INTERNATIONAL LABOUR OFFICE

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FIFTH ITEM ON THE AGENDA

# 334th Report of the Committee on Freedom of Association

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# Part I

# Introduction

**1.** The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951) met at the International Labour Office, Geneva, on 27, 28 May and 4 June 2004, under the chairmanship of Professor Paul van der Heijden.

**2.** The members of South African, Salvadorian, Guatemalan and Mexican nationality were not present during the examination of the cases relating to South Africa (Case No. 2197), El Salvador (Case No. 2214), Guatemala (Cases Nos. 2241, 2259 and 2295) and Mexico (Case No. 2282), respectively.

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**3.** Currently, there are 108 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 30 cases on the merits, reaching definitive conclusions in 18 cases and interim conclusions in 12 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

**4.** The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos. 2249 (Venezuela), 2254 (Venezuela), 2258 (Cuba) and 2313 (Zimbabwe) because of the extreme seriousness and urgency of the matters dealt with therein.

## New cases

**5.** The Committee adjourned until its next meeting the examination of the following cases: Nos. 2326 (Australia), 2327 (Bangladesh), 2329 (Turkey), 2330 (Honduras), 2331 (Colombia), 2332 (Poland), 2333 (Canada), 2334 (Portugal), 2335 (Chile), 2337 (Chile), 2338 (Mexico), 2339 (Guatemala), 2340 (Nepal), 2341 (Guatemala), 2342 (Panama) and 2343 (Canada) since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted to the last meeting of the Committee.

## Observations requested from governments

**6.** The Committee is still awaiting observations or information from the governments concerned in the following cases: Nos. 2087 (Uruguay), 2153 (Algeria), 2174 (Uruguay), 2189 (China), 2228 (India), 2264 (Nicaragua), 2268 (Myanmar), 2275 (Nicaragua), 2286 (Peru), 2309 (United States), 2314 (Canada), 2315 (Japan), 2319 (Japan), 2321 (Haiti), 2322 (Venezuela), 2323 (Islamic Republic of Iran) and 2324 (Canada).

## Partial information received from governments

**7.** In Cases Nos. 1787 (Colombia), 2068 (Colombia), 2177 (Japan), 2183 (Japan), 2203 (Guatemala), 2226 (Colombia), 2241 (Guatemala), 2244 (Russian Federation), 2248 (Peru), 2262 (Cambodia), 2287 (Sri Lanka), 2292 (United States), 2298 (Guatemala), 2300 (Costa Rica), 2318 (Cambodia), 2328 (Zimbabwe) and 2336 (Indonesia), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

## Observations received from governments

**8.** As regards Cases Nos. 1865 (Republic of Korea), 2138 (Ecuador), 2217 (Chile), 2236 (Indonesia), 2257 (Canada), 2265 (Switzerland), 2274 (Nicaragua), 2276 (Burundi), 2277 (Canada), 2283 (Argentina), 2290 (Chile), 2293 (Peru), 2296 (Chile), 2303 (Turkey), 2304 (Japan), 2306 (Belgium), 2307 (Chile), 2308 (Mexico), 2311 (Nicaragua), 2312 (Argentina), 2317 (Republic of Moldova), 2320 (Chile) and 2325 (Portugal) the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting. In Case No. 2277 (Canada), the Committee requests the complainant organization to provide the information requested so that it can proceed to the examination of the case in full knowledge of the facts.

## Urgent appeals

**9.** As regards Cases Nos. 2111 (Peru), 2270 (Uruguay), 2273 (Pakistan), 2285 (Peru), 2289 (Peru), 2294 (Brazil), 2302 (Argentina) and 2305 (Canada) the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

## Suspension of complaint

**10.** In Case No. 2278 (Canada), the Committee notes that an agreement has been concluded between the complainant organization, *l'Association des Substituts du Procureur du Québec*, and the Provincial Government of Quebec, with a view to presenting a bill to the National Assembly. The complainant organization will provide its comments thereon once the bill is adopted and enters into force.

## Transmission of cases to the Committee of Experts

**11.** The Committee draws the legislative aspects of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Bulgaria (Case No. 2047), Cambodia (Case No. 2222) and the Russian Federation (Case No. 2216).

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

### *Case No. 2053 (Bosnia and Herzegovina)*

**12.** The Committee last examined this case, which concerned the refusal by the authorities to register the complainant trade union (URS FbiH) at its March 2001 session, where it requested the Government to finalize the registration process, to keep it informed of developments, and to bring the legislation into conformity with Convention No. 87 [see 324th Report, para. 234].

**13.** In a communication of 15 March 2004, the complainant organization informs that it has now been registered, at federal level, as a workers' organization.

**14.** *The Committee notes this information with interest.*

### *Case No. 2156 (Brazil)*

**15.** At its November 2002 meeting, the Committee had requested the Government to keep it informed of the result of inquiries made and of the corresponding court judgements aimed at ensuring that those responsible for the murder of trade unionist Mr. Carlos Alberto Santos would be promptly punished [see 329th Report, para. 18].

**16.** In its communications of 10 February 2003 and 29 March 2004, the Government indicates that, as part of the criminal proceedings opened in this matter, the Attorney-General of the State of Sergipe has filed charges of murder against two individuals, whose preventive detention has also been requested. The Government also sent numerous information on the status of the proceedings.

**17.** *The Committee notes this information and requests the Government to provide it with the court judgement as soon as it is issued.*

### *Case No. 1957 (Bulgaria)*

**18.** The Committee last examined this case, which concerns the eviction of trade union premises and confiscation of trade union property of the National Syndical Federation (NSF "GMH") at its November 2003 meeting [see 332nd Report, paras. 19-21]. On that occasion, the Committee recalled that this complaint, which dates back to March 1998, involved very serious violations of freedom of association principles and urged once again the Government to hold without delay meaningful discussions with the complainant organization with a view to settling the issues of trade union premises and confiscation of trade union property of NSF "GMH" and to keep it informed of developments.

**19.** In a communication of 6 February 2004, the Government indicates that under article 46 of the Labour Code, state authorities and employers must facilitate trade union activities, including by providing free of charge real estate, premises and other facilities required for the performance of their functions. In this context "provide" means the right to use, not ownership. In addition, the grounds for providing such facilities are the performance of the unions' lawful functions; if the functions in question are irrelevant or are not observed, the grounds themselves are not present. The legislation therefore provides that any state property held in such circumstances is subject to eviction by order of the District Governor. This is why in this case the property in question has been seized, sealed and deposited for safe-keeping. The president of NSF "GMH" has been legally called during

and after the eviction but has not appeared for inventory of the property, a list of which is attached to the Government's communication. The Government adds that some items are missing from the initial list and that there remain charges unpaid by GMH, a behaviour the Government considers unfair, non-constructive and in some respects contrary to the law. The Government argues that, under Article 8 of Convention No. 87, workers' organizations should respect the law of the land.

**20.** Referring further to the information provided as part of Case No. 2047 (see below) on the new representativity criteria for workers' and employers' organizations, the Government states that NSF "GMH" does not have structures and members at enterprise, sectoral and regional levels; and that the organization is not party to any registered collective agreement. In any event, the Government considers real activity by workers' organizations, and not only formal registration. That being so, the Government cannot see any legal possibility to provide for free use of new premises to NSF "GMH".

**21.** *While noting the Government's assertion that NSF "GMH" does not have at present trade union activities, is not a party to any collective agreement and may not, under the law, enjoy the gratuitous use of facilities provided by the state authorities or the employer, the Committee recalls that the acts which initially gave rise to this complaint, i.e. eviction from trade union premises and confiscation of trade union equipment and documents, may constitute serious impediments to trade union activities. The Committee urges the Government to refrain from having recourse to such measures in future.*

## *Case No. 2047 (Bulgaria)*

**22.** The Committee last examined this case at its meeting in November 2003, where it reiterated its hope that the regulation concerning trade union representativeness would be adopted rapidly and that a vote concerning the representativeness of PROMYANA and the Association of Democratic Syndicates (ADS) could take place rapidly on that basis. The Committee also requested the Government to provide it with a copy of the regulation in question [see 332nd Report, para. 24].

**23.** In a communication of 6 February 2004, the Government indicates that on 11 July 2003, the Council of Ministers adopted an Ordinance on representativeness criteria for workers' and employers' organizations (Ordinance No. 64/18, which entered into force on 21 October 2003) a copy of which is attached to its communication. The procedure provided for in the Ordinance was carried out at the end of 2003: eight organizations of workers and employers have submitted the documents required under the new procedure, but neither PROMYANA nor the ADS are among them. The documents sent by the participating organizations will be analysed and processed by the Ministry and referred to the Council of Ministers for decision. The Committee will be informed in due course of the final result of the procedure.

**24.** *The Committee notes this information and requests the Government to keep it informed of developments. The text of Ordinance No. 64/18 is being brought to the attention of the Committee of Experts for the Application of Conventions and Recommendations.*

## *Case No. 1991 (Japan)*

**25.** The Committee last examined this case at its June 2003 meeting. It concerns allegations of anti-union discrimination arising out of the privatization of the Japanese National Railways (JNR) which were taken over by the Japan Railway Companies (the JRs). The Committee noted that the Tokyo High Court had ruled in October 2002 that the JRs had a responsibility as employers and that the National Railways Workers' Union's (KOKURO)

and the All Japan Construction, Transport and General Workers' Union's (KENKORO-TETSUDOHONBU) opposition to the privatization plan was a factor in the decision not to rehire some workers, belonging to these organizations, although the High Court did not infer that this constituted unfair labour practices. The Committee urged the Government to pursue its efforts towards finding a fair solution, acceptable to the largest possible number of workers, and requested the Government to provide it with a copy of the decision of the Supreme Court concerning these workers [see 331st Report, paras. 45-53].

**26.** In a communication dated 31 October 2003, KENKORO states that it has asked various authorities to implement the Committee's recommendations; the Government's position throughout has been that nothing could be done as the issue was pending before the Supreme Court. In a communication dated 5 January 2004, KENKORO states that the Supreme Court, on 22 December 2003, issued an unfair ruling on the discriminatory hiring practices of the company. In a majority decision (three-two), the Court relied on a mere formality of the JNR Reform Law providing that the list of employees was to be drawn up by the JNR while the hiring decision was to be taken by the JR Founding Committee on the basis of that list. The Court completely dissociated the two acts (establishment of the list by the JNR; hiring by the JRs) to conclude that even if the JNR discriminated against some union members in establishing the list, the JRs could not be held responsible for that discrimination. This majority judgement totally denies a relief to victims and violates Convention No. 98 which provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment". While the minority opinion clearly disagreed with the High Court that there had not been unfair labour practices, and stated that it "can be assumed that union members had been treated in a discriminatory manner on the sole ground of their affiliation to ZENDORO", the majority decision avoided the issue of anti-union discrimination altogether. Moreover, the Government has failed to implement the Committee's recommendations while awaiting the Supreme Court's decision. When the Diet had examined the draft JNR Reform Law, the Government had repeatedly assured that the JRs would be responsible if the JNR treated workers in a discriminatory manner. The Diet also passed a resolution outlawing anti-union discrimination in the hiring of JR employees and the then Prime Minister promised that he would "not let any [JNR] worker become jobless and destitute". None of these commitments have been kept. After the Supreme Court issued its ruling, KENKORO asked the authorities to re-initiate negotiations between the JRs and the unions concerned to find a solution to the dismissal of the 1,047 workers, to no avail. KENKORO requests that the Committee urge the Government to assume its responsibility in finding an early and fair solution, and send a fact-finding mission to Japan.

**27.** In a communication dated 20 January 2004, KOKURO also comments on the Supreme Court ruling of 22 December 2003. It points out that the majority decision dismissed all the appeals, held that the JRs had no responsibility "as employers" and that if there were discriminatory hiring practices in 1987, this was the JNR's responsibility. The Court considered that the hirings that took place after the establishment of the JRs were "new recruitments" in respect of which an employer has wide freedom. KOKURO strongly protested this Supreme Court ruling based on a narrow and formalistic interpretation of the JNR Reform Act. The end result is that, in spite of 17 years of proceedings, the various labour relations bodies and the courts could not implement any relief measures for unfair labour practices and protect the right to organize: this demonstrates the shortcomings in the existing mechanism for the protection of the right to organize in Japan.

**28.** In its communication of 15 April 2004, which includes the full text of the Supreme Court decision, the Government stresses that KOKURO's and KENKORO's comments concern the minority opinion of the Supreme Court. However, the Court has finally ruled that the JRs are not liable as employers and has rejected the demands to rehire the workers. Appeals to the Supreme Court are limited to constitutional issues and to violations of

judicial precedents or laws. Oral pleadings are not generally held; the fact that a ruling is made with a one-vote margin does not affect its weight since it is the last court of appeal.

**29.** As regards the first complainants' argument (i.e. that while the Supreme Court ruling does not deny the judgement of the Central Labour Relations Commission (CLRC) that there were unfair labour practices, it did not implement relief measures in practice and therefore does not protect the right to organize) the Government points out that the Court annulled the CLRC's relief order since it considered that "even if there were acts of unfair labour practices in the process of selecting candidates, the JRs shall not be liable for these acts as employers". Therefore, the Court did not decide whether or not there were unfair labour practices. It is therefore improper to discuss relief measures since there are no grounds to conclude that there were such unfair labour practices.

**30.** Concerning the second complainants' argument (that even if workers were not hired due to anti-union discrimination, there was no framework in place to protect the right to organize in that no relief was provided in the form of rehiring by the JRs) the Government similarly argues that it is not appropriate to discuss the types of relief on the assumption that unfair labour practices existed, since the Supreme Court did not decide that such practices occurred. While the Court denied the JRs responsibility for unfair labour practices, it stated at the same time that "if JNR committed unfair labour practices in making employment lists, JNR or the Settlement Corporation (currently the Japan Railway Construction Transport and Technology Agency, JRTT), which succeeded JNR's legal status, shall not be exempt from liability as an employer". For the Government, it cannot therefore be said that there is a systemic defect in ensuring the right to organize.

**31.** As regards the alleged lack of efforts to find a solution, the Government refers to the previously submitted information [see 331st Report, paras. 51-52] showing that it has made every possible effort to find appropriate solutions through: hiring by JRs, including, at a later stage, on a wider area basis; voluntary retirement with special compensation; redeployment in other industries, etc. However, there remained 1,047 people who insisted on getting their original job in their original region; they were finally dismissed by JNR in April 1990 when the Re-Employment Promotion Law expired. In order to achieve a political solution based on humanitarian considerations, the Government convened meetings with the parties on the basis of the Four Party Agreement concluded in May 2000 (which the Freedom of Association Committee has urged the parties to accept). KENKORO did not accept the Agreement and there was disagreement on this issue within KOKURO, which filed another lawsuit against the JRTT. As time passed and no agreement could be found, the Four Party Agreement was ultimately cancelled.

**32.** The Government concludes that it has made all possible efforts to find a fair and acceptable solution. The workers in question rejected the rather generous re-employment measures by insisting on re-employment by their local JRs without showing any spirit of compromise, relying instead on court proceedings. Following the Supreme Court ruling, it would be extremely difficult for the Government to take any new measure and obtain the consent or understanding of other parties directly concerned, including the current majority railway trade unions, JR SOREN and JR RENGO, which together regroup about 80 per cent of JRs' employees.

**33.** *The Committee notes all the above information and in particular the Supreme Court ruling of 22 December 2003. Although there were apparently differing views within the Court on the issue of unfair labour practices, the majority decision in effect absolves the JRs of any responsibility as employers in this respect. The Committee observes that it has dealt with this case in some depth since 1998, with two detailed examinations on the merits [318th and 323rd Reports] and three follow-ups [325th, 327th and 331st Reports]. The Committee notes that the various competent administrative, quasi-judicial or judicial*

*bodies called upon to decide the matter held different views on the issue of unfair labour practices, which in itself indicates the complexity of the factual and legal issues at hand. However, the Committee cannot conclude, on the basis alone of the set of circumstances in this case, that the legal mechanism for protection against anti-union discrimination is deficient as a whole. The problem in the present case was compounded by the fact that the lay-offs, dismissals and rehirings occurred in a context of restructuring of the railway industry, with a major staff reduction. Noting that there have been substantial consultations with trade union organizations and that genuine efforts were made over the years to find a solution (first through re-employment measures based on legal avenues; and then on the basis of political and humanitarian considerations) the Committee regrets that no solution acceptable to all workers and organizations concerned could be found, including on the basis of the Four Party Agreement that, at its November 2000 session, the Committee had urged the parties to accept, as it considered that it offered "a real possibility of speedily resolving the issue of non-hiring by the JRs" [see 323rd Report, para. 376].*

**34.** *Noting that the Supreme Court has ruled that "if JNR committed unfair labour practices in making employment lists, JNR or the Settlement Corporation (currently the Japan Railway Construction, Transport and Technology Agency, JRTT) which succeeded JNR's legal status, shall not be exempt from liability as an employer", taking into account the serious nature of the allegations in this case, as well as the serious social and economic consequences that resulted for a large number of workers, the Committee invites the Government to pursue the discussions with all parties concerned in the spirit of political and humanitarian considerations that once prevailed in order to resolve the issues and requests it to keep it informed of developments in this matter.*

## *Case No. 2301 (Malaysia)*

**35.** This case concerns the Malaysian labour legislation and its application which, for many years, have resulted in serious violations of the right to organize and bargain collectively: discretionary and excessive powers granted to authorities as regards trade union registration and scope of membership; denial of workers' right to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal unions' activities, including free elections of trade union representatives; establishment of employer-dominated unions; and arbitrary denial of collective bargaining. The Committee formulated the following recommendations at its March 2004 meeting [see 333rd Report, para. 599]:

(a) The Committee expresses its concern at the fact that several complaints have been filed on these same issues during the last 15 years, on which it made unambiguous recommendations, and that no significant progress could be observed.

(b) The Committee urges once again the Government to introduce in the near future legislation to amend the Trade Unions Act, 1959, and the Industrial Relations Act, 1967, to bring them into full conformity with freedom of association principles, by ensuring:

- that all workers without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, and for the establishment of federations and confederations;
- that no obstacles are placed, in law or in practice, to the recognition and registration of workers' organizations, in particular through the granting of discretionary powers to the responsible official;
- that workers' organizations have the right to adopt freely their internal rules, including the right to elect their representatives in full freedom; and

– that workers and their organizations enjoy appropriate judicial redress avenues over the decisions of the minister or administrative authorities affecting them.

(c) The Committee requests the Government to amend its legislation so as 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 regulating terms and conditions of employment by means of collective agreements.

(d) The Committee requests the Government to take rapidly appropriate measures and give instructions to the competent administrative authority, so that the 8,000 workers denied representational and collective bargaining rights in 23 named companies may effectively enjoy these rights, in accordance with freedom of association principles.

(e) The Committee requests the complainant and the Government to keep it informed on the court challenges filed by some employers and affecting some 2,000 workers, so that it may make an informed decision in full knowledge of the facts.

(f) The Committee requests the Government to keep it informed of developments on all the abovementioned issues.

(g) The Committee suggests once again that the Government avail itself of the ILO's technical assistance, to help it bring its law and practice into full conformity with freedom of association principles.

**36.** In a communication dated 15 April 2004, the Government states in connection with recommendation (b): that workers have the right to establish a trade union "if its membership is confined exclusively to workmen employed in a particular establishment, trade, occupation or industry", or to join a union which is registered "in respect of the particular establishment, trade, occupation or industry"; that the Trade Union Act allows for the establishment of federations and affiliation to confederations; that no obstacles are placed, in law or in practice, to recognition and registration of trade unions as long as "their membership is confined to workmen employed in a particular establishment, trade, occupation or industry"; that trade unions have the right to adopt freely their internal rules, including the "right to elect eligible members" to be their representatives in full freedom; and that workers and their organizations have the right to seek legal redress over decisions of the director-general of trade unions affecting them.

**37.** As regards recommendation (c), the Government indicates that the current legislation is sufficient to encourage and promote the full development and utilization of collective bargaining machinery, and that workers have not been denied their right to representation and collective bargaining "provided that they are represented by a competent union". The Government states that it notes the recommendation concerning the 8,000 workers but that the complainant is in a better position to inform the Committee. As regards the recommendation concerning the court challenges filed by employers and affecting some 2,000 workers, the Government indicates it will fulfil its obligation under article 19 of the ILO Constitution. Finally, as regards the recommendation that the Committee be kept informed of developments on all the above issues, the Government states that it considers that the current law and practice have helped the orderly and healthy development of trade unions, which in turn contributes to industrial harmony in the country.

**38.** In a communication dated 5 May 2004, the complainant organization (MTUC) refers to the Committee's conclusion that no significant progress could be observed in spite of a series of complaints on the same issues during the last 15 years and requests that a mission be sent to Malaysia to follow up on the Committee's recommendations. In this regard, in a communication dated 26 May 2004, the Government states that the legislative provisions have been successful in maintaining the healthy growth of trade unions, as well as harmonious industrial relations conducive for investment so as to ensure the continuous political, social and economic development. Under the current legislation, workers can join a union related to their work and the union can represent workers in collective bargaining.

Consequently, the Government considers that an ILO mission to follow up on the recommendations of the Committee is not necessary.

**39.** *The Committee notes with deep regret that the Government merely reiterates the arguments submitted in its initial reply. The Committee emphasizes that all the points raised by the Government in its communication have already been dealt with at length and rebutted in its previous decision on the merits, including through examination of the relevant provisions of the Trade Unions Act, 1959 [see paras. 586-598, and Annex 1].*

**40.** *The Committee deplores the lack of cooperation from the Government on these matters which have been examined by the Committee for 15 years and therefore reiterates its previous recommendations in their entirety and, noting the complainant organization's request, recalls, once again, that the Government may avail itself of the ILO's technical assistance.*

## *Case No. 2185 (Russian Federation)*

**41.** The Committee last examined this case at its November 2003 meeting [see 332nd Report, paras. 146-154]. On that occasion, the Committee requested the Government to initiate an independent inquiry into the allegations concerning the creation of a "yellow" trade union at the OAO Novorossiisk Commercial Sea Port (OAO NMTP), as well as the continuing discriminatory policy of the OAO NMTP management towards the primary trade union of the Trade Union of Water Transport Workers (PRVT) and the pressure exercised on individual members of this trade union to leave the PRVT. The Committee also requested the Government to reply to the complainants' allegation that the collective agreement between workers and the OAO NMTP was concluded in violation of the Russian legislation.

**42.** In its communication of 12 February 2004, the Government indicates that the additional inspection conducted by the National Labour Inspectorate of the Krasnodar Territory revealed that the collective agreement for 2002-04 was signed by the chairperson of the Trade Union of Workers of the Seaports (RMP) of the Krasnodar Territory. At that time, 3,908 workers were employed by the OAO NMTP and four following trade unions were active at the enterprise: primary trade union of the OAO NMTP dockers of the Russian Trade Union of Dockers (1,163 members), primary trade union of the PRVT (168 members), Trade Union of Workers of the Seaports of the Krasnodar Territory, to which 17 primary trade unions are affiliated (2,455 members), and the National Trade Union of Dockers of Southern Russia (60 members). The conference of the RMP Trade Union of the Krasnodar Territory authorized its chairperson to conduct collective bargaining on behalf of 2,455 workers, members of that trade union. Due to the fact that the unified representative body was not established, in conformity with section 37(3) of the Labour Code, the port administration conducted collective bargaining with the RMP Trade Union of the Krasnodar Territory, an organization representing more than half of the employees. The Government further indicates that the representatives of other trade unions participated in discussions on the draft collective agreement. The Government adds that since the current collective agreement expires on 1 May 2004, the port administration took the initiative towards concluding a new collective agreement for 2004-07 by issuing an order to nominate, authorized by the respective trade unions, representatives to the commission responsible for conducting collective bargaining. Finally, the Government points out that no violations of labour legislation were revealed by the inspection.

**43.** *The Committee notes the information provided by the Government.*

## *Case No. 2199 (Russian Federation)*

**44.** The Committee last examined this case, which concerns alleged acts of anti-union discrimination by the administration of the Commercial Seaport of Kaliningrad, at its November 2003 meeting. On that occasion, the Committee requested the Government to indicate whether court decisions to reinstate the dockers, members of the Russian Trade Union of Dockers (RPD), in their posts was fully implemented [see 332nd Report, paras. 155-162].

**45.** In its communication of 12 February 2004, the Government repeats its previous observations and denies the alleged facts of anti-union discrimination and states that the Russian legislation provides for the effective means of protection of trade union rights. The Government states that the Baltic district court, in its decision of 24 May 2002, ordered the reinstatement of the illegally dismissed dockers. It indicates that this decision was implemented and the dockers were offered jobs at the Transport and Freight Company Ltd. (TPK). Despite the numerous job offers issued by the TPK management, the dockers did not return to work. Finally, the Government indicates that the Commercial Seaport of Kaliningrad (MTPK) is preparing to appeal the above-mentioned decision to the Supreme Court of the Russian Federation.

**46.** *The Committee notes the information provided by the Government.*

## *Case No. 2216 (Russian Federation)*

**47.** The Committee examined this case at its November 2003 meeting [see 332nd Report, approved by the Governing Body at its 288th Session, paras. 891-914] and on that occasion, it formulated the following recommendations:

- As concerns the allegation of no recognition of occupational unions by the Labour Code, especially as concerns their collective bargaining rights, the Committee requests the Government to take all the necessary measures, including the amendment of section 45, so as to allow the possibility of collective bargaining at occupational or professional level both in law and in practice.
- The Committee requests the Government to amend section 31 of the Labour Code so as to ensure that it is only where there is no trade union at the workplace that workers can elect other representatives to represent their interests.
- As concerns the allegation of violation of the right of trade unions, other than primary trade unions, trade union federations and confederations to conclude collective agreements at the enterprise level, the Committee requests the Government to amend its legislation so as to ensure that higher union structures, as well as federations and confederations have access to the collective bargaining process and enjoy the right to conclude collective agreements.
- As concerns the alleged requirement to obtain an approval of the claims a trade union wishes to make to the employer by the meeting (conference) of employees, the Committee requests the Government to provide additional information as to how section 399 works in practice.
- As concerns the allegation concerning restriction of the right to strike, the Committee requests the Government to amend section 410 of the Labour Code so as to lower the quorum required for a strike ballot.

**48.** In its communication of 23 January 2004, the Seafarers' Union of Russia (RPSM) once again alleges that section 37 of the Labour Code, which, for the purpose of collective bargaining, gives preference to unions with a larger membership, is incompatible with Conventions Nos. 87, 98 and 154. More particularly, the RPSM alleges that, as concerns the collective agreements at the national, industrial and territorial level, section 37(6) is

frequently used to exclude minority unions (trade union associations) from participation in collective bargaining. The majority trade unions refuse to agree on the composition of a unified representative body. Hence, although the Code grants the right to participate in collective bargaining to minority unions, this right is not realizable due to the absence of necessary mechanisms to ensure its implementation (the complainant agrees that at the enterprise level, the conflict between minority unions and trade unions with a larger membership is partially resolved by the provision contained in section 37(5)). The RPSM provides two examples where the requests to participate in collective bargaining with a view to conclude collective agreements at the industrial level made by all-Russia trade unions, which operate outside of the Federation of Independent Trade Unions of Russia (FNPR) structure, were ignored by the representatives of the latter organization.

**49.** The complainant organization further indicates that contrary to the Government's assertion that the complainant organization has not appealed to national remedies available to it in order to resolve the conflicts arising from the practical application of section 37, it has complained to the Deputy Minister of Labour and Social Development of the Russian Federation, who is the Head State Inspector of Labour, and the Ministry of Labour and Social Development of the Russian Federation. In its communication, the RPSM transmits the relevant documents.

**50.** In its communication of 12 February 2004, the Government states that, although the conclusion of occupational agreements is not envisaged by section 45 of the Labour Code, section 37(6) of the Code provides for the creation of a single representative body where trade unions are represented according to the principle of proportionality. Thus, the law provides for participation in the collective bargaining of all trade unions, including those consisting of workers of specific occupations.

**51.** Concerning the recommendation to amend section 31 of the Russian Federation Labour Code, the Government indicates that it cannot agree with the Committee's recommendation to amend this section as it considers that such an amendment would violate the rights of non-unionized workers. The Government points out that, under the Act on trade unions, their rights and guarantees of their activities, the presence of other representative bodies may not be used to undermine the activity of trade unions. Moreover, under section 16 of the Act, trade unions have the right to propose candidates for the election of workers' representatives.

**52.** With respect to the right of higher trade union organizations to conclude collective agreements, the Government indicates that the interests of workers in collective bargaining are represented by the primary trade union or other representatives elected by the workers. At federal, regional, local and district level, for the purposes of concluding agreements relating to social and economic policies, workers are represented by trade unions, their territorial organizations and trade union associations (regional and all-Russia). The Government therefore considers that the alleged violation of the right of higher trade union organizations (federations or confederations) to conclude collective agreements at the enterprise level is unfounded, since this right of the workers is exercised either directly or through the appropriate representative bodies, as determined by the legislation.

**53.** As concerns the application in practice of section 399 of the Labour Code, the Government states that the following industrial disputes were registered by the north-west territorial branch of the Russian Ministry of Labour in 2003: the free primary trade union of TETs submitted its demands to the administration of the State Shoe Factory; the trade union of the Chemical-Pharmaceutical Company OAO "ICN October" registered an industrial dispute with the management of that company; the trade union committee of the primary trade union of the "Prikladnaya Himiya" enterprise submitted its demands to the management of the company; and the workers' group of the International Information

Centre for the preparation and celebration of the tercentenary of Saint Petersburg registered an industrial dispute that arose between the workers' group and the management of the Centre. All these demands were submitted by workers' groups. The Government indicates that the registration of disputes with the Government's office for the settlement of industrial disputes and the participation of its staff in resolving disputes yielded positive results. No difficulties were found concerning compliance with the provision that a quorum of two-thirds of the workers of the organization is required to submit demands and to declare a strike.

**54.** Concerning the request to amend section 410 of the Russian Federation Labour Code, the Government indicates that it considers the requirement of this section to be in conformity with the international legal standards. This requirement to take decisions on declaring a strike by a majority vote of workers of the organization has existed since the adoption, in 1995, of the law on procedure for resolution of collective labour disputes. The Government further indicates that, since in practice there are no obstacles to strike action and no trade union has been dissolved for conducting a strike, it considers that there is no need to review the current legislation in this respect.

**55.** Finally, the Government states that contrary to the complainant's allegation that only the representatives of the FNPR were involved in the discussion on the new Labour Code, the President of the Russian Trade Union Congress and the President of the Council of the All-Russia Labour Congress were members of the working groups responsible for drafting proposals. To support its statement, the Government forwards the copy of the Decree of the State Duma of 15 March 2001, N1250-III GD.

