cases of alleged anti-union discrimination are involved, the competent authorities should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see* ***Compilation****, para. 1159] and trusts that the Government will ensure the full respect of the above.*

156. *Finally, with regard to the dismissal carried out in December 2015 by contracting enterprise B of trade union members that had participated in a strike in 2013 in an enterprise that later merged with enterprise B and the corresponding allegations of anti-union discrimination and violation of the disciplinary process established by the collective labour agreement, the Committee observes that it is clear from the information and documents provided by the parties that: (i) the Labour Appeals Chamber of the Supreme Court of Justice ruled on 9 April 2014 that the strike carried out by this group of workers was illegal; (ii) it appears from the summons to statement hearings, which have been provided by the Government, that the workers involved were given two days to present themselves to the employer and that two members of the trade union were allowed to be present; (iii) the First Criminal Court which supervises compliance of the municipality of Soledad (Atlántico), on considering a tutela action, ruled on 12 January 2016 that there was no evidence of a persecutory attitude against the trade union body and considered that the case should be referred to the ordinary courts, where the evidence could be extensively assessed in order to determine whether the trade union association was truly affected; and (iv) there is no information about the possible actions brought in the ordinary courts concerning the alleged situation. On the basis of the above, the Committee will not pursue its examination of this allegation any further.*

The Committee's recommendation

157. In the light of its foregoing conclusions, which do not call for further examination, the Committee invites the Governing Body to approve the following recommendation:

> **The Committee trusts that the Government will ensure that, where there are allegations of anti-union discrimination and threats, the competent authorities will immediately investigate and take appropriate measures to remedy the consequences of such acts.**

Case No. 3316

Report in which the Committee requests
to be kept informed of developments

Complaint against the Government of Colombia
presented by
– the Single Confederation of Workers of Colombia (CUT) and
– the Colombian Association of Civil Aviators (ACDAC)
supported by
– the International Trade Union Confederation (ITUC)
– the Trade Union Confederation of the Americas (TUCA–CSA)
– the International Transport Workers' Federation (ITF)
– the International Federation of Air Line Pilots' Associations (IFALPA)
– the General Confederation of Labour (CGT)
– the Confederation of Workers of Colombia (CTC)
– the Colombian Association of Flight Attendants (ACAV) and
– the Union of Air Transport Workers of Colombia (SINTRATAC)

Allegations: The complainant organizations allege violations of the right to collective bargaining in Avianca S.A. through the use of collective accords, the denial of the right of the enterprise's pilots to go on strike, as well as a series of anti-union acts following the ruling that the strike held by the Colombian Association of Civil Aviators was illegal

158. The complainants sent their allegations in communications dated 17 April, 29 and 31 May, 4 June, and 1 and 31 October 2018; 11 January, 1 April, 15 and 21 May, 21 June and 26 August 2019; 7 and 11 February and 2 March 2020, 14 and 21 January 2021.

159. The Government sent its observations in communications dated 24 April, 13 June and 3 September 2019, 21 February, 3 and 31 March, 12 September and 23 December 2020 and 17 February 2021.

160. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

161. In a communication in April 2018, the Single Confederation of Workers of Colombia (CUT) and the Colombian Association of Civil Aviators (ACDAC) allege that the airline Avianca (hereinafter "the enterprise"), with the complicity and acquiescence of the public authorities, is violating the rights to freedom of association, collective bargaining and strike of civil aviators affiliated to the ACDAC through, among other activities: (i) acts of

anti-union discrimination; (ii) the signing of collective accords with non-unionized aviators, the contents of which discriminate against unionized workers and the existence of which has an impact on union membership and the exercise of the right to collective bargaining; (iii) the refusal to bargain collectively with the trade union; (iv) undue interference by the authorities in the strike by appointing an arbitration tribunal; (v) the replacement of the striking pilots by foreign pilots; (vi) the unlawful ruling that the strike held by the trade union was illegal; (vii) violations of due process to the detriment of the trade union organizations; (viii) mass dismissals and penalties imposed against union members; and (ix) the danger that the trade union would face dissolution for having exercised the right to strike.

162. The complainant organizations indicate that: (i) the ACDAC is a first-level trade union organization established in 1949 that groups together aviators from various Colombian aviation companies and several companies specializing in aerial spraying activities; (ii) the ACDAC signs different collective work agreements with each aviation company, whose clauses are included in the employment contracts of the pilots belonging to the trade union; (iii) with respect to the enterprise that is the subject of the complaint, the ACDAC is recognized as a single occupation union , in accordance with clause 1 of the collective work agreement in force; (iv) before the collective dispute that is the subject of the present case began, the ACDAC had as members 702 workers of the airline enterprise; and (v) since the establishment of the ACDAC, the trade union organization and the airline enterprise have signed several collective agreements recognizing the non-statutory rights of the aviators belonging to the ACDAC.

163. The complainant organizations also describe a series of events related to collective bargaining procedures between the ACDAC and the airline enterprise dating back to 2013. They state in this respect that: (i) a group of non-unionized aviators, on the one hand, and the ACDAC, on the other, decided to request the enterprise to review its working conditions through a public collective bargaining process that began in March 2013; (ii) the management of the enterprise put pressure on the non-unionized workers to reach an agreement involving the signing of a collective accord (*pacto colectivo*) classified as a "voluntary benefit plan". The unionized workers were left without an agreement and discriminated against owing to the inequality resulting from the recognition of better rights for non-unionized workers; (iii) on 22 March 2013, the ACDAC informed the enterprise in writing of its intention to partially denounce the collective work agreement in force; (iv) on 17 December 2013, the ACDAC officially submitted its list of demands but the enterprise refused to negotiate with the ACDAC; (v) the ACDAC lodged an action for protection of rights, which resulted in a favourable outcome for the ACDAC and required the enterprise to sit at the negotiating table; (vi) owing to the enterprise's refusal to examine the list of demands, an agreement was not reached, which is why the trade union's general assembly decided to refer the matter to an arbitration tribunal; (vii) on 30 April 2014, the Ministry of Labour ordered an arbitration tribunal to be set up, a decision contested without success by the enterprise; (viii) through ruling No. T-069 of 18 February 2015, the Constitutional Court ordered the enterprise to extend the same benefits and increases set out in the voluntary benefit plan to the unionized workers and to refrain from laying down conditions that discourage workers from joining or remaining in the trade union; (ix) on 5 October 2015, the ACDAC communicated to the Ministry of Labour its decision to withdraw its list of demands submitted on 17 December 2013 owing to irregularities observed during the dispute and because the arbitration tribunal was not providing any guarantee of a genuine ruling of equity; (x) on 8 August 2017, the ACDAC submitted a fresh list of demands, the direct settlement stage began on 23 August 2017 and concluded on

11 September 2017, with no agreement being reached between the parties; (xi) with the possibility of reaching an agreement having failed, the trade union decided to resort to strike action, which began on 20 September 2017 and was joined by 702 pilots belonging to the ACDAC, of the 1,200 pilots working for the enterprise; (xii) on 28 September 2017, through ruling No. 3744 of 2017, the Minister of Labour, exceeding her legislative authority and without being requested to do so, ordered a compulsory work arbitration tribunal to be set up, asserting that air transport is an essential public service and, as such, a strike cannot be held (the convening of the arbitration tribunal was legally contested by the ACDAC claiming an infringement of its fundamental rights, a legal action which is still pending); (xiii) on 3 October 2017, the Civil Aviation Authority authorized the enterprise to contract foreign pilots to cover the air routes cancelled on account of the exercise of the right to strike; (xiv) the Public Prosecutor's Office summoned a hearing bringing charges against the president of the trade union following a complaint lodged by the enterprise at the beginning of that year for the alleged offence of economic panic; (xv) on 6 October 2017, the Bogota High Court ruled in first instance that the strike held by the ACDAC was illegal, a decision that was appealed by the trade union; (xvi) on 31 October 2017, the Ombudsman summoned the enterprise to try to mediate in the labour dispute, a proposal that was declined by the enterprise, which indicated that it was awaiting the decision of the arbitration tribunal; (xvii) on 10 November 2017, the strike action came to an end after 51 days following a decision by the general assembly of the ACDAC; (xviii) the enterprise then proceeded to send those pilots who were trade union leaders on permanent leave to prevent them from returning to the enterprise; (xix) on 29 November 2017, the Labour Appeals Chamber of the Supreme Court upheld in second instance the ruling that the strike was illegal because, in the Chamber's view, it concerned an essential public service and because it did not receive the majorities required for the ballot, both of which are criteria that run counter to the Political Constitution and ILO Convention No. 87, as well as the recommendations of the ILO supervisory bodies; (xx) on 14 February 2018, the Labour Appeals Chamber of the Supreme Court rejected the applications for nullity, clarification and addition filed separately by the ACDAC and the CUT; (xxi) from 26 February 2018, the enterprise began more than 230 disciplinary proceedings against the unionized pilots for taking part in the strike; during those proceedings, the enterprise prevented the pilots from having the assistance of a lawyer or trade union leaders while the various dismissal hearings were simultaneously being held; (xxii) by 6 April 2018, 112 pilots had been penalized through a suspension of their contracts, 116 had been dismissed, including five national union leaders and 23 union leaders of subcommittees; and (xxiii) the trade union leaders who had been dismissed received a letter from the enterprise stating that: "The enterprise reserves the right to impose material consequences on you for the illegal action that you led as a member of the executive board of the ACDAC."

164. The complainant organizations further state that the principal objective of a trade union organization is the development of the right to collective bargaining and it is for this reason that when it is not possible to reach an agreement, workers have the possibility of exercising their right to strike. They denounce the fact that civil aviators in Colombia are being denied this right on the basis of the mistaken allegation that they provide an essential public service, demonstrating a complete disregard by the Government of considerations of what is "essential in the strict sense" as expressed by the Committee on Freedom of Association, through its decisions and the ILO Conventions ratified by Colombia that form part of the body of constitutional law. The complainants state that the facts described in the above paragraphs constitute a violation of Articles 2, 3 6 and 8

of Convention No. 87, Articles 1, 3 and 4 of Convention No. 98 and Articles 3, 4 and 6 of Convention No. 154.

165. The complainants also list the various violations of freedom of association to which the ACDAC was subjected in its relations with the enterprise. They refer firstly to the setting up of an arbitration tribunal by the Ministry of Labour to resolve the collective dispute, ignoring the ILO's rules, in particular Article 6 of Convention No. 154 concerning the voluntary participation of parties in collective bargaining, and conciliation and arbitration mechanisms. They state in this respect that: (i) the Ministry of Labour convened the arbitration tribunal based on the mistaken idea that the strike action was being held by an essential public service and was also having a serious impact on the national economy, ignoring the fact that 43 other air passenger transport companies exist in Colombia, 37 of which are foreign companies, which is why a violation of the fundamental rights of citizens could not possibly have occurred because the enterprise that is the subject of the complaint is merely one among other passenger transport companies; (iii) the Government did not take measures to protect the rights to freedom of association, collective bargaining and strike during the collective dispute because priority was given to the good offices not to facilitate collective bargaining but rather to intervene in the dispute in order to bring judicial proceedings.

166. Secondly, the complainants assert that the ruling that the strike held by the ACDAC was illegal, based on the twofold reasoning that air transport constitutes an essential public service and that the occupation-based nature of the strike held by the enterprise's pilots should be approved by the majority of all the enterprise's workers, is contrary to the ILO's principles. They state in this respect that: (i) air transport in Colombia does not meet the criteria established by the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on defining essential public services in the strict sense; (ii) both the Committee on Freedom of Association and the CEACR have repeatedly drawn attention to specific cases where air transport does not constitute an essential public service in the strict sense; and (iii) the Committee on Freedom of Association and the CEACR have also emphasized that the requirement for excessive majorities in order to declare a strike could place a substantial limitation on the means of action open to trade union organizations.

167. Thirdly, the complainants refer to the contracting of foreign pilots during the strike through an intervention by the Civil Aviation Authority. They state in this respect that: (i) a fundamental requirement to enable the exercise of the right to strike is the prohibition of "*esquirolaje*" [promoting, permitting or guaranteeing the replacement of staff] and therefore the provision of a guarantee from the enterprise to the trade union organizations that it will not contract other workers to replace them; and (ii) the decision adopted through Civil Aviation Authority ruling No. 03033 amending the regulation in order to allow foreign pilots to be contracted, thereby replacing the workers on strike, is contrary to the State of Colombia's obligations with respect to the right to freedom of association and trade union rights.

168. Fourthly, the complainants allege that the judicial authorities that ruled on the legality of the strike ignored the CUT's rights to representation, denying it both in first and in second instance the ability to act as an added party to the ACDAC, the defendant in the proceedings. They state in this respect that the courts incorrectly required the CUT to prove substantial and concrete involvement in the proceedings and, in violation of the ILO's rules, failed to recognize the trade union representativeness, autonomy and legitimacy of the CUT to defend the fundamental guarantees of freedom of association in all necessary forums.

169. Fifthly, the complainants allege that, during the strike, the enterprise's largest shareholder repeatedly referred to the strikers as "criminals and extortionists" which, in the light of the serious context of violence in Colombia, gives rise to risks to the personal safety and life of the members of the ACDAC and results in other workers refraining from exercising their rights for fear of reprisals by their employer. The complainants also state that the acts of stigmatization, criminalization and slander against the trade union and its leaders did not end when the strike action stopped but increased during the dismissals following the strike, including: the launching by the Public Prosecutor's Office of criminal proceedings against the union leaders for the alleged offences of obstructing the course of justice, promoting public smear campaigns through alleged misappropriation of the trade union's funds, involving charges of corruption, tax evasion and several types of denigration in widely circulated media.

170. Sixthly, the complainants denounce the fact that section 450 of the Substantive Labour Code authorizes the dissolution of the trade union and the dismissal of unionized workers participating in the strike that was declared illegal, even though this judicial declaration is contrary to the principles of the ILO. They add that this provision contradicts the repeated recommendations of the CEACR on the matter.

171. The complainant organizations also refer to a previous complaint submitted against the enterprise in 2004 and examined by the Committee in Case No. 2362. They indicate that the case refers to anti-union dismissals in the context of a restructuring process, the rehiring of dismissed workers through labour cooperatives, depriving them of coverage under the collective agreement concluded with the business group, threats against trade union leaders, failure to comply with the collective agreement, the conclusion of a collective accord and pressure on individuals to adhere to it, dismissals of trade union leaders and non-compliance with a collective agreement. The complainants request that the allegations in that case and the related conclusions of the Committee be taken into account as the background to the present dispute and as evidence of the enterprise's anti-union activities and of the Government's responsibility in the continued violation of rights.

172. The complainant organizations further provide a list of numerous administrative and legal actions initiated by them in relation to the present dispute, indicating the status of each one. They refer in particular to their frustrated attempt to resolve the dispute through conciliation before the Special Committee for the Handling of Disputes referred to the ILO (CETCOIT). They state in this respect that: (i) the request to refer the dispute to the CETCOIT was submitted by the trade union organizations on 12 October 2017; (ii) the aim of that initiative was to overcome the excessive use of judicial action in the collective dispute; and (iii) however, in late 2017, the Employer representatives of the CETCOIT maintained the position that the dispute should be heard in the judicial proceedings already under way and that the case should not be dealt with by the CETCOIT, a position supported by the representatives of the Government who also refused to admit the case on the ground that the enterprise would not wish to resolve the dispute before that body.

173. On the basis of the above, the CUT and the ACDAC request the Committee on Freedom of Association to make recommendations to the State of Colombia with a view to: (i) deleting section 450 of the Substantive Labour Code, which provides that employers can dismiss workers who have taken part in a strike, once the strike has been declared illegal, since it is an excessive measure that discourages trade union action; (ii) reviewing the Substantive Labour Code so that the characteristics of essential public services are aligned with the criteria established by the ILO supervisory bodies and in such a manner

that air transport is not included as an essential public service; (iii) preventing the application of the legal effects of the ruling that the strike action was illegal because the strike was held in conformity with national standards that are contrary to international labour standards and recommendations of the ILO supervisory bodies on the matter; (iv) the enterprise rehiring the workers who took part in the strike, who were dismissed following the ruling that the strike was illegal, in violation of the recommendations of the ILO, and restoring the rights of the penalized workers; (v) the Ministry of Labour henceforth refraining from setting up arbitration tribunals that have not been requested by the parties to the dispute; (vi) the Civil Aviation Authority and all other national public bodies henceforth refraining from taking any action aimed at promoting, permitting or guaranteeing the replacement of striking staff members *(esquirolaje)*; (vii) the Government and the national prosecuting or judicial authorities terminating the criminal proceedings in progress against the members of the ACDAC for reasons related to the exercise of trade union activity; (viii) preventing the dissolution of the trade union for reasons related to the strike; (ix) preventing any material repercussions on the trade union and its members for matters related to the strike; and (x) guaranteeing an end to all anti-union action.

174. In a communication dated 17 April 2018, the Colombian Association of Flight Attendants (ACAV) and the Union of Air Transport Workers of Colombia (SINTRATAC) indicate their wish to be joined to the complaint submitted by the CUT and the ACDAC. Both organizations state that their members have, with the complicity of the State, also fallen victim to the enterprise's anti-union policy, and specifically that: (i) the enterprise discriminates against the members of their organizations; (ii) similarly to the situation involving the pilots belonging to the ACDAC, the enterprise ignores the signed collective agreements and attempts to impose the collective accord concluded with the non-unionized workers on its other categories of workers; (iii) the State has not taken decisive action to sanction the enterprise, as an exemplary case, for its indiscriminate application of collective accords despite the existence of trade unions within the enterprise; (iv) the failure to implement the recommendations of the ILO supervisory bodies on collective accords has resulted in an end to collective bargaining with the trade unions and its replacement with accords signed by a minority of non-unionized workers; (v) the State of Colombia has not provided judicial guarantees of due process to the striking pilots belonging to the ACDAC; (vi) the State of Colombia has violated the right to strike of the pilots belonging to the ACDAC in view of the fact that transport in general and air transport in particular do not constitute an essential public service. On the basis of the above, the ACAV and the SINTRATAC request the Committee to protect, as a matter of urgency, the trade union rights of the enterprise's pilots, flight attendants and cabin crew who have been threatened because of the above-mentioned collective accords.

175. In a communication dated 31 May 2018, the CUT and the ACDAC provide additional information on the alleged anti-union nature of the collective accord concluded by the enterprise with the non-unionized pilots. They state that the recommendations addressed to Colombia by the Committee and the CEACR to prevent collective bargaining with non-unionized workers in enterprises where trade unions exist have been ignored by the Government. They allege that the above is demonstrated by the situation at the enterprise in which the Ministry of Labour not only took no action to prevent the enterprise from signing and imposing collective accords that have a serious impact on freedom of association and the right to collective bargaining but even fostered such accords. They state that, by acting in that manner, the Ministry of Labour not only ignored Conventions Nos 87 and 98 but also ruling No. T-069 of 2015 concerning the collective accord concluded with the enterprise in 2013 and in which the Constitutional

Court not only ordered the benefits contained in the collective accord to be paid to the unionized workers, but also called for freedom of association and collective bargaining to be respected, in line with Conventions Nos 87 and 98.

176. The complainants state specifically that: (i) the enterprise, together with the Organization of Avianca Aviators (ODEAA), which is a civil association and not an employing organization, colluded to promote collective accords applicable to non-unionized pilots that discriminate against unionized pilots and that seek to amend the collective agreement in force with the ACDAC; (ii) the enterprise and the ODEAA signed a collective accord in March 2017; (iii) the new accord abusively reproduces the content of the collective agreement, while changing a number of clauses (concerning additional crew (termed "*tripadi*"), days off, overnight stays, multi-crew use, food allowances, time spent in airports, assigning flights on 25 December and 12 January, educational assistance, housing funds, trade union leave, airfares for members of the executive board, annual assistance granted by the enterprise to the organization, the roster of pilots and co-pilots, the classification of crews, occupational diseases, long-service bonuses, monthly salary, assistance for non-absenteeism, navigation bonuses, holiday bonuses, disciplinary proceedings, life insurance, maternity assistance, public transport passes, retirement, medical services and tickets for retirees, uniforms, travel allowances, assistance for permanent transfers, variable compensation, language courses, deductions on behalf of the trade union organization); (iv) despite the fact that the ODEAA is civil, rather than trade union, in nature and that, at the time this communication was sent, only 30 pilots had signed the collective accord, the enterprise and the ODEAA agreed to lie to the media and to the pilots, presenting the ODEAA as the representative of the majority of the enterprise's pilots, the development of the new accord as being the result of collective bargaining with all the enterprise's pilots, and the collective accord as a collective agreement (v) the enterprise is insisting on implementing the new collective accord over the collective agreement with respect to the various matters mentioned in point (iii) above; (vi) previously, in October 2013, the enterprise had already concluded a collective accord with the ODEAA (referred to as a voluntary benefit plan), the content of which discriminated against the unionized pilots with respect to a number of aspects; (vii) the enterprise attempted to force the unionized pilots, as well as the flight attendants and ground staff, to accept these changes and, by promoting the new collective accord, discouraged trade union membership among the workers and attempted to deprive the trade unions of their right to collective bargaining; (viii) through ruling No. T-069 of 2015, the Constitutional Court protected the rights of the unionized pilots and flight attendants, ordering the enterprise to: (a) extend to the workers belonging to the ACDAC and those benefiting from the collective agreement the benefits set out in the voluntary benefit plan; (b) provide a guarantee to those workers who had resigned from the ACDAC in order to enjoy the benefits set out in the voluntary benefit plan the possibility of returning to that organization and being governed by the collective agreement without losing the benefits contained in the voluntary benefit plan; and (c) refrain from laying down conditions in collective accords that discriminate against unionized workers, and from adopting policies aimed at discouraging workers from joining or remaining in the trade union; and (ix) the enterprise is not complying with ruling No. T-069 of 2015, as demonstrated above by the content of the collective accord deposited with the Ministry of Labour in March 2017.

177. Having stated that the events described above led the unionized pilots to exercise their right to strike in accordance with ILO doctrine, the complainant organizations request the Committee on Freedom of Association to: (i) require the State of Colombia to take the measures necessary to ensure that the collective accord reached between the

enterprise and the civil association ODEAA does not affect the rights to organize and collective bargaining; (ii) require the enterprise to immediately terminate the collective accord concluded between the civil association ODEAA and a group of 30 pilots and not to sign other collective accords while trade union organizations such as the ACDAC, the ACAV or the SINTRATAC exist in the enterprise; and (iii) request the non-application of sections 430 and 450 of the Substantive Labour Code as they are contrary to the ILO's rules and because they enabled the anti-union dismissal of many pilots belonging to the ACDAC.

178. In communications dated 29 May, 31 May and 4 June 2018, the CUT and the ACDAC sent additional information. They state firstly that there are more than 60 air passenger transport companies in Colombia and more than 20 air ambulance companies and, as a result, over 70 per cent of domestic air travel continued during the strike. They further state that, as a result of the actions taken by the enterprise during the collective dispute that is the subject of this case, 25 per cent of the enterprise's pilots who were members of the ACDAC have left the trade union (179 of the 702 members that the ACDAC had within the enterprise when the strike began). The collective accord concluded between the enterprise and the non-unionized pilots is now being applied to those workers, thereby discouraging freedom of association and collective bargaining, the collective accord being the far less risky option in the context of anti-union discrimination.

179. In communications dated 1 and 31 October 2018, the ACDAC alleges that the pilots belonging to the trade union were subjected to illegal eavesdropping carried out by a contractor working for the enterprise with a view to discovering in advance the legal actions that the trade union was planning to take and that the results of these interceptions were used by the enterprise in the disciplinary proceedings following the pilots' strike. The complainant organization states that these interceptions are the subject of an investigation by the Public Prosecutor's Office and that a person has been arrested in that connection. The complainant organization further alleges that the enterprise is conducting an economic blockade of the ACDAC, preventing the deduction of members' ordinary and extraordinary union dues in order to prevent the trade union from accomplishing its aims and defending the victims of the collective dispute. Lastly, the ACDAC states that these new facts demonstrate the need for the present complaint to be urgently examined by the Committee.

180. In a communication dated 11 January 2019, the ACDAC states that the investigation conducted by the Public Prosecutor's Office into the illegal interceptions has exposed the existence of an organized criminal network in which both the enterprise's lawyers and officials of the Public Prosecutor's Office itself were involved. The complainant organization further states that the Government and the Congress of the Republic are putting forward a bill called the "Consumer Statute", the purpose of which is to establish that air transport constitutes an essential public service, thereby contradicting the ILO's rules, as well as the related recommendations of the ILO supervisory bodies.

181. In a communication dated 1 April 2019, the CUT also requests the Committee to urgently examine the case. In addition to allegations put forward in previous communications, the complainant organization denounces: (i) the lack of protection from the Ministry of Labour and the tribunals in light of the irregularities and arbitrary actions committed in the disciplinary proceedings in which more than 100 unionized pilots were dismissed and an additional 100 were penalized; (ii) the irreversible damage caused to the dismissed pilots who cannot be re-employed by other companies because of the time that has elapsed in which they have been unable to complete flight hours; (iii) the lack of judicial guarantees for settling the dispute, given that the Constitutional Court is headed

by a lawyer who was employed by the enterprise and that, in spite of that fact, the lawyer participated in the proceedings for protection of rights to determine that they will not be selected for review by the Constitutional Court; (iv) the application to dissolve the legal personality of the ACDAC submitted by the enterprise through expedited judicial proceedings and based on the ruling that the strike held by the trade union was illegal. The CUT states in this respect that the dissolution of the trade union, resulting from mistakes made by the State in incorrectly classifying the strike as illegal, would lead to the disappearance of eight collective agreements in the air transport sector and leave destitute more than 1,000 families benefiting from their provisions. Lastly, the CUT indicates that, in view of the severity of the attacks on human and labour rights, the necessary actions have been brought not only before the ILO but also before the Inter-American Commission on Human Rights.

182. In communications dated 15 and 21 May 2019, the ACAV, the SINTRATAC and the ACDAC also request the urgent intervention of the Committee to examine the present complaint in view of the imminent risk that the ACDAC will be dissolved following the legal proceedings to which it is being subjected. The ACAV and the SINTRATAC add that flight attendants and crews are not able to bargain collectively with the enterprise through their trade union organizations either due to the enterprise giving precedence to the interests of the collective accord and that approximately 20 flight attendants were dismissed after their trade union submitted a list of demands.

183. In a communication dated 21 June 2019, the ACAV and the SINTRATAC indicate that the criminal courts have recently convicted an official of the Public Prosecutor's Office, Mr Luis Carlos Góngora, for the illegal interceptions that the unionized pilots belonging to the ACDAC were subjected to during the strike. They assert that the ruling states that the enterprise's lawyers had an interest in intercepting the pilots' conversations throughout the collective dispute and that the ruling demonstrates the severity of the case and the need for it to be urgently examined by the Committee.

184. In a communication dated 26 August 2019, the ACDAC states that the consequences of its legal dissolution, which it alleges could be imminent, would lead to: (i) the disappearance of the collective agreements of companies in the air transport sector and the loss of their benefits for thousands of active and retired pilots; (ii) the impossibility of the trade union seeking ways to improve the pilots' working conditions; (iii) the impossibility of pursuing the legal actions taken to protect trade union rights in the aviation sector; (iv) the precedence of the enterprise's collective accord as the regulatory source for all pilots, which would set a very bad precedent for the other occupations in the enterprise that are also being threatened with collective accords; and (v) impunity for the offences committed against the trade union and collective bargaining rights of the members of the ACDAC.

185. In communications dated 7 and 11 February and 2 March 2020, the complainant organizations denounce that ACDAC union leaders and members of their families were subjected to death threats, a situation which, according to the complainants, makes it impossible for the ACDAC to appear before the CETCOIT and requires the case to be urgently examined by the Committee.

186. In communications dated 14 and 26 January 2021, the complainant organizations refer to an agreement signed on 27 October 2020 between the enterprise and the ACDAC. The complainant organizations indicate in this regard that: (i) they welcome the agreement, the objective of which, in a very difficult economic context, is to ensure the continued operation of the enterprise and save jobs; (ii) the agreement, based on the trust that exists between the new Chief Executive Officer of the enterprise and the ACDAC, was

possible thanks to the willingness on the part of the trade union to sacrifice acquired extra-legal rights (reduction of wages and deferral of certain clauses in the agreement for four years), and the willingness on the part of the enterprise to preserve the greatest possible number of jobs. The complainant organizations assert, however, that: (i) the sole and specific objective of the agreement signed was the continued operation of the enterprise and the jobs therein by the aforementioned means; and (ii) most of the violations that gave rise to the present complaint have not been resolved and persist, in particular those related to the exercise of the right to strike, the discrimination affecting the aviators who took part in it, the criminal charges against the leaders of the ACDAC and the resort to collective accords with non-unionized workers, for which reasons the Committee on Freedom of Association must examine the present case.

187. The ACDAC attaches the text of the agreement of 27 October 2020 concluded with the enterprise and states specifically that: (i) the agreement expressly recognizes that the ACDAC is an occupation-based union; (ii) the unilateral withdrawal by the enterprise of its legal actions demonstrates that there were no grounds for pursuing them; (iii) although the enterprise undertook, by the agreement, to refrain from any act contrary to freedom of association and to the rights recognized in the collective agreement with the ACDAC, this did not prevent it, the following month, from signing a collective accord with its non-unionized pilots, thereby undermining the original agreement and discriminating in operational terms against the ACDAC pilots; and (iv) lastly, the agreement provides that the enterprise will comply with any national or international decision concerning the reinstatement of the pilots, which demonstrates the acceptance by the enterprise of the review by this Committee of the case.

B. The Government's reply

188. In a communication dated 24 April 2019, the Government submits the observations of the enterprise, as well as its reply to the complainants' allegations. The enterprise states firstly that: (i) in accordance with its statutes, the ACDAC is an industrial trade union organization; (ii) it is a minority organization within the enterprise (as at 15 September 2017, 693 of the enterprise's 8,524 workers were members of the ACDAC); (iii) the enterprise has signed several collective agreements with the ACDAC and has always respected the non-statutory rights laid down in those instruments; (iv) in 2013, the ACDAC submitted a list of demands but decided to leave the negotiating table and it was therefore not possible to reach any agreement; (v) in a consultation process backed by the Ministry of Labour, a voluntary benefit plan was drawn up, which the enterprise put forward to all the pilots, the widely offered plan rendering the formulation of discriminatory acts impossible; (vi) the voluntary benefit plan is not relevant to this case given that it has not been in force since 1 May 2017, that a court decision on the situation already exists, and because it has already been examined by the Committee on Freedom of Association in Case No. 2362; (vii) on 17 December 2013, the ACDAC submitted a list of demands, without first having denounced the collective work agreement; (viii) despite the lack of a complaint concerning the agreement, the enterprise began the direct settlement stage on 21 March 2014, which concluded on 10 April of the same year without reaching an agreement; (ix) at the request of the ACDAC, the Ministry of Labour convened an arbitration tribunal, a decision contested by the enterprise but upheld in a ruling of 30 April 2014; (x) on 5 October 2015, the ACDAC, with no explanation, withdrew the list of demands submitted in December 2013; (xi) on 8 August 2017, the ACDAC submitted a fresh list of demands without validating the complaint regarding the collective agreement; (xii) the direct settlement stage lasted until 11 September 2017 with no agreement being reached; (xiii) once the direct settlement stage had ended, the

enterprise met with the trade union on more than six occasions with the assistance of the Ministry of Labour; (xiv) the trade union organization elected to unlawfully declare a strike within the enterprise, despite not having obtained the majorities required under the law, and to hold the strike within an essential public service in the strict sense; (xv) on 3 October 2017, the Special Administrative Unit for Civil Aviation issued a ruling of a general nature and with an erga omnes effect to broaden the opportunities to contract foreign captains in Colombia (the ACDAC lodged an action for protection of rights against the ruling, which was first suspended and later declared to be illegal, which is why the enterprise refrained from contracting foreign captains); (xvi) the enterprise considers that Mr Jaime Hernández, president of the ACDAC, engaged in conduct that could constitute the offence of economic panic, which is why it consequently filed the related complaint; (xvii) on 6 October 2017, the Bogota High Court ruled in first instance that the strike held by the ACDAC was illegal on the two grounds mentioned in point (xiv); (xviii) the Ministry of Labour convened the arbitration tribunal when the legal action concerning the classification of the legality of the strike had already been lodged; (xix) the arbitration award was handed down on 7 December 2017, giving rise to an appeal for annulment that is still pending; (xx) once the strike had ended, the enterprise reinstated the striking workers; (xxi) following the ruling that the strike was illegal and after scrupulously respecting due process, and based on objective and compelling reasons, the enterprise decided with just cause to terminate the employment contracts of 83 pilots; (xxii) the enterprise considers that the executive board of the ACDAC engaged in behaviour that allegedly amounts to the offence of obstructing the course of justice, which is why it consequently filed the complaint to enable the competent authority to carry out the respective investigation; and (xxiii) although the enterprise reported the possibility of civil proceedings in order to seek compensation for the damage caused, applications of this type have not been brought against any of the members of the ACDAC.

189. The enterprise also comments on the judicial declaration of the illegality of the strike, stating that the declaration complied with the principles of the ILO and recalling that the judicial power to determine the legality or illegality of the strike is set down in a legislative reform of 2008, which was adopted in order to comply with the recommendations of the ILO supervisory bodies in this respect. The enterprise states that the Supreme Court found firstly that, in accordance with the democratic principles recognized by the Political Constitution and by the ILO supervisory bodies, the ACDAC had not obtained the majority required by section 444 of the Substantive Labour Code to be able to hold a strike. The enterprise indicates in this respect that: (i) without prejudice to the consideration of the ACDAC as an industry- or occupation-based trade union, the democratic principles on strike ballots set down in section 444 of the Substantive Labour Code should be respected; (ii) the actions of the ACDAC during the strike ballot demonstrate that it recognizes that it is a minority union because, according to the minutes of its meetings, it called on the other trade unions in the enterprise to approve the strike action with the aim of obtaining a majority ballot among all the enterprise's workers; (iii) notwithstanding this, in the end, the ACDAC held the ballot in a members-only meeting room, without the members of the other trade unions casting a ballot, preventing the participation of non-unionized workers despite their request to take part, and without accepting the findings of the labour inspector to guarantee the validity of the results; and (iv) as a result, only 279 of the enterprise's 8,624 workers voted in favour of the strike.

190. The enterprise further states that the Supreme Court, in its examination of the legality of the strike, also considered that, in the Colombian context, air transport constitutes an

essential public service because it: (i) ensures the supply of goods and services, thereby guaranteeing fundamental rights such as health and education; (ii) allows the transfer of patients and medical supplies to guarantee the right to life and health of the population; and (iii) even enables humanitarian assistance services to be provided to populations that are remote and disconnected from the national territory and guarantees the connectivity of marginalized or remote regions, which do not have other transport alternatives. The enterprise provides as examples the island of San Andres and the city of Leticia where, owing to the geographical conditions, air transport is the main and almost only means of supplying food and medicines, as well ensuring the movement of people. The enterprise also refers to the declaration of the Governor of the Department of Caldas, cited in the ruling of the Supreme Court, in which he expresses his concern over the consequences of the cessation of activities for the region "… remaining completely isolated from the rest of the country …". In respect of the above, the enterprise provides the following figures: owing to Colombia's economic situation and infrastructure, the enterprise provides 48 per cent of passenger transport, the provision of 80 per cent of food supplies to the Department of San Andres, Providencia and Santa Catalina and 50 per cent of food supplies to the city of Leticia, capital of the Department of Amazonas. It is the only airline authorized for the transport of items such as medicines, human organs, blood, plasma, chemotherapy treatments, human remains and surgical items. The enterprise is the only airline in Colombia that provides air transport to the population of Manizales, Caldas. The 51 days of strike action affected more than 377,000 passengers and 14,547 flights were cancelled.

191. The enterprise concludes by highlighting that the review of the enterprise's activity and its classification as an essential public service in the strict sense has been the subject of a detailed legal analysis, followed by a discussion of the evidence in which it was objectively decided that its disruption in Colombia would put the life, personal safety and health of some or all of the population at risk, taking into account the context and transport infrastructure of the country. The enterprise further states that the ruling of the Supreme Court is based on the guidelines developed by the Constitutional Court in its interpretation of article 56 of the Political Constitution which guarantees the right to strike, except for essential public services defined by the legislator, and that this jurisprudence takes full account of the criteria of the ILO supervisory bodies in this respect. The enterprise adds that, on previous occasions, the Constitutional Court had highlighted the essential nature of the activities of transport companies in general (ruling No. C-450 of 4 October 1995) and of the enterprise that is the subject of this case (ruling No. T-987 of 23 November 2012).

192. The enterprise also states that, in their allegations, the complainant organizations incorrectly refer to previous cases of the Committee on Freedom of Association whose factual elements are very different from this case, which does not allow their use out of context, particularly when taking into account that: (i) the Committee clearly maintains that the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population depends to a large extent on the particular circumstances prevailing in a country; (ii) a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering life, personal safety or health; and (iii) in this case, the strike held by the ACDAC lasted for 51 days.

193. The enterprise also provides further details on the disciplinary proceedings brought by the enterprise against the strikers, stating in this respect that: (i) the enterprise respects a process that was previously established with the trade union organization through the collective agreement, which is consistent with the provisions of Colombian legislation;

(ii) that process provides for the identification of those workers who took part in the strike, the establishment of their level of participation and thus the imposition of non-discretionary sanctions, in line with the analysis of the level of participation of each pilot, including acquittals in cases where their non-involvement in the activities of the trade union organization is proven; (iii) in accordance with section 450(2) of the Substantive Labour Code, the employer is authorized to dismiss workers who have participated in a strike declared illegal by the courts; (iv) this provision has been declared valid by the Supreme Court of Justice and is in conformity with the position of the Committee on Freedom of Association on the matter, which only rejects the dismissal of workers following a lawful strike; (v) a transparent and serious process has been carried out to reinstate the workers who took part in the strike that was declared illegal, and the majority of striking pilots continue to form part of the enterprise (of the 702 pilots who participated in the strike, 232 were disciplined, resulting in 83 dismissals and 129 suspensions); (vi) only when there was a certainty that a pilot promoted the strike, participating actively in it, did the enterprise proceed to terminate his employment contract; and (vii) where it was not possible to establish that a pilot had promoted the cessation of activities, but it was determined that he had participated in it, that is to say through passive participation, the penalty imposed was suspension of the employment contract. The enterprise further highlights that a series of administrative and legal actions related to this case are still pending and states that it would be appropriate for the Committee to await the domestic resolution thereof in order to avoid a double investigation and to have available the factual and legal elements necessary to analyse the case.

194. The enterprise also provides its observations on the additional allegations submitted by the complainants in October 2018 and January 2019. With respect to the allegations of civil and criminal actions against ACDAC leaders, the enterprise states that: (i) a compensation claim can by no means be considered as criminalizing an act and the enterprise recently filed an application before the Sixteenth Civil Court of the Bogota Circuit for the recognition of and payment for the serious damage caused on the occasion of the illegal stoppage; (ii) the enterprise repudiates the labelling of the president of the ACDAC as a "criminal defendant" "for exercising his statutory and legal functions of defending and representing the pilots"; (iii) a criminal complaint has indeed been lodged against the president of the ACDAC at the request of the Public Prosecutor's Office concerning declarations he made on a television programme about an accident involving a plane belonging to the Bolivian airline Lamia, which occurred on 28 November 2016; (iv) in that interview, Mr Hernández circulated negative and false information regarding the enterprise; and (v) the declarations concerning the plane accident of an airline connected to the enterprise are unrelated to the "statutory and legal functions of defending and representing the pilots". With respect to the allegations of the ACDAC concerning irregularities in the disciplinary proceedings brought and dismissals ordered because of the strike action, the enterprise states that the disciplinary proceedings were conducted in full observance of the guarantees of due process. The termination of employment contracts with just cause occurred as a consequence of the judicial ruling in which the strike held by the ACDAC was declared illegal in a special hearing pursuant to Act No. 1210 of 2008. In addition, the disciplinary proceedings were conducted to identify and determine the level of participation of the striking workers, as well as to verify the occurrence of possible disciplinary offences arising from the illegal stoppage of activities. With respect to the allegations of illegal interceptions, the enterprise: (i) categorically denies any connection with the interceptions and states that it has never contracted services for that purpose, nor has it requested a natural or legal

person to carry out such services; (ii) states that, to date, the enterprise has not been notified of any judicial decision or criminal investigation and that the enterprise presented itself as a victim through a group of shareholders and is recognized as such by the courts of the Republic in the proceedings; (iii) in April 2017, the enterprise contracted the multinational company Berkeley Research Group (hereinafter "the investigation company") to conduct global investigations aimed at detecting any corporate fraud against the enterprise; and (iv) as a result of the arrest of Mr Fernández, representative of the investigation company in Colombia, and until the Public Prosecutor conducts and concludes the investigation, the enterprise is suspending its relations with the investigation company's branch in the country.

195. The enterprise further states that: (i) it ensured the timely remittance of union dues to ACDAC as certified in management records, where a grand total of 3,684,836,518 Colombian pesos is recorded for union dues deducted from pilots in 2017, 2018 and the months from January to February 2019; (ii) there are no blacklists against pilots who participated in the strike, as evidenced by the high percentage of pilots who continue to perform their duties in the enterprise, and (iii) with regard to the presentation of draft legislation relating to the exercise of strike action in the aviation sector, the need for such legislation has arisen in view of a societal need.

196. The Government provides the following reply to the allegations of the complainant organizations. The Government indicates that all of the facts to which the present complaint refers prior to the list of demands submitted by the ACDAC on 8 August 2017 form part of Case No. 2362, which is being followed up by the Committee on Freedom of Association and which, in accordance with the rules established by the Committee itself, should not be subject to further examination in the context of the present case. The Government indicates that in particular, this includes aspects related to the voluntary benefit plan offered by the enterprise in 2013 (which is no longer in effective) and the enforcement of ruling No. T-069 of the Constitutional Court.

197. The Government states in general terms that ILO Conventions Nos 87, 98 and 154 form part of the national Constitution and therefore serve as a necessary point of reference for the interpretation of workers' rights. It indicates that the concept of collective negotiation enshrined in Convention No. 154 is broader than lists of demands and collective agreements and that it also encompasses arbitration and strike mechanisms, which are therefore protected by the guarantees recognized by the Political Constitution and international Conventions for the right to collective bargaining.

198. The Government goes on to highlight that Article 4 of Convention No. 98 and Paragraph 1 of the Collective Agreements Recommendation, 1951 (No. 91) underline the need for collective bargaining mechanisms to be appropriate to national conditions, which is why it clearly provides that it falls to each country to regulate, depending on the circumstances of individual States, aspects related to collective bargaining and, inter alia, the right to strike. Similarly, the Committee on Freedom of Association has always recognized that determining whether a public service is essential depends to a large extent on the particular circumstances prevailing in a country and that 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 exceeds a certain scope.

199. With regard to the exercise of the right to strike in the air transport sector, the Government refers, firstly, to the legal framework for the right to strike in Colombia and to article 56 of the Political Constitution, which guarantees this right except in the case of essential public services as defined by law. It states that although the right to strike is not an absolute right, it can only be limited in the case of a public service of an essential

nature; the Constitutional Court has laid down two conditions, one material and the other formal, under which the right to strike may legitimately be limited: (i) firstly, from a material point of view, that it concerns a public service which by its nature may be considered as an essential public service, and (ii) secondly, from a formal point of view, that the legislator has not only expressly stipulated that the activity concerned is an essential public service but has furthermore expressly restricted the right to strike in respect of such activity, based on the material criterion of essential public service insofar as it affects the basic core of fundamental rights.

200. The Government refers to Constitutional Court ruling No. C-450 of 1995 in which the Court, referring to the non-absolute nature of the right to strike, specifies that a strike cannot affect the rights and fundamental freedoms of persons not involved in the conflict, since it is between workers and employers, and the use of strike action in public services can not threaten or undermine the rights of the community and of the State itself. It also states that the balance of conflicting interests and rights must weigh in favour of fundamental rights, that is to say the rights of the users of those services.

201. The Government adds that the official declaration of the legality or illegality of a strike falls to the judiciary, pursuant to Act No. 1210 of 2008, which was adopted with a view to complying with the pronouncements of the ILO supervisory bodies and was welcomed with satisfaction by the CEACR. The Government indicates that both the Labour Chamber of the High Court of the Judicial District of Bogota, in its ruling of 6 October 2017 and the Labour Appeals Chamber of the Supreme Court of Justice, in its ruling of 7 October 2017, declared, in full accordance with Colombian law and with ILO standards, the strike carried out by the ACDAC to be illegal on the grounds that air transport constitutes an essential public service and that the ACDAC did not consult the majority of workers in the enterprise in taking this decision. The Government adds that, in response to an action for protection of rights lodged by the ACDAC against the two aforementioned rulings, the Civil Chamber of the Supreme Court decided, by a ruling of 18 July 2018, to uphold the illegality of the strike carried out by the ACDAC.

202. With regard to the essential public service nature of air transport, the Government indicates that Colombian law clearly and explicitly defines public air transport as an essential public service, as established in sections 5 and 68 of Act No. 336 of 1996 and section 430(b) of the Substantive Labour Code. In this regard, the Government states that: (i) air transport links people, countries and cultures, provides access to global markets and generates trade and tourism, and forges ties between developed and developing nations; (ii) air transport networks facilitate the sending of emergency and humanitarian aid to any part of the globe, and also ensure the expeditious delivery of medical supplies and organs for human transplants; (iii) air transport in Colombia is often the sole means of transport to and from remote areas, making it more possible to meet many needs and even to be a major actor for social inclusion, connecting the people living there with the rest of their country; (iv) this activity is essential because it is closely linked to the exercise of the right to life and the right to work, enshrined as fundamental in the Political Constitution; (v) the possible consequences of a strike by the pilots of an air transport enterprise for users must be taken into account; the figures relating to flight cancellations, passengers affected, the impact on scheduled events such as surgeries, conferences, seminars, forums, business in different sectors, show clearly that such strikes have a direct impact on the lives and economic activity of people and may even be detrimental to the health, life and work opportunities of passengers; (vi) the failure by an air transport operator to provide a public service for more than 50 days causes alarm, has a highly negative impact, affects the life, health, well-being and opportunities of all those who have already bought their airline tickets, as well as those who plan to

travel, whether for pleasure, to visit family, for surgery, for a medical appointment or in hope of work; and (vii) the country has no other means of transport that provides the same or similar efficiency as that of air transport, it has no river fleets and no low- or high-capacity rail transport; air transport is the only means of transport between remote areas without exposure to risks. The Government indicates that, on the basis of the above, the Supreme Court considered in the aforementioned ruling of 29 November 2017 that: "In social environments such as ours, air transport ensures the supply of goods and services whereby guarantee fundamental rights such as health and education are guaranteed" and that, in the same ruling Judge Ernesto Carvajalino Contreras considered "that the enterprise (…) provides an essential public service and its workers are therefore prohibited from taking strike action (…)." Therefore, in accordance with the Constitution, the cessation of activities must unswervingly be declared illegal on the basis of the provision set out in sections 430 and 450(a) of the Substantive Labour Code and sections 5 and 68 of Act No. 336 of 1998 and the line of case law followed by the high Courts throughout this ruling.

203. With regard to minority support for the strike in the enterprise, the Government states that, under section 444 of the Substantive Labour Code, "[t]he strike or request for arbitration shall be addressed within ten (10) working days (…) by way of a "secret, individual and non-delegable ballot, requiring an absolute majority of (…) members of the trade union or unions that together represent more than half of those workers". The Government indicates that, as emphasized in the first instance decision of the High Court of the Judicial District of Bogota, the ballot was held only among the general assembly and did not include an absolute majority of ballots of the entire payroll of the enterprise, taking into account that only 279 of its 8,642 workers voted in favour of the strike.

204. The Government refers to the decision of the Ministry of Labour to convene, during the course of the strike, an arbitration tribunal. The Government states that this decision was entirely legal and constitutional since, as indicated above, various legal provisions state clearly that air transport constitutes an essential public service and that, under section 452 of the Substantive Labour Code, which was declared constitutional by the Constitutional Court, collective disputes affecting essential public services that are not resolved by means of direct settlement shall be submitted for compulsory arbitration. The Government adds that the convening of a compulsory arbitration tribunal by the Ministry of Labour does not imply the legality or illegality of a strike occurring in an essential public service, since the decision as to whether a strike is legal or illegal falls within the competence of the judicial authorities, as established in section 2 of Act No. 1210 of 2008. With regard to the legal proceedings initiated by the ACDAC against the convening of the arbitration tribunal, the Government indicates that Administrative Courts of both Cundinamarca and Antioquia rejected the applications for *amparo* [protection of constitutional rights] on the grounds that the administrative decision was in accordance with the law applicable in the event of collective disputes affecting the provision of an essential public service.

205. In connection with the Civil Aviation Authority ruling which, according to the complainant organizations, would have allowed foreign pilots to be contracted to cover the air routes cancelled on account of the strike, the Government states that the ruling in question was of a general nature and was intended to affect all airlines, not only the enterprise that is the subject of this complaint, hence the purpose was not *"esquirolaje"*. The Government adds that in view of the foregoing, the action for protection of rights lodged by the ACDAC was successful and, as a result, the aforementioned ruling was not implemented and, therefore, the enterprise did not contract foreign pilots.

206. With regard to disciplinary proceedings following the strike, the Government states that: (i) once the Supreme Court handed down its ruling of 29 November 2017 upholding the illegality of the strike, the Ministry of Labour immediately wrote to the enterprise to remind it of the need to apply article 1 of Decree No. 2164 of 1959 and to indicate that the Ministry of Labour would follow up on situations that needed to be resolved by administrative means; (ii) following the request made by the ACDAC through the Ombudsman's Office to follow up on the process of reinstatement of pilots after the strike was declared illegal, the Ministry of Labour assigned a labour inspector who carried out steps on 17 and 18 January and 21 and 22 March 2018; (iii) once the enterprise instituted disciplinary proceedings, the Bogota Territorial Directorate assigned a labour inspector who, on 1 March 2018, ascertained what measures were being taken with regard to the workers; and (iv) without prejudice to the foregoing, it is not the responsibility of the Ministry of Labour to intervene in disciplinary proceedings in connection with the illegality of the strike, since it is described by case law as a preliminary procedure to be performed by the employer without interference or intervention from any administrative or judicial authority.

207. With regard to the dismissal of a large number of pilots following disciplinary proceedings, the Government refers to statements made by the enterprise. The Government further refers to the Supreme Court ruling of 29 November 2017, in which the Court states that under section 450 of the Substantive Labour Code, "[i]f a work stoppage has been declared illegal, the employer shall be at liberty to dismiss for that reason anyone who has been involved or participated in such stoppage and, as regards workers who enjoy protection by virtue of [trade union] immunity, such dismissal shall not require any judicial authorization." The Government also refers to Constitutional Court ruling No. C-450/99, in which the Court states that: "An illegal strike is not only a serious act that goes against the interests of the enterprise and of society at large, it also constitutes a manifest violation of the duties and obligations of workers, of the kind that could result in the termination of the contract with just cause." Lastly, the Government indicates that workers who may have been dismissed without having participated actively in the strike can assert their rights before the courts, although the investigation has no knowledge or evidence of any such cases.

208. With regard to the various criminal complaints filed by the enterprise against ACDAC leaders and reported by the complainant organizations, the Government refers to the enterprise's reply and states that the complaints are not related to trade union activities but to conduct allegedly constituting offences unrelated to the legitimate exercise of freedom of association, and that it is for the competent bodies to decide on the matter. With specific regard to the criminal proceeding brought against the president of the ACDAC for statements on a television channel, the Government states that the business group brought the events to the attention of the Public Prosecutor's Office and that a preliminary hearing was being scheduled for 21 May 2019. The Government adds that the events are entirely unrelated to the exercise of freedom of association and that the person charged is the natural person not the trade union organization, for which reasons the Committee is not considered to be competent in this respect.

209. Regarding the economic blockade that the enterprise is allegedly imposing on ACDAC leaders, the Government confirms that the enterprise is making timely payments of dues to the trade union organization, in support of which it provides certification of trade union dues deducted from affiliated pilots during 2017, 2018 and until January 2019.

210. With respect to the alleged illegal interceptions of pilots who took part in the strike, the Government, after referring to the statements of the ACDAC and the enterprise,

indicates that the investigation is ongoing but that it has not been notified to date of any judicial decision in the process. It adds that it will be the criminal courts of Colombia that are called on to determine liability and assess the penalty for this conduct, if the evidence so permits.

211. In communications dated 3 September 2019, 21 February, 3 and 31 March 2020, the Government provides further replies and forwards new observations from the enterprise. In addition to repeating the information and assertions provided in its initial communication, the enterprise indicates that: (i) it guaranteed the exercise of the right to strike of the ACDAC by not interfering in any way during the work stoppage, assuming in principle that the strike was legal and relying on the tool provided for in national law to qualify a strike; (ii) the disciplinary proceedings following the declaration of the illegality of the strike and instituted by the enterprise complied with all guarantees established by law and in signed agreements, indicating in this regard that, as a result of Act No. 1210 of 2008, it is no longer necessary to turn to the Ministry of Labour to determine the extent to which the workers who are the subject of disciplinary proceedings participated in the strike; (iii) a number of workers involved in the events of the present case lodged an action for protection of rights, which undermines the alleged lack of protection of their fundamental rights; (iv) in respect of the aforementioned actions for protection of rights, the enterprise appeared, met the procedural requirements imposed and complied with the orders given by the judges; (v) the fact that the pilots who were dismissed after their participation in the strike were not immediately in a position to fly for another company cannot be attributed to the enterprise but rather, on the one hand, to the need to comply with the Aeronautical Regulations of Colombia (RAC), which require that a pilot who has been out of operation for more than 90 days must undergo a period of retraining and, on the other hand, to the technical challenge posed, after the end of the strike, by the simultaneous return of 581 pilots combined with a shortage of flight simulators; (vi) the allegation of the CUT, that the Constitutional Court was not sufficiently impartial to rule on disputes relating to the enterprise, is completely unfounded, and it must be underscored that the procedures followed by the Court meet all due process criteria; (vii) in accordance with section 450(3) of the Substantive Labour Code and given that a court ruling declared the work stoppage carried out by the ACDAC to be illegal, the trade union organization is liable to be dissolved and liquidated and the enterprise is entitled to seek a judicial decision in this regard; (viii) dissolution is not automatic but requires a judicial decision based on proceedings that respect all guarantees of due process; (ix) it is inaccurate to claim that the ACDAC is at imminent risk of dissolution since, on average, proceedings of this type last for 17.3 months and are further subject to the constitutional principle of the right to appeal, with appeals taking on average 185 days to be resolved; (x) under section 474 of the Substantive Labour Code, the dissolution of a trade union signatory of a collective agreement does not imply the termination of the collective agreement that it signed; and (xi) the claim for economic damages submitted by the enterprise against the trade union, in respect of which no decision has yet been reached, is due to the need of the enterprise to safeguard its capital and preserve its assets.

212. With regard to the investigation under way into the illegal interceptions to which ACDAC union leaders were subjected, the enterprise states that on 4 July 2019, the Public Prosecutor in charge of the file requested the evaluation of protection measures for an executive from the enterprise, and in October 2019 initiated a procedure for precautionary protection measures before the Inter-American Commission on Human Rights. The enterprise adds that it was listed, with the ACDAC, by the Public Prosecutor's Office on 18 November 2019 as a victim of the aforementioned interceptions. After

reiterating that it has always respected freedom of association, as the existence of nine workers' associations in the enterprise shows, the enterprise emphasizes that since the appointment of its new Chief Executive Officer in July 2019, it has stepped up efforts to reach an agreement to end the labour dispute with the ACDAC and has held various working meetings in this regard. Lastly, the enterprise expresses its solidarity with and support for the leaders of the ACDAC in the context of the threats received and offers its cooperation in this regard.

213. In its turn, in addition to reiterating the information and assertions provided in its communication of April 2019, the Government states that: (i) with respect to the facts of the present case, the State has not carried out any labour massacre, and the Ministry of Labour held numerous meetings in order to bring the parties together; (ii) the process of application for judicial dissolution of the trade union established by the Substantive Labour Code complies with all due process guarantees, and it is incorrect to assert that the ACDAC is in a defenceless position or at imminent risk of dissolution, as demonstrated by the time that has elapsed since the claim was made; and (iii) under section 474 of the Substantive Labour Code if the trade union signatory of a collective agreement is dissolved, the agreement does not remain in force, but its content goes on to form part of the employment contracts of those who were covered by it while they continue to work in the same enterprise.

214. With regard to the court ruling that the strike carried out by the ACDAC was illegal, the Government reiterates that the Supreme Court in its corresponding ruling: (i) recalled that the Constitutional Court (ruling No. C-450 of 1995) considered constitutional, with the force of constitutional res judicata, section 450(1)(b) of the Substantive Labour Code according to which air transport services are essential; (ii) emphasized that minority trade unions do not have the exclusive right to strike, since trade union autonomy must be kept in perspective in order to protect and guarantee the rights of non-unionized workers, whom the law authorizes to take part in making this decision; and (iii) as a sectoral and minority union, the trade union organization ACDAC should, in order to declare the strike, have obtained a vote in favour from the majority of the workers in the enterprise and not solely from its members.

215. With regard to the allegations of illegal interceptions to which ACDAC leaders were subjected and the court ruling that was handed down, reported by ACAV and SINTRATAC, after re-emphasizing that it falls to the judicial authorities to determine the innocence or not of the defendants, the Government indicates that: (i) the enterprise reported that it had not been notified of any decision against it and that it would be paying attention to the decision of the authority in that regard; and (ii) it is known that Mr Luis Carlos Gómez Góngora was sentenced to eight years of prison for procedural fraud, unlawful violation of communications and falsification of public documents.

216. In respect of the alleged death threats to which ACDAC leaders were subjected, the Government indicates that: (i) it only learned of them when the ILO forwarded the relevant communications of the ACDAC and the CUT of 11 February 2020; (ii) the Ministry of Labour immediately notified the National Protection Unit (UNP), which, until that moment, had no knowledge of the aforementioned threats; and (iii) the president of the ACDAC was therefore requested to submit the information at his disposal to the UNP in order to provide appropriate and immediate protection.

217. Following on from the mention contained in its communication of 13 June 2019 that the case would be dealt with in the framework of the CETCOIT, the Government emphasizes the efforts made to reach a consensus solution to the conflict through mediation by that body. The Government indicates in this regard that: (i) the meeting scheduled for

10 September 2019 could not be held because of the failure to attend of the ACDAC and the CUT; (ii) while, at the request of the ACDAC, an international facilitator was contacted, between October 2019 and February 2020 it was hoped that the aforementioned organization would indicate whether or not it was willing to take part in the facilitation process; (iii) it is regrettable that the ACDAC, which has recognized the importance of the CETCOIT in matters of social dialogue, should have called into question the impartiality of its national facilitator; and (iv) in view of the above, the Government reiterates its constant desire to bring together the parties to the conflict.

218. In a communication dated 12 September 2020, the Government updates the information provided previously and also submits new observations on the part of the enterprise. In addition to reiterating the information and assertions contained in its previous communications, the enterprise states that: (i) the legal actions filed against the ACDAC (action to dissolve the trade union organization and claim for financial damages as a result of the effects of the strike) did not make significant progress; (ii) it is engaged in ongoing talks with its 11 workers' associations and, since 2019, approaches have been initiated with the ACDAC with the aim of restoring trust between the parties, efforts which have intensified in the search for solutions to the impact of the COVID-19 pandemic; (iii) in this context, it is willing to withdraw the aforementioned legal actions, provided that there is common will on both sides to find substantive solutions to their natural differences; (iv) it remains willing to resort to the CETCOIT or any other national or international mediation mechanism. The enterprise adds that, in the context of the impact of the COVID-19 pandemic: (i) civil aviation is suffering the worst crisis in its history and the temporary suspension of the national and international passenger operations of the enterprise for more than five months has had devastating effects on its finances, seriously jeopardizing its viability and sustainability; (ii) as a result of the above, since 10 May 2020, a corporate reorganization process was initiated voluntarily under the United States Bankruptcy Code with the main objective of ensuring the survival of the enterprise as a source of employment in Latin America and in Colombia; and (iii) in this situation of force majeure faced by the sector, the enterprise has focused its efforts on establishing discussions and seeking stable and sustainable compromise solutions with all stakeholders, including the workers and their representative trade unions.

219. In its turn, in addition to reiterating the information and assertions provided in its previous communications, in particular with regard to the existence of a constitutional and legal framework for strikes – specified by the Constitutional Court itself (ruling No. C-858-08) – in accordance with ILO standards and principles, the Government: (i) states that the complete independence of the Colombian judiciary with regard to strikes has been demonstrated anew by the various protection rulings handed down by the courts in relation to applications for reinstatement submitted by workers dismissed as a result of the strike at issue in the present case, whereas in some cases the courts ruled in favour of the enterprise and the Ministry of Labour (ruling No. T-509 of 2019) and, in others, in favour of the workers (ruling No. SU-598 of 2019); (ii) underscores the willingness of the enterprise to withdraw the legal actions brought against the ACDAC if it reaches such an agreement in the framework of the workshops with the ACDAC; (iii) indicates that the Ministry of Labour has done everything possible to facilitate the referral of the case to the CETCOIT, which is an ideal forum for social dialogue to resolve this type of dispute; (iv) expresses regret that, despite the guarantees provided to address the concerns raised by the ACDAC, the latter declined to take part in this forum for consultation; (v) states that, as soon as they became aware of the alleged threats against the ACDAC leaders, the Ministry of Labour and the UNP took all necessary protective measures; and

(vi) indicates that, as a consequence of the situation generated by the COVID-19 pandemic, the enterprise, which provides an essential public service because it accounts for some 50 per cent of air traffic in the country, is going through a serious financial crisis, which prompted the Government to make it a loan, with a view both to maintaining air transport in the country and preserving the 500,000 jobs generated directly or indirectly by the activities of the enterprise.

220. In a communication received on 23 December 2020, the Government indicates that after numerous efforts to resolve their dispute and as a result of their persistence and faith in social dialogue, the enterprise and the ACDAC succeeded, despite the context of grave economic difficulties in the aviation sector, in signing, on 27 October 2020, a new agreement for a term of four years. The Government submits that, with this achievement, the grounds for the present complaint have been eliminated since, in particular: (i) although there was a sound legal basis for the latter, the enterprise has undertaken to withdraw its legal actions seeking to have the registration of the ACDAC cancelled, on the one hand, and, on the other hand, seeking an award of damages from the union in the wake of the strike action of 2017; and (ii) the constant communication between the enterprise and the trade union illustrates respect between the parties and respect for trade union rights in the enterprise. The Government considers that, in the light of the above, there are no longer grounds for the Committee to examine the present case.

221. The Government also encloses a communication addressed to it by the enterprise in response to a request from the Ministry of Labour, in which the enterprise indicates that: (i) in the context of the serious difficulties experienced by the global aviation industry that are jeopardizing the viability of its business, the enterprise initiated discussions with its own workers' organizations, including the ACDAC, with the main objective of finding long-term compromise solutions in order to ensure the stability and survival of the enterprise ; (ii) after more than a decade of open labour unrest, on 27 October 2020 the enterprise and the ACDAC signed an extra-legal benefits adjustment agreement for a term of four years, aimed at protecting the enterprise as a source of employment for thousands of people; and (iii) on 28 October 2020, even though the legal actions that it brought were based on legal and reasonable claims, as a statement of good faith and with the aim of removing labour relations from the courts, the enterprise withdrew its application for the legal personality of the ACDAC to be withdrawn and is in the process of withdrawing the civil damages claim that it brought against the trade union.

222. In a further communication dated 17 February 2021, the Government submits the document from the judicial branch establishing the definitive closure, following the withdrawal by the enterprise, of the legal action to cancel the legal personality of the ACDAC. The Government indicates that the legal concept of withdrawal signifies the finalization of the judicial process and has the same effects as a ruling. The Government states that the withdrawal demonstrates the clear willingness of the parties to find a compromise solution and for conciliation.

C. The Committee's conclusions

223. *The Committee notes that this case refers to a collective dispute over the renewal of a collective agreement between an air transport enterprise and the pilots' trade union, the ACDAC. This dispute culminated in strike action held from 20 September to 10 November 2017, which was declared illegal by the Bogota High Court on 6 October 2017, a decision that was upheld by the Labour Appeals Chamber of the Supreme Court on 29 November 2017.*

224. *The Committee notes that the main allegations of the complainants and the different national and international trade unions associated with the complaint are that: (i) the enterprise, with the complicity of the Ministry of Labour, restricted the pilots' freedom of association and right to collective bargaining by concluding and promoting collective accords* (pactos colectivos) *with non-unionized pilots, the content of which discriminate against unionized workers; (ii) using as a basis legislation that runs counter to ILO Conventions Nos 87 and 98, both the Ministry of Labour – by convening a compulsory arbitration tribunal during the strike – and the country's judicial authorities – by issuing rulings declaring the strike illegal – unjustly denied the pilots' right to strike; (iii) during the legal proceedings related to the collective dispute, the CUT was denied the right to defend the interests of its members and affiliated organizations; (iv) the pilots on strike were replaced by foreign pilots; (v) on grounds of the ruling that the strike was illegal, many pilots were allegedly dismissed without justification or respect for due process; (vi) again on grounds that the ruling that the strike was illegal, the ACDAC was allegedly subject to expedited judicial proceedings for its dissolution; (vii) ACDAC trade union leaders had a number of civil and criminal proceedings brought against them for carrying out their legitimate trade union activities; (viii) the enterprise had stopped forwarding to the ACDAC the trade union dues of its members; (ix) the trade union was subjected to illegal interceptions during the strike by persons connected to the enterprise and public officials; and (x) in early 2020, ACDAC union leaders and members of their families were subjected to death threats.*

225. *The Committee notes, furthermore, that both the enterprise and the Government deny any violation of freedom of association and collective bargaining, maintaining that the enterprise, on the one hand, and the public authorities, on the other, have acted in accordance with the Colombian constitutional order which, in turn, is based on the ILO's standards and principles, and that it is the ACDAC trade union organization that has diverged from the aforementioned constitutional order by holding an illegal strike.*

226. *Before examining the above allegations, and the corresponding replies from the Government and the enterprise, the Committee observes that it appears from the different information provided by the parties that the events leading up to the collective dispute that is the subject of this case gave rise to the following stages: (i) from 2013, attempts were made to renew the collective agreement between the enterprise and the ACDAC; (ii) in October 2013, the enterprise adopted a voluntary benefit plan; (iii) the voluntary benefit plan in question gave rise to the Constitutional Court's ruling No. T-069 on 18 February 2015, which equates the voluntary benefit plan to a collective accord and requests the enterprise not to use collective accords to restrict freedom of association and collective bargaining (the voluntary benefit plan expired in 2017); (iv) in the absence of an agreement on the renewal of the collective agreement and, at the request of the ACDAC, the Ministry of Labour appointed an arbitration tribunal in 2015; (v) on 5 October 2015, alleging a lack of impartiality on the part of the tribunal, the ACDAC withdrew its list of demands from 2013 that formed the basis for the appointment of the arbitration tribunal; (vi) in March 2017, the enterprise and the civil association ODEAA concluded a collective accord, applicable under Colombian law to non-unionized workers of the enterprise; (vii) on 8 August 2017, the ACDAC submitted a fresh list of demands for the renewal of the collective agreement; (viii) the direct settlement stage with the enterprise lasted until 11 September 2017, with no agreement being reached; (ix) after a ballot of its members, the ACDAC began strike action on 20 September 2017; (x) on 28 September 2017, as provided by the legal provisions classifying air transport as an essential public service, the Minister of Labour ordered a compulsory arbitration tribunal to be set up, a decision contested by the ACDAC; (xi) on 6 October 2017, at the request of the enterprise, the Bogota High Court ruled that the strike action was illegal, a decision that was appealed by the ACDAC; (xii) on 31 October 2017, the Ombudsman summoned the enterprise*

to try to mediate in the dispute, a proposal that was declined by the enterprise because there was already a court decision on the strike; (xiii) on 29 November 2017, the Labour Appeals Chamber of the Supreme Court upheld the decision of first instance of the Bogota High Court that the strike was illegal; (xiv) on 10 November 2017, the ACDAC ended the strike action; (xv) from 26 February 2018, the enterprise began disciplinary proceedings against the pilots who had taken part in the strike; (xvi) on 18 July 2018, the Civil Chamber of the Supreme Court dismissed the action for protection of rights filed by the ACDAC against the ruling handed down by the Court's Labour Appeals Chamber; and (xvii) the enterprise, applying section 450 of the Substantive Labour Code, went before the courts to seek the dissolution of the ACDAC. With regard to the negotiating stages of the above-mentioned list of demands, the Committee notes the divergent positions of the ACDAC and the enterprise on the legality of the procedures followed by the ACDAC, on the one hand, and on the willingness of the enterprise to negotiate the list of demands effectively, on the other.

227. *The Committee notes that, subsequent to the events described in the previous paragraph which constitute the factual context of the allegations in the present case, it received communications from the Government, and from the complainant organizations, in which they reported: (i) the signature, on 27 October 2020, in the context of the serious economic crisis affecting the global airline sector as a result of the COVID-19 pandemic, of an agreement between the enterprise and the ACDAC, aimed at ensuring the continued operation of the enterprise and jobs therein; and (ii) the withdrawal by the enterprise – with a view to improving the climate of social dialogue – of its legal actions seeking to cancel the trade union registration of the ACDAC and claiming damages for the economic impact of the strike.*

228. *The Committee notes that the Government: (i) indicates that the agreement of 27 October 2020 is a major achievement after many years of conflict and is the result of the commitment of the parties to social dialogue; (ii) the withdrawal by the enterprise of its legal action to cancel the trade union registration of the ACDAC confirms the willingness of the parties to find a compromise solution; (iii) considers that the agreement confirms that there is full compliance with freedom of association; (iv) considers that the grounds on which the present case was brought have already been resolved. The Committee notes that, for their part, the complainant organizations, while welcoming the signature of the agreement and underscoring the importance of the trust between the new Chief Executive Officer of the enterprise and the ACDAC for its achievement, indicate that: (i) the sole and specific objective of the agreement, which was based on the willingness on the part of the trade union to sacrifice extra-legal rights and the willingness on the part of the enterprise to preserve the greatest possible number of jobs, was the continued operation of the enterprise and the jobs therein; (ii) most of the violations that gave rise to the present complaint (in particular those related to the exercise of the right to strike, the discrimination affecting the aviators who took part in it, the criminal charges against the leaders of the ACDAC and the resort to collective accords with non-unionized workers) have not been resolved and persist.*

Allegations concerning the anti-union use of collective accords by the enterprise

229. *The Committee notes that the complainants allege that, despite representative workers' unions already being in existence, the enterprise concluded and promoted collective accords applicable to non-unionized workers in order, with the support of the Ministry of Labour, to restrict the rights to freedom of association and collective bargaining of workers and their trade union organizations. The Committee takes note of the complainants' specific allegations that: (i) despite ruling No. T-069 of 18 February 2015 which, in reference to a collective accord adopted in 2013 (the Voluntary Benefits Plan), ordered the enterprise to refrain from laying*

down conditions in collective accords that discourage workers from joining or remaining in the trade union, the enterprise, with the complicity of a civil association (the ODEAA), in April 2017 adopted a new collective accord, the contents of which, applying solely to non-unionized workers, changes a number of aspects of the collective agreement and discriminates against the unionized pilots; (ii) despite the fact that the accord was signed by only 30 pilots at the time the complaint was presented, the enterprise insisted on its implementation over the collective agreement and misleadingly presented it as the result of negotiations between the enterprise and all the enterprise's pilots; (iii) in view of the dismissals and other anti-union acts carried out by the enterprise after the strike ended, many pilots left the ACDAC to be able to enjoy the benefits of the collective accord; (iv) the anti-union use of collective accords by the enterprise was not limited to the pilots but was also extended to cabin crew and attendants, to the detriment of the trade union organizations SINTRATAC and ACAV; (v) despite the precedent provided by ruling No. T-069 and the repeated recommendations of the ILO supervisory bodies regarding collective accords, the Ministry of Labour has failed to take action to stop the anti-union use of collective accords in the enterprise; and (vi) although the enterprise undertook, through the agreement of 27 October 2020, to refrain from any act contrary to freedom of association and to the rights recognized in the collective agreement with the ACDAC, the following month it signed a new collective accord with the non-unionized pilots in the enterprise, which undermines the agreement and discriminates in operational terms against the ACDAC pilots. The Committee notes that, on the basis of the above, the complainants request that the enterprise refrain from adopting collective accords so long as trade unions already exist in the enterprise and, moreover, that the provisions of the Substantive Labour Code regarding collective accords are adapted to the Committee's recommendations.

230. The *Committee also notes that the enterprise and the Government indicate that the voluntary benefit plan adopted in 2013 has expired and that the facts reported by the complainants prior to the negotiations on the 2017 list of demands are already under examination by the Committee in Case No. 2362 in follow-up. The Committee recalls in this regard that Case No. 2362 refers to a complaint presented by the ACDAC in 2008, alleging a series of anti-union acts by the enterprise, in particular as regards the use of collective accords , and which is currently in follow-up. While underlining the reiterative nature of its recommendations addressed to Colombia regarding the fact that collective accords concluded with non-unionized workers should not be used to undermine the position of trade union organizations [see Case No. 1973, 324th Report; Case No. 2068, 325th Report; Case No. 2046, 332nd Report; and Case No. 2493, 349th Report] and that the signing of collective accords should only be possible in the absence of trade union organizations [see Case No. 2796, 368th and 362nd Reports and Case No. 3150, 387th Report, para. 336] and noting that the coexistence of collective agreements and collective accords concluded with non-unionized workers at the enterprise is one aspect of the dispute that is the subject of the present case, the Committee requests the Government to provide its observations on the complainants' allegations on the adoption by the enterprise of a new collective accord in April 2017 so that it may examine this issue at its next meeting under Case No. 2362.*

Allegations concerning the violation of the right to strike by the enterprise's pilots

231. *The Committee notes that the complainants allege that both the Ministry of Labour – by convening a compulsory arbitration tribunal in the midst of the strike action – and the domestic courts – through a ruling declaring the strike held by the ACDAC illegal – unjustly denied the enterprise's pilots the right to strike. The Committee takes note specifically that the complainants consider the two main grounds on which the ruling of illegality was based to be*

false, namely, that air transport is an essential public service, and the need – not met by the ACDAC – for the majority of the enterprise's workers to have voted in favour of the strike. With regard to the classification of air transport as an essential public service, the Committee notes that the complainants state that: (i) air transport in Colombia does not meet the Committee's criteria on the basis of which only the services whose interruption would endanger the life, personal safety or health of the whole or part of the population can be classified as essential public services in the strict sense of the term; (ii) on many occasions the Committee has deemed that air transport did not meet the criteria in question, which is why Colombian legislation should be amended in this regard; (iii) there are more than 60 air passenger transport companies in Colombia and more than 20 air ambulance companies; and (iv) as a result, over 70 per cent of domestic air travel continued during the strike that is the subject of this case.

232. *The Committee notes that, for its part, the enterprise states that, in the Colombian context, air transport in general and that provided by the enterprise in particular constitute an essential public service. The enterprise states that this finding is based on the following factors: (i) air transport ensures the supply of goods and services, thereby guaranteeing fundamental rights such as health and education; (ii) air transport allows the transfer of patients and medical supplies to guarantee the right to life and health of the population; (iii) air transport even enables humanitarian assistance services to be provided to populations that are remote and disconnected from the national territory and guarantees the connectivity of marginalized or remote regions, which do not have other transport alternatives; (iv) as a result of Colombia's economic situation and infrastructure, the enterprise provides 48 per cent of passenger transport, the provision of 80 per cent of food supplies to the Department of San Andres, Providencia and Santa Catalina and 50 per cent of food supplies to the city of Leticia, capital of the Department of Amazonas; (v) the enterprise is the only airline authorized for the transport of items such as medicines, human organs, blood, plasma, chemotherapy treatments, human remains, medical supplies and surgical items; (vi) the enterprise is the only airline in Colombia that provides air transport to the population of Manizales, Caldas; and (vii) the 51 days of strike affected more than 377,000 passengers and 14,547 flights were cancelled.*

233. *The Committee notes further the enterprise's statement that the Supreme Court, on the basis of a detailed and objective analysis in which the above factors were assessed, found that, in the Colombian context, air transport constituted an essential public service. The enterprise states that the position expressed by the Labour Appeals Chamber of the Supreme Court coincides with previous rulings of the Constitutional Court, in which the latter had highlighted the essential nature of the activities of transport enterprises in general (ruling No. C-450 of 4 October 1995) and of air transport in particular (ruling No. T-987 of 23 November 2012). Lastly, the enterprise states that the complainants have taken information out of context when referring to the Committee's cases that dealt with factual elements that are totally different from the facts of this case.*

234. *The Committee notes that the Government, in turn, states that: (i) Article 4 of Convention No. 98 and Paragraph 1 of Recommendation No. 91 underline the need for collective bargaining mechanisms to be appropriate to national conditions, which is why it clearly provides that it falls to each country to regulate, depending on its own particular circumstances, aspects related to collective bargaining and, inter alia, the right to strike; (ii) similarly, the Committee has always recognized that determining whether a public service is essential depends to a large extent on the particular circumstances prevailing in a country and that this concept is not absolute in the sense that a non-essential service may become essential if a strike lasted beyond a certain time or extended beyond a certain scope; (iii) in Colombia, article 56 of the Political Constitution guarantees this right with the exception of*

essential public services defined by law; (iv) on the basis of this provision, and the other articles of the Political Constitution that protect freedom of association, the Constitutional Court, in accordance with ILO standards and principles, has clarified the scope and limits of the right to strike through various rulings (see, in particular, ruling No. C-858-08); (v) on the basis of the aforementioned article 56 of the Political Constitution, the Constitutional Court considers that the right to strike can be restricted in those services which, by their very nature, can be considered as an essential public service (material criterion) insofar as their interruption affects the essential core of fundamental rights and that, additionally, have been expressly defined as such by the legislator (formal criteria); (vi) Colombian legislation, in accordance with the Political Constitution, clearly and explicitly defines public air transport as an essential public service; (vii) air transport facilitates the delivery of emergency and humanitarian aid to any part of the globe, as well as ensuring the expeditious delivery of medical supplies and organs for human transplants; (viii) air transport in Colombia is often the only means of transport to and from remote areas without exposure to risks, as the country has no other means of transport that provides the same or similar efficiency as that of air transport; it has no river fleets and no low- or high-capacity rail transport; (ix) the air transport strike has a direct impact on people's activities, to the point of affecting the health, life and work opportunities of passengers. The Government indicates that, on the basis of the above, and pursuant to Act No. 1210 of 2008 granting the judiciary the power to declare the legality of a strike, the Labour Appeals Chamber of the Supreme Court, in its ruling of 29 November 2017, upheld the ruling declaring the strike held by the ACDAC illegal handed down in first instance by the Bogota High Court.

235. *In this regard, the Committee notes that, in the aforementioned ruling, the Supreme Court by majority vote, found that "passenger air transport constitutes a normal, main and regular service for many people who need to travel in order to fulfil obligations and duties and exercise rights such as health and education. By way of illustration, therefore, according to figures from the Special Administrative Unit for Civil Aviation, during 2016 more than 36 million passengers travelled by air, 48 per cent of which were served by the enterprise subject to this complaint. […] In the light of the above, while it is true that air transport serves purposes such as tourism, entertainment, business and many other non-essential social activities, in the strict sense of the term, it is a somewhat misleading to consider that its role ends there and that it is therefore merely a luxury resource or a means of entertainment for wealthy people. On the contrary, in the Court's view, because of how fundamentally important air transport has become in our lives, its suppression, even partial, would mean risking people's health and lives, such that, as regards substance, it can be considered an essential public service."*

236. *The Committee also notes that, in the same ruling, the Supreme Court states that: "However, despite the foregoing, without ignoring the realities of our context and the tangible evidence for the prohibition of strikes in the air transport public sector, which was analysed above, the Court attaches cardinal importance to the guidance provided by the ILO supervisory bodies that there should not be an absolute prohibition of the right to strike in this sector, which is derived from authoritative interpretations of the rights to freedom of association and collective bargaining, proclaimed in fundamental Conventions such as Nos 87 and 98, to which Colombia has committed to respect, promote and comply with in good faith. In this regard, in the Chamber's view, the doctrine of the Committee on Freedom of Association of the International Labour Organization to which the lawyer of the defendant organization refers, without disregarding its relevance in the interpretation of the constitutional and legal provisions governing the right of the work, should serve as a basis for the legislator – within the framework of a state policy and in making use of his/her constitutional powers, with the participation of all the social organizations involved and democratically and deliberatively – to clarify the exceptional possibility of exercising the right to strike in public services such as*

air transport, with the guarantee of minimum operating services with a view to safeguarding fundamental rights to the health, life and safety of the population. It is therefore worth reminding the Congress of the Republic of the need to update the legislation respecting the right to strike and its limitations in the area of essential services, taking into account the legal reserve provided for in article 56 of the Political Constitution".

237. *The Committee takes due note of the different elements mentioned above and observes that the complainants and the Government, as well as the Supreme Court in its ruling, refer to the importance of the general criteria established by the Committee for the classification of essential public services in the strict sense and to the need to assess them in the light of the specific context and the particular circumstances in which the strike took place.*

238. *The Committee recalls that it has considered that in order to determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population [see* ***Compilation of the decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 836]. The Committee has also stated 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 [see* ***Compilation****, para. 837].*

239. *In this regard, the Committee notes in particular the detailed information supplied by the enterprise on the importance of the flights it provides, stating that: (i) it ensures provision of 80 per cent of food supplies to the Department of San Andres, Providencia and Santa Catalina (the Archipelago of San Andres, Providencia and Santa Catalina) and 50 per cent of food supplies to the city of Leticia, capital of the Department of Amazonas; (ii) it is the only airline authorized to transport supplies such as drugs, human organs, blood, plasma, chemotherapy treatments, human remains, medical supplies and surgical items; and (iii) it is the only airline in Colombia that provides air transport to the population of Manizales, Caldas. The Committee also notes the complainants' statements about the practical impact of the strike action that is the subject of this complaint, according to which: (i) there are more than 60 air passenger transport companies and more than 20 air ambulance companies in Colombia; and (ii) during the strike, more than 70 per cent of domestic air traffic continued operating. The Committee also notes that, according to the figures cited by the Labour Appeals Chamber of the Supreme Court in its ruling, the enterprise serves 48 per cent of the country's air passengers and, during the strike, 60 per cent of the country's air transportation activity was assured. The Committee observes that it is clear from the foregoing that, for some limited parts of the country, which, owing to their remoteness, rely to a large extent on air transport for their provisions and access to health services, and for the transport of certain health products throughout the country, the corresponding air transport operations carried out by the enterprise appear to be of such importance that there are indications that the total interruption of these limited operations may endanger the life of part of the population. The Committee also notes that the above-mentioned relevance does not extend to the entire activity of the company and the sector.*

240. *The Committee emphasizes that these considerations, based on the specific circumstances of the country that is the subject of this complaint, are in line with its conclusions adopted in other cases concerning the air transport sectors of other countries and in which, based on the circumstances of each case, it was considered that the air transport sector as a whole is not an essential public service in the strict sense but that its importance could justify the*

establishment of a minimum service aimed at ensuring that users' basic needs are met, without calling into question the right to strike of the majority of workers in the sector.

241. *On the basis of the elements at its disposal concerning the importance of the airline sector in the country and with a view to ensuring both respect for the fundamental rights of the population and the right of pilots to defend their occupational interests by striking, the Committee therefore considers that a mechanism could be established for negotiating minimum services in the event of a strike in the country's air transport sector. The Committee therefore requests the Government, in consultation with the social partners from the sector, to take the necessary measures as soon as possible to review the legislation, in conformity with the principles of freedom of association referred to above, ensuring the establishment of a mechanism for negotiating minimum services in the event of strikes in the air transport sector, and it invites the Government to avail itself of ILO technical assistance in this regard.*

242. *With regard to the grounds for the judicial declaration of the illegality of the strike held by the ACDAC based on the failure to obtain the majorities required under Colombian law, the Committee notes that the complainants state that: (i) in its relations with the enterprise and under the collective agreement signed between them, the ACDAC is an occupation-based trade union organization ("sindicato gremial") which, at the time the strike began, had as members 702 of the enterprise's 1,200 pilots; (ii) the occupation-based strike held by the ACDAC was joined by 702 of the enterprise's pilots belonging to the trade union organization; (iii) the requirement that the pilots' strike be supported by more than half of all of the enterprise's workers, whether or not they be pilots, constitutes an excessive requirement of a majority, contrary to the principles of freedom of association. The Committee notes that, on the other hand, both the enterprise and the Government state that: (i) the ACDAC is a minority industry union within the enterprise, given that, as at 15 September 2017, 693 of the enterprise's 8,524 workers were its members; (ii) whether it is considered an occupation-based union or an industrial union, the ACDAC was required to adhere to the democratic principles in section 444 of the Substantive Labour Code; (iii) after initially calling on the other unions in the enterprise in order to obtain a majority vote of the enterprise's workers, in the end the ACDAC limited the vote to its members; (iv) only 279 workers belonging to the union voted personally in favour of the strike; (v) the union did not accept the presence of the labour inspectorate to guarantee the validity of the proceedings; (vi) Bogota's High Court and the Supreme Court found by majority vote that there had not been an absolute majority vote by the enterprise's workers in favour of the strike, nor even through a personal vote of the majority of workers belonging to the trade union, meaning that the strike was illegal as it violated sections 444 and 450(d) of the Substantive Labour Code.*

243. *The Committee takes due note of the information provided by the various parties and observes that the first issue, relating to the validity of the vote on the strike by the ACDAC, revolves around the requirement for it to be supported by the majority of the enterprise's workers.*

244. *The Committee notes that the Government and the enterprise refer in this respect to the provisions of section 444 of the Substantive Labour Code, which establishes a distinction regarding the conditions for strike ballots, depending on whether or not they are called by a majority union at the enterprise. If it is a majority union, that union's general assembly must approve the strike; if the union does not represent the majority of the enterprise's workers, the strike must have the support of the majority of the enterprise's workers taken as a whole. The Committee also notes the Government's emphasis on the fact that, in its ruling of 29 November 2017, the Supreme Court of Justice highlighted that the ACDAC, as a minority industrial trade union in the enterprise, should have the support of the majority of the enterprise's workers and not just of its members in order to call the strike as, in accordance with the provisions of*

the Substantive Labour Code, the trade union autonomy of minority unions should be qualified in order to also protect and guarantee the rights of non-unionized workers.

245. *Recalling that it has considered that the requirement of a decision by over half of all the workers involved in order to declare a strike is too high and could excessively hinder the possibility of calling a strike, particularly in large enterprises [see **Compilation**, para. 806], the Committee observes, in the present case, that the strike initiated by the ACDAC occurred on the occasion of a collective dispute, the objective of which was to negotiate the renewal of the collective agreement applicable only to the enterprise's pilots, given that the other occupations operating in the enterprise are governed by separate collective agreements. The Committee observes that, while the requirement of a majority vote in respect of strikes is in itself in full conformity with the principles of freedom of association, the manner in which it is implemented must be reasonable and objective and, consequently, grounded in the involvement of those workers who are actually covered by the collective instrument that is the object of the dispute that the strike is seeking to resolve. In this regard, in the framework of negotiations that are clearly of an occupation-based nature (it being the nature of the ACDAC that gave rise to discussions) and with a view to preserving the autonomy of the parties to the negotiations under way, the Committee considers that it is the workers in the occupation concerned who should decide the relevance of possible recourse to strike action to settle the collective dispute in question.*

246. *In view of the above, the Committee considers that, in the context of negotiations concerning the renewal of the collective agreement covering the enterprise's pilots, making the exercise of the pilots' right to strike conditional on the vote of all the enterprise's workers did not correspond to the specificities of the collective dispute in question and that, in the context of negotiations concerning a specific occupation, the possible majority status of the ACDAC should be evaluated in respect of the number of pilots employed by the enterprise. In this regard, the Committee requests the Government to take the necessary measures, in consultation with the representative social partners, to amend section 444 of the Substantive Labour Code so that, in the context of an occupation-based collective bargaining the autonomy of the organizations involved is guaranteed. The Committee requests the Government to keep it informed in this regard.*

247. *The Committee notes that a second aspect related to the validity of the vote on the strike initiated by the ACDAC relates to the fact that, in addition to the lack of support from the majority of the enterprise's workers, the trade union would not have had the personal and direct vote of the majority of its members, as prescribed by the Substantive Labour Code. The Committee notes in this respect that, in its decision, the Labour Chamber of the Supreme Court found that it was clear from the strike ballots presented by both the trade union organization and the labour inspector that, while 699 votes had been registered in favour of the strike, only 215 of the 702 members of the trade union had participated directly and personally in the strike vote while the remainder voted by proxy, contrary to the provisions of section 444 of the Substantive Labour Code, which requires a "secret, individual and non-delegable ballot, requiring an absolute majority of (…) members of the trade union or unions that together represent more than half of those workers".*

248. *The Committee takes due note of the information provided. It recalls firstly, in general terms, that it has considered that no violation of the principles of freedom of association is involved where the legislation contains certain rules intended to promote democratic principles within trade union organizations or to ensure that the electoral procedure is conducted in a normal manner and with due respect for the rights of members in order to avoid any dispute as to the election results [see **Compilation**, para. 600]. In the case under consideration, the Committee notes that the information available indicates that, on the one hand, a*

considerable majority of the members of the pilots' union voted in favour of the strike but that, on the other hand, the majority of the members of the organization were not present at the ballot but voted by proxy. While it appreciates the purpose of the legislation with regard to the security of electoral processes, the Committee observes the specificities of the profession of international airline pilots, which is characterized by the constant geographic dispersion of the workers concerned at the national and international airports where their enterprise operates. The Committee observes that this dispersion could make it difficult to meet the requirement for an individual ballot of the absolute majority of the members of the ACDAC and their ability to convene while continuing to attend to their professional activities. In this regard, the Committee recalls that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations [see ***Compilation,*** *para. 789].*

249. *Regarding the alleged violations of the right to strike of the ACDAC and its members, the Committee notes that the complainant organizations also denounce the setting up, during the cessation of activities and before the courts ruled on the legality of the strike, of a compulsory arbitration tribunal by the Minister of Labour, a decision that gave rise to several legal actions by the ACDAC and that the complainant organizations consider to be contrary to Article 6 of Convention No. 154 ratified by Colombia. The Committee notes that, for its part, the Government states that: (i) its decision to convene a compulsory arbitration tribunal was entirely legal and constitutional due to the legislative classification of air transport as an essential public service; (ii) under the Substantive Labour Code, collective disputes that affect essential public services and that have not been resolved by way of direct settlement shall be subject to compulsory arbitration; (iii) the convening of a compulsory arbitration tribunal by the Ministry of Labour does not imply the classification of the strike as being legal or illegal, as that power falls under the remit of the judiciary in Colombia; and (iv) the Administrative Courts of both Cundinamarca and Antioquia rejected the applications for* amparo *lodged by the ACDAC, considering that the administrative decision to convene the tribunal was legal.*

250. *The Committee observes that it appears from the above that the complainant organizations are denouncing, on the one hand, the referral of the dispute opposing them to the enterprise to compulsory arbitration and, on the other hand, the fact that the administrative convening of the arbitration preceded the judicial declaration of the illegality of the strike.*

251. *With respect to the referral to an arbitration tribunal of the dispute that is the subject of the present complaint, the Committee recalls that it has considered that in as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organize freely their activities and could only be justified in the public service or in essential services in the strict sense of the term [see* ***Compilation****, para. 818]. Noting that the ACDAC submitted a fresh list of demands on 8 August 2017 and that the Minister of Labour ordered an arbitration tribunal to be set up on 28 September 2017, the Committee considers that, in order to maintain the space necessary for free and voluntary collective negotiation, the dispute between the enterprise and the union should have given rise to additional mediation and conciliation efforts rather than being subject to compulsory arbitration. While it notes that the arbitration award has been the subject of a pending legal action, the Committee requests the Government to take the necessary measures to ensure that in future, any disputes relating to the renewal of the collective agreement of the enterprise are resolved by way of negotiation and voluntary dispute settlement mechanisms in accordance with the principles of freedom of association.*

252. *Regarding the allegation that the CUT was denied the right to participate in the legal proceedings related to the ruling that the strike called by the ACDAC, a trade union*

organization affiliated to the CUT, was illegal, the Committee notes the complainant organizations' assertion that the courts of both first and second instance: (i) denied the CUT the ability to act as an added party to the ACDAC, the defendant in the proceedings, incorrectly requiring the CUT to prove substantial and concrete involvement in the proceedings; (ii) in this way they failed to recognize the legitimacy of the CUT to defend the fundamental guarantees of freedom of association in all necessary forums and violated Article 6 of Convention No. 87, which stipulates that federations and confederations shall enjoy all the guarantees provided for in the Convention. The Committee notes the enterprise's statement that the Supreme Court of Justice upheld the ruling of the Bogota High Court, in that it denied the CUT the ability to act as an added party "insofar as (…) it was only admissible when the third party seeking to intervene was likely to be impacted if the person it sought to assist was defeated in court", which it did not deem to be the situation in this case.

253. *While taking due note of the information provided by the parties, the Committee emphasizes the importance for workers' and employers' organizations to be able to receive full support from the federations and confederations to which they are affiliated, and it trusts that the Government will ensure full respect for the above-mentioned.*

254. *With regard to the alleged replacement of the striking pilots through the contracting of foreign pilots on the basis of a Civil Aviation Authority ruling dated 3 October 2017, the Committee notes that the Government and the enterprise state that: (i) the ruling in question was of a general nature and with an erga omnes effect to broaden the opportunities for all the airlines to contract foreign captains in Colombia; (ii) the ACDAC lodged an action for protection of rights against the ruling, which was first suspended and later declared to be illegal; and (iii) in accordance with the result of the action for protection of rights, the enterprise refrained from contracting foreign captains. While recalling that strikers should be replaced only: (a) in the case of a strike in an essential service in the strict sense of the term in which the legislation prohibits strikes; and (b) where the strike would cause an acute national crisis [see **Compilation**, para. 917], the Committee, in the light of the information provided by the Government and the enterprise, will not pursue the examination of this allegation.*

Allegations concerning the anti-union consequences of the ruling that the strike was illegal

255. *With regard to the allegations of mass dismissals and penalties imposed against union members for exercising their legitimate right to strike, the Committee notes that according to the complainants over 100 unionized pilots were dismissed and a further 100 had penalties imposed on them without the Ministry of Labour or the courts providing the due protection in the face of numerous irregularities and arbitrariness committed in the disciplinary proceedings. The Committee also notes that the Government and the enterprise state that: (i) in accordance with section 450(2) of the Substantive Labour Code, the employer is authorized to dismiss workers who have participated in a strike declared illegal by the courts; (ii) the majority of the striking pilots continue to form part of the enterprise (of the 702 pilots who participated in the strike, 232 were disciplined, resulting in 83 dismissals and 129 suspensions); (iii) only when there was certainty that a pilot promoted the strike, participating actively in it, did the enterprise proceed to terminate the contract of employment, while passive participation in the strike only resulted in a penalty of suspension; (iv) all the disciplinary guarantees applicable to the enterprise were respected; (v) workers who were dismissed without having participated actively in the strike may assert their rights before the judicial authority; (vi) indeed, a number of workers involved in the events of the present case lodged an action for protection of rights requesting their reinstatement; and (vii) while in some cases the courts ruled in favour of the enterprise and the Ministry of Labour (ruling*

No. T-509 of 2019), in others, the courts upheld the actions of the workers (ruling No. SU-598 of 2019), which invalidates the alleged lack of protection of their fundamental rights and again demonstrates the full independence of the judiciary.