**56.** *The Committee notes the information provided by the complainant and the Government. The Committee notes the complainant's concerns over the preference given by the Labour Code to majority unions in the collective bargaining process at all levels (enterprise, as well as territorial, industrial and national). The Committee recalls that in its previous examination of this case, as well as in Case No. 2251, it dealt with this allegation [see 332nd Report, para. 907, and 333rd Report, para. 979, approved by the Governing Body at its 289th Session]. It considered on these occasions that the approach favouring the most representative trade union for collective bargaining purposes at the enterprise or a higher level is not incompatible with Convention No. 98. The Committee notes from the complainant's communication that the problem at issue involves a conflict between different trade unions. It points out that inter-union rivalry is outside the scope of Convention No. 98.*

**57.** *While taking into account the Government's explanation concerning section 45 of the Labour Code, the Committee notes the Government's indication that conclusion of occupational agreements is not envisaged by the legislation. The Committee recalls that in this case, as well as in Case No. 2251 [see 333rd Report, para. 978], the complainant referred to the difficulties encountered by trade unions defending the interests of particular professions. The Committee points out that legislation should not constitute an obstacle to collective bargaining at the occupational or professional level. It therefore once again requests the Government to take all the necessary measures so as to ensure that a possibility to conduct collective bargaining at occupational or professional level exists both in law and in practice.*

**58.** *Concerning its request to amend section 31 of the Labour Code, the Committee notes the Government's disagreement. The Committee once again refers to the Collective Agreements Recommendation, 1951 (No. 91), which stresses the role of trade union organizations as one of the parties in collective bargaining and refers to representatives of non-unionized workers only when no trade union organization exists at the enterprise. A provision which permits collective bargaining with other workers' representatives,*

*bypassing trade union existing at the enterprise does not promote collective bargaining. The Committee therefore once again requests the Government to amend section 31 so as to ensure the application of the abovementioned principle.*

**59.** *As concerns the right of trade unions, other than primary trade unions, to conclude collective agreements, the Committee recalls that it also had to deal with this question in Case No. 2251 [see 333rd Report, paras. 973-975]. The Committee recalls that the complainant's concern in the present case was that trade unions, as well as federations and confederations of trade unions, could not represent workers during collective bargaining at the enterprise level. In Case No. 2251, the complainant alleged that the rights to collective bargaining of the so-called "stand-alone" trade unions (trade unions, which are not organizational structures of a higher trade union body) were restricted. The Committee notes the information provided by the Government in this respect. It finds, however, that it is still rather unclear whether trade unions, other than primary trade unions, can represent workers during collective bargaining at the enterprise level. The Committee requests the Government to take steps so that the law and practice permit the promotion of collective bargaining with the organizations freely chosen by the workers. The Committee therefore requests the Government to clarify whether the abovementioned structures of trade union organizations can represent workers' interests during collective bargaining at the enterprise level.*

**60.** *The Committee notes that the information provided by the Government regarding practical application of section 399 of the Labour Code does not clarify whether trade unions need to refer to a meeting or conference of employees every time there is a claim to be made to an employer, as it is in the case of non-union representatives. The Committee once again requests the Government to provide information in this respect.*

**61.** *As concerns the quorum required for a strike ballot pursuant to section 410 of the Labour Code, the Committee notes the Government's disagreement with the Committee's recommendation to lower it. The Committee points out that, since 1996, the Committee of Experts on the Application of Conventions and Recommendations has also been requesting the Government to amend its legislation so as to lower the quorum required for a strike ballot, which it considers too high. Therefore, the Committee once again requests the Government to amend its legislation so as to lower the quorum required for a strike ballot.*

**62.** *The Committee once again draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case.*

## *Case No. 2171 (Sweden)*

**63.** At its November 2003 session the Committee examined this case which concerns a statutory amendment enabling workers to remain employed until the age of 67 and prohibiting negotiated clauses on compulsory early retirement. The Committee once again requested the Government to take remedial measures so that agreements already negotiated on pension matters continue to produce all their effects until their expiry dates. It also requested the Government to keep it informed of the results of consultations on pension issues with the bargaining partners with a view to finding a solution that would be in conformity with the Conventions on freedom of association ratified by Sweden [see 332nd Report, para. 165].

**64.** In a communication of 9 March 2004, the Government clarifies that the new mandatory rule (2001:298) in the Employment Protection Act (1982:80) entitles, but does not oblige, workers to remain employed until the end of the month they are 67 years old. This provision was introduced with the new pension system under which the computation of income-related old-age pension is based on the lifetime income principle. There is no

upper age limit to the earning of pension rights under this scheme. According to the compulsory public scheme, income-related old-age pension can still be paid from the month persons reach their 65th birthday, but they may request an early pension (from age 61) or a deferred one. The right to remain employed until the age of 67 enables workers to earn pension rights for a longer time. Under the Employment Protection Act, as amended, it is no longer possible to conclude agreements obliging workers to retire earlier than the age of 67; however, it is still possible to make an agreement specifying an earlier age at which workers are entitled to retire with a pension. Provisions on pension rights contained in collective agreements already negotiated thus continue to produce their effects until their expiry dates. The Government therefore assumes that the case concerns only the right to remain employed (agreements on compulsory retirement age) and not pension rights.

**65.** The Government adds that a meeting took place with the bargaining partners on 12 June 2003. In the public sector (State and local governments) new agreements on retirement age, adapted to the Employment Protection Act as amended, have been concluded; in other cases, agreements were under way but not formally concluded yet. Like before, no pension points under the collective agreement scheme are earned after the age of 65. As for the private sector, new agreements on retirement age have not been concluded.

**66.** *The Committee notes this information. It nevertheless recalls its previous request that the Government should take remedial measures so that agreements already negotiated on pension matters continue to produce all their effects until their expiry dates. The Committee asks the Government to provide information on the results obtained at the meeting with the bargaining partners on 12 June 2003 and on any further consultations held. The Committee asks the Government to implement its recommendations, in conformity with freedom of association principles, and to keep it informed of developments.*

## *Case No. 2126 (Turkey)*

**67.** The Committee last examined this case at its meeting in March 2003 [see 330th Report, paras. 148-152]. The Committee recalls that the allegations in this case concerned the change of branch activity classification of the Pendik and Alaybey shipyards from "shipbuilding" to "national defence", which resulted in the loss of representation rights for the Dok Gemi-Is trade union on behalf of workers involved [see 327th Report, paras. 838-839]. At this point it should also be recalled that section 3 of Act No. 2821 on trade unions provides that trade unions may be formed at industrial level by workers employed in establishments in the same branch activity. Under section 4, the branch of activity covering an establishment is to be determined by the Ministry of Labour and Social Security, and the parties concerned may appeal the decision to the competent courts.

**68.** Allegations of anti-union discrimination were also raised and more specifically: (a) allegations of the impending dismissal of 1,100 workers of the Haliç and Camialti shipyards, virtually all of whom were alleged to be Dok Gemi-Is members; (b) allegations of harassment and intimidation of Dok Gemi-Is members by management of the Pendik and Alaybey shipyards, including the dismissal of the maximum number of workers allowed by law (nine per month), and the dismissal of some 200 workers at the ship-scrapping site at Aliaga the day after they had agreed to join the Dok Gemi-Is union [see 327th Report, para. 845].

**69.** The case was first examined by the Committee at its session in March 2002. In the course of its last two examinations at its meetings in November 2002 and March 2003, the Committee expressed deep regret at the Government's unwillingness to give effect to the recommendations of the Committee on these allegations, and in particular to: (a) take the

necessary measures so as to guarantee the right of Dok Gemi-Is to organize and represent its members in the Pendik and Alaybey shipyards and to ensure that any lost membership in this union as a result of the classification of these shipyards as falling within the national defence be immediately restored; (b) to institute independent investigations into all the allegations of anti-union discrimination and to take the necessary remedial steps if these allegations are proven to be true.

**70.** The Government sent a first communication dated 10 September 2003 in which it pointed out that the necessary information was given in its previous responses on the case. In a second communication of 9 March 2004, the Government recalled that Dok Gemi-Is had asked for the determination of the branch of activity under which Pendik and Alaybey shipyards should be classified, in accordance with section 4 of Act No. 2821. Following the examination of this demand, it was decided that these shipyards fell into the national defence branch of activity. This decision was promulgated in the *Official Gazette* and subjected to an objection by Dok Gemi-Is. The labour court rejected this objection and its decision was upheld by the Supreme Court. Once the classification procedure had been completed, the workers employed in the Pendik and Alaybey shipyards could exercise their right to freedom of association by becoming members of Türk Harb-Is Sen. The Government pointed out that all the administrative actions and decisions were taken in accordance with Act No. 2821 on trade unions and Act No. 2822 on collective agreements, strike and lockout and had been reviewed by the competent courts.

**71.** Concerning the allegations of anti-union discrimination, the Government indicated that it received a communication from the lawyer of Dok Gemi-Is submitting an appeal to the Ministry of Labour and Social Security concerning the dismissals of workers from the Pendik shipyard. This appeal was sent to the Ministry of National Defence; the Government has provided a copy of a letter confirming this transmission. The Government has also attached a copy of the reply of the Ministry of Labour and Social Security to Dok Gemi-Is' lawyer. In this letter, the Ministry indicates in particular that the issue of the dismissals has been forwarded to the Ministry of National Defence. The Government underlined that Dok Gemis-Is did not submit any appeal on other issues; therefore, no other investigation was carried out. The Government explained that under article 91 of the new Labour Law No. 4857, which entered into force on 10 June 2003, complaints for infringements of the labour legislation are investigated by the labour inspectors of the Ministry of Labour and Social Security (MLSS).

**72.** *With respect first to the organizational and representational rights of workers affiliated to Dok Gemis-Is, in view of the Government's observations, the Committee must underline that neither the application of the national legislation with respect to the classification of two shipyards in the national defence sector nor the exercise of freedom of association in respect of Türk Harb-Is Sen are at issue in the present case. The core question is the compatibility of the legal provisions concerning such classification, and its impact in respect of Dok Gemis-Is trade union and its members, with the Conventions relating to freedom of association ratified by Turkey. The Committee recalls once again that it had found that "the classification of the Pendik and Alaybey shipyards as part of the national defence sector, with the resulting loss of trade union membership and representation, constitutes a violation of both the organizational and the representational rights of the workers affiliated to Dok Gemi-Is, in contravention of Convention No. 87 (ratified by Turkey)" [see 327th Report, para. 844]. In this respect, the Committee must underline once again that the Committee of Experts on the application of Conventions and Recommendations has raised questions about the criteria on which the Ministry of Labour determines that a worksite belongs to a particular branch of activity under section 4 of Act No. 2821; in particular, that Committee considered that the classification and its modification should be determined "according to specific, objective and pre-established criteria". Noting that, two years after its first examination of the case, the Government still*

*refuses to take the measures recommended by the Committee, the Committee firmly urges the Government to give effect to its recommendations and more specifically, to take the necessary steps to guarantee the right of Dok Gemi-Is to organize and represent its members in the Pendik and Alaybey shipyards and to ensure that any resulting lost membership in the Dok Gemi-Is trade union be immediately restored. The Committee requests the Government to keep it informed in this respect.*

**73.** *Turning to the allegations of anti-union discrimination, the Committee notes that the Government seems to consider that it can only act when allegations of anti-union discrimination are submitted directly to governmental authorities. This is not the first time that the Government has recourse to such an argument, ignoring the allegations identified by the Committee and its recommendations in its successive reports and, in particular, the institution of independent investigations into the allegations of anti-union discrimination. The Committee recalls in this respect that complaints of anti-union discrimination should be examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned who should participate in the procedure in an appropriate and constructive manner [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 738 and 750]. The Committee trusts that the Government will also bear in mind this principle when tackling the allegations that have been submitted to the Ministry of Labour by Dok Gemi-Is and referred to the Minister of Defence. The Committee once again urges the Government to institute independent investigations without delay into each of the allegations of anti-union discrimination raised in the present case and, if these allegations are proven, to take all the necessary remedial steps, including reinstatement, without loss of pay, in their jobs of workers dismissed or adequate compensation for damages suffered by those dismissed.*

**74.** *In view of the above, the Committee must solemnly express its concern over the absence of progress made to give effect to its recommendations in this case since its first examination two years ago. This is all the more regrettable as the events raised in the complaint occurred more than four years ago and any infringements to freedom of association, which might have occurred at the time, may have by now irreversible effects. The Committee expects the full cooperation of the Government in the future, with a view to fulfil its commitments undertaken by ratifying Conventions Nos. 87 and 98.*

## *Case No. 2147 (Turkey)*

**75.** The Committee last examined this case at its meeting in March 2002 [see 327th Report, paras. 848-867]. The Committee recalls that the allegations concerned the non-renewal of the contract of Mr. Mehmet Akyüz, the branch president of the Samsun section of the Turkish Teachers' Union, for anti-union reasons. More specifically, the complainant alleged that the non-renewal of contract was due to public statements made within the framework of discussions concerning the draft law on public servants' trade unions. For its part, the Government asserted that this was one of the reasons for the dismissal but that Mr. Akyüz had also been rebuked on an earlier occasion. Both the Government and the complainant agreed that the public statements were made in Mr. Akyüz's capacity as president of the local branch union; the Government added that these statements were insulting towards the university.

**76.** Considering that the non-renewal of a contract for anti-union reasons constituted a prejudicial act within the meaning of Article 1 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Committee requested the Government to institute an inquiry into the motivations for the non-renewal of Mr. Mehmet Akyüz's contract and to review this decision in the light of the principle of freedom of expression in respect of trade union matters recalled by the Committee [see 327th Report, para. 865].

**77.** The Government sent two communications dated, respectively, 10 September 2003 and 9 March 2004. In the latter communication, the Government indicated that it was not possible to institute the inquiry requested by the Committee since the matter had been submitted to the competent courts by Mr. Mehmet Akyüz. The Government underlined that final decisions have been handed down and that therefore Mr. Mehmet Akyüz exhausted all the legal recourses opened to him. More specifically, from some of the documents provided by the Government (one of the documents is illegible), it seems that Mr. Mehmet Akyüz submitted two claims. The first claim related to the loss of fees sustained because of the university's decision to assign classes he was originally due to give to another lecturer. This claim was rejected by the Samsun Administrative Court in a decision of 13 September 2001, upheld by the eight court of the Council of State in a decision dated 6 November 2002. The second claim related to the non-renewal of contract. This claim was also rejected by the Samsun Administrative Court in a decision of 25 December 2001 which was confirmed by the Council of State in a decision of 20 November 2002. Underlining that the administration must comply with court decisions under the national Constitution, the Government indicated that the only recourse left is an appeal to the European Court of Human Rights.

**78.** *The Committee takes note of the information submitted by the Government and in particular that, since the Committee's last examination of the case, actions were lodged in the courts and decisions were duly taken in accordance with the usual and appropriate judicial mechanisms.*

## *Case No. 2038 (Ukraine)*

**79.** The Committee last examined this case at its November 2003 meeting when it noted with interest the amendment of section 16 of the Trade Unions Act [see 332nd Report, paras. 172-174].

**80.** In its communication dated 31 January 2004, the Government forwards the copy of amended section 16 of the Trade Unions Act.

**81.** *The Committee notes that according to newly amended section 16 of the Trade Unions Act, "a trade union acquires the rights of a legal person from the moment of the approval of its statute". However, according to section 3 of the Act of Ukraine on the state registration of legal persons and physical persons-entrepreneurs of 15 May 2003, "the associations of citizens (including trade unions), for which special conditions for state registration have been established under the Act, shall obtain the status of legal person only after their state registration, to be conducted in accordance with the order established by the present Act", and, according to section 87 of the Civil Code of 16 January 2003, an organization acquires its rights of legal personality from the moment of its registration. The Committee notes the contradiction in the legislation and requests the Government to provide clarification in this respect without delay.*

## *Case No. 2079 (Ukraine)*

**82.** The Committee last examined this case at its November 2003 meeting when it requested the Government: (1) to clarify the situation of the Volynskaya Province division of the All-Ukrainian Trade Union "Capital-Region" as far as its registration with local authorities is concerned; (2) to set up an independent inquiry into dismissal of Mr. Linik and if there was evidence that he had been dismissed for reasons linked to his legitimate trade union activities, to take all necessary measures to reinstate him in an appropriate position without loss of pay or benefits; (3) to set up an independent inquiry into the alleged violations of trade union rights at the "AY-I EC Rovnoenergo" enterprise and keep it informed in this

respect; and (4) to provide information on the alleged violations of trade union rights at the "Volynoblenergo" enterprise [see 332nd Report, paras. 175-178].

**83.** In its communication of 8 January 2004, the Government indicates that it has requested the Central Administrations of Labour and Social Protection of Population to conduct thorough examination of the alleged violations of trade union rights in Volynskaya and Rovenskaya Provinces and assures that the results of the investigations will be sent to the Committee. In its communication of 31 January 2004, the Government states that in July 2002, the Territorial State Labour Inspection of the Rovenskaya Province together with the regional office of the National Service of Mediation and Reconciliation examined the allegations made by the Chairperson of the "Capital-Region" trade union concerning negotiation of the collective agreement for 2002 at the "AY-I EC Rovnoenergo". The Government indicates that a joint representative body, composed of an equal number of representatives from the administration and the trade union organizations, including the Chairperson of the "Capital-Region", was established for collective bargaining purposes. According to its section 1.1, "the Agreement is concluded between the owner of the 'AY-I EC Rovnoenergo'" […] and the joint representative body of the working collective of the "AY-I EC Rovnoenergo", which includes the trade union of workers of energy sector and electrical industry of Ukraine and the All-Ukrainian Trade Union "Capital-Region". The Government states that this section testifies to the recognition of the legitimacy of both trade unions present at the enterprise. It further states that two sections recognizing the trade union of workers of energy sector and electrical industry of Ukraine as an exclusive representative of the workers at the enterprise were in fact included in the collective agreement. The inspection concluded that these provisions were discriminatory against the All-Ukrainian Trade Union "Capital-Region" and requested the manager of the enterprise and the chairperson of the trade union committee to bring them into conformity with the legislation. On 25 October 2002, the Conference of the working collective of the enterprise amended the collective agreement and extended the period of its validity for the year 2003. The Government further indicates that no other issues had been raised concerning the violation of the legislation by the owner of the "AY-I EC Rovnoenergo" with regard to the trade union "Capital-Region".

**84.** Concerning the Committee's request to clarify the situation of the Volynskaya Province division of the All-Ukrainian Trade Union "Capital-Region" as far as its registration with local authorities is concerned, the Government indicates that no documents for the registration of this organization were submitted to the regional Department of Justice.

**85.** Concerning the dismissal of Mr. Linik on 26 May 1999, the Government indicates that it was carried out without the violation of the existing legislation. The Government further states that Mr. Linik did not lodge an appeal against this decision of the administration, neither with a labour dispute commission of the enterprise nor with the court. Finally, the Government states that the allegations of the persecution of Mr. Linik for his trade union activities were not corroborated.

**86.** The Government further indicates that the Regional State Administration examined the allegations of the persecution of the trade union activists of the complainant organization and concluded that there was no violation of trade union rights. The Government points out that at present, the primary trade union organization of the All-Ukrainian Trade Union at the Lutsk Bearing Plant is not functioning.

**87.** *The Committee notes the statement of the Government. With regard to the alleged violations of trade union rights at the "AY-I EC Rovnoenergo" and "Volynoblenergo" enterprise, the Committee notes that in its communication of 8 January 2004, the Government indicates that it has requested the Central Administrations of Labour and Social Protection of the Population to conduct thorough examination of allegations of*

*violation of trade union rights in Rovenskaya and Volynskaya Provinces. The Committee notes, however, that in its communication of 31 January 2004, the Government refers to the investigation carried out in July 2002. The Committee reiterates its previous request and urges the Government to transmit the conclusions of the independent investigation on violations of trade union rights at the "AY-I EC Rovnoenergo" and the "Volynoblenergo" enterprise, alleged by the complainant in its communications of 2 January and 5 May 2003.*

**88.** *Concerning the dismissal of Mr. Linik, the Committee notes the Government's indication that Mr. Linik did not lodge an appeal against this decision of the administration, neither with a labour dispute commission of the enterprise nor with the court. It recalls, however, that in its communication of 14 April 2003, the Government refers to the April 1999 decision of the Territorial State Labour Inspectorate, which examined the representation of Mr. Linik concerning his dismissal. It further recalls that since February 2000, the Committee has been asking the Government to set up an independent inquiry into this case. The Committee once again reiterates its request and, if there is evidence that Mr. Linik had been dismissed for reasons linked to his legitimate trade union activities, it urges the Government to take all the necessary measures to reinstate him in an appropriate position without loss of wages and benefits or, if reinstatement is not possible, to pay Mr. Linik an adequate compensation.*

## *Case No. 2160 (Venezuela)*

**89.** At its March 2004 meeting, the Committee requested the Government to transmit the judgement concerning the denial of registration of the Trade Union of Revolutionary Workers of the New Millennium, and requested the complainant trade union to indicate whether the following trade unionists remained dismissed: Jorge Amaro, Alfredo Aular, Guido Sivira, Otiel Montero and Orlando Acuña [see 333rd Report, para. 166].

**90.** In its communications of 30 October 2003 and 3 March 2004, the Government attaches a ruling of the Supreme Court of Justice (Political/Administrative Chamber) which acknowledges that the four individuals who had requested the cancellation of the administrative decision (concerning the denial of registration of the Trade Union of Revolutionary Workers of the New Millennium) had withdrawn their claim.

**91.** *The Committee notes this information and requests once again the complainant trade union to indicate whether the following trade unionists remain dismissed, for having participated in the establishment of the trade union: Jorge Amaro, Alfredo Aular, Guido Sivira, Otiel Montero and Orlando Acuña.*

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**92.** Finally, as regards the following cases, the Committee requests the governments concerned to keep it informed as soon as possible of any developments relating to these cases:

– *case examined for the last time in November 2002:* 2140 **(Bosnia and Herzegovina)**;

– *cases examined for the last time in March 2003:* 2105 **(Paraguay)**, 2192 **(Togo)**;

– *cases examined for the last time in June 2003:* 1955 **(Colombia)**, 1962 **(Colombia)**, 2127 **(Bahamas)**, 2162 **(Peru)**, 2169 **(Pakistan)**, 2220 **(Kenya)**;

– *cases examined for the last time in November 2003:* 1826 **(Philippines)**, 1854 **(India)**, 2086 **(Paraguay)**, 2132 **(Madagascar)**, 2148 **(Togo)**, 178 **(Denmark)**, 2188

**(Bangladesh)**, 2195 **(Philippines)**, 2198 **(Kazakhstan)**, 2225 **(Bosnia and Herzegovina)**, 2233 **(France)**, 2242 **(Pakistan)**, 2250 **(Argentina)**;

– *cases examined for the last time in March 2004:* 1890 **(India)**, 1937 **(Zimbabwe)**, 1951 **(Canada)**, 1952 **(Venezuela)**, 1975 **(Canada)**, 1996 **(Uganda)**, 2027 **(Zimbabwe)**, 2084 **(Costa Rica)**, 2088 **(Venezuela)**, 2096 **(Pakistan)**, 2104 **(Costa Rica)**, 2125 **(Thailand)**, 2133 **(The former Yugoslav Republic of Macedonia)**, 2141 **(Chile)**, 2150 **(Chile)**, 2158 **(India)**, 2161 **(Venezuela)**, 2164 **(Morocco)**, 2166 **(Canada)**, 2172 **(Chile)**, 2173 **(Canada)**, 2175 **(Morocco)**, 2180 **(Canada)**, 2181 **(Thailand)**, 2182 **(Canada)**, 2186 **(China/Hong Kong Special Administrative Region)**, 2196 **(Canada)**, 2208 **(El Salvador)**, 2221 **(Argentina)**, 2229 **(Pakistan)**, 2230 **(Guatemala)**, 2237 **(Colombia)**, 2251 **(Russian Federation)**, 2272 **(Costa Rica)**, 2281 **(Mauritius)**, 2284 **(Peru)**, 2288 **(Niger)**, 2291 **(Poland)**, 2299 **(El Salvador)**.

**93.** The Committee trusts that these governments will quickly provide the information requested.

**94.** In addition, the Committee has just received information concerning Cases Nos. 1965 (Panama), 1970 (Guatemala), 2017 and 2050 (Guatemala), 2048 (Morocco), 2103 (Guatemala), 2118 (Hungary), 2134 (Panama), 2146 (Serbia and Montenegro), 2204 (Argentina), 2227 (United States), 2234 (Mexico), 2243 (Morocco), 2252 (Philippines) and 2255 (Sri Lanka), which it will examine at its next meeting.

CASE NO. 2197

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

## Complaint against the Government of South Africa presented by Mandate Trade Union (MTU)

***Allegations: The complainant alleges the refusal of the South African Embassy to Ireland to meet and negotiate with the union chosen by the locally recruited personnel to represent them***

**95.** The complaint is contained in communications from the Mandate Trade Union dated 7 and 21 May 2002.

**96.** The Government transmitted its reply in a communication dated 8 October 2002.

**97.** South Africa 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. Questions of receivability

**98.** Before coming to the examination of the substance of this complaint, the Committee wishes to recall the issues of receivability that had been raised in this case.

**99.** In communications dated 7 and 21 May 2002, the Mandate Trade Union, representing the Irish staff employed in the administrative support section of the South African Embassy in Dublin, submitted a complaint against the Government of South Africa for failure to ensure respect for freedom of association and collective bargaining rights in its Embassy in Ireland.

**100.** In its reply of 8 October 2002, the Government, while replying to the substantive aspects of the case, also contested the receivability of the complaint, stating that the relationship between an embassy as employer and its locally recruited personnel, at question in the complaint, is governed by the law of the country in which the embassy is situated and emphasizing that neither the South African Constitution, nor the statute law, has application to the employment by an embassy of locally recruited personnel.

**101.** In the light of the contradictory understandings between the complainant and the Government of South Africa in respect of the country whose jurisdiction would be applicable in this case, the Committee invited the Government of Ireland to indicate whether Irish law indeed governs the employment relationship between locally recruited personnel and the South African Embassy [see 330th Report, para. 9].

**102.** In a communication dated 5 November 2003, the Irish Government advised that the issue of whether Irish law governs the employment relationship between locally recruited personnel and embassies depends on the nature of the employees' duties in the embassy. According to the Irish Government, that type of issue was the subject of a decision of the Irish Supreme Court in *The Government of Canada* v. *The Employment Appeals Tribunal and Brian Burke* in which the following statement of currently recognized principles of international law was adopted:

> One must decide whether the relevant act upon which the claim was based should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character ... or whether it should be considered as having been done outside that area and is in the sphere of governmental or sovereign activity.

**103.** The Supreme Court further held that, if an activity touched the actual business or policy of a foreign government, then sovereign immunity should be accorded to such activity. In this case, which concerned a chauffeur, the Justice held that "the element of trust and confidentiality that is reposed in the driver of an embassy car creates a bond with his employers that has the effect of involving him in the employing government's public organization and interest".

**104.** The Irish Government states that it is not clear whether such circumstances apply to the Mandate employees; much would depend on whether or not the duties of the individuals touched upon the business or policy of the foreign government or were invested with an element of trust and confidentiality. If the employment relationships did come within this category, then it is likely that a claim of sovereign immunity would be accepted by an Irish court. It may be, however, that functions performed by one or more of the Mandate employees fall outside the scope of the abovementioned Supreme Court decision, and Irish employment law would be held by an Irish court to apply.

**105.** In conclusion, the Irish Government states that it is not possible, on the basis of information currently available, to state with certainty whether the employment contract and relationship between the five locally recruited personnel and the Embassy of South Africa would be governed by Irish domestic law.

**106.** The Committee thus understands from the information communicated by the Irish Government that the contention made by the South African Government that Irish law in

this case governs the employment relationship between its Embassy in Dublin and its locally recruited personnel cannot be confirmed on the basis of the information available. While the question of whether Irish national law applies to the locally recruited personnel in a given embassy is dependent on a variety of circumstances that can only be determined on a case-by-case basis, the application of the fundamental international principles of freedom of association embodied in the ILO Constitution and the Declaration of Philadelphia are applicable to all member States.

**107.** In view of the above principle which binds ILO member States, it would be anomalous to abandon the locally recruited personnel in this case at the international level merely because of an ambiguous situation relevant to the application of national law. Thus, while the national laws applicable to the locally recruited personnel have yet to be determined, the Committee, in the interests of justice, may look to the authority relevant to the employer, the South African Embassy, which in this case is clearly the Government of South Africa in light of the uncontested sovereignty it maintains over its government officials and employees representing it around the world.

**108.** The Committee therefore considers that, if there has been a violation of international labour standards or principles relative to freedom of association and collective bargaining in this case, it is the South African Government that is most assuredly in a position to take the necessary measures to address such a violation. The Committee thus concludes that the complaint is receivable and will now proceed with its analysis and examination of the substantive issues concerned.

## B. The complainant's allegations

**109.** In its communications dated 7 and 21 May 2002, the Mandate Trade Union alleges that South Africa has failed to secure the effective observance within its jurisdiction, and specifically within its Embassy to Ireland, of ILO Conventions Nos. 87 and 98.

**110.** Irish staff employed at the Embassy of South Africa in Dublin had decided that, because of certain concerns and claims they wished to make regarding their terms and conditions of employment, and also regarding the particular management style of the Ambassador, that they needed union protection. They joined the local Mandate Trade Union and thereafter the union approached the Embassy to enter into a collective bargaining arrangement.

**111.** A meeting was requested with the Ambassador by letter dated 25 October 2001 [attached to the complaint]. The Embassy advised the union by letter dated 29 November 2001 that it was not intended to recognize the union [also attached to the complaint]. It was stated, inter alia, that: "… it is not the policy of the Embassy to negotiate or work through a third party, in relation to issues of labour relations". Thus, the Embassy declined to recognize or deal with the Mandate Trade Union.

**112.** Subsequently, the Embassy was given official notice of strike action, planned from 10 January 2002. Following some discussion between the Embassy and the Mandate Trade Union, it was decided to defer industrial action by 24 hours. This was in order to facilitate a proposal by the union that both parties would attend conciliation at the Labour Relations Commission.

**113.** On 10 January 2002, the Embassy had not agreed to mediation. A staff meeting was called and staff were presented with a memo from the Ambassador dated 9 January 2002. In the absence of agreement by the Embassy to conciliation, the strike commenced on 11 January 2002.

**114.** A further intervention was made by the Assistant General Secretary of the Irish Congress of Trade Unions, to the effect that an independent person would be appointed by agreement to recommend a process whereby the dispute could be resolved but this too was rejected by the Embassy. A detailed submission concerning the dispute and the recognition issue was made to the Director-General, Foreign Affairs, in Pretoria on 18 December 2001.

**115.** The Mandate Trade Union submits that by their actions in refusing to meet with the union, the Embassy of South Africa and the Government of South Africa are actively preventing the trade union from exercising its right to negotiate with the employer on behalf of the union members, in breach of ILO Convention No. 87 and in particular Article 3(2), Article 8(2) and Article 11 thereof.