256. *The Committee takes due note of these various elements. The Committee recalls that it has considered that no one should be penalized for carrying out or attempting to carry out a legitimate strike, and that the dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No. 98 [see* ***Compilation,*** *paras 953 and 957]. In the light of its conclusions on the strike action carried out by the ACDAC and taking into account, in particular, the need, highlighted by the Supreme Court, to bring the legislative provisions prohibiting any strikes in the airline sector into conformity with the principles of freedom of association, the Committee trusts that with the technical assistance of the Office, the Government, will facilitate contacts between the enterprise and the complainant organization in order to address the situation of the pilots who were dismissed as a result of their participation in the strike and thus contribute to a lasting resolution of the dispute that is the subject of the present case.*

257. *With regard to the legal action initiated by the enterprise to seek the dissolution of the ACDAC as a consequence of the illegal nature of the strike it held, the Committee notes with satisfaction that the enterprise, with a view to contributing to the strengthening of social dialogue, decided to withdraw this legal action on 28 October 2020.*

258. *While it recalls that it has considered that the dissolution of a trade union is an extreme measure and recourse to such action on the basis of a picket action resulting in the disruption of a public event, the temporary termination of an organization's activities or the disruption of transport, is clearly not in conformity with the principles of freedom of association [see* ***Compilation****, para. 1000], the Committee will not pursue its examination of this allegation. Similarly, the Committee notes that, for the reasons described above, the enterprise also decided to withdraw its civil case seeking to obtain compensation from the ACDAC for the damages caused by the strike. The Committee will therefore not pursue its examination of this allegation.*

259. *With regard to the criminal proceedings brought against ACDAC trade union leaders for calling the strike, which, according to the allegations made by the complainant organizations, constituted a means of criminalizing the trade union action, the Committee notes that the complainant organizations allege that the Public Prosecutor's Office initiated criminal proceedings against ACDAC trade union leaders for alleged obstruction of justice and that the president of the organization, Mr Jaime Hernández, was charged at the beginning of 2018 with the offence of economic panic following a complaint made by the enterprise. The Committee notes that the enterprise states that a criminal complaint has indeed been lodged against the president of the ACDAC at the request of the Public Prosecutor's Office, but concerning events unrelated to his functions in defence of the interests of the pilots in his organization, as he circulated false information about the enterprise on a television programme about an accident involving a foreign airline entirely unconnected to the enterprise. Regarding this point, the Committee notes that the Government states that: (i) the events are entirely unrelated to the exercise of freedom of association, the person charged is the individual and not the trade union organization, and consequently the Committee is not competent in this respect; and (ii) a preliminary hearing was being scheduled for 21 May 2019.*

260. *The Committee notes this information. Regarding the criminal action taken against the president of the ACDAC for statements made on television, while it does not have the elements necessary to give its opinion on the matters pertaining to the criminal action, the Committee recalls that it has considered, on the one hand, that while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of ordinary criminal*

law, the arrest of, and criminal charges brought against, trade unionists may only be based on legal requirements that in themselves do not infringe the principles of freedom of association and, on the other hand, that the full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, these organizations should respect the limits of propriety and refrain from the use of insulting language [see ***Compilation****, paras 133 and 236]. The Committee emphasizes the importance of the Committee's decisions mentioned above and requests the Government to keep it informed of developments in the criminal proceedings under way.*

261. *Regarding the alleged illegal interceptions the trade union and its members were subjected to by persons connected to the enterprise and public officials, the Committee notes that the complainant organizations allege that: (i) in July 2017 the criminal courts convicted an official of the Public Prosecutor's Office for the illegal interceptions that the unionized pilots belonging to the ACDAC were subjected to during the strike; and (ii) the ruling indicates that the enterprise's lawyers had an interest in intercepting the pilots' conversations throughout the collective dispute. The Committee notes, furthermore, that the enterprise states that: (i) it has nothing to do with the interceptions; (ii) no judicial decision or criminal investigation has been brought against the enterprise; (iii) as a result of the arrest of the national representative of the investigation company contracted to investigate corporate fraud of which it was a victim, the enterprise has suspended its relations with the national branch of the investigation company until the Public Prosecutor concludes the corresponding investigation; (iv) the enterprise presented itself as a victim through a group of shareholders and is recognized as such by the courts of the Republic in the proceedings; and (v) on 4 July 2019 the Public Prosecutor in charge of the file requested the evaluation of protection measures for an executive from the enterprise, and in October 2019 initiated a procedure for precautionary protection measures before the Inter-American Commission on Human Rights. The Committee also notes that the Government states in its various communications that: (i) the matter is in the hands of the criminal courts, which will have to determine liability and assess the penalty for this conduct, if the evidence so permits; and (ii) it is known that Mr Luis Carlos Gómez Góngora was sentenced to eight years of prison for procedural fraud, unlawful violation of communications and falsification of public documents.*

262. *The Committee duly notes this information, which shows that the investigations and criminal proceedings relating to the illegal interceptions that the ACDAC was subjected to already led, in July 2019, to an eight-year sentence for a former official of the Public Prosecutor's Office, and that the former leader of a private investigation company has been detained since November 2018 while the corresponding criminal investigations are being completed. The Committee expresses its concern about the illegal interceptions, particularly in the delicate context of a strike. In this respect, the Committee recalls that it has considered that tampering with correspondence is an offence which is incompatible with the free exercise of trade union rights and civil liberties and that the International Labour Conference in its 1970 resolution on trade union rights and their relation to civil liberties stated that particular attention should be given to the right to the inviolability of correspondence and telephone conversations [see* ***Compilation****, para. 270]. The Committee firmly expects that the relevant institutions will continue to take all appropriate measures with a view to rapidly identifying those responsible and punishing the perpetrators and instigators of the interceptions in question. The Committee requests the Government to keep it informed in this regard.*

263. *Regarding the death threats made against ACDAC union leaders and members of their families reported by the complainant organizations in February 2020, the Committee notes that the Government states that: (i) it only found out about the threats as a result of the ILO*

*forwarding the corresponding communications from the complainant organizations; (ii) the Ministry of Labour immediately alerted the UNP, which, until that point, had no knowledge of the threats; and (iii) consequently, the president of the ACDAC was asked to forward all available information to the UNP to enable it to provide the due and immediate protection. Recalling 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 that it is for governments to ensure that this principle is respected [see **Compilation**, para. 84], the Committee trusts that the Government will continue to pay close attention to the security situation of the ACDAC union leaders so that any protection they might need can immediately be provided.*

264. *With regard to the alleged suspension by the enterprise of transfers to the ACDAC of the trade union dues of the enterprise's pilots, the Committee notes the Government's indications that the enterprise has been promptly depositing the trade union dues as shown by the certification of trade union dues deducted from the unionized pilots in 2017, 2018 and up until January 2019. In the light of this information and in the absence of any new information from the complainant organizations in this regard, the Committee will not pursue its examination of this allegation.*

265. *Lastly, the Committee takes due note of the progress made in the dialogue between the enterprise and the ACDAC reported by the Government, the enterprise and the complainant organizations from 2019. The Committee notes in particular in this regard, in the context of the acute crisis affecting the global airline sector, the agreement concluded by the enterprise and the ACDAC on 27 October 2020 with a view to preserving the viability of the enterprise and jobs therein. While it observes that the agreement does not encompass all of the existing differences between the parties, the Committee welcomes this important step forward and trusts that its present conclusions and recommendations will help the parties to leave behind definitively the conflict that they have experienced in the course of the past decade.*

The Committee's recommendations

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

(a) The Committee requests the Government to take the necessary measures to ensure that, in future, any disputes relating to the renewal of the enterprise's collective agreement are resolved by way of negotiation and voluntary dispute settlement mechanisms in accordance with the principles of freedom of association.

(b) In the light of its conclusions on the strike action at issue in the present case and taking into account, in particular, the need, as highlighted by the Supreme Court, to bring the legislative provisions prohibiting any strikes in the air transport sector into conformity with the principles of freedom of association, the Committee requests the Government, in consultation with the most representative social partners from the country, to take the necessary measures as soon as possible to review the legislation in the sense referred to above, ensuring the establishment of a mechanism for negotiating minimum services in the event of strikes in the sector. The Committee invites the Government to avail itself of ILO technical assistance in this regard.

(c) With respect to the criminal proceedings brought against the president of the ACDAC, the Committee emphasizes the importance of its decisions mentioned

in the conclusions and requests the Government to keep it informed of developments in the criminal proceedings under way;

(d) The Committee firmly expects that the relevant institutions will continue to take all appropriate measures with a view to rapidly identifying those responsible and punishing the perpetrators and instigators of the illegal interceptions to which the ACDAC was subjected. The Committee requests the Government to keep it informed in this respect; and

(e) The Committee trusts that the Government will continue to pay close attention to the security situation of the ACDAC union leaders so that any protection they might need can immediately be provided.

Case No. 3371

Definitive report

Complaint against the Government of the Republic of Korea presented by – the Korean Fixed-Term Teachers' Union (KFTTU)

Allegations: The complainant denounces the refusal by the Ministry of Employment and Labour to issue the registration of establishment of the Korean Fixed-Term Teachers' Union and alleges that the registration system in the country is in violation of the principles of freedom of association

267. The complaint is contained in a communication dated 16 October 2019 from the Korean Fixed-Term Teachers' Union (KFTTU).

268. The Government provides its observations in communications dated 10 February and 11 September 2020 and 29 January 2021.

269. The Republic of Korea has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

270. In its communication dated 16 October 2019, the complainant denounces the refusal by the Ministry of Employment and Labour (MOEL) to issue the registration of establishment of the KFTTU and alleges that the registration system in the country is in violation of the principles of freedom of association as it excludes from the definition of trade unions those organizations that allow dismissed workers and workers seeking employment to become their members.

271. The complainant indicates that the KFTTU is a nationwide organization established in January 2018 with the aim to protect and promote the interests of teachers and their

working conditions and currently has 112 active members. KFTTU members – teachers with fixed-term contracts – are often under short-term contracts for a particular semester or two, mostly less than a year, or on temporary terms, meaning that their contracts are expected to terminate at a defined term. Workers with such fixed-term contracts work over consecutive periods, with likelihood of unemployment between jobs. They are often dismissed from work when teachers with permanent contracts return to their jobs and are exposed to discrimination over a number of employment conditions. Despite the union's efforts to improve job security of these workers, the insecurity of contracts is used as a justification by the MOEL to deprive the union of its legitimate status and the workers of the right to freely join the trade union of their choice.

272. In July 2018, the KFTTU filed a registration to the MOEL for the authorization to establish in accordance with the formalities required by section 14 of the Trade Union and Labor Relations Adjustment Act (TULRAA). The complainant alleges that this request was rejected by the MOEL on the ground that the labour contract of the representative of the union, Hyeseong Park, was found dismissed and the representative could not be considered as an active worker, thus disqualifying the organization from being considered as a trade union under the legislation, since section 2(4)(d) of the TULRAA provides that "an organization shall not be regarded as a trade union … where those who are not workers are allowed to join it". The MOEL also justified the rejection of the union's establishment by stating that article 6(2) of its by-laws, which allows membership to teachers and prospective teachers whose labour contracts had been terminated, who had been dismissed or are seeking employment, is contrary to section 2 of the Act on the Establishment, Operation, etc. of Teachers' Unions (AEOTUT), since it allows a teacher who is not defined as a teacher under the AEOTUT to become a member of the union. In May 2019, the KFTTU filed again a registration for the authorization of establishment to the MOEL, which once again rejected to issue the certification for the same reasons. Similarly, in 2013, the Korean Teachers and Education Workers Union was also rejected under the same justification, namely that its by-laws allowed membership for workers whose labour contracts had been terminated, who had been dismissed or who were seeking employment.

273. According to the complainant, the refusal by the MOEL to issue a certification to the KFTTU and thus to grant it any rights under the relevant legislations amounts to a violation of Article 2 of Convention No. 87 as it limits the right to organize by imposing a previous authorization by the State. The complainant also argues that section 2(4)(d) of the TULRAA which excludes from the definition of "trade unions" organizations that allow dismissed workers to become their members, is in violation of Article 2 of Convention No. 87 as it discriminates between workers with an active labour contract and dismissed workers, as a result of which trade unions are restricted from accepting dismissed workers in order to maintain their status as legitimate trade unions and exercise their full trade union rights. The complainant alleges that the TULRAA and the relative state authorities are prohibiting dismissed workers from joining trade unions and exercising their trade union rights and asserts that the legislation that serves as a justification for the refusal to authorize the KFTTU as a legitimate trade union is incompatible with the ILO Conventions and the core principles of freedom of association. In this regard, the complainant points to Case No. 1865, where the Committee had recommended the State to abolish section 2(4)(d) of the TULRAA due to its incompatibility with the principles of freedom of association.

B. The Government's reply

274. In its communications dated 10 February and 11 September 2020, the Government asserts that the registration system is not designed to infringe on any specific union's rights but rather to protect the rights of legitimately established unions and that the purpose and content of the registration system are in conformity with the principle of freedom of association. It also maintains that the refusal to register the KFTTU is a legitimate act under the current law, which is in conformity with ILO principles.

275. Concerning the registration system, the Government in its first communications explains in detail why it considers that the registration system is not in breach of the Conventions on freedom of association. With regard to the criteria of trade union recognition (i), the Government indicates that it officially recognizes an organization as a trade union by issuing a certificate of registration. In line with sections 10 and 12 of the TULRAA, anyone who wants to establish a union is required to submit a registration form on its establishment and its by-laws to the competent administrative office, which issues a certificate of registration within three days unless the organization has any grounds for disqualification under section 2(4) of the same Act. Upon issuance of the certificate, the organization is recognized as a legitimate trade union and is guaranteed statutory rights, including the right to collective bargaining and collective action. The prescribed grounds for disqualification under the TULRAA are designed to protect the right to organize of legitimate unions and special provisions are in place to provide strong protection of the right to collective bargaining and collective action, including criminal punishment on any employer who rejects a bargaining request from a legitimately established union without a proper reason or hires workers to replace striking employees. Therefore, it is essential to verify if there are any grounds for disqualification in the process of establishing a trade union. Otherwise, employers would have to go to court whenever they had doubts about the union's eligibility, which could hinder the right to establish and would run counter to the principles of freedom of association. Considering that the Government officially recognizes legitimately established unions through legal registration by issuing a certificate, the union establishment registration system is not in violation of the principle of freedom of association.

276. As to the determination of the grounds for disqualification (ii), the Government indicates that the administrative offices do not have discretion to decide if a union falls under any of the grounds for disqualification since these are very specifically prescribed by the law. Under section 2(4) of the TULRAA, the grounds for disqualification of a union are: where an employer or other persons who always act in the interest of the employer are allowed to join it; where most of its expenditure is supported by the employer; where its activities are only aimed at mutual benefits, moral culture and other welfare undertakings; where those who are not workers are allowed to join it (provided that a dismissed person shall not be regarded as a person who is not a worker until a review decision is made by the National Labour Relations Commission when an application has been made to the Commission for remedies for unfair labour practices); and in case where its aims are mainly directed at political movements. The Government states that all these reasons for disqualification can be clearly verified through the union's registration and by-laws, including the one invoked by the KFTTU (whether or not a specific worker is unemployed or dismissed), leaving no room for the administrative office's discretion to intervene. This means that the union establishment registration system is not in violation of the principle of freedom of association.

277. Concerning the right to appeal any administrative decision (iii), the Government states that anyone who has an objection can appeal to the court when a report on union

establishment has been rejected and can seek its withdrawal. If the court recognizes that the action of the Government is illegitimate, the administrative office is required to issue a certificate on the establishment of the union as per the binding effect of the court decision. Since the administrative decision may be subject to judicial review by the court, the establishment registration system does not go against the principle of freedom of association.

278. The Government further indicates that the Constitution and the TULRAA grant fundamental labour rights to workers and ensure that they may exercise the independent and democratic right to associate. As for teachers, given their distinctive status as civil servants and the nature of their duties, a separate law – the AEOTUT – regulates their right to organize, collective bargaining and collective agreements, section 2 of which limited union membership to teachers who are currently employed, since these teachers are the very persons who are directly and practically subject to provisions on employment conditions, whereas those who are not currently employed have no employment conditions to improve through collective bargaining.

279. The Government therefore indicates that the rejection of the registration of the KFTTU was not a result of the Government's arbitrary judgment but a legitimate action taken in accordance with the law in force, which in its view was consistent with ILO principles. The Government explains that since the KFTTU is composed above all by teachers under section 19(1) of the Elementary and Secondary Education Act, the KFTTU is subject to the AEOTUT. However, the union's representative is a retired teacher and its by-laws recognize trade union membership to fixed-term teachers in search of jobs after the termination of their contract or their dismissal. These persons were not considered as teachers under the AEOTUT, which meant that the union allowed ineligible people to join as members, in violation of the law. As a result, the KFTTU could not be deemed a legitimate union and its establishment registration was therefore rejected in July 2018, indicating that the reason for disqualification was allowing union membership to those who are not teachers. The Government asserts that even though the union had around ten months to amend and supplement its establishment form, it submitted a second establishment registration in May 2019 without any modification, which was again refused.

280. In its communication dated 29 January 2021, the Government adds that it has been working to meet international labour standards, setting the ratification of fundamental Conventions as one of the tasks to achieve and improving domestic laws and measures to ratify Conventions Nos 87 and 98. Reflecting the results of discussions at the Economic, Social and Labour Council, ILO recommendations and the opinions of various stakeholders, the Government submitted several legislative amendment bills to the National Assembly in October 2019 and June 2020, including amendments to the TULRAA, the AEOTUT and the Act on the Establishment and Operation, etc., of Public Officials' Trade Unions. Following the Government's efforts to facilitate discussions within the National Assembly, the integrated amendment bills were adopted in December 2020, promulgated in January 2021 and will enter into force in July 2021. The main changes introduced concern the ability for unions, through their by-laws, to autonomously determine membership eligibility of dismissed teachers. In particular, the new section 4(2) of the AEOTUT provides that the scope of persons eligible to join a labour union shall be any person who is a teacher or was appointed and worked as a teacher and meets the membership eligibility prescribed in the by-laws of a trade union. The Government asserts that the controversy involving membership eligibility of dismissed teachers has thus been resolved and they will be guaranteed their basic labour rights, including the right to organize. Since the amended laws guarantee the

right to organize for dismissed and retired fixed-term teachers, the Government plans to issue a certificate of registration to the KFTTU, should it submit its report on establishment once the amended laws enter into force.

C. The Committee's conclusions

281. *The Committee observes that this case concerns allegations of the refusal by the Ministry of Employment and Labour (MOEL) to issue the registration of establishment of the Korean Fixed-Term Teachers' Union (KFTTU) and allegations that the registration system in the country is in violation of the principles of freedom of association as it excludes from the definition of trade unions those organizations that allow dismissed workers and workers seeking employment to become their members.*

282. *The Committee notes, in particular, the complainant's allegations that following the submission of the registration form in July 2018 and in May 2019, the registration of establishment of the KFTTU was refused both times on the ground that the labour contract of its representative had been dismissed and the representative could not be considered as an active worker, thus disqualifying the organization from being considered as a trade union, and that the union's by-laws allowed membership to persons who were not considered as teachers under the legislation (prospective teachers whose labour contracts had been terminated, who had been dismissed or who were seeking employment). The Committee observes that while the complainant alleges that the refusal by the MOEL to register the KFTTU as a legitimate union amounts to a previous authorization by the State and deprives the union of any rights provided by the legislation, the Government explained that the refusal to issue a certificate of establishment to the KFTTU was a legitimate act, based on an established ground for disqualification in the legislation, and was conducted without any discretion of the administrative authorities. The Committee further notes that, according to the complainant, the registration system in the country at the time of the complaint was in violation of the principles of freedom of association as it excluded from the definition of trade unions those organizations that allowed dismissed workers and workers seeking employment to become their members (section 2(4)(d) of the TULRAA and section 2 of the AEOTUT).*

283. *While noting the views of the Government at the time of the complaint, justifying the refusal to register the KFTTU on the basis of the non-conformity of its by-laws with section 2 of the AEOTUT, the Committee must recall that this provision deprives a certain category of workers (dismissed and currently unemployed workers) from the right to join the organization of their own choosing and also unduly affects the ability of organizations whose members include dismissed or unemployed workers to obtain a certification of registration. The Committee also observes that this restriction posed particular problems in the present case, where the majority of KFTTU members are teachers employed on fixed-term contracts who, by the very nature of their contractual situation, are likely to alternate between periods of employment and unemployment, thus potentially depriving such union members of the possibility to be represented in a stable manner.*

284. *The Committee recalls that it has previously examined the alleged restrictions on the right to organize of dismissed and unemployed workers, as well as restrictions on the right to elect representatives in full freedom, in the framework of Case No. 1865, where it has been requesting the Government for a number of years to take the necessary measures to amend or repeal the provisions of the TULRAA and the AEOTUT that prohibit dismissed and unemployed workers from being trade union members and that make non-union members ineligible to stand for trade union office [see Case No. 1865, 382nd Report, June 2017, para. 42 and 353rd Report, March 2009, para. 720]. More specifically, the Committee recalls that all workers, regardless of their status, should be guaranteed their freedom of association*

rights so as to avoid the possibility of having their precarious situation taken advantage of. A provision depriving dismissed workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organization of their choice. Such a provision entails the risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization [see ***Compilation of the decisions of the Committee on Freedom of Association****, sixth edition, 2018, paras 329 and 410].*

285. *In this regard, the Committee welcomes the Government's latest information that integrated amendment bills to the AEOTUT, the TULRAA and the Act on the Establishment and Operation, etc., of Public Officials' Trade Unions were adopted in December 2020 and will enter into force in July 2021. It observes, in particular, that the amended laws will enable trade unions, through their by-laws, to autonomously determine membership eligibility of dismissed and retired teachers and workers. The Committee also observes, from publicly available information, that in February 2021, the National Assembly passed motions to ratify Conventions Nos 87 and 98 and welcomes this legislative development. In these circumstances, the Committee trusts that the legislative amendments will effectively ensure that all workers, including dismissed and temporarily unemployed workers, will be able to join organizations of their own choosing, both in law and in practice, subject only to the union by-laws, and that membership of such workers in a trade union will not deprive it of its legitimate trade union status and statutory rights. Considering that the current legislative provisions used to justify the refusal to issue a certificate of establishment to the KFTTU in July 2018 and May 2019 are themselves incompatible with the principles of freedom of association and have been amended, and in view of the Government's assurance that it plans to issue a certificate of registration to the KFTTU if it submits a report on establishment once the amended laws enter into force, the Committee trusts that the Government will ensure that the KFTTU will be registered as soon as the new laws enter into force and the request for registration is resubmitted.*

The Committee's recommendations

286. **In the light of its foregoing conclusions, which do not call for further examination, the Committee invites the Governing Body to approve the following recommendations:**

(a) **Welcoming the adoption of the amended labour bills, which will allow unions, through their by-laws, to autonomously determine membership eligibility of dismissed and retired teachers and workers and welcoming the ratification of Conventions Nos 87 and 98 in the national assembly, the Committee trusts that these legislative amendments will effectively ensure that all workers, including dismissed and temporarily unemployed workers, will be able to join organizations of their own choosing, both in law and in practice, subject only to the union by-laws, and that membership of such workers in a trade union will not deprive it of its legitimate trade union status and statutory rights.**

(b) **The Committee trusts that the Government will ensure that the KFTTU will be registered upon submission of its new request for registration in line with the amended laws as soon as they enter into force.**

Case No. 3312

Definitive report

Complaint against the Government of Costa Rica presented by the Association of Secondary School Teachers (APSE)

Allegations: The complainant organization alleges that it has been excluded from collective bargaining processes in the public education sector despite its representative status

287. The complaint is contained in two communications from the Association of Secondary School Teachers (APSE) dated 8 June 2017 and 1 February 2018.

288. The Government sent its observations in communications of 26 April 2019 and 22 January 2021.

289. 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 complainant's allegations

290. In its communications dated 8 June 2017 and 1 February 2018, the APSE, which was established in 1955 as a civil association and became an industry trade union in 2014, states that it has a membership of approximately 40,000 workers from the different occupational and professional categories of the Ministry of Public Education (MEP) (teachers, educators, technical and administrative staff and interdisciplinary professionals).

291. The complainant organization states that, in 2013, the MEP, together with the Costa Rican Education Workers' Union (SEC) and the Union of School Cafeteria and Other Related Workers (SITRACOME), signed the first collective labour agreement (CLA) for public employees in the education sector working for the MEP. The complainant organization states that the CLA was valid for three years and that, on 1 April 2016, both unions denounced it with a view to negotiating the second CLA. The complainant organization states that the negotiation process for the second CLA was undertaken by a union coalition comprising the two aforementioned unions, as well as the APSE and the National Association of Teachers (ANDE). The complainant organization alleges that, when the negotiations for the second CLA were completed and that all that remained was for the agreement to be signed, the Minister for Education unilaterally and arbitrarily excluded the APSE and concluded the CLA with the other three unions. The complainant organization claims that not only had the APSE actively participated in the process of negotiating the CLA, but that it is also the most representative union of the MEP as it is the one to which the majority of unionized workers from the different categories of public employees who provide their services in the Ministry belong. According to the complainant organization, the Minister's action constitutes a typical act

of reprisal and anti-union discrimination against the APSE for having opposed several bills, in relation to which the APSE had called a strike.

292. The complainant organization adds that, on 1 June 2016, the MEP signed the second CLA with the other three unions. It also states that this CLA had a period of validity of one year and that, one month before its expiry, the APSE asked the Minister to start the negotiation process for the next CLA. According to the complainant organization, in order to prevent the APSE from negotiating the next CLA, the Minister decided to extend the second CLA for a period of three years, once again excluding the APSE from the CLA.

293. The complainant organization further alleges that, despite the efforts made to open forums for dialogue and to acknowledge the participation of the APSE, in some of the joint bodies under the CLA, such as the Joint Labour Relations Board, this has been impossible. The complainant organization states that the Board is a joint body established under the agreement, composed of representatives of the MEP and representatives of the unions that signed the CLA, and it has broad negotiating powers. The complainant organization alleges that, having been arbitrarily excluded from the CLA and from participating in the Board, the APSE has essentially been denied access to any collective bargaining forums.

294. The complainant organization states that, under the legal system, the entitlement to negotiate a CLA rests with the majority union. In the public sector, in accordance with section 56(b) of the Labour Code, if several enterprise unions or unions for a branch of activity each present their own proposal for a CLA, the management shall ask them to present a joint proposal, and in the absence of a response or if there is any opposition, the CLA shall be negotiated with the majority union, without prejudice to negotiations with the other unions, with which any agreements reached will apply only to the members of the union in question. The complainant organization maintains that, in the light of the above, it is incumbent on the APSE to negotiate the CLA that covers all MEP workers, as it is the union to which the majority of workers directly affected by the CLA belong.

295. The complainant organization adds that, at the same time as the aforementioned events, the APSE asked the Director of Human Resources of the MEP to attest to how many workers were members of the SEC, SITRACOME and the ANDE unions (the signatories to the CLA), but that this information was denied. According to the complainant organization, the refusal to provide this information is part of the institutional, systematic, discriminatory and anti-union targeting of the APSE, which, as a whole, causes it serious and irreversible damage that threatens its normal functioning, substantially restricting the performance of the union role and threatening the very existence of the union.

B. The Government's reply

296. In its communication of 26 April 2019, the Government states that, on 16 April 2013, the MEP, with the SEC and SITRACOME unions, signed the first CLA governing labour relations for workers in the public education system whose sole employer is the MEP (approximately 85,000 workers). This CLA was approved on 17 May 2013 and entered into force a day later, with a period of validity of three years, that is to say until 18 May 2016. According to the Government, the negotiations for this CLA led two long-standing associations in the field of Costa Rican education, the APSE and the ANDE, which were established in 1955 and 1942 as civil associations, to become trade union organizations, in order to participate in collective bargaining in the education sector.

297. The Government states that, on 1 April 2016, the SEC and SITRACOME unions gave notice of the termination of the CLA, and informed the MEP that a broader union coalition had been formed and that the ANDE and the APSE unions would also participate in the negotiations for the new CLA. The Government states that, although the negotiations for the second CLA took place quickly and in a positive way, the discussion within the Legislative Branch of a bill (Act No. 19506 on arrangements for additional remuneration beyond the base salary of the public sector) had divided the activities of the unions that were in the process of negotiating the second CLA: while the SEC, SITRACOME and the ANDE stayed at the negotiating table for the CLA, the APSE left the coalition and unilaterally abandoned the negotiation process, calling a general strike to be held on 29 June 2016 in protest against the bill. The Government states that the actions of the APSE forced the MEP to continue the process of dialogue towards the second CLA only with the organizations that decided to remain at the negotiating table. The Government denies the allegation that the MEP excluded the APSE from the negotiations in an act of anti-union reprisal and maintains that the APSE, in disagreement with the rest of the coalition of teachers' unions with regard to strategy for mounting a campaign, withdrew itself from the negotiating table.

298. The Government states that, on 1 June 2016, the MEP and the unions that stayed at the negotiating table (the SEC, SITRACOME and the ANDE) signed the second CLA. It was approved on 10 June 2016, entered into force the day after its approval (11 June 2016) and was valid for one year from that date, that is to say until 11 June 2017. The Government states that, on 5 May 2017, as the expiry date of the second CLA approached, the APSE requested the MEP to begin the process of negotiating the third CLA, for which it submitted a draft for negotiation. The Government states that the APSE had informed the MEP of several attempts to ensure that the third CLA could be negotiated and signed jointly with the SEC, SITRACOME and the ANDE, but that its direct efforts had not met with success, so it requested the Minister of Labour to convene all union organizations so that they could reach an understanding and jointly negotiate the next CLA. The Government has sent a copy of a letter that the APSE sent to the Minister for Public Education on 5 May 2017, in which the APSE acknowledges the efforts made by the Minister for Labour in having invited all the union organizations to a meeting to be held on 4 May 2017, so that they could reach an understanding and jointly negotiate the draft version of the next collective agreement. In this letter, the APSE confirms that the SEC, SITRACOME and the ANDE did not attend that meeting and that, when the Minister for Labour insisted on holding another meeting on 5 May 2017, the organizations stated that they could not attend that one either, thereby demonstrating a lack of interest in the joint negotiation process. The Government states that the MEP has always been in favour of the participation of the APSE in the negotiations for the third CLA and stresses that, although it made efforts to help the unions overcome their differences and participate in collective bargaining as a united group, it did not achieve its goal of reconciling them.

299. The Government states that, in view of the clear inter-union dispute, the MEP refused the request of the APSE to negotiate a new CLA, because the organization was not part of the union coalition representing workers' interests in the second CLA. According to the Government, the MEP informed the APSE that: (i) it could not engage in negotiations with the APSE, which until then had not demonstrated through the appropriate mechanisms that it was more entitled than the group in question to represent the collective labour interests of the workers of the MEP; and (ii) it was prevented, as an employer, from intervening in the internal affairs of the unions and was prohibited from taking unilateral decisions with respect to the union representation of the workers. The

Government further states that the membership that the APSE claims to have from among the public employees of the MEP is not correct because the number it cites includes retirees who are no longer actively working in the education sector. The Government states that neither is it correct to say that it is the majority union across all the occupational and professional categories of the MEP, as the coalition of the SEC, SITRACOME and the ANDE has more members than the APSE and includes workers from all of the categories.

300. The Government states that the MEP and the coalition unions (the SEC, SITRACOME and the ANDE) agreed, for reasons of convenience and opportunity, not to denounce the second CLA and that, under article 68 of that agreement, the second CLA was automatically extended for three years as from 11 June 2017, that is to say it would be valid until 11 June 2020.

301. The Government states that: (i) on 4 September 2017, the president of the APSE petitioned the Ministry of Labour and Social Security (MTSS) to declare invalid the ministerial decision that approved the aforementioned extension (this is because the CLA was valid for one year and it could not be automatically extended for a period of three years); (ii) the MTSS ordered the Directorate of Legal Affairs of the MTSS to conduct a legal study in this regard; (iii) the Directorate of Legal Affairs of the MTSS ruled that the wording "This agreement may be automatically extended for three-year periods" contained in article 68 of the agreement was invalid, as it extended the agreement for three years, whereas the previous period had been only one year, and it recommended that the Minister for Labour should request the invalidity of this wording, without entailing changes to the act of approval or to the rest of the content of the CLA; (iv) in order to correct the point referred to by the Directorate of Legal Affairs of the MTSS, the main parties to the CLA agreed to amend the period of validity of the CLA, specifying that it was to be valid for three years from the first annual extension that had already put into effect, that is to say from 12 June 2017 to 12 June 2020, maintaining the possibility that, in the event of an automatic extension, the CLA should be extended for an equal period (of three years); and (v) this amendment to the CLA was made on 20 July 2018.

302. The Government states that the MEP holds regular meetings with the leadership of the APSE to discuss matters of interest to its members and that all of the union's officials enjoy trade union immunity, are granted trade union leave and benefit from facilities in the exercise of their duties. The Government also states that, although the APSE does not participate in the Joint Labour Relations Board, because the Board is a body under the agreement and the APSE is not a party thereto, it participates in the negotiations to reform the public employment system and in specific committees, such as the committee to review the amendment of incentive pay.

303. As for the information concerning the membership of the other unions that the APSE allegedly requested from the MEP, the Government states that the information was never denied to the APSE, but that the Director of Human Resources of the MEP informed it that this information should be requested from the competent agency, in this case, the National Treasury.

304. The Government considers that the dispute raised by the APSE is rather a dispute of an inter-union nature, in which it cannot intervene on pain of violating the freedom of association enshrined in international conventions and constitutional jurisprudence, in particular Vote No. 5000-93 of the Constitutional Chamber, all of which oblige the employer and the State not to intervene in the internal decisions of unions, to guarantee their independence to negotiate and not to change unilaterally the worker representation in an existing CLA. The Government states that, notwithstanding the

foregoing, the recently enacted legislation (sections 699 and 701 of the Labour Code) establishes the procedure to be followed in the event that the unions do not agree before entering into negotiations for a CLA. In particular, section 701 provides that: "When there are several trade union organizations at the negotiating table and each of them has submitted its own draft collective agreement, they will be asked to prepare a single draft before the negotiations begin. If they have not complied with this requirement within one calendar month from the date on which they were informed of it by the management of the institution or enterprise concerned, the draft that will be the subject of the negotiations will be, if a single company or negotiation is concerned, the one submitted by the majority union, or, if a sectoral negotiation is concerned, the one that is supported by the majority of union representatives."

305. In its communication of 22 January 2021, the Government states that the second CLA, signed on 1 June 2016 between the MEP and the ANDE, SITRACOME and SEC unions, was terminated on 7 May 2020. It also states that the third CLA was signed between the MEP and the ANDE, SITRACOME, SEC and APSE unions on 1 December 2020. The Government further states that the CLA is currently being reviewed by the MTSS under file No. 947. In view of the above, the Government considers that the demand set out in the complaint filed by the APSE has been met in full, as the APSE participated in the negotiation and signed the third CLA with the MEP.

C. The Committee's conclusions

306. *The Committee notes that, in the present complaint, the APSE, which is a trade union of workers in the education sector, alleges that the MEP has excluded it from the collective bargaining process, despite its representative nature, causing it serious and irreversible damage that threatens its normal functioning and the very existence of the union.*

307. *The Committee notes that the complainant organization and the Government agree that: (i) on 16 April 2013, the MEP signed a CLA with the SEC and SITRACOME trade unions, which remained valid until 18 May 2016; (ii) in 2014, the APSE and the ANDE, which were established in 1955 and 1942 as civil associations, became trade union organizations; and (iii) on 1 April 2016, the SEC and SITRACOME gave notice of the termination of the CLA and informed the MEP that the process of negotiating the second CLA would be taken over by a trade union coalition comprising these unions as well as the APSE and the ANDE.*

308. *The Committee notes that the accounts given by the complainant organization and by the Government as to the manner in which the second CLA was signed differ. On the one hand, the complainant organization claims that: (i) when all that remained was for the second agreement to be signed, the Minister for Education decided arbitrarily to exclude the APSE and concluded the CLA with the other three unions; (ii) the Minister acted in reprisal because the APSE had called a strike in relation to a public policy bill; and (iii) it is incumbent on the MEP to negotiate with the APSE because it is the most representative union of the MEP, with a membership of almost 40,000 people comprising the largest number of MEP workers.*

309. *For its part, the Government maintains that: (i) it was not the MEP that excluded the APSE from signing but rather it was the APSE that left the trade union coalition and abandoned the process of negotiating the second CLA to call a general strike on 29 June 2016 in protest against the bill; (ii) the membership that the APSE claims to have is not correct, because the number it cites includes retirees who are no longer actively working in the education sector; and (iii) neither is it correct to say that it is the majority union across all the occupational and professional categories of the MEP, as the coalition of the SEC, SITRACOME and the ANDE has more members than the APSE and includes workers from all of the categories.*

310. *The Committee notes that both the complainant organization and the Government state that, on 1 June 2016, the MEP signed with the SEC, SITRACOME and the ANDE the second CLA with a period of validity of one year.*

311. *The Committee notes that, according to the complainant organization, in order to prevent the APSE from participating in the negotiations for the third CLA, the MEP extended the second CLA for a period of three years. The Committee notes that the Government denies this allegation and points out that the MEP has always been in favour of the participation of the APSE in the negotiations for the third CLA and even convened two meetings for all the trade unions so that they could reach an understanding and jointly negotiate the draft of the next collective agreement (which has been acknowledged by the APSE in a letter sent to the MEP and included as an annex by the Government). According to the Government, there was a dispute between the unions, in which it could not intervene, for which reason the MEP and the coalition unions (the SEC, SITRACOME and the ANDE) agreed, for reasons of convenience and opportunity, not to denounce the second CLA, and instead to extend it for three years from 11 June 2017. The Committee also notes that, according to the Government, the APSE requested that the ministerial decision approving the aforementioned extension be declared invalid (because the CLA was valid for one year and it could not be automatically extended for a period of three years) and, as a result, by order of the Directorate of Legal Affairs of the MTSS, on 20 July 2018 it was specified that the CLA was to be valid for three years, from the first annual extension that had already put into effect, that is to say from 12 June 2017 to 12 June 2020.*

312. *The Committee also notes that, with regard to the allegation that it has been impossible for the APSE to participate in the joint bodies under the CLA, mainly the Joint Labour Relations Board, the Government states that this is because the Board is a body under the agreement and the APSE is not a party thereto, but that the APSE nevertheless participates in the negotiations to reform the public employment system, has regular meetings with the MEP, and its officials enjoy trade union immunity, are granted trade union leave, and benefit from facilities in the exercise of their duties. Furthermore, the Committee notes that the Government denies the allegation that the Director of Human Resources of the MEP refused to give the APSE information on the number of members of the SEC, SITRACOME and the ANDE, and claims instead that the APSE was informed that this information should be requested from the National Treasury.*

313. *The Committee notes that, according to national legislation, if there are several trade unions at the negotiating table and they cannot agree on a single draft for negotiation, the draft submitted by the majority trade union must be taken as the one to be negotiated. In the light of the above, the Committee regrets to note that, in view of the disputes concerning participation in the negotiations which are the subject of this complaint, including the differing accounts by the complainant organization and by the Government regarding the degree of representativeness of the trade unions in question, everything seems to indicate that such representativeness was not verified, so that to date there is no clear and objective information as to the number of members of each of these unions and therefore their capacity to negotiate with the MEP.*

314. *In this regard, the Committee recalls that the competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible. If the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 1366].*

315. *The Committee notes that, in its most recent communication, the Government states that the second CLA, signed on 1 June 2016 between the MEP and the SEC, ANDE and SITRACOME unions, was terminated on 7 May 2020. It also states that the APSE participated together with the aforementioned unions in the negotiation of the third CLA, which was signed on 1 December 2020 by the Government and the SEC-ANDE-SITRACOME-APSE trade union coalition. According to the Government, that CLA is currently (January 2021) being reviewed by the MTSS for approval under file No. 947.*

316. *In the light of the above and having received no further information from the complainant organization, the Committee understands that the subject of the present complaint has been resolved through the inclusion of the APSE in the third CLA. Noting, however, that the approval of the third CLA is still pending, the Committee expects the Government to take the necessary measures to bring the agreement into force as soon as possible and trusts that this will contribute to the harmonious development of collective relations in the MEP.*

The Committee's recommendation

317. In the light of its foregoing conclusions, which do not call for further examination, the Committee invites the Governing Body to approve the following recommendation:

> **The Committee expects the Government to take the necessary measures to bring the third collective labour agreement, which was signed on 1 December 2020, into force as soon as possible and trusts that this will contribute to the harmonious development of collective relations in the Ministry of Public Education.**

Case No. 3271

Interim report

Complaint against the Government of Cuba presented by the Independent Trade Union Association of Cuba (ASIC)

Allegations: The complainant organization alleges harassment and persecution of independent trade unionists, involving assaults, acts of aggression and dismissals; other acts of anti-union discrimination and interference by the public authorities; official recognition of only one trade union federation, controlled by the State; and the absence of collective bargaining and recognition of the right to strike

318. The Committee last examined this case (submitted in December 2016) at its October 2019 meeting, when it presented an interim report to the Governing Body [see 391st Report, approved by the Governing Body at its 337th Session (October 2019), paras 191–224].

319. The complainant sent further allegations on 15 October and 26 November 2019, and 28 January, 21 July and 7 December 2020.

320. The Government sent its observations in seven communications dated 13 November 2019, 6 January, 27 and 28 May, 22 July and 22 December 2020, and 17 February 2021.

321. Cuba has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

322. During its previous examination of the case in October 2019, the Committee made the following recommendations [see 391st Report, para. 224]:

(a) Referring to its previous conclusions, the Committee urges the Government to ensure that the Independent Trade Union Association of Cuba (ASIC) is given recognition and that it can freely operate and carry out its trade union activities.

(b) The Committee urges the Government to send a copy, without further delay, of the criminal convictions against Mr Iván Hernández Carrillo, Mr Carlos Reyes Consuegras, Mr Jorge Anglada Mayeta, Mr Víctor Manuel Domínguez García, Mr Alejandro Sánchez Zaldívar, Mr Wilfredo Álvarez García, Mr Bárbaro de la Nuez Ramírez, Mr Alexis Gómez Rodríguez, Mr Roberto Arsenio López Ramos, Mr Charles Enchris Rodríguez Ledezma, Mr Eduardo Enrique Hernández Toledo and Mr Yoanny Limonta García, and to keep the Committee informed of the outcome of the administrative and judicial proceedings awaiting decision.

(c) The Committee urges the Government to ensure, in light of the decisions mentioned in its conclusions, that an investigation is made into all the allegations of acts of aggression and restrictions on public freedoms with respect to Mr Osvaldo Arcis Hernández, Mr Bárbaro Tejeda Sánchez, Mr Pavel Herrera Hernández, Mr Emilio Gottardi, Mr Raúl Zerguera Borrell, Mr Aimée de las Mercedes Cabrera Álvarez, Mr Reinaldo Cosano Alén, Mr Felipe Carrera Hernández, Mr Pedro Scull, Mr Lázaro Ricardo Pérez, Mr Hiosvani Pupo, Mr Daniel Perea García, Mr Dannery Gómez Galeto, Mr Willian Esmérido Cruz, Mr Roque Iván Martínez Beldarrain, Mr Yuvisley Roque Rajadel, Mr Yakdislania Hurtado Bicet, Ms Ariadna Mena Rubio and Ms Hilda Aylin López Salazar, and to provide the Committee with detailed information with respect to each of the persons mentioned above and on the outcome (with copies of decisions or rulings) of any administrative or judicial proceedings instituted in relation to the above-mentioned allegations.

(d) With regard to the alleged restrictions imposed on ASIC members on travelling outside the country to participate in international activities in connection with their trade union work, including ILO meetings and invitations, the Committee expects the Government to refrain from unduly restricting the right of ASIC officials and members to organize and carry out their union activities freely, including when these are held outside the country.

(e) With regard to the alleged restrictions on the right to free movement of ASIC officials and members in Cuban territory, the Committee firmly expects that the Government will fully ensure that ASIC officials have the freedom of movement in the national territory required to carry out their trade union activities.

(f) Concerning the alleged anti-union dismissals of Mr Kelvin Vega Rizo and Mr Pavel Herrera Hernández, the Committee once again requests the Government to send its observations in this respect as soon as possible.

(g) With regard to the dismissal of Ms Omara Ruíz Urquiola, the Committee requests the complainant to provide further information about its alleged anti-union nature.

(h) With respect to the alleged infiltration by the Government into the trade union movement and acts of interference, the Committee urges the Government to provide its observations in that regard without further delay.

(i) Regarding the exercise of the right to strike, the Committee trusts that the Government will guarantee the exercise of this right in practice.

B. The complainant's new allegations

323. In its communications, the complainant reports new violations of the public freedoms of ASIC officials and members. The complainant alleges that harassment, repression, arbitrary arrests and threats against ASIC officials and members by the state police forces are still ongoing, in addition to restrictions on their right travel to participate in international activities in connection with their trade union work, without explanation or just cause.

- With regard to Mr Iván Hernández Carrillo, ASIC general secretary, the complainant alleges specifically that: (i) on 24 January 2020 he was arrested by state security agents in Havana, taken arbitrarily and without charge to a police station in the capital, subjected to physical aggression and threats and then taken to the Colón municipality, in the Matanzas province, where he lives. His belongings and documents, including his mobile telephone and the Committee's latest interim report, were confiscated, and he was confined to his house under penalty of detention. The confiscation of his mobile telephone effectively blocked all forms of communication, both within the country and internationally, and his access to the internet. Upon leaving his home, he was arrested three times and taken back to his house under threat. During these brief periods of detention, the authorities withheld his whereabouts from his family and colleagues; (ii) on 28 June 2020 the police surrounded his home, and on 30 June 2020, while attempting to leave his home to participate in ASIC meetings, he was arrested and taken to the police station in Colón, where he was detained for three hours. Before being released, he was charged with the offence of incitement to commit crime and warned that he would not be permitted to engage in any public activity; (iii) on 22 November 2020, together with Mr Carlos Orlando Olivera Martínez and Mr Lázaro Díaz Sánchez, he was subjected to a violent arrest by police officers patrolling the area around his house. After being transferred to the police station in Colón, he was interrogated and threatened for almost five hours. Before being released, he was issued with a warning for alleged public disorder; (iv) on 23 November 2020, he was arrested and transferred to the police station in Colón, where he was interrogated and threatened for two and a half hours. Before being released, he was issued with a warning for allegedly disturbing public order and fined 150 pesos for breaching the security cordon; (v) the political police maintained a police cordon in the area around his house, intimidating him and warning him not to leave; and (vi) he received death threats and threats to return him to prison. The official in question is serving a 25-year prison sentence under a legal concept known as *licencia extrapenal* [parole completed at home] and may be returned to prison to serve the rest of his sentence.

- With regard to Mr Willian Esmérido Cruz Delgado, secretary of labour and trade union affairs at the ASIC Municipal Secretariat, the complainant alleges specifically that: (i) he was subjected to a violent arbitrary arrest on 5 October 2019; (ii) he was deemed a risk to society and placed in pretrial detention; (iii) on

11 October 2019 he was sentenced to one year's imprisonment at a summary trial for alleged contempt; and (iv) he was refused a self-employment licence for political reasons.

- With regard to Ms Yorsi Kelin Sánchez, ASIC secretary in the Sancti Spíritus province, the complainant alleges specifically that: (i) on 12 October 2019, she was arrested violently and in degrading conditions at a police station, without being formally charged; (ii) she was transferred to the pretrial detention facility in Sancti Spíritus where she was subjected to psychological abuse and deprived of sleep and of visits from her family; and (iii) she received threats relating to her family, including a threat to remove her daughter from her custody. She was asked to work for state security.

- With regard to Mr Alejandro Sánchez, Mr Emilio Gottardi, Mr Charles Rodríguez and Mr Felipe Carreras, ASIC officials, the complainant reports that they were prohibited from travelling to Panama City to attend a trade union training course at the University of Latin American Workers (UTAL) and that, specifically: (i) on 20 September 2019, Mr Alejandro Sánchez and Mr Emilio Gottardi were prevented from boarding their flight at José Martí International Airport; and (ii) on 16 November 2019, Mr Felipe Carreras was arrested and transferred to a police station, then released without charge after having missed his flight to Panama.

324. Furthermore, the complainant expresses its concern at the dissemination of false reports, defamation and rumours targeting ASIC officials and members through a blog entitled *Top de la Disidencia Cubana* (Top Dissidents in Cuba) run by the state security bodies. The complainant also states that the health crisis brought about by COVID-19 has served as an excuse to maintain pressure on ASIC officials and members, who have been threatened pre-emptively with being accused of spreading an epidemic, a crime set out in article 174 of the Criminal Code (Act No. 62 of 1987), if they leave their homes to meet, particularly in Havana. That crime carries a sentence of 2 to 12 years' imprisonment. Lastly, the complainant expresses its general concern at the redoubled efforts to repress ASIC officials and members identified in the Committee's reports.

C. The Government's reply

325. In its communications, the Government provides its observations on the allegations in the present case. In general, the Government states that: (i) as with the allegations considered previously in relation to this case, these new allegations are false, baseless and lack legitimacy; (ii) the allegations form part of externally organized and financed campaigns of political manipulation to discredit Cuba under the agenda to bring about a regime change, in contravention of the principles of sovereignty, self-determination and non-interference in domestic affairs; (iii) the complainant does not aim to promote and protect workers' rights and trade union freedoms; (iv) the exercise of the right to freedom of association is not limited; rather, under article 56 of the Constitution, such exercise must respect public order and comply with the requirements set out in national legislation; (v) the accusation that degrading practices intensify on dates surrounding the approval of the Committee's reports is false; and (vi) the recommendations made by the Committee in its previous examination of the case are a reflection of the persistence of selective practices and political manipulation in the ILO's working methods and supervisory bodies against developing countries. The Government considers that these practices go against the spirit of dialogue and cooperation for the effective promotion of workers' rights, undermine tripartism and do not help improve the situation of workers in the world. Furthermore, it considers that these negative practices are

inconsistent with the principles of objectivity, impartiality and non-selectiveness that should prevail in the handling of trade union freedoms. The Government therefore anticipates that it will be possible, on the basis of the elements submitted in its observations, to dismiss all of the allegations relating to the present case as baseless.

326. With regard to the allegations that the COVID-19 pandemic is serving as a pretext for maintaining the restrictions supposedly imposed on ASIC officials and members, the Government states that: (i) the measures implemented by the competent authorities to control and reduce the spread of COVID-19 and safeguard the lives of all persons in the country, in accordance with the country's legal system, were not adopted with the purpose of maintaining pressure on the supposed trade union leaders and trade unionists; (ii) the restrictions on movement between provinces are intended to prevent the spread of the pandemic, in accordance with article 45 of the Constitution which provides that an individual's exercise of his or her rights is limited only by the rights of others, collective security, general well-being and respect for public order, for the Constitution itself and for legislation; and (iii) the crime of spreading an epidemic, and the relevant sanctions, are set out in article 187(1) of the Criminal Code.

Recommendation (a)

327. With regard to recommendation (a) of the Committee's last report, the Government states once again that ASIC is not a trade union organization, given that: (i) it does not have the objective of promoting or defending workers' interests; (ii) it does not have the genuine support of any labour collective and is not a grouping of Cuban workers; (iii) it does not enjoy legal or social recognition; (iv) the supposed leaders or activists referred to in the complaint do not represent labour collectives and are not workers themselves, as they do not have fixed employment relationships with entities or employers in Cuba; (v) the Government of the United States, through the International Group for Corporate Social Responsibility and the American organization National Endowment for Democracy, funds ASIC leaders to engage in internal subversion that constitutes an affront to the legitimate constitutional and legal order of Cuba, as well as to the purposes and principles of the Charter of the United Nations and international law; (vi) legitimate trade union officials and representatives exercise their functions normally, enjoy all the necessary legal safeguards and are protected by the provisions of the Labour Code (Act No. 116 of 2013), the Criminal Code and the Criminal Procedure Act (Act No. 5 of 1977); (vii) the trade union organizations that make up the Confederation of Workers of Cuba (CTC) are autonomous and their members approve their own statutes and regulations, discuss and reach agreements democratically, and elect or dismiss their executives; (viii) national unions have 3,151,128 members and 95.1 per cent of Cuban workers are unionized; and (ix) Cuban workers are the beneficiaries of participatory and democratic social dialogue at all decision-making levels.

Recommendation (b)

328. With regard to recommendation (b), the Government regrets that the Committee has not taken note of the information sent in its previous replies, in which it explains in detail that the activities and acts for which the persons mentioned were charged and sentenced constitute crimes provided for and sanctioned under the Criminal Code. The Government states that: (i) the crimes have no connection whatsoever to trade union activities and the exercise of the right to organize; (ii) the legal system provides full protection and respect for the procedural safeguards required in criminal proceedings and that inform due process; (iii) trials are public, oral and adversarial, and final sentences are communicated to the public prosecutor and the accused person or his or

her counsel, in accordance with the provisions of article 85 of the Criminal Procedure Act; (iv) sentences take into account private affairs that are protected under article 38 of the Civil Code; and (v) sending copies of sentences is not considered relevant.

Recommendation (c)

329. With regard to recommendation (c), the Government states that: (i) in Cuba, no one is arrested, persecuted, harassed, intimidated or imprisoned for exercising his or her trade union rights; (ii) the Cuban authorities adhere strictly to the legal safeguards required in criminal proceedings and provided for in criminal legislation, which sets out the procedures to be followed when an arrest is made, the circumstances that warrant such action and the conditions in which an arrested person must be subject to preventive measures or criminal proceedings, or released; (iii) the Criminal Code provides for aggravating circumstances when the perpetrator of a crime is a public official or law enforcement officer; (iv) none of the persons mentioned in the recommendation are trade unionists or trade union officials; and (v) none of them were tried or convicted for any act or activity relating to the defence of workers' interests or the exercise of trade union freedoms.

330. In that regard, and concerning the individual cases mentioned by the complainant, the Government states that:

- Mr Osvaldo Arcis Hernández was arrested, prosecuted and tried for acts that disturbed the peace of foreign nationals between 2015 and 2017 and was declared "unfit for work" by the Expert Occupational Medical Examination Commission owing to his schizophrenia.
- Mr Pavel Herrera Hernández was dismissed for a workplace disciplinary infraction and the subject of criminal prosecution for the crime of theft.
- Mr Dannerys Gómez Galeto, Mr William Esmérido Cruz Delgado, Mr Roque Iván Martínez Beldarrain, Mr Yuvisley Roque Rajadel and Mr Yakdislania Hurtado Bicet were arrested and taken to the National Revolutionary Police station in the Colón municipality: (i) they were charged with subversive propaganda under current criminal legislation; (ii) the money confiscated was returned in full, and it is untrue that the individuals were threatened; (iii) Mr William Esmérido Cruz Delgado, Mr Roque Iván Martínez Beldarrain and Mr Yuvisley Roque Rajadel received official warnings; and (iv) Mr William Esmérido Cruz Delgado was fined for violating the provisions of Decree Law No. 141/88 and failing to carry his personal identification.
- Mr Roque Iván Martínez Beldarrain has been prosecuted for the crimes of theft (2005), causing injury (2007, 2008 and 2009), speculation and hoarding (2013), making threats (2015) and handling stolen goods (2018).
- With regard to Mr William Esmérido Cruz Delgado: (i) between 2004 and 2018, he was convicted of the crimes of causing injury, making threats, contempt and public disorder; (ii) between 1998 and 2019 he received official warnings on six occasions for his continued antisocial behaviour; (iii) between 1990 and 2013 he received eight sanctions for various criminal acts that posed a low risk to society; between 2015 and 2018, he received two fines for violations of Decree Law No. 315 of 2013 on individual violations of the regulations governing self-employment; and (iv) in October 2019 he was sentenced to one year's imprisonment for two acts of contempt.

- Mr Emilio Alberto Gottardi was not arrested, threatened or harassed; he was simply summoned to the Zanja police station in Havana with the aim of analysing the "false reports" of alleged trade union violations that he had made during the ILO Centenary celebrations.
- It is untrue that Mr Daniel Perea García was a victim of harassment, arbitrary arrest and threats: (i) in February 2019 he received an official warning regarding his duty to refrain from destabilizing, dissident and disconcerting activity; and (ii) in August 2019 he was charged with handling stolen goods (reports Nos 11329/19 and 11349/19).
- It is untrue that the freedom of movement around the country of Mr Raúl Zerguera Borrell, Mr Aimée de las Mercedes Cabrera Álvarez and Mr Lázaro Ricardo Pérez has been restricted; Mr Raúl Zerguera Borrell works as a private carrier and makes unlimited journeys around the national territory. He has been convicted on several occasions of crimes including damage and disturbing public order; Mr Lázaro Ricardo Pérez travelled to the United States of America on 30 January 2019; and Mr Aimée de las Mercedes Cabrera Álvarez does not have an employment relationship.
- Mr Bárbaro Tejeda Sánchez, Mr Felipe Carrera Hernández, Mr Pedro Scull, Ms Ariadna Mena Rubio and Ms Hilda Aylin López Salazar do not have employment relationships; Mr Bárbaro Tejeda Sánchez has been prosecuted on 12 occasions for the crimes of theft, leaving the national territory illegally, public disorder, making threats, speculation, hoarding, and handling stolen goods; Mr Pedro Scull and Mr Felipe Carrera Hernández were involved in subversive activities in the national territory for economic gain; Ms Ariadna Mena Rubio left the organization that calls itself ASIC and no longer has any link to it; and Ms Hilda Aylin López Salazar has lived outside the country since 2017.

Recommendation (d)

331. With regard to recommendation (d), the Government states that: (i) it defends and guarantees the right of all persons to leave the country and to return; (ii) it is untrue that in the exercise of their functions, the Cuban authorities arbitrarily infringe citizens' freedom to travel; (iii) the Migration Act (Act No. 1312 of 1976, as amended by Decree Law No. 302 of 2012) determines the grounds on which the authorities may restrict the right to leave the country and this power is exercised by the relevant authorities in a non-arbitrary manner and respecting the legal guarantees set out; and (iv) Mr Alejandro Sánchez Zaldívar was convicted of illicit economic activities and disobedience under the provisions of the Criminal Code, and the immigration authorities have acted in accordance with the provisions of current legislation.

Recommendation (e)

332. With regard to recommendation (e), the Government disagrees with the allegations of restrictions on the right to free movement in Cuban territory of officials and members of the organization that calls itself ASIC and states that: (i) article 52 of the Constitution provides for the right to free movement, and individuals' freedom to enter, remain in, travel through and leave the national territory without any restrictions beyond those set out in law is therefore recognized; (ii) legislation does not limit the freedom of movement in connection with the exercise of labour and/or trade union rights, and it provides extensive guarantees for the full exercise and enjoyment thereof; and (iii) the freedom

of movement, including within the country, is legally restricted in the case of Cuban citizens who are defendants in criminal proceedings or respondents in civil proceedings; those who are completing a criminal sentence, whether custodial or non-custodial; and those who have been granted licencia extrapenal, suspended sentences or parole by the court.

Recommendation (f)

333. With regard to recommendation (f), the Government states that: (i) commissions of inquiry were formed and interviews carried out with managers and human resource management specialists, and the relevant employment records underwent comprehensive review; (ii) the commissions corroborated that the dismissals were not anti-union in nature given that both disciplinary measures were imposed in response to serious labour discipline violations (unjustified absences and unauthorized abandonment of the workplace), in accordance with the provisions of article 147(b) and (c) of the Labour Code; and (iii) neither Mr Kevin Vega nor Mr Pavel Herrera Hernández lodged any complaint with the Lower Labour Justice Body.

Recommendation (g)

334. With regard to recommendation (g), the Government states that the dismissal of Ms Omara Ruíz Urquiola was not politically motivated and that the termination of her employment relationship owed to her repeated absences from the university and consequent breach of her employment contract.

Recommendation (h)

335. With regard to recommendation (h), the Government states that it is untrue that the police or criminal investigation bodies undertake acts of interference or incite to infiltration those subject to criminal prosecution for common crimes and calling themselves "independent trade unionists".

Recommendation (i)

336. With regard to recommendation (i), the Government states that: (i) legislation does not prohibit the right to strike, and criminal legislation does not provide for any form of sanction for striking; (ii) workers may make use of other, more effective, methods; and (iii) protection for trade union leaders from possible acts of anti-union discrimination for having exercised their right to strike is set out in article 16 of the Labour Code, which grants trade union leaders the guarantees required to fully exercise their management.

D. New allegations

337. With regard to the complainant's new allegations, the Government states that:

- The allegations relating to supposed threats concerning the custody of a girl, the daughter of Ms Yorsi Kelin Sánchez, are false.
- It is untrue that Mr Iván Hernández Carrillo was subject to illegal or arbitrary arrest: (i) there is an absence of allegations of supposed violations, arbitrariness and excesses committed against him by the Cuban authorities or their agents; (ii) he was not arrested on 30 June 2020, and there is no police record of the alleged offence of incitement to commit crime; (iii) nor was he arrested on 23 November 2020, and there is no record of any action against him; (iv) he was

sentenced by the People's Municipal Court of Cienfuegos (trial no. 87 of 2019) to one year's imprisonment for two acts of contempt, and the People's Provincial Court of Cienfuegos declared his appeal to be inadmissible on 29 October 2019; (v) the following reports were lodged against him, in accordance with the provisions of article 8(3) of the Criminal Code: disobedience (45523/16), incitement to commit crime (9928/17) and contempt (3634/18); and (vi) he was the subject of criminal prosecution (trial no. 8 of 2003), in compliance with legal guarantees, for disturbing public order and acts against the independence and territorial integrity of the State provided for in the Act on the Protection of National Independence and the Economy of Cuba (Act No. 88 of 1999) and sentenced to 25 years' imprisonment; and (vii) he was granted licencia extrapenal in March 2011 and is currently completing the rest of his sentence, which will end in 2028, at liberty.

- In October 2019, Mr William Esmérido Cruz Delgado was sentenced to one year's imprisonment for two acts of contempt.
- The Cuban authorities, including the security and law enforcement agencies and their agents, must adhere strictly to the law and are in no circumstances permitted to threaten or intimidate citizens; should such acts occur, there are mechanisms to report them and to adopt the necessary internal disciplinary and criminal measures.

338. Lastly, the Government expresses its hope that, once all the information provided has been taken into account, the allegations that gave rise to this case will be dismissed because they are based on false grounds and constitute false accusations that lack a truthful factual or legal basis.

E. The Committee's conclusions

339. *The Committee recalls that this complaint concerns a number of allegations of assault, harassment, persecution, arrests, acts of aggression and restrictions on the free movement of union officials and members while carrying out their functions by State security forces. The complainant also alleges that the State recognizes only one trade union federation, which is controlled by the State.*

340. *The Committee notes that, once again, the Government objects to the Committee's examination of this case. In particular, it notes that the Government reiterates that the allegations put forward by the complainant are part of campaigns of political manipulation to discredit Cuba, financed externally and in contravention of the principles of sovereignty; and that the Committee's conclusions in the previous examination of the case are a reflection of the persistence of selective practices and political manipulation in the ILO's working methods and supervisory bodies against developing countries. In this respect, the Committee wishes to recall that, within the terms of its mandate, it is empowered to examine to what extent the exercise of trade union rights may be affected in cases of allegations of the infringement of civil liberties [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 22]. The Committee also recalls that it is not competent to consider purely political allegations; it can, however, consider measures of a political character taken by governments in so far as these may affect the exercise of trade union rights [see* ***Compilation****, para. 24].*

341. *With regard to the recognition of ASIC, and its ability to operate freely and carry out its trade union activities, the Committee notes that the Government reiterates that: (i) ASIC is not a trade union organization; (ii) it does not have the support of any labour collective; (iii) the*

supposed trade union officials of the organization in question have reportedly not entered into any employment relationship with any entities or employers in Cuba and, furthermore, they have not been elected by the workers to represent them; (iv) the right to organize and to establish trade unions freely is enshrined in the Constitution, adopted in 2019, and in the 2013 Labour Code; and (v) certain ASIC union members and officials do not have an employment relationship.

342. *While taking due note of the Government's reply, the Committee observes, firstly, that for several decades it has been examining allegations of non-recognition and interference by the Government in the free operation of trade union organizations not affiliated to the CTC [see Cases Nos 1198, 1628, 1805, 1961 and 2258 of the Committee on Freedom of Association]. The Committee recalls that the right to official recognition through legal registration is an essential facet of the right to organize since that is the first step that workers' or employers' organizations must take in order to be able to function efficiently, and represent their members adequately. It further recalls that freedom of association implies the right of workers and employers to elect their representatives in full freedom and to organize their administration and activities without any interference by the public authorities [see **Compilation**, paras 449 and 666]. Considering that, according to the information provided by the complainant, some trade union members and officials mentioned in the complaint were self-employed workers and that others had been dismissed for anti-union reasons, the Committee recalls that all workers, regardless of their status, should be guaranteed their freedom of association rights so as to avoid the possibility of having their precarious situation taken advantage of [see **Compilation**, para. 329]. The Committee recalls that in its initial examination of this case, it noted that ASIC, in its founding declaration of principles, advocates trade union autonomy in the framework of the rule of law, aims to promote full compliance with ILO international labour standards and proclaims that it will not compromise or associate itself with party-political activities. In its union constitution, ASIC states that its central objectives include grouping together independent trade unions and reporting violations of international labour standards. Moreover, ASIC members' duties as set out in the union constitution include defending workers' claims and benefits. It is in this context that the Committee observes that the elements of ASIC's declaration of principles and union constitution fall within the scope of action and definition of a workers' organization. The Committee therefore refers to its previous conclusions and, once again, strongly urges the Government to ensure that ASIC is given recognition, and that it can freely operate and carry out its trade union activities.*

Civil liberties

343. *With regard to the alleged restrictions on civil liberties, the Committee recalls that, in its last examination of the case, the complainant had reported acts of anti-union discrimination, including arbitrary arrests, harassment, raids and prosecutions [see the Committee's 391st Report, paras 197–199] and had requested the Government to ensure that an investigation was made into those allegations. The Committee also notes that, in its new allegations, the complainant reports arbitrary arrests, harassment and criminal prosecutions by the public authorities against the following trade union leaders: Mr Iván Hernández Carrillo, Mr Willian Esmérido Cruz Delgado and Ms Yorsi Kelin Sánchez.*

344. *In that regard, the Committee notes that the Government states that: (i) in Cuba, no one is arrested, persecuted, harassed, intimidated or imprisoned for exercising his or her trade union rights; (ii) the public authorities must adhere strictly to the law and are in no circumstances permitted to threaten or intimidate citizens; (iii) the mentioned persons were tried and convicted for various activities classified as offences under Cuban legislation, with no connection whatsoever to their trade union activities; and (iv) those persons enjoyed all*

due process guarantees. The Committee also observes that: (i) the Government has not provided a copy of the court rulings handed down to the above-mentioned persons or to those mentioned in recommendation (b) of its previous report; (ii) while the Government lists the offences or details of previous legal proceedings against these persons, it does not provide any evidence on the commission of those offences; (iii) the nature of the offences attributed to ASIC members and affiliated unions are very similar to those examined by the Committee in Case No. 2258, following a complaint filed in 2003 by the International Confederation of Free Trade Unions (ICFTU); (iv) the situation of Mr Iván Hernández Carrillo, ASIC general secretary, and Mr Víctor Manuel Domínguez García, director of the National Trade Union Training Centre (CNCS), was already examined by the Committee in Case No. 2258; and (v) in the case mentioned above, the Government did not provide a copy of the conviction of Mr Iván Hernández Carrillo and denied the existence of legal or other action against Mr Víctor Manuel Domínguez García.

345. *The Committee recalls that, on numerous occasions, where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the governments' replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has requested the Governments concerned to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations. It also recalls that in many cases, it has asked the Government concerned to communicate the texts of any judgments that have been delivered together with the grounds adduced therefor [see **Compilation**, para. 179]. The Committee regrets deeply the absence of a response from the Government to its request for specific information. Referring to its previous conclusions, the Committee once again urges the Government to send a copy, without further delay, of the criminal convictions against Mr Iván Hernández Carrillo, Mr Carlos Reyes Consuegras, Mr Jorge Anglada Mayeta, Mr Víctor Manuel Domínguez García, Mr Alejandro Sánchez Zaldívar, Mr Wilfredo Álvarez García, Mr Bárbaro de la Nuez Ramírez, Mr Alexis Gómez Rodríguez, Mr Roberto Arsenio López Ramos, Mr Charles Enchris Rodríguez Ledezma, Mr Eduardo Enrique Hernández Toledo, Mr Yoanny Limonta García, Mr Willian Esmérido Cruz Delgado and Ms Yorsi Kelin Sánchez. The Committee urges the Government to keep it informed of the outcome of the administrative and judicial proceedings awaiting decision.*

346. *With regard to its request that an investigation is made into all the allegations of aggression and restrictions on civil liberties reported by the complainant, the Committee notes the Government's reply that Mr Osvaldo Arcis Hernández, Mr Bárbaro Tejeda Sánchez, Mr Pavel Herrera Hernández, Mr Emilio Gottardi, Mr Raúl Zerguera Borrell, Mr Aimée de las Mercedes Cabrera Álvarez, Mr Reinaldo Cosano Alén, Mr Felipe Carrera Hernández, Mr Pedro Scull, Mr Lázaro Ricardo Pérez, Mr Hiosvani Pupo, Mr Daniel Perea García, Mr Dannery Gómez Galeto, Mr Willian Esmérido Cruz, Mr Roque Iván Martínez Beldarrain, Mr Yuvisley Roque Rajadel, Mr Yakdislania Hurtado Bicet, Ms Ariadna Mena Rubio and Ms Hilda Aylin López Salazar are not truly trade unionists and were not tried or convicted for activities relating to the exercise of trade union freedoms.*

347. *The Committee recalls that, while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists. The apprehension and systematic or arbitrary interrogation by the police of trade union leaders and unionists involves a danger of abuse and could constitute a serious attack on trade union rights [see **Compilation**, paras 132 and 128]. While observing that the Government's reply makes no reference to the alleged*

restriction of movement of Mr Reinaldo Cosano Alén and Mr Hiosvani Pupo, the Committee regrets that the Government has not adopted the measures necessary to make an investigation into all the allegations of acts of aggression and restrictions on public freedoms with respect to the aforementioned persons. The Committee strongly urges the Government to ensure that the investigation in question is made and requests it to provide detailed information with respect to each of the persons mentioned and on the outcome (with copies of decisions or rulings) of any administrative or judicial proceedings instituted in relation to the above-mentioned allegations.

348. *With regard to the alleged restrictions on travelling outside the country to participate in international activities connected to trade union work, the Committee notes the complainant's new allegations that Mr Alejandro Sánchez, Mr Emilio Gottardi, Mr Charles Rodríguez and Mr Felipe Carreras, ASIC officials, were prohibited from travelling to Panama City to attend a trade union training course at UTAL. On the other hand, the Committee notes that the Government states that: (i) it is untrue that in the exercise of their functions, the Cuban authorities arbitrarily infringe citizens' freedom to travel; (ii) the Migration Act determines the grounds on which the authorities may restrict the right to leave the country; and (iii) this power is exercised by the relevant authorities in a non-arbitrary manner and respecting the legal guarantees set out.*

349. *Recalling that it has highlighted that trade unionists, just like all persons, should enjoy freedom of movement and that, in particular, they should enjoy the right, subject to national legislation, which should not be such so as to violate freedom of association principles, to participate in trade union activities abroad [see **Compilation**, para. 190], the Committee strongly urges the Government to refrain from unduly restricting the right of ASIC officials and members to organize and carry out their union activities freely, including when these are held outside the country.*

350. *With regard to the alleged restrictions on the right to free movement of ASIC officials and members in Cuban territory, the Committee notes that the Government disagrees with the allegations of restrictions on the right to free movement. While noting the diverging versions of events of the Government and complainant, the Committee is bound to recall that the restriction of a person's movements to a limited area, accompanied by the prohibition of entry into the area in which his or her union operates and in which he or she normally carries on trade union functions, is inconsistent with the normal enjoyment of the right to association and with the exercise of the right to carry on trade union activities and functions [see **Compilation**, para. 200]. The Committee therefore firmly expects the Government to fully ensure that ASIC officials have the freedom of movement in the national territory required to carry out their trade union activities without Government interference.*

Dismissals and anti-union transfers

351. *With respect to the alleged anti-union dismissals of Mr Kelvin Vega Rizo and Mr Pavel Herrera Hernández, the Committee notes the information provided by the Government according to which: (i) commissions of inquiry were formed; (ii) the disciplinary measures were imposed in response to serious labour discipline violations (unjustified absences and unauthorized abandonment of the workplace); and (iii) the workers concerned did not lodge any complaint with the Lower Labour Justice Body. The Committee requests the Government to send a copy of the outcome of the investigations. The Committee also requests the complainant to confirm whether complaints against the dismissals in question have been lodged with the competent judicial authority.*

352. *With regard to the dismissal of Ms Omara Ruíz Urquiola, in relation to which the Committee had requested further information from the complainant about its alleged anti-union nature,*

the Committee notes the information provided by the Government according to which the disciplinary measures were imposed in response to serious labour discipline violations (unjustified absences). Noting the absence of additional information from the complainant, the Committee will not pursue its examination of this allegation.

Acts of interference

353. *Lastly, with respect to the alleged infiltration by the Government into the trade union movement and acts of interference, the Committee notes that the complainant alleges that its members continue to be subject to pressure during arbitrary arrests with the aim of persuading them to become informants. On the other hand, the Committee notes that the Government denies the allegations of interference by the police or criminal investigation bodies. Furthermore, with respect to the allegations that the COVID-19 pandemic is serving as a pretext for maintaining the restrictions supposedly imposed on ASIC officials and members, the Committee notes that the Government indicates that the measures implemented were not adopted with the purpose of maintaining pressure on the supposed trade union leaders and members. While noting the diverging versions of events of the Government and complainant, the Committee recalls the importance of adequate protection against any acts of interference in the establishment, functioning or administration of workers' and employers' organizations and firmly expects the Government to fully ensure adequate protection for ASIC officials against any acts of interference in their trade union activities, including in the circumstances described by the Government.*

The Committee's recommendations

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

(a) The Committee once again strongly urges the Government to ensure that the Independent Trade Union Association of Cuba (ASIC) is given recognition and that it can freely operate and carry out its trade union activities.

(b) The Committee once again urges the Government to send a copy, without further delay, of the criminal convictions against Mr Iván Hernández Carrillo, Mr Carlos Reyes Consuegras, Mr Jorge Anglada Mayeta, Mr Víctor Manuel Domínguez García, Mr Alejandro Sánchez Zaldívar, Mr Wilfredo Álvarez García, Mr Bárbaro de la Nuez Ramírez, Mr Alexis Gómez Rodríguez, Mr Roberto Arsenio López Ramos, Mr Charles Enchris Rodríguez Ledezma, Mr Eduardo Enrique Hernández Toledo, Mr Yoanny Limonta García, Mr Willian Esmérido Cruz Delgado and Ms Yorsi Kelin Sánchez, and to keep the Committee informed of the outcome of the administrative and judicial proceedings awaiting decision.

(c) The Committee once again urges the Government to ensure that an investigation is made into all the allegations of acts of aggression and restrictions on public freedoms raised with respect to Mr Osvaldo Arcis Hernández, Mr Bárbaro Tejeda Sánchez, Mr Pavel Herrera Hernández, Mr Emilio Gottardi, Mr Raúl Zerguera Borrell, Mr Aimée de las Mercedes Cabrera Álvarez, Mr Reinaldo Cosano Alén, Mr Felipe Carrera Hernández, Mr Pedro Scull, Mr Lázaro Ricardo Pérez, Mr Hiosvani Pupo, Mr Daniel Perea García, Mr Dannery Gómez Galeto, Mr Willian Esmérido Cruz, Mr Roque Iván Martínez Beldarrain, Mr Yuvisley Roque Rajadel, Mr Yakdislania Hurtado Bicet, Ms Ariadna Mena Rubio and Ms Hilda Aylin López Salazar, and to provide the Committee with detailed information with respect to each of them and on the

outcome (with copies of decisions or rulings) of any administrative or judicial proceedings instituted in relation to the above-mentioned allegations.

(d) With regard to the alleged restrictions imposed on ASIC members on travelling outside the country to participate in international activities in connection with their trade union work, the Committee strongly urges the Government to refrain from unduly restricting the right of ASIC officials and members to organize and carry out their union activities freely, including when these are held outside the country.

(e) The Committee firmly expects the Government to fully ensure that ASIC officials have the freedom of movement in the national territory required to carry out their trade union activities without Government interference.

(f) With regard to the alleged anti-union dismissals, the Committee requests the Government to send a copy of the outcome of the corresponding investigations. The Committee also requests the complainant to confirm whether complaints against the dismissals have been lodged with the competent judicial authority.

(g) The Committee firmly expects the Government to fully ensure adequate protection for ASIC officials against any acts of interference in their trade union activities, including in the circumstances described by the Government.

Case No. 2923

Interim report

Complaint against the Government of El Salvador presented by – Union of Municipal Workers of Santa Ana (SITRAMSA) and – the Autonomous Confederation of Salvadorian Workers (CATS)

Allegation: Murder of a trade union leader

355. The Committee last examined this case, presented in 2012, at its March 2019 meeting, when it presented an interim report to the Governing Body [see 388th Report, paras 329–339, approved by the Governing Body at its 335th Session (March 2019)].

356. The Government sent new observations in communications dated 25 March 2019 and 9 February 2021.

357. 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

358. In its previous examination of the case in March 2019, the Committee made the following recommendations [see 388th Report, para. 339]:

(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.

B. The Government's reply

359. In its communication of 25 March 2019, the Government confirms that its efforts to shed light on the crime continue and indicates that it contacted the Public Prosecutor of the Republic on 25 February 2019 to ask for more resources to dedicate to the investigation. The Government conveys the information provided by the new Public Prosecutor of the Republic through a communication dated 5 March 2019, which: (i) reiterates the information previously sent to the Committee regarding the investigations and procedures undertaken; (ii) underscores that, if there are still four lines of investigation, of which two are linked to Mr Victoriana Abel Vega's union activities, the most probable theory still holds, which is that Mr Vega was murdered by accident by gang members that were attempting to murder another municipal worker that was a witness in a murder case; (iii) confirms that this theory would be supported by the ballistic analysis, which showed that a weapon that had been seized from another member of the same gang had been used in the murder of Mr Vega; (iv) communicates that focus has been redirected to as to ensure that investigative efforts continue to be concentrated on searching for other sources of information (to shed light on existing lines of investigation or to generate new theories); and (v) indicates that the investigator on the case has confirmed ongoing efforts to obtain information that will identify the perpetrators in spite of existing difficulties, including insufficient resources and a significant workload in the division, and the fact that the only possible suspect in the case, who supported the theory of mistaken identity mentioned above, will already have been sentenced for his involvement in another murder. It was difficult to make contact with him in prison and, with an 18-year prison sentence, it is unlikely that he will cooperate. As a result, efforts have been focused on finding another informant or witness.

360. In its communication of 9 February 2021, the Government indicates that the Minister of Labor and Social Welfare has been following up on the investigations carried out by the Office of the Public Prosecutor of the Republic and that it has insisted to the Public Prosecutor the importance that the case merits and the need to expedite the investigations so that this crime does not go unpunished and to set a precedent in the defence of the exercise of the right to freedom of association. The Government indicates that it is awaiting the report of the Prosecutor, which it will transmit to the Committee as soon as it is received.

C. The Committee's conclusions

361. *The Committee recalls once again 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.*

362. *The Committee takes note of the information provided by the Government in relation to the ongoing efforts of the Office of the Public Prosecutor of the Republic to obtain information that will identify the perpetrators in spite of existing difficulties, including insufficient resources and a significant workload, and the fact that the only possible suspect in the case, would have already been sentenced for his involvement in another murder. The Committee also takes note that, as indicated by the Government, the Minister of Labour and Social Welfare has been following up on the investigations carried out by the Office of the Public Prosecutor of the Republic and that it has insisted to the Public Prosecutor the importance that the case merits and the need to expedite the investigations so that this crime does not go unpunished and to set a precedent in the defence of the exercise of the right to freedom of association.*

363. *The Committee notes with regret that, in spite of repeated requests made by the Ministry of Labour and Social Welfare to the Public Prosecutor of the Republic to take the necessary steps to progress in the case, no tangible progress has been made towards identifying and punishing the perpetrators of this serious crime more than ten years since the murder of the union leader.*

364. *In this respect, the Committee once again 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].*

365. *In the light of the foregoing, the Committee 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 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 are provided with the required human and financial resources and that they 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 asks the Government to keep it informed of all developments in the investigation and criminal proceedings.*

The Committee's recommendation

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

(a) The Committee urges the Government and all the competent authorities to make in a coordinated manner, as a matter of urgency and priority, all the necessary efforts 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 are provided with the required human and financial resources and that they 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 asks the Government to keep it informed of all developments in the investigation and criminal proceedings.

(b) The Committee once again draws the Governing Body's attention to the extremely serious and urgent nature of this case.

Case No. 3258

Interim report

Complaint against the Government of El Salvador presented by – the National Confederation of Workers of El Salvador (CNTS) and – the Trade Union Council of El Salvador (CONSISAL)

Allegations: The complainant organizations allege, on the one hand, the imposition of arbitrary conditions for registering trade union executive committees and the issuing of accreditation to their members and, on the other hand, irregularities in the appointment of worker representatives in a number of tripartite bodies

367. The Committee examined this case (presented in 2016) at its meeting in June 2019, when it presented an interim report to the Governing Body [see 389th Report, paras 319–346, approved by the Governing Body at its 336th Session].

368. The Government sent its observations in a communication dated 9 February 2021.

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

A. Previous examination of the case

370. In its previous examination of the case in June 2019, the Committee made the following recommendations [see 389th Report, para. 346]:

(a) The Committee refers to its conclusions in Case No. 3136 regarding the requirement to be Salvadoran by birth and again expresses the hope that the Government will take all steps, including legislative measures, to ensure that section 225 of the Labour Code and its application are consistent with the right of workers to elect their representatives in full freedom;

(b) The Committee requests the Government to take appropriate steps to ensure that, irrespective of the worker's type of contract, trade unions may freely appoint members of their executive committees. The Committee requests the Government to keep it informed in this respect;

(c) The Committee requests the Government, in consultation with the most representative trade union organizations, to take the necessary steps to review the rules applicable to the registration of executive committees in order to guarantee the right of organizations to elect their representatives in full freedom and to ensure a swift process. Reminding the Government that it can avail itself of ILO technical assistance, the Committee requests the Government to keep it informed in this regard;

(d) The Committee requests the Government, in consultation with the organizations concerned, to expedite the pending registrations of the executive committees of the trade unions mentioned in this case. The Committee requests the Government to keep it informed in this regard;

(e) With regard to the suspension of the Higher Labour Council, the Committee refers to its recommendations in Case No. 3054 and urges the Government to reactivate the Higher Labour Council as soon as possible; and

(f) As for the alleged irregularities in the appointment of worker representatives to the National Minimum Wage Council and the Housing Social Fund, the Committee urges the Government to respond without delay to the allegations made by the complainant organization and expresses the hope that the Government will ensure that the appointment of worker representatives to tripartite bodies will be based on objective, precise and pre-established criteria on representativeness, and that any dispute as to the appointment of those representatives will be resolved by an independent body. Regretting that this situation has persisted for years, and reminding the Government that it can continue to benefit from the Office's technical assistance, the Committee requests the Government to keep it informed in this regard.

B. The Government's reply

371. In its communication dated 9 February 2021, the Government indicates that, in accordance with article 256 of the Labour Code, the Ministry of Labour and Social Welfare is responsible for supervising trade union organizations, in order to verify whether they comply with the rule of law in carrying out their activities, and refrains from any form of intervention designed to limit the rights and guarantees enshrined by the laws for the benefit of trade unions. The Government indicates that, on that basis, the principles have been established for the supervision of rights of the persons who are members of trade union management committees, beginning with the phase of registration and verification of the person who forms part of the workers' representatives on the management committee. For this purpose, the appropriate means is the Single Identity Document, as well as any instrument with which the employment relationship can be verified. The Government indicates that since 2015 the management committees of the

National Confederation of Salvadoran Workers (CNTS) have been registered without delay and within the legal deadline. The Government has attached certified copies of the records of registration of those committees.

C. The Committee's conclusions

372. *The Committee recalls that this case refers, firstly, to the alleged imposition of excessive and arbitrary conditions for registering and recognizing the credentials of trade union executive committees (such as the submission of copies of individual identity documents and payslips in order to verify whether members of executive committees are Salvadorans by birth or to verify the worker's type of contract), and the subsequent refusal of the labour administration to register the executive committees of a number of trade union organizations, thus preventing their members from being elected to various tripartite bodies. This includes the executive committees of 24 trade unions affiliated with the Trade Union Council of El Salvador (CONSISAL), namely the Independent Union of Agricultural Workers in the San José de la Montaña Canton (SITRAM), the General Trade Union of Workers in the Fishing and Allied Industries (SGTIPAC), the Independent Union of Commercial Workers in Colonia Las Flores (SITRACOF), the Independent Union of Retail Workers in Jerusalén (SICOJ), the Independent Union of Agricultural Workers in the El Espino Canton (SITRACE), the Union of Independent Craftspersons in Santa María Ostuma (SINAISMO), the Trade Union Federation of Registered Workers of El Salvador (FESTRAIS), the Trade Union Federation of Agricultural and Commercial Workers (FESTRAC), the Western Trade Union Association of Small Retailers (ASPECO), the Association of Merchant Seafarers of El Salvador (AMMS), the Independent Union of Agricultural Workers in the Tepeagua Canton (SITRACT), the Union of Agricultural Producers in the San Felipe Canton (SIPROACASF), the Union of Independent Commercial Workers in Nueva San Salvador (SITICONSS), the Union of Agricultural Workers in the Achichilco Canton (SINTRACA), the Union of Commercial Workers in La Unión (SITRACUN), the Union of Agricultural Workers in the La Labor Canton (SITRACL), the Independent Union of Artisanal Fishers in Zacatecoluca (SINPEZ), the Independent Union of Professionals and Technicians of El Salvador (SIPROTES), the Union of Agricultural Producers in Santo Domingo (SIPROASD) and the Union of Small Agricultural Producers in the Galeano Canton (SIPEACG), the Union of Independent Commercial Workers in Puerto de la Libertad (SITRAINCOP), the Union of Agricultural Producers in the La Esperanza Canton, San Sebastián District (SIPROACESS), the Union of Commercial Workers in Colonia Agua Caliente (SITRACCAC) and the Independent Union of Agricultural Workers in the Chaperno Canton (SITRACH). The case also refers to alleged irregularities in the appointment of worker representatives in tripartite bodies such as the National Minimum Wage Council and the Housing Social Fund, as well as the Higher Labour Council.*

373. *The Committee notes that in its communication the Government refers to the documents that must be submitted for the purposes of requesting the registration of management committees and states that, since 2015, the management committees of the CNTS have been registered without delay and within the legal deadline. In this regard, the Committee recalls that the last time it examined the case it made specific recommendations in relation to the excessive requirements for the registration of trade union management committees. It also recalls that the last time it examined the case, it had noted that the CNTS management committees had been registered, once the precautionary measures taken by the National Department of Social Organizations of the Ministry of Labour and Social Welfare had been remedied. The Committee notes that the Government has attached certified copies in which it costs the registration of the CNTS management committees between 2015 and 2020. Observing, however, that the Government has not sent any information regarding the registration of the management committees of the 24 trade unions that belong to CONSISAL, mentioned in the*

previous paragraph, or any information relating to the remaining recommendations it made when it last examined the case at its meeting in June 2019 [see 389th Report, paras 319–346], the Committee finds itself obliged to reiterate those recommendations, as follows.

The Committee's recommendations

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

(a) The Committee refers to its conclusions in Case No. 3136 regarding the requirement to be Salvadoran by birth and again expresses the hope that the Government will take all steps, including legislative measures, to ensure that section 225 of the Labour Code and its application are consistent with the right of workers to elect their representatives in full freedom.

(b) The Committee requests the Government to take appropriate steps to ensure that, irrespective of the worker's type of contract, trade unions may freely appoint members of their executive committees. The Committee requests the Government to keep it informed in this regard.

(c) The Committee requests the Government, in consultation with the most representative trade union organizations, to take the necessary steps to review the rules applicable to the registration of executive committees in order to guarantee the right of organizations to elect their representatives in full freedom and to ensure a swift process. Reminding the Government that it can avail itself of ILO technical assistance, the Committee requests the Government to keep it informed in this regard.

(d) The Committee requests the Government, in consultation with the organizations concerned, to expedite the pending registrations of the executive committees of the trade unions mentioned in this case. The Committee requests the Government to keep it informed in this regard;

(e) With regard to the suspension of the Higher Labour Council, the Committee refers to its recommendations in Case No. 3054 and urges the Government to reactivate the Higher Labour Council as soon as possible.

(f) As for the alleged irregularities in the appointment of worker representatives to the National Minimum Wage Council and the Housing Social Fund, the Committee urges the Government to respond without delay to the allegations made by the complainant and expresses the hope that the Government will ensure that the appointment of worker representatives to tripartite bodies will be based on objective, precise and pre-established criteria on representativeness, and that any dispute as to the appointment of those representatives will be resolved by an independent body. Regretting that this situation has persisted for years, and reminding the Government that it can continue to benefit from the Office's technical assistance, the Committee requests the Government to keep it informed in this regard.

Case No. 3330

Report in which the Committee requests to be kept informed of developments

Complaint against the Government of El Salvador presented by – the Union of Health Solidarity Fund Workers (SITRAFOS) and – the Autonomous Federation of Salvadoran Workers (CATS)

Allegations: Delays and other obstacles to collective bargaining within a public health institution

375. The complaint is contained in communications from the Union of Health Solidarity Fund Workers (SITRAFOS) and the Autonomous Federation of Salvadoran Workers (CATS) dated 29 May and 8 October 2018.

376. The Government sent its observations in a communication dated 12 June 2019.

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

A. The complainants' allegations

378. The complainant organizations report delays and other obstacles to collective bargaining suffered by the majority trade union at the Health Solidarity Fund (FOSALUD) (the employing institution).

379. In their communication of 29 May 2018, the complainant organizations condemn the fact that the various state bodies in which they participated in order to engage in collective bargaining in strict accordance with the law, instead of creating conditions to facilitate or promote negotiation, have shown deliberate intent to obstruct it. They allege that this has allowed the employer to avoid negotiating with SITRAFOS. The complainants state that:

(i) SITRAFOS is the majority trade union at the employing institution with 1,654 members and, in accordance with the requirements of section 271 of the Labour Code (to have at least 51 per cent of the workers as members), it drew up a set of demands in the form of a draft collective agreement, which was approved by its general assembly on 12 June 2017, and, following the procedure established in the Labour Code, it made a request on 17 October 2017 to the Directorate-General of Labour to launch the direct contact phase in the negotiation process;

(ii) on 7 November 2017, SITRAFOS was notified of the decision of 31 October 2017 of the Director-General of Labour instructing the representatives of FOSALUD (the employer) to certify the type of employment relationship that existed between the institution and its workers (individual employment contracts or appointments under the Wages Act);

(iii) on 13 November 2017, the Minister of Health, as the legal representative of FOSALUD, issued a reply indicating that 299 employees had individual contracts and the other 2,659 were employed under the Wages Act;

(iv) on the basis of this information, arguing that if the process was conducted on the basis of the Labour Code the resulting collective agreement would only apply to the minority of workers holding individual contracts, the Labour Director-General, by a decision of 15 November 2017, declared that the matter lay outside her competence and that the Civil Service Act was applicable. In this regard, the complainants questioned the validity of the above-mentioned argument and pointed out that, under the existing legal provisions, the resulting collective agreement – irrespective of the legislative basis – would apply to all workers. They emphasized that the Labour Director-General was aware of this, since there had been previous examples of autonomous institutions which, like FOSALUD, employ workers on individual contracts as well as workers appointed under the Wages Act, and in these institutions collective agreements exist which have been negotiated on the basis of the provisions of the Labour Code and apply to all workers;

(v) SITRAFOS had no choice but to use the procedure established in the Civil Service Act and on 15 December 2017 it submitted to the Civil Service Tribunal (TSC) the request and documentation for initiating the direct contact phase;

(vi) by a decision of 10 January 2018, the TSC issued four specific reservations, which SITRAFOS resolved satisfactorily within the stated deadline;

(vii) however, the TSC was dilatory in not informing the FOSALUD representatives until 19 March 2018, when it issued a decision requesting the latter to submit the payroll of public servants working at the institution. The complainants object that this requirement was not only unnecessary – since the union's request already contained the relevant documentation, which the employer had forwarded to the Ministry of Labour and which SITRAFOS had already sent to the TSC – but was also imposed without fixing a time limit, thereby paving the way for further delays; and;

(viii) the Minister of Health, representing the employer, had not completed this formality at the time of presentation of the complaint (29 May 2018), thereby unduly delaying the procedure, despite possessing the information and having previously sent it to the Ministry of Labour.

380. By a communication of 8 October 2018, the complainants provided additional documentation condemning the continuation of the delaying tactics, since the bargaining process had still not started at that date. By a decision of 7 June 2018, the TSC finally confirmed that the requirements of the Civil Service Act (having a membership of at least 51 per cent of the workers) had been met, and so it would be possible to proceed to the initial phase of direct contact. However, the employer's representatives continued with their delaying tactics. Instead of calling a meeting with the union representatives in accordance with its legal obligation (section 133 of the Civil Service Act gave the employer 72 hours, from the time of the TSC decision, to hold a meeting with the requesting party), the employer addressed a note directly to the TSC, dated 19 June 2019, delaying even further the start of negotiations.

381. The complainants indicate that, as a result of these manoeuvres, the TSC summoned the parties to a hearing to be held on 20 July 2018 to determine the date and time of negotiations (which, under the terms of the Civil Service Act, should have been determined within the 72 hours following the decision of 7 June 2018). Moreover, the complainants object that in this summons the institution's proposal was not sent to

SITRAFOS, which would have enabled progress to be made. Lastly, the complainants indicate that this proposal was not sincere either, since on the day of the hearing the employer's representatives, far from maintaining this proposal, refused to enter into negotiations and presented three additional delaying motions that lacked any legal basis, and these were addressed by the TSC.

B. The Government's reply

382. In its communication of 12 June 2019, the Government has provided the responses of the authorities concerned to the allegations made in the complaint. The Government states that:

(i) on 31 October 2017, the Director-General of Labour issued a decision requesting FOSALUD to certify the type of its employment relationship with its workers. FOSALUD replied on 13 November 2017, stating that it employed 299 workers on individual contracts and 2,659 on appointment agreements under the terms of the Wages Act;

(ii) by a decision of 10 January 2018, the TSC acknowledged receipt of the set of demands containing the revised version of the FOSALUD collective labour agreement and it issued reservations which were resolved by SITRAFOS on 1 February 2018;

(iii) on 10 April 2018, the TSC notified the employer of the decision, requesting it to send the payroll of employees working at the institution;

(iv) on 23 May 2018, FOSALUD replied, certifying that SITRAFOS met the requirement of having a membership of more than 51 per cent of the workers;

(v) on 18 June 2018, notification was received of the TSC official letter of 7 June 2018, informing the FOSALUD representatives of the set of demands and requiring them to reach agreement with the requesting trade union within 72 hours (under the terms of section 133 of the Civil Service Act) regarding the place, date and time for opening negotiations;

(vi) on 19 June 2018, FOSALUD sent a communication to the TSC proposing that the negotiations be held on Thursdays at 9 a.m.;

(vii) on 20 July 2018, a meeting was held at the TSC to enable the parties to reach an agreement on the scheduling of meetings. The Government points out that no agreement was reached at the above-mentioned meeting because the TSC representative started the meeting on the mistaken premise that the negotiation process had been exhausted;

(viii) on 23 July 2018, two motions were brought before the TSC: (a) one by SITRAFOS, alleging a violation of the right of defence and failure to meet the 72-hour deadline established by law; and (b) the other by the employing institution, to clarify whether the bargaining committee appointed by the union in 2017 still had the same legitimacy and representativeness to negotiate the collective agreement (or whether a new bargaining committee had been given legitimacy at the previous general assembly);

(ix) in view of the concerns expressed by SITRAFOS regarding the delays, FOSALUD sent the TSC a communication on 1 October 2018 denying any lack of willingness and declaring its readiness to the TSC to continue with the phases of the process,

and requested a meeting with SITRAFOS to establish a mechanism to streamline notifications;

(x) on 15 November 2018, the TSC declared certain previous notifications and decisions null and void and summoned the representatives of FOSALUD and SITRAFOS to appear before it;

(xi) by a ruling of 5 December 2018, the TSC placed on record that no agreement had been reached by the parties at the meeting of 20 November regarding the scheduling of meetings;

(xii) by a decision of 22 January 2019, the TSC acknowledged receipt of the certification of the record of the general assembly authorizing the elected executive committee to engage in the negotiation process;

(xiii) on 15 February 2019, FOSALUD received an instruction for the parties concerned to agree on a timetable for holding meetings in the direct contact phase;

(xiv) on 26 February 2019, the representatives of the parties went to the TSC, where a FOSALUD representative stated that, in accordance with the updated information at the institution's disposal, SITRAFOS no longer had a membership of 51 per cent of the workers. Consequently, it stated that, being liable for its actions and acting on the basis of the principle of legality, the institution was not obliged to negotiate. The Government has forwarded a communication from that representative, stating that in the public sector voluntary negotiation is not possible if the 51 per cent requirement is not fulfilled (something which is possible under the Labour Code). The grounds put forward are that public officials do not have decision-making power to commit public funds for the future, or any other powers apart from those explicitly laid down by law, and that voluntary collective bargaining in the public sector, although not expressly prohibited, would be open to challenge on account of a lack of regulation. In this regard, the SITRAFOS bargaining committee replied that the TSC had already resolved the above-mentioned motion at the time (corroborating the necessary representativeness) and that it had been filed out of time. This being the case, no agreement had been reached to determine the place, date and time for engaging in the direct contact phase; and

(xv) on 13 March 2019, the TSC acknowledged receipt of the motion refusing negotiations on the grounds that SITRAFOS did not have the necessary representativeness.