**116.** The Mandate Trade Union further submits that the Embassy of South Africa and the Government of South Africa are in breach of ILO Convention No. 98 and in particular Articles 3 and 4 thereof. The Mandate Trade Union contends that whereas Convention No. 98 does not apply to "public servants engaged in the administration of the State", the trade union members involved in this dispute are not so excluded in view of the nature of their employments in the administrative support section of the Embassy in Dublin. The complainant submits that the Embassy and the Government of South Africa have directly intervened to prohibit negotiations in respect of matters relating to conditions of work, contrary to the provisions of Convention No. 98.

**117.** Furthermore, the workers in dispute believe that they are being discriminated against since South African diplomatic staff at the Embassy (for example the Foreign Assistant and the Head of Management), with whom they are working side by side, are trade union members. The complainant therefore requests the Committee to assist in ensuring that the Embassy/South African Government comply fully with the obligations placed on them by the ILO.

## C. The Government's reply

**118.** In its communication dated 8 October 2002, the Government states that the Embassy employs both South African nationals and locally recruited personnel (the "LRP"). Five of the LRP are members of the complainant trade union which has made a request to the Embassy that it be formally recognized as the collective bargaining representative of these employees for purposes of discussing issues relating to remuneration and the conditions of service.

**119.** On 29 November 2001, the Ambassador responded that:

> Due to its diplomatic status and the nature of its activities, it is not policy of the Embassy to negotiate or work through a third party in relation to issues relating to labour relations.
>
> However, the Embassy is most open to direct discussion between its management and its locally recruited personnel relating to personnel issues.
>
> In the pursuit of improving employer-employee relations, the Embassy would be most willing to set up a personnel forum within the Embassy, which could serve in the Platform for dealing with such matters.

**120.** The relationship between an embassy as employer and its LRP is governed by the law of the country in which the embassy is situated. In terms of the relevant Irish procedures, the trade union processed a dispute and later embarked on strike action to compel the embassy to grant recognition to their trade union. In terms of Irish law, there is no legal obligation upon an employer to grant recognition to a trade union.

**121.** While the union alleges that the Embassy and the Government of South Africa are in breach of Convention No. 87, in particular Articles 3(2), 8(2) and 11, and Convention No. 98, in particular Articles 3 and 4, the Government asserts that the language of the two Conventions shows that neither Convention is applicable to the current situation and that South Africa has not violated their terms. Accordingly, the complaint is without substance and should be rejected as it contains no allegation which, if proved, would amount to a violation of either of the Conventions.

**122.** According to the Government, the complaint in respect of Convention No. 87 must fail because the conduct complained of (failure to recognize a trade union) does not concern the rights and freedoms guaranteed by the Convention. The Embassy has not interfered with, restricted or impeded the union's right to lawfully exercise the four basic rights guaranteed by Article 3 of Convention No. 87, namely, the right to draw up their constitution and rules, elect representatives, organize administration and formulate their programmes without interference from public authorities. Nor has the Embassy applied the "law of the land" as contemplated by Article 8(2) to impair the guarantees provided in the Convention. Firstly, the Convention does not guarantee trade union recognition. Secondly, in refusing to recognize the complainant trade union, the Embassy has not acted contrary to the laws of Ireland. With respect to Article 11, the Embassy and the Government has in no way acted to impede the right of its employees who are members of the complainant trade union to freely exercise the right to organize.

**123.** The Government further asserts that Convention No. 98 has no application to the present situation. Article 3 requires that countries establish appropriate machinery for ensuring respect for the right to organize. Article 4 requires that countries take appropriate measures to encourage and promote machinery for voluntary negotiation between employers and employees. An employer's refusal to recognize a trade union, particularly in circumstances in which there is no legal obligation to grant trade union recognition can never constitute a violation of Convention No. 98.

**124.** Finally, the Government refers to references in the complaint to South African legislation, and asserts that this is entirely irrelevant as neither the South African Constitution nor statute law has application to the employment by an embassy of LRP. In conclusion, the Government affirms that it has not violated in any way Conventions Nos. 87 and 98 and the complaint should accordingly be rejected.

## D. The Committee's conclusions

**125.** *The Committee notes that the allegations in this case concern the refusal of the South African Embassy to Ireland to meet and negotiate with the complainant who represents the locally recruited personnel. While the union had requested a meeting with the Ambassador by a letter dated 25 October 2001, the Embassy advised one month later that it did not intend to recognize the union as it was not its policy to negotiate or work through a third party in respect of labour relations. The Embassy did indicate, however, that it was open to direct discussion between its management and its locally recruited personnel relating to personnel issues. Attempts by the complainant to have the matter resolved by mediation and conciliation were refused by the Embassy.*

**126.** *There is no contention between the complainant and the Government as to these facts. The disagreement concerns whether non-recognition of the complainant was a violation of international labour standards and principles concerning freedom of association.*

**127.** *Referring to Irish law, the Government states that there is no obligation upon an employer to grant recognition to a trade union. Furthermore, the Government argues that Convention No. 87 does not concern union recognition and that, on the other hand, the*

*Embassy has not in any way interfered with the rights of the locally recruited personnel to organize, draw up their constitutions and rules, elect representatives and organize their administration and formulate their programmes. As concerns Convention No. 98, the Government contends that an employer's refusal to recognize a trade union, particularly in circumstances in which there is no legal obligation at the national level to grant trade union recognition, is not a violation of the provisions of the Convention. As for the complainant's references to South African law, the Government considers that these are entirely irrelevant arguing that neither the South African Constitution nor the statute law is applicable to employment of locally recruited personnel by an embassy.*

**128.** *The Committee would first recall that the issue at hand is not which national law is applicable to the locally recruited personnel at the South African Embassy to Ireland (a question for which, according to the Irish Government, there is not a clear and definitive answer at present), but rather whether the actions at issue are contrary to international standards and principles of freedom of association.*

**129.** *Within this framework, the Committee requests the Government to indicate the actual duties of the five locally recruited personnel at the South African Embassy in Ireland who are members of the complainant trade union.*

**130.** *The Committee nevertheless recalls that Conventions Nos. 87 and 98 are applicable to locally recruited personnel. In the first instance, Article 2 of Convention No. 87 sets forth the right of all workers, without distinction whatsoever (with the sole possible exception of the police and the armed forces under Article 9) to form and join organizations of their own choosing. As for Convention No. 98, at no time does the Government contend that the employees in question, stated to be in the administrative support section, are excluded under Article 6, and even the Government's own assertion that these locally recruited staff are covered by Irish rather than South African legislation, would confirm that they are not deemed to be public servants engaged in the administration of the State.*

## The Committee's recommendations

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

***(a) The Committee recalls that locally recruited Embassy personnel are covered by the provisions of Conventions Nos. 87 and 98.***

***(b) The Committee requests the Government to indicate the actual duties of the five locally recruited personnel at the South African Embassy in Ireland who are members of the complainant trade union.***

CASE NO. 2224

DEFINITIVE REPORT

## Complaint against the Government of Argentina presented by — the Confederation of Argentine Workers (CTA) and — the Association of State Workers (ATE)

***Allegations: The complainant organizations allege that the administrative authority for the health sector in Misiones Province did not transfer the trade union dues of the members of the ATE to the trade union between 1994 and 1996***

**132.** The complaint is presented in a communication from the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) dated 30 September 2002.

**133.** The Government sent its observations in communications dated 10 September 2003 and 20 January 2004.

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

### A. The complainants' allegations

**135.** In their communication of 30 September 2002, the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) allege that the Ministry of Public Health of Misiones Province has not deposited in the ATE account for this purpose the trade union dues of members for the January 1994 to October 1996 period. The complainant organizations add that on 23 June 1998 they lodged a judicial request before the department for common pleas of the first instance of the Supreme Court of Justice of the Nation (CSJN), with regard to this matter against the Misiones Province, claiming the amounts withheld.

**136.** The complainant organizations add that although, in September 1999, the Supreme Court ordered the sums owing to be paid, and in June 2001 ordered the seizure of assets of the province, Misiones Province replied, on 26 June 2002, this time invoking the provincial law for the consolidation of debt in the provincial state and requesting that the seizure of assets be lifted. The complainant organizations state that the provincial law invoked by Misiones Province lays down the consolidation by the provincial state of all recognized debt after 31 March 1991 and before 1 January 2000. The Supreme Court decided to admit the petition of Misiones Province and annulled the seizure of assets.

**137.** According to the complainant organizations, it is important to note that the sums owing to the ATE do not represent a default on consideration in any form but are deducted by the State acting as "withholding agent" in accordance with legal authorization and that this money that has been withheld (wrongfully because the deposit has not been made to the account of the payee) does not belong to Misiones Province and should have never formed part of its assets. This sum belongs to the workers who are members of the trade union

organization. This implies that the provincial state, with the support of the national State through its highest judicial body, carried out an actual confiscation of assets belonging to the workers and that, in spite of the committed violation being wholly recognized (by the province itself and by the Supreme Court), the provincial state was allowed to return the sum of money that never belonged to it in the form of provincial bonds, with interest only up to December 1999, through an exceedingly lengthy administrative process.

**138.** Finally, the complainant organizations indicate that the trade union is still feeling the repercussions of the trade union dues deducted from the workers by the provincial state and wrongfully withheld from the payee account of the ATE from January 1994 to October 1996, i.e. eight years ago; and that the trade union, which groups together the workers of the public administration, relies solely on the support of its members and that this is the money that the provincial state has decided to withhold for itself, incorporating it into its assets.

## B. The Government's reply

**139.** In its communications of 10 September 2003 and 20 January 2004, the Government indicates that, with regard to the allegations of the supposed violation of freedom of association relating to the conduct of the Ministry of Public Health of Misiones Province as withholding agent for trade union dues, there is a final decision by the Supreme Court of Justice of the Nation in which the application for the case in question of provincial law No. 3726, through which Misiones Province adhered to Law No. 25344 on economic and financial emergency, is considered legitimate and in accordance with the law.

**140.** The Government adds that throughout 2000 and 2001, Argentina underwent an unprecedented financial crisis that led to a situation where payment to its external creditors and to international lending organizations came to a virtual halt and it was also impossible for it to pay all its internal debts. In the framework of this unusual state of affairs, the applicable law consolidated all recognized debt after 31 March 1991 and before 1 January 2000. The consolidated debt was paid with bonds (with a redemption period and regular interest) quoted on the stock exchange and widely used to pay the debts of the State. The reason for this law was the public scale of the economic and financial emergency affecting the State and the provinces and it was applicable to all obligations payable without exception, unless explicitly laid down in the law itself. On a number of occasions the constitutionality of the emergency provisions was confirmed by the courts, as in the case mentioned.

## C. The Committee's conclusions

**141.** *The Committee notes that the complainant organizations allege that the Ministry of Public Health of Misiones Province did not transfer to the Association of State Workers (ATE) the trade union dues of its members that had been deducted between January 1994 and October 1996 and that, as a result of a decision by the highest national legal authority, the province was allowed to pay the equivalent amount of the trade union dues deducted in the form of provincial bonds, with interest only up until December 1999, through an exceedingly lengthy administrative procedure.*

**142.** *The Committee notes the Government's statement that: (1) the Supreme Court of Justice of the Nation considered the application of the provincial law, through which Misiones Province adhered to Law No. 25344 on economic and financial emergency, legitimate and in accordance with the law; (2) during 2000 and 2001, Argentina faced a financial crisis that resulted in the cessation of payments to its external creditors and to international lending organizations and in the impossibility for it to pay all its internal debts; (3) the*

*applicable emergency law in this case consolidated all recognized debt after 31 March 1991 and before 1 January 2000; (4) the consolidated debt was paid in the form of bonds that were quoted on the stock exchange and that were widely used to pay the debts of the State; (5) the reason for this law was the public scale of the economic and financial emergency affecting the national State and the provinces, and it was applicable to all debts without exception.*

**143.** *The Committee notes that the Government recognizes that the trade union dues of members of the ATE deducted by the public health authorities of Misiones Province have not been transferred to the trade union organization. The Committee understands the economic and financial difficulties that have affected the country for some years now. However, the Committee emphasizes that the trade union dues do not belong to the authorities, nor are they public funds, but rather they are an amount on deposit that the authorities may not use for any reason other than to remit to the appropriately concerned trade union organization without delay.*

**144.** *The Committee also notes that it has previously examined a similar complaint presented against the Government of Argentina on the failure to transfer the trade union dues deducted by the provincial authorities [see 300th and 302nd Reports, Case No. 1744, paras. 100 and 45, respectively] and on that occasion it reminded the Government that "failure to transfer union dues to trade unions may constitute serious interference in trade union affairs" and it requested the Government "to take appropriate steps to ensure that, even if the Government of the Province of La Rioja is faced with budget difficulties, the union dues are transferred to the trade union organizations".*

**145.** *In these circumstances, the Committee requests the Government to take the necessary steps without delay to ensure that the competent authorities of Misiones Province immediately transfer to the ATE, in money of legal tender, the amount of the trade union dues of its members that it wrongfully withheld between January 1994 and October 1996, with payment of the corresponding interest.*

## The Committee's recommendation

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

***The Committee requests the Government to take the necessary steps without delay to ensure that the competent authorities of Misiones Province immediately transfer to the ATE, in money of legal tender, the amount of the trade union dues of its members that it wrongfully withheld between January 1994 and October 1996, with payment of the corresponding interest.***

CASE NO. 2256

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

## Complaint against the Government of Argentina presented by
## — the Confederation of Education Workers of Argentina (CTERA)
## — the United Union of Education Workers of Mendoza (SUTE) and
## — the Confederation of Argentine Workers (CTA)

***Allegations: The complainant organizations allege that the administrative authority of the education sector of the province of Mendoza paralysed the collective bargaining process by not appointing its representatives to a joint committee and also that it denounces a joint accord***

**147.** The complaint is contained in a communication from the Confederation of Education Workers of Argentina (CTERA), the United Union of Education Workers of Mendoza (SUTE) and the Confederation of Argentine Workers (CTA) dated March 2003.

**148.** The Government sent its observations in a communication dated 6 January 2004.

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

## A. The complainants' allegations

**150.** In their communication of March 2003, the United Union of Education Workers of Mendoza (SUTE), the Confederation of Education Workers of Argentina (CTERA) and the Confederation of Argentine Workers (CTA) state that the SUTE is a trade union body with legal status in the sphere of education workers of the province of Mendoza.

**151.** The complainant organizations indicate that the authorities of the province of Mendoza organize education in the province and for that purpose have established an independent body with the personality called the Directorate General of Schools (DGE).

**152.** The complainants note that within this institutional framework the SUTE has concluded numerous joint accords and collective agreements with the DGE over the past decade. The complainants allege that in December 1999 the province's new authorities came into office, including the new Directorate General of Schools, and that despite repeated notifications, warnings and legal proceedings to persuade the new Government to appoint joint members in order to negotiate a collective agreement for the sector, the DGE has taken no notice and has still not named any joint members, which has brought negotiations to a standstill.

**153.** The complainant organizations also allege that the DGE denounced an earlier joint accord concluded with the SUTE (No. 1 dated 25 August 1999) and that it is seeking to establish a new framework for negotiations for that particular joint accord, and refusing to recognize

the representatives of the workers' sector. The complainant organizations indicate that the accord denounced by the DGE related to the manner of electing and integrating the Assessment and Disciplinary Boards of the Directorate General of Schools. The complainant organizations state that the joint accord established that representation on those boards would be of four members appointed by the State, four by the SUTE and five appointed following a free election of all teachers in the province, whether or not affiliated to the SUTE. When that accord was concluded on 25 August 1999, the first boards were established with a mandate for their members of three years, with new elections to be held on 31 October 2002. The DGE did not call elections and denounced the agreement, thus contravening article 12 of Act No. 24185 that provides that agreements shall remain in force until new ones replace them.

**154.** Lastly, the complainant organizations state that it was only by means of an *amparo* action (appeal for the protection of the constitutional rights) lodged by the SUTE (record No. 80543-35738 entitled United Union of Education Workers of Mendoza against Directorate General of Schools) before the 15th Civil Court of the first district of the province of Mendoza, that by express order of the judge they succeeded in beginning the election process for the boards in question, but the DGE appealed that decision and Civil Court No. 1 of the province of Mendoza revoked the ruling of first instance, leaving the electoral process suspended. As a result, the electoral process for the members of the boards mentioned in the joint accord has once again been interrupted.

## B. The Government's reply

**155.** In its communication of 6 January 2004, the Government states that it is true that the Directorate General of Schools (DGE) of the province of Mendoza concluded numerous collective labour agreements and joint accords with the United Union of Education Workers of Mendoza (SUTE), the most recent one in 1999 (joint accord No. 1), which the DGE denounced when it expired in 2002. It also states that neither the Government nor the DGE violated or sought to violate the provisions of article 14 of the National Constitution, which establishes the fundamental right to collective bargaining. According to the Government, it was and is the SUTE that has refused to negotiate and that took legal action after warning the DGE to negotiate in good faith.

**156.** The Government indicates that it is true that in 1999 there was a change of authorities within the democratic system in force in the country, but that it is not true that the new authorities did not call for collective bargaining. Provincial Decree No. 2002/01 ordered that collective bargaining between the provincial authorities and the bodies representing the various sectors of the public administration should continue. It should be pointed out that at one of the first meetings, the SUTE got up and refused to negotiate if the trade union organization, Union of Argentine Teachers (UDA), took part.

**157.** With respect to joint accord No. 1 of 1999, the Government states that the accord established its validity, as a period of "three years from its official approval, with its validity being extended until conditions are amended by another joint accord ...". Decree No. 1463 officially approved the accord in question on 8 September 1999, and as a result the agreed period of three years expired on 9 September 2002. The DGE denounced the accord on 5 September 2002. In the same document in which the accord was denounced, the Office of the Undersecretary of Labour and Social Security requested that a joint meeting be convened. The Office of the Undersecretary, in accordance with the provisions of the accord, and as stipulated in Act No. 24185, convened the DGE, the SUTE and the UDA to joint negotiations. The first meeting of the parties was held on 11 September 2002.

**158.** The Government states that the SUTE requested the exclusion of the UDA (a trade union organization also comprised of teachers, similar to the SUTE, both with legal personality

recognized by the Ministry of Labour). The trade union organization UDA cited its representativity (recognized by the Ministry of Labour) and the provisions authorizing it to take part in the negotiations. In addition, it requested that the call for exclusion made by the SUTE be refused and that the periods and deadlines in place for the convening of elections and the configuration of the boards mentioned in joint accord No. 1 be suspended.

**159.** The Government adds that on 17 September 2002 the SUTE presented an *amparo* action before the courts, which the DGE opposed on the grounds of form and substance. Although the judge of the 15th Civil, Commercial and Mining Court of the province of Mendoza (first instance) ruled in favour of the *amparo* action and ordered elections to be called to fill the vacancies on the boards mentioned in joint accord No. 1 by 31 March 2003, in the second instance the *amparo* action was rejected. The UDA also lodged an *amparo* action before the courts maintaining that Decree No. 1463/99, which officially approved joint accord No. 1 of 1999, was unconstitutional. On 2 April 2003, the SUTE lodged special remedies for unconstitutionality and judicial review before the Supreme Court of Justice of the province of Mendoza. The Supreme Court of Justice of the province of Mendoza rejected the application for judicial review and formally allowed the action of unconstitutionality. Since 16 September 2003, the action of unconstitutionality has been pending before the courts, for consideration by the Ministers of the Supreme Court of Justice, and will shortly be ruled upon.

**160.** According to the Government, the DGE has conducted itself in accordance with the law and the Constitution, it has denounced a joint accord and has engaged in a new round of negotiations.

## C. The Committee's conclusions

**161.** *The Committee observes that the complainant organizations allege that since 1999 the Directorate General of Schools (DGE) of the province of Mendoza has refused to appoint its representatives to continue the negotiation of the collective agreement for the sector with the United Union of Education Workers of Mendoza (SUTE) – a trade union organization with legal personality, which, in accordance with Argentine legislation allows it to be the sole collective bargaining agent. In addition, the complainant organizations object to the decision by the DGE to denounce joint accord No. 1 of 1999 concluded with the SUTE relating to the election and integration of the tripartite Assessment and Disciplinary Boards and that as a result it did not convene elections for its members and is trying to convene new joint meetings for new negotiations on this particular issue.*

**162.** *As regards the alleged failure of the DGE since 1999 to appoint its representatives to continue to negotiate a collective agreement for the sector with the SUTE, the Committee observes that the Government states in general terms that, by way of Provincial Decree No. 2002/01, it was ordered that collective bargaining between the provincial authorities and the bodies representing the various sectors of the public administration should continue. Nevertheless, the Committee observes from the allegations that the negotiation of a collective agreement for the education sector is excessively delayed. The Committee recalls that Article 4 of Convention No. 98 provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. Consequently, the Committee requests the Government to take measures to this effect and to keep it informed of the result of the negotiation of the collective agreement in question.*

**163.** *Concerning the alleged denunciation of joint accord No. 1 of 1999 by the DGE, the Committee notes the Government's acknowledgement that the SUTE and the DGE concluded numerous accords and collective agreements and that the most recent joint accord concluded was joint accord No. 1 mentioned by the complainants, which was officially approved by Decree No. 1463/99. In addition, the Committee notes the Government's information that: (1) the DGE denounced joint accord No. 1 when it expired in 2002 and at the same time requested the Office of the Undersecretary of Labour and Social Security to convene joint meetings to conduct new negotiations; (2) the Office of the Undersecretary convened a joint meeting of the DGE, the SUTE and another trade union organization (the Union of Argentine Teachers – UDA) which had not participated in the negotiation of joint accord No. 1; (3) the SUTE requested that the judicial authority exclude the UDA (which, according to the Government, also has legal personality), and the UDA cited its representativity and the provisions that authorized it to take part in the negotiations and asked that the call by the SUTE be rejected; and (4) the matter is currently pending before the Supreme Court of Justice of the province of Mendoza.*

**164.** *First of all, the Committee considers that, in these circumstances, the denunciation of the joint accord in itself – the corresponding legal requirements being respected – does not violate the principles of free collective bargaining. Furthermore, as to the intention of the SUTE to exclude the UDA from the joint negotiating committee, the Committee does not have sufficient facts to determine the representativity of the UDA. Whatever the case may be, the Committee observes that this matter has been submitted to the judicial authority. The Committee requests the Government to inform it of the final decision handed down by the judicial authority in this respect.*

## The Committee's recommendations

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

***(a) As regards the alleged failure of the Directorate General of Schools (DGE) of the province of Mendoza since 1999 to appoint its representatives to continue to negotiate a collective agreement for the sector with the United Union of Education Workers of Mendoza (SUTE), the Committee recalls that Article 4 of Convention No. 98 provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee requests the Government to take measures to this effect and to keep it informed of the result of the negotiation of the collective agreement in question.***

***(b) The Committee requests the Government to inform it of the final decision handed down by the judicial authority with respect to the participation by a new trade union organization, the Union of Argentine Teachers (UDA), in the renegotiation of joint accord No. 1 of 1999 concluded between the SUTE and the DGE.***

CASE NO. 2222

DEFINITIVE REPORT

## Complaint against the Government of Cambodia presented by the Cambodian Independent Teachers Association (CITA)

***Allegations: (1) allegations relating to legal issues: the Common Statute of Civil Servants is incompatible with Conventions Nos. 87 and 98, as it does not guarantee the rights of public employees to form trade unions and to conduct collective bargaining nor does it ensure the protection of trade union leaders and members against anti-union discrimination; (2) allegations relating to factual issues: in specific instances, the complainant was prevented by the local public authorities and the police from holding meetings relating either to its internal organization or to its activities***

**166.** The Cambodian Independent Teachers Association (CITA) lodged its complaint in a communication dated 27 August 2002. Through a communication dated 29 August 2003, Education International (EI) transmitted a further communication from CITA, dated 4 July 2003 and completing the original communication. At the same time, EI declared that it associated itself with the complaint.

**167.** The Government submitted its reply in a communication dated 24 February 2004.

**168.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Labour Relations (Public Service) Convention, 1978 (No. 151).

### A. The complainant's allegations

**169.** CITA indicates that it was established in 2000 and recognized by the Ministry of Interior in July 2001, following the intervention of the United Nations Special Representative to Cambodia for Human Rights.

**170.** In its original communication of 27 August 2002, CITA focuses on legal issues. It states that the Common Statute of Civil Servants, adopted on 21 October 1994, governs teachers' conditions of employment. CITA submits that this statute is incompatible with Conventions Nos. 87 and 98. In particular, it does not guarantee civil servants' rights to establish unions and to conduct collective bargaining, nor does it ensure protection of trade union leaders and activities. CITA places particular emphasis on the lack of protection against anti-union discrimination and the absence of collective bargaining. CITA believes that technical assistance should be provided in order to draft a law applicable to civil servants and compatible with Conventions Nos. 87 and 98. CITA has provided a translation of the Common Statute of Civil Servants.

**171.** In its second communication dated 4 July 2003, CITA contends that it was prevented by local public authorities and the police from organizing meetings concerning its internal organization and its activities. In support of its contention, CITA describes the circumstances surrounding the organization of specific meetings, which can be summarized as follows.

**172.** *On 1 December 2002*, CITA organized a convention in the Kompong Chhnang province, to establish a branch executive committee. CITA contends that the governor of the province, Mr. So Pearin, and the chief of police, Mr. Touch Narong, gave orders to have the convention surrounded by 30 police officers; they also banned the use of loudspeakers. CITA adds that the chief of the education department for the Kompong Thom province, Ms. Phat Chhny, wrote to the schoolmaster with a view to instructing teachers not to join CITA.

**173.** *On 10 December 2002*, CITA decided to hold a meeting in the compound of the Srayov Junior high school, Srayov commune, Stoeng Sen district, Kompong Thom province. The purpose of the meeting was to explain the role of trade unions. The third deputy governor of the Kompong Thom province, Mr. Kung Bunthan, and the district chief of police, Mr. Srey Puthy, ordered ten police officers to end the meeting.

**174.** *On 22 December 2002*, officials of CITA arrived at the "II village Chak Engre primary school", Mean Cheay district, to assist ten teachers who had been threatened and intimidated by the chief of the district education office, Ms. Kung Kanitha, and by the schoolmaster, Mr. Huy Saroen, following their participation in a non-violent demonstration on 16 December 2002. The schoolmaster called the police, and five police officers ousted officials of CITA from the school.

**175.** *On 1 March 2003*, the organization's officials went to Saang high school, Saang district, Kandal province, to meet teachers. The schoolmaster, Mr. Chhi Kung, requested the deputy chief of police, Mr. Rothy, to threaten and oust from the school CITA's president upon his arrival.

**176.** *On 6 April 2003*, CITA summoned a convention to establish a branch executive committee in Kompong Thom province. 150 teachers attended the convention. The complainant contends that, before the convention, Order No. 026, dated 1 April 2003, was released under the mark of the governor of the province, Mr. Nou Phoeng, forbidding CITA to hold the meeting on 6 April 2003.

**177.** CITA decided to hold a three-day seminar in Pursat province, to start on *26 June 2003*. CITA explains however that the governor of the province, Mr. Ong Sami, informed it that he could not authorize the seminar to take place for security reasons. At the same time, the authorities forbade hotels and restaurants of the province to provide accommodation for the purpose of the seminar. Despite the governor's refusal, the president of CITA decided to go ahead with the seminar. Forty teachers, from both the Kompong Chhnang and Pursat provinces, arrived to participate in the meeting. While half of the 40 teachers present were able to participate, the remainder were banned by 25 police officers from joining the seminar. The police prevented the meeting continuing after its official opening, by "cracking [it] down". The president of CITA made a second attempt to hold the seminar, but pressure engendered by the police presence obliged him to declare the seminar closed on the evening of 26 June 2003, to avoid violence and to ensure teachers' security.

**178.** CITA contends that in relation to all the activities described above, despite having informed the competent authorities one week before the meeting was due to take place, it was always prevented by local authorities from carrying out its activities. CITA underlines that the Government has allowed local authorities to thwart its meetings. This is in clear

violation of the national Constitution as well as of Conventions Nos. 87 and 98. According to CITA, the Government has denied teachers' freedom of opinion, freedom of expression and right to assembly.

## B. The Government's reply

**179.** In its communication of 24 February 2004, the Government addresses solely the allegations relating to factual issues. The Government explains that the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY), the Ministry of Education, Youth and Sport (MOEYS) and the Ministry of Interior have appointed an inter-ministerial group to investigate the allegations. For each instance, the Government submits both explanations and records of meetings conducted by the inter-ministerial group with representatives of the local authorities concerned and officials and members of the Cambodian Independent Teachers Association (CITA). The Government has provided the Committee with translations of the records, alongside originals bearing either fingerprints or signatures. These translations differ from those of the complainant in relation to the spelling of the names of provinces, districts, cities and of persons involved. For ease of reference, the Government's reply will be reflected in the order followed by CITA in presenting the allegations.

### *Case of 1 December 2002 – Kampong Chhnang province*

**180.** The Government denies that the rights of CITA have been infringed. It argues that the case stemmed from a lack of information and clarification. The Government underlines that the Association did not submit a proposal to obtain authorization from the competent authorities and that the latter had merely fulfilled their responsibility regarding the preservation of social order and security. The Government emphasizes that, while the meeting occurred under some constraints, CITA was able to carry it through to its end.

**181.** The Government submits three records of meetings conducted by the inter-ministerial working group in relation to these events. All of these meetings took place on 16 January 2004. The first record presented is that of the interview of four officials and members of the local branch of CITA: Mr. Chun Cham, Mr. Doung Chetra, Mr. Chan Nithera and Mr. Chhoeung Ravy. The following information was provided to the working group:

- CITA delivered a letter to the governor and to the directorate of education, youth and sport in relation to the meeting;
- the authorities did not authorize the meeting, in particular because the procedure to apply for authorization was unclear; nonetheless, the meeting took place as planned, in the presence of the police; another meeting was subsequently organized without any intervention of the authorities;
- the events of 1 December 2002 resulted from a misunderstanding between CITA and the local authorities; the vice-chief of the CITA branch stated his intention to establish good relationships with the local authorities.

**182.** The second record concerns the interview of the chief of the directorate of education, youth and sport, Ms. Phat Thorny, who provided the following information to the working group:

- she denied having issued a letter to the school director to ban teachers from participating in the activities of CITA; the record then makes reference to a letter No. 2710 of 11 December 2003, in the following terms: "[the directorate of

education, youth and sport] has never issued letter No. 2710 dated 11 December 2003 on the activities of a few associations which have been disturbing the process of teaching and other educational institutions";

- the directorate of education, youth and sport received a report on the workshop relating to the establishment of the CITA branch in Kampong Chhnang province; according to the report, the workshop had taken place the whole morning of 1 December 2002, with approximately 200 participants; only 104 persons voted.