383. Lastly, the Government states that at no time did FOSALUD launch internal campaigns to undermine any of the trade unions at the institution, let alone to cause them any loss of membership. It concludes by stating that FOSALUD hopes that the TSC will resolve the outstanding motion so that negotiations regarding a collective agreement can go ahead.

C. The Committee's conclusions

384. *The Committee observes that in the present case the complainant organizations report delays and other obstacles to collective bargaining from the authorities concerned. The Committee notes that the negotiation process was proposed in a public health sector institution (FOSALUD), where some workers had been contracted under the Labour Code and others under the Wages Act, and that, since most workers had been appointed under the Wages Act, the Directorate-General of Labour decided that the procedure established under the Civil Service Act should be applied; SITRAFOS complied with this, following the procedures provided for in the aforementioned Act.*

385. *The Committee observes that, although the authorities indicate that they are willing to engage in negotiations, after a process initiated by SITRAFOS in October 2017 and with no success in fixing a place and date for sessions in the direct contact phase of negotiations, in February 2019 FOSALUD stated that it was unable to proceed with negotiations since SITRAFOS no longer had the 51 per cent representativeness required by the Civil Service Act for compulsory collective bargaining.*

386. *In general terms, with regard to the alleged refusal of FOSALUD to negotiate with SITRAFOS on the grounds that the latter no longer represented 51 per cent of the workers, the Committee has considered that if there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 1390].*

387. *Furthermore, with regard to this specific case, the Committee observes that the objection made by FOSALUD that the membership had decreased in 2019 is a matter which, as indicated by SITRAFOS, was reportedly dealt with at the start of the procedure (compliance was verified by the TSC by a decision of 7 June 2018, admitting the list of demands and affirming that SITRAFOS had the stated percentage). In addition, the Committee observes that the alleged decrease in SITRAFOS membership below 51 per cent in 2019 is not an obstacle to negotiation via the procedures established by the Labour Code (these procedures, as asserted by the complainants and not denied by the Government, do allow voluntary negotiation when the 51 per cent level of representativeness is not achieved and apply to other institutions with similar mixed situations – in other words, involving workers appointed under the Wages Act as well as workers hired on the basis of the Labour Code).*

388. *The Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations, and also recalls that the principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided The Committee also recalls that both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence [see* ***Compilation****, paras 1327, 1330 and 1329].*

389. *In this regard, the Committee observes that the Government, apart from denying the allegation of a lack of willingness to negotiate and stating its readiness to streamline and complete the negotiation process, does not deny or attempt to justify the specific instances of procrastination reported in the complaint (for example, one and a half months for FOSALUD to communicate information which it possessed and which it had already sent to the Ministry of Labour) or the resulting delay (over 14 months since the start of the procedure without any progress). The negotiation process having started at the end of 2017, there had still been no compliance in May 2019 with the initial requirement (agreeing on the schedule for direct contact meetings), for which the law prescribes no more than 72 hours. In conclusion, the Committee notes with regret that, in the negotiation process launched by SITRAFOS, a series of actions and delays occurred which could be ascribed to the authorities concerned and which had the effect of obstructing the negotiations. The Committee considers that situations of this kind can undermine confidence in the system of labour relations in the sector. Lastly, the Committee observes that although the Government refers to the decrease in union membership as an obstacle to negotiation, it concludes its observations by stating that FOSALUD is waiting for that issue to be resolved in order to conduct negotiations for the collective agreement.*

390. *In these circumstances, the Committee firmly expects that the authorities concerned will take the appropriate measures to promote the negotiation of a collective agreement between FOSALUD and SITRAFOS without further delay. The Committee requests the Government to keep it informed of all progress in this respect.*

The Committee's recommendation

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

> **The Committee firmly expects that the authorities concerned will take the appropriate measures to promote the negotiation of a collective agreement between the Health Solidarity Fund (FOSALUD) and the Union of Health Solidarity Fund Workers (SITRAFOS) without further delay. The Committee requests the Government to keep it informed of all progress in this respect.**

Case No. 3350

Report in which the Committee requests to be kept informed of developments

Complaint against the Government of El Salvador presented by – the Union of Municipal Workers of Santa Ana (SITRAMSA) and – the National Confederation of Salvadoran Workers (CNTS)

Allegations: The complainant organizations allege acts of anti-union discrimination by the municipal administration of Santa Ana: non-compliance with the arbitration ruling of 2014 (ruling which has the status of a collective labour agreement; threats against union members, suspensions and dismissals (including ten members of the managerial committee), and the closure of union premises

392. The complaint is included in a joint communication from the Union of Municipal Workers of Santa Ana (SITRAMSA) and the National Confederation of Salvadoran Workers (CNTS) of 10 September 2018.

393. The Government sent its observations in a communication dated 9 February 2021.

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

A. The complainant's allegations

395. In its communication dated 10 September 2018, the complainant organizations allege that in October 2016 the administration of the ARENA political party, to which the mayor of the municipality of Santa Ana, Mr Moreira Cruz, belonged and its plural municipal council (comprising councillors from his party and other parties, apart from the Farabundo Martí National Liberation Front (FMLN) and the Grand Alliance for National Unity (GANA) political parties), requested SITRAMSA to support them. Since the trade union did not accede to this request, this led to a discrimination campaign against SITRAMSA, threats of dismissals of its members, and non-compliance with the arbitration ruling. The complainant organizations indicate that the arbitration ruling, issued on 27 May 2014 by the Court of Arbitration during the direct reconciliation proceedings, has the status of a collective labour agreement, was registered with the Ministry of Labour and Social Welfare and entered into force on 1 January 2015. The complainant organizations allege that the municipal administration failed to comply with several of the 88 clauses of the arbitration ruling, despite the fact that compliance with all of them was compulsory for both parties.

396. The complainant organizations allege that, at the beginning of 2017, the municipal administration began to delay the payment of instalments for loans that members had with financial institutions, banks and cooperatives, even though those instalments had been deducted from the salaries of workers, who had fallen into arrears and were exposed to the payment of additional interest, and threats of seizure. The complainant organizations allege that the funds had been used by the administration to cover the municipality's debts, thereby infringing paragraph 77 of the arbitration ruling relating to the retention of union dues, payment of external funds held in custody and workers' contributions.

397. They also allege that between January and February 2017, the workers who were members of SITRAMSA, Mr Cuellar, Mr Leiva and Mr Mejía, were subject to discrimination as they were trade union members and as the result of personal circumstances, following which they were dismissed. They allege also that 97 employees were suspended and their salaries reduced without justification, in specific violation of paragraphs 17, 35 and 88 of the arbitration ruling, relating to employment stability, and non-discrimination and special rights for trade union members.

398. The complainant organizations state that, in February 2017, in the face of constant violations of freedom of association and the arbitration ruling, and since the authorities and the mayor did not respond, trade union activities were conducted to request observance of employment rights and compliance with the arbitration ruling. Similarly, on 22 February 2017 SITRAMSA lodged a relevant complaint with the Office of the Prosecutor for the Defence of Human Rights, and requested this Office to mediate between the parties. The Mayor's Office of the Municipality of Santa Ana did not, however, wish to engage in dialogue, as a result of which the Office of the Prosecutor issued a ruling on 12 June 2017, recording the fact that the municipal administration had abused its authority.

399. The complainant organizations state that on 15 February 2018 the management council of SITRAMISA (ten members) was notified of its indefinite suspension with dismissal proceedings. It was also informed that similar proceedings would be instituted against the 40 employees of the trade union committees in the following days, in addition to 37 trade union members, together with a reduction in the salaries of more than 380 workers who had participated in the trade union activities. The council members were

also informed that the premises assigned to the trade union was being used by the municipal administration and that henceforth they would be denied entry to the premises. All the officials were forbidden to enter the municipal mayor's offices, an example of trade union persecution. The complainant organizations state that on 16 February 2018 the municipal authorities arbitrarily closed and seized the trade union premises. The union members were escorted by the police out of the municipal mayor's offices. The complainants attached a copy of a letter, dated 8 May 2018, which was sent by SITRAMISA to the then lady mayor of Santa Ana. It requested that the trade union officials be reinstated and indicated that the officials were the subject of a court ruling ordering their reinstatement. In the letter, the trade union also requested that the 97 workers who had been suspended and were trade union members be reinstated.

400. The complainant organizations allege that as of 23 February 2018 the members of SITRAMSA were the subject of discrimination as a result of their trade union membership (868 members); similarly, trade unions attached to the municipal government and with a smaller number of members (SITRAMUSA, 68 members, and SEMSA, 49 members) forced the workers to give up their membership of SITRAMSA and the same municipal government conducted anti-union activities by taking photographs of any worker who supported the union. The complainant organizations also report that there were 55 suspensions with dismissal proceedings and 25 dismissals owing to the expiry of contracts, thereby constituting unfair dismissals in different areas. Further, there is a persistent threat that more workers will be dismissed when their employment contracts expire, affecting all the above-mentioned union members.

401. Finally, the complainants allege that in 2017 and 2018 there were delays in the delivery of the basic basket of goods, and the supermarket vouchers, awarded in the arbitration ruling, were not given. Similarly, benefits such as home help in the case of death of family members and life insurance were infringed and abolished, as was paid vacation for administrative employees. The complainant organizations allege that the above measures are designed to undermine the claims that were successful in the arbitration ruling. They also allege that, as of 1 May 2018, the new lady mayor. Ms Calderón de Escalón, adopted the same policy of deleting clauses from the SITRAMSA arbitration ruling. The mayor had stated in newspaper stories that the collective agreement had already expired and, for that reason, the benefits resulting from the agreement were not granted.

B. The Government's reply

402. In its communication of 9 February 2021, the Government submits its observations, together with those of the Mayor's Office of the Municipality of Santa Ana. As regards the alleged non-compliance with the arbitration ruling, the Mayor's Office indicates that the ruling was issued on 27 May 2014, and was in force for three years, from 1 January 2015 to 31 December 2017. The Mayor's Office indicates that, although the ruling could be extended automatically, provided that none of the parties requested it to be revised, in this case, both parties (the municipality of Santa Ana and SITRAMSA) did request the arbitration ruling to be revised before the Public Service Tribunal. Therefore, since such a revision was requested, the ruling was not extended for one more year and remained in force until 31 December 2017. The Mayor's Office also states that to date no other valid collective labour agreement exists, that has been concluded by the municipality of Santa Ana and SITRAMSA. The municipal Mayor's Office emphasizes that when the Mayor took power, in May 2018, the ruling in question was no longer valid and that, in any case, she was not aware which benefits from the ruling were not complied with.

403. In relation to the alleged threats of dismissal of trade union members and the alleged prohibition on entry to the municipal mayor's offices, those offices indicate that since the current administration came to powers, i.e. on 1 May 2018, it has always observed and guaranteed the social and individual rights of any person who is a trade union member. The mayor's offices state that it was the municipal authorities which were in power from 1 May 2015 to 30 April 2018, that put forward requests for authorization of dismissal of various municipal employees to the judge of the Santa Ana Labour Court. These employees include the SITRAMSA officials, who were deemed to have undertaken actions that were construed as reasons for dismissal under the Municipal Administrative Career Act, as they had endangered the health of the population of Santa Ana, unlawfully obstructed the collection of solid waste by the municipality, and used violent means to close municipal facilities and obstructed lorries collecting solid waste from leaving. In view of the above, the Municipal Council of Santa Ana requested authorization for dismissal of the union officials from the judge of the Santa Ana Labour Court, prior to taking the decision to dismiss them. Since the municipal employees involved, including the union officials, were made aware of the requests that had been filed against them, they abandoned their posts in February 2017 and did not report for work.

404. The Government indicates that it requested information on this case from the judge of the Santa Ana Labour Court and that the judge had responded that his records contained the details of two cases which were already finalized and had been filed: (i) as regards Ms Cuellar, a final ruling was issued on 4 April 2018 declaring that the request to nullify the dismissal was not receivable, as confirmed by the Chamber of Second Instance; and (ii) as for Ms Leiva, on 27 February 2018, a final ruling was issued declaring the dismissal to be null and void, as confirmed by the respective Chamber of Second Instance. The case was currently with the First Labour Chamber, since an appeal had been lodged against an initial ruling made on 20 July 2020. The Government attached a note from the Santa Ana Labour Court in which the labour judge states that he could not provide the Government with information on the dismissal authorization proceedings concerning the SITRAMSA officials, because their names or case numbers had not been communicated.

405. Finally, the Government indicates that it will continue to follow up on this case and provide information on any progress made.

C. The Committee's conclusions

406. *The Committee observes that in this case, the complainant organizations allege that, at the beginning of 2017 and after not supporting the party to which he belonged, the then mayor of Santa Ana and the municipal council of the mayor's office (excluding the FMLN and GANA political parties) undertook a campaign of discrimination against SITRAMSA, threatening its officials with dismissal and failing to comply with various clauses of the arbitration ruling issued in 2014 (a ruling which has the status of a collective labour agreement). They also allege that suspensions and dismissals of trade union members (including the ten members of the management council) took place and that the union premises were closed. The Committee notes that, according to the complainant organizations, on 22 February 2017 SITRAMSA reported these matters to the Office of the Prosecutor for the Defence of Human Rights.*

407. *As regards the alleged failure to comply with the arbitration ruling (clauses relating to employment stability; non-discrimination: retention of trade-union dues and payment of external custodial funds; economic assistance, etc.), the Committee notes that the mayor's office of the municipality of Santa Ana indicates that: (i) both the municipality of Santa Ana and SITRAMSA made a request to the Public Service Tribunal for the ruling to be revised, for*

which reason it was not automatically extended and was in force until 31 December 2017, (ii) it was unaware which benefits from the ruling were not complied with and, in any case, when it took power in May 2018, the ruling was no longer valid, and (iii) no valid collective agreement with SITRAMSA currently exists.

408. *The Committee observes that the complainant organizations attached to their complaint a copy of the arbitration ruling and that, according to the provisions of paragraph 83, the ruling was valid for three years as of 1 January 2015, after which date it would be automatically extended for one-year periods, provided that no party requested it to be revised. The Committee notes that although it is not clear from the complaint that any of the parties requested the ruling to be revised, the municipal mayor's office indicates that both parties appear to have requested such a revision and that the ruling seemingly ceased to be valid at the end of 2017. The Committee notes, in any case, that the complainant organizations allege that the failure to comply with the ruling appears to have begun at the start of 2017, and regrets to observe that, in its response, the municipal mayor's office simply indicates that it was unaware which benefits from the ruling were not complied with. In any case, the current administration took up office in May 2018, when the ruling was no longer in force. Recalling that agreements should be binding on the parties and that mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, paras 1334 and 1336], the Committee requests the Government and the complainant organizations to provide information and specific documentation relating to the revision of the arbitration ruling. Similarly, it requests the Government, if the ruling is valid, to take all necessary measures to ensure full compliance therewith.*

409. *As regards the alleged suspensions and dismissals of union members (including the ten members of the SITRAMSA management council), the Committee notes that the municipal mayor's office indicates that: (i) since it came to power on 1 May 2018, it has always observed and guaranteed the rights of trade union members, (ii) the previous municipal administration had made requests for authorization of dismissal of various municipal employees, including the SITRAMSA officials, for having endangered the health of the population of Santa Ana, unlawfully obstructing the collection of solid waste by the municipality, using violent means to close municipal facilities, and obstructing lorries collecting solid waste from leaving, and (iii) in February 2017, the municipal employees, including the union officials, were made aware of the requests that had been made against them, abandoned their posts and did not report for work. The Committee also notes that the Government has attached a note from the judge of the Santa Ana labour court, which states that: (i) Ms Cuellar, a member of SITRAMSA, is the subject of a final ruling declaring that the request to nullify the dismissal is not receivable, and (ii) Ms Leiva, a member of SITRAMSA, is the subject of a final ruling declaring her dismissal to be null and void, as confirmed by the chamber of second instance, and which is currently with the first labour chamber as the result of an appeal lodged against an initial ruling made on 20 July 2020 (copies of the rulings are not attached).*

410. *The Committee observes that the complainant organizations attached to their complaint a copy of the ruling handed down by the Office of the Prosecutor for the Defence of Human Rights on 12 June 2017, noting that the ruling confirms the violation of labour rights, trade union freedoms, and those deriving from the right of association, owing to unlawful acts or those infringing the employment stability of union officials and trade union persecution. The Office of the Prosecutor indicated that the municipal mayor bears responsibility for these violations and recommended to that authority that the necessary administrative proceedings be undertaken to reinstate the union officials, and also other workers, immediately. It also*

indicated that it would inform the Minister of Labour and Social Welfare of the ruling so that the Minister exercised appropriate supervision.

411. *The Committee also notes that the complainant organizations attached a copy of a letter which SITRAMSA sent on 8 May 2018 to the then lady mayor of Santa Ana. The Committee observes that in the letter the trade union requests that the SITRAMSA officials be reinstated and indicates that the officials were the subject of a judicial ruling ordering that they be reinstated. In the letter, the union also requested that the 97 suspended workers who were members of the trade union be reinstated. The Committee notes that although the information provided by the complainant organizations would appear to show that the union officials were the subject of a ruling ordering their reinstatement and that those officials had seemingly not been reinstated, at least as of the date of submission of the complaint, according to the municipal mayor's office the union officials had abandoned their posts in February 2017, when they were made aware of the requests for dismissal that had been made against them. Furthermore, the Committee points out that in a note attached by the Government and signed by the judge of the Santa Ana Labour Court, the judge indicated that he could not provide information relating to the dismissal authorization proceedings concerning the SITRAMSA officials, because their names or case numbers had not been communicated.*

412. *Recalling in general that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and that it is important to forbid or penalize in practice all acts of anti-union discrimination in respect of employment [see **Compilation**, para. 1075], the Committee requests the Government and the complainant organizations to supply a copy of any court ruling issued in relation to the dismissals of the union members and officials. The Committee urges the Government to take all the necessary initiatives, including by means of dialogue with SITRAMSA, to ensure that the union officials are immediately reinstated, provided that these officials are the subject of relevant court orders, and also that workers for whom the anti-union nature of their suspensions or dismissals has been confirmed are reinstated.*

413. *As regards the allegation that the discrimination campaign against SITRAMSA and its members appears to have originated because the trade union had not allegedly supported the political party to which the then municipal mayor of Santa Ana belonged, the Committee reaffirms the principle expressed by the International Labour Conference in the resolution concerning the independence of the trade union movement that governments should not attempt to transform the trade union movement into an instrument for the pursuance of political aims, nor should they attempt to interfere with the normal functions of a trade union movement because of its freely established relationship with a political party [see **Compilation**, para. 724].*

414. *As regards the allegation that the municipal authorities arbitrarily closed and seized the trade union's premises, thereby denying access to those premises for officials and members, who were escorted by the police out of the municipal mayor's offices, while regretting that the Government has not submitted any detailed observations in this regard, the Committee recalls that the access of trade union members to their union premises should not be restricted by the state authorities [see **Compilation**, para. 290] and urges the Government to guarantee strict observance of such access.*

The Committee's recommendations

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

(a) The Committee requests the Government and the complainant organizations to provide information and specific documentation relating to the revision of the arbitration ruling. It also requests the Government, provided that the ruling is in force, to take the necessary measures to ensure that the ruling is applied in full.

(b) The Committee requests the Government and the complainant organizations to provide a copy of any court ruling issued in relation to the dismissals of the union members and officials. The Committee urges the Government to take all the necessary initiatives, including by means of dialogue with SITRAMSA, to ensure that the union officials are immediately reinstated, provided that these officials are the subject of relevant court orders, and also that workers for whom the anti-union nature of their suspensions or dismissals has been confirmed are reinstated,

(c) The Committee urges the Government to guarantee access for SITRAMSA members to their union premises.

Case No. 3347

Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Ecuador presented by – Public Services International (PSI) and – the National Confederation of Civil servant of Ecuador (CONASEP)

Allegations: The complainant organizations allege that, following the establishment of the National Association of Workers of the Civil Registry, Identification and Certification (ANERCIC), the public authorities dismissed on anti-union grounds 36 members and leaders of that organization

416. The complaint is contained in a communication dated 29 January 2019 from the Public Services International (PSI) and the National Confederation of Civil servant of Ecuador (CONASEP).

417. The Government sent its observations in communications dated 10 May 2019, 10 March 2020 and 2 February 2021.

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

A. The complainants' allegations

419. In a communication dated 29 January 2019, the complainant organizations allege that, following the establishment of the National Association of Workers of the Civil Registry, Identification and Certification (ANERCIC), the public authorities dismissed, on anti-union grounds, 36 members and leaders of that organization. The complainant organizations specifically allege that: (i) the ANERCIC, a national organization affiliated to the CONASEP, which is composed of permanent officials of the Civil Registry, Identification and Certification, was established on 16 August 2018 and recognized by a ministerial order of 12 October 2018; (ii) the first action taken by the ANERCIC was to request the Civil Registry authorities (hereafter the public institution) to reclassify the posts of all staff in order to comply with the rules on optimization and austerity of public spending approved by the presidency of the Republic in 2018; (iii) on 6 December 2018, the human resources director of the public institution requested, by means of a written memorandum, details of the regular activities carried out by 37 civil servants, stipulating that this process must remain entirely confidential; (iv) on 28 December 2018, through Decision No. 0134-DIGERCIC-CGAJ-DPyN-2018, the Director-General of the institution decided to abolish 36 of the 37 posts about which information had been requested (the post of Mr José Luis Játiva Medina was not abolished as he had a daughter with disabilities in his care); and (v) all of the abolished posts were held by members of the ANERCIC, including its President, Mr Marco Antonio Martínez Jiménez, as well as four other members of the board of the union.

420. According to the complainant organizations, the abolition of 36 permanent posts, all held by ANERCIC members, and the dismissal of five of the organization's leaders, including its president, were intended to dissolve that union and thus violated Articles 3 and 4 of Convention No. 87 and Articles 1 and 2 of Convention No. 98, both ratified by Ecuador. In this respect, the complainant organizations emphasize that: (i) the dismissals took place a few months after the establishment of the organization and its petition for improved working conditions; (ii) the 36 civil servants were dismissed summarily and unilaterally only 23 days after the human resources director of the institution had requested a report on the functions of their posts; (iii) they were not informed, and still have not been informed, of the technical grounds or other objective reasons for their dismissal; and (iv) the abolition of the posts was not preceded by any consultation with the trade union.

421. The complainant organizations further state that, on this occasion, the Government once again applied Executive Decree No. 813 of 2011, which enables, through the "compulsory purchase of redundancy" procedure, the unjustified and unilateral dismissal of civil servants. The complainant organizations state that this procedure, to which the Committee on Freedom of Association referred in its recommendations regarding Case No. 2926, has not been used by the Government on a large scale since 2012. Lastly, they state that the events contravene the provisions of the Basic Act Reforming Public Sector Legislation of 2017, which prohibits anti-union discrimination and establishes that "the abolition of posts and the compulsory purchase of redundancy for civil servants who are members of the board of the Civil Service Committee shall be null and void". In light of the above, the complainant organizations request the reinstatement of the 36 dismissed civil servants.

B. The Government's reply

422. In a communication dated 10 May 2019, the Government provides its comments on the allegations of the complainant organizations, denying that any act of anti-union

discrimination had taken place. The Government stated that, since August 2013, the public institution has been implementing a process to modernize its services for citizens and optimize its resources which, given the technological developments related to civil registration operations, has led to a significant decrease in the number of agencies of the institution throughout the country (from 755 in August 2013, to 220 in December 2017 and 207 in December 2018) and a reduction in its workforce (from 3,341 civil servants in 2013 to 2,074 in 2018).

423. The Government adds that, in the context of the above-mentioned optimization policy and in conformity with the provisions of the Basic Act on the Public Service (LOSEP) and its general regulations, a study was required into workforce optimization in the public institution for the year 2018. The Government states in this respect that: (i) the above-mentioned human resources planning process for the year 2018 in the public institution began on 5 February 2018 upon the request of the Ministry of Labour; (ii) Official Letter No. DIGERCIC-DIGERCIC-2018-042-O of 31 October 2018, sent to the Ministry of Labour, established the need to determine the number of posts to be abolished during the 2018 financial year; (iii) Official Letter No. MDT-SFSP-2018-2011, of 29 November 2018, established the existence of a surplus of civil servants in the public institution, whose posts were not essential to the institutional structure because their activities were duplicated by other positions; (iv) technical report No. DIGERCIC-CGAF-DARH-0243-I, of 13 December 2018, determined the 36 fixed-term posts to be abolished, taking into account the personal situation of each of the concerned workers and, in particular, verifying that they did not have severe disabilities or responsibility for someone with a severe disability, in accordance with the legislation; (v) under Decision No. MDT-SFSP-2018-0000078, of 28 December 2018, the Ministry of Labour approved the abolition of 36 of the institution's fixed-term posts; (vi) Memorandum No. DIGERCIC-CGAF-DF-2019-001-M, of 8 January 2019, informed the 36 persons affected of their dismissal and they were paid the compensation determined by the Ministry of Labour, which amounted to a total, for the 36 persons, of US$1,525,297; and (vii) the entire above-mentioned procedure was conducted in line with the rules established under the LOSEP and its general regulations regarding the abolition of posts in the public administration.

424. In relation to the complainant organizations' allegations that the above-mentioned abolition of the 36 posts did not comply with the provisions on anti-union discrimination of the Basic Act reforming public sector legislation of 2017, the Government states the following: (i) the ANERCIC obtained its legal personality on 12 October 2018 under Ministerial Decree No. MDT-089-2018; (ii) the ANERCIC is a non-profit social organization regulated by the provisions of the Civil Code and Executive Decree No. 193 of 23 October 2017; (iii) this is provided in section 3 of its statutes, which indicates that "[…] it shall be a non-profit social organization that aims to defend the rights of its members and improve their economic and social situation […]"; (iv) the ANERCIC is therefore not a trade union organization governed by the Labour Code, but a non-profit social organization governed by the Civil Code; and (v) in light of the above, this case cannot involve a violation of the right to organize and collective bargaining established in Convention No. 98 and therefore the anti-union discrimination alleged by the ANERCIC cannot exist.

425. In a communication of 10 March 2020, after noting that the Basic Act Reforming Public Sector Legislation of 2017 recognizes and protects the right of civil servants to organize, the Government reiterates that the ANERCIC is registered not as a trade union but as a social organization and therefore the alleged anti-union discrimination could not take place. The Government adds that: (i) the LOSEP provides for a number of ways to definitively terminate the employment of civil servants, including the abolition of posts with compensation and the purchase of redundancy with compensation; (ii) while in both

cases the terminations must be duly justified in the respective technical and legal reports, the abolition of posts and the purchase of redundancy with compensation are two different arrangements with different purposes, and each arrangement is therefore subject to specific requirements; (iii) in the present case, the abolition of posts with compensation was the arrangement used; (iv) in full compliance with section 60 of the LOSEP and with the Constitution of Ecuador, the abolitions were supported by technical reports and preceded by a process carried out on technical, functional and economic grounds, based on the principles of rationalization, prioritization, optimization and functionality, and therefore there was no discrimination against the ANERCIC and its members.

426. In a communication dated 2 February 2021, the Government reiterates that: (i) the abolition of posts has been carried out in accordance with due process of law and in accordance with the legal regulations in force; and (ii) the ANERCIC, due to its legal nature which sets it apart from being a trade union or labour organization as such, is a purely social organization governed by the Civil Code. The Government further states that: (i) the complainants have neither requested a dialogue nor filed a complaint with the public institution or the Ministry of Labour, and it is therefore understood that the complainants have accepted the terms of the termination of their contracts, which have been legally substantiated and have given rise to the payment of compensations calculated in accordance with the provisions of the law; and (ii) since the procedure to dismiss the career civil servants has been carried out, there has been no dialogue or agreement to address the complaint filed with the ILO's Committee on Freedom of Association.

C. The Committee's conclusions

427. *The Committee observes that the present case concerns the dismissal of 36 members of the ANERCIC, including its president and four further members of its executive committee, a few months after the establishment of the organization. In this respect, the Committee notes that the complainant organizations specifically allege that: (i) the ANERCIC was established in August 2018 to defend the interests of career officials in the above-mentioned public institution and was officially recognized in October 2018; (ii) the first action taken by the ANERCIC was to request the reclassification of the posts of the entire staff of the public institution in order to comply with current standards; (iii) on 6 December 2018, the human resources director of the public institution requested details on the regular activities of 37 civil servants, stipulating that this process must remain entirely confidential; (iv) on 28 December 2018, the Director-General of the public institution decided to abolish 36 of the 37 posts about which information had been requested (the post of a worker who had a daughter with disabilities in his care was not abolished); and (v) all of the 36 abolished posts were held by the ANERCIC members, including its President, Mr Marco Antonio Jiménez, as well as four further members of the union's executive committee. The Committee notes that, with regard to the alleged events, the complainant organizations state that: (i) the elimination, a few months after the establishment of the ANERCIC, of 36 permanent posts all held by members of that organization, including its president and four members of its leadership, was intended to dismantle the ANERCIC; (ii) the civil servants were dismissed summarily, without prior consultation with the trade union organization and were not informed of the technical grounds or other reasons for their dismissal; (iii) on this occasion, Executive Decree No. 813 of 2011 was applied, which allows the Government to dismiss civil servants without justifying its decision, through the so-called "compulsory purchase of redundancy" procedure; this Decree had been the subject of the Committee on Freedom of Association's recommendations regarding Case No. 2926; and (iv) the new provisions of the Basic Act reforming legislation on*

the public sector of 2017, which prohibits anti-union discrimination in general and the application of Executive Decree No. 813 to the members of the boards of the Civil Service Committees in particular, were disregarded.

428. *The Committee notes the Government's indication that no anti-union discrimination took place, but rather staff numbers were reduced as part of a process of optimizing and rationalizing the activities of the public institution. The Committee notes the Government's particular indications that: (i) the above-mentioned optimization process, which has been ongoing since 2013 and is related, inter alia, to the significant technological developments in civil registry operations, has led to a significant reduction in the numbers of agencies and staff of the public institution since 2013; (ii) this process continued during 2018 and the need to eliminate 36 posts that had become redundant was identified in October/November; (iii) having ascertained that the civil servants in question did not suffer from a severe disability or have someone with a severe disability in their care, they were made redundant and received substantial financial compensation; the laws in force were respected throughout the process; (iv) in particular, section 60 of the LOSEP, concerning the abolition of posts with compensation, which provides that the abolitions must be substantiated by technical reports setting out the technical, functional and economic reasons for such decisions; (v) the complainants have neither requested a dialogue nor filed a complaint with the public institution or the Ministry of Labour regarding the dismissal process; and (vi) in accordance with the legislation in force and its own statutes, the ANERCIC is not a trade union, but a non-profit social organization governed by the Civil Code, and this case cannot therefore involve anti-union discrimination in violation of ILO Convention No. 98.*

429. *Concerning the Government's statement that the ANERCIC is not a trade union organization, but rather a social organization and cannot therefore have been subjected to anti-union discrimination, the Committee notes that: (i) under the current Ecuadorian legislation,, workers covered by the Labour Code, i.e. private sector workers and public sector manual workers, are organized into trade unions, while civil servants can exercise their freedom of association through the establishment of civil servants' organizations governed by the rules on social organizations; and (ii) the ANERCIC statutes to which the Government refers establish that "it shall be a non-profit social organization that aims to defend the rights of its members and improve their economic and social situation".*

430. *In this respect, the Committee recalls that, in a previous case related to the alleged anti-union use of Executive Decree No. 813 of 2011, which permits the dismissal with compensation of civil servants without providing the grounds for termination ("compulsory purchase of redundancy" procedure), the Committee drew the Government's attention to the fact that "the principle of adequate protection from acts of anti-union discrimination is fully applicable to workers in the public sector in general, and that it applies in practice to the compulsory purchase of redundancy and especially to unfair dismissal, whatever the name given to organizations that may be set up by civil servants and workers under the national law in force" (see Case No. 2926, 370th Report of the Committee on Freedom of Association, October 2013, paragraph 386). In light of the foregoing, the Committee regrets that it must once again emphasize that insofar as civil servants' organizations are intended to promote the economic and social interests of their members, they are fully covered by the principles of freedom of association in general and protection against anti-union discrimination in particular, regardless of their legal name or regulations under national legislation. Noting that the legislation applicable to the public sector reformed in 2017 provides special protection against dismissal that applies only to the leaders of the Civil Services Committees (a specific form of representation for public sector workers established by that legislation), the Committee trusts that the Government will take all necessary measures to ensure that the above-mentioned*

legislative provisions protect all leaders of public workers' organizations against possible acts of anti-union discrimination.

431. *In relation to the alleged anti-union nature of the dismissal of 36 civil servants who were members of the ANERCIC, the Committee takes particular note of the Government's indication that, in accordance with section 60 of the LOSEP, the abolition of the 36 posts was based on objective criteria and was part of a process of optimization and rationalization that the public institution has been carrying out since 2013, which has led to a significant reduction in staff since that date. The Committee also notes the indication of the complainant organizations that all of the dismissed workers were ANERCIC members, including five members of its leadership, and their allegations that the dismissals were not preceded by consultation with the trade union or accompanied by an indication of the technical grounds upon which they were based. In light of the above, the Committee requests the Government to ensure that the alleged anti-union nature of the dismissal of 36 members of the ANERCIC is investigated in the near future by an independent body. The Committee requests the Government to keep it informed regarding this investigation and its outcomes. Furthermore, noting the Government's statement that neither the public institution concerned nor the Ministry of Labour have received complaints about the dismissal process in question, the Committee requests the complainant organizations to provide information on any administrative or judicial action taken in this respect.*

432. *Lastly, noting that this case refers to allegations of anti-union discrimination in the context of a restructuring process, the Committee recalls that it has repeatedly emphasized that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 1555]. In this regard, the Committee notes that, in its reply, the Government did not refer to contacts between the public institution and the civil servants' organizations concerned before the abolition of the above-mentioned posts. Reiterating its recommendations regarding Case No. 2926 (see 370th Report of the Committee on Freedom of Association, paragraph 389), the Committee once again requests the Government to take the necessary measures to ensure that the civil servants' organizations concerned are consulted on staff reduction plans with a view, inter alia, to preventing possible instances of anti-union discrimination. The Committee requests the Government to keep it informed in this regard.*

The Committee's recommendations

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

(a) The Committee trusts that the Government will take all the necessary measures to ensure that the legal provisions applicable to the public sector, which currently focus on the protection of the leaders of the civil service committees, protect all leaders of civil servants' organizations against possible acts of anti-union discrimination.

(b) The Committee requests the Government to ensure that the alleged anti-union nature of the dismissal of 36 members of the National Association of Workers of the Civil Registry, Identification and Certification (ANERCIC) is investigated in the near future by an independent body. The Committee requests the Government to keep it informed regarding this investigation and its outcomes; furthermore, noting the Government's statement that neither the public institution concerned nor the Ministry of Labour have received

complaints about the dismissal process in question, the Committee requests the complainant organizations to provide information on any administrative or judicial action taken in this respect.

(c) The Committee requests the Government to take the necessary measures to ensure that the civil servants' organizations concerned are consulted regarding plans to reduce staff numbers, with a view to, inter alia, preventing possible instances of anti-union discrimination. The Committee requests the Government to keep it informed in this regard.

Case No. 3367

Definitive report

Complaint against the Government of Ecuador presented by – Public Services International (PSI) and – the National Confederation of Public Servants of Ecuador (CONASEP)

Allegations: The complainant organizations allege that disciplinary action was taken and dismissal proceedings initiated against the President of the Association of Public Customs Officials of Ecuador

434. The complaint is contained in a communication dated 31 July 2019, presented jointly by Public Services International (PSI) and the National Confederation of Public Servants of Ecuador (CONASEP). The PSI presented additional allegations in a communication dated 3 December 2019.

435. The Government sent its observations in communications dated 23 September 2019, 11 March 2020 and 2 February 2021.

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

A. The complainants' allegations

437. In a communication dated 3 July 2019, the complainants allege that the President of the Association of Public Customs Officials of Ecuador (ASPAE) and the General Secretary of the National Confederation of Public Servants of Ecuador (CONASEP), Mr Iván Kennedy Bastidas Ordóñez, was subject to disciplinary action for legitimately carrying out his trade union duties, in violation of Article 3 of Convention No. 87, Article 1 of Convention No. 98, and the resolution of 1970 concerning trade union rights and their relation to civil liberties. The complainants allege, specifically, that: (i) on 24 January 2019, the Communications Director of the National Customs Service of Ecuador ("the public institution") sent a memorandum regarding two posts published in January 2019 by Mr Bastidas Ordóñez on ASPAE's social media page in which, on the one hand, he

deplores the fact that the director of the public institution relies more on the national police than on her own service's employees and that, on the other hand, the institution's equipment and staffing levels are inadequate; (ii) the memorandum considers that the two posts constitute gross misconduct, flouting the public institution's communications guidelines and code of ethics, as well as section 289 of the code for agencies responsible for public safety and public order (COESCOP), which include provisions for gross misconduct committed by the public officials of those agencies; (iii) on 7 April 2019, following a series of procedural steps, the public institution's disciplinary board imposed a financial penalty on Mr Bastidas Ordóñez equivalent to 8 per cent of his monthly salary; and (iv) the administrative appeal lodged by Mr Bastidas Ordóñez was subsequently rejected.

438. With regard to the above allegations, the complainants state that: (i) Mr Bastidas Ordóñez, in addition to being President of ASPAE and General Secretary of CONASEP, is PSI Coordinator in Ecuador and Director of the MERCOSUR member States' Federation of Revenue and Customs Employees of South America; (ii) as a trade union official, he constantly uses social media to communicate with his members and with the community in general so as to keep them informed and make known the positions of the unions in question and his own views; (iii) Mr Bastidas Ordóñez is indeed the author of the social media posts that led to the disciplinary action; however, the posts did not breach any national or international regulations; (iv) the posts in question were made by Mr Bastidas Ordóñez in his capacity as trade union official on a clearly identified trade union social media platform (the ASPAE web page) and in the strict exercise of freedom of association and freedom of expression; and (v) the content of the communications published by Mr Bastidas Ordóñez are in no way humiliating, demeaning, degrading, malicious or untruthful, but they do contain criticism and comments about the management of a public institution, which the latter must accept and, if need be, refute, as part of the normal exercise of democracy.

439. On the basis of the above, the complainants assert that the two posts published by the trade union official cannot have violated section 289(22) of the COESCOP, given that they are far removed from any of the three situations covered by the provision that constitute gross misconduct (issuing unsubstantiated information on the institution, hampering operations provided for in legislation, or contravening the institutional communications guidelines). With respect to the truthfulness of the statements made by Mr Bastidas Ordóñez, the complainants maintain that, during the disciplinary proceedings, the defence asked for reports to be provided demonstrating that the various statements made by Mr Bastidas Ordóñez on the institution's inadequate equipment and staffing levels were unfounded, but that this request was rejected. With regard to the possible damage caused by the posts published by the trade union official, the complainants state that an administrative ruling included in the administrative inquiry asking the Directorate of Communications to indicate the damage caused had gone unheeded and that there is no information in the administrative file on the damage caused. The complainants also maintain that the communications in question cannot be considered to be contravening the institution's communications guidelines because they apply to public servants while carrying out their employment duties, whereas Mr Bastidas Ordóñez published his posts while carrying out his responsibilities as a trade union official. The complainants assert, finally, that the disciplinary proceedings brought against Mr Bastidas Ordóñez are set against the wider backdrop of systematic violations of freedom of association, especially in the public sector.

440. In a second communication of 3 December 2019, the complainants state that two new administrative inquiries have been opened in retaliation for the legitimate trade union

activities of Mr Bastidas Ordóñez. The complainants refer, first, to administrative inquiry No. SENAE-CVA-006-2019, based on the statements that Mr Bastidas Ordóñez gave to the broadcasting and media production company, Pichincha Universal, during the period of public protests that began in Ecuador in October 2019 in the wake of the economic measures adopted by the Government. Memorandum No. SENAE-DNV-2019-2207-M dated 14 October 2019 states that Mr Bastidas Ordóñez "allegedly issued statements that were devoid of technical basis regarding the quality of the institution's public servants and measures announced by the National Government", acts that could constitute misconduct under section 289(11) and (22) and section 290(11) of the COESCOP. The complainants refer, second, to administrative inquiry No. SENAE-CVA-007-2019, based on a letter dated 24 September 2019 sent by CONASEP to the President of the Republic in which numerous acts of violence against the institution's public servants are detailed and which includes a request for a hearing to discuss the facts. The complainants state that, once again, the employer considered this letter to be contrary to the above-mentioned provisions of the COESCOP because the statements were without technical basis. The complainants emphasize that, while section 289 of the aforementioned COESCOP provides for gross misconduct, section 290(11) defines as very serious misconduct the issuance of reports or technical criteria that are unfounded, biased or malicious or contain technically proven fundamental errors.

441. The complainants state that the two additional administrative inquiries against Mr Bastidas Ordóñez constitute new violations of the free exercise of trade union duties and that, as in the initial allegations of July 2019, the administrative inquiries do not establish any causal link between the regulations allegedly violated and the conduct described, which falls within the legitimate and regular exercise of freedom of association. The complainants add that, as in the initial administrative inquiries that led to the opening of the complaint file, the fundamental rules of domestic and international law regarding freedom of information and expression and freedom of association are not being taken into consideration in the ongoing disciplinary proceedings. The complainants maintain that taking these rules into account is of special importance now, given that the accumulation of administrative inquiries and sanctions against Mr Bastidas Ordóñez will directly result in his dismissal as a public official. The complainants point out, lastly, that the disciplinary board that will decide on Mr Bastidas Ordóñez' case is an internal body of the public institution that is wholly devoid of independence, given that the person who requested the initiation of disciplinary proceedings is a member of the body.

B. The Government's reply

442. In a communication dated 23 September 2019, the Government provided its observations on the complainants' initial allegations. The Government states that Mr Iván Kennedy Bastidas Ordóñez, a level 2 customs inspector, has indeed been subject to an administrative inquiry, initiated on 24 January 2019 and related to several posts made by the person concerned on social media that violated the institution's code of ethics and several internal provisions, as well as section 289(22) of the COESCOP. The Government indicates, specifically, that: (i) it was informed of various posts, dated 16, 20 and 21 January 2019, published on the ASPAE web page in which, as President of that organization, Mr Bastidas Ordóñez made unfounded comments against the National Customs Service of Ecuador; (ii) those posts call into question the running of the institution and the guidelines issued by its senior management, and attempt to disrupt the institutional order by criticizing the handling and conduct of checks usually

performed by customs inspection services but undertaken by the national police, stating in one of the posts that "they [the police] can't even handle public safety and now they want to take over transit and customs, so where are we heading with the national police?"; (iii) one of these statements was also linked to the personal web page of Mr Bastidas Ordóñez; (iv) it was verified during the disciplinary proceedings that Mr Bastidas Ordóñez was indeed the author of the posts and the administrator of the web pages in question; (v) in his defence, Mr Bastidas Ordóñez merely stated that it was the obligation of the party initiating the proceedings to establish the facts contained in the complaint, thereby challenging the facts and legal basis for the disciplinary proceedings and claiming his right to legal certainty; and (vi) among the rules violated by the public official are the public institution's guidelines, which provide that an official spokesperson of the institution should not give a personal opinion, but transmit the institution's position through messages previously decided by the Directorate of Communications, and that official spokespersons are members of general management and that assistant managers, while being district spokespersons, can only act with the prior authorization of the Directorate of Communications.

443. The Government states that, having verified that the public official was guilty of gross misconduct provided for in section 289(22) of the COESCOP, a substantial financial penalty equivalent to 8 per cent of his monthly salary was imposed. The Government also indicates that the administrative appeal lodged by Mr Bastidas Ordóñez against his disciplinary action was declared inadmissible because it had not been filed within the deadline. Mr Bastidas Ordóñez lodged the appeal on 23 April 2019, even though he was notified of the disciplinary action on 17 April 2019, after the deadline of three working days to file his action had already passed, according to section 305 of the COESCOP.

444. With regard to the complainants' allegation that the communications subject to the investigation were made by Mr Bastidas Ordóñez in his capacity as trade union official and in the strict exercise of freedom of association, the Government states that: (i) although the Government of Ecuador recognizes the right of workers to form trade unions, the formation of not-for-profit social organizations under the relevant legal framework does not in itself result in the legal recognition of such organizations as trade unions; (ii) trade unions, having a distinct legal status, are regulated by the Labour Code, the Labour Organization Regulations and other regulations issued for this purpose; (iii) ASPAE was not formed, registered or legalized as a trade union but as a not-for-profit social organization according to article 1 of its statutes; (iv) ASPAE is therefore regulated by the rules for the granting of legal personality to social organizations; and (v) given the above and under the current regulations, ASPAE is not a trade union and neither does its President have the status of trade union official; it can therefore be deduced that the alleged violations under Conventions Nos 87 and 98 do not apply.

445. In a communication dated 11 March 2020, the Government reiterates that: (i) ASPAE is registered as a not-for-profit social organization, which does not imply *per se* that it is legally recognized as a trade union or that its President has the status of a trade union official; (ii) Mr Bastidas Ordóñez incurred a fine equivalent to 8 per cent of his salary for having posted statements questioning the guidelines and management of the Director-General of the public institution; (iii) this penalty was imposed observing the due process established in the Ecuadorian legislation in force and does not entail harassment and/or persecution of Mr Bastidas Ordóñez; and (iv) the administrative inquiry was therefore conducted without violating provisions established by the ILO regarding freedom of association rights.

446. In a communication dated 2 February 2021, the Government reiterates that on 24 January 2019 an administrative inquiry was opened against Mr Bastidas Ordóñez for issuing information against the public institution and its service, and this gave rise to the imposition of a fine, which the official contested unsuccessfully. Moreover, with regard to the second administrative inquiry referred to by the complainants (No. SENAE-CVA-006-2019), the Government states that: (i) Mr Bastidas Ordóñez made statements on the Pichincha Universal channel against the public institution and called for protest action during the national stoppage in October 2019, action which violated the institution's code of ethics and the COESCOP; (ii) the public institution's disciplinary board established that the public servant had committed gross misconduct as defined by section 289(22) of the COESCOP and fined him the equivalent of 4 per cent of his monthly salary; (iii) on 14 January 2020, Mr Bastidas Ordóñez lodged an administrative appeal against the disciplinary decision; and (iv) on 23 January 2020, the public institution dismissed the appeal. With regard to the third administrative inquiry (No. SENAE-CVA-007-2019), the Government indicates that: (i) Mr Bastidas Ordóñez signed and sent a communication to the authorities making baseless statements regarding the public institution and the service that it provides, which breached the public institution's communications guidelines and violated its code of ethics and the COESCOP; (ii) the public institution's disciplinary board established that the public servant had committed gross misconduct as defined by section 289(22) of the COESCOP and fined him the equivalent of 8 per cent of his monthly salary; (iii) on 6 January 2020, Mr Bastidas Ordóñez lodged an administrative appeal against the disciplinary decision; and (iv) on 14 January 2020, this appeal was dismissed by the public institution.

447. The Government further states that the three administrative inquiries brought against Mr Bastidas Ordóñez have been dropped as a result of definitive judicial rulings issued in the context of claims for legal protection Nos 17294-2019-01768 and 17230-2019-21533 filed by the public servant. In this regard, the Government indicates that: (i) in the context of legal protection claim No. 17294-2019-01768 relating to administrative inquiry No. 006-2019, after the protection claim filed by Mr Bastidas Ordóñez was rejected at first instance, the appeal ruling overturned the first-instance ruling and ordered the definitive closure of the aforementioned administrative inquiry; (ii) in the context of protection claim No. 17230-2019-21533 relating to administrative inquiries Nos 001-2019 and 007-2019, both the first- and second-instance rulings accepted the protection claim and ordered the closure of the aforementioned administrative inquiries.

448. The Government states that, without prejudice to the foregoing, the administrative inquiries relating to Mr Bastidas Ordóñez: (i) were opened in relation to his status of public servant and were conducted legally on the basis of clear evidence of the acts committed; (ii) the procedure provided for in the COESCOP was fully complied with and the public servant's right of legitimate defence was strictly observed; (iii) at no time did these procedures result in the violation of trade union rights or of freedom of expression and Mr Bastidas Ordóñez has continued as a trade union official up to the present time; and (iv) no complaint has been submitted to the Ministry of Labour regarding the situation of Mr Bastidas Ordóñez. Furthermore, regarding the complainants' allegation that Mr Bastidas Ordóñez is at risk of imminent dismissal, the Government asserts that this allegation is untrue, since the public servant in question is still in active service and the reasons for dismissal of any customs official from the customs inspection corps are explicitly established in section 240 of the COESCOP. On the basis of the foregoing and in light of the courts' quashing of the disciplinary decisions taken against Mr Bastidas Ordóñez, the Government requests the Committee not to pursue its examination of this case.

C. The Committee's conclusions

449. *The Committee notes that the present case refers to the imposition of disciplinary sanctions (fines) against Mr Bastidas Ordóñez, a customs service official and President of ASPAE, as well as General Secretary of CONASEP and General Secretary of the PSI in Ecuador, following communications and statements made on a social media platform and through a broadcasting and media production company, in which he criticized the management of the customs service of Ecuador and measures taken by the Government.*

450. *The Committee notes that the complainants assert that: (i) the statements by Mr Bastidas Ordóñez which gave rise to the above-mentioned disciplinary sanctions formed part of the legitimate and regular exercise of freedom of expression, which belongs to the function of trade union representation; (ii) these elements were not taken into consideration in the disciplinary decisions which are the subject of the present complaint; and (iii) owing to the accumulation of administrative inquiries against him, Mr Bastidas Ordóñez is now facing possible dismissal.*

451. *The Committee notes that the Government, after stating that the three disciplinary sanctions imposed on Mr Bastidas Ordóñez in 2019 and 2020 were administered legally, on the basis of clear evidence of the acts committed and without affecting the public servant's freedom of association, indicates in its latest communication of 2 February 2021 that: (i) the three disciplinary sanctions have been overturned and the proceedings closed by two definitive judicial rulings further to protection claims filed by Mr Bastidas Ordóñez; and (ii) the aforementioned public servant is still in active service without any risk of being dismissed.*

452. *The Committee notes these separate elements and recalls that the resolution of 1970 concerning trade union rights and their relation to civil liberties places special emphasis on freedom of opinion and expression, which are essential for the normal exercise of trade union rights [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 257]. While observing that the Government has not provided any information on the reasons for the judicial quashing of the disciplinary sanctions and has not appended the text of those rulings, the Committee, noting that the disciplinary sanctions which are the subject of the present case have been dropped, will not pursue its examination of the present case.*

453. *Noting, lastly, that the Government stated in its communications of September 2019 and March 2020 that ASPAE was not registered as a trade union but as a not-for-profit social organization and that its President does not therefore have the status of trade union official, and that it therefore deduced that the alleged violations of the principles of freedom of association do not apply, the Committee recalls that in a previous case the Committee had called the Government's attention to the fact that the principles of freedom of association were fully applicable to public servants, "whatever the name given to organizations that may be set up by public servants and workers under the national law in force" [see Case No. 2926, 370th Report of the Committee on Freedom of Association, October 2013, paragraph 386]. Noting the repeated counter-claims by the Government in this regard (see also in this connection, Case No. 3347, 393rd Report of the Committee on Freedom of Association, March 2021, paragraphs 429 and 430), the Committee trusts that the Government will take the necessary steps, including legislative measures if necessary, to ensure that, in accordance with the principles of freedom of association, public servants' organizations enjoy the different guarantees and prerogatives necessary for the exercise of their functions as representatives of the social and economic interests of their members.*

The Committee's recommendation

454. In the light of its foregoing conclusions, which do not call for further examination, the Committee invites the Governing Body to approve the following recommendation:

> **The Committee trusts that the Government will take all necessary steps, including legislative measures if necessary, to ensure that, in accordance with the principles of freedom of association, public servants' organizations enjoy the different guarantees and prerogatives necessary for the exercise of their functions as representatives of the social and economic interests of their members.**

Cases Nos 2967 and 3089

Definitive report

Complaint against the Government of Guatemala presented by the Indigenous and Rural Workers' Trade Union Movement of Guatemala (MSICG)

Allegations: The complainant organization alleges that a number of provisions of the Criminal Code and the Labour Code impede the free exercise of freedom of association; that it has not been allowed to be part of the delegation of Guatemala to the International Labour Conference; and that officials and members of a trade union of municipal workers were victims of anti-union dismissal

455. The Committee examined Case No. 2967 at its meeting in June 2014, when it presented an interim report to the Governing Body [see 372nd Report, paras 297–307, approved by the Governing Body at its 321st Session (June 2014)]. The complaint in Case No. 3089 is contained in a communication from the Indigenous and Rural Workers' Trade Union Movement of Guatemala (MSICG) dated 24 May 2014. As the complainant organization is the same and as both complaints primarily concern legislative matters, the Committee decided to examine Cases Nos 2967 and 3089 together.

456. The Government sent its observations in communications of 13 August, September and 25 November 2014; 2 May, 22 July, 13 August and 16 December 2019; 31 January, 2 and 10 September 2020 and 25 January 2021.

457. 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. Previous examination of Case No. 2967

458. At its June 2014 meeting, the Committee made the following recommendations in relation to Case No. 2967 [see 372nd Report, para. 307]:

(a) The Committee deeply regrets to note that, despite several requests and urgent appeals, the Government has failed to provide any information on the allegations.

(b) The Committee requests the Government to send its observations on the legislative and regulatory provisions mentioned in the complaint without delay.

(c) Recalling that the Government is responsible for preventing all acts of anti-union discrimination and that it must ensure that complaints of anti-union discrimination are examined in the framework of a prompt and impartial procedure, the Committee urges the Government to conduct an independent inquiry into the dismissals mentioned in the complaint without delay and, should it be found that the dismissals were anti-union in nature, to reinstate the workers concerned to their posts or, should this prove impossible, to pay them adequate compensation so as to constitute a sufficiently dissuasive sanction.

B. The complainant's allegations (Case No. 3089)

459. In its communication of 24 May 2014, the complainant organization denounces the ineffectiveness of the legislative and judicial protection provided to trade union officials in respect of anti-union discrimination. The complainant organization states that, although the Political Constitution and the Labour Code provide protection against anti-union dismissal in the form of reinstatement to workers who: (i) are involved in a socio-economic collective dispute (section 380 of the Labour Code); (ii) have participated or are participating in the establishment of a trade union (section 209 of the Labour Code); or (iii) are members of the executive committee (section 223(d) of the Labour Code), these workers are deprived, because of legislative and judicial shortcomings, of a means of prompt and effective protection.

460. The complainant organization alleges in particular that: (i) although the Labour Code provides that orders for the reinstatement of workers who are victims of anti-union dismissal must be issued and applied within 24 hours of the complaint being submitted to the court, the Code omits any express regulation on how the process of reinstatement should take place; and (ii) in view of this omission, the labour courts, under section 96 of the Code of Civil and Commercial Procedure, consider applications for reinstatement in ordinary proceedings. The complainant organization further denounces the fact that the labour courts require that all remedies, exceptions and questions of procedure must be exhausted in order to issue a reinstatement order, which causes excessive delays. The complainant organization states that a reinstatement procedure for a trade union official can involve up to three hearings and that a reinstatement order can be issued only after the decision is final, in other words, after it has been upheld by the Court of Appeal, which, in practice, can take more than ten years. Under these circumstances, the complainant organization claims that the Government of Guatemala, by failing to provide effective protection to the trade union leaders responsible for representing and liaising on behalf of the unions, is not guaranteeing adequate protection against anti-union dismissal.

C. The Government's reply

Case No. 2967: Legislative aspects

461. In a communication of 2 May 2019, the Government provides its observations in respect of the legislative provisions which, according to the complainant organization, raise issues of compatibility with freedom of association (sections 256, 292, 294, 390 and 414 of the Criminal Code; and sections 220(c), 223(d) and 226 of the Labour Code). The Government indicates that, in accordance with the tripartite agreement signed at the ILO in November 2017 and with a view to implementing the 2013 road map adopted in the context of the complaint submitted in 2012 under article 26 of the ILO Constitution concerning the non-observance by Guatemala of Convention No. 87, meetings and workshops have been held in the framework of the National Tripartite Committee on Labour Relations and Freedom of Association. The Government reports that the National Tripartite Committee considered Bill No. 5199 of the Congress of the Republic, on approving amendments to Decree No. 1441 of the Congress of the Republic (Labour Code), Decree No. 71–86 of the Congress of the Republic (Act on Unionization and Regulation of Strike Action by State Employees), and Decree No. 17–73 of the Congress of the Republic (Criminal Code). The Government also reports that, within the framework of that tripartite body, a consensus was reached on certain fundamental matters, such as the definition of essential services and the amendment of sections 390 and 430 of the Criminal Code. The Government refers in particular to section 390 of the Criminal Code concerning rebellion or sedition, which was amended by tripartite agreement so as to exclude from its scope lawful strikes carried out in accordance with the legislation in force. It further states that the National Tripartite Committee sent a letter to the Congress of the Republic on 7 May 2018, informing it of the legislative matters on which a tripartite consensus had been reached and those still pending, and requesting the legislative body to defer its discussion of Bill No. 5199 until a tripartite consensus is reached on the issues pending in the National Tripartite Committee.

462. In a communication of 10 September 2020, the Government refers to the follow-up given to the ILO Governing Body decision of November 2018 contained in document GB.334/INS/9, which declared closed the above-mentioned procedure initiated under article 26 of the ILO Constitution. The Government emphasizes that, after having recognized the progress achieved by the country, the Governing Body: (i) highlighted the importance of elaborating and adopting legislative reforms that fully comply with point 5 of the road map (according to which the Government must take urgent action, in consultation with the tripartite constituents, to propose amendments to the Labour Code and the other relevant laws, incorporating the amendments which have long been proposed by the ILO supervisory bodies); and (ii) requested the Office to implement without delay a robust and comprehensive technical assistance programme to ensure the sustainability of the current social dialogue process as well as further progress in the implementation of the road map.

463. The Government states that, in June 2020, in accordance with the above-mentioned decision of the Governing Body, the tripartite constituents approved a technical cooperation project on "Strengthening the National Tripartite Committee on Labour Relations and Freedom of Association in Guatemala for the effective application of international labour standards", prepared by the Office. The Government highlights that one of the key aspects of this project is support for bringing legislation into conformity with the ILO Conventions on freedom of association through the work of the National Tripartite Committee. Lastly, the Government indicates that, on 6 August 2020, the

National Tripartite Committee approved its work plan for the period from May 2020 to May 2021, an objective of which is to reach agreement on legislative reforms involving the proposal of amendments to the Labour Code and other relevant laws, incorporating the amendments proposed by the ILO supervisory bodies.

Case No. 2967: Other allegations

464. By communication of 12 August 2019, the Government transmits its observations concerning the alleged anti-union dismissal of 17 leaders and members of the Trade Union of Workers of the Municipality of San Carlos in the Department of Retalhuleu on 14 May 2012. In this regard, the Government reports that:

(a) the worker Vilma Lucrecia Flores Rodas, having reached an out-of-court settlement with the defendant, withdrew the claim she had filed against the Municipality;

(b) the workers Marina Emérita Escobar Estacuy, Sofía Floridalma Lorenzo Martínez de Agustín, Alejandra Castillo Luis, Ingrid Nineth Valiente Navas de Torres, Norma Leticia Tem Alvarado, Pilar Cayax López, Orlando Abigail Cifuentes Sánchez and Carlos Roberto Barrios Chávez, having also reached an out-of-court settlement with the defendant, discontinued their respective proceedings;

(c) by a decision of 5 May 2015, the worker Ranferi Fuentes Escobar had to drop his case, having failed to remedy several irregularities in his claim; and

(d) as for the claim filed by workers Olga Marina de León and Bernabé Rodas Benedicto, although the Municipality was initially exonerated, on 19 January 2017 the court of second instance ordered their immediate reinstatement, which became effective on 15 August 2017. Subsequently, at the request of the Municipality, a conciliation process was carried out between the parties and on 29 September 2017 a payment agreement was reached between the above-mentioned trade unionists and the Municipality.

465. With regard to the allegation concerning the unlawful nomination of employers' and workers' representatives to the International Labour Conference, the Government states in its communication of 13 August 2014 that Ministerial Agreement No. 126–2012 was not the subject of any administrative, legal or constitutional challenge and that, moreover, this agreement was repealed in its entirety by Ministerial Agreement No. 181– 2013. With regard to the refusal to accredit the MSICG delegates, the Government states that the Ministry of Labour and Social Welfare recognizes trade union movements but is unable to determine the representative status of those that do not have registers which make it possible to quantify their membership, a requirement that is established in the ILO Constitution, and that no longer applying this objective and verifiable requirement would be acting in a discriminatory way against those entities that had been accredited in accordance with the national law in force.

Case No. 3089

466. In a communication dated 24 May 2014, the Government states that the Guatemalan legal framework protects and guarantees the right to organize and to bargain collectively. It also states, in relation to the allegations of unjustified delays in the labour justice system, that by creating the Centre for Labour Justice in 2011 and reducing the length of ordinary labour proceedings, the judicial backlog was notably reduced in less than a year, with the average processing time dropping from three years to eight months. With regard to the alleged failure of the courts to issue reinstatement orders within 24 hours of the application, the Government states that the employer may, by

virtue of its right of defence under article 12 of the Political Constitution, challenge reinstatement decisions through appropriate remedies, which implies that such decisions are not final. Furthermore, the Government regrets that the allegations made by the complainant organization are of a general nature, and that no specific cases are identified. It further states that the issues raised were known to the Committee on Freedom of Association in the context of other cases and that these are also being examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

467. In its communications of January and September 2020, the Government refers to the draft Code of Labour and Social Security Procedure prepared by the Supreme Court of Justice with a view to streamlining the functioning of the labour justice system and providing an efficient service to citizens. It states in this regard that: (i) the preliminary draft law prepared by the Court was submitted in December 2018 to the social partners in the framework of a roundtable dialogue with a view to gathering their opinions; (ii) although it was not possible for the workers to participate in the above-mentioned roundtable, the possibility was left open for them to submit their comments on the text; (iii) in the first four months of 2019, a consultant from the Office visited the country and participated, together with representatives of the Government and of employers, in a meeting with judges and consultants from the judicial body in charge of the preliminary draft; (iv) the draft was approved by the plenary of the Supreme Court and has been before the Congress of the Republic since 17 July 2020 as Bill No. 5809; (v) the bill seeks to prevent the application of procedural rules from other branches of law that may not be suited to the specific nature of labour relations; and (vi) the draft establishes specific rules and time limits for cases concerning the reinstatement of union officials and workers who establish a union. In a communication of 25 January 2021, the Government once again recalls that the 2020-2021 work plan of the National Tripartite Commission on Labour Relations and Freedom of Association in Guatemala includes the proposal for legislative amendments incorporating the recommendations of the ILO supervisory bodies. In this context, the Government refers to the activities of the Subcommittee on Labour Legislation and Policy.

D. The Committee's conclusions

468. *The Committee recalls that Case No. 2967 concerns: (i) allegations that a number of legislative provisions are impeding the exercise of freedom of association; (ii) the alleged anti-union dismissal of members of a union of municipal workers; and (iii) allegations that the MSCIG was unduly excluded from the delegation of Guatemala to the International Labour Conference. In the absence of information from the Government, the Committee examined the case in question at its meeting in June 2014 and made its recommendations. With regard to Case No. 3089, the Committee observes that it concerns the alleged absence in the Labour Code of procedural provisions affording effective protection to union officials against acts of anti-union discrimination. Taking into account that both complaints were presented by the same complainant organization and that they both primarily concern legislative matters, the Committee decided to examine Cases Nos 2967 and 3089 together.*

Case No. 2967: Legislative aspects

469. *The Committee notes the allegations of a legislative nature made by the complainant organization, according to which a number of the provisions of the Labour Code and Criminal Code are in violation of ILO principles on freedom of association. The Committee notes that the complainant organization alleges specifically that: (i) a number of provisions of the*

Criminal Code (sections 256, 292, 294, 390 and 414) promote the criminalization of peaceful labour protests by laying down an excessively general and subjective characterization of ordinary offences; and (ii) several provisions of the Labour Code (sections 220(c), 223(d) and 226) relating to, inter alia, the motives for the dissolution of trade union organizations and the possibility of the labour administration imposing amendments to trade union statutes restrict the freedom of trade union organizations to establish their statutes independently, to organize themselves and to perform their social and political functions.

470. *The Committee also takes note of the Government's reply, indicating that, in the context of the follow-up given to the complaint submitted in 2012 under article 26 of the ILO Constitution concerning non-compliance by Guatemala of Convention No. 87: (i) the National Tripartite Committee on Labour Relations and Freedom of Association was established, in which discussions are held on bringing national legislation into conformity with the ILO Conventions that have been ratified by Guatemala in the area of freedom of association and with the corresponding comments of the ILO supervisory bodies; (ii) the first tripartite agreements were reached in 2018 with a view to amending a number of legislative provisions, including, inter alia, an agreement on the amendment of section 390 of the Criminal Code; (iii) further to the Governing Body's decision of November 2018 contained in document GB.334/INS/9 which declared closed the above-mentioned complaint procedure under article 26 of the ILO Constitution, in June 2020 the tripartite constituents approved the technical cooperation project on "Strengthening the National Tripartite Committee on Labour Relations and Freedom of Association in Guatemala for the effective application of international labour standards", prepared by the Office, one of the key aspects of which is support for bringing legislation into conformity with the ILO Conventions on freedom of association through the work of the National Tripartite Committee; and (iv) one of the objectives set by the National Tripartite Committee in its work plan for 2020–21 is to propose amendments to the Labour Code and the other relevant laws, incorporating the recommendations proposed by the ILO supervisory bodies.*

471. *The Committee takes due note of the information provided by the parties. The Committee observes that the issues of legislative conformity raised by the complainant organization have been under close scrutiny by the CEACR and the Conference Committee on the Application of Standards for many years and that, in the context of the implementation of the Governing Body's decision contained in document GB.334/INS/9, the Office continues to provide technical assistance to the tripartite constituents in carrying out the legislative reforms requested by the Governing Body. In this context, and trusting that the reforms to the Labour Code and Criminal Code enabling the full application of the principles of freedom of association will be adopted at the earliest opportunity, with the technical assistance of the Office, the Committee refers these legislative aspects of the case to the CEACR.*

Case No. 3089

472. *The Committee takes note of the complainant organization's allegations that the absence of specific procedural provisions in the Labour Code, coupled with the practices of the labour courts, leads to excessive slowness in procedures concerning the reinstatement of union officials who are victims of anti-union dismissal, rendering the legislative and constitutional protection against anti-union discrimination ineffective. The Committee also takes note of the Government's reply indicating that a draft Code of Labour and Social Security Procedure prepared by the Supreme Court of Justice is before the Congress of the Republic and that the draft establishes special rules and time limits for cases concerning the reinstatement of union officials and workers who establish a union.*

473. *The Committee recalls the repetitive nature of the cases that it has examined, in which it has had to note the slowness of legal proceedings regarding anti-union discrimination (see 372nd Report, Case No. 2989, June 2014, para. 316, and Case No. 2869, para. 296; 382nd Report, Case No. 2948, June 2017, paras 375–378; 383rd Report, Case No. 3062, October–November 2017, para. 367; and 386th Report, Case No. 3188, June 2018, para. 333]. The Committee emphasizes that, in this context, the Committee urged the Government, in consultation with the social partners, to carry out a thorough review of the procedural rules of the relevant labour regulations in order to ensure that the judiciary provides appropriate and effective protection in cases of anti-union discrimination [see 382nd Report, Case No. 2948, June 2017, para. 378; and 386th Report, Case No. 3188, June 2018, para. 333].*

474. *Under these circumstances, the Committee takes special note of the legislative procedure under way aimed at the adoption of a Code of Labour and Social Security Procedure. Recalling that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed and emphasizing the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition, 2018, paras 1140 and 1541], the Committee expects that procedural legislation which fully complies with the above-mentioned principles of freedom of association will be adopted at the earliest opportunity. The Committee refers the legislative aspects of this case to the CEACR.*

Case No. 2967: Other allegations

475. *With regard to the allegation concerning the anti-union dismissal in 2012 of 17 leaders and members of the Trade Union of Workers of the Municipality of San Carlos in the Department of Retalhuleu, the Committee takes note of the information provided by the Government, according to which: (i) nine workers, having reached an out-of-court settlement with the defendant, withdrew their respective claims; (ii) one worker had to drop his case because he had failed to remedy several irregularities; (iii) the court of second instance ordered the immediate reinstatement of Ms Olga Marina de León y León and Mr Bernabé Rodas Benedicto; and (iv) at the request of the Municipality, a conciliation hearing was held on 29 September 2017 and, on that occasion, both trade unionists reached a payment agreement with the defendant, and the case has been closed and archived. The Committee takes due note of the information provided by the Government concerning the situation of 12 workers from the municipality of San Carlos who were dismissed in 2012 and, in particular, the existence of reinstatement orders handed down by a court of second instance. Noting that the allegations made by the complainant organization concerned the dismissal of 17 workers, although no information was provided enabling these workers to be identified, the Committee requests the Government to ensure that the rights of all workers who may have been victims of anti-union dismissal by the above-mentioned municipality have been respected. Noting further the repetitive nature of the cases concerning anti-union dismissals in municipalities [see, for example, the 376th Report of the Committee, Case No. 3042, paras 488–568; and 382nd Report of the Committee, Case No. 2978, paras 380–392], the Committee urges the Government to take the necessary measures to address this situation effectively.*

476. *The Committee finally takes note of the complainant organization's allegations concerning the Government's refusal, based on Ministerial Agreement No. 126–2012, to include the MSCIG in the Workers' delegation of Guatemala to the International Labour Conference. The Committee also takes note of the Government's reply indicating, on the one hand, that the above-mentioned ministerial agreement was repealed in its entirety in 2013 and, on the other, that it is unable to determine the representative status of organizations such as the MSICG*

*which do not have a register of members. While it takes note of this information, the Committee also observes that, in 2012, the Conference Credentials Committee considered several objections from various Guatemalan trade union organizations, one of which was presented by the MSICG. Recalling that questions of representation at the International Labour Conference, participation in the International Labour Conference and composition of delegations to the International Labour Conference fall within the competence of the Conference Credentials Committee [see **Compilation**, para. 26], the Committee will not pursue its examination of this allegation.*

The Committee's recommendations

477. In the light of its foregoing conclusions, which do not call for further examination, the Committee invites the Governing Body to approve the following recommendations:

(a) The Committee expects that, with the technical assistance of the Office, reforms to the Labour Code and the Criminal Code will be adopted at the earliest opportunity enabling the full application of the principles of freedom of association. Similarly, the Committee expects that procedural legislation which fully complies with the principles of freedom of association mentioned in the conclusions of the present case will be adopted at the earliest opportunity. The Committee refers these legislative aspects to the Committee of Experts on the Application of Conventions and Recommendations.

(b) The Committee requests the Government to ensure that the rights of all workers who may have been victims of anti-union dismissal by the municipality of San Carlos in the department of Retalhuleu have been respected. Noting also the repetitive nature of the cases concerning anti-union dismissals in municipalities, the Committee once again urges the Government to take the necessary measures to address this situation effectively.

Case No. 3179

Interim report

Complaint against the Government of Guatemala presented by
– the Latin American and Caribbean Confederation of State Workers (CLATE) and
– the National Trade Union of Health Workers of Guatemala (SNTSG)

Allegations: The complainant organizations denounce the public authorities' introduction of a unilateral revision process for collective agreements in force in the public health sector, in open violation of the principle of negotiating in good faith, and the criminalization of the trade union activity of SNTSG members

478. The complaint is contained in a communication dated 12 January 2016, presented by the Latin American and Caribbean Confederation of State Workers (CLATE) and the National Trade Union of Health Workers of Guatemala (SNTSG), and in a communication dated 19 February 2019, presented by the CLATE. In a communication dated 29 March 2016, the National Federation of Trade Unions of State Workers of Guatemala (FENASTEG) joined the initial complaint.

479. The Government sent observations in communications dated 18 January 2017, 8 March 2018, 28 May 2019, 22 and 27 August 2019, 14 February 2020, 3 September and 17 December 2020.

480. 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

481. In a communication dated 12 January 2016, the complainant organizations allege that the Government instigated acts of interference and obstruction of collective bargaining in the public sector, particularly in the health sector, supposedly on the grounds of the financially burdensome nature of the collective agreements. They indicate that on 28 April 2015, the Office of the Comptroller-General lodged a complaint with the Public Prosecutor's Office concerning the collective agreement on working conditions signed in August 2013 with the Ministry of Health, and that on 26 July that same year, the Ministry of Health did the same. The complainants denounce the fact that the State as employer, with the support of the business sector through the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations (CACIF), is proceeding to disregard the agreements and planning to annul them, also calling into question the trade unions' ability to represent the interests of workers in the health sector. According to the complainants, there has been a de facto denial of the right to collective bargaining

by the State, insofar as provision is made for the subsequent revision and annulment of agreements by the Government – in other words, one of the signatories of the agreements as the employer – which constitutes an unfair practice and demonstrates a clear attitude of bad faith, in violation of domestic and international standards.

482. In a communication dated 20 January 2019 from the CLATE, supported by various national and international organizations – Public Service International (PSI), Global Nurses United (GNU) and the Federation of Public Service Employees (FeSP-UGT) of the General Union of Workers (UGT) of Spain – the complainant requests that evidence be included concerning the legal proceedings brought against various union officials of the SNTSG owing to their participation in the negotiation of the collective agreement signed in 2013 with the Ministry of Health, and concerning the subsequent arrest and detention of Mr Luis Antulio Alpirez Guzmán, Secretary-General of the SNTSG, and the organization secretary, Ms Dora Regina Ruano Saldaña. The CLATE indicates that Mr Javier Méndez Franco was detained alongside them and an arrest warrant was issued for Mr César Landelino Franco López, both of whom are legal advisers of the SNTSG. The trade union confederation considers that the legal proceedings concerning the aforementioned collective agreement are part of a government campaign to delegitimize collective bargaining in the public sector and undermine the trade union movement. In a communication dated 19 February 2019, the CLATE indicates that the union leaders have regained their freedom of movement, albeit only temporarily, as they are still subject to the legal proceedings. The situation of the legal advisers, however, remains unchanged.

B. The Government's reply

483. In a communication dated 18 January 2017, the Government indicates that the Office of the Attorney-General neither promoted nor attempted to obtain the annulment of the collective agreements on working conditions in the public sector through review processes not provided for under the law. However, the Office of the Attorney-General is empowered under the constitution to investigate or conduct a legal analysis, on its own initiative, of legal instruments that may contain or amount to unlawful clauses or articles, without that contravening, restricting or violating rights derived from ILO Conventions Nos 87 and 98. The Government emphasizes that its questioning concerns the misuse of public funds, insofar as the particular collective bargaining in the health sector was conducted in a political dynamic that did not serve the best interests of the State and especially the population that is directly dependent on the public health system, and did not comply with some formal and substantive requirements, as the CACIF noted.

484. The Government adds that the newly elected authorities took over the Ministry of Public Health and Social Assistance as from 28 July 2016. The high-level authorities of that Ministry consider that, as long as the collective agreement on working conditions that is in force in the entity is not revised, amended or annulled by a competent authority, it is formally valid, insofar as the entity which is simultaneously a signatory cannot unilaterally declare it invalid. However, the Government states that the Ministry of Public Health and Social Assistance has a responsibility to verify that the administrative acts that serve as the basis for the signing of any type of agreement or pact constituting the basis for any matter related to the working conditions in the entity comply with the principle of legality. The corresponding institutional actions did not initiate a revision of the exercise of freedom of association and collective bargaining; on the contrary, they analysed the appropriateness under the current legislation of the administrative acts carried out by civil servants and public employees and which must be executed with due

probity in the granting or recognition of labour rights. Thus, the Government considers that no finding of the Office of the Comptroller-General is aimed at revising the collective agreement on working conditions, as the purpose of audit processes is to ascertain the lawfulness of the procedure of the public servants and public employees who participate in the approval and application of administrative acts concerning working conditions.

485. The Government goes on to refer to the legal proceedings on the protection of constitutional rights that were lodged by the SNTSG (File Nos 4661-2016, 4662-2016 and 5073-2016 of the Constitutional Court), which resulted in a ruling of 12 May 2016 upholding the legal basis of the legal review by the Office of the Comptroller-General. The Government also considers that the principle of good faith in collective bargaining in the public administration begins with strict legal compliance of the administrative acts of the public servants who sign and execute collective agreements. The Government underscores that, in the case of the 2013 agreement, there are flaws in the fulfilment of this condition and that the intention of the public authorities is to protect the right of freedom of association and collective bargaining and to ensure appropriate sustainability of the institutions that create decent working conditions.

486. The Government refers to the following files: (i) File No. MP001-2015-39496 derives from the complaint lodged by the Office of the Comptroller-General stating that the signing of the collective agreement on working conditions by the Ministry of Public Health and Social Assistance and the union of workers of that Ministry violated the regulations on travel expenses contained in Government Decree No. 397-98, insofar as it increased excessively the travel expenses contemplated in the corresponding provisions of the collective agreement; and (ii) File No. MP001-2015-71161, which derives from the complaint lodged on 26 July 2015 by the former Minister of Public Health and Social Assistance, Luis Enrique Monteroso de Léon, arguing that although the collective agreement on working conditions was approved by the Ministry of Labour and Social Welfare, it affected the budget of the Ministry of Public Health and Social Assistance, as it had not undergone a technical assessment of its real budgetary and financial viability; the former Minister indicates that it affects the budget of the Ministry, as the professional who advised on the agreement was hired by and in the interests of the union itself, and the adviser's extremely high fees were paid by the Ministry. The Government states that it does not promote the revision of collective agreements on working conditions; on the contrary, it has made efforts to ensure that all sectors involved in labour relations receive capacity-building and awareness-raising on the subject of collective bargaining, including with technical support from the International Labour Office.

487. In a communication dated 28 May 2019, the Government provides additional information indicating that Prosecution Agency No. 1 of the Anti-Corruption Office has been assigned File No. MP001-2014-101645, to which further complaints have been linked, including those lodged by the Office of the Comptroller-General and the former Minister of Public Health and Social Welfare, Mr Luis Enrique Monterroso de León. The Government indicates that the allegations relate to purported anomalies during the process of negotiating, signing and executing the collective agreement on working conditions between the Ministry of Public Health and Social Assistance and the SNTSG in 2013. The alleged irregularities are limited to the unlawful insertion of a regulation on travel expenses into the collective bargaining instrument (whereby the members of the bargaining committee assumed a power to establish regulations that is the sole preserve of the President of the Republic), and the alleged hiring of the lawyer and notary César Landelino Franco López, and using state funds to pay him in the amount of 14,000,000.00 quetzales, without any legal justification for it. The Fifth Court of First

Instance in Criminal Matters, Drug Trafficking and Environmental Crimes of Guatemala has jurisdiction over the investigation, under Case No. C-01077-2014-00480, and had the proceedings declared confidential in 2017, which was maintained January 2019, when the chief judge in the investigation was petitioned to issue arrest and search warrants. On 16 January 2019, the court issued 16 arrest warrants, including those authorizing the arrest of Mr Luis Antulio Alpirez Guzmán, Ms Dora Regina Ruano Saldaña, Mr Javier Méndez Franco and Mr César Landelino Franco López, on suspicion of participating in various offences, such as abuse of authority, misappropriation of funds, special cases of fraud and money laundering and other activities. In their capacity as members of the bargaining committee of the collective agreement on working conditions, Mr Luis Antulio Alpirez Guzmán and Ms Dora Regina Ruano Saldaña allegedly exceeded their authority by assuming regulatory powers, in that they included in the collective agreement the aforementioned travel expense provisions, arbitrarily and unlawfully increasing the per diem payments established by the relevant government agreement that was in effect at the time; consequently they were accused of having committed the offence of abuse of authority under the Penal Code. The Government states that in no way was the trade union activity of the SNTSG members criminalized, as the offences for which they were charged correspond to alleged criminal conduct, and hence circumstances that must be resolved before the relevant courts as part of the criminal proceedings relating to the various trade union members, which also include the former Minister of Public Health and Social Assistance, Dr Jorge Alejandro Villavicencio Álvarez. The Government goes on to indicate that the chief judge granted Mr Luis Antulio Alpirez Guzmán and Ms Dora Regina Ruano Saldaña alternative measures that do not restrict their trade union activity, as both may move freely within the national territory. In its communications dated 14 February and 3 September 2020, the Government states in relation to Public Prosecution File No. MP001-2014-101645 that the file has been split into two phases; the first phase, being handled under criminal case No. 01077-2014-0000480, in accordance with the ruling of the Third Chamber of the Court of Appeal in Criminal Matters, Drug Trafficking and Environmental Crimes of Guatemala, is currently suspended after a preliminary ruling was upheld on appeal. That judgment was impugned by the Public Prosecutor's Office by means of an application for special judicial review, which is pending a ruling. The second phase of the case is at the investigation stage, the actions of which are confidential pursuant to article 314 of the Code of Criminal Procedure.

488. With regard to the approval of public sector collective agreements, the Government informs the Committee in its communication of 22 August 2019 that, in late 2018, the Ministry of Labour submitted to the National Tripartite Committee on Labour Relations and Freedom of Association a draft government order for the purpose of establishing the formal requirements for approval of collective agreements in the public administration, for which tripartite consolidation is pending.

489. In its communication dated 27 August 2019, the Government specifies that when employers and workers manage to reach agreement on the draft agreement on working conditions, they sign it and subsequently must apply the provisions of the Procedure on negotiating, standardizing and reporting collective agreements on conditions of work in an enterprise or specific manufacturing site, contained in Presidential Order No. 221-94, which is applicable in the absence of a specific standard for the public sector.

C. The Committee's conclusions

490. *The Committee observes that the complainants in this case denounce: (i) a process of unilateral revision of the agreements in force in the public sector in the health service, and in particular of the collective agreement on working conditions signed in 2013 with the Ministry of Health, with the intention of annulling it, in open violation of the principle of good faith; and (ii) the criminalization of the trade union activity of members of the SNTSG.*

491. *The Committee notes that the complainants allege that on 28 April 2015, the Office of the Comptroller-General lodged a complaint with the Attorney-General's Office concerning the 2013 collective agreement on working conditions in the health sector, and that on 26 July 2015, the Ministry of Health followed suit, which is tantamount to a de facto annulment of collective bargaining by the State, insofar as there is the possibility of subsequent revision and annulment of agreements by the Government.*

492. *The Committee notes that the Government states that its objective is not to annul collective agreements on working conditions by means of revision processes not contemplated in the law and its questioning is instead directed at the misuse of public funds, and that the effectiveness of the right to bargain collectively in the public sector begins with ensuring that the public servants and actors representing the Government as an employer take sound and lawful decisions. In this regard, the Committee notes that the Government emphasizes that the Office of the Attorney-General is empowered under the constitution to investigate or conduct a legal analysis, on its own initiative, of legal instruments that may contain unlawful clauses or articles, without that contravening, restricting or violating any rights or principles derived from ILO Conventions Nos 87 and 98, such as the principle of good faith. The Committee also notes that the Government indicates that the legal proceedings on the protection of constitutional rights lodged by the SNTSG (Cases Nos 4661-2016, 4662-2016 and 5073-2016 of the Constitutional Court) resulted in a ruling of 12 May 2016 upholding the legal basis of the legal review by the Office of the Comptroller-General.*

493. *The Committee also notes that, in the particular case of the 2013 collective agreement on working conditions in the health sector, the Government considers that there are flaws in legal compliance with the procedure for negotiating the agreement and that the financially burdensome nature of the 2013 agreement is questionable. The Committee notes that the Government refers in this connection to the following files: (i) File No. MP001 2015 39496 derives from the complaint lodged by the Office of the Comptroller-General stating that the signing of the collective agreement violated the regulations on travel expenses contained in Government Decree No. 397-98, in that it increased excessively the travel expenses contemplated in the corresponding provisions of the collective agreement; and (ii) File No. MP001-2015-71161, which derives from the complaint lodged on 26 July 2015 by the former Minister of Public Health and Social Assistance, arguing that although the collective agreement on working conditions was approved by the Ministry of Labour and Social Welfare, it affected the budget of the Ministry of Public Health and Social Assistance, as it had not undergone a technical study to assess its real budgetary and financial viability.*

494. *The Committee takes note of the various evidentiary materials provided by the parties in relation to the first allegation in the present case. The Committee observes in particular that: (i) the collective agreement on working conditions in the health sector was signed by the authorities of the Ministry of Public Health and Social Assistance and the SNTG on 21 August 2013; (ii) the signed agreement was approved by the Ministry of Labour; (iii) in 2015, the agreement was subject to a legal challenge by the Office of the Comptroller-General and the former Health Minister as they considered that it increased disproportionately the travel expenses applied in the institution and that it had an excessive impact on the budget of the*

Ministry of Public Health and Social Assistance, as there had been no technical study on its budgetary and financial viability; and (iv) no information has yet been transmitted on the outcome of the aforementioned legal challenges, which are in "intermediate procedure status", as indicated by the Government in its communication dated 17 December 2020.

495. *The Committee recalls the importance it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations [see **Compilation of decisions of the Committee on Freedom of Association**, sixth edition (2018), para. 1327]. The Committee therefore requests the Government to take all measures necessary to resolve the issues raised in relation to the content of the collective agreement on working conditions in the health sector to the extent possible through collective bargaining. Trusting that the principle will be fully applied, the Committee also requests the Government to inform it of any developments in the legal challenges on the validity of certain clauses of the said agreement.*

496. *Observing in addition that, after it was approved by the Ministry of Labour, the health sector agreement was subject to a challenge alleging that there had been no technical study to ensure its financial viability, the Committee recalls that in Case No. 3094, it had requested the Government of Guatemala, in consultation with the trade unions concerned, to take the measures required to ensure that collective bargaining procedures in the public sector follow clear guidelines which meet both the requirements of financial sustainability and the principle of bargaining in good faith [see 377th Report, March 2016, para. 345]. In this connection, the Committee notes that the Government indicates that, in late 2018, the Ministry of Labour submitted to the National Tripartite Committee on Labour Relations and Freedom of Association a draft government order for the purpose of establishing the formal requirements for approval of collective agreements in the public administration, for which tripartite consolidation of the text was pending. Noting the efforts under way to strengthen the normative framework applicable to the conclusion of collective agreements in the public sector, the Committee trusts that the tripartite process that was initiated will soon lead to the adoption of a text that is in conformity with the principles of freedom of association and the effective recognition of collective bargaining.*

497. *As to the criminal responsibility of particular individuals involved in the negotiation of the collective agreement, the Committee notes that the CLATE, supported by various national and international organizations, provided information on the criminal proceedings initiated against various union officials of the SNTSG owing to their participation in the negotiation of the collective agreement signed in 2013 with the Ministry of Health, and on the subsequent arrest and detention of Mr Luis Antulio Alpirez Guzmán, General Secretary of the SNTSG, and the organization secretary, Ms Dora Regina Ruano. The Committee notes that the CLATE indicated that Mr Javier Méndez Franco was arrested alongside them and an arrest warrant had been issued for Mr César Landelino Franco López, both of whom are legal advisers of the SNTSG. Lastly, the Committee notes that on 19 February 2019, the CLATE indicated that the union officials had regained their freedom of movement, albeit only temporarily, but the situation of the legal advisers remained unchanged.*

498. *The Committee notes the information from the Government that Prosecution Agency No. 1 of the Anti-Corruption Office has been assigned File No. MP001-2014-101645, to which further complaints were linked, including those that were lodged by the Office of the Comptroller-General and the former Minister of Public Health and Social Welfare, Mr Luis Enrique Monterroso de León. The Committee notes that, according to the Government, the allegations relate to purported anomalies during the process of negotiating, signing and executing the 2013 collective agreement on working conditions; in addition to the aforementioned unlawful insertion of a regulation on travel expenses into the collective bargaining instrument, the irregularities refer to payment made from state funds to the lawyer and notary, César*

Landelino Franco López, in the amount of 14,000,000.00 quetzales, without any legal justification for it. The Committee notes that the Government informs it that: (i) the Fifth Court of First Instance in Criminal Matters, Drug Trafficking and Environmental Crimes of Guatemala has jurisdiction over the investigation, under Case No. C-01077-2014-00480, having had the proceedings declared confidential in 2017, which was maintained until January 2019, when the chief judge in the investigation was petitioned to issue arrest and search warrants; (ii) on that date, the court issued 16 arrest warrants, including those authorizing the arrest of Mr Luis Antulio Alpirez Guzmán, Ms Dora Regina Ruano Saldaña, Mr Javier Méndez Franco and Mr César Landelino Franco López; and (iii) the chief judge granted Mr Luis Antulio Alpirez Guzmán and Ms Dora Regina Ruano Saldaña alternative measures that do not restrict their trade union activity, as they may move freely within the national territory. The Committee also notes that the Government indicates in its communications of February and September 2020 that prosecution file No. MP001 2014 101645 has been split into two phases; the first, which is being handled under criminal case No. 01077-2014-0000480, in accordance with the ruling of the Third Chamber of the Court of Appeal in Criminal Matters, Drug Trafficking and Environmental Crimes of Guatemala, is currently suspended as a preliminary ruling had been upheld on appeal. That judgment had been impugned by the Public Prosecutor's Office by means of an application for special judicial review, which was still pending a ruling, as confirmed by the Government in its communication dated 17 December 2020. The second phase of the proceedings is at the investigation stage, the actions of which are confidential pursuant to article 314 of the Code of Criminal Procedure.

499. *The Committee recalls that, while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, the arrest of, and criminal charges brought against, trade unionists may only be based on legal requirements that in themselves do not infringe the principles of freedom of association [see **Compilation**, para. 133]. The Committee notes that part of the criminal proceedings is pending, while other aspects are still at the investigation stage, which are confidential pursuant to article 314 of the Code of Criminal Procedure. The Committee observes, however, that the courts have not yet ruled on the charges against the SNTSG officials. Trusting that, in full application of the principle of freedom of association, the courts will rule on the matter in the near future, the Committee requests the Government to provide detailed information in this regard. In particular, it requests the Government to provide updated information on the situation of Mr Luis Antulio Alpirez Guzmán, General Secretary of the SNTSG, and the organization secretary, Ms Dora Regina Ruano Saldaña, who temporarily regained their freedom of movement in February 2019. The Committee also requests the Government to provide information on the situation of Mr Javier Méndez Franco and Mr César Landelino Franco López, both of whom are legal advisers of the SNTSG.*

500. *The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office with a view to addressing the Committee's recommendations.*

The Committee's recommendations

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

(a) The Committee requests the Government to take all measures necessary to resolve the issues raised in relation to the content of the collective agreement on working conditions in the health sector to the extent possible through collective bargaining. Trusting that the principle will be fully applied, the

Committee also requests the Government to inform it of any developments in the legal challenges to the validity of certain clauses of the said agreement.

(b) Emphasizing that collective bargaining procedures in the public sector must follow clear guidelines which meet both the requirements of financial sustainability and the principle of bargaining in good faith, and noting the efforts under way to strengthen the normative framework applicable to the conclusion of collective agreements in the public sector, the Committee trusts that the tripartite process that was initiated will soon lead to the adoption of a text that is in conformity with the principles of freedom of association and the effective recognition of collective bargaining.

(c) Trusting that, in full application of the principle of freedom of association, the courts will rule on the matter in the near future, the Committee requests the Government to inform it of developments in the criminal proceedings under way. In particular, it requests the Government to provide updated information on the situation of Mr Luis Antulio Alpirez Guzmán, General Secretary of the National Trade Union of Health Workers of Guatemala (SNTSG), and Ms Dora Regina Ruano Saldaña, organization secretary, who temporarily regained their freedom of movement in February 2019. The Committee also requests the Government to provide information on the situation of Mr Javier Méndez Franco and Mr César Landelino Franco López, both of whom are legal advisers of the SNTSG.

(d) The Committee reminds the Government of the possibility to avail itself of the technical assistance of the Office with a view to addressing the Committee's recommendations.

Case No. 3249

Interim report

Complaint against the Government of Haiti presented by the Confederation of Public and Private Sector Workers (CTSP)

Allegations: The complainant alleges that union officials working in the postal sector have been automatically laid off, that they have not been reinstated in their posts and that their union has been dissolved

502. The Committee last examined this case, presented in 2016, at its June 2019 meeting, when it presented an interim report to the Governing Body [see 389th Report, approved by the Governing Body at its 336th Session (June 2019), paras 412–422].

503. In the absence of a reply from the Government, the Committee has been obliged once again to postpone its examination of this case. In March 2020, the Committee expressed regret at the continued lack of cooperation and launched an urgent appeal to the

Government, indicating that it would present a report on the substance of the matter at its next meeting even if the information or observations requested had not been received on time. Even now, the Government has yet to provide its observations.

504. Haiti 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

505. During its previous examination of the case, in June 2019, the Committee made the following recommendations [see 389th Report, para. 422]:

(a) The Committee deplores that the Government has not replied to the allegations, even though it has been asked to do so on several occasions, including through urgent appeals, and urges it to reply as soon as possible.

(b) In the light of the scant and contradictory information brought to its attention, the Committee urges the Government and the complainant organization to provide precise information concerning the establishment of the Haiti Postal Workers' Union (SPH) (date of establishment, registration procedure, statutes, etc.) and the circumstances surrounding its alleged dissolution.

(c) The Committee urges the Government to expedite an independent inquiry into the allegations concerning the automatic laying off of the union representatives concerned, namely Mr Daniel Dantes, Mr Fely Desire, Mr Jean Estima Fils, Mr Petit-Maitre Jean Jacques, Mr Ronald Joseph, Mr Harold Colson Lazarre, Mr Amos Musac and Mr Guito Phadael, and to provide information on their present situation. If it is found that acts of anti-union discrimination have been committed by the Directorate General of the Post Office, the Committee calls on the Government to take the necessary measures of redress, including ensuring that the workers concerned are reinstated without loss of pay. The Committee requests the Government to keep it informed of all measures taken in this regard and the results of those measures, and to indicate whether any court rulings have been issued in these cases.

(d) In the light of the issues raised in this complaint, the Committee reminds the Government that it may avail itself of the technical assistance of the Office.

B. The Committee's conclusions

506. *The Committee deplores that, over four years after the submission of the complaint, the Government has still not provided the requested observations and information in response to the allegations made by the complainant organization and the Committee's recommendations, even though it has been asked to do so on several occasions, including through urgent appeals.*

507. *Under these circumstances and in accordance with the applicable procedural rule [see 127th Report, approved by the Governing Body at its 184th Session (1972), para. 17], the Committee is obliged to present a new report on the substance of the case without being able to take account of the information that it hoped to receive from the Government.*

508. *The Committee reminds the Government that the purpose of the full procedure established by the International Labour Organization for the examination of alleged violations of freedom of association is to ensure respect for this freedom in law and in fact. The Committee firmly maintains its position that, while this procedure protects governments against unreasonable accusations, governments must recognize the importance of formulating, for objective examination, detailed replies concerning allegations brought against them [see first report,*

1952, para. 31]. In spite of the multiple difficulties the country has had to face, the Committee urges the Government to be more cooperative in the future.