**183.** The third record relates to the interview of the chief of police of the Kampong Chhnang province, Mr. Touch Narong, who provided the following information to the working group:

- upon being informed of the meeting, he recommended that CITA applied for the necessary authorization to that end, for safety and security reasons;

- despite the absence of authorization, the meeting took place; he was obliged to send 15 police officers to guarantee security since 150 persons attended the meeting;

- the meeting took place the whole morning: speakers were used and the participants took a vote, without any interference, to establish the branch executive committee and to adopt the statutes of the association.

### *Case of 10 December 2002 – Kompong Thom province*

**184.** The Government denies the allegations. No conflict arose between the local representatives of CITA and the local authorities. The case rather stemmed from a lack of cooperation between the parties and the fact that they did not clearly determine their respective responsibilities. In this respect, the Government insists that CITA failed to submit a proposal to obtain prior authorization; nevertheless, the authorities did not take any decision with respect to the meeting, nor did they issue any kind of guideline.

**185.** The Government submits the records of two meetings, both of which took place on 13 January 2004. The first meeting was held between the inter-ministerial working group and representatives of the local authorities. (As an aside, it should be noted that, during the meeting, information was provided not only on the events of 10 December 2002 but also on those of 6 April 2003, since they concerned the same province and therefore the same authorities. However, the translation of the record does not always allow a clear understanding as regards to which event each piece of information relates. Statements which are more likely to concern the events of 6 April 2003, will be reflected below). As far as the events of 10 December 2002 are concerned, the following information was provided by the second governor of the province's Cabinet, Mr. Kong Bunthon, the vice-chief of the directorate of education, youth and sport, Mr. Kem Visoth, and the chief of police, Stoeung Sen district, Mr. Srey Puthi:

- the second governor of the province stated that he had ordered the police to undertake mediation in relation to the meeting held in the premises of the Sroyov high school; the second governor indicated that police acted properly towards the trade union officials and that the meeting was allowed to take place;

- the vice-chief of the directorate of education, youth and sport confirmed that his directorate had not allowed CITA to hold a meeting within the premises of the school, to preserve the neutrality of the institution; it seems that he also made reference to CITA's disagreement with a policy of the MOEYS and that, in response, the

directorate had instructed the director of Sroyov high school not to allow "any activity in the school";

- the chief of police declared that the meeting at the Sroyov high school had taken place from 2 p.m. to 4 p.m. and that approximately 20 teachers participated in the meeting; seven police officers were present for security reasons.

**186.** During the second meeting, the working group undertook the interview of three members of CITA working at the Sroyov high school: Mr. Khout Sokhoeun, Mr. Cheam Leng and Mr. Sreng Dara. The group reached the following conclusions:

- CITA did not obtain the necessary authorization to organize the meeting primarily because the public authorities were not able to ascertain whether the meeting would create risks for the security and the stability of the area;

- the meeting of 10 December did not take place as originally planned; but it was carried out in front of the school gate from 1.30 p.m. to 3.30 p.m. without any interference from the authorities; a few police officers were "invited by CITA" to participate;

- after the first meeting, CITA was able to organize seven other meetings in different places without any obstruction from the authorities and this is still the case.

### *Case of 22 December 2002 – Phnom Penh city*

**187.** The Government rejects the allegations and states that the director of the school never threatened CITA, but simply advised the teachers to comply with internal rules. On the other hand, the president of CITA entered the school premises without permission to do so and caused problems to the school's administration during working hours.

**188.** The Government has attached records of two meetings conducted by the inter-ministerial group on 23 January 2004. The first record relates to the interview of five teachers of "the Chak Enre 2 primary school": Ms. Yim Mich, Ms. Chan Nary, Ms. Rey Sochenda, Ms. Ek Sophea and Ms. Loeung Bophan. One of the teachers provided the following information:

- she confirmed that she had participated in a demonstration on 16 December 2002 for improvement of her living conditions; she had not sought authorization from the school director because she was convinced that the latter would have refused to grant it;

- after the demonstration, the teachers and the director discussed the matter and teachers' duties and obligations; the teachers' absence had no further consequences.

**189.** The second record relates to the interview of the school director, Mr. Suy Saroeun, who provided the following information:

- on 16 December 2002, 16 teachers were absent from work and this created difficulties in the functioning of the school;

- the teachers concerned were reminded of the rules in force in the school and no further incidents occurred.

### *Case of 1 March 2003 – Kandal province*

**190.** The Government does not agree with CITA's views on the matter. The school director neither threatened CITA's president nor removed him from the school. He merely abided by internal rules, all the more since at the time the school was conducting examinations.

**191.** The Government has attached records of two meetings conducted by the inter-ministerial working group, both of which took place on 20 January 2004. During the first meeting, the director of the Hun Sen Sa Ang high school, Mr. Chhi Kong was heard and provided the following information:

- on 1 March 2003, the school was an examination centre and any person whose presence was not required for that purpose was not allowed to enter the school; at the time, the director had been informed that documents had been distributed and that this had adversely affected the discipline necessary for the examination to take place; as a result, he ordered the guard to stop the distribution and invited the persons who were responsible to leave the school; it was only at this time that he learned that his interlocutor was the president of CITA;

- the director had often advised the president of CITA not to carry out trade union activities during working hours.

**192.** Two members of CITA, Ms. Heng You and Mr. Koun Nhoun, who worked at the Hun Sen Sa Ang high school were interviewed during the second meeting and provided the following information:

- on 1 March 2003 the president of CITA entered the school's premises without permission, as he had previously worked in the school and was used to having free access; on this particular day, the school was used as an examination centre and access was strictly restricted to the persons concerned with the examination; the school director asked the security guard to invite the president of CITA to leave the school;

- after this event, the president of CITA could have access to the school's premises, in the normal way.

**193.** The working group and the two teachers agreed in conclusion that the director of the school's behaviour was unexceptional, no serious mistake had been made and that the incident was the result of a misunderstanding.

### *Case of 6 April 2003 – Kompong Thom province*

**194.** The Government indicates that the provincial authority had issued a letter under which CITA was not authorized to conduct the meeting for security reasons. The reason for such a decision was that CITA had submitted insufficient details to the competent authorities, merely informing them that it intended to hold a meeting. Since then, CITA has organized its meetings without any problem whatsoever.

**195.** Regarding the working group's examination of the allegations, in light of the record of the meeting of 13 January 2004 with the abovementioned local authorities, the following information is assumed to relate to the events of 6 April 2003:

- the second governor of the province stated that, in refusing to allow CITA to hold its meeting, he had merely applied the law on demonstrations; this was also due to the

fact that CITA had not applied for the required authorization; further, the Ministry of Interior had not authorized the opening of CITA's branch;

- the chief of the province's Cabinet underlined that the provincial authorities specifically requested CITA to apply for the required authorization to organize the convention, rather than merely informing them that it was going to hold a meeting; further, CITA rendered public the name of its branch before applying for authorization; CITA should abide by the law when establishing a local branch.

### *Case of 26 June 2003 – Pursat province*

**196.** The Government contends that the authorities did not breach CITA's rights. They had merely exercised their duties in relation to the protection and the maintenance of the social order. CITA had not fulfilled correctly its own responsibilities and should have respected the authorities' responsibility regarding the protection of social order.

**197.** The inter-ministerial working group held three meetings. The first meeting took place on 14 January 2004, to interview the chief of the directorate of education, youth and sport, Mr. Theam Lim Eng, who provided the following information:

- he had never impeded members of CITA in carrying out their activities;
- letter No. 1061, dated 24 June 2003, was delivered by the directorate to the chief of the association branch underlining that the provincial authority had not authorized the seminar;
- after the events surrounding the holding of the seminar, the local branch of the association carried out its activities without interference;
- on a general level, CITA should be reminded not to undertake any activity during school working hours but during its members' free time.

**198.** A meeting was then held on 15 January 2004 to interview the chief of the province's Cabinet, Mr. Vong Sam Ol, who provided the following information:

- CITA informed the Cabinet that it was going to organize a seminar from 26 to 28 June 2003, in a letter dated 14 June 2003, but without submitting enough information; because of this insufficient information, the Cabinet requested the association to complete the file; since it had not received the supplementary information, on 24 June 2003, the Cabinet issued a letter declaring that the seminar was not authorized, for security reasons linked, it seems, to the holding of a national election;
- when an association or an organization wishes to hold a meeting or a seminar, it must first seek authorization and support its request with all the necessary documentation.

**199.** Another meeting was held on 15 January 2004 with the chief and vice-chief of the local representation of CITA, Mr. Yeap Seng and Ms. Kim Darani. The two trade union officials and the working group agreed on the following points:

- the seminar of 26 June 2003 was not held because of lack of understanding between the local authorities and CITA; the local authorities did not understand the position of the association and the latter did not provide the necessary information to obtain authorization to organize the seminar;

- the local authorities and the association did not intend to interfere with each other's responsibilities and duties; on the other hand, CITA's duties must be clarified and there should be no interference with the association's activities based on freedom of association and carried out outside working hours;

- the association suggested that its activities should not be threatened or impeded when being undertaken outside working hours and teachers' obligations should be defined clearly.

**200.** The Government concludes by underlining that CITA's allegations are not founded. Misunderstandings had indeed arisen between CITA and the local authorities but only for a short period of time at the beginning of the association's activities. The Government adds that the new representatives of CITA had little experience when they started their duties and failed to comply with national regulations administered by the national authorities.

## C. The Committee's conclusions

**201.** *The Committee notes that the case concerns the recognition of, and respect for, teachers' trade unions rights by public authorities, in both law and in practice.*

### *Compatibility of the Common Statute of Civil Servants with Conventions Nos. 87 and 98*

**202.** *CITA indicates that teachers are governed by the Common Statute of Civil Servants and contends that this law is incompatible with Conventions Nos. 87 and 98. In particular, there is no protection of trade union members and leaders against anti-union discrimination, nor is there any recognition of public employees' right to collective bargaining. Noting that the Government has not replied to the legal issues raised in the complaint, the Committee will examine the provisions of the Common Statute of Civil Servants, in order to determine whether it guarantees public employees' rights to freedom of association and collective bargaining, in accordance with the commitments undertaken by the ratification by Cambodia of Conventions Nos. 87 and 98.*

**203.** *The Committee notes that this is the first time that the question of freedom of association and collective bargaining rights in the Cambodian civil service is brought before it. It also notes that the Common Statute of Civil Servants was adopted before the Labour Law of 1997 and before the country's ratification of both Conventions Nos. 87 and 98.*

**204.** *The Committee notes that section 1 of the Labour Law excludes from its scope some categories of public employees, including those governed by the Common Statute of Civil Servants. While in the present case the Committee is only called upon to examine the provisions of this latter law, it wishes to recall that public servants, like all other workers, without distinction whatsoever, have the right to form and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, para. 213]. The Committee will also refer the Government to the comments made by the Committee of Experts on the Application of Conventions and Recommendations, at its November-December 2003 session, on the necessity of guaranteeing the right to organize of public employees other than those falling under the scope of the Common Statute of Civil Servants (see the report of the Committee of Experts to be submitted to the Committee on the Application of Standards, at the 92nd Session of the International Labour Conference).*

**205.** *The Committee observes that the Common Statute of Civil Servants contains only one provision, article 36, which touches upon civil servants' right to organize. Under this provision, "any civil servant may join or participate in the management of an association authorized by law". This provision may well be the legal basis on which CITA has been recognized by the public authorities as a professional organization. The parties did not specify whether any text has been adopted under article 36 to govern in more detail civil servants' associations. While the Labour Law explicitly recognizes workers' rights to organize and to collective bargaining, the Committee notes that, in contrast, the Common Statute of Civil Servants: (i) does not refer explicitly to associations aiming to further and defend civil servants' occupational interests, let alone to trade unions; (ii) does not detail the organization, the functioning and the activities of these associations referred to in article 36; and (iii) does not make any mention of collective bargaining and of protection against anti-union discrimination.*

**206.** *The Committee therefore draws the Government's attention to the following. The standards contained in Convention No. 87 apply to all workers "without distinction whatsoever", and are therefore applicable to employees of the State. It was indeed considered inequitable to draw any distinction in trade union matters between workers in the private sector and public servants, since workers in both categories should have the right to organize for the defence of their interests [see **Digest**, op. cit., para. 212]. The difference in treatment by the national legislation between workers falling under the Labour Law and civil servants, combined with the absence of an explicit mention of the latter's right to establish and join occupational organizations, places civil servants' right to freedom of association in a precarious position. Such a situation can only engender practical difficulties of the kind mentioned in the complaint, if not amount to arbitrariness, to the detriment of civil servants' occupational organizations, their officials and their members.*

**207.** *The Committee will now turn to the specific issues arising from the complaint.*

**208.** *With respect first to the issue of prior authorization for the establishment of a union, the Committee notes that, in relation to the convention scheduled for 6 April 2003, the provincial authorities referred to the absence of authorization by the Ministry of Interior for the opening of the local branch. Under Article 2 of Convention No. 87, workers and employers have the right to establish and join "organizations of their own choosing without previous authorization". Indeed, the principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization [see **Digest**, op. cit., para. 244]. Although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations [see **Digest**, op. cit., para. 248]. Moreover, an appeal should lie with the courts against any administrative decision concerning the registration of a trade union. Such a right of appeal constitutes a necessary safeguard against unlawful or ill-founded decisions by authorities responsible for registration [see **Digest**, op. cit., para. 264]. These provisions and principles apply equally to the constitution of a trade union's branch.*

**209.** *Concerning collective bargaining rights of public employees and their right to be protected against anti-union discrimination, the Committee underlines the comments of the Committee of Experts that, under Convention No. 98, public employees other than those engaged in the administration of the State should benefit from the guarantees set out in the Convention. The Committee would recall in this respect that a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies) as well as officials acting as supporting elements in these*

*activities and, on the other hand, persons employed by the government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98 [see **Digest**, op. cit., para. 794].*

**210.** *For public employees falling under the scope of Convention No. 98, the Committee underlines that, under Article 1 of the Convention, the Government should take explicit measures to ensure that civil servants enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Firstly, such a protection should cover not only hiring and dismissal, but also any discriminatory measure during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker [see **Digest**, op. cit., para. 695]. Secondly, it is particularly desirable in the case of trade union officials because, in order to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on the account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect be given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest**, op. cit., para. 724]. Thirdly, legislation should lay down explicit remedies and penalties against acts of anti-union discrimination in order to ensure the effective application of Article 1 of Convention No. 98 [see **Digest**, op. cit., para. 697]. Finally, the Committee must emphasize 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; workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., paras. 739 and 741].*

**211.** *As far as collective bargaining is concerned, the Committee recalls that under Article 4 of the Convention, measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers, or employers' organizations, and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [see **Digest**, op. cit., para. 781]. Convention No. 98 and, in particular, Article 4 thereof concerning the encouragement and promotion of collective bargaining, applies both to the private sector and to nationalized undertakings and public bodies [see **Digest**, op. cit., para. 792].*

**212.** *Regarding the specific case of teachers, the Committee has recalled on numerous occasions that they should fully enjoy trade union rights. In particular, the Committee has emphasized the importance of promoting collective bargaining in the education sector [see **Digest**, op. cit., para. 804; 310th Report, Case No. 1928 (Canada/Manitoba), para. 175; 311th Report, Case No. 1951, (Canada/Ontario), para. 220].*

**213.** *In light of the above, the Committee considers that the Government should take the necessary measures to amend the Common Statute of Civil Servants so as to fully guarantee the right to organize and the right to collective bargaining of civil servants, consistent with Conventions Nos. 87 and 98 and the principles of freedom of association recalled above. The Committee deems it appropriate to refer the legislative aspects of this case to the Committee of Experts and reminds the Government that the technical assistance of the Office will be at its disposal if it so wishes to avail itself of this opportunity.*

### *Factual allegations*

**214.** *The Committee notes that CITA alleges interference in its activities by the local public authorities and the police. More specifically, CITA alleges that it was prevented from*

*exercising its right to assembly and from having access to workplaces to meet teachers. CITA contends that in all cases it duly informed the competent authorities one week in advance. Allegations of anti-union discrimination are also submitted. The Committee notes that the Government constituted an inter-ministerial working group to review the allegations and that its observations can be summarized as follows: (i) no conflict occurred between CITA and the local authorities, but there were misunderstandings at the beginning of CITA activities when its representatives were inexperienced; (ii) these misunderstandings were for the most part due to CITA's failure to comply with national legislation and schools' internal rules and, more specifically, to properly apply for authorization to hold meetings and open local branches or to seek permission to access workplaces during working hours; (iii) in some of the cases cited by CITA, meetings did eventually take place either at the time mentioned in the complaint or at a later date; and (iv) in general, public authorities merely carried out their responsibilities in the interests of public order or applied schools' internal rules.*

**215.** *The Committee must make the following preliminary considerations before examining in turn the issues of police intervention in trade union matters, workers' organizations' right to assembly, workers' organizations' right of access to workplaces and anti-union discrimination. The Committee notes that the complaint points to several difficulties that arose, from December 2002 until June 2003, between CITA and different local authorities, and which all concerned the organization of meetings or access to workplaces by CITA. The Committee notes that information provided by the Government confirms that these meetings or instances of access to workplaces had trade union objectives and that they all involved intervention on the part of the local authorities and the police. The Committee is also mindful of the conclusions it has reached on the insufficient legislative provisions in relation to civil servants' trade union rights and of the consequences that may be thus engendered in practice.*

**216.** *Turning now to the specific issues arising from the complaint, the Committee wishes to recall that in general the use of forces of order during trade union demonstrations should be limited to cases of genuine necessity [see **Digest**, op. cit., para. 146]. The Committee accordingly requests the Government to bring this principle to the attention of the police, the authorities responsible for authorizing public meetings, and school directors or head teachers.*

**217.** *Turning now to the issues of the right to assembly and access to workplaces, the Committee notes that it seems that CITA has merely "informed" one week in advance the local authorities of its intention to organize meetings, while the Government requires CITA to submit a "proposal" to be authorized by the competent authorities. In this context, the Committee will commence its examination by clarifying the rights and obligations of trade unions in such instances, in the following manner.*

**218.** *With respect first to the right to assembly of a workers' organization, the Committee refers to the conventions of 1 December 2002 and 6 April 2003 held to establish local branches, the meeting of 10 December 2002 to explain the trade union's role (which also involves a question of access to a workplace) and the seminar of 26 June 2003. With the exception of the meeting of 10 December 2002, which was to be organized in the premises of a public school, the Committee has not been informed of the exact locations of the other meetings.*

**219.** *A distinction must be drawn between meetings held within trade union premises and those held in public locations: while the first kind of meeting cannot be subject to prior authorization by the authorities, the requirement of prior permission for the second one is acceptable. More specifically, the right of occupational organizations to hold meetings in their premises to discuss occupational questions, without prior authorization and interference by the authorities, is an essential element of freedom of association and the*

*public authorities should refrain from any interference which would restrict this right or impede its exercise, unless public order is disturbed thereby or its maintenance seriously and imminently endangered [see **Digest**, op. cit., para. 130]. With respect to public meetings, the Committee would like to recall the following principles: firstly, the right to organize public meetings constitutes an important aspect of trade union rights [see **Digest**, op. cit., para. 133]. Secondly, the requirement of administrative permission to hold public meetings and demonstrations is not objectionable* per se *from the standpoint of the principles of freedom of association. The maintenance of public order is not incompatible with the right to hold demonstrations so long as the authorities responsible for public order reach an agreement with the organizers of a demonstration concerning the place where it will be held and the manner in which it will take place [see **Digest**, op. cit., para. 138]. Thirdly, permission to hold public meetings and demonstrations, which is an important trade union right, should not be arbitrarily refused [see **Digest**, op. cit., para. 139]. Finally, organizations must observe the general provisions relating to public meetings, which are applicable to all. This principle is contained in Article 8 of Convention No. 87, which provides that workers and their organizations, like other persons or organized collectivities, shall respect the law of the land [see **Digest**, op. cit., para. 140].*

**220.** *With respect to access to workplaces, the Committee notes that CITA has reported three instances in which such access was at stake: the meeting of 10 December 2002 to explain the role of the trade union, the events of 22 December 2002 when the president of CITA was seeking to bring assistance to teachers, and the events of 1 March 2003 concerning another of his visits to a school. In the course of the examination of another case, the Committee has underlined that for the right to organize to be meaningful, the relevant workers' organizations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members [see 329th Report, Case No. 2198 (Kazakhstan), para. 681, see also **Digest**, op. cit., para. 954]. Access should not of course be exercised to the detriment of the efficient functioning of the administration or public institutions concerned. Therefore, in such instances, the Committee has often indicated that the workers' organizations concerned and the employer should strive to reach agreements so that access to workplaces, during and outside working hours, should be granted to workers' organizations without impairing the efficient functioning of the administration or the public institution concerned.*

**221.** *In light of the above, the Committee requests the Government to take any measures deemed appropriate so that the local authorities, the police, as well as the local educational administrations and institutions are made fully aware of the above principles in relation to the holding of trade union meetings and the access by trade unions to workplaces. The Committee also requests CITA to bear in mind these principles in its future activities. Finally, the Committee requests the Government to invite the competent local authorities, including the educational authorities, and CITA to negotiate future agreements on the place where trade union public meetings will be held and the manner in which they will take place, as well as on facilities to be enjoyed by CITA, including access to workplaces, for the furtherance and defence of its members' occupational interests.*

**222.** *With respect to the two allegations relating to anti-union discrimination, the Committee notes the allegation according to which a letter was sent by a senior officer of the local administration of the Ministry of Education, Youth and Sport (MOEYS) with a view to instructing teachers not to join the complainant organization. The Committee notes also that, in relation to the events of 22 December 2002, it is alleged that teachers have been intimidated and threatened for having participated in a non-violent demonstration on 16 December 2002. From the Government's reply, the Committee notes that the senior officer denied having sent the alleged letter. It also notes from the record produced by the*

*Government that the participants in the demonstration of 16 December 2002, stated that they had simply been reminded of their statutory obligation since they had participated in the demonstration without authorization from the school director and that their absences had no further consequences. The Committee notes that it is not clear from the information placed at its disposal whether the demonstration in question had trade union objectives.*

**223.** *In view of the above contradictory and incomplete evidence, the Committee can only recall that no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities, whether past or present [see* ***Digest****, op. cit., para. 690] and refer the Government to its earlier conclusions on the necessity of adopting explicit measures to protect effectively civil servants from all acts of anti-union discrimination.*

**224.** *The Committee concludes its examination by drawing the Government's attention to the two following issues. Firstly, given that teachers' trade union rights are at stake in the present case, the Committee cannot ignore the lack of understanding on the part of officials of the local educational administration in dealing with CITA, which at times even seems to amount to an obstructive attitude to trade unions. This is reflected in the difficulties faced by CITA, which are not only recurrent but also occurred in more than one province. Furthermore, the Committee notes the governmental record of the hearing of a senior officer of the local educational administration, in relation to the events of 10 December 2002, which refers to CITA's disagreement with a policy of the MOEYS, as a reason for the prohibition of any of its activities in a particular school. The Committee therefore requests the Government to take specific measures, including training activities, so that these officials, including school directors, are fully apprised of the provisions of Conventions Nos. 87 and 98 and the principles underlined in this report concerning teachers' rights to freedom of association and collective bargaining. Special mention should be made of paragraph 2 of Article 3 of Convention No. 87, under which "the public authorities shall refrain from any interference which would restrict [the right of workers' organizations to organize their activities] or impede the lawful exercise thereof". In addition, the Government should diffuse widely future amendments to the Common Statute of Civil Servants requested earlier in this report.*

**225.** *Finally, the Committee would like to make the following observation on the method used by the Government to review the factual allegations brought before the Committee. The Committee notes the process put in place by the Government to investigate these allegations in a thorough manner. Nonetheless, to avoid any doubt being cast, such a process should always be established with the intention of guaranteeing independence and impartiality. Thus, the persons appointed to conduct the investigation should be unconnected with the allegations and the individuals who will be expected to give evidence. An inter-ministerial working group composed of officials of the Ministry of Education, in direct hierarchical line with the teachers heard as witnesses, places individuals in the invidious position of discussing trade union matters with their hierarchy. Having regard to the particular circumstances of the case, an investigative body constituted in this manner may be perceived by the workers concerned as being devoid of sufficient guarantees of independence and impartiality. The Committee trusts that respect for this principle will be ensured in the future by the Government.*

## The Committee's recommendations

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

***(a) The Committee considers that the Government should take the necessary measures to amend the Common Statute of Civil Servants so as to guarantee fully the right to organize and the right to collective bargaining of civil servants, consistent with Conventions Nos. 87 and 98, and the principles of freedom of association recalled in paragraphs 206-212 above; once they have been adopted, the Government should diffuse widely these amendments in particular amongst the local public authorities, including the local educational administration.***

***(b) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case and reminds the Government that the technical assistance of the Office will be at its disposal if it so wishes to avail itself of this opportunity.***

***(c) The Committee requests the Government to bring the principle of freedom of association on police intervention in trade union matters (paragraph 216 above) as well as those relating to the holding of trade union meetings (paragraph 219 above) and the access by trade unions to workplaces (paragraph 220 above), to the attention of the police and the authorities responsible for authorizing public meetings.***

***(d) The Committee requests the Government to take specific measures, including training activities, so that officials of the local educational administration, including school directors, are fully apprised of the provisions of Conventions Nos. 87 and 98, and the principles of freedom of association, with respect to teachers' rights to freedom of association and to collective bargaining.***

***(e) The Committee requests CITA to bear in mind, in its future activities, the principles of freedom of association in relation to the holding of trade union meetings (paragraph 219 above) and the access by trade unions to workplaces (paragraph 220 above).***

***(f) The Committee requests the Government to invite the competent local authorities (including the local educational administration) and CITA to negotiate future agreements on the place where trade union public meetings will be held and the manner in which they will take place, as well as on facilities to be enjoyed by CITA, including access to workplaces for the furtherance and defence of its members' occupational interests.***

***(g) Noting that the Government has put in place a process to investigate thoroughly the factual allegations, the Committee trusts that the Government will ensure that such a process contains guarantees of independence and impartiality.***

CASE NO. 2215

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

## Complaint against the Government of Chile presented by the Latin American Workers' Confederation (CLAT)

***Allegations: The complainant organization alleges (1) the anti-union dismissal of a trade union official in the Pedro Pablo Castillo company who, despite administrative and judicial decisions for his reinstatement, at present is still not occupying his post; and (2) anti-union activities against the Trade Union of the Sanitation Works Company of the Vth Region (ESVAL S.A.), including attempted suborning of personnel through threats and dismissals; illegal confiscation of officials' work equipment (telephones, computers); prohibition on performance of their duties and delay in payment of their earnings***

**227.** The Committee examined this case at its May-June 2003 meeting and presented an interim report to the Governing Body [see 331st Report, paras. 169-180, approved by the Governing Body at its 287th Session (June 2003)].

**228.** The Government sent new observations in communications dated 12 January and 9 February 2004.

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

## A. Previous examination of the case

**230.** At its May-June 2003 meeting, the Committee made the following recommendations [see 331st Report, para. 180]:

(a) In the circumstances of this case, the Committee requests the Government to adopt the necessary measures to ensure that Mr. Yapur Ruíz is reinstated in his place of work at least until the appeals lodged in this case are decided by the court. The Committee also requests the Government to keep it informed of developments.

(b) As regards the serious allegations concerning the Trade Union of the Sanitation Works Company of the Vth Region, ESVAL S.A., the Committee notes with regret that the Government has not communicated its observations in this respect and requests it to send them without delay in order to examine these allegations in full knowledge of the facts.

## B. The Government's reply

**231.** In its communications of 12 January and 9 February 2004, the Government refers to the situation concerning the dismissal of the trade union official Erick Dusan Yapur Ruíz, director of trade union No. 3 of the Pedro Pablo Castillo public transport company. The Government points out that, on 14 May 2002, a complaint alleging anti-union activities by the employer was brought before the First Labour Court of San Miguel, Case No. 3234-2002. The Court handed down a ruling on 25 June 2002, finding the employer guilty of the aforementioned activities and imposing a fine of 20 UT (payment units) (1 UT = US$50). The defendant lodged an appeal and submitted an application for judicial review for error of form. The Labour Directorate in turn lodged an appeal for review. The Supreme Court automatically quashed the final ruling because essential evidential procedures had been omitted. The court of first instance (First Labour Court) consequently brought the case back to the preliminary hearing stage. On 28 March 2003, the Labour Court ordered the reinstatement of the dismissed trade union official, cautioning the employer that any failure to comply with the court order would result in detention. On 2 May 2003 the company lodged an appeal for preventive constitutional protection *(amparo)*. The Court of Appeal rejected this appeal but replaced the threat of detention with a fine of 1 UTM (monthly payment unit). On 7 August 2003 a final ruling was handed down, finding the defendant guilty of anti-union activities and imposing a fine of 50 UTM, ordering the immediate reinstatement of the trade union official Mr. Yapur Ruíz and ordering the defendant to pay the costs of the case. On 20 August 2003 the defendant lodged an appeal and submitted an application for judicial review for error of form to the Court of Appeal. On 19 September 2003, the Court declared the application for judicial review to be inadmissible and, as regards the appeal, declared that proceedings relating to this matter were before the San Miguel Court of Appeal. This appeal is still pending and has been neither pleaded nor settled up to the date of the report supplied by the Labour Directorate in Case No. 2058 of 26 November 2003.

**232.** With regard to the situation of ESVAL, and in particular with respect to Mr. Aquiles Mercado, president of one of the enterprise trade unions, the Government declares that, on 1 April 2003, a former member of the trade union (of two members who had that status) brought a complaint (Case No. 708-03) before the Regional Electoral Tribunal of the Vth Region concerning the leadership elections held on 20 March 2003, in which Mr. Aquiles Mercado, the only member of the union at the time, was elected. The Electoral Tribunal decided, in accordance with a ruling of 30 October 2003, to annul that election, also declaring that a new election could not be held, since the trade union did not achieve the quorum laid down in article 227 of the Labour Code. That ruling was the subject of an appeal for reversal (the only admissible form of appeal) by Mr. Aquiles Mercado. Up to the date of the report supplied by the Labour Directorate in Case No. 2058 of 26 November 2003, that appeal has not been settled. Article 227 of the Labour Code lays down the following provisions:

> *Article 227*. In order to form a trade union in an enterprise which has more than fifty workers, a minimum of twenty-five workers representing at least ten per cent of the total of those who provide services in the said enterprise shall be required.
>
> Notwithstanding the above, in order to form a trade union in enterprises in which no trade union already exists, at least eight workers shall be required, and the quorum required in the previous subparagraph must be achieved within a period of not more than one year, on expiry of which the legal personality of the union shall statutorily cease to exist, should that requirement fail to be met.
>
> If the enterprise has fifty workers or less, a trade union may be formed by eight of those workers.

> If the enterprise has more than one establishment, the workers belonging to each establishment may also form a trade union, with a minimum of twenty-five workers representing at least thirty per cent of the workers of that establishment.
>
> Notwithstanding the above, whatever the percentage that they represent, a trade union may be formed by two hundred and fifty or more workers of the same enterprise.

**233.** In conclusion, the Government points out that the problem relating to Mr. Aquiles Mercado, according to information from the Labour Directorate, is that he elected himself president of a trade union which has only one member: himself. In this case there is no violation of freedom of association.

## C. The Committee's conclusions

**234.** *With regard to the allegations concerning the dismissal of the trade union official, Mr. Erick Dusan Yapur Ruíz, the Committee had noted in its previous examination of the case that the Government had informed it that he had been dismissed illegally in 2002 (as had been verified by the labour inspectorate) and that the court of first instance and the appeal court had ordered his reinstatement and imposed a heavy fine on the Pedro Pablo Castillo company [see 331st Report, para. 177].*

**235.** *The Committee notes the new statements by the Government to the effect that, after various appeals, on 28 March and 7 August 2003, the judicial authority again ordered on two occasions (the last of these via a final ruling) the reinstatement of the aforementioned trade union official and imposed fresh sanctions on the company, which continued to appeal.*

**236.** *Under these circumstances, the Committee deplores the delay in this case and reiterates the conclusions that it formulated at its May-June 2003 meeting [see 331st Report, paras. 178 and 179]:*

> The Committee recalls that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed (see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, para. 739).

**237.** *In view of the circumstances of this case, the Committee once again requests the Government to adopt measures to ensure that Mr. Yapur Ruíz is reinstated in his post at least until the last appeal brought before the courts is settled. The Committee also requests the Government to keep it informed of developments.*

**238.** *With regard to the allegations concerning the Trade Union of the Sanitation Works Company of the Vth Region (ESVAL S.A.), the Committee recalls that the complainant organization had alleged that serious incidents had occurred against that union, especially against Mr. Aquiles Mercado, the president of the union, and other officials of the union, and that the union had been the subject of pressure and harassment from the company since 1996; according to the complainant organization, since the trade union firmly opposed the privatization of the company, attempts were made to suborn the staff by means of threats and dismissals; officials' work equipment (telephones, computers) was illegally confiscated; they were prohibited from performing their duties and payments of their wages were delayed in order to intimidate them and make them leave the union [see 331st Report, para. 179].*

**239.** *The Committee notes the Government's statements to the effect that, on 30 October 2003, the judicial authority annulled the 20 March 2003 election of Mr. Aquiles Mercado as president of the trade union since the union had just one member (Mr. Aquiles Mercado*

*himself), and that under these circumstances article 227 of the Labour Code concerning the minimum number of workers for forming a trade union was not respected. The Committee notes the fact that Mr. Aquiles Mercado lodged an appeal for reversal which has still not been settled.*

**240.** *The Committee nevertheless wishes to emphasize the fact that the complaint was submitted by the complainant organization in November 2002 and therefore predates the unusual elections referred to by the Government. Consequently, the Committee requests the Government to carry out an investigation into the allegations and keep it informed of its result.*

## The Committee's recommendations

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

***(a) In view of the circumstances of this case, the Committee once again requests the Government to adopt the necessary measures to ensure that the trade union official, Mr. Yapur Ruíz, is reinstated in his post at least until the last appeal brought before the courts is settled and requests the Government to keep it informed of developments.***

***(b) With regard to the allegations concerning the Trade Union of the Sanitation Works Company of the Vth Region, (ESVAL S.A.), the Committee requests the Government to carry out an investigation in this respect and keep it informed of its result.***

CASE NO. 2296

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

## Complaint against the Government of Chile presented by the National Confederation of Federations and Trade Unions of the Food, Tourism, Trade and Services Industry (COTIACH)

***Allegations: Failure to deduct from wages of non-unionized employees sums corresponding to advantages derived from collective bargaining, dismissal of workers and non-compliance with the collective agreement by Distribuidora de Industrias Nacionales S.A.; dismissal of members of the works union, dismissal of a trade union official, harassment of workers, exertion of pressure on workers not to join the works' union and recruitment of piece-workers and trainees by Hoteles Carrera-Hotel Araucano de Concepción; dismissal of union members by Multivending Ltda.; and dismissal of all the workers, including the union officials, by Andonaegui S.A.***

**242.** The National Confederation of Federations and Trade Unions of the Food, Tourism, Trade and Services Industry (COTIACH) presented its complaint in a communication dated 18 July 2003.

**243.** The Government sent its observations in a communication dated 29 January 2004.

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

### A. The complainant's allegations

**245.** The National Confederation of Federations and Trade Unions of the Food, Tourism, Trade and Services Industry (COTIACH) alleges that, by Ordinary Act No. 2651, the National Labour Directorate fined Distribuidora de Industrias Nacionales S.A. for failure to pay over to the enterprise's works' union the deductions that it was supposed to make from the wages of non-unionized workers in the year 2000 (corresponding to advantages deriving from the collective agreement of 1999), and informed the union that it should apply to the courts for payment of the said deductions. The complainant adds that the enterprise has likewise failed to make similar deductions in respect of the new collective agreement concluded in 2001.

**246.** The complainant further alleges that, since the collective bargaining process that ended with the signing on 26 December 2001 of a collective agreement covering 421 workers, a total of 102 workers affiliated to the union have been dismissed because of "pressing needs

of the enterprise" (section 161 of the Labour Code) and that these workers were immediately replaced by part-time workers employed under individual contracts, as provided for under sections 40bis(a), 40bis(b), 40bis(c) and 40bis(d) of the Labour Code. Moreover, in November and December of 2001 and 2002, in a bid to wreck the trade union organization, the enterprise obliged the part-time workers to work full time, thereby inflicting damages both in financial terms and in terms of labour rights on the workers affiliated to the trade union and on those employed under part-time contracts. In disregard of the provisions of the 2001 collective agreement, the enterprise threatened the workers with dismissal if they did not sign an annex to their individual contracts, modifying the hours of work and treating Saturdays and Sundays as normal working days, thus putting an end to the bonus that had been negotiated in the collective agreement currently in force (eighth clause, letter *(h)*). The complainant adds that on 4 November 2002 the Labour Directorate was asked to issue a legal ruling on this matter and that on 28 May 2003 the Directorate ruled (ORD. 2035) that the enterprises had acted within the law.

**247.** Regarding Hoteles Carrera-Hotel Araucano de Concepción, COTIACH alleges that since about 1996 that enterprise has systematically resorted to practices that have resulted in the trade union's membership declining from 90 to a mere 24 workers.

**248.** The complainant adds that on 4 April 1996 Mr. Manuel Castillo was dismissed because of "pressing needs of the enterprise" (section 161 of the Labour Code) even though he enjoyed trade union immunity as National Director of COTIACH; he was reinstated in his job on 9 April 1996. In July and August 1996 the enterprise began to harass workers by unilaterally changing their rest days, obliging them to work night shifts and adding new functions to their jobs that were not provided for under their individual contracts. In December 1996 the enterprises applied to the First Labour Tribunal of Concepción to waive the immunity of trade union official Miguel Arroyo on the grounds that he left the enterprise without prior permission. On 25 February 1997 the Tribunal ruled in favour of the union official.

**249.** From April to September 1997 the enterprise once again started taking unilateral decisions, obliging workers to change their rest days and disregarding the terms of individual contracts relating to daily hours of work and functions. The same year the enterprise started recruiting workers on a piece-work basis; this measure, which was aimed specifically at unionized workers, resulted in the dismissal of workers with long-term contracts.

**250.** During 1998 the trade union repeatedly called for financial inspections, which had led in the past to the enterprise being fined. The situation of the trade union suffered from the deliberate attempts of the enterprise to reduce the organization's strength, with the complicity of the regional labour authority which refused to carry out financial inspections in response to complaints lodged by the trade union, despite the fact that the enterprise had previously been inspected and fined for such illegal activities and had not changed its conduct.

**251.** As from 2002 the enterprise recruited trainees to replace union members that had been dismissed; this, together with the recruitment of piece-workers, has completely undermined the trade union organization.

**252.** The complainant organization draws attention to the National Labour Directorate's report No. 3581/0186 of 29 October 2002 in which it concluded that an employer can have on its premises an unlimited number of trainees without running foul of the law. Furthermore, the enterprise has infringed the principle of freedom of association by systematically exerting pressure on new workers not to join the trade union and on workers already with the

organization to leave the union; for this it has employed a variety of methods, from the promise of wage increases to the offer of fictitious jobs within the enterprise.

**253.** As regards Multivending Ltda., COTIACH states that early in 2002 the enterprise entered into collective bargaining with more than 30 members of the trade union but that because of the constant pressure and harassment by the employer there were only three members of the organization left at the beginning of the current year. When the organization applied to the National Labour Directorate to appeal against these anti-union practices, it declared in its ordinary ruling No. 2289 of 17 June 2003 that its investigations had not brought to light any anti-union practices.

**254.** Finally, with regard to Andonaegui S.A., a works' union was set up in the enterprise during the first half of 2001. After the conclusion of the collective bargaining process, the enterprise started harassing the workers (all of them women) to make them leave the company; the pressure tactics used ranged from cutting off the hot water in the showers to refusing to offer the workers even minimum working conditions. The enterprise dismissed all the workers, including the union officials, without any compensation whatsoever, and it was only this that induced the labour authority to refer the matter to the labour tribunals in accordance with the labour legislation.

## B. The Government's reply

### *Distribuidora de Industrias Nacionales S.A.*

**255.** The Government states that, in its regular report No. 2651 of 8 July 2003 based on the financial inspection report, the Labour Directorate observes that Distribuidora de Industrias Nacionales S.A. was required to make wage deductions for 2000 in respect of the advantages deriving from the 1999 collective agreement and pay them over to the trade union organization and that, since the deductions were not made, the only resort for the union officials was to apply to the courts for payment of the amounts that had not been collected. The Government adds that the enterprise was duly fined.

**256.** Regarding the collective agreement signed in 2001, which had been concluded as a result of a revision of the labour legislation and where, as with the collective agreement of 1999, the 75 per cent of the union dues corresponding to the advantages deriving from the agreement had again not been collected, the Government indicates that this is once again because the trade union organization has not lodged an appeal with the Labour Tribunal.

**257.** The Government encloses a communication from the enterprise dated 1 December 2003 indicating that the wage deductions were not made because in point of fact the advantages deriving from the agreement were not extended to the non-unionized workers; consequently, no fine was imposed in this connection by the administrative authority at any time nor was any appeal lodged with it.

**258.** As to the dismissal of workers, the Government states that the matter was reported to the Freedom of Association Office of the Labour Directorate. For its part, the enterprise states that the dismissals were part of the normal rotation of staff that are typical of this kind of company and affected both unionized and non-unionized workers; compensation was paid as stipulated in the relevant legislation. The recruitment of part-time workers was in response to the adaptation of the enterprise's commercial activity to current market conditions. The enterprise categorically denies any intention to undermine the trade union organization.

**259.** Concerning the alleged non-compliance with the 2001 collective agreement, the Government notes that the Labour Directorate concluded that no such non-compliance could be invoked because, as the enterprise points out, a possibility exists under the legislation to modify working conditions by common agreement. The parties concerned thus decided by common agreement to modify the days and hours of work, including as they affected Saturdays and Sundays which were the days when sales were greatest and which therefore afforded the employees bigger commissions. Consequently, payment of the bonus provided for under the eighth clause, letter *(h)* of the collective agreement was waived and replaced by the new method of work that was more advantageous for the workers.

### *Hoteles Carrera-Hotel Araucano de Concepción*

**260.** With regard to the systematic dismissal of workers that has resulted in a decline in membership of the trade union from 90 to 24, the Government indicates that an investigation conducted by the Labour Directorate was unable to determine that the dismissals could be classified as anti-union practices inasmuch as they had taken place over a period of seven years and were due to pressing needs of the enterprise.

**261.** As to the dismissal of Mr. Castillo, National Director of the National Confederation of Federations and Trade Unions of the Food, Tourism, Trade and Services Industry (COTIACH), the Government states that this was a mistake, as the enterprise was unaware that Mr. Castillo was a union official and that, as the complainant organization recognizes, he was subsequently reinstated five days later.

**262.** With respect to the alleged harassment of the workers from 1996 onwards, infringement of their work contracts, request for a trade union official's immunity to be lifted, dismissal of unionized workers and their replacement by piece-workers, recruitment of trainees and pressure on new workers not to join the trade union, the Government states that the Labour Directorate considered that the alleged facts did not constitute anti-union practices, inasmuch as the few cases that had been verified were not in any significant number.

### *Multivending Ltda.*

**263.** The Government states that the complainant organization has not produced sufficient evidence to conclude that the principle of freedom of association has been violated, since it merely indicates that its membership has declined. The Labour Directorate reached the same conclusion in its regular report No. 4731.

### *Andonaegui S.A.*

**264.** The Government states that the Labour Directorate was informed of the allegations regarding the dismissal of all the workers, including the trade union officials, after the conclusion of the collective bargaining process, and immediately referred the matter to the courts, whose decision is still pending.

## C. The Committee's conclusions

### *Distribuidora de Industrias Nacionales S.A.*

**265.** *The Committee observes that the allegations refer to the failure of the enterprise to make the deductions from wages corresponding to advantages deriving from collective bargaining, as provided for by the legislation (a deduction amounting to 75 per cent of the*

*union dues should have been made from the wages of the non-unionized workers because the coverage of the 1999 and 2001 collective agreements extended to them too); to the dismissal of 102 workers; and to non-compliance with the 2001 collective agreement. Regarding the failure to make the deductions from the wages of non-unionized workers, the Committee notes the Government's statement that, after the facts had been established with respect to the 1999 collective agreement, the enterprise had been fined and that, if the complainant organization was unable to have the deductions made, its only recourse was to refer the matter to the labour courts. The Government also notes that the proper channel for obtaining payment of the deductions corresponding to the 2001 collective agreement is through the courts. The Committee observes, however, that the information provided by the Government does not match the communication of the enterprise, which the Government itself encloses with its reply. The enterprise states that the advantages deriving from the collective agreement were not in fact extended to non-unionized workers and that it was therefore not required to make the deductions and that it had never been fined or been the object of official complaints. The Committee calls on the Government to clarify these different versions and to send it the text of the decision of the Labour Inspectorate to the effect that the enterprise was fined. The Committee points out to the trade union of Distribuidora de Industrias Nacionales S.A. that it rests with the union to lodge an official complaint with the labour courts for payment of the deductions corresponding to the advantages deriving from the 1999 and 2001 collective agreements, if it so desires.*

**266.** *Concerning the alleged dismissal of 102 union members, the Committee notes the Government's information that the matter was brought before the Freedom of Association Office of the Labour Directorate and that the enterprise denies that the action taken was anti-union in nature. The Committee calls on the Government to keep it informed of any decision taken by said Office in this matter.*

**267.** *Concerning the alleged non-compliance with the 2001 collective agreement, the Committee notes the Government's information that the Labour Directorate concluded that there had not been such non-compliance. The Committee calls on the Government to inform it whether the trade union organization has lodged an official appeal against the said decision.*

### *Hoteles Carrera-Hotel Araucano de Concepción*

**268.** *The Committee observes that the allegations refer to the systematic dismissal of workers and the resulting decline in the membership of the works' union from 90 to 24, the dismissal of Mr. Manuel Castillo, National Director of the National Confederation of Federations and Trade Unions of the Food, Tourism, Trade and Services Industry (COTIACH), the harassment of workers since 1996 and failure to respect their contracts, the dismissal of unionized workers and their replacement by piece-workers and trainees and the pressure on new workers not to join the trade union.*

**269.** *Concerning the alleged systematic dismissal of workers in the Hoteles Carrera-Hotel Araucano de Concepción enterprise, and the resulting decline in membership from 90 to 24, the Committee notes that, according to the Government, the Labour Directorate conducted an investigation and was unable to determine whether the dismissals could be classified as anti-union practices inasmuch as they had taken place over a period of seven years and were due to pressing needs of the enterprise.*

**270.** *Concerning the dismissal of the trade union official Mr. Manuel Castillo, the Committee observes that both the complainant organization and the Government state that the official was reinstated in his job five days after he was dismissed and that, according to the Government, his dismissal was a mistake (the enterprise being unaware of Mr. Castillo's*

*status as a union official). As to the dismissal of trade union official Mr. Miguel Arroyo, the complainant organization itself notes that the tribunal ruled in his favour.*

**271.** *Concerning the alleged harassment of the workers since 1996 and failure to respect their contracts, the dismissal of unionized workers and their replacement by piece-workers and trainees and the pressure on new workers not to join the trade union, the Committee notes that the Labour Directorate's investigation indicated that the few cases that had been verified were not in a sufficiently significant number to be said to constitute a violation of the principle of freedom of association. That being so, the Committee will not pursue its examination of these allegations any further.*

### *Multivending Ltda.*

**272.** *The Committee observes that the allegations relate to the dismissal of a large number of unionized workers by the enterprise, with the result that the union only had three members left at the beginning of 2003. The Committee notes that, according to the Government, the complainant organization has not produced sufficient evidence to conclude that the principle of freedom of association has been violated, since it merely indicates that its membership has declined, and that the Labour Directorate reached the same conclusion in its regular report No. 4731. That being so, the Committee will not pursue its examination of these allegations any further.*

### *Andonaegui S.A.*

**273.** *The Committee observes that the allegations relate to the dismissal of all the workers of the enterprise, including the union officials, after the conclusion of the collective bargaining process. The Committee notes that, according to the Government, the matter was referred to the Labour Directorate which immediately lodged a complaint with the courts and that a decision is still pending. The Committee calls on the Government to keep it informed of the decision handed down by the judicial authority.*

## The Committee's recommendations

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

***(a) Regarding the failure to deduct from wages of non-unionized employees sums corresponding to the advantages derived from the collective agreements of 1999 and 2001, the Committee points out to the trade union of the Empresa Distribuidora de Industrias Nacionales S.A. that it rests with the union to lodge an official complaint with the labour courts for payment of said deductions, if it so desires; the Committee also calls upon the Government to clarify the discrepancies between its own statements regarding deductions and the enterprise's communication on this subject, and to send it a copy of the decision handed down by the Labour Inspectorate to the effect that the enterprise has been fined, which the enterprise denies.***

***(b) Regarding the alleged dismissal of 102 workers of Distribuidora de Industrias Nacionales S.A. that had been brought before the Freedom of Association Office of the Labour Directorate, the Committee calls on the Government to keep it informed of any decision taken by the said Office.***

***(c) Regarding the alleged dismissal of all the workers of Andonaegui S.A., including the union officials, after the conclusion of the collective bargaining process, the Committee calls on the Government to keep it informed of the decision handed down by the judicial authority.***

CASE NO. 2253

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

## Complaint against the Government of China/Hong Kong Special Administrative Region presented by the Hong Kong Confederation of Trade Unions (HKCTU)

***Allegations: The complainant alleges that by enacting the Public Officers Pay Adjustment Ordinance in 2002, the Government unilaterally reduced civil service pay without proper negotiations with civil service unions and refused to settle the dispute over pay adjustment through continued dialogue or through a committee of inquiry, as provided in the 1968 Agreement between the Government and the main staff associations***

**275.** In a communication dated 10 March 2003, the Hong Kong Confederation of Trade Unions (HKCTU) submitted a complaint of violations of freedom of association against the Government of China/Hong Kong Special Administrative Region.

**276.** The Government sent its observations in a communication dated 8 March 2004.

**277.** China has declared the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) applicable in the territory of Hong Kong Special Administrative Region (HKSAR) with modifications. It has declared the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) as well as the Labour Relations (Public Service) Convention, 1978 (No. 151) applicable without modifications.

### A. The complainant's allegations

**278.** In its communication dated 10 March 2003 the complainant alleges that, by enacting the Public Officers Pay Adjustment Ordinance in 2002, the Government unilaterally reduced civil service pay without proper negotiations with civil service unions and refused to settle the dispute over pay adjustment through continued dialogue or through a committee of inquiry, as provided in the 1968 Agreement between the Government and the main staff associations.

### *Unilateral reduction of civil service pay without negotiations*

**279.** The complainant initially presents the mechanism of the annual civil service pay adjustment. According to the complainant, the Net Pay Trend Indicators form the basis for the civil service pay adjustment. They are produced on the basis of a survey of private sector pay trends which is commissioned annually by the independent Pay Trend Survey Committee. The Pay Trend Survey produces three Gross Pay Trend Indicators which represent the movements in private sector pay for each (upper, middle and lower) salary band from 2 April the previous year until 1 April of the current year. The payroll costs of civil service increments are then deducted from the Gross Pay Trend Indicators to produce the Net Pay Trend Indicators. Apart from the movements in private sector pay, factors such as changes in the cost of living, the state of the economy, budgetary considerations, the staff sides' pay claims, and the civil service morale are all taken into account when determining civil service pay adjustment.

**280.** The complainant describes the usual procedure for deciding on the civil service pay adjustment. After taking into account the above six factors, the Chief Executive in Council puts an offer of pay adjustment for each salary band to the staff sides of the four central consultative councils, i.e., the Senior Civil Service Council (SCSC), the Model Scale 1 Staff Consultative Council (Mod 1 Council), the Disciplined Services Consultative Council (DSCC) and the Police Force Council (PFC). Having considered the views of the staff sides on the offer, the Chief Executive in Council then makes a final decision on the annual civil service pay adjustment.

**281.** The complainant adds that the findings of the 2001-02 Pay Trend Survey were announced on 6 May 2002 and endorsed on 13 May 2002 by the Pay Trend Survey Committee. The Net Payment Trend Indicators (forming the basis for the civil service pay adjustments) were -4.42 per cent for the upper salary band, -1.64 per cent for the middle salary band, and -1.58 per cent for the lower salary band. On 15 May 2002, the staff sides of three central consultative councils (the SCSC, the Mod 1 Council and the DSCC) submitted their pay claims, urging the Government to freeze civil service pay for all salary bands despite the negative Net Payment Trend Indicators (the PFC did not submit any pay claims). On 22 May 2002 the Chief Executive in Council decided that an offer of a pay reduction of -4.42 per cent for the upper band, -1.64 per cent for the middle band and -1.58 per cent for the lower band, with effect from 1 October 2002, should be put to the staff sides of the four central consultative councils. The Chief Executive in Council also agreed in principle that in the event of a decision to reduce civil service pay, a bill should be introduced in the Legislative Council to provide for the specified rates of adjustment. On 24 May 2002 the staff sides of the SCSC and the Mod 1 Council reiterated their original proposal of a pay freeze. On 25 May 2002 the staff side of the DSCC proposed that the civil service pay adjustment exercise be held in abeyance pending the completion of the comprehensive review of the civil service pay policy and system. All of them objected to the proposed legislative approach to implement a pay reduction. The staff council of the fourth consultative council, the PFC, did not submit any views. On 28 May 2002, after having considered the reactions of the staff sides to the pay offer, the Chief Executive in Council decided that this year's civil pay should be reduced as originally proposed and that the Public Officers Pay Adjustment Bill (the Bill) should be introduced in the Legislative Council. The first and second readings of the Bill were then scheduled for the Legislative Council sitting of 5 June 2002. The Bill was finally passed at the Legislative Council sitting on 11 July 2002, and the Public Officers Pay Adjustment Ordinance was published in the Gazette on 19 July 2002 (copy attached).

**282.** The complainant alleges that although there is a long-established consultative machinery within the HKSAR civil service, the role of civil service unions in determining the

remunerations of civil servants is rather marginal and their participation is limited to submitting their pay claims and commenting on the pay offer made by the Chief Executive in Council. There is no negotiation, in its ordinary sense, between the Government and civil service unions during the pay adjustment exercise, and the determination of civil service pay is essentially the prerogative of the Government under the existing mechanism.

**283.** The complainant further indicates with regard to the 2002 civil service pay adjustment exercise, that the Chief Executive in Council made the final decision just one week after putting the pay offer to the staff sides of the four central consultative councils. Thus, in a letter of 24 May 2002, the staff side of the SCSC held that the spirit of consultation had not been respected and that the normal process of consultation and negotiation to arrive at an agreement had not been conducted in an open-minded and constructive manner. According to the complainant, the undue haste with which the process had been conducted gave the clear impression that the Government had already made up its mind. It was obvious that no meaningful negotiations could have taken place in such short period of time, given the controversies of this year's civil service pay reduction. The Public Officers Pay Adjustment Bill had been drafted and announced well before the Administration's decision was made known to the staff side. The complainant contends that the Government's hasty decision to cut civil service pay deprived in effect civil service unions of the right to participate in determining the remunerations of civil servants, contrary to Article 4 of Convention No. 98 and Article 7 of Convention No. 151.

### *Refusal to settle the dispute*

**284.** The complainant adds that the staff side of the Senior Civil Service Council wrote to the Chief Executive on 31 May 2002 requesting the setting up of an independent committee of inquiry under the 1968 Agreement between the Hong Kong Government and the main staff associations, to deal with the dispute over this year's civil service pay adjustment (copy attached). This request was supported by a total of 67 civil service unions in a joint statement of 5 June 2002, in which they undertook that they would accept the outcome of the inquiry (copy attached). The complainant explains that according to clause 7 of the 1968 Agreement, a committee of inquiry can be appointed by the Chief Executive where there are no prospects of reaching agreement on a matter within the scope of the Agreement, provided that the matter in dispute is not, in the opinion of the Chief Executive, trivial, or a matter of settled public policy, or affects the security of the HKSAR. The complainant adds that on 11 June 2002 the Chief Executive decided not to appoint a committee of inquiry under the 1968 Agreement because, as indicated in his reply, he was of the opinion that it was a matter of settled public policy that in determining the size of each year's civil service pay adjustment, the Government took into account certain factors, some of which, such as the Net Pay Trend Indicators and the cost of living, were capable of upward and downward movements. Thus, according to the Chief Executive, it was inherent in the existing mechanism that civil service pay may be increased or decreased (copy attached).

**285.** The complainant considers this argument unacceptable because as conceded by the Government, under the existing employment contracts of most serving civil servants, the Government had no authority to reduce civil service pay unilaterally. The complainant quotes the Secretary for Civil Service (SCS) as saying before the Legislative Council on 5 June 2002 that the standard memorandum on conditions of service and the employment contracts of most serving civil servants (except for a very small number of officers recruited since June 2000) do not contain any express provision authorizing pay reduction by the Government and, on the basis of decided cases, the courts are unlikely to accept that a general power of variation could apply to such a fundamental term as the salary. The complainant alleges that it is therefore disputable whether the Government could reach a pay reduction decision unilaterally. Consequently, according to the complainant, the Chief

Executive's decision against the appointment of a committee of inquiry under clause 7 of the 1968 Agreement on the ground that the matter in dispute is a matter of settled public policy is unsubstantiated.

**286.** With regard to the Government's legislative approach to reduce civil service pay, the complainant notes that the Chief Executive argued that the decision to give effect to the 2002 civil service pay adjustment by legislation was a matter of implementation of a settled policy, and that whether this decision could have been implemented without legislation or whether the proposed legislation was constitutional, were questions of law which a committee of inquiry would not be able to resolve. According to the complainant, the Government's argument that a legislative approach was but a technical means to implement the decision of pay reduction was unconvincing because it ignored its far-reaching implications on the existing regime regulating civil service pay. Prior to the enactment of the Public Officers Pay Adjustment Ordinance, civil service pay was not governed by legislation and was purely a matter of contractual relationship between the Government and civil servants. Since the enactment of the Ordinance represented a departure from the existing regime and a significant change in the conditions of service affecting all civil servants, the Government was obliged, on the basis of general legal policy on contractual relationships, to negotiate with civil service unions with a view to reaching an agreement; in the event that an agreement could not be reached, the matter in dispute should be referred to a committee of inquiry appointed under the 1968 Agreement. Consequently, the complainant contends that a legislative approach to reduce civil service pay is not a matter of settled public policy, and the Government's refusal to appoint a committee of inquiry under the 1968 Agreement constitutes a breach of the terms of a collective agreement between the Government and the main civil service unions.

**287.** The complainant alleges that although some Legislative Council members urged the Government to reconsider the staff sides' request for the appointment of a committee of inquiry under the 1968 Agreement, the Government maintained its stance, pointing out that despite the undertaking by 67 civil service unions to accept the outcome of the inquiry, individual civil servants would not be bound by the recommendations of a committee of inquiry. Moreover, the SCS stated before the Legislative Council on 11 July 2002 that negotiations with civil service unions were obstructed by the existence of 300 civil service unions and 180,000 civil servants, and the impossibility to draw up a new agreement with each one of them. The complainant points out that this is exactly the reason why collective bargaining machinery, with provisions laying down objective procedures for determining the representative status of civil service unions for bargaining purposes, is essential to the good management of the civil service. Thus, the complainant suggests that the only proper way to address this problem would be to introduce legislation to give legal effect to the 1968 Agreement instead of abandoning it altogether as the Government did. The complainant is also of the view that the present impasse is evidence of the Government's failure to take necessary measures to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment of civil servants with civil service unions.

**288.** In conclusion, the complainant alleges that the Government's refusal to extend the consultation period despite repeated calls from civil service unions for continued dialogue to resolve the differences, and its turning down of the request to refer the matter to an independent committee of inquiry, constituted a violation of Article 8 of Convention No. 151.

## B. The Government's reply

**289.** In its communication dated 8 March 2004, the Government indicates that it does not consider that there is any violation of Conventions Nos. 98 and 151 in relation to the 2002 civil service pay adjustment.

### *Unilateral reduction of civil service pay without negotiations*

**290.** The Government first provides information on the civil service pay policy and system, the objective of which is to offer sufficient remuneration to attract, retain and motivate staff of a suitable calibre to provide the public with an effective and efficient service. In this framework, the principle of broad comparability with the private sector is an important factor and has underpinned civil service pay policy since the 1960s. As of 1974, broad comparability with pay movements in the private sector has been assessed annually through a Pay Trend Survey. The Pay Trend Survey is carried out by the independent Pay Survey and Research Unit. The results are analysed and validated by the Pay Trend Survey Committee which comprises representatives from the staff sides of the central consultative councils. The survey produces a Gross Pay Trend Indicator for each salary band, which represents the weighted average pay adjustment for all surveyed employees in the respective salary band during the survey period (from 2 April of the previous year to 1 April of the survey year). Following validation by the Pay Trend Survey Committee, the Gross Pay Trend Indicators are submitted to the Government, which in turn deducts the payroll cost of civil service increments to produce the Net Pay Trend Indicators for each salary band. The Net Pay Trend Indicators form one of the factors which the Government takes into account in determining the size of the annual civil service pay adjustment. Under the prevailing mechanism, the Government decides on the size of the annual civil service pay adjustment having regard to six factors (Net Pay Trend Indicators, state of the economy, budgetary considerations, cost of living, pay claims of the staff sides of the central consultative councils and civil service morale).

**291.** The Government adds that in accordance with the established procedures, the Government consults the staff sides of the central consultative councils in the course of the annual civil service pay adjustment exercise. In the first place, the staff sides are represented on the abovementioned Pay Trend Survey Committee which validates the findings of the Pay Trend Survey. Moreover, following the validation, the Government invites the staff sides to submit their pay claims for that year. In the light of the staff sides' pay claims and other relevant factors, the Chief Executive in Council then takes a view on the pay offer to be made to the staff sides. Finally, taking account of the staff sides' comments on the Government's pay offer and other relevant factors, the Chief Executive in Council makes a final decision on the pay adjustment for that year.

**292.** With regard to the 2002 civil service pay adjustment in particular, the Government indicates that when the 2001-02 Pay Trend Survey was released on 6 May 2002, its results were a decrease in the Gross Pay Trend Indicators for the three salary bands (-3.39 per cent for the upper band, -0.60 per cent for the middle band and -0.79 per cent for the lower band). The Pay Trend Survey Committee discussed and validated the findings of the Survey on 13 May 2002. The results were submitted to the Government which deducted, in accordance with the established mechanism, the payroll cost of civil service increments from the Gross Pay Trend Indicators to produce the Net Pay Trend Indicators as follows: -4.42 per cent for the upper salary band, -1.64 per cent for the middle salary band and -1.58 per cent for the lower salary band. The staff sides of the four central consultative councils were invited to submit their pay claims. Three of them, namely, the Senior Civil Service Council (SCSC), the Model Scale 1 Staff Consultative Council (Mod 1 Council) and the Disciplined Services Staff Consultative Council (DSCC) submitted their claims to

the Government on 15 May 2002, urging the Government to freeze civil service pay for all salary bands despite the negative pay trend indicators. The staff side of the Police Force Council (PFC) decided not to submit a pay claim.

**293.** At the meeting of the Executive Council on 22 May 2002, it was decided, among other things, that an offer of a pay reduction of -4.42 per cent for the directorate and the upper salary band, -1.64 per cent for the middle salary band and -1.58 per cent for the lower salary band should be put to the staff sides of the four central consultative councils. The Chief Executive in Council also gave its agreement in principle to a draft Public Officers Pay Adjustment Bill to implement the proposed pay reduction. The Government specifies that in coming to this decision, the Chief Executive in Council took full account of the relevant considerations under the prevailing mechanism for civil service pay adjustment, including: (1) the Net Pay Trend Indicators which showed a downward trend; (2) the state of the economy which underwent a distinct downturn in 2001 and remained modest in 2002 with unemployment reaching a new high of 7 per cent; (3) budgetary considerations: the Government faced a structural fiscal deficit problem of HK$65.6 billion for 2001-02 and HK$45.2 billion for 2002-03 and set the target of reducing public expenditure to 20 per cent of gross domestic product by 2006-07; (4) changes in the cost of living: the composite consumer price index had declined by 1.8 per cent by 31 March 2002; (5) the staff sides' pay claims urging the Government to freeze civil service pay; and (6) civil service morale.

**294.** The Government attaches the text of a brief submitted to the Legislative Council in which these elements are analysed. The contractual implications of the adjustment are also carefully analysed in the brief, which provides that since the standard Memorandum on Conditions of Service (governing the employment arrangements for a civil servant) does not expressly reserve for the Government the right to reduce the salaries of civil servants, there is a risk that a decision to reduce civil service pay without legislation will be subject to a successful legal challenge; thus, the Government should seek the enactment of legislation to provide for an express reduction of civil service pay at the specified rates of adjustment for different salary bands. The text of the Public Officers Pay Adjustment Bill is attached to the brief, which is dated 22 May 2002, as its Annex A.

**295.** The Government adds that on 22 May 2002, the staff sides of the central consultative councils were informed of the Chief Executive in Council's decision and were invited to provide their views on the pay offer. In response, the staff sides of three consultative councils (SCSC, Mod 1 Council and DSCC) reiterated that a pay freeze would be appropriate. On 28 May 2002, the Executive Council decided that the Government should adjust civil service pay as originally proposed, and that the Public Officers Pay Adjustment Bill should be introduced into the Legislative Council. The Government adds that in coming to this decision the Chief Executive in Council took full account of the views of the staff sides of three central consultative councils (SCSC, Mod 1 Council and DSCC) as well as all the other relevant factors (the Government attaches the second brief to the Legislative Council dated 28 May 2002, in which consideration is given to these factors).

**296.** The Government adds that following approval by the Chief Executive in Council, the Public Officers Pay Adjustment Bill was published in the Gazette on 31 May 2002 and introduced into the Legislative Council on 5 June 2002. Interested bodies, including the staff sides of the central consultative councils and the major service-wide staff unions, were invited to give their views on the Bill which was passed by the Legislative Council on 11 July 2002. The Public Officers Pay Adjustment Ordinance was published in the Gazette on 19 July 2002 (text attached).

**297.** The Government adds that after the enactment of the Public Officers Pay Adjustment Ordinance, a number of civil service staff unions and individual civil servants applied to

the court for judicial review regarding the lawfulness of the Ordinance. The Court of First Instance dismissed two lead cases on 10 June 2003 and dismissed the remaining cases on 7 November 2003. The Court did not accept the applicants' arguments that the Government had not complied with Convention No. 151 and hence had contravened Article 39 of the Basic Law (excerpts attached).

**298.** In response to the complainant's allegations, the Government indicates that it has applied Convention No. 98 in full, through a well-established and extensive consultative machinery comprising four central consultative councils and 89 departmental consultative committees in 66 government bureaux and departments. Each central consultative council/departmental consultative committee comprises the official side (representing management) and the staff side (representing the relevant staff unions/associations). Through this machinery, individual civil servants and staff unions/associations are consulted on a wide range of civil service matters concerning, for instance, pay, conditions of service and the working environment. In addition to the formal machinery, informal channels of consultation are in place.

**299.** As far as civil service pay is concerned, the Government indicates that, as noted above, the established pay adjustment mechanism has built-in procedures for staff consultation and is effective and adequate for the purpose of consulting with staff on matters relating to civil service pay. With regard to the 2002 civil service pay adjustment, the Government emphasizes that the staff sides were able to submit their pay claims which were taken into account by the Chief Executive in Council.

**300.** As to the application of Article 7 of Convention No. 151, the Government recalls that this Article allows a degree of flexibility in the choice of procedures to be used in the determination of the terms and conditions of employment. The Government therefore holds that in compliance with Article 7, it has taken measures appropriate to the local conditions, and has established the consultative machinery which allows staff representatives to participate in the determination of terms and conditions of employment of civil servants. The pay adjustment mechanism for the civil service allows the staff side representatives to participate in the determination of adjustments to pay. In conducting the 2002 civil service pay adjustment exercise, the Government followed the established procedures for consulting the staff sides. The Court of First Instance rejected any claim that there had been a contravention of Article 7 of Convention No. 151, as the established procedure allowed for the participation of public servants.

**301.** As to the allegation that meaningful negotiations could not have taken place in such a short period of time, the Government states that there was no material difference in the timetable for staff consultation in 2002 as compared with previous years. The tight timetable was due to the fact that the summer recess of the Legislative Council normally commences in early July.

### *Refusal to settle the dispute*

**302.** The Government indicates that on 31 May 2002, the staff side of the SCSC wrote to the Chief Executive requesting the appointment of a committee of inquiry under clause 7(1) of the 1968 Agreement signed between the Government and the main civil service staff associations (copy attached). After consideration of the request, the Chief Executive decided not to appoint a committee of inquiry and this decision was conveyed in writing to the staff side of the SCSC on 11 June 2002.

**303.** As to the allegation of violations of Article 8 of Convention No. 151 and the 1968 Agreement, the Government indicates that to come within the scope of Article 8, the dispute must be in connection with the determination of the terms and conditions of

employment and not with the method by which terms and conditions, once determined, are implemented. According to the Government, once the magnitude of the pay adjustment has been determined in accordance with machinery which is consistent with Article 7 of Convention No. 151 (through negotiation or other procedures such as mediation, conciliation and arbitration), a dispute as to the implementation of the decision does not fall within Article 8.

**304.** With regard to the allegation of non-compliance with the terms of the 1968 Agreement between the Government and the main staff associations, the Government indicates that the 2002 civil service pay adjustment has been conducted in strict accordance with the established mechanism and that the final decision on a civil service pay reduction has taken account of all the relevant consideration factors. The Government emphasizes as an inherent feature of the prevailing pay adjustment mechanism, that civil service pay may be increased or decreased as some of the factors taken into consideration such as the Net Pay Trend Indicators and the cost of living are capable of upward and downward movements. The fact that there had been no civil service pay reduction until 2002 was a reflection of the generally favourable fiscal and economic environment over the years and was not an indication of any government policy that civil service pay should not be reduced. According to the Government, the Court of First Instance confirmed that the matter was one of settled public policy. It found that the possibility of a reduction was inherent to the working of the existing mechanism; the use of the latter was so much part of settled policy, that the possibility of a reduction in pay was itself part of settled policy. Thus, the decision to reduce civil service pay had been adopted in accordance with the established mechanism. There was no violation of Article 8 of Convention No. 151 as the established mechanism allowed for the participation of public servants. At this stage, the remaining issue in dispute were the methods through which the decision would be implemented, and this issue did not belong to the competence of the committee of inquiry.

**305.** As to the question of implementing the 2002 civil service pay adjustment by legislation, the Government considers that this was a matter of implementation of a settled policy and that the committee of inquiry would be unable to resolve such a question. It was incumbent on the Government to implement with certainty and in a fair manner a decision which was generally supported by the community. The Court of First Instance confirmed that this matter of implementation was not encompassed within Article 8 of Convention No. 151. The Government adds that the allegation that the legislative approach is a significant departure from the existing regime regulating civil service pay is unfounded. The Public Officers Pay Adjustment Ordinance was related only to the pay adjustment and did not change the system of pay or the conditions of service for the civil servants.

**306.** The Government further adds that even if a committee of inquiry had been set up, its recommendations would not be binding on the Government or the staff associations – parties to the 1968 Agreement – unless accepted by them. Moreover, they would not be binding on staff associations which were not parties to the 1968 Agreement or to individual civil servants. Finally, given that under clause 7(2) of the 1968 Agreement the decision of the Chief Executive on this matter shall be final, the latter was entitled to form the opinion that the 2002 civil service pay adjustment exercise was a matter of settled public policy and accordingly not to appoint a committee of inquiry.

**307.** As to the allegation that the Government has failed to encourage and promote the full development of machinery for negotiation of terms and conditions of employment of civil servants, the Government states that there is no question of the Government abandoning the 1968 Agreement and that it has taken measures appropriate to local conditions for handling matters concerning the terms and conditions of employment of civil servants in compliance with Conventions Nos. 98 and 151.

**308.** In conclusion, the Government notes that given the economic climate prevailing in 2002, the stringent fiscal situation and the pay adjustment trend in the private sector, its decision to reduce civil service pay was reasonable and struck a balance between the concerns of civil servants and the wider interests of the community as a whole. The adjustment exercise was conducted in accordance with the established mechanism and procedures, in compliance with Conventions Nos. 98 and 151.

## C. The Committee's conclusions

**309.** *The Committee notes that this case concerns allegations that by enacting the Public Officers Pay Adjustment Ordinance in 2002, the Government unilaterally reduced civil service pay without proper negotiations with civil service unions and refused to settle the dispute over pay adjustment through continued dialogue or through a committee of inquiry, as provided in the 1968 Agreement between the Government and the main staff associations.*

### *Unilateral reduction of civil service pay without negotiations*

**310.** *The Committee takes note of the facts on which both the complainant and the Government agree. The annual civil service pay adjustment is decided on the basis of six factors (Net Pay Trend Indicators, state of the economy, budgetary considerations, cost of living, staff sides' pay claims and civil service morale). In the context of the standard procedure for determining civil service pay for the year 2002, on 6 May 2002 the Pay Trend Survey was released. This survey constitutes an important step in determining civil servants' pay adjustment because it produces the private sector Gross Pay Trend Indicators from which the public sector Net Pay Trend Indicators will be deduced. In 2002, the survey's results were a decrease in the Gross Pay Trend Indicators. On 13 May 2002 the results of the Pay Trend Survey were validated by the Pay Trend Survey Committee with the participation of the staff sides of the central consultative councils. The results were submitted to the Government which produced, in accordance with the established mechanism, the Net Pay Trend Indicators as follows: -4.42 per cent for the upper salary band, -1.64 per cent for the middle salary band and -1.58 per cent for the lower salary band. On 15 May 2002 the staff sides of three out of four central consultative councils (namely, the Senior Civil Service Council (SCSC), the Model Scale 1 Staff Consultative Council (Mod 1 Council) and the Disciplined Services Staff Consultative Council (DSCC)) submitted their claims to the Government, urging the latter to freeze civil service pay. On 22 May 2002 the Executive Council decided to make an offer of pay reduction at a rate identical to the decrease in that year's Net Pay Trend Indicators. The Government also decided on the same day that the reduction in civil service pay should be implemented through legislation. The text of the Public Officers Pay Adjustment Bill was annexed to the Legislative Council brief of the same date. As explained in the brief, the adoption of legislation was necessary because the civil servants' Memorandum on Conditions of Service and case law did not allow for a unilateral reduction of a fundamental term of the employment contract like the salary. On 25 and 26 May 2002 the staff sides of three out of four central consultative councils (SCSC, Mod 1 Council and DSCC) objected to the salary reduction and the draft Bill, and proposed in essence to maintain the status quo. On 28 May 2002 the Chief Executive in Council decided that this year's civil service pay should be reduced as originally proposed (i.e., without any modifications) and that such reduction should be implemented through legislation. On 5 June 2002 the Public Officers Pay Adjustment Bill was introduced in the Legislative Council. On 11 July 2002 the Bill was passed by the Legislative Council. On 19 July 2002 the Public Officers Pay Adjustment Ordinance was published in the Gazette. On 10 June 2003 and 7 November 2003, the Court of First Instance rejected certain applications for judicial review regarding the lawfulness of the*

*Ordinance. The Court did not find any violation of Convention No. 151 as the established procedure allowed for the participation of the staff sides.*

**311.** *The Committee notes that according to the complainant, although there is a long-established consultative machinery within the civil service, the role of civil service unions in determining the remuneration of civil servants is rather marginal and there is no negotiation in the ordinary sense between the Government and civil service unions over civil service pay. According to the complainant, during the 2002 civil service pay adjustment exercise, there were no meaningful negotiations given the short period of time left (one week) between the pay offer and the final decision made by the Chief Executive in Council as to the pay adjustment. Moreover, the Public Officers Pay Adjustment Bill had been drafted and announced well before the Administration's decision was known to the staff side. The Committee notes that according to the Government, the available, well-established and extensive consultative machinery is both effective and adequate for the purpose of consulting with staff on matters relating to civil service pay, in conformity with Article 4 of Convention No. 98 and Article 7 of Convention No. 151. This mechanism allows the staff sides of the central consultative councils to be represented on the Pay Trend Survey Committee, to submit their pay claims which are taken into account when the Chief Executive in Council makes a pay offer, and to make comments on the Government's pay offer which are taken into account when making the final decision on the pay adjustment. As to the 2002 civil service pay adjustment exercise, the Government indicates that it was conducted in strict accordance with the established mechanism. The staff sides were able to submit their pay claims which were taken into account by the Chief Executive in Council. The final decision on the civil service pay reduction took account of all the relevant consideration factors. The timetable for staff consultation was the same as in other years and was determined by the fact that the summer recess of the Legislative Council normally commences in early July.*

**312.** *The Committee notes that public employees are subject to the consultation mechanism in place, while those of them who are not engaged in the administration of the State cannot engage in collective bargaining. The Committee recalls that a distinction should be drawn between those public employees who are engaged in the administration of the State, who can be excluded from the scope of Convention No. 98 on the basis of Article 6, and those who are not engaged in the administration of the State and who should enjoy collective bargaining rights in accordance with Article 4 of Convention No. 98. The Committee emphasizes that it is imperative that the legislation contain specific provisions clearly and explicitly recognizing the right of organizations of public employees and officials who are not acting in the capacity of agents of the state administration to conclude collective agreements. From the point of view of the principles laid down by the supervisory bodies of the ILO in connection with Convention No. 98, this right could only be denied to officials working in the ministries and other comparable government bodies but not, for example, to persons working in public undertakings or autonomous public institutions [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 795]. The Committee notes the complainant's suggestion that legislative measures could include objective procedures for determining the representative status of civil service unions and recalls that in Case No. 1942 it had requested the Government to give serious consideration to the adoption of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes which respect freedom of association principles. The Committee finally takes note of the latest observation made by the Committee of Experts on the Application of Conventions and Recommendations in which the Government is requested to take all necessary measures so as to guarantee the right of public employees who are not engaged in the administration of the State, to negotiate collectively their conditions and terms of employment [see Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 92nd Session, 1994]. The Committee therefore*

*requests the Government to engage in consultations with the staff sides of the central consultative councils without delay with a view to taking the appropriate legislative measures so as to establish a collective bargaining mechanism allowing public employees who are not engaged in the administration of the State, to negotiate collectively their terms and conditions of employment in accordance with Article 4 of Convention No. 98, applicable in the territory of China/Hong Kong Special Administrative Region without modifications. The Committee requests to be kept informed of developments in this respect.*

**313.** *With regard to the other category of public employees (those engaged in the administration of the State who have been excluded from the scope of Convention No. 98 under Article 6), the Committee considers it useful to recall that, under the terms of the Labour Relations (Public Service) Convention, 1978 (No. 151) (Article 7) "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters." The Committee acknowledges that Article 7 of Convention No. 151 allows a degree of flexibility in the choice of procedures to be used in the determination of the terms and conditions of employment [see* ***Digest****, op. cit., para. 923] Thus, a mechanism of consultations might enable public employees engaged in the administration of the State to participate in the determination of their terms and conditions of employment.*

**314.** *The Committee observes that during the 2002 civil service pay adjustment exercise, the period of consultations lasted two weeks, from 15 May 2002 when the staff sides of the three central consultative councils proposed a pay freeze, to 28 May 2002 when the Chief Executive in Council decided that this year's civil service pay should be reduced as originally proposed; moreover, the final decision was adopted only one week after the Government had made its initial pay offer and two to three days after the staff sides of the central consultative councils had made their counter-proposals. The outcome of the consultations was that the Government decided to maintain the original pay reduction without any modification despite categorical opposition from the staff sides. The pay reduction was identical to the decrease in that year's Net Pay Trend Indicators, although additional factors were to be taken into account in this framework, in particular, the claims of the staff sides of the central consultative councils. It also emerges from the brief to the Legislative Council dated 22 May 2002, that the Public Officers Pay Adjustment Bill had already been drafted on 22 May 2002 when the staff sides were informed of the pay reduction offer. On the basis of these elements, it appears to the Committee that the consultations which took place during the 2002 civil service pay adjustment exercise seemed to be perfunctory.*

**315.** *As the national system in place in the framework of Convention No. 151 relies on consultations rather than negotiations, the Committee emphasizes the need for genuine in-depth consultations with public employees' organizations. The staff sides of the central consultative councils should be invited to talks with adequate advance notice and should be allowed sufficient time for consultations on their conditions of employment. They should also be consulted at sufficient length by the authorities on matters of mutual interest, including everything relating to the preparation and application of legislation concerning their terms and conditions of employment; this would contribute to more solidly founded legislation, programmes and measures that the public authorities have to adopt or apply, and to greater compliance and better implementation. The Government should, as far as possible, also aim at reaching agreement with the staff sides of the central consultative councils. The Committee expects that the staff sides of the central consultative councils will be allowed in the future to engage in full and frank consultations with the Government over the terms and conditions of employment of public employees who are engaged in the*

*administration of the State in accordance with Article 7 of Convention No. 151, applicable in the territory of China/Hong Kong Special Administrative Region without modifications.*

### *Refusal to settle the dispute*

**316.** *With regard to allegations concerning the Government's refusal to settle the dispute, the Committee takes note of the facts on which both parties agree. On 31 May 2002 the staff side of the SCSC wrote to the Chief Executive requesting the setting up of an independent committee of inquiry under the 1968 Agreement between the Government and the main staff associations, to deal with the dispute over this year's pay adjustment. According to clause 7 of the 1968 Agreement, a committee of inquiry can be appointed by the Chief Executive where there are no prospects of reaching agreement on a matter within the scope of the Agreement, provided that the matter in dispute is not, in the opinion of the Chief Executive, trivial, or a matter of settled public policy, or a matter which affects the security of the HKSAR. On 5 June 2002, the request for the committee of inquiry was supported by a total of 67 civil service unions in a joint statement. On 11 June the Chief Executive decided against the appointment of a committee of inquiry on the ground that it was a matter of settled public policy that in determining the size of each year's civil service pay adjustment, the Government took account of certain factors, some of which (Net Pay Trend Indicators, cost of living) were capable of downward movements and it was therefore inherent in the existing mechanism that civil service pay may be increased or decreased. Since civil service pay adjustment was a matter of settled policy, the decision to implement such adjustment through legislation was a matter of implementation of a settled policy and a committee of inquiry would be unable to resolve the questions of law as to whether this decision could have been implemented without legislation. On 10 June 2003 and 7 November 2003, the Court of First Instance found that the issue in question was one of settled public policy because the possibility of reducing civil service pay was an inherent feature of the established procedure for civil service pay adjustment. The Court did not find any violation of Convention No. 151 because the established pay adjustment procedure allowed for the participation of the staff sides. At this stage therefore, the only issue in dispute concerned the methods through which the decision would be implemented, and this matter did not belong to the competence of the committee of inquiry.*

**317.** *The Committee notes that according to the complainant, the Government's refusal to extend the consultation period and its turning down of the request to refer the matter to an independent committee of inquiry, constituted a violation of Article 8 of Convention No. 151 which provides that the settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved. The Committee notes that the Government indicates that on the contrary, the dispute did not come within the scope of Article 8 because it was not related to the determination of the terms and conditions of employment but to the method by which terms and conditions are implemented once determined. Thus, according to the Government, the Chief Executive had the authority under clause 7 of the 1968 Agreement to refuse the appointment of the committee of inquiry.*

**318.** *The Committee notes that there has been a dispute between the Government and the staff sides of three central consultative councils over the decision to reduce civil service pay. The Committee observes that the Court of First Instance examined the dispute primarily from the point of view of whether a reduction in pay was possible on the basis of the established procedure. The Committee is of the view that the essential issue in dispute in this case was not so much whether civil service pay could be reduced, but whether it could be reduced without genuine consultations. The Committee observes that the Court of First*

*Instance did not examine this issue, confining itself to noting that the established pay adjustment procedure allowed for the participation of the staff sides. It appears to the Committee therefore, that an essential issue in dispute has not been settled; an examination of this issue would fall squarely within the scope of Article 8 of Convention No. 151. The Committee is of the view that by not bringing this dispute before the committee of inquiry in accordance with the 1968 Agreement, the Government avoided the procedure in place for the settlement of disputes, putting a unilateral end to it, in violation of Article 8 of Convention No. 151 and Article 4 of Convention No. 98. Given the time which has elapsed since the 2002 civil service pay adjustment exercise, the Committee considers that it would not be realistic to insist at this stage on the appointment of the committee of inquiry. Nevertheless, the Committee expects that the authorities will accept in the future the appointment of the committee of inquiry provided in the 1968 Agreement between the Government and the main staff associations, in case of dispute over the determination of the terms and conditions of employment of public employees.*

**319.** *In light of the recurrent and serious issues involved in recent cases concerning China/Hong Kong Special Administrative Region, the Committee reminds the Government that it may avail itself of the technical assistance of the Office so as to bring its law and practice into full conformity with freedom of association standards and principles.*

## The Committee's recommendations

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

***(a) The Committee requests the Government to engage in consultations with the staff sides of the central consultative councils without delay with a view to taking the appropriate legislative measures so as to establish a collective bargaining mechanism allowing public employees who are not engaged in the administration of the State to negotiate collectively their terms and conditions of employment in accordance with Article 4 of Convention No. 98, applicable in the territory of China/Hong Kong Special Administrative Region without modifications. The Committee requests to be kept informed of developments in this respect.***

***(b) The Committee expects that the staff sides of the central consultative councils will be allowed in the future to engage in full and frank consultations with the Government over the terms and conditions of employment of public employees who are engaged in the administration of the State in accordance with Article 7 of Convention No. 151, applicable in the territory of China/Hong Kong Special Administrative Region without modifications.***

***(c) The Committee expects that the authorities will accept in the future the appointment of the committee of inquiry provided in the 1968 Agreement between the Government and the main staff associations in case of dispute over the determination of the terms and conditions of employment of public employees.***

***(d) In light of the recurrent and serious issues involved in recent cases concerning China/Hong Kong Special Administrative Region, the Committee suggests that the Government avail itself of the technical***

***assistance of the Office so as to bring its law and practice into full conformity with freedom of association standards and principles.***

CASE NO. 2046

INTERIM REPORT

## Complaints against the Government of Colombia presented by — the Colombian Union of Beverage Industry Workers (SINALTRAINBEC) — the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) and — the National Union of Caja Agraria Workers (SINTRACREDITARIO)

***Allegations: Dismissals and disciplinary measures against officials of SINALTRABAVARIA for participating in a strike in the company; failure to comply with the collective agreement, refusal to deduct trade union dues, intimidation of workers to force them to sign a collective agreement and preventing the union from entering the premises to advise workers in that connection, the refusal to allow trade union leave and the dismissal of many officials and members of various branches and pressure to accept a voluntary retirement plan; the refusal to register the trade union organization USITAC, alleged by SINALTRABAVARIA and SINALTRAINBEC, dismissals, disciplinary measures and transfers for trying to establish this organization; mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario and dismissal of trade union officials in disregard of their trade union immunity and failure to comply with the orders for reinstatement by the Caja de Crédito Agrario of some of these officials. A number of allegations presented by SINALTRABAVARIA, including denial of leave for trade union affairs, pressure on workers to resign from the union, disciplinary measures, requests to revoke trade union registration and the untimely closure of enterprises, among others***

**321.** The Committee last examined this case at its November 2003 meeting [see 332nd Report, paras. 426-457].

**322.** SINALTRAINBEC sent new allegations in a communication dated 9 October 2003.

**323.** The Government sent its observations in communications dated 24 December 2003, 22 January, 16 February and 1 March 2004.

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

**325.** In a communication dated 5 May 2004, SINALTRAINBEC sent new allegations concerning the facts which have already been denounced.

## A. Previous examination of the case

**326.** At its meeting in November 2003, when it examined allegations relating to acts of anti-union discrimination and persecution at a number of undertakings, the Committee made the following recommendations [see 332nd Report, para. 457]:

(a) With regard to the alleged dismissals and disciplinary measures against members of the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) for having participated in the strike of 31 August 1999, the Committee expresses its firm hope that the Government will take all possible measures to ensure that all workers and trade union officials who were dismissed and disciplined as a result of this strike will, as soon as possible, have their cases dealt with in the labour courts, and requests the Government to keep it informed in this respect.

(b) With regard to the allegations presented by SINALTRABAVARIA concerning intimidation of workers to make them sign a collective agreement and preventing the union from entering the premises to advise workers in that connection, the Committee requests the Government to take the necessary steps to ensure that the trade union organization can negotiate freely and that workers are not intimidated into signing a collective agreement against their will and without the advice from the trade union organization to which they belong. The Committee requests the Government to keep it informed in this respect.

(c) With regard to non-compliance with the collective agreement by the Bavaria S.A. enterprise, which gave rise to resolutions Nos. 2553 and 2554 of 19 November 2002 in favour of the enterprise, the Committee requests the Government to keep it informed of the outcome of the appeals against these.

(d) With regard to the untimely closure of enterprises, the dismissal of many officers and members of various branches and pressure to accept a voluntary retirement scheme, the Committee requests the Government to carry out an investigation to determine whether the retirements were in effect voluntary or whether pressure was brought to bear on the workers, and to keep it informed in this respect.

(e) The Committee requests SINALTRABAVARIA to provide the list of trade union members to the enterprise so as to ensure that the deduction of trade union dues is carried out without delay.

(f) With regard to the complainant organization not attending hearings called by the Ministry of Labour, the Committee considers that whenever the complainant organizations abandon the administrative claims they have filed, the administrative authority should refrain from issuing resolutions in this respect. The Committee requests the Government to ensure that notification of hearings in the framework of the administrative proceedings in progress, take place expeditiously within the legal time limits.

(g) With regard to the mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario, the Committee requests the Government to keep it informed of any legal action begun by the workers to obtain compensation for dismissal following the closure of the Caja de Crédito Agrario and expresses its firm hope that, as this is an issue of labour debt, these claims will be examined as quickly as possible.

(h) As regards the dismissal of trade union officers due to failure to recognize their trade union immunity and failure to comply with the orders for reinstatement of some of those officers by the Caja de Crédito Agrario, taking into account that the legal rulings ordered reinstatement and according to the Government this is impossible, the Committee requests the Government to take steps to find a solution that can be agreed upon by the administration and the trade union officers in question, which might consist of compensation. The Committee requests the Government to keep it informed in this respect.

(i) The Committee requests the Government to take steps to ensure that USITAC, SINALTRAINBEC and UNITAS are registered in the trade union registry without delay as soon as the legal requirements are complied with and to keep it informed in this respect.

(j) With regard to the dismissals of trade union officers and members who enjoyed trade union immunity in their capacity as founders and other trade union members as a result of the creation of USITAC, the Committee requests the Government to take the necessary steps to ensure that an investigation in this regard is carried out and, if it is confirmed that these dismissals occurred as a result of anti-union discrimination, that it immediately ensure the reinstatement of the workers affected and, if the reinstatement is not possible, that they be fully compensated. The Committee requests the Government to keep it informed in this respect.

(k) As regards the closing of the Colenvases plant, which led to the dismissal of 42 workers, and of seven trade union leaders in violation of their trade union preferential rights, and in violation of the labour ministry resolution authorizing said closing provided that clauses 14 and 51 of the collective agreement were applied, the Committee requests the Government to provide a copy of the relevant court decisions as soon as they are issued.

(l) With regard to allegations relating to administrative disciplinary measures imposed on the workers of SINALTRABAVARIA, the Committee requests the Government to take measures for the holding of an independent investigation to determine whether the internal work rules have been applied uniformly to all workers regardless of whether or not the workers are unionized, and to keep it informed in this respect.

(m) With regard to the allegations relating to dismissals presented by SINALTRAINBEC and the allegations of anti-union discrimination presented by SINALTRABAVARIA: disciplinary measures against workers and pressure on them to resign from their trade unions; denial of trade union leave and access of trade union officials belonging to SINALTRABAVARIA to workplaces; delay on the part of the Ministry of Labour to carry out labour inspections to confirm anti-union activity in the enterprise and in the registration of new executive committees; hiring by the enterprise, as a labour cooperative of workers that it had dismissed. The Committee requests the Government to send its observations without delay so that it may examine the case in full possession of the facts.

## B. New allegations

**327.** In its communication of 9 October 2003, the Colombian Union of Beverage Industry Workers (SINALTRAINBEC) states that dismissals of its members are continuing, as well as efforts to put pressure on workers to leave the union. It adds that given the refusal to grant trade union leave that had been requested, an application for protection of constitutional rights *(tutela)* was brought before the judges of Itagüi on 5 June 2003. This included a request to be treated on an equal footing with the union SINTRACERVUNION, with the same trade union leave as provided for in the collective agreement. Mr. William de Jesús Puerta Cano is subject to criminal prosecution for having initiated these proceedings. In a recent communication, SINALTRAINBEC sent new allegations concerning the facts which have already been denounced.

**328.** At the same time, as regards the dismissal of Jaime Romero, for whom the Committee had called for reinstatement or full compensation, the complainant states that he initiated *tutela*

proceedings before the Supreme Court in October 2002 because he had not been reinstated; the application was turned down by Ruling No. 138 of November 2002.

## C. The Government's reply

**329.** In its observations of 24 December 2003, 22 January, 16 February and 1 March 2004, the Government sent the following observations.

**330.** Item (a) of the recommendations: As regards the allegations of dismissals and disciplinary measures against members of SINALTRABAVARIA for taking part in a work stoppage at the undertaking on 31 August 1999, the Government indicates that the proceedings that have been initiated are at the preliminary stage of hearing evidence and a copy of the rulings will be provided when they are issued. More specifically, as regards the case brought by Alfonso Maigual Valdés and José Luis Salazar, Labour Court 16 of the Bogotá Circuit conducted a hearing on 24 November 2003 at which the judicial review requested by the parties was begun and a date of 24 March 2004 was set for the continuation. With regard to Luis Alfredo Quintero Velásquez, the 9th Labour Court of the Bogotá Circuit declared the preliminary (evidence) stage closed on 10 November 2003, and a date of 2 April 2004 was set for hearing the Court's ruling.

**331.** Item (b) of the recommendations: With regard to the allegations presented by SINALTRABAVARIA concerning intimidation of workers to make them sign a collective labour pact and preventing the union from entering the premises to advise workers in that connection, the Committee states that the workers in question have recourse to the appropriate judicial body which has the power to resolve disputes on points of law. The Government adds that since there is no agreement between the parties, an arbitration tribunal was convened and gave a ruling on 14 November 2003; the trade union appealed against this ruling. Furthermore, in accordance with labour legislation currently in force, collective labour pacts are concluded with non-unionized workers, so that any participation by a trade union must be within its own organization. The collective agreement is an individual agreement which cannot be used specifically to benefit trade union members, under the terms of section 481 of the Substantive Labour Code which was replaced with section 69 of Act No. 50 of 1990.

**332.** Item (c) of the recommendations: With regard to non-compliance with the collective agreement by the Bavaria S.A. enterprise, which gave rise to resolutions Nos. 2553 and 2554 of 19 November 2002 in favour of the enterprise, subject to pending appeals, the Government states that these appeals were turned down on the grounds that they had been lodged outside the legal deadlines, under the terms of an order of 6 December 2002.

**333.** Item (d) of the recommendations: With regard to the untimely closure of enterprises, the dismissal of many trade union officers and members of various branches and pressure to accept a voluntary retirement scheme, the Government states that resolution No. 015 of 10 January 2003 issued by the Inspection and Oversight Group of the Cundinamarca Territorial Directorate states that "… most of the sites are functioning, albeit with workers from temporary service enterprises, … the enterprise terminated the employment contracts of its workers by mutual agreement, which led to the conclusion of conciliation agreements under the auspices of the inspection departments of this Ministry and the relevant Chamber of Commerce. Similarly, examination of the conciliation agreements concluded under the auspices of the Chamber of Commerce and municipal labour inspectorates involved in the complaint and appended to the enterprise investigation file shows that the parties entered into an agreement freely and voluntarily with the authorities competent to effect conciliation in accordance with Act No. 446 of 1998 (section 77), as amended by Act No. 640 of 2001 …"; and "on the other hand, as noted by the different departments of this Ministry, the enterprise concerned is functioning at a number of plants where there has

been no repeated indication that workers, by agreement with the employer, have terminated their employment contracts, and it is therefore concluded that the material submitted in evidence in the present investigation does not support the allegation of untimely closure made by SINALTRABAVARIA".

**334.** Items (g) and (h) of the recommendations: With regard to the mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario, and the failure to comply with orders for the reinstatement of certain trade union officers at SINTRACREDITARIO, in connection with which the Committee had requested the Government to take steps to find a solution that could be agreed upon by the administration and the trade union officers in question, which might consist of compensation, the Government maintains that some decisions upholding trade union immunity went against the enterprise and ordered reinstatement, but, given that the Caja de Crédito Agrario is in liquidation, and could not therefore comply with the reinstatement order, conciliation was obtained with a group of workers who wished to do so and a resolution was adopted for workers who did not agree to conciliation based on the judgement of the Council of State according to which: "the entity affected by the court ruling shall issue an administrative act setting out the reasons that make it impossible to implement the reinstatement order, such as the absence of any jobs on the payroll at the same or higher category for the ex-worker concerned, in the light of the functions he or she carried out and the nature of his or her current duties …"; and "If reinstatement is impossible, the individual right of the applicant shall be safeguarded by acknowledgement of the arrears of wages owed from the time at which the post was abolished until the notification of the administrative act setting out the reasons why reinstatement is impossible."

**335.** Item (i) of the recommendations: With regard to registration of USITAC, SINALTRAINBEC and UNITAS, which according to the Government was refused owing to legal flaws and regarding which the Committee requested the Government to carry out registration without delay as soon as the legal requirements were complied with, the Government refers to information sent previously, in which it had questioned whether the trade union organization's real intention was to defend trade union rights, as opposed to their own jobs, disregarding the law and the union's social objectives. As regards the registration of USITAC, the Government states again that by resolution No. 00027 of 15 January 2003, the Labour, Employment and Social Security Group of the Atlantic Territorial Department refused registration on grounds of failure to comply with constitutional requirements. The trade union once again applied for registration of its founding charter, executive board and by-laws, which was refused by resolution No. 000272 of 28 February 2003 on grounds that the existing administrative avenues were exhausted, which was confirmed by resolution No. 0602 of 30 April 2003.

**336.** Item (j) of the recommendations: With regard to the alleged persecution of 47 founder members of USITAC, in connection with which the Committee had asked the Government to take the necessary steps to ensure that an investigation in this regard would be carried out and, if it were confirmed that these dismissals occurred as a result of anti-union discrimination, to immediately ensure the reinstatement of the workers affected and, if the reinstatement was not possible, to ensure that full compensation was paid, the Government states that according to the enterprise, it had always respected the right of freedom of association and the dismissals in question had been a response to real and serious misconduct involving infringements of internal regulations and labour law. The enterprise had not sought the suspension of trade union immunity because in its view the organization in question had never existed. The Government also indicates that the Ministry of Social Protection is not competent to evaluate dismissals of workers with trade union immunity, as this involves value judgements; it is the labour courts that are competent in this area, and it is incumbent on the worker concerned to initiate legal proceedings.

**337.** As regards the cases of William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo, the enterprise had sought a suspension of trade union immunity from the labour courts in view of the information submitted by the company according to which they had committed serious misconduct, in breach of their contracts of employment, internal regulations and labour law.

**338.** As regards the refusal to allow trade union leave for USITAC officials, the enterprise indicates that there have not to its knowledge been any such requests from that organization. With regard to the seizure of trade union bulletins and the matter of trade union leave, the Government further states that the Ministry of Labour and Social Security gave a ruling in resolution No. 2817 in 2002.

**339.** Item (l) of the recommendations: With regard to allegations relating to administrative disciplinary measures imposed on the workers of SINALTRABAVARIA, concerning which the Committee had requested the Government to take measures for the holding of an independent investigation to determine whether the internal work rules had been applied uniformly to all workers regardless of whether or not they were unionized, the Government states that the Ministry of Social Protection is not competent to launch investigations on the application of the disciplinary measures adopted by the company against non-unionized workers, because this would mean making value judgements for which labour judges alone are competent.

**340.** Item (m) of the recommendations: With regard to allegations relating to dismissals presented by SINALTRAINBEC and the allegations of anti-union discrimination presented by SINALTRABAVARIA (pressure on workers to resign from the trade union; denial of trade union leave and access of trade union officials belonging to SINALTRABAVARIA to workplaces; delay on the part of the Ministry of Labour to carry out labour inspections to confirm anti-union activity in the enterprise and in the registration of new executive committees; hiring by the enterprise as a labour cooperative of workers that it had previously dismissed). With regard to the alleged harassment of SINALTRAINBEC members, the Ministry of Labour and Social Security in resolution No. 2817 of 2002 gave a final ruling on the alleged violation of freedom of association, taking into account the fact that resolutions Nos. 3467 of 31 December 2002 and 666 of 8 April 2003 had resolved the matter of appeal. The Attorney-General's Office also carried out an investigation and dismissed the case on jurisdictional grounds. As regards the pressure put on members of SINALTRAINBEC to accept the retirement plan at CERVECERIA UNION S.A., the Ministry of Labour and Social Security stated in its resolution No. 3467 of 31 December 2002 that "as regards the early retirement plan which according to the trade union was intended to put an end to the sub-department, this office finds that it has not been shown that this was the case and that, according to information in the case file, the plan has been accepted by 73 workers at CERVECERIA UNION S.A. of whom about 16 were members of SINALTRAINBEC".

**341.** As regards the most recent allegations made by SINALTRAINBEC, the Government states with regard to the dismissals that the employer may dismiss workers for valid reasons provided that these are duly proven and, where they are not, the worker is entitled to compensation. If the worker concerned believes that there was no valid reason, he can appeal to the ordinary labour courts before having recourse to international bodies.

**342.** With regard to the refusal to grant trade union leave, the Government states, that according to the company, some 80 per cent of such leave requested was granted. It adds that the Ministry of Labour and Social Security, in resolution No. 2817 of 18 November 2002, states that "this office considers that in general trade union leave, the associated payments and the length of leave or number of instances of leave are determined in collective labour agreements between the company and the majority trade union at the company, which

would mean that any leave granted beyond what is provided for in the collective agreement must be consistent with the law, namely section 57(6) of the Substantive Labour Code, according to which such leave is not paid and is subject to certain other restrictions". As regards the constitutional protection *(amparo)* proceedings initiated by William Jesús Puerta Cano, the Government indicates that the application was turned down as inadmissible on the grounds that the judges competent in such cases cannot assume the functions of labour judges. With regard to the alleged intimidation by management to make workers leave the union, Attorney-General's Office 121 in Itagüí found that "it is difficult to determine that the CERVECERÍA UNIÓN S.A. through its managers has had the policy of breaking up the union, especially as the relations between a company and a trade union are sometimes difficult by virtue of the inherent conflict of interests, but that does not mean that there were any violations of the guaranteed rights of association and assembly or that the relevant provisions were infringed, and it does not appear from the investigation that there was any agreement on the part of managers, that there should be any pressure on these employees to force them to leave the union. However, situations arose during the year in question in connection with economic difficulties that may have created a climate of disquiet and fear among workers, and this, and the anonymous posters that appeared without management approval, may have been the cause of the abandonment by SINALTRAINBEC members of the union in collective talks and the reason for workers leaving the union in large numbers, as well as the lack of interest on the part of managers in a trade union which posed no threat to the company since it did not play a major role".

## D. The Committee's conclusions

**343.** *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.*

**344.** *Item (a) of the recommendations: As regards the allegations of dismissals and disciplinary measures against members of SINALTRABAVARIA for participating in a work stoppage at the enterprise on 31 August 1999, the Committee takes note of the Government's information according to which the proceedings are at the preliminary (evidence) stage. Taking into account the considerable time that has elapsed since the alleged acts took place, the Committee firmly expects that the labour courts will give a ruling as soon as possible and requests the Government to keep it informed in this respect. The Committee recalls that justice delayed is justice denied.*

**345.** *Item (b) of the recommendations: With regard to the allegations presented by SINALTRABAVARIA concerning intimidation of workers to make them sign a collective labour pact and preventing the union from entering the premises to advise workers in that connection, the Committee recalls that there are collective agreements between the company and the trade unions and notes that according to the Government, it cannot pronounce itself on legal disputes and that the trade union concerned can seek redress from the courts. The Committee also notes that according to the Government, legislation provides for conclusion of the collective agreement with non-unionized workers and, consequently, does not give rise to the participation of the trade union. The Committee recalls that according to the Collective Agreements Recommendation, 1951 (No. 91): "For the purpose of this Recommendation, the term "collective agreements" means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other." The Committee emphasizes that the Recommendation stresses the role of workers' organizations as one of the parties in collective bargaining. Direct negotiation between the undertaking and its*

*employees, by-passing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 786]. For this reason, the Committee strongly requests the Government to ensure that no individual negotiations take place with workers to induce them to sign a collective labour pact that excludes the trade unions.*

**346.** *Item (c) of the recommendations: With regard to the alleged non-compliance with the collective agreement by the Bavaria S.A. enterprise, the Committee notes the Government's information concerning the rejection of appeals lodged by SINALTRABAVARIA against resolutions Nos. 2553 and 2554 of November 2002, which were favourable to the company, on the grounds that the appeals were lodged outside the legal deadlines. The Committee requests the Government to take steps to ensure that the enterprise complies with the collective agreements that it has signed.*

**347.** *Item (d) of the recommendations: With regard to the allegations by SINALTRABAVARIA regarding the untimely closure of enterprises, the dismissal of many trade union officers and members of various branches and pressure so that they accept a voluntary retirement scheme, the Committee notes that according to resolution No. 015 of 10 January 2003 by the Cundinamarca Inspection and Oversight Group there were no such closures, and that the enterprises in question continued to operate with temporary workers. The Committee notes that according to the inspectorate, workers were not dismissed but signed conciliation agreements, the validity of which was not legally challenged. The Committee requests the Government to indicate whether the trade union has lodged any appeal against the resolution.*

**348.** *Item (h) of the recommendations: As regards the dismissal of trade union officers of the Caja de Crédito Agrario, in disregard of trade union immunity and in contravention of the rulings ordering the reinstatement of a number of these officers, the Committee notes that according to the Government, in view of the impossibility of reinstating the workers owing to the fact that the Caja de Crédito Agrario is in liquidation, conciliation procedures have been carried out with some of the workers, while for those who did not accept conciliation a resolution was adopted based on the Council of State decision according to which the entity concerned must give the reasons why reinstatement is not possible in the form of an administrative act and, in view of the impossibility of reinstatement, applicants' individual rights shall be safeguarded by acknowledgement of arrears of wages and other benefits owed from the time the posts were abolished until the notification of an administrative act setting out the reasons why reinstatement is not possible. The Committee requests the Government to indicate whether wages and other benefits owed to workers have been paid in accordance with the resolution in question and if this is not the case, to ensure immediate payment.*

**349.** *Item (i) of the recommendations: As regards the refusal to register the trade union organizations USITAC, SINALTRAINBEC and UNITAS, on the grounds according to the Government of legal flaws, the Committee notes that the Government refers to previous observations in which it stated its reservations regarding the unions' intentions at the time they were established and wonders if in reality the purpose was not to secure job stability. The Committee emphasizes that the question of the unions' intentions at the time of the establishment of USITAC, SINALTRAINBEC and UNITAS is a matter for the unions, not the Government. The Committee recalls that Article 2 of Convention No. 87, ratified by Colombia, states that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation". That right involves two possibilities: either to join an existing organization, or to create a new one that is*

*independent of existing organizations. In these conditions, the Committee once again urges the Government to ensure that the authorities register USITAC, SINALTRAINBEC and UNITAS and to keep it informed in this regard.*

**350.** *Item (j) of the recommendations: With regard to the dismissals of trade union officers and members who enjoyed trade union immunity in their capacity as union founders and of other trade union members as a result of the creation of USITAC, the Committee notes that according to the Government, the Ministry of Social Protection is not competent to examine dismissals of workers with trade union immunity, as this pertains to the labour courts and it is the workers concerned who must initiate legal proceedings. The Committee requests the Government to ensure an adequate and speedy functioning of the legal procedures. The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom, and that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct [**Digest**, op. cit., paras. 724 and 727]. The Committee notes that this protection is reflected in Colombia in the "trade union immunity" which makes it impossible for an employer to dismiss a trade union officer without a valid reason reviewed by a labour court judge (sections 405 ff. of the Substantive Labour Code). Under these circumstances and given that that Colombian law (section 406a of the Code) gives special protection to founders of a trade union organization, the Committee requests the Government to indicate whether the enterprise sought judicial authorization before the dismissal and, if not, to indicate whether the trade union officers concerned have lodged the corresponding appeals and what was the outcome.*

**351.** *As regards the allegations concerning officers of SINALTRAINBEC, William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo, the Committee notes the Government's information according to which the enterprise sought the suspension of trade union immunity from the labour court on the grounds of serious misconduct. The Committee requests the Government to keep it informed of the outcome of these actions.*

**352.** *As regards the allegations regarding the dismissals of members of the complainant organization, the refusal to grant trade union leave to officers of USITAC and the seizure of trade union information bulletins by SINALTRAINBEC, the Committee notes that, in its last communication, SINALTRAINBEC refers to new allegations of the same kind. The Committee notes the Government's information according to which the enterprise can dismiss workers if appropriate compensation is paid and that workers who object may apply to the labour courts. The Committee recalls that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [**Digest**, op. cit., para. 707]. The Committee requests the Government to take measures to adapt its legislation and legal procedures in line with Conventions Nos. 87 and 98. The Committee requests the Government to indicate whether the workers have lodged appeals before the courts against the decisions to dismiss them.*

**353.** *As regards the matter of trade union leave, the Committee notes the Government's information that according to the enterprise, 80 per cent of such leave requested has been granted, by agreement with the majority union SINTRACERVUNION, and that the applicable legislation does not provide that trade union leave beyond that agreed in the collective agreement with the majority union should be paid. The Committee notes that the Ministry of Labour and Social Security has adopted Decision No. 2817 in this regard based on the same criterion. Under these circumstances the Committee requests the Government to invite the enterprise to enter into contact with both trade unions for the purpose of examining the possibility of granting trade union leave to the minority union SINALTRAINBEC, to allow it to exercise its trade union functions.*

**354.** *Item (k) of the recommendations: As regards the closure of the COLENVASES plant, which led to the dismissal of 42 workers and seven trade union leaders without lifting their trade union immunity and in violation of the labour ministry resolution authorizing the closure provided that clauses 14 and 51 of the collective agreement in force were applied, the Committee recalls that in its previous examination of the case it had indicated that resolutions Nos. 2169, 2627 and 2938 regarding this matter had been appealed against by SINALTRABAVARIA before the administrative courts. The Committee recalls that justice delayed is justice denied. The Committee once again urges the Government to forward the court rulings as soon as they are handed down.*

**355.** *Item (l) of the recommendations: With regard to allegations relating to disciplinary measures imposed on the workers of SINALTRABAVARIA, concerning which the Committee had requested the Government to take measures for the holding of an independent investigation to determine whether the internal statute had been applied uniformly to all workers, the Committee notes that according to the Government, the Ministry of Social Protection is not competent to initiate investigations into the effective application of disciplinary measures by the enterprise, since this involves value judgements. The Committee recalls that in its previous examination of the case, it had confined itself to requesting an investigation to ascertain whether the internal statute had been applied consistently to all workers so that the Committee could formulate its conclusions in this respect. The Committee emphasizes that it did not request that disciplinary measures be applied, or that disputed points be defined or rights stated, contrary to what appears to have been the interpretation of the Ministry of Social Protection. Under these circumstances, the Committee once again requests the Government to carry out an investigation to establish the facts and, in the light of the investigation's conclusions, to indicate the avenues of legal redress available to the union to safeguard its rights, and to take measures to adapt its legislation and legal procedures in line with Conventions Nos. 87 and 98.*

**356.** *Item (m) of the recommendations: With regard to the allegations relating to dismissals presented by SINALTRAINBEC through a system of early retirement the purpose of which was to eliminate the union, the Committee notes that according to the Government, the Ministry of Labour and Social Security in its resolutions Nos. 2817 and 3467 of 2002 decided that there was not sufficient evidence that the dismissals and the early retirement plan had anti-union objectives, and that some 73 workers, of whom only 16 were members of the union, joined the plan. The Committee requests the complainant organization to provide further information in this regard.*

**357.** *With regard to allegations of anti-union discrimination presented by SINALTRABAVARIA (pressure on workers to resign from the trade union, denial of trade union leave, delay on the part of the Ministry of Labour in carrying out inspections to confirm anti-union activity in the enterprise and in the registration of new executive committees, and hiring by the enterprise as a labour cooperative, of workers that it had previously dismissed), the*

*Committee notes that the Government has sent no observations in this respect, and once again requests it to do so without delay.*

**358.** *As regards Mr. Romero, the Committee notes that according to the allegations presented by SINALTRAINBEC in its last communication, Mr. Romero has initiated constitutional protection* (tutela) *proceedings against the Government for its failure to implement the Committee's recommendation that it take steps without delay to reinstate him, or, if that is impossible, to compensate him in full. The Committee notes that the Government has sent no observations on this matter, and requests it to indicate whether Mr. Romero has promptly received full compensation.*

**359.** *The Committee takes note of the recent communication by SINALTRAINBEC which contains new allegations and requests the Government to send its observations in this respect.*

## The Committee's recommendations

**360.** ***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 solicit information from the employers' organizations concerned with a view to having at its disposal their views, as well as those of the enterprises concerned, on the question at issue.***

***(b) With regard to the alleged dismissals and disciplinary measures against members of SINALTRABAVARIA for participating in a work stoppage at the enterprise on 31 August 1999, taking into account the time that has passed since the events occurred, the Committee firmly hopes that the labour courts will give a ruling as soon as possible, and requests the Government to keep it informed in this respect.***

***(c) With regard to the allegations concerning intimidation of workers to make them sign a collective agreement and preventing SINALTRABAVARIA from entering the premises to advise workers in that connection, the Committee strongly requests the Government to ensure that no individual negotiations take place with workers to induce them to sign a collective labour pact that excludes the trade unions.***

***(d) With regard to the alleged non-compliance with the collective agreement by the BAVARIA S.A. enterprise, the Committee requests the Government to take steps to ensure that the enterprise complies with the collective agreements that it has signed.***

***(e) As regards the allegations concerning the untimely closure of enterprises, the dismissal of many trade union officers and members of various branches, and pressure so that they accept a voluntary retirement scheme, in respect of which the Cundinamarca Inspection and Oversight Group decided in a resolution that the workers were not dismissed but signed conciliation agreements, and that there were no untimely closures of enterprises, the Committee requests the Government to indicate whether the trade union concerned has lodged any appeal against the resolution.***

***(f) As regards the dismissal of trade union officers at the Caja de Crédito Agrario, in disregard of trade union immunity and in contravention of the rulings ordering the reinstatement of a number of these officers, with regard to which the Council of State considered in a resolution that the individual rights of the applicants were safeguarded by acknowledgement of the arrears of wages owed from the time the posts were abolished until the notification of an administrative act setting out the reasons why reinstatement was not possible, the Committee requests the Government to indicate whether wages and other benefits owed to workers have been paid in accordance with the resolution in question, and if this is not the case, to ensure immediate payment.***

***(g) As regards the refusal to register the trade union organizations USITAC, SINALTRAINBEC and UNITAS on grounds of legal flaws, the Committee once again urges the Government to register USITAC, SINALTRAINBEC and UNITAS and to keep it informed in this regard.***

***(h) As regards the alleged dismissals of trade union officers and members who enjoyed trade union immunity in their capacity as union founders and of other trade union members as a result of the creation of USITAC, the Committee requests the Government to guarantee the rapid and adequate functioning of legal procedures and to indicate whether the enterprise sought judicial authorization before the dismissal and, if not, to indicate whether the trade union officers concerned have lodged the corresponding appeals and what was the outcome.***

***(i) With regard to the actions taken by the enterprise sought in the suspension of the trade union immunity of William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo, the Committee requests the Government to keep it informed of the outcome of these actions.***

***(j) As regards the allegations concerning the dismissal of members of the complainant organization, the refusal to grant trade union leave to USITAC officers and the seizure of trade union information bulletins, the Committee requests the Government to take measures to adapt its legislation and legal procedures in line with Conventions Nos. 87 and 98. The Committee requests the Government to indicate whether the workers have lodged appeals against the decisions to dismiss them, and to invite the enterprise to engage in negotiations with SINTRACERVUNION and SINALTRAINBEC for the purpose of examining the possibility of granting trade union leave to the minority union SINALTRAINBEC to allow it to exercise its trade union functions.***

***(k) As regards the closure of the COLENVASES plant, the Committee once again urges the Government to forward the court rulings as soon as they are handed down.***

***(l) With regard to the allegations concerning disciplinary measures against members of SINALTRABAVARIA, the Committee once again requests the Government to carry out an investigation to establish the facts and, in the light of the investigation's conclusions, to indicate the avenues of legal***

***redress available to the trade union to safeguard its rights, and to take measures to adapt its legislation and legal procedures in line with Conventions Nos. 87 and 98.***

***(m) With regard to the allegations concerning anti-union discrimination presented by SINALTRABAVARIA (pressure on workers to resign from the trade union, denial of trade union leave, delay on the part of the Ministry of Labour in carrying out inspections to confirm anti-union activities in the enterprise and in the registration of new executive committees, and the hiring by the enterprise as a labour cooperative of workers that it had previously dismissed), the Committee once again requests the Government to send its observations in this respect without delay.***

***(n) With regard to allegations relating to dismissals presented by SINALTRAINBEC through a system of early retirement, the Committee requests the complainant organization to provide further information in this regard.***

***(o) With regard to the failure to implement the Committee's recommendation for the reinstatement of or payment of full compensation to Mr. Romero, the Committee requests the Government to send its observations in this respect and to indicate whether Mr. Romero has promptly received full compensation.***

***(p) The Committee takes note of the recent communication by SINALTRAINBEC and requests the Government to send its observations in this respect.***

CASE NO. 2097

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

## Complaints against the Government of Colombia presented by
## — the Trade Union of Workers of Antioquia Department (SINTRADEPARTAMENTO)
## — the National Trade Union of Workers of AVINCO S.A. (SINTRAVI)
## — the Trade Union of Workers of "Cementos del Nare S.A." (SINTRACENARE) and
## — the Single Confederation of Workers of Colombia (CUT), Antioquia Executive Subcommittee

***Allegations: The complainant organizations allege dismissals of trade union officials protected by trade union immunity from the enterprise AVINCO S.A.; the dismissal of trade unionists on anti-union grounds and pressure put on workers to leave the trade union and conclude an agreement; anti-union dismissals in the Department of Antioquia; dismissal of a worker from the enterprise Cementos del Nare S.A.***

**361.** The Committee last examined this case at its May-June 2003 meeting [see 331st Report, paras. 267-282, approved by the Governing Body at its 287th Session (June 2003)].

**362.** The Trade Union of Workers of Antioquia Department (SINRADEPARTAMENTO) sent new allegations in a communication dated 11 November 2003.

**363.** The Government sent its observations in communications dated June 2003, 5 and 8 September 2003 and 4 February 2004.

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

## A. Previous examination of the case

**365.** At its May-June 2003 meeting, following its examination of allegations relating to acts of discrimination and persecution against trade union officials and trade unionists in various enterprises, the Committee made the following recommendations [see 331st Report, para. 282]:

(a) With respect to the serious allegations of violations of trade union rights at the enterprise AVINCO S.A., submitted by the organization SINTRAVI, the Committee once again strongly urges the Government to take measures to ensure that the inquiry is completed

as soon as possible, that it covers all the allegations and that its results as well as the text of the arbitral award relating to the collective bargaining process are transmitted to the Committee. Concerning the five dismissed workers, the Committee requests the Government, if it is found that they were covered by trade union immunity and that there was no just cause to dismiss them, to take measures to ensure they are reinstated in their jobs, without loss of pay or benefits.

(b) As regards the dismissal of 13 workers from the Department of Antioquia affiliated to the complainant organization SINTRADEPARTAMENTO, the Committee once again requests the Government to conduct an investigation in this respect and, if it is found that the 13 workers were dismissed for the same reasons as the other 35 workers who were reinstated by judicial order, to take measures to promote their reinstatement and if this proves to be impossible due to the time that has elapsed, to compensate them fully.

(c) Concerning the allegations relating to the dismissal of Mr. Héctor Gómez from the enterprise Cementos del Nare S.A., the Committee once again requests the Government to send the texts of the final judicial and administrative decisions without delay and to indicate whether Mr. Gómez has been paid the corresponding compensation for dismissal plus an additional 12 per cent, which the Government indicated he would be entitled to under the provisions of the prevailing collective agreement, and to send the text of the collective agreement.

(d) With regard to the allegations submitted by the Single Confederation of Workers of Colombia (CUT), Antioquia Executive Subcommittee, and the Union of "Official" Workers and Public Employees of the General Hospital of Medellín, the Committee requests the Government to promote collective bargaining at the General Hospital of Medellín without delay and to keep it informed in this respect.

## B. New allegations

**366.** In its communication of 11 November 2003, the Trade Union of Workers of Antioquia Department (SINRADEPARTAMENTO) indicates, with respect to the Government's statement made in the previous examination of the case that the 13 workers dismissed from the Department of Antioquia had not begun the corresponding judicial action, that on the contrary, those workers had initiated the corresponding legal proceedings before the labour courts (it attaches certificates from the courts that heard the cases).

## C. The Government's reply

**367.** In its communications the Government indicates that, with respect to the serious allegations of violations of trade union rights at the enterprise AVINCO S.A. submitted by the organization SINTRAVI, the Territorial Directorate of Antioquia initiated an inquiry and by way of resolution No. 1868 of 20 August 2003 determined that the Ministry of Social Protection was not competent to settle the inquiry as, according to the resolution "in conformity with the repeated declarations of the Council of State, in view of the clear and definite division of power between administrative officials and the ordinary courts, administrative officials are also forbidden from defining disputes, declaring rights and issuing value judgements in the case under examination, and neither can the office inquire into the internal reasoning of the employer to find out whether the dismissal occurred in order to impede freedom of association" (the Government attaches a copy of the resolution). With regard to the process of collective bargaining at the enterprise, the Government sends a copy of the arbitral award issued on 27 November 2001. As to the dismissal of the five trade union officials, the High Court of Medellín decided, in a ruling dated 27 February 2003, that the status of trade union officials held by the dismissed workers was not accredited and therefore revoked the ruling of first instance that had ordered their reinstatement (the Government attaches a copy of the ruling).

**368.** With respect to the dismissal of 13 workers from the Department of Antioquia affiliated to the complainant organization the Trade Union of Workers of Antioquia Department (SINTRADEPARTAMENTO), the Government states that the workers dismissed in the Department of Antioquia did not exhaust government channels, as they were public employees and not official workers, which is why the request they submitted to the labour authority for reinstatement was unsuccessful. The Government indicates that they also had recourse to administrative jurisdiction, lodging an action for annulment that was unsuccessful.

**369.** With respect to the allegations concerning the dismissal of Mr. Héctor de Jesús Gómez from the enterprise Cementos del Nare S.A., the Government sends a copy of all the administrative and judicial decisions relating to the case. A reading of those decisions shows that, in accordance with clause 13 of the collective agreement in force at the time, following the dismissal of Mr. Gómez, the trade union requested the enterprise to convene the dismissals committee. That committee, made up of arbitrators chosen by the trade union and the enterprise in accordance with the mentioned clause of the collective agreement, decided in an arbitral award dated 24 August 1995 that "the enterprise Cementos del Nare S.A. should reinstate Mr. Héctor de Jesús Gómez ... and pay him any unpaid wages until he is effectively reinstated". In accordance with clause 13 of the collective agreement, "if the committee decides by majority to reinstate or keep the worker in employment, the company can insist on its decision to dismiss and, in that case, it shall pay the worker the corresponding compensation plus 12 per cent". Clause 13, No. 5, provides that "the decisions of the committee, with the exception of the power conferred on the enterprise, to insist on the dismissal, are final and obligatory, as they are the result of conciliation between the parties, which have expressly resolved to submit this type of dispute to the arbitration stipulated in this clause and in so doing have renounced judicial channels".

**370.** Article 139 of the Code of Labour Procedure establishes that "when in a collective agreement, the parties stipulate the establishment of tribunals and committees of arbitration of a permanent nature, the terms of the agreement shall be adhered to in everything related to their establishment, competence and procedure deciding any corresponding disputes, and only where there is no special provision will the provisions of this chapter be applied".

**371.** The Government adds that the enterprise went to the High Court of Medellín to appeal the arbitral award and that Court, in a ruling dated 1 November 1995, after analysing whether the committee had been properly established, concluded "that the tribunal (dismissals committee) having decided by a majority that the dismissal of the worker Héctor de Jesús Gómez was unjust, strictly speaking did not examine the facts properly as maintained by the applicant as the decision was duly justified, but with its decision it affected the power conferred on the employer to dismiss a worker when there is just cause. According to the provisions of article 142 of the Code of Labour Procedure, disregard for that power renders the arbitral award null and void. On the basis of the grounds presented in this ruling, it is declared that the dismissal of the worker Héctor de Jesús Gómez was for just cause ...". For the reasons given, the High Court of Medellín, Third Chamber for Decisions on Labour Issues, administering justice on behalf of the Republic of Colombia and by the authority of the law, annuls the arbitral award issued on 24 August 1995 by the arbitration tribunal convened in these proceedings and instead declares that there was just cause for the dismissal of the worker Héctor de Jesús Gómez.

## D. The Committee's conclusions

**372.** *With regard to the allegations of violations of trade union rights at the enterprise AVINCO S.A. submitted by the National Trade Union of Workers of AVINCO S.A. (SINTRAVI) (the dismissal of five workers covered by trade union immunity after they had*

*formed a trade union organization at the company AVINCO S.A.; pressure put on workers to conclude a collective agreement bypassing the trade union and the subsequent withdrawal of non-statutory benefits from unionized workers; pressure put on workers to make them leave the union; and intransigence by the company in refusing to negotiate a list of demands [see 329th Report, para. 466]), the Committee highlights the seriousness of the allegations and notes the Government's information that the Territorial Directorate of Antioquia initiated an inquiry and by way of resolution No. 1868 of 20 August 2003 determined that the Ministry of Social Protection was not competent to settle the inquiry (the Government attaches a copy of the resolution).*

**373.** *The Committee deplores that, despite the time that has passed since these allegations were presented in August 2000, all the Ministry of Social Protection has done is initiate an inquiry and issue a resolution stating that the matter falls outside its area of competence, and this only recently, in August 2003. The Ministry based its resolution on the division of powers between administrative officials and the ordinary courts. The Committee recalls that in its previous examinations of the case it has limited itself to requesting that an inquiry be conducted to determine whether the alleged facts occurred or not so that the Committee could formulate its conclusions in that respect. It emphasizes that in its previous examinations of the case it did not request the application of sanctions nor for disputes to be defined or rights declared, contrary to the interpretation of the Ministry of Social Protection as contained in resolution No. 1868. This being the case, the Committee once again urges the Government to conduct an inquiry into the alleged facts and, depending on the conclusions reached by the inquiry, to state which legal channels the trade union can use to protect its rights. The Committee requests the Government to take the necessary measures to adapt the legislation and the legal procedures into conformity with Conventions Nos. 87 and 98. The Committee requests the Government to keep it informed in this respect.*

**374.** *As to the allegation concerning intransigence by the company in refusing to negotiate, the Committee notes with interest that the Government has sent a copy of the arbitral award issued on 27 November 2001 in the framework of the collective bargaining procedure.*

**375.** *Concerning the alleged dismissal of five trade union officials, the Committee notes that, according to the Government, the High Court of Medellín decided, in a ruling dated 27 February 2003, that the status of trade union officials held by those dismissed was not accredited and therefore revoked the ruling of first instance that had ordered their reinstatement (the Government attaches a copy of the ruling). The Committee will therefore not pursue the examination of these allegations unless the complainant organization SINTRAVI provides accreditation for the status of trade union officials of the dismissed workers.*

**376.** *Concerning the allegations relating to the dismissal of 13 workers from the Department of Antioquia affiliated to the complainant organization the Trade Union of Workers of Antioquia Department (SINTRADEPARTAMENTO) (the Government had stated that of the 48 workers who had been dismissed initially, 35 workers were reinstated by judicial order and the other 13 did not submit judicial appeals), the Committee observes that the Government only indicates that the workers dismissed from the Department of Antioquia had not exhausted government channels, as they were public employees and not official workers, which is why the request they submitted to the labour authority for reinstatement was unsuccessful, and that they also had recourse to administrative jurisdiction, lodging an action for annulment that was unsuccessful. While it notes these decisions based on procedural regulations, the Committee recalls that in previous examinations of the case it had requested the Government to conduct an inquiry into the dismissal of these 13 workers and, if it was found that they were dismissed for the same reasons as the other 35 workers who were reinstated by judicial order, to take measures to promote the reinstatement of*

*these 13 workers and, if that proved to be impossible due to the time that had elapsed, to compensate them fully. The Committee observes that the Government has sent no information in this respect. It therefore firmly repeats the recommendation it made in the previous examination of the case.*

**377.** *With respect to the dismissal of Mr. Héctor de Jesús Gómez, former trade union official and trade unionist of the Trade Union of Workers of "Cementos del Nare S.A." (SINTRACENARE), on 25 May 1995, the Committee recalls that, in the framework of that dismissal and in accordance with clause 13 of the collective agreement, the trade union organization requested the enterprise to set up a dismissals committee, which it did on 18 August 1995, and the committee declared the dismissal of Mr. Gómez to be unjust and ordered his reinstatement, together with the payment of the wages and benefits he had failed to receive [see 329th Report, para. 454]. The Committee observes that clause 13 of the collective agreement left the employer the possibility of insisting on the dismissal but having to pay the corresponding compensation plus 12 per cent. Clause 13, No. 5, provided that the decisions of the dismissals committee could not be appealed against. The Committee observes that, in spite of this, the enterprise lodged an appeal against the arbitral award, citing article 141 of the Code of Labour Procedure (CPL), with the Labour Division of the High Court of Medellín.*

**378.** *The Committee likewise notes that article 139 of the CPL gives the parties to collective agreements the power to determine the method of establishment, the competence and the procedures of the committees and tribunals set up under such agreements. In this respect, the Committee observes that the collective agreement could stipulate, and does in clause 13, No. 5, that the decisions of the dismissals committee could not be appealed against. The Committee notes that the enterprise did not comply with the provisions of clause 13, No. 5, of the collective agreement by lodging an appeal with the Labour Division of the High Court of Medellín, and refusing to recognize the ruling of the dismissals committee that provided for the reinstatement of the worker (leaving open the possibility for the enterprise – as per the collective agreement – to insist on its decision to dismiss and in that case to pay the worker the corresponding compensation plus 12 per cent). This being the case, the Committee requests the Government to take the necessary measures to ensure that the enterprise fully complies with article 13 of the collective agreement and pays Mr. Héctor de Jesús Gómez the compensation stipulated in the collective agreement and to keep it informed in this respect.*

**379.** *With regard to the allegations submitted by the Single Confederation of Workers of Colombia (CUT), Antioquia Executive Subcommittee, and the Union of "Official" Workers and Public Employees of the General Hospital of Medellín, concerning the refusal to bargain the Committee observes that the Government has not sent its observations on the subject. The Committee requests the Government to promote collective bargaining at the General Hospital of Medellín without delay and to keep it informed in this respect.*

## The Committee's recommendations

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

***(a) With respect to the allegations of violations of trade union rights at the enterprise AVINCO S.A., submitted by the National Trade Union of Workers of AVINCO S.A. (SINTRAVI), related to the pressure put on workers to conclude a collective agreement bypassing the trade union, the subsequent withdrawal of non-statutory benefits from unionized workers and the pressure put on workers to make them leave the trade union, the Committee***

***highlights the seriousness of these allegations and once again urges the Government to conduct an inquiry into the alleged facts and, depending on the conclusions reached by the inquiry, to state which legal channels the trade union can use to protect its rights. The Committee requests the Government to keep it informed in this respect. The Committee requests the Government to take the necessary measures to adapt the legislation and the legal procedures into conformity with Conventions Nos. 87 and 98.***

***(b) As regards the allegations concerning the dismissal of five workers from AVINCO S.A., who were covered by trade union immunity after having set up a trade union organization, the Committee, taking into account that the High Court of Medellín considered that the status of trade union officials of the dismissed workers was not accredited, and therefore revoked the ruling of first instance that had ordered their reinstatement, the Committee will not pursue the examination of these allegations unless the complainant organization SINTRAVI provides accreditation for the status of trade union officials of the dismissed workers.***

***(c) As regards the dismissal of 13 workers from the Department of Antioquia affiliated to the complainant organization the Trade Union of Workers of Antioquia Department (SINTRADEPARTAMENTO), the Committee once again strongly requests the Government to conduct an inquiry in this respect and, if it is found that they were dismissed for the same reasons as the other 35 workers who were reinstated by judicial order, to take measures to promote the reinstatement of these 13 workers and, if that proves to be impossible due to the time that has elapsed to compensate them fully.***

***(d) Concerning the dismissal of Mr. Héctor de Jesús Gómez, former trade union official and trade unionist of the Trade Union of Workers of "Cementos del Nare S.A." (SINTRACENARE), on 25 May 1995, the Committee requests the Government to take the necessary measures to ensure that the enterprise fully complies with article 13 of the collective agreement and pays Mr. Héctor de Jesús Gómez the corresponding compensation plus an additional 12 per cent, and to keep it informed in this respect.***

***(e) With regard to the allegations submitted by the Single Confederation of Workers of Colombia (CUT), Antioquia Executive Subcommittee, and the Union of "Official" Workers and Public Employees of the General Hospital of Medellín, the Committee requests the Government to promote collective bargaining at the General Hospital of Medellín without delay and to keep it informed in this respect.***

CASE NO. 2239

INTERIM REPORT

## Complaints against the Government of Colombia presented by
## — the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO)
## — the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) and
## — the World Federation of Trade Unions, Regional Office, Americas (WFTU-ROA)

***Allegations: The National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) alleges the dismissal of a large number of workers belonging to the trade union who have been replaced by labour cooperatives, the workers of which are refused the right to belong to a trade union. The Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) alleges the dismissal of a worker who attended a trade union course with the authorization of the Cristalería Peldar company and the suspension of the contract of a trade union official from the same company for refusing, in protest, to hand over the list of workers who attended a training day because this was carried out on a non-working day. Finally, the World Federation of Trade Unions (WFTU) alleges that the GM Colmotores company has signed a collective agreement with those workers not belonging to the National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-metals and Related Industries (SINTRAIME) to the detriment of workers belonging to the trade union***

**381.** The National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) presented its complaint in a communication dated 21 November 2002 and the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) in a communication dated 25 April 2003. Both organizations sent further information in communications dated 15 January and 5 August 2003, respectively. Finally, the World Federation of Trade Unions (WFTU), Regional Office, Americas, sent new allegations in communications dated 14 May and 30 June 2003.

**382.** The Government sent its observations in communications dated 16 July, 13 August, 24 September 2003 and 30 January 2004.

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

## A. The complainants' allegations

**384.** In its communications of 21 November 2002 and 15 January 2003, the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) indicates that on 3 August 1998, after a strike that had begun on 17 July 1998 at the Tejidos El Cóndor S.A. company, Tejicondor signed a collective agreement that was valid until 31 July 2000. However, between 22 January and 20 June 1999, the company dismissed more than 100 workers belonging to the trade union, among whom were three trade union officials. The complainant organization adds that the company replaced the dismissed workers with workers from the COOTEXCON and Gente Activa cooperatives, the workers of which do not have the right to freedom of association nor to collective bargaining. The complainant organization lodged an action for protection of constitutional rights *(tutela)*, the outcome of which was the reinstatement of the workers in March 2001. However, in August 2001, the Constitutional Court reversed the previous decisions as it considered that the dismissals and the subsequent hiring of cooperatives was solely motivated by an attempt to reduce costs. Finally, the complainant organization indicates that some of the workers who were dismissed were employed again to work in the enterprise through the cooperatives, but that these workers were not able to join the trade union nor were they able to bargain collectively.

**385.** In its communications of 25 April and 5 August 2003, the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) alleges that Carlos Mario Cadavid, a member of the trade union, was dismissed from the Cristalería Peldar company because of his participation in a trade union course, and José Angel López, a trade union official, had his employment contract suspended after expressing his opposition, as a trade union official, to the organization of a training day outside working hours, by withholding the attendance list of workers.

**386.** In its communications of 14 May and 30 June 2003, the World Federation of Trade Unions (WFTU) alleges that the GM Colmotores company signed a collective agreement with each of the workers who did not belong to the National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-metals and Related Industries (SINTRAIME). This collective agreement could be signed by all workers who wished to do so but it automatically implied that they resign from the trade union. The WFTU indicates that the signing of the agreement took place in spite of the fact that the collective agreement signed with SINTRAIME was valid, an agreement in which it was laid down that this was extended to all workers. In order to proceed with the signing of the collective agreement, the company invited all those workers who did not belong to the trade union to a training day during which, according to the complainant organization, the workers were forced to sign the collective agreement under threat of their employment contracts not being renewed. Although the labour inspector went to the company to attend this day at the request of the trade union organization, she was not allowed to enter. This agreement was subsequently signed by 75 per cent of the company's employees, which implied the automatic resignation from the trade union of those workers who belonged to it.

## B. The Government's reply

**387.** In its communications of 16 July and 13 August 2003, the Government indicates that, with regard to the allegations presented by the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) relating to the dismissal of

more than 100 workers at the Tejidos El Cóndor S.A. company and the hiring of new employees through the COOTEXCON and Gente Activa cooperatives, the essential point of the complaint lies in the right of the company freely to employ its staff. According to the Government, there is no violation of Conventions Nos. 87 and 98 when services are contracted through cooperatives. Article 333 of the Political Constitution of Colombia provides for economic freedom, which should be understood as the power of people to carry out activities of an economic nature in order to maintain or to increase their resources, provided that the principles of reasonability and impartiality are maintained in order to ensure the harmonization of the various rights. In exercising the abovementioned rights, enterprises may suspend shifts, bring forward holiday periods, contract with cooperatives for collaborative work, merge with other enterprises, as is the case of the Tejidos El Cóndor S.A. company, Tejicondor. The Government adds that cooperatives working collaboratively deserve the same legal and constitutional protection as workers in employment relationships, all the more so when they practise the principle of solidarity (unlike employment contracts) as their members are also their owners and their wage system is as legitimate as those laid down in the Substantive Labour Code for workers in employment relationships. With regard to the right to strike, the right to collective bargaining and the right to freedom of association, the Government confirms that it has complied with the abovementioned Conventions.

**388.** The Government adds that the Constitutional Court considered that the company did not in fact carry out the dismissal of more than 100 workers inasmuch as these workers had fixed-term contracts and those contracts were not renewed, without there being any intention to reduce the number of active members of the trade union organization, to bring pressure to bear on the workers to resign from the trade union or to carry out retribution for the workers' participation in a strike. The Government adds that all the ordinary labour proceedings begun by the majority of the 103 workers were decided in favour of the company.

**389.** The Ministry of Labour and Social Security, through the Territorial Directorate of Antioquia issued resolution No. 02816 of 18 November 2002, in which it abstained from taking administrative measures against Tejicondor because it believed that anti-union harassment did not take place as it was not proven how many trade union members were dismissed and the hiring of staff through cooperatives is not, in itself, a sign of anti-union discrimination. The complainant organization lodged motions for appeal and reversal of decision that were decided in resolutions Nos. 00144 of 27 January 2003 and 01326 of 13 June 2003, which confirmed the administrative decision of November 2002.

**390.** In its communication of 30 January 2004, the Government indicates that, with regard to the allegations presented by the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) referring to the dismissal of Carlos Mario Cadavid and the suspension of José Angel López at the Cristalería Peldar company, the employer is legally empowered, in accordance with articles 111, 112, 114, 115 and 413 of the Substantive Labour Code, to impose disciplinary measures on, and to dismiss, its workers without just cause provided that they are paid the relevant compensation. The employer has the right to dismiss workers who do not fulfil the general duties and specific obligations and prohibitions that are laid down in law, in national labour regulations and in the respective employment contract, agreement or collective agreement. Finally, the Government indicates that neither of the workers involved has made use of the legal options available to him.

## C. The Committee's conclusions

**391.** *With regard to the dismissal, between January and June 1999, of more than 100 workers at the Tejidos El Cóndor S.A. company who were members of the National Union of*

*Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO), and the subsequent hiring, through cooperatives for collaborative work, of workers who do not have the right to freedom of association or collective bargaining, the Committee notes the Government's statement that the company has the freedom to employ its own staff and that the hiring out of services through cooperatives cannot be considered a violation of Conventions Nos. 87 and 98, which, according to the Government, have always been respected. The Committee also notes the Government's statement that the Constitutional Court repealed the reinstatement orders issued as a result of the appeals lodged for protection of constitutional rights; the Constitutional Court considered that the measures were not for the purpose of anti-union discrimination but that once the fixed-term contracts expired they were not renewed as a way of reducing costs. The content of this decision coincided, according to the Government, with that of resolution No. 02816 of 18 November 2002 issued by the Territorial Directorate of Antioquia.*

**392.** *The Committee notes that there is not sufficient information to allow it to reach its conclusions in full knowledge of the facts. In these circumstances, the Committee requests the Government to: (1) send a copy of the decision of the Constitutional Court; (2) inform it whether the workers of cooperatives in general, and in the specific case of COOTEXCON and Gente Activa can establish their own organizations in order to defend their interests or join a branch trade union; and (3) send a copy of the statutes of the two cooperatives, COOTEXCON and Gente Activa, as well as a copy of all the legislative provisions on cooperatives.*

**393.** *With regard to the allegations presented by the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) relating to the dismissal of Carlos Mario Cadavid because of his participation in a trade union course and the suspension of the employment contract of trade union official José Angel López for refusing to hand over the attendance list of workers called to participate in training on a non-working day, the Committee notes that, according to the Government, the workers affected did not make use of the legal options available to them and that, moreover, the employer is legally empowered to impose disciplinary measures and to dismiss workers without just cause provided that they are paid the relevant compensation.*

**394.** *The Committee recalls that exhausting national legal options is not a prerequisite for the presentation of a complaint to be accepted. Moreover, the Committee recalls that, although employers are empowered to impose disciplinary measures, "no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 696]. In this respect, the Committee requests the Government to take steps to ensure that an independent investigation is carried out to determine whether the dismissal of Mr. Cadavid and the suspension of Mr. López were the result of their trade union activities and, if this is the case, that it take steps to ensure that Mr. Cadavid is reinstated without delay with payment of the wages and benefits owing to him and that the suspension of Mr. López is revoked and that he receives any unpaid wages and benefits that are owing to him. The Committee requests the Government to take the necessary measures to adapt the legislation and the legal procedures into conformity with Conventions Nos. 87 and 98. The Committee requests the Government to keep it informed in this respect.*

**395.** *The Committee regrets that the Government has not sent its observations with regard to the serious allegations presented by the World Federation of Trade Unions relating to the forced signing of a collective agreement with workers at the GM Colmotores company, including members and non-members of the trade union, which implied the automatic resignation from the trade union of a high percentage of workers belonging to the National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-metals and Related*

*Industries (SINTRAIME). The Committee requests the Government to send its observations without delay.*

## The Committee's recommendations

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

***(a) With regard to the dismissal of more than 100 workers at the Tejidos El Cóndor S.A company who were members of the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO), and the subsequent hiring, through cooperatives for collaborative work, of workers who, according to the allegations, do not have the right to freedom of association or collective bargaining, the Committee requests the Government to: (1) send a copy of the decision of the Constitutional Court; (2) inform it whether the workers of cooperatives in general, and in the specific case of COOTEXCON and Gente Activa, can establish their own organizations in order to defend their interests or join a branch trade union; and (3) send a copy of the statutes of the two cooperatives, COOTEXCON and Gente Activa, as well as a copy of all the legislative provisions on cooperatives.***

***(b) With regard to the allegations presented by the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) relating to the dismissal of Carlos Mario Cadavid and the suspension of trade union official José Angel López, the Committee requests the Government to take steps to ensure that an independent investigation is carried out to determine whether the dismissal and the suspension were the result of these workers' trade union activities and, if this is the case, that it take steps to ensure that Mr. Cadavid is reinstated with payment of the wages and benefits owing to him and that the suspension of Mr. López is revoked and that he receives any unpaid wages and benefits that are owing to him. The Committee requests the Government to take the necessary measures to adapt the legislation and the legal procedures into conformity with Conventions Nos. 87 and 98. The Committee requests the Government to keep it informed in this respect.***

***(c) With regard to the serious allegations presented by the World Federation of Trade Unions (WFTU) relating to the forced signing of a collective agreement with workers at the GM Colmotores company, including both members and non-members of the trade union, which implied the automatic resignation from the trade union of a high percentage of workers belonging to the National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-metals and Related Industries (SINTRAIME), the Committee requests the Government to send its observations without delay.***

CASE NO. 2297

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

## Complaints against the Government of Colombia presented by
## — the Union of Public Servants of the Districts and Municipalities of Colombia (UNES) and
## — the Single Confederation of Workers (CUT)

***Allegations: The trade union organizations allege the mass dismissal of workers at the National Telecommunications Company (ENT) in 1995, at the National Railways Company (ENF) in 1991 and at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit in 1991 and 1992. The complainant organizations allege that the mass dismissals took place without consultation with the trade union organizations representing the workers at that time and that in some cases caused those organizations to disappear***

**397.** The Union of Public Servants of the Districts and Municipalities of Colombia (UNES) presented the complaint in a communication dated 1 September 2003. On 29 September 2003 it presented new allegations, and on 12 November and 12 December 2003, and 26 January 2004 it sent further information. The Single Confederation of Workers (CUT) presented new allegations in a communication dated 14 November 2003.

**398.** The Government sent its observations in a communication dated 3 December 2003 and two communications dated 4 February 2004.

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

## A. The complainants' allegations

**400.** In its communications of 1 and 29 September, 12 November and 12 December 2003 and 26 January 2004, the Union of Public Servants of the Districts and Municipalities of Colombia (UNES) alleges the mass dismissal of workers at the National Railways Company (ENF) and at the National Telecommunications Company (ENT) in 1991 and 1995 respectively. The complainant organization states that, in the case of the ENT, the dismissals caused the disappearance of the trade union organizations SITTELECOM, ATT and ASSITEL. In neither case were consultations held with the trade union organizations before proceeding with the dismissals; however, the companies held conciliation hearings on an individual basis with each of the workers. In the case of the ENF, the complainant organization attaches a copy of a reply sent to the organization by the Ministry of Social Protection, which shows that the president of the Single National Trade Union of Railroad Workers and National Railways, an organization which at that time represented the

employees of the ENF, was a key member of the advisory committee for procedures relating to closing down the company.

**401.** In its communication of 14 November 2003, the Single Confederation of Workers (CUT) alleges the mass dismissal, between 1991 and 1992, of approximately 350 workers at the Ministry of Finance and Public Credit, the majority of these workers being members of the Trade Union of Employees of the Ministry of Finance and Public Credit, among whom were the members of the executive committee of the trade union. According to the complainant organization, in order to carry out the dismissals, the Ministry merged the Taxation Directorate with the Customs Directorate, giving rise to DIAN, which, in turn, established the General Directorate of Taxation Support. Subsequently, there was a transfer of DIAN employees, previously chosen by the Ministry, 80 per cent of whom belonged to a trade union and among whom were the members of the executive committee. Once the transfer of employees had been carried out, the Ministry of Finance issued Resolution No. 00101 of 1992 in which it approved a retirement plan with compensation for the recently established General Directorate of Taxation Support. The complainant organization adds that a short time after the dismissals, the Ministry employed new workers who have filled these posts up until the present time.

## B. The Government's reply

**402.** In its communications of 3 December 2003 and 4 February 2004, the Government indicates that the restructuring of public bodies is part of its responsibilities and it emphasizes that the parties concerned had not taken advantage of the appropriate legal recourse since the restructuring began in spite of its being available and in spite of the time passing. The Government adds, moreover, that the conciliation hearings were legal acts that were held between responsible persons and that they are *res judicata*, provided that the agreement has been freely given. Moreover, any worker that considers that the conciliation hearing in which he or she took part was not valid had three years to appeal before the judicial authorities, after which time the statutory limitation laid down in article 150 of the Procedural Labour Code became effective. The Government emphasizes that the dismissals referred to in the allegations date from 1991, 1992 and 1995.

## C. The Committee's conclusions

**403.** *The Committee notes that the allegations in this case are similar to those examined by the Committee on a previous occasion [see 330th Report, Case No. 2151, paras. 528-543]. In a general way, the Committee recalls that it can examine allegations concerning* economic rationalization *programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 935].*

**404.** *With regard to the restructuring being carried out at the National Telecommunications Company (ENT) and the National Railways Company (ENF), the Committee notes that the complainant organization the Union of Public Servants of the Districts and Municipalities of Colombia (UNES) alleges that consultation was not carried out before the mass dismissals took place but that there were conciliation hearings on an individual basis with the workers and that, in the case of the ENT, these mass dismissals caused the disappearance of the trade union organizations SITTELECOM, ATT and ASSITEL. The Committee notes that, according to the Government, the conciliation hearings that took place with the workers on an individual basis at both companies were legal and that, in spite of the time passing, the workers did not take advantage of the legal recourse*

*available, which has now expired as the statutory limitation has taken effect for the events that took place in 1991 and 1995. Although the closure of the trade union organizations SITTELECOM, ATT and ASSITEL is regrettable, the Committee is not in a position to decide, from the information contained in the allegations, whether the restructuring was carried out solely for rationalization purposes or whether, underlying this, there was anti-union discrimination.*

**405.** *The Committee notes that, with regard to the alleged lack of consultation in the case of the National Railways Company (ENF), the communication from the complainant organization shows that the president of the National Single Trade Union of Railroad Workers and National Railways, which was representing the workers at that time, participated as an adviser in the procedures to close down the National Railways Company. However, with regard to the restructuring of the ENT, the Committee notes that nothing in the Government's reply shows that consultations took place or that an agreement was attempted with the trade union organizations. In this respect, the Committee has indicated on a number of occasions that it can only regret that in the rationalization and staff-reduction process, the Government did not consult or try to reach an agreement with the trade union organizations [see* ***Digest****, op. cit., para. 935]. The Committee requests the Government to ensure that the proper consultations are carried out with the relevant trade union organizations in the future when restructuring procedures are being undertaken.*

**406.** *With regard to the restructuring carried out at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit, the Committee notes that, according to the Single Confederation of Workers, this took place shortly after the Directorate was established and after workers from other departments of the Ministry of Finance were transferred to this body to carry out their tasks, 80 per cent of these workers being members of the Trade Union of the Ministry of Finance and Public Credit, including the executive committee. The Committee also notes that, according to the allegations, shortly after the 350 employees were dismissed, new employees were hired. The Committee notes that, according to the Government, restructuring falls within its responsibilities and that the workers had available to them internal legal channels but that those were no longer available because the statutory limitation had taken effect. The Committee regrets to note, however, that the Government makes no reference to the way in which the restructuring took place, as pointed out by the complainant. In these circumstances, the Committee requests the Government to take steps to ensure that an investigation is carried out to determine the alleged anti-union nature of this restructuring and to keep it informed in this respect.*

## The Committee's recommendations

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

***(a) The Committee requests the Government to ensure that the proper consultations are carried out with the relevant trade union organizations in the future when restructuring procedures are being undertaken.***

***(b) With regard to the restructuring carried out at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit, with the dismissal of 350 employees shortly after the Directorate was established and workers were transferred to it from other departments of the Ministry of Finance, 80 per cent of these workers being members of the Trade Union of the Ministry of Finance and Public Credit, including the***

***executive committee, the Committee requests the Government to take steps to ensure that an investigation is carried out to determine the alleged anti-union nature of this restructuring, and to keep it informed in this respect.***

CASE NO. 2258

INTERIM REPORT

## Complaints against the Government of Cuba presented by — the International Confederation of Free Trade Unions (ICFTU) and — the Latin American Central of Workers (CLAT) supported by the World Confederation of Labour (WCL)

***Allegations: The authorities recognize only one trade union central controlled by the State and the Communist Party and prohibit independent trade unions, which have to carry out their activities in a very hostile environment; non-existence of collective bargaining; the law does not authorize the right to strike; arrest and harassment of trade union members, who are threatened with criminal penalties, physical violence; unlawful house entry; trials and sentencing of trade union officials to long prison terms; confiscation of trade union property and infiltration of state agents into the independent trade union movement***

### Provisional working document

**408.** The Committee examined this case at its November 2003 meeting and submitted an interim report to the Governing Body [see 332nd Report, Case No. 2258, paras. 458-531, approved by the Governing Body at its 288th Session (November 2003)].

**409.** The Government sent further observations in communications dated 20 January, 25 February, 19 and 24 May 2004.

**410.** The World Confederation of Labour submitted a number of documents and information in a communication dated 11 March 2004.

**411.** Cuba 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

**412.** The Committee recalls that the pending allegations relate to the following issues:

The Cuban authorities only recognize one trade union central, which is under the strict control of the State and the Communist Party. The Government prohibits independent trade unions. which carry out their activities in a very hostile environment. Collective bargaining does not exist. The right to strike is not authorized by law; arrest and harassment of trade union members, threat of criminal prosecution, physical