509. *The Committee recalls that the allegations in this case concern the automatic laying off in 2012 of union officials working in the postal sector, their non-reinstatement in their posts and the dissolution of their longstanding union. The union representatives concerned are Mr Daniel Dantes, Mr Fely Desire, Mr Jean Estima Fils, Mr Petit-Maitre Jean-Jacques, Mr Ronald Joseph, Mr Harold Colson Lazarre, Mr Amos Musac and Mr Guito Phadael.*

510. *The Committee deeply regrets that neither the Government nor the complainant organization has provided the requested information concerning the establishment of the Haiti Postal Workers' Union (SPH) (date of establishment, registration procedure, statutes, etc.) and the circumstances surrounding its alleged dissolution. The Committee also deeply regrets that it has not received any information from the Government on the automatic laying off of the above-mentioned union representatives. The Committee can only emphasize that such actions against union officials, which have been aggravated by the Government's silence over steps taken to ensure their protection such as conducting an independent inquiry as quickly as possible, are likely to corroborate the more general allegations of non-observance of union rights in the country.*

511. *Under these circumstances, the Committee is obliged to refer the Government to the conclusions of its last examination of this case [see 389th Report, paras 412–422] and to reiterate its previous recommendations in their entirety.*

The Committee's recommendations

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

(a) The Committee again deplores that the Government has not replied to the allegations, even though it has been asked to do so on several occasions, including through urgent appeals, and urges it to reply as soon as possible.

(b) In the light of the scant and contradictory information brought to its attention, the Committee urges the Government and the complainant organization to provide precise information concerning the establishment of the Haiti Postal Workers' Union (SPH) (date of establishment, registration procedure, statutes, etc.) and the circumstances surrounding its alleged dissolution.

(c) The Committee urges the Government to expedite an independent inquiry into the allegations concerning the automatic laying off of the union representatives concerned, namely Mr Daniel Dantes, Mr Fely Desire, Mr Jean Estima Fils, Mr Petit-Maitre Jean-Jacques, Mr Ronald Joseph, Mr Harold Colson Lazarre, Mr Amos Musac and Mr Guito Phadael, and to provide information on their present situation. If it is found that acts of anti-union discrimination have been committed by the Directorate General of the Post Office, the Committee calls on the Government to take the necessary measures of redress, including ensuring that the workers concerned are reinstated without loss of pay. The Committee requests the Government to keep it informed of all measures taken in this regard and the results of those measures, and to indicate whether any court rulings have been issued in these cases.

(d) In the light of the issues raised in this complaint, the Committee reminds the Government once again that it may avail itself of the technical assistance of the Office.

Case No. 3337

Interim report

Complaint against the Government of Jordan presented by the Jordanian Federation of Independent Trade Unions (JFITU)

Allegations: The complainant alleges that the Labour Code restricts the right of workers to freely organize and bargain collectively. It further alleges acts of anti-union discrimination, interference and retaliation by the Government against independent trade unions

513. The complaint is contained in communications dated 15 September and 28 December 2018, and 30 July 2019 from the Jordanian Federation of Independent Trade Unions (JFITU).

514. The Government provided its observations in communications dated 15 January, 14 July, 28 August and 11 December 2019, and 13 January and 20 February 2020.

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

A. The complainant's allegations

516. In its communications dated 15 September and 28 December 2018, and 30 July 2019, the JFITU alleges that the Labour Code restricts the right of workers to freely organize and bargain collectively. It further alleges acts of anti-union discrimination, interference and retaliation by the Government against independent trade unions in practice.

517. The JFITU alleges, in particular, restrictions on the right to organize of certain categories of workers. In this respect, according to the JFITU, while the Labour Code was amended so as to allow migrant workers to join unions, it does not permit them to form unions or to hold union office. Thus, according to the complainant, it is very unlikely that trade unions will be formed and that workers will bargain collectively over the terms and conditions of their employment in sectors in which migrant workers predominate. According to the complainant, it remains a legal question as to whether migrant workers can vote in elections for union executive boards.

518. Furthermore, according to the complainant, although the Labour Code was amended in 2008 so as to extend certain rights to domestic and agricultural workers, the law requires these workers to be covered by separate legislation. While a regulation on domestic workers was enacted in 2009, it did not extend the right to freedom of association to this

category of workers. According to the JFITU, currently, there is no regulation for agricultural workers. The complainant alleges that in 2008, an independent agricultural union attempted to register but the Government refused to review its application. It points out, however, that while the General Federation of Jordanian Trade Unions (GFJTU) created a domestic workers' union, despite the lack of a legal framework, the latter was not established by domestic workers nor it is led by domestic workers. The JFITU considers that this union has been set up in order to block the establishment of any future independent domestic workers' union and recalls that the law prohibits more than one union per sector.

519. In this respect, the JFITU indicates that under section 98 of the Labour Code, unions may be organized only in sectors designated by the Government (currently set at 17) and there may be only one union per sector. The even GFJTU has also been unable to register unions outside of the sectors recognized by the Government, thus denying the workers engaged in such sectors the right to collective bargaining. The limitation of one union per sector also serves to exclude independent unions from organizing workers in the recognized sectors. According to this section:

A. The union shall be established by not less than 50 workers in the industry or economic activity or industries and economic activities that are identical, or related to each other in a single production.

B. Employers in any industry or economic activity of no less than 25 persons shall have the right to establish a trade union for them to take care of their professional interests related to the provisions of this law.

C. No trade union or employer's organization shall be established for the purpose of carrying out activities based in ethnic, religious or doctrinal grounds, nor shall it be permitted to exercise any of these activities after its establishment.

D. The Minister may, through the Registrar of Trade Unions, classify industries and economic activities in which trade unions may be established in accordance with the provisions of paragraphs (A) and (B) of this section so that no industry or economic activity shall have more than one trade union and taking into consideration Arab and international classifications.

520. Furthermore, according to the complainant, the Labour Code authorizes the Minister of Labour to seek judicial dissolution of a union that fails to conform to the law. In this respect, the JFITU refers to section 116 of the Labour Code, pursuant to which:

A. If the administrative body of any trade union or employers' union violates the provisions of this law and the regulations issued pursuant to it or if the bylaws of any of them are in violation of the legislation in force, the Minister must issue a written warning to remove the violation within a period not exceeding 30 days starting the day of notice.

B. If the violation continues, the Minister may, on the recommendation of the Registrar of Trade Unions, issue a decision to dissolve the administrative body. The decision shall be subject to appeal before the Supreme Administrative Court within 30 days from the date of notification thereof.

C. The Minister shall, in consultation with the General Federation of Trade Unions and regarding the trade unions, appoint an interim administration body from the General Assembly to administer the union and to hold elections for a new administrative body within a maximum period of six months from the date of dissolution.

The complainant points out that the union's administrative body should not be dissolved in the first place, but when the leadership is dissolved, it should be for the workers to select the new leadership and not for the Government. The JFITU also queries whether the Supreme Administrative Court (to whom the right of appeal has been transferred from the Court of Appeals) guarantees the right to due process.

521. The JFITU also refers to section 119 of the Labour Code, according to which:

A. A penalty of imprisonment for a period not exceeding three months and a fine of not less than 500 Jordanian dinars and not more than 1,000 dinars or by either of the two penalties for anyone who continues to be active in the name of a dissolved union or employers' union or administrative board of any of them.

The complainant considers that the above provisions constitute a serious setback for workers to form and join trade union organizations of their own choosing as they put trade unions at risk of arbitrary dissolution and their members potentially face imprisonment and fines.

522. The JFITU points out that as it is a violation for a union to exist outside of the official trade union structure, independent trade unions risk judicial dissolution. Thus, trade unions are required to be affiliated to the GFJTU, which also deducts trade union dues against the will or knowledge of workers. According to the complainant, the GFJTU functions according to a unified system that it imposes on its affiliated unions: there are no real elections; executive board meetings do not take place; collective bargaining is conducted by the executive board of the GFJTU, whereas union branches, union committees and labour units at workplaces or even at the level of an establishment are denied the right to be involved in negotiations or submit any demands.

523. According to the complainant, the Government continues to influence trade union policies and activities of the official union – the GFJTU – and its affiliates. At the same time, the Government has repeatedly denied recognition to independent unions organized outside this structure; it does not meet with independent unions and the lack of legal recognition has limited their ability to collect dues, address grievances and to bargain collectively.

524. Furthermore, the complainant points out that while under the terms of section 98(f) of the Labour Code, trade union members must attain the age of 18 years, persons who attain the age of 16 years are admissible for work in the country. The complainant considers therefore that the Labour Code should be amended to allow workers between the ages of 16 and 18 to become members of trade unions.

525. Furthermore, the complainant alleges inadequate protection against acts of interference. It refers in this respect to section 139 of the Labour Code and indicates that a penalty of 50–100 dinars (€62–€124) does not have a sufficiently dissuasive effect.

526. The JFITU also alleges that the law prohibits public sector workers from exercising the right to bargain collectively.

527. Additionally, the JFITU alleges that by virtue of the 2008 amendment to the Labour Code, the term "group of workers" was deleted from section 2 of the Labour Code setting out the definition of a "labour dispute". The latter, as defined after the amendment, is no longer a dispute "between a group of workers or the union and the employer or the employers' union …", but is a dispute "between a union and the employer or the employers' union …".

528. The complainant organization refers to several violations of freedom of association rights in practice. It alleges, in particular, that in an official memo (a copy of which the

complainant transmits with the complaint) sent to all government departments and establishments, the Prime Minister advised them not to recognize independent unions and that the Ministry of Labour has advised its staff not to accept any letters or respond to any correspondence from independent unions. Applications to register unions with the Ministry of Labour have been either denied or ignored.

529. According to the complainant, the chairperson of the Parliamentary Labour Committee, who was at the same time the president of the General Union of Mining Workers and vice-president of the GFJTU, demanded in a speech to Parliament that they put an end to independent unions. The JFITU alleges that the leadership of the GFJTU constantly attacks the independent unions and describes them as mercenaries and demands they be eliminated and that it had escalated an offensive media campaign against independent trade unions through statements, press releases, TV interviews, seminars, conferences and workshops.

530. The JFITU further alleges abuse of workers in the Jordan Water Company "Miyahuna". It alleges, in particular, that when the company management learned that the workers intended to form an independent trade union, it issued a formal announcement, with reference to the letter of the Minister of Labour warning the workers that the company will not cooperate with any independent trade union and that the company recognizes and deals only with the General Union of Workers in Food Industries. Workers were warned not to join any independent union. The complainant organization alleges that after the establishment of an independent trade union of workers at the company, the company's management took various abusive actions against trade union activists. The JFITU refers, in particular, to the arbitrary transferring of the president of the Independent Trade Union, Mahmoud Shihada Al-Khateeb the firing of one of the workers, Mr Khaled Hasan Ali; and threatening company workers wishing to join the independent trade union.

531. The JFITU further alleges that those who try to operate an independent trade union face severe pressure and refers in this respect to the following examples:

- Mr Mohamed Al Senaid, ex-president of the Independent Union of Agricultural Workers, was detained because of his union activity.
- Mr Amin Ghanim, president in the Independent Trade Union of Art Workers, was detained for several days, and he and other members of the union were interrogated after a complaint from the president of the Artists' Union (a professional association).
- Mr Tayel Al Khamayseh, ex-president of the Independent Union of Phosphate Mine Workers was suspended from his job because he raised labour demands.
- The Government pressured the president and the secretary of the Chemical Industries' Independent Union by asking them to resign from the union or be fired from their jobs. This was after they had succeeded in negotiations that led to signing a collective agreement. They preferred to resign rather than be fired.
- Mr Khalil Butros Wahhab, vice-president of the Independent Trade Union of Civil Aviation Workers, was forced to submit his resignation.
- Mr Jalal El Harasees, president of the Independent Union of Jordan Electricity Workers, stood up to defend a colleague who is a member of the independent union. The annual promotion of Mr El Harasees Jalal was deferred and his wages withheld.
- The president of the Independent Trade Union in the Pharmaceutical Industries and his board members were forced to sign pledges stating that they will not engage in union activities.

- The Independent Union of Electricity Workers organized a strike that lasted 17 days in 2012. However, the GFJTU negotiated an agreement to end the strike despite the fact that the workers' demands were not addressed. In 2013, the Independent Union of Electricity Workers once again submitted the same list of demands as in 2012. However, it was not taken into consideration. The union organized another strike for five days until a Memorandum of Understanding (MoU) was signed between the Ministry of Labour, the company's management and the parliamentary labour committee. The independent union was not allowed to sign the memorandum. The condition of signing the MoU was that the demands were to be submitted in 2014 (two years from the 2012 agreement). In 2014, the independent union resubmitted its demands but was once again ignored. The GFJTU was asked to submit fewer demands, and accordingly an agreement was signed. The electrical company deducted the pay for a five-day strike from the salaries of striking workers. The union filed a lawsuit and won, but the company appealed. The case is still pending.
- Security forces prevented the re-distribution of administrative positions at the General Union of Electricity Workers/Amman branch.

532. The complainant also alleges interference in public meetings. In this respect it refers to a celebration that was planned by a women's committee of the independent trade union federation on the occasion of Women's Day 2017 at the Jordanian University. The celebration was cancelled only two days before it was to take place. The women's committee decided to move the event to Jerusalem International Hotel instead, but again it was cancelled by the security authorities just two hours before it was supposed to begin, despite the permissions obtained both times.

533. The JFITU also refers to a blood drive campaign that it was planning to launch jointly with the Amman municipality to provide the blood bank with 500 blood units, which was cancelled only hours before the starting time despite the fact that all permissions were obtained in advance. Another manifestation, a tree planting activity that the complainant organization was planning to launch jointly with the Amman municipality on the occasion of "tree day", was cancelled although all permissions were obtained.

B. The Government's reply

534. In its communications dated 15 January, 14 July, 28 August and 11 December 2019, and 13 January and 20 February 2020 provides the following information.

535. The Government points out that articles 16 and 23(2)(f) of the Constitution enshrine the freedom to establish unions and form associations and leaves the manner in which they are established and function to the relevant law and regulations. The Labour Code describes the registration procedure for trade unions and employers' association. According to the Government, the provisions of the Labour Code apply to workers without distinction and irrespective of sex, nationality, race, colour or religion.

536. With regard to the rights of migrant workers, the Government indicates that there is nothing in the Labour Code that prevents them to vote in their respective unions. Moreover, the Code allows every union to establish its own statute specifying its functioning, election and voting procedures, in which the Ministry is not involved.

537. According to the Government, agricultural workers are subject to the Labour Code and there is no special law relating to them. The Government informs that a group of workers in the agricultural sector submitted an application to establish the Agricultural Workers' Union and that this matter will be brought before the Tripartite Committee for consideration and decision.

538. As for the situation of domestic workers, the Government indicates that this category of workers is subject to the provisions of the Labour Code. However, due to the importance of this sector (there are 48,000 domestic workers in the Kingdom) and the nature of work, the Ministry has issued special regulations and instructions for this sector, which regulate the recruitment process and give this category of workers privileges better than those provided for in the Labour Code. The Government also points out that there is nothing in the law that prevents domestic workers from joining the existing and registered trade union – the General Trade Union of Workers in Public Services and Free Occupations.

539. Regarding section 98 of the Labour Code, the Government indicates that the Minister may issue, through the Registrar of Associations, a decision to categorize the industries and economic activities. This is justified by the intention to give greater flexibility in order to increase the number of trade unions and open the door for the establishment of new trade unions, including in sectors that were not previously represented or to reclassify large sectors incorporated under one trade union. According to the Government, the latest amendment of this provision refers to the expansion of the decision to classify professions by transferring the powers of classification of occupation from the Tripartite Committee to the Minister.

540. The Government further indicates that public servants are excluded from the provisions of the Code and are subject to the provisions of the civil services administration system.

541. Regarding the amendment to the Labour Code deleting the term "group of workers", the Government explains that in the context of labour disputes, most of the countries in the world deal with unions and not with groups of workers to prevent chaos and organize trade union work. The Government points out that instead of allowing any worker to negotiate, there is a need to strengthen the role of trade unions in representing workers and defending their rights.

542. As for section 116 of the Labour Code, the Government explains that the recent amendments made it possible for the Minister to dissolve the union administrative body, instead of dissolving the union itself, if the latter violates the laws and regulations in force. The final decision is made by the court.

543. The Government also points out that in accordance with the national legislation and the relevant ratified Convention, working age in Jordan is set at 18.

544. The Government indicates that it intends to reopen elements of the legislation in the future and to conduct consultations with the social partners with a view to preparing relevant amendments.

545. The Government further indicates that the independent trade union unions mentioned in the complaint did not follow the procedures for their establishment and functioning described in the Labour Code. Independent unions may not be founded without resort to the Tripartite Committee. Members of the independent unions may join the existing unions in the current professional category. In this respect, the Government points out that there is an existing registered union, the General Trade Union of Electricity Workers, which all workers in the electricity sectors have the right to join, and in which most of those seeking to establish an independent union enjoy full membership. There is also an existing registered trade union, the General Trade Union of Workers in Mining and Metal Industries, which all workers in the phosphate sector have the right to join. Therefore, when an appeal against the decision to refuse to register independent unions in electricity and phosphate sectors was lodged with the court, the latter upheld the decision on grounds that there was no legal justification for establishing a new union.

The Government indicates that consequently, it issued a general order to deal with legally registered trade unions and to distinguish between those legally registered and those not.

546. With regard to the allegations of discrimination between trade unions and intimidation of leaders of independent trade unions, the Government points out that Jordan is a State governed by the rule of law and that the relationship between trade unions and the Ministry of Labour is regulated by law. It further indicates that the allegations are untrue.

547. With regard to the alleged detention of leaders of two independent trade unions, the Government indicates that this matter is not within the competence of the Ministry of Labour, and that it has no information in this regard.

548. With regard to the alleged interference in the activity of a trade union in the electricity sector in Amman, the Government indicates that it is not aware of the existence of this federation and points out that there is a legitimate union in the sector, known as the General Trade Union of Electricity Workers.

549. With regard to the alleged cancellation by the authorities of public meetings, the Government indicates that the Ministry of Labour has no knowledge of any meetings held and has not addressed any authority in this regard.

550. Finally, with regard to the alleged practices to prevent the establishment of a trade union of workers' at Miyahuna, the Government indicates that no application to establish a trade union has been submitted to the Ministry; however there is an existing union, registered in accordance with the provision of the Labour Code, to represent workers of the company, namely, the General Trade Union of Workers in Food Industries.

C. The Committee's conclusions

551. *The Committee notes that the complainant in this case, the JFITU, alleges that the Labour Code restricts the right of workers to freely organize and bargain collectively. It further alleges acts of anti-union discrimination, interference and retaliation by the Government against independent trade unions in practice.*

552. *The Committee notes that according to the JFITU, while migrant workers can join trade unions, the Labour Code restricts their right to organize and to hold trade union office. Consequently, their right to bargain collectively is also restricted. According to the complainant, it is further not clear whether migrant workers can vote in elections for union executive boards. The Committee notes the Government's indication that the Constitution enshrines the freedom to establish unions and form associations and leaves the manner in which trade unions are established and function to the relevant laws and the regulations. In this respect, the Labour Code describes the registration procedure for trade unions and employers' associations. According to the Government, the provisions of the Labour Code apply to workers without distinction whatsoever and irrespective of nationality. Furthermore, the Labour Code does not prevent migrant workers from voting in their respective unions.*

553. *The Committee notes that the text of section 98(e) of the Labour Code, as amended in 2010, provides that the first condition for founding a workers' or employers' organizations is to be Jordanian. The Committee recalls that the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing, without previous authorization, implies that anyone legally residing in the country benefits from trade union rights, including the right to vote, without any distinction based on nationality [see* ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 322]. The Committee requests the Government to amend section 98(e) of the Labour Code, in*

consultation with the social partners, so as to eliminate the restriction placed on the organizing rights of migrant workers and to keep it informed of all measures taken in this respect.

554. *Regarding the alleged prohibition to hold office imposed on migrant workers, the Committee noting the absence of the Government's observations in this regard, recalls that legislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit foreign workers access to trade union posts, at least after a reasonable period of residence in the host country [see* ***Compilation****, para. 623]. The Committee requests the Government to take the necessary measures, in consultation with the social partners, to ensure that foreign workers enjoy their freedom of association rights, including to the right to be elected to trade union office. It requests the Government to keep it informed of the measures taken in this respect.*

555. *The Committee further notes the allegation that domestic and agricultural workers do not enjoy the right to organize. The complainant alleges, in particular, that a request for registration of an independent union of agricultural workers had been denied and that the GFJTU had created a domestic workers' union, despite the lack of a legal framework, in order to block the establishment of any future independent domestic workers' union. The complainant points out that the GFJTU domestic workers' union was not established by domestic workers, and that it is not led by such workers. The Committee notes that according to the Government, agricultural workers are subject to the Labour Code and there is no special law relating to them. The Government informs that a group of workers in the agricultural sector submitted an application to establish the Agricultural Workers' Union and that this matter will be brought before the Tripartite Committee for consideration and decision. As for the situation of domestic workers, the Government indicates that this category of workers is subject to the provisions of the Labour Code as well as to special regulations and instructions, which regulate the recruitment process and give this category of workers privileges better than those provided for in the Labour Code. The Government also points out that there is nothing in the law that prevents domestic workers from joining the existing and registered trade union – the General Trade Union of Workers in Public Services and Free Occupations.*

556. *The Committee notes from the information provided by the Government to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) within the framework of the application of Convention No. 98 that despite the removal of the express exclusion of domestic and agricultural workers from the coverage of the Labour Code, the law and regulations still did not clearly guarantee these workers the rights set out in the Convention. The Committee requests the Government to provide information on the measures taken to ensure that agricultural and domestic workers can join the organization of their own choosing to the CEACR to the attention of which it draws legislative aspects of this case.*

557. *The Committee believes that the above alleged restrictions on the rights to organize of migrant, domestic and agricultural workers should be seen in the larger context alleged by the complainant. According to the JFITU, pursuant to section 98 of the Labour Code, unions may be organized only in sectors designated by the Government and there may be only one union per sector. There are currently 17 recognized sectors. The Committee notes that according to the JFITU, not only has the GFJTU been unable to register unions outside those sectors, but that this limitation of one union per sector also serves to exclude independent unions from organizing workers in the recognized sectors. The Committee notes that the JFITU alleges a number of instances where independent trade unions could not be registered because, as confirmed by the Government, a GFJTU structure existed in the given sector (e.g. in the electricity, food, and mining and metal industries). The Committee understands that previously, the Tripartite Labour Committee was competent to recognize occupations and*

industries in which trade union may be established and that by virtue of the latest amendment of the Labour Code, this power has been vested in the Minster of Labour. The Government explains that this is justified by the intention to give greater flexibility, to increase the number of trade unions and open the door for the establishment of new trade unions, including in sectors which are not represented or to reclassify large sectors represented by one trade union.

558. *The Committee notes with concern that the current system might leave out entire groups of workers unable to exercise their right to organize and to benefit from collective bargaining rights. It recalls that in Case No. 2977 concerning Jordan it had urged the Government to take without delay the necessary measures to ensure that the labour legislation and all relevant implementing decisions are reviewed and amended to ensure that workers may freely exercise their right to establish and join organizations of their own choosing [see Report No. 367 (March 2013), para. 860]. The Committee therefore requests the Government to take, in consultation with the social partners, the necessary measures, including legislative, in order to ensure that all workers in all sectors in the country, with the only possible exception of the armed forces and the police enjoy the right to establish and join organizations of their own choosing. The Committee requests the Government to keep it informed of the measures taken or envisaged in this regard.*

559. *The Committee further expresses its concern that no more than one union can be established per industry or sector. It also notes with concern that the GFJTU is expressly mentioned in the Labour Code as an organization which the Minister of Labour shall consult with regard to the appointment of a union interim administrative body (section 116), which would appear to further consolidate a trade union monopoly in the country. The Committee recalls that the existence of an organization in a specific occupation should not constitute an obstacle to the establishment of another organization, if the workers so wish. It further recalls that unity within the trade union movement should not be imposed by the State through legislation because this would be contrary to the principles of freedom of association [see **Compilation**, paras 477 and 487]. The Committee requests the Government to take the necessary measures, in consultation with the social partners, to amend the Labour Code so as to ensure that more than one trade union organization per sector or industry can be established if the workers so desire. It requests the Government to keep it informed of the developments in this regard.*

560. *The Committee further notes the allegation that the legislation prohibits public sector workers to organize and to bargain collectively. The Committee notes the Government's indication that public servants are excluded from the provisions of the Labour Code and are subject to the provisions of the civil services administration system. Recalling that public servants, like all other workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [see **Compilation**, para. 336], the Committee requests the Government to provide information, including specific legal provisions, regarding the right to organize and to bargain collectively in the public sector, including in the public service.*

561. *The Committee notes that the complainant further alleges that pursuant to section 98(f) of the Labour Code, workers must attain the age of 18 years to be able to be a member of a trade union, while persons of 16 years of age are admissible to work. The Committee notes the Government's indication that the working age is set at 18. The Committee observes, however, that section 73 of the Labour Code prohibits the employment of minors under 16 years of age. The Committee considers that minor workers who have reached the legal age of employment should be able to form and join organizations of their own choosing. It therefore requests the Government to take the necessary measures, in consultation with the social partners, to amend section 98(f) so as to ensure that minors who have reached the legal age for*

employment, whether as workers or trainees, are fully protected in their exercise of the freedom of association rights. It requests the Government to provide information on measures contemplated or adopted in this respect.

562. *The Committee notes that section 116 of the Labour Code confers the power to the Minister to dissolve an administrative body of a trade union (or an employer's organization) if it violates provisions of the Code, regulations issued pursuant to it or if the bylaws of the organization are in violation of the legislation in force. The Minister's decision is subject to appeal before the Supreme Administrative Court. Furthermore, pursuant to the same provision, in consultation with the GFJTU, the Minister appoints an interim administrative body from the General Assembly to administer the union and to hold elections of a new administrative body. The Committee further notes that section 119 of the Labour Code provides for a penalty of imprisonment for a period not exceeding three months and/or a fine of up to 1,000 dinars (US$1,410) for continuing to act on behalf of a dissolved organization or administrative board.*

563. *The Committee recalls that the removal by the Government of trade union leaders from office is a serious infringement of the free exercise of trade union rights [see* ***Compilation,*** *para. 654]. It further considers that the power of the Minister to remove a freely elected administrative body of an organization on the basis of such a broad criteria as "any violation of the legislation" constitutes a serious interference in trade union activities, including the right of trade unions to elect their own representatives and organize their administration, even if it can be appealed to the Administrative Court, as the latter bases its decisions on the legislation in force setting out the same broad criteria. The Committee further considers that the nomination by the authorities of members of executive committees of trade unions constitutes direct interference in the internal affairs of trade unions. The Committee therefore requests the Government to amend section 116 of the Labour Code in consultation with the social partners in this light and to keep it informed of the measures taken in this regard.*

564. *The Committee notes that the complainant organization considers that the penalty of 50–100 dinars (US$70–US$140) provided for in section 139 of the Labour Code is not a sufficient sanction against acts of interference. The Committee recalls that legislation must establish sufficiently dissuasive sanctions against acts of interference by employers against workers and their organizations. The Committee requests the Government to review the fines with the social partners in order to determine what would represent a sufficiently dissuasive sanction and to take the necessary measures to amend the section accordingly. It requests the Government to keep it informed of the steps taken in this regard.*

565. *The Committee notes the Government's indication that it intends to reopen elements of the legislation in the future and to conduct consultations with the social partners with a view to preparing relevant amendments. The Committee trusts that steps will be taken in the near future to amend the law and requests the Government to keep it informed in this respect. It further draws the attention of the CEACR to the legislative aspects of this case.*

566. *The Committee notes the alleged violations of trade union rights in practice. The JFITU alleges, in particular, that those who try to operate independent trade unions face pressure and refers in this respect to the detention of Mr Muhamed Al Senaid, ex-president of the Independent Union of Agricultural Workers and of Mr Amin Ghanim, president of the Independent Trade Union of Art Workers. The Committee notes the Government's indication that this matter is not within the competence of the Ministry of Labour, which has no information in this regard. The Committee regrets that no information has been provided by the Government on these serious allegations. It recalls that the detention of trade union leaders or members for trade union activities or membership is contrary to the principles of freedom of association [see* ***Compilation****, para. 120]. It further recalls that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [see* ***Compilation****,*

para. 46]. The Committee considers that if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of providing full replies concerning allegations made against them, which should include information obtained from the relevant national authorities. The Committee urges the Government to provide detailed observations on these two alleged cases of detention without further delay.

567. *The Committee further notes the following alleged cases of interference and discrimination suffered by leaders and activists of independent trade unions: dismissal (Mr Khaled Hasan Ali, worker at the water company), suspension (Mr Tayel Al Khamayseh, ex-president of the Independent Union of Phosphate Mine Workers), pressure to resign from the job (president and secretary of the Chemical Industries' Independent Union and Mr Khalil Butros Wahhab, vice-president of the Independent Trade Union of Civil Aviation Workers), deferral of promotion and withholding of wages (Mr Jalal El Harasees, president of the Independent Union of Jordan Electricity Workers), transfer (Mr Mahmoud Shihada Al-Khateeb, president of the Independent Trade Union of Workers at the Jordan Water Company Miyahuna); and threatening company workers wishing to join the independent trade union and pressure to sign pledges not to engage in trade union activities (president of the Independent Trade Union in the Pharmaceutical Industries and its board members, as well as at the water company). The Committee notes the Government's indication that these allegations are untrue. The Committee requests the Government to provide detailed information on any investigation conducted into the above allegations.*

568. *The Committee requests the Government and the complainant to provide information on the outcome of the appeal in the case involving the Independent Union of Electricity Workers regarding the employer's alleged denial to bargain collectively.*

569. *With regard to the alleged cancellation by the authorities of public meetings organized by independent trade unions, the Committee notes the Government's indication that the Ministry of Labour has no knowledge of any such meetings and has not addressed any authority in this regard. The Committee requests the Government to review these allegations with the competent authorities with a view to giving appropriate instructions in the event that they have interfered with the right to hold meetings and the freedom of assembly of the trade unions involved and to keep the Committee informed of the measures taken in this respect.*

570. *The Committee invites the Government to avail itself of the technical assistance of the Office in respect of the matters raised in this case.*

The Committee's recommendations

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

(a) The Committee requests the Government to amend section 98(e) of the Labour Code, in consultation with the social partners, so as to eliminate the restriction placed on the organizing rights of migrant workers and to keep it informed of all measures taken in this respect.

(b) The Committee requests the Government to take the necessary measures, in consultation with the social partners, to ensure that foreign workers enjoy their freedom of association rights, including to the right to be elected to trade union office. It requests the Government to keep it informed of the measures taken in this respect.

(c) The Committee requests the Government to take, in consultation with the social partners, the necessary measures, including legislative, in order to ensure that all workers in all sectors in the country, with the only possible exception of the armed forces and the police enjoy the right to establish and join organizations of their own choosing. The Committee requests the Government to keep it informed of the measures taken or envisaged in this regard.

(d) The Committee requests the Government to take the necessary measures, in consultation with the social partners, to amend the Labour Code so as to ensure that more than one trade union organization per sector or industry can be established if the workers so desire. It requests the Government to keep it informed of the developments in this regard.

(e) The Committee requests the Government to provide information, including specific legal provisions, regarding the right to organize and to bargain collectively in the public sector, including in the public service.

(f) The Committee requests the Government to take the necessary measures, in consultation with the social partners, to amend section 98(f) of the Labour Code so as to ensure that minors who have reached the legal age for employment, whether as workers or trainees, are fully protected in their exercise of the freedom of association rights. It requests the Government to provide information on measures contemplated or adopted in this respect.

(g) The Committee requests the Government to amend section 116 of the Labour Code in consultation with the social partners and to keep it informed of the measures taken in this regard.

(h) The Committee requests the Government to review the fines with the social partners in order to determine what would represent a sufficiently dissuasive sanction and to take the necessary measures to amend the relevant legislative provision accordingly. It requests the Government to keep it informed of the steps taken in this regard.

(i) The Committee trusts that steps will be taken in the near future to amend the legislation and requests the Government to keep it informed in this respect. It further draws the attention of the CEACR to the legislative aspects of this case.

(j) The Committee urges the Government to provide detailed observations on the two alleged cases of detention without further delay.

(k) The Committee requests the Government to provide detailed information on any investigation conducted into the alleged acts of discrimination against trade unionists.

(l) The Committee requests the Government and the complainant to provide information on the outcome of the appeal in the case involving the Independent Union of Electricity Workers regarding the employer's alleged denial to bargain collectively.

(m) The Committee requests the Government to review the allegations of cancellation by the authorities of public meetings organized by independent trade unions with the competent authorities with a view to giving appropriate instructions in the event that they have interfered with the right to hold meetings and the freedom of assembly of the trade unions involved and to keep the Committee informed of the measures taken in this respect.

(n) The Committee invites the Government to avail itself of the technical assistance of the Office in respect of the matters raised in this case.

Case No. 3275

Interim report

Complaint against the Government of Madagascar presented by the International Transport Workers' Federation (ITF)

Allegations: The complainant alleges anti-union discrimination from a port sector company, by: (i) refusing to recognize the General Maritime Union of Madagascar (SYGMMA) as the legitimate representative of its workforce; and (ii) penalizing and dismissing union leaders and members in retaliation for carrying out legitimate trade union activities

572. The Committee examined this case, presented in 2017, at its June 2019 meeting, when it presented an interim report to the Governing Body [see 389th Report, approved by the Governing Body at its 336th Session (June 2019), paras 445–466].

573. The Government sent its observations on 1 February 2021.

574. Madagascar has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

575. In its previous examination of the case, in June 2019, the Committee made the following recommendations [see 389th Report, para. 466]:

(a) The Committee deeply regrets that the Government has not replied to the allegations, even though it has been asked to do so on several occasions, including through an urgent appeal, and requests it to reply as soon as possible.

(b) The Committee requests the Government to take the necessary measures to ensure that: (i) the decision of the Arbitration Board of the Court of First Instance of 26 July 2013 is enforced; and (ii) trade union rights are respected at the Port of Toamasina allowing SYGMMA to carry out its trade union activities in full freedom.

(c) The Committee requests the Government to indicate whether a judgment on appeal has been issued on the unfair dismissal claim of the 43 workers. If it is found that acts of anti-union discrimination have been committed by the company, the Committee calls on the Government to take the necessary measures of redress, including ensuring that the workers concerned are reinstated without loss of pay, and if reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation.

(d) The Committee urges the Government to solicit information from the employers' organizations concerned, if they so desire, with a view to having at its disposal their views as well as those of the enterprise concerned on the pending issues.

B. Reply by the Government

576. On 1 February 2021, the Government provided a copy of the arbitral award of 26 July 2013, as well as a copy of the decision of the Labour Court of First Instance of 10 April 2015 dismissing the unfair dismissals claim of the 43 dockers. According to the Government, they were among the 203 dockers "deleted from the list" of dockers maintained by the company for various reasons (including prolonged unjustified absences, miscellaneous offences and social unrest).

C. The Committee's conclusions

577. *The Committee recalls that this complaint concerns allegations of anti-union discrimination from a port sector company by: (i) refusing to recognize the General Maritime Union of Madagascar (SYGMMA) as the legitimate representative of its workforce; and (ii) penalizing and dismissing union leaders and members in retaliation for carrying out legitimate trade union activities.*

578. *The Committee notes with regret the lack of detail in the Government's observations in response to its previous recommendations. Indeed, the Government confines itself to providing a copy of the arbitral award of 26 July 2013, which states that the company's failure to recognize the union amounted to an unconstitutional act in contravention of the principles of freedom of association, and a copy of the decision of the Labour Court of First Instance of 10 April 2015 dismissing the unfair dismissals claim of the 43 dockers. The Committee notes with deep regret that the Government does not provide information on the measures taken to enforce the decision of the Arbitration Board of 26 July 2013 and to ensure that trade union rights are respected at the Port of Toamasina. Similarly, the Committee deeply regrets having no information from the Government concerning the outcome of the appeal lodged in September 2015 against the decision of the Court of First Instance concerning the dismissal of the 43 workers. On this point, the Committee notes that it is apparent from the contested decision that the dockers concerned were regarded as daily workers, since they had provided no evidence of an employment contract of unlimited duration within the meaning of section 9 of the Labour Code. Furthermore, the Committee notes that, according to the Government, they were among the 203 dockers "deleted from the list" of dockers maintained by the company for various reasons (including prolonged unjustified absences, miscellaneous offences and social unrest). In view of the above, the Committee urges the Government to provide detailed information on the situation of the 43 workers involved, as well as on the outcome of the appeal lodged in September 2015 against the decision by the Labour Court of First Instance concerning their dismissal. The Committee recalls that, if it is found that acts of anti-union discrimination have been committed by the company, the Government should take the necessary measures of redress, including ensuring that the workers concerned are reinstated without loss of pay, and if reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation.*

579. *Recalling that dockers, in view of their status and conditions of recruitment, may prove to be especially vulnerable to anti-union discrimination, the Committee considers that the lack of information on the outcome of judicial proceedings relating to the dismissal of the 43 workers, compounded by the Government's silence over the measures taken to protect the trade unionists and the free exercise of trade union activities, would appear to corroborate the more general allegations of a lack of respect for trade union rights in the country.*

The Committee's recommendations

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

(a) The Committee urges the Government to take the necessary measures to ensure that, in accordance with the decision of the Arbitration Board of the Court of First Instance dated 26 July 2013, trade union rights are respected at the Port of Toamasina, allowing the SYGMMA to carry out its trade union activities freely.

(b) The Committee urges the Government to provide detailed information on the situation of the 43 dismissed workers, as well as on the outcome of the appeal lodged in September 2015 against the decision by the Court of First Instance. If it is found that acts of anti-union discrimination were committed by the company, the Committee calls on the Government to take the necessary measures of redress, including ensuring that the workers concerned are reinstated without loss of pay, and if reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation.

Case No. 3018

Interim report

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

Allegations: The complainant organization alleges anti-union actions by the management of a hotel in Karachi and the failure of the Government to ensure freedom of association

581. The Committee last examined this case (submitted in 2013) at its June 2019 meeting, when it presented an interim report to the Governing Body [see 389th Report, paras 490–509, approved by the Governing Body at its 336th Session].

582. The Government provided its observations in communications dated 14 October 2020 and 27 January 2021.

583. 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

584. At its June 2019 meeting, the Committee made the following recommendations [see 389th Report, para. 509]:

(a) The Committee encourages the Government to take the necessary steps to ensure that the Hotel trade union will be able to actively engage in the negotiations with the management in order to find solutions to the long standing matters in a way that will ensure that the workers concerned are represented by persons freely chosen and elected by them.

(b) With regard to the situation of the trade union members who benefited from a reinstatement order from the Sindh Appellate Labour Tribunal in January 2013, the Committee firmly expects that the Sindh High Court's decision on the management's appeal will be rendered without further delay and requests the Government to transmit a copy of the judgment once it has been issued. Should the reinstatement order be confirmed, the Committee expects that the Government will ensure the full execution of the ruling and secure the effective reinstatement of the workers in question (or payment of pension for those who have reached the retirement age) and compensation for lost wages, as well as any damages suffered. Further regretting that the Government does not provide any information on the case of the union member who died while awaiting the enforcement of the reinstatement judgment, the Committee requests once again the Government to inform of the steps taken in follow-up to its previous recommendations that his heirs receive adequate compensation and to provide updated and concrete information in this regard. The Committee also expects the Government to keep it informed of the outcome of the five cases regarding claims for compensation before the Compensation Commissioner for which the Government had previously indicated that two are pending for cross-action of the applicants and three are at the stage of hearing on objections.

(c) In view of the lengthy proceedings concerning the workers who were allegedly denied access to the workplace after the events of March 2013, the Committee must once again express its firm expectation that the Sindh High Court's decision will be rendered without further delay and that all proceedings pending before the NIRC will be properly and expeditiously dealt with. It further expects the Government to provide detailed information on meaningful development concerning these proceedings or any follow-up to the recommendations of the Tripartite Committee set up by the MOPHRD in this regard.

(d) The Committee requests the Government to clarify whether the Tripartite Committee established by the MOPHRD to conduct an independent inquiry into the allegations of anti-union harassment and violence has concluded its examination of the following allegations: harassment of union members; the acts of violence on 25 February and 13 March 2013 against several members of the Hotel trade union, its General Secretary, Mr Ghulam Mehboob and workers participating in a strike; and the subsequent brief arrest of union officers and members and filing of criminal charges against 47 of them. The Committee requests the Government to provide concrete updated information on the outcome of the investigations and of any follow-up measures thereof and expects that the Government will be able to provide such information without further delay.

(e) The Committee trusts that the decision of the Sindh High Court on the management's appeal challenging the decision of the NIRC on holding elections at the national level to determine the collective bargaining agent will be rendered without delay and urges the Government to keep it informed of any developments regarding the recognition of the national union by the Hotel, in accordance with the Tripartite Committee's recommendations.

(f) Observing the Government's assertion that a number of issues have been mutually settled through arbitration and that others will be resolved through social dialogue, the Committee trusts that any remaining issues in this case will indeed be rapidly resolved through the appropriate mechanisms, including with the participation of the concerned union, and requests the Government to keep it duly informed of any

amicable settlement reached between the Hotel and the workers as a follow-up to the recommendations of the Tripartite Committee set up by the MOPHRD on their reinstatement. It reminds the Government that ILO technical assistance is available to it should it so desire.

B. The Government's reply

585. In communications dated 14 October 2020 and 27 January 2021, the Government informs about developments in the present case and reiterates that the Ministry of Overseas Pakistanis and Human Resource Development (MOPHRD) is regularly engaged with the stakeholders including the National Industrial Relations Commission, the Labour Department of the Government of Sindh, the Pakistan Workers' Federation (PWF) and the Employers' Federation of Pakistan (EFP), to resolve the issues between the Pearl Continental Hotel Karachi Employees Union and the Pearl Continental Hotel Karachi Management (hereafter "the Hotel management") through social dialogue.

586. In relation to the recommendation of the Committee that steps be taken to ensure that the Hotel trade union will be able to actively engage in the negotiations with the management in order to find solutions to the long-standing matters in a way that will ensure that the workers concerned are represented by persons freely chosen and elected by them (recommendation (a)), the Government informs that the Tripartite Committee constituted by the Federal Government had recommended that representatives of the PWF and the EFP help facilitate dialogue between the parties to the dispute on the many outstanding issues. As the complainant has raised concerns over the involvement of the PWF and the EFP, no significant development has been made in respect of the recommendations of the Tripartite Committee. However, the Government endeavours to ensure that the issues between the Hotel trade union and the Hotel management are settled through negotiations and by mutual consent.

587. In relation to the situation of the trade union members who benefited from a reinstatement order from the Sindh Appellate Labour Tribunal in January 2013 (recommendation (b)), the Government merely reiterates that the Hotel management has maintained its appeal before the Sindh High Court against the reinstatement order. Although the reinstatement order has been challenged, the back benefits have been deposited in the Tribunal in the shape of a bank guarantee, in compliance with the Appellate Labour Tribunal's order, and workers (except those who have attained the age of retirement) receive their monthly salary. The MOPHRD has requested the National Industrial Relations Commission (NIRC) to obtain details on the case so that it could address the Attorney General and the Registrar of the Sindh High Court to request early disposal of the case through legal channels. Once rendered, the decision of the Court will be implemented effectively, and a copy will be provided to the Committee. As previously stated, the Hotel management has informed that the entire legal dues have already been paid to several employees and has indicated its readiness to facilitate the payment of pension and settle claims of employees who have attained the age of retirement. With regard to Mr Ghulam Mehboob, General Secretary of the Hotel trade union, who retired, the Government informs that his age determination case was decided by Court and his legal dues are being calculated and shall be paid shortly. Furthermore, the Government reiterates that a number of issues raised by the union, individuals, as well as cases before the NIRC and the courts, have been mutually resolved, including the settlement of the application of seven security guards of the Hotel whose reinstatement was also ordered by the Appellate Labour Tribunal in January 2013. With regard to the five cases pending before the Compensation Commissioner of the Sindh Labour Department, South Division Karachi, the Government states that two

cases relate to deduction of provident fund involving respectively 121 and nine workers and are pending a cross application. The three other cases have been filed for profit on Provident Fund involving 22 workers and are at the stage of hearing on the statement of objections.

588. With regard to the 65 workers who were allegedly denied access to the workplace in the aftermath of the industrial action in March 2013 (recommendation (c)), the Government indicates that the Hotel management has been paying the salaries and other perks to the workers who have been reinstated by the Court. The cases of workers which are still pending adjudication will be settled in the light of the decision of the Court. Besides the Hotel management, the trade unions in the establishment too have filed cases which are also causing delays in the resolution of the matter. For the cases pending in the NIRC, the concerned benches have been advised by the Commission to prioritize them. In its latest communication, the Government states that among 36 workers who were on "special leave" and were not allowed to work, 32 were taken back after withdrawal of their cases, three are still under negotiation and one has died.

589. As to the serious allegations of anti-union harassment and violence submitted to the Federal Tripartite Consultative Committee for necessary action (recommendation (d)), the Government refers to its previous statement indicating that the Hotel management has once again reiterated that the allegations are false and fabricated. The Tripartite Committee recommended that both parties resolve the issues through social dialogue and try to reach amicable solutions.

590. With regard to the issue of the certification request lodged by the Hotel's national union, the Government recalls that the management has challenged the decision of the NIRC on holding elections at national level to determine the collective bargaining agent before the Sindh High Court and the matter is pending adjudication due to non-appearance of either party. According to the Government, other unions in the establishment have also filed cases against each other, causing delay in the resolution of the matter. At the same time, the Hotel management has stated that all other establishments located in other parts of the country have duly elected trade unions and their collective bargaining agents with whom agreements or settlements are executed periodically as and when industrial disputes occur.

C. The Committee's conclusions

591. *The Committee recalls that this case concerns serious allegations of anti-union actions including transfer and dismissal, harassment, arrest and criminal prosecution of trade union members and officials by the management of a hotel in Karachi in the Sindh Province, and ultimately the Government's failure to ensure that the Hotel's union and its members enjoy freedom of association.*

592. *With regard to the situation of the trade union members who benefited from a reinstatement order from the Sindh Appellate Labour Tribunal in January 2013 (these dismissals were the object of Case No. 2169 examined by the Committee, the predecessor to this case concerning the same hotel [see 331st Report, June 2003]), the Committee notes the Government's reiteration that the Hotel management maintained its appeal against the reinstatement order before the Sindh High Court and that the Ministry plans to intervene with the Attorney General and the Registrar in order to request early disposal of the case. The Hotel management asserts once again that the entire legal dues have already been paid to some workers and expresses its readiness to facilitate the payment of pension and settle claims of employees who have attained the age of retirement. The Government indicates that a number of issues raised by the union, individuals, as well as cases before the NIRC and the courts, have been mutually*

resolved, including the settlement of the application of seven security guards of the Hotel whose reinstatement was also ordered by the Appellate Labour Tribunal in January 2013. While taking note of the payment of some benefits to the concerned workers, as well as of the reaffirmed openness of the management to settle their claims, the Committee must once again express deep concern at the time that has elapsed since the Sindh Appellate Labour Tribunal upheld the 2011 ruling of the Sindh Labour Court ordering reinstatement of 21 members of the Hotel's union, many of whom have since retired, and at the fact that the management's appeal against this order is still pending. The Committee is bound to reiterate its firm expectation that the Sindh High Court's decision on the Hotel management's appeal will be rendered without further delay and requests the Government to transmit a copy of the judgment once it has been issued. Should the reinstatement order be confirmed, the Committee expects that the Government will ensure the full execution of the ruling and secure the effective reinstatement of the workers in question (or payment of pension for those who have reached the retirement age) and compensation for lost wages, as well as any damages suffered. In this regard, the Committee notes the indication that the case of Mr Ghulam Mehboob, General Secretary of the Hotel trade union, who is among the officers who benefited from the reinstatement order and is now retired, was decided by Court and that his legal dues were being calculated and shall be paid shortly. The Committee requests the Government to keep it informed of any development in this regard. It also expects detailed information from the Government on the case of the union member who died while awaiting the enforcement of the reinstatement judgment, for which the Committee made a previous recommendation that his heirs receive adequate compensation.

593. *In reply to its previous request on the outcome of five cases regarding claims for compensation pending before the Compensation Commissioner of the Sindh Labour Department, South Division Karachi, the Committee notes the Government's indication that two cases relate to deduction of provident fund involving respectively 121 and nine workers and are pending a cross application. The three other cases have been filed for profit on provident fund involving 22 workers and are at the stage of hearing on the statement of objections. The Committee requests the Government to keep it informed of the outcome of these cases.*

594. *With regard to the 65 workers who were allegedly denied access to the workplace in the aftermath of the industrial action in March 2013, the Committee recalls that several proceedings were initiated before the NIRC, that reinstatement of 32 workers was ordered but that the Hotel management obtained a stay order from the Sindh High Court and that the matter was sub judice before the Court. In its latest communication, the Government states that among 36 workers who were on "special leave" and were not allowed to work, 32 were taken back after withdrawal of their cases, three are still under negotiation and one has died. The Government indicates that the Hotel management has been paying the salaries and other perks to the workers who have been reinstated by the Court. The cases of workers which are still pending adjudication will be settled in the light of the decision of the Court. In this regard, besides the Hotel management, the trade unions in the establishment have also filed cases which are also causing delays in the resolution of the matter. For the cases pending in the NIRC, the Committee notes that the concerned benches have been advised by the Commission to prioritize them. While acknowledging the latest report from the Government on the amicable settlement reached resulting in the reinstatement of 32 workers after the withdrawal of their cases, the Committee must once again express its concern in view of the lengthy proceedings. The Committee must express its firm expectation that the Sindh High Court's decision on the matter will be rendered without further delay and that all proceedings pending before the NIRC will be properly and expeditiously dealt with. The Committee firmly expects that the Government will provide detailed information on meaningful development*

concerning these proceedings or any follow-up to the recommendations of the Tripartite Committee set up by the MOPHRD in this regard.

595. *The Committee recalls that it had requested the Government to institute without delay an independent inquiry into the following serious allegations of anti-union harassment and violence submitted to the Federal Tripartite Consultative Committee: (i) the harassment of union members; (ii) the acts of violence on 25 February and 13 March 2013 against several members of the Hotel trade union, its General Secretary, Mr Ghulam Mehboob, and workers participating in a strike; and (iii) the subsequent brief arrest of union officers and members and filing of criminal charges against 47 of them. An independent inquiry was conducted into these allegations in April 2018 at which the Hotel management stated that it did not take any disciplinary action, did not file criminal charges and did not victimize in any other way workers involved in the 2013 incidents, who continue to be paid salaries and other benefits but some Hotel employees who disrupted law and order, were indeed arrested by the police and later released. The Committee notes that, in its latest communication, the Government merely refers to the statement of the Hotel management that the allegations are false and fabricated. From the information provided, it remains unclear to the Committee whether the independent inquiry has concluded its examination of these allegations. Therefore, the Committee requests the Government to provide without further delay concrete updated information on the outcome of the investigations and of any follow-up measures thereto.*

596. *With regard to the certification request lodged by the Hotel's national union in March 2017, the Committee recalls from its previous examination of the case that the Hotel management has challenged the decision of the NIRC on holding elections at national level to determine the collective bargaining agent before the Sindh High Court. The Committee also noted that following its meeting of July 2018, the Tripartite Committee established by the MOPHRD to look into the issues raised by the complainant recommended that the Hotel management recognize and work in harmony with the national union. In its latest communication, the Government informs that the matter is still pending adjudication due to non-appearance of either party. Additionally, other unions in the establishment have also filed cases against each other, causing delay in the resolution of the matter. The Committee notes with regret that these overly lengthy proceedings are undoubtedly detrimental to the conduct of sound labour relations in the Hotel and understands that initiating collective bargaining in the Hotel remains a daunting process. The Committee urges the Government to take measures to encourage and promote, in accordance with ratified Convention No.98, free and voluntary negotiations in the Hotel, with a view to the peaceful resolution of outstanding matters and for the determination of workers' terms and conditions of employment through binding collective agreements. Emphasizing once again that one of the main objectives of workers exercising their right to organize is to bargain collectively their terms and conditions of employment and that it is incumbent on the Government to ensure that there is no undue impediment in this regard; the Committee must express its firm expectation that the decision of the Sindh High Court will be rendered without further delay and urges the Government to keep it informed of any developments regarding the recognition of the national union by the Hotel, in line with the Tripartite Committee's recommendations.*

597. *In its previous examination of this case, the Committee had acknowledged some initiatives on the part of the Federal Government and the Sindh Government to deal specifically with the outstanding issues. Among these initiatives, the Committee had noted that the Tripartite Committee set up by the MOPHRD to conduct an independent inquiry into the allegations recommended to involve representatives of the EFP and the PWF to promote negotiations among the parties. The Committee had noted the concerns expressed by the complainant that such involvement should not result in excluding the Hotel trade union from the negotiations and encouraged the Government to take the necessary steps to ensure that the Hotel trade*

union actively engage in the negotiations with the management in order to find solutions to the long-standing matters in a way that will ensure that the workers concerned are represented by persons freely chosen and elected by them. In its latest communication, the Government asserts that the objection raised by the complainant had resulted in no significant development being made in respect of the recommendations of the Tripartite Committee. However, the Government indicates that it is making earnest efforts to resolve the outstanding matters between the Hotel trade union and the management, through negotiations and mutual consent. The Committee encourages the Government to pursue its efforts, including within the Tripartite Committee set up by the MOPHRD and with the guidance of the above-mentioned umbrella organizations where appropriate, to facilitate the engagement of the parties to find solutions to the pending matters.

598. *In view of the time that has elapsed since the lodging of the complaint in 2013, the Committee expresses once again the firm expectation that the Government will take swift action and will be able to report meaningful progress regarding the outstanding matters in this case.*

The Committee's recommendations

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

(a) With regard to the situation of the trade union members who benefited from a reinstatement order from the Sindh Appellate Labour Tribunal in January 2013, the Committee is bound to reiterate its firm expectation that the Sindh High Court's decision on the management's appeal will be rendered without further delay and requests the Government to transmit a copy of the judgment once it has been issued. Should the reinstatement order be confirmed, the Committee expects that the Government will ensure the full execution of the ruling and secure the effective reinstatement of the workers in question (or payment of pension for those who have reached the retirement age) and compensation for lost wages, as well as any damages suffered. In this regard, noting from the information provided that the case of Mr Ghulam Mehboob, General Secretary of the Hotel trade union, who is among the officers who benefited from the reinstatement order and is now retired, was decided by Court and that his legal dues were being calculated and shall be paid shortly, the Committee requests the Government to keep it informed of any development in this regard. It also requests the Government to provide detailed information on the steps taken to implement its recommendation that the heirs of the union member who died while awaiting the enforcement of the reinstatement judgment receive adequate compensation. With regard to the five cases regarding claims for compensation pending before the Compensation Commissioner of the Sindh Labour Department, the Committee requests the Government to keep it informed of the outcome of these cases.

(b) In view of the lengthy proceedings still pending concerning the workers who were allegedly denied access to the workplace after the events of March 2013, the Committee must express its firm expectation that the Sindh High Court's decision on the matter will be rendered without further delay and that all proceedings pending before the NIRC will be properly and expeditiously dealt with. The Committee firmly expects that the Government will provide detailed information on meaningful development concerning these proceedings or any follow-up to the recommendations of the Tripartite Committee set up by the MOPHRD in this regard.

(c) The Committee requests the Government to clarify whether the Tripartite Committee established by the MOPHRD in April 2018 to conduct an independent inquiry into the allegations of anti-union harassment and violence has concluded its examination of the following allegations: harassment of union members; the acts of violence on 25 February and 13 March 2013 against several members of the Hotel trade union, its General Secretary, Mr Ghulam Mehboob and workers participating in a strike; and the subsequent brief arrest of union officers and members and filing of criminal charges against 47 of them. The Committee requests the Government to provide without further delay concrete updated information on the outcome of the investigations and of any follow-up measures thereto.

(d) The Committee must express its firm expectation that the decision of the Sindh High Court on the Hotel management's appeal challenging the decision of the NIRC on holding elections at the national level to determine the collective bargaining agent will be rendered without delay and urges the Government to keep it informed of any developments regarding the recognition of the national union by the Hotel, in accordance with the Tripartite Committee's recommendations.

(e) The Committee encourages the Government to pursue its effort to facilitate the engagement of the parties to find solutions to the pending matters. In view of the time that has elapsed since the lodging of the complaint in 2013, the Committee expresses once again the firm expectation that the Government will take swift action and will be able to report meaningful progress regarding the outstanding matter of this case.

Case No. 3323

Report in which the Committee requests to be kept informed of developments

Complaint against the Government of Romania
presented by
– the International Trade Union Confederation (ITUC)
– the International Transport Workers' Federation (ITF) and
– the Block of National Trade Unions of Romania (BNS)
supported by
– the National Trade Union Confederation of Romania (CNS "Cartel ALFA")
– the Confederation of Democratic Trade Unions of Romania (CSDR) and
– the National Confederation of Free Trade Unions of Romania (CNSLR-FRATIA)

Allegations: The complainants denounce the Government's failure to ensure compliance with the principles of freedom of association and collective bargaining which has resulted in widespread violations in law and in practice. The complainants allege shortcomings and gaps in the national legislation, denial of freedom of association and collective bargaining in many enterprises and systematic violations of fundamental rights of workers, including physical and verbal abuse, especially in the private sector

600. The complaint is contained in communications dated 16 July and 12 October 2018 from the International Trade Union Confederation (ITUC), the International Transport Workers' Federation (ITF) and the Block of National Trade Unions of Romania (BNS). The complaint is supported by the National Trade Union Confederation of Romania (CNS "Cartel ALFA"), the Confederation of Democratic Trade Unions of Romania (CSDR) and the National Confederation of Free Trade Unions of Romania (CNSLR-FRATIA).

601. The Government provides its observations in communications dated 23 October 2018 and 30 September 2020.

602. Romania 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 Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

603. In their communications dated 16 July and 12 October 2018, the complainants denounce the Government's failure to ensure compliance with the principles of freedom of

association and collective bargaining which has resulted in widespread violations in law and in practice. In particular, the complainants allege a number of shortcomings and gaps in the national legislation which have led to the effective denial of freedom of association and collective bargaining in many enterprises, as well as to systematic violations of fundamental rights of workers, including physical and verbal abuse, especially in the private sector. They also point to case-specific allegations of interference and bad faith collective bargaining by an air transport company.

Allegations of shortcomings in the national legislation

604. The complainants indicate that new labour laws were adopted in the country in 2011, including the Labour Code (Act No. 40/2011) and the Law on Social Dialogue (Act No. 62/11), which abrogated Act No. 130/1996 on collective agreements which had established the National Collective Agreement providing for wage scales, Act No. 168/1999 on the settlement of labour conflicts, Act No. 356/2001 concerning employers' organizations and Act No. 54/2003 on trade unions. According to the complainants, the Law on Social Dialogue raises a number of issues of non-compliance with the right to freedom of association and collective bargaining, including: restrictions on the right to establish and join trade union organizations through excessive minimum membership requirement; limitations on the right to strike resulting from the threat of paying extensive damages if the strike is declared unlawful; excessive and arbitrary thresholds for the determination of representativity for collective bargaining purposes; power of the employer to challenge trade union representativity at any time; a significant role for elected workers' representatives in situations in which the most representative trade union at the enterprise cannot be determined; a reduced role for minority unions in collective bargaining and collective disputes; and imposition of a collective bargaining mechanism with restrictions on collective bargaining at the national level and limitations on the right to initiate negotiations.

605. With regard to the right to establish and join trade unions, the complainants allege that the minimum membership requirement of 15 members required under section 3 of the Law on Social Dialogue is arbitrary and excessive given the prevalence of small and medium-sized enterprises in the country, 92 per cent of which employ less than 15 employees. As a result, around 1 million workers are denied the right to unionize and bargain collectively. The complainants also consider that section 201 of the Law on Social Dialogue, which allows the employer to challenge the legality of a strike and request the court to order payment of damages, has a debilitating effect on freedom of association and limits the right to strike, not only at the level of execution but also at the level of preparation, as demonstrated by the concrete situation described below.

606. Concerning the thresholds for determining representativity for collective bargaining purposes, the complainants allege that section 51 of the Law on Social Dialogue establishes a minimum threshold of 50 per cent +1 of the total number of workers in an undertaking who need to be members of a legally recognized union for that union to be determined as the most representative workers' organization in the undertaking and to be able to bargain collectively. At the sectoral level or at the level of a group of undertakings, a minimum qualification threshold for the most representative federation is 7 per cent membership of the total number of workers in the sector. At the national level, the minimum threshold required is 5 per cent of the total number of workers in the national economy and the national union must have structures in at least 50 per cent +1 counties. According to the complainants, these qualification criteria are excessive, arbitrary (unrelated to reasonably objective criteria that reflect the situation in the country) and their implementation in practice has occasioned instability and disharmony

in industrial relations. They argue that since the adoption of the Law on Social Dialogue in 2011, collective bargaining at the national level has been non-existent and the number of employees covered by collective bargaining has drastically reduced from 98 per cent to 36 per cent. At the sectoral level, only nine out of 30 sectors have met the representativity criteria and the number of collective agreements signed at the level of the undertaking has reduced from 100 per cent to 15 per cent. The complainants also point to the fact that around 92 per cent of enterprises in Romania employ less than 15 employees, as a result of which the representative status of a trade union is often dependent on one or two workers shifting in and out of trade union membership. In addition, while verification of representativity takes place every four years (section 221), employers can challenge representativity at any time (section 222) which creates an environment for employer interference and anti-union discrimination, since employers incessantly put pressure on a few workers to withdraw from a union so as to undermine its representative status. Workers who refuse to succumb to the pressure are subjected to further anti-union discrimination, including dismissals, transfers and harassment, thus creating severe insecurity of employment. The complainants suggest that necessary protection should be put in place to ensure that employers cannot undermine the effectiveness and autonomy of trade union membership.

607. As to situations where the most representative status for purposes of collective bargaining at the enterprise cannot be determined, the complainants indicate that the law provides for several options (section 135). If the trade union at the undertaking is affiliated to a most representative federation, the union can, jointly with the elected representatives of workers, request the federation to carry out collective bargaining at the level of the enterprise. In the absence of such affiliation, exclusively and automatically, only the elected representatives of workers (not jointly with the union) can carry out collective bargaining at the enterprise. The complainants allege that this arrangement favours elected workers' representatives over trade union representatives and undermines the principles of freedom of association and collective bargaining, contrary to Conventions Nos 135 and 154. According to the complainants, where trade unions exist at the undertaking, elected workers' representatives should not be the default negotiating partner and situations where workers are required to elect representatives to facilitate engagement with the employer cannot be construed as an all-encompassing mandate to engage in collective bargaining. Even though the Committee of Experts on the Application of Conventions and Recommendations has requested the Government to change the legislation on this point, the Government has failed to do so and figures from 2014 reveal that 92 per cent of collective agreements signed at the level of the enterprise were negotiated by workers' representatives. The complainants also denounce that under the Law on Social Dialogue, minority unions are not allowed to represent their members in collective bargaining or in collective conflict settlement. The Government's failure to address these legislative violations and to institute an effective labour administration and inspection to oversee compliance in practice has resulted in the systematic decimation of collective bargaining and exposed workers to real and material harm for their trade union activities.

608. The complainants further allege that section 128 of the Law on Social Dialogue eliminates collective bargaining at the national level by expressly excluding it from the list of levels at which collective bargaining may take place, thus undermining the principle that confederations should be able to conclude collective agreements, including at the national level. Section 129 of the Law on Social Dialogue makes collective bargaining compulsory at the level of the undertaking but vests the power to initiate collective bargaining exclusively with the employer or employers' organization. The most

representative union only benefits from a residual initiative after the employer fails to start collective bargaining, the maximum duration of which is automatically 60 days except where the parties agree to extend it. According to the complainants, these provisions impose a collective bargaining mechanism on the parties and limit their initiative to negotiate contrary to the principle of free and voluntary collective bargaining.

609. Finally, the complainants argue that even though some amendments to the Law on Social Dialogue are currently before Parliament, they did not take into account the technical advice provided by the ILO in April 2018 and the proposed modifications have far-reaching harmful implications for the implementation of the principles of freedom of association, are detrimental to workers and contrary to the Government's obligations under Conventions Nos 87 and 98. The complainants consider that despite the Government's obligation to ensure that social partners are effectively and meaningfully consulted in the preparation and implementation of laws and regulations affecting workers' interests, such consultations did not take place and the draft law lacks input from the workers.

Allegations of interference and bad faith collective bargaining by an air transport company

610. The complainants further allege interference with freedom of association of the Free Trade Union of Aeronautics Handling (Sindicatul Liber De Handling Aeronatic (SLHA)) and bad faith collective bargaining by GlobeGround Romania, an air transport company, as well as the Government's failure to ensure the company's compliance with the principle of freedom of association and collective bargaining. The complainants indicate that the SLHA was formed in February 2015 in accordance with the Law on Social Dialogue and obtained its representative status by court order in July 2015 (determined as final in July 2018) with 440 members out of a total of 710 employees. The SLHA is affiliated to the National Federation of Port Trade Unions of Romania (FNSP), which is affiliated to BNS and to the ITF.

611. In January 2015, the SLHA requested the management to commence collective bargaining at the unit level but almost a year after the start of the negotiations, no meaningful progress had been achieved and the enterprise put up one impediment after another to delay and stagnate the process. For this reason, in December 2015, the union notified the management of its intention to declare a negotiation deadlock and a labour dispute to trigger a strike. In January 2016, compulsory conciliation took place under the supervision of the Territorial Labour Inspectorate without, however, the parties reaching any agreement and the collective bargaining process thus remained stalled. Therefore, in accordance with the labour conflict procedure, the union notified the enterprise of an impending strike beginning with a warning strike on 22 January. One day before the intended warning strike, the enterprise instituted a court action so as to suspend the strike and to have it declared unlawful. The complainants allege that the court of first instance heard the matter in the absence of the union, upheld the claims of the enterprise and the warning strike was temporarily suspended pending final settlement. On 29 February 2016, the Court of Appeals issued a final decision granting the right to proceed with the warning strike and the substantive issue on the legality of the strike as a whole was subsequently determined in favour of the union in May 2016 (it took five months to resolve the issue of the strike). The complainants point out that had the strike been declared unlawful, its organizers and participants would have been required to pay significant damages covering the scope of the activity of the company in line with

section 201 of the Law on Social Dialogue detailed above. Immediately after the litigation was completed, a warning strike took place, following which a collective labour agreement was concluded at the level of the unit and came into effect on 1 July 2016. The complainants allege that contrary to its obligation to negotiate in good faith, the enterprise unjustifiably delayed the negotiations for almost one and a half years (from January 2015 to May 2016) before concluding the first collective agreement. In the complainants' view, the company's anti-union policy aimed at frustrating the union and its members, reducing its representativity and relevance and causing withdrawal of membership from the union. In this situation, the Government should have ensured that measures were in place to prevent the undermining of its obligations under the principles of freedom of association and collective bargaining, such as effective inspections, supervision and reporting, but the Government failed to do so.

612. The complainants further allege that before the expiry of the 2016 collective agreement and upon the union's request, the parties were to start negotiations to renew the agreement in November 2017. However, instead of the SLHA, the management invited the workers' representatives to the meeting, unilaterally suspended the negotiations and declared that the union was no longer representative and could not negotiate a collective agreement. The enterprise also filed a lawsuit to challenge the union's representativity and used it as a justification to refuse any further engagement with the union. According to the complainants, section 222 of the Law on Social Dialogue allows the employer to challenge the union's representativity at any time if satisfied that the conditions of representativity no longer exist and there are no sanctions or safeguards in place when such representativity claims are made as part of an anti-union discrimination campaign by the employer. The complainants argue that the employer should not have the power to unilaterally suspend negotiations and nothing should prevent the enterprise from continuing the negotiations pending the outcome of the court case.

613. In view of the intransigence of the enterprise to delay negotiations until after the court case challenging the union's representativity, the SLHA resorted to an unprecedented step to renounce its representativity so that, in accordance with section 134 of the Law on Social Dialogue, the most representative organization at the sectoral level – the FNSP – could negotiate on behalf of the enterprise workers. However, the enterprise refused to negotiate. Even though the court of first instance dismissed the enterprise's challenge as to the union's representativity in May 2018, the parties have not yet commenced the negotiations as an appeal could be filed by the employer within 30 days. To prevent further delay, the union attempted to initiate a labour dispute process with a view to engaging in a strike but since the Law on Social Dialogue only allows representative organizations to do so, the union was disabled from initiating this process pending the final court decision. The complainants allege that in spite of all the legally valid actions taken by the union including a court order validating its standing to negotiate a collective agreement on behalf of its members, the enterprise has refused to negotiate with the union and the workers have not benefited from any collective bargaining protection since January 2018. According to the complainants, the Government has failed to adopt measures to ensure that no unjustifiable and unreasonable delay created gaps in protection and has not shown willingness or ability to put measures in place as required by its international obligations to ensure that the enterprise acted in accordance with principles of freedom of association and collective bargaining. At the time of the complainants' communication in October 2018, a new agreement had not yet been in place.

614. The complainants further allege that after the conclusion of the 2016 collective agreement, the enterprise engaged in retaliatory actions aimed at weakening and undermining the union and rendering its work ineffective. The management ensured that all new contracts concluded were short-term contracts and many new employees reported that the management threatened them that if they joined the union their contracts would not be renewed. As a result, no newly engaged fixed-term contract worker has joined the union in spite of the constitutional and international protection of the right to freedom of association. The enterprise also began restructuring and reduced the number of employees in the departments where the trade union density was the highest, such as the cleaning and security departments. The management revealed that it intended to dismiss 29 employees but upon the union's challenge in court, a decision was issued in June 2018 preventing the dismissals. Nevertheless, due to the constant threat of dismissal, 20 workers have since resigned from the relevant departments and ten workers have withdrawn their membership from the union. Furthermore, the management has placed the union's offices in an open place in front of a director's office, as a result of which workers feel surveyed, fearful and unable to freely engage the support or assistance of the union. For example, on 31 July 2018 an employee who went to the trade union office to seek information was invited to explain a ten-minute absence from his or her desk. The complainants argue that the use of short-term contracts to avoid freedom of association, daily harassment, intimidation, anti-union retaliation and discrimination amount to a massive and deliberate anti-union attack and render meaningless the right to freedom of association and collective bargaining in practice.

615. In conclusion, reiterating the allegation that the Government failed to ensure respect for the principles of freedom of association and the right to collective bargaining, the complainants ask the Committee to urge the Government to: ensure that the enterprise recognizes the most representative status of the union and starts collective bargaining in good faith pending the determination of the court case; launch a speedy investigation into cases of anti-union discrimination at the enterprise and ensure effective remedies and dissuasive sanctions; ensure that appropriate measures exist in law and practice to safeguard freedom of association, as well as effective redress for anti-union discrimination; conduct necessary labour inspections to avoid anti-union discrimination and intimidation and ensure respect for the rights of the workers; and review the Law on Social Dialogue in meaningful consultation with the social partners, in particular the provisions relating to the formation of unions, determination of representativity, collective bargaining and dispute settlement, in order to bring them into line with ILO Conventions.

B. The Government's reply

616. In its communications dated 23 October 2018 and 30 September 2020, the Government informs about the historical evolution of industrial relations in the country and points to a lack of cooperation, as well as a conflictual relationship between trade unions and employers' organizations, leading to excessive workloads in the national courts and inspection authorities. The Government states that the regulations and measures taken to promote bipartite dialogue and collective bargaining are penalized in practice by the lack of the social partners' capacity to cooperate at different levels through negotiation and consensual relations based on good faith.

617. Concerning the adoption of new labour laws, the Government states that the review of legislation in the field of social dialogue has been debated with the social partners since 2006. Following tripartite consultations, the parties assumed the consolidation of the

relevant legislation by adopting the Law on Social Dialogue in 2011, which brings together previous regulations in this field and reflects amendments agreed to by the social partners. Further efforts to improve the legal framework through consultations with the social partners in bipartite and tripartite working groups between 2014 and 2017 did not lead to consensus and no agreement could be reached on the necessary legal amendments.

618. As to the minimum membership requirement of 15 employees to establish a trade union, the Government indicates that, according to the European Committee of Social Rights, a requirement for a minimum number of employees to set up a trade union complies with the right to organize if the number is reasonable and does not prevent the funding of organizations. The Government informs that the data from the National Institute of Statistics (NIS) suggests that in 2015, the average number of employees at company level in the field of industry was around 25 compared to five employees in the field of services. The requirement of 15 employees introduced by the Law on Social Dialogue and assumed by the unions during consultations thus considered the interest for organization prevalent in the field of industry. The Government asserts that this requirement aims at strengthening enterprise unions and ensuring the necessary initial funding to organize and initiate the activities of a new union, bearing in mind the affordability of union dues for the employees, so as not to deter affiliation.

619. Regarding the issue of industrial disputes and strikes, the Government indicates that under national law, a collective labour dispute may be triggered by a representative union or, where there is no representative union, by freely elected employees' representatives, without distinction between union and non-union representatives (section 183). Participation in a strike does not constitute a breach of professional duties nor does it trigger sanctions and any of the parties may request verification of any possible breach by the Labour Inspectorate. If the employer suspects a breach of the law, it may request the court to cease the strike and the court's decision is subject to appeal. Since protection of union members during a strike does not cover offences under national law, the provisions which allow to limit a strike in case of a breach of law do not restrict freedom of association.

620. With regard to the criteria of representativity, the Government indicates that, upon proposal by the trade unions, the criteria of representativity at the sectoral level (seven per cent) and national level (five per cent) remained the same as in previous legal provisions, while the representativity requirement at the enterprise level was set to a majority of 50+1 with the aim of ensuring legitimacy in the representation of individual interests required by the *erga omnes* effect of collective agreements, which are a source of law. It also aimed at strengthening trade unions at the enterprise by eliminating cases of mutual complaints on the lack of cooperation between unions, which penalized collective bargaining and the conclusion of collective agreements in practice. Section 221 of the Law on Social Dialogue stipulates that trade union representativity is established solely by a court decision and verified every four years and section 222 provides for measures to prevent mutual challenges on grounds of representativity of the parties during collective bargaining at different levels.

621. The Government further indicates that the Law on Social Dialogue provides for several options for representation of all employees in collective bargaining at the level of the enterprise, either through representative trade unions or unions affiliated to representative sectoral federations or elected employees' representatives. It clarifies that, following the 2016 amendment to the Law on Social Dialogue, in situations where there is no representative union or no union affiliated to a representative federation,

employees at the enterprise can choose how they are represented in collective bargaining for agreements applicable *erga omnes* - they vote to elect their representatives among union members and non-affiliated employees (sections 134 and 135 of the Law on Social Dialogue). According to the Government, employees can thus decide by vote whether the elected representatives who can participate in collective bargaining on behalf of all employees will include trade union members or not and the choice of elected representatives thus reflects the free will and interest of the employees.

622. Concerning the rights of minority unions, the Government clarifies that while section 135 of the Law on Social Dialogue provides for representativity for collective bargaining on behalf of all employees (*erga omnes* collective agreements), voluntary bargaining and mutual recognition of the parties are not conditioned by the representativity of the organizations and negotiations may be initiated at the bargaining levels of interest for the parties on the basis of their mutual recognition (section 153 of the Law on Social Dialogue). Accordingly, all trade unions have the right to bargain collectively and to conclude collective agreements at all levels, which are only applicable to members of the signatory parties and there is no obligation to register them or inform the authorities. The Government asserts that the recommendation of the Committee of Experts to foster voluntary collective bargaining, referred to by the complainants, is fully guaranteed by section 153 of the Law on Social Dialogue.

623. With regard to collective bargaining at the national level, the Government indicates that section 128 of the Law on Social Dialogue sets forth the levels of collective bargaining agreements but does not ban voluntary bargaining at the national level and affirms that section 153 provides for collective bargaining at any level of interest based on mutual recognition of the parties. However, in practice, workers' and employers' confederations recognized as representative did not show any intentions to negotiate at the national level since 2011. At the sectoral level, voluntary negotiations led to the conclusion of sectoral agreements by federations, such as in the construction field. Data on registered collective agreements further indicates that: 8,367 enterprise-level agreements were registered in 2013 and 9,366 agreements in 2016 covering around 33 per cent of active employees; 12 unit-level collective agreements were registered in 2013 covering 4,605 employees and seven agreements in 2016 covering 26,180 employees; and three sector-level agreements were registered in 2014 and none in 2016. The Government states that the current situation in the country reflects the willingness, involvement and mutual interest of the parties towards voluntary collective bargaining and comparative data for the period from 2008 to 2012, as well as for later periods, indicates an increase in the number of collective agreements concluded at the enterprise level (including those negotiated through representatives of employees), at the level of groups of enterprises and at the sectoral level.

624. Turning to the concrete allegations of bad faith collective bargaining at the air transport company, the Government enumerates the guarantees relevant to collective bargaining provided by the Law on Social Dialogue, including an obligation to initiate collective bargaining at the unit level, obligation not to exceed a 60-day period for negotiation without the consent of the parties, protection of trade union management against bullying and dismissals and recognition of trade union representativity by courts. Violations in this regard are identified and sanctioned by the Labour Inspectorate upon notification or following inspections and its decisions may be challenged before an administrative court. The Government further states that involvement in collective bargaining means actual bargaining capacity of the parties and the identification of common and mutually beneficial interests to reach an agreement, which has not been the case at the air transport enterprise considering that the negotiations to reach the

2016 collective agreement took almost one year (the Labour Inspectorate was not immediately informed of the prolonged negotiations) and the bargaining for a new agreement also exceeded the 60-day limit set by section 129 of the Law on Social Dialogue. The Government indicates that in order to foster an amicable resolution of legally registered collective disputes, the law provides for mandatory conciliation, as well as voluntary mediation and arbitration which can be requested by the parties. In this specific dispute, the Territorial Labour Inspectorate carried out conciliation in January 2016 but the parties failed to reach an agreement and the union refused further mediation. When the enterprise challenged the legality of the union's announced strike, the court first postponed its decision so as to allow the union to hire a defence counsel but it later ruled in favour of the union, declaring that it had complied with the legal procedure for initiating a strike and the employer's request to cease the strike was rejected. In May 2018, during the negotiation of a new agreement, the Territorial Labour Inspectorate was notified of the enterprise's failure to comply with the obligation to initiate collective bargaining and conducted verification and analysed a number of documents provided by the enterprise. The Labour Inspectorate found that the union had representative status valid until July 2019 as per the 2018 court order and that on the date of the inspection in June 2018, the employer had exceeded the bargaining deadline of 60 days, contrary to section 129 of the Law on Social Dialogue. In order not to waste the efforts of collective bargaining already conducted, the Labour Inspectorate ordered that bargaining should continue upon agreement by the parties and that the enterprise should report on any progress in the negotiating process. The enterprise informed of actions taken to continue the bargaining process between June and October 2018, indicating that it would assume good faith negotiations and would maintain the benefits stipulated by the former collective agreement throughout the bargaining process. As a result, three negotiating meetings took place but the union failed to respond to two minutes of meetings and did not comment on the draft collective agreement. Given the union's passive attitude, the enterprise informed the Labour Inspectorate that it cannot be considered responsible for the delay in negotiations. Finally, the Labour Inspectorate indicates that until July 2020, it has not received any request to register a collective labour agreement.

625. Concerning the allegations of the use of short-term contracts at the enterprise, the Government affirms that the right to organize is guaranteed to persons with individual employment contracts regardless of the type and duration of the contract and this right cannot be waived. Upon notification, the Labour Inspectorate carries out inspections, applies preventive actions and sanctions and implements information and inspection campaigns. The measures and sanctions taken by the Labour Inspectorate may be challenged in line with legal procedures.

626. As to the allegations of intimidation and harassment at the enterprise, the Government indicates that these allegations are speculative due to the absence of individual or collective notices or evidence of the alleged discrimination and harassment and that, according to the enterprise, written statements of four union members during a labour inspection in May 2019 demonstrate that the enterprise did not discriminate against union members throughout the bargaining process. It further states in general terms that the Law on Social Dialogue sets forth trade union rights and freedoms, as well as protection in the exercise of trade union prerogatives, including anti-union discrimination and dissuasive sanctions. The legislation stipulates mechanisms to notify and sanction acts of discrimination and harassment, including on anti-union grounds. These mechanisms include the National Council for Combating Discrimination (NCCD) which is entitled to issue enforceable decisions, the Labour Inspectorate, the

Ombudsman and out-of-court mediation pursuant to the provisions of the Labour Code, the Law on Social Dialogue, laws on equal treatment and Government Ordinance No. 137/2000 sanctioning all forms of discrimination. Victims of discrimination can thus use independent mediation mechanisms, notify the NCCD or go to court. Harassment in general terms is an offence under the Criminal Code while work harassment is based on the rights guaranteed by the labour law. In order to ensure confidentiality, protect union members and not to deter affiliation, the available legal and administrative actions are solely based on statements submitted by the union with respect to the number of its members out of the total number of employees and the union may represent the interests of its members before the authorities and in court. With a view to guaranteeing employee protection in the exercise of their rights, the Labour Code also provides for the employer's obligation to justify decisions on dismissal or modifications of the labour relation. In matters related to anti-union discrimination, trade unions and employers' associations that are representative at the national level are directly involved in a shared mechanism for notification and inspection through their membership in the Tripartite Council established as an advisory structure at the level of the Labour Inspectorate and territorial inspectorates.

C. The Committee's conclusions

627. *The Committee observes that this case concerns, on the one hand, allegations of shortcomings and gaps in the national legislation which have led to the denial in practice of freedom of association and collective bargaining in many enterprises, as well as to systematic violations of fundamental workers' rights and, on the other hand, case-specific allegations of interference, bad faith collective bargaining, anti-union harassment and intimidation of workers at an air transport company.*

Allegations of shortcomings in the national legislation

628. *The Committee notes that according to the complainants, several provisions of the Law on Social Dialogue, 2011, are contrary to the principles of freedom of association and the effective recognition of collective bargaining. The Committee observes that these allegations refer to: restrictions on the right to establish and join trade union organizations through excessive minimum membership requirement (section 3); restrictions on the right to strike resulting from the threat of paying extensive damages if the strike is declared unlawful (section 201); excessive and arbitrary thresholds for determining trade union representativity for collective bargaining purposes (section 51); a significant role given to elected workers' representatives to the detriment of trade unions in situations where the most representative union at the enterprise cannot be determined (section 135); a reduced role for minority unions in collective bargaining and in collective dispute settlement; possibility for employers to challenge representativity of a trade union at any time, creating an environment for employer interference (section 222); legislative exclusion of collective bargaining at the national level (section 128); and imposition of a collective bargaining mechanism where the exclusive power to initiate collective bargaining is vested with the employer or the employers' organization and only residual power of initiative is attributed to the most representative trade unions (section 129).*

629. *Concerning the alleged restrictions on the right to organize, the Committee notes the complainants' allegations that the minimum membership requirement of 15 founding members of the same unit to set up a trade union, as stipulated by section 3(2) of the Law on Social Dialogue, is arbitrary and excessive given the high prevalence of small and medium-sized enterprises in the country, most of which employ less than 15 employees, and that, as a*

result of this requirement, around 1 million workers are left without the right to unionize and bargain collectively. The Committee notes that the Government acknowledges the prevalence of small and medium-sized enterprises which employ on average five to 25 workers but indicates that the requirement was accepted by the unions during consultations preceding the adoption of the Law on Social Dialogue and aims at strengthening enterprise unions and ensuring they have sufficient initial funding. The Committee recalls that while a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed [see ***Compilation of decisions of the Committee on Freedom of Association****, sixth edition, 2018, para. 441]. Given the high level of small enterprises in the country and the concerns raised by the complainants as to the inability for these workers to organize, the Committee invites the Government to review the minimum membership requirement to establish a trade union, in full consultation with the social partners, and to take any appropriate measures to ensure that all workers can form and join organizations of their own choosing. The Committee also requests the Government to clarify the manner in which workers in small enterprises can establish trade unions and, in particular, to indicate whether they can form inter-enterprise groups to reach the necessary threshold to be able to organize. The Committee requests the Government to provide information on the measures taken to the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) to which it refers this legislative aspect of the case.*

630. *The Committee notes that the complainants also allege that the current legislation has a debilitating effect on freedom of association as it limits the right to strike, including at the level of preparation, by allowing employers to request a court to declare a strike illegal, order its cessation, as well as payment of significant damages covering the scope of the activity of the company (section 201 of the Law on Social Dialogue). According to the Government, protection of union members during a strike does not cover offences under national law and provisions which allow to limit a strike in case of a breach of law therefore do not restrict freedom of association. The Committee recalls in this regard that while the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see* ***Compilation****, para. 965], any penalties imposed in respect of illegitimate actions linked to a strike should be proportionate to the offence or fault committed.*

631. *Regarding the thresholds of representativity for collective bargaining purposes, the Committee notes, on the one hand, the complainants' allegations that the requirements imposed by section 51 of the Law on Social Dialogue are excessive and arbitrary – at the level of the enterprise, a legally recognized trade union must represent half plus one of the total number of workers; at the sectoral level, it must obtain 7 per cent membership of the total number of workers in the sector; and at the national level, the minimum threshold required is 5 per cent of the total number of workers in the national economy and the union must have structures in at least half plus one of the counties. The complainants also allege that the existing thresholds of representativity have led to a drastic decrease in collective bargaining agreements concluded at all levels and that minority unions are not allowed to represent their members in collective bargaining. On the other hand, the Committee notes the Government's indication that the criteria of representativity at the sectoral and national levels remained unchanged and that the requirement introduced at the level of the enterprise aims at ensuring legitimacy in the representation of individual interests required by the erga omnes effect of collective agreements and at strengthening trade unions by eliminating cases of lack of cooperation which penalized the conclusion of collective agreements in practice. The Government asserts that the current situation in the country reflects the willingness, involvement and mutual interest of the parties towards voluntary collective bargaining.*

632. *The Committee understands from the above that the thresholds of representativity are used for determining the most representative trade unions at all levels (enterprise, sector and national) in a system based on exclusive bargaining rights, that is, a system where the most representative organization can negotiate and conclude collective agreements applicable to all workers in a bargaining unit. The Committee wishes to recall from the outset that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association [see* ***Compilation****, para. 1351]. However, where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members [see* ***Compilation****, para. 1389]. The Committee notes the Government's clarification that voluntary bargaining is not conditioned by the representativity of the organizations since all trade unions have the right to bargain collectively based on mutual recognition and can conclude collective agreements applicable to members of the signatory parties. In light of the above, the Committee trusts that, in practice, trade unions which do not reach the representativity threshold are able to represent their members and negotiate collective agreements on their behalf and that they are not deprived of essential means to defend the interests of their members or to organize their administration and activities.*

633. *As regards the specific thresholds of representativity, the Committee is of the view that the thresholds should be assessed on the basis of the specific characteristics of the industrial relations system in the country and should not be so high as to hinder the promotion and development of free and voluntary collective bargaining. The Committee notes the concerns expressed by the complainants that the existing thresholds are very difficult to achieve and their application in practice has had a detrimental impact on collective bargaining in practice at all levels. The Committee therefore encourages the Government to encourage and promote effective recognition of collective bargaining at all levels and refers this legislative aspect to the Committee of Experts.*

634. *The Committee further notes the complainants' allegations that, in situations where the representativity of a trade union at the enterprise level cannot be determined, collective agreements applicable to all workers are negotiated and concluded exclusively by elected workers' representatives, contrary to the principles of freedom of association and collective bargaining. The Committee observes the Government's indication in this regard that following the 2016 amendment to the Law on Social Dialogue, section 134(2) now stipulates that representation is made by elected employees' representatives only when there is no trade union at the enterprise. While taking due note of this amendment, the Committee however emphasizes the complainants' allegation that in 2017, over 92 per cent of collective agreements in the private sector were concluded by workers' representatives. Recalling that the Workers' Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), also contain explicit provisions guaranteeing that, where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned [see* ***Compilation****, para. 1345], the Committee invites the Government to review, together with the social partners, the alleged prevalence of collective agreements concluded with workers' representatives, so as to determine whether additional measures should be taken to promote collective bargaining between workers' and employers' organizations, with a view to ensuring that agreements concluded with elected representatives prior to the 2016 amendment do not have the effect of continuing to undermine the position of trade unions.*

635. *With regard to the alleged limitations on collective bargaining at the national level, the Committee observes that while the complainants argue that the legislation expressly omits collective bargaining at the national level from the list of possible levels at which bargaining may take place and that, as a result, collective bargaining at the national level is non-existent, the Government asserts that even though section 128 of the Law on Social Dialogue does not mention bargaining at the national level, it does not prohibit such bargaining and that, in practice, representative workers' and employers' confederations have not shown any intention to negotiate at the national level since 2011. Recalling that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties [see* ***Compilation****, para. 1406] and that the level of negotiation should not be imposed by law, the Committee trusts that the Government will reinforce measures, adapted to the national conditions, to ensure that collective bargaining can be conducted at any level whatsoever, including at the national level.*

636. *The Committee also takes note of additional allegations with respect to collective bargaining and observes that, according to the complainants, the legislation imposes a collective bargaining mechanism on the parties where the exclusive power to initiate collective bargaining is vested with the employer or the employers' organization (section 129), the collective bargaining duration is of maximum 60 days unless otherwise agreed by the parties (section 129) and the employers can challenge representativity of a trade union at any time (section 222), thus creating an environment for employer interference and undermining the union's autonomy and representativity. The Committee notes that the Government refutes these allegations, indicating that trade union representativity is determined by a court decision and verified every four years, that measures are in place to prevent mutual challenges on grounds of representativity of the parties during collective bargaining and that the legislation contains a number of provisions to guarantee free and voluntary bargaining. In view of the issues raised and while taking note of the Government's information, the Committee wishes to recall that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [see* ***Compilation****, para. 1231]. In view of the allegations of a considerable decrease of collective bargaining at all levels, the Committee encourages the Government to take measures to encourage and promote the full development and utilization of the collective bargaining machinery by the social partners, as an effective means of regulating the terms and conditions of employment and contributing to the development and maintenance of constructive labour relations.*

637. *Furthermore, the Committee notes the complainants' allegations that even though the Law on Social Dialogue is in the process of being amended, the version currently before Parliament lacks input from the workers due to the absence of any meaningful consultation with the social partners and does not take into account the technical advice provided by the ILO in April 2018, as a result of which the proposed modifications could have far-reaching harmful implications for the implementation of the principles of freedom of association. The Committee notes that the Government, for its part, maintains that bipartite and tripartite consultations with the social partners did take place between 2014 and 2017 with the aim of further improving the legal framework but no agreement could be reached on the necessary legal amendments. Recalling that tripartite consultations before a Government submits a draft to the legislative assembly or establishes a labour social or economic policy should be full, frank and detailed [see* ***Compilation****, para. 1545], the Committee trusts that the Government will ensure meaningful involvement of the social partners in the remaining part of the ongoing legislative review and that the proposed amendments will address all pending concerns as to the protection of the right to organize and collective bargaining. The Committee requests the*

Government to provide information on any developments in this regard to the Committee of Experts, to which it refers this legislative aspect of the case.

Allegations of interference and bad faith collective bargaining by an air transport company

638. *The Committee notes that the complainants also point to case-specific allegations of bad faith collective bargaining on the part of an air transport company vis-à-vis the Free Trade Union of Aeronautics Handling (Sindicatul Liber De Handling Aeronatic (SLHA)). The Committee observes that these allegations refer to purposeful impediments to collective bargaining, including unjustified delays in negotiations, the filing of a court case challenging the union's representativity, unilateral suspension of bargaining and negotiations with elected workers' representatives, as a result of which the enterprise workers were deprived of collective bargaining benefits for several months. The Committee further observes that while the complainants denounce the company's attempts at frustrating the union and reducing its representativity and point to the Government's failure to take steps to ensure compliance by the enterprise of its good faith collective bargaining obligations, the Government, for its part, contends that the legislation provides guarantees with respect to collective bargaining and that measures had been taken to address the specific allegations at the enterprise, including conciliation in January 2016 and labour inspection in June 2018. The Committee also observes from the information provided that, following the labour inspection, the enterprise demonstrated willingness to engage in good faith negotiations with the union, that three negotiating meetings took place between July and October 2018 but that up until July 2020, the Labour Inspectorate has not received any request to register a collective labour agreement. It observes that, according to the enterprise, the union demonstrated a passive attitude by not responding to two minutes of meetings or to the draft collective agreement and the enterprise thus cannot be considered responsible for the delay in negotiations. In these circumstances, the Committee recalls that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties. The principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided [see* ***Compilation****, paras 1328 and 1330]. Furthermore, the Collective Agreements Recommendation, 1951 (No. 91) emphasizes the role of workers' organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exists [see* ***Compilation****, para. 1343]. In light of the above, the Committee trusts that the Government will take measures to bring the parties together with a view to encouraging genuine and constructive social dialogue based on good faith, as a means of establishing and maintaining a relationship of confidence between the parties and harmonious labour relations in the enterprise.*

639. *Finally, with regard to the allegations of an anti-union policy at the enterprise, the Committee observes that while the complainants denounce the company's use of short-term contracts, intimidation of newly recruited workers, daily harassment, anti-union retaliation, threats of dismissals and discrimination, and allege that this practice amounts to a massive and deliberate anti-union attack rendering meaningless the right to freedom of association and collective bargaining in practice, the Government considers these allegations as speculative due to the absence of individual or collective notices or any evidence of the alleged harassment and indicates that, according to the enterprise, written statements of four union members during a labour inspection in May 2019 demonstrate that the enterprise did not discriminate against union members throughout the bargaining process. The Government also affirms that*

the right to organize is guaranteed to workers regardless of the type and duration of the employment contract and that the legislation sets forth protection in the exercise of trade union prerogatives and stipulates mechanisms to notify and sanction acts of discrimination and harassment, including on anti-union grounds. Taking due note of the Government's indication, the Committee observes, however, with concern the allegations of intimidation of newly-recruited workers and retaliation against trade union members and recalls in this regard that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions. Acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize. Direct threat and intimidation of members of a workers' organization and forcing them into committing themselves to sever their ties with the organization under the threat of termination constitutes a denial of these workers' freedom of association rights [see ***Compilation****, paras 1072, 1098 and 1100]. Furthermore, fixed-term contracts should not be used deliberately for anti-union purposes [see* ***Compilation****, para. 1096]. In light of the above and taking into consideration the negative effects that anti-union retaliation can have on trade union affiliation and functioning, the Committee requests the Government to conduct an independent investigation into the allegations of persistent anti-union retaliation at the enterprise and, should these be confirmed, ensure the availability of effective remedies for the persons concerned, as well as sufficiently dissuasive sanctions. The Committee also invites the complainants to provide any relevant information in this regard to the competent national authorities so that they can proceed to an objective and full investigation of the matter. The Committee requests the Government to keep it informed of any investigation conducted, the outcome and the measures taken as a result thereof.*

The Committee's recommendations

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

(a) The Committee invites the Government to review the minimum membership requirement to establish a trade union, in full consultation with the social partners, and to take any appropriate measures to ensure that all workers can form and join organizations of their own choosing.

(b) The Committee encourages the Government to encourage and promote effective recognition of collective bargaining at all levels through the full development and utilization of the collective bargaining machinery by the social partners, as an effective means of regulating the terms and conditions of employment and contributing to the development and maintenance of constructive labour relations. It further trusts that the Government will reinforce measures, adapted to the national conditions, to ensure that collective bargaining can be conducted at any level whatsoever, including at the national level.

(c) The Committee invites the Government to review, together with the social partners, the alleged prevalence of collective agreements concluded with workers' representatives, so as to determine whether additional measures should be taken to promote collective bargaining between workers' and employers' organizations, with a view to ensuring that the agreements concluded with elected representatives prior to the 2016 amendment do not have the effect of continuing to undermine the position of trade unions.

(d) The Committee trusts that the Government will ensure meaningful involvement of the social partners in the remaining part of the ongoing legislative review and that the proposed amendments will address all pending concerns as to the protection of the right to organize and collective bargaining.

(e) The Committee refers the above legislative aspects to the Committee of Experts on the Application of Conventions and Recommendations.

(f) The Committee trusts that the Government will take measures to bring the parties together with a view to encouraging genuine and constructive social dialogue based on good faith, as a means of establishing and maintaining a relationship of confidence between the parties and harmonious labour relations at the air transport company.

(g) Taking into consideration the negative effects that anti-union retaliation can have on trade union affiliation and functioning, the Committee requests the Government to conduct an independent investigation into the allegations of persistent anti-union retaliation at the air transport enterprise and, should these be confirmed, ensure the availability of effective remedies for the persons concerned, as well as sufficiently dissuasive sanctions. The Committee also invites the complainants to provide any relevant information in this regard to the competent national authorities so that they can proceed to an objective and full investigation of the matter. The Committee requests the Government to keep it informed of any investigation conducted, the outcome and the measures taken as a result thereof.

Geneva, 19 March 2021

(Signed) Professor Evance Kalula
President

Points for decision:

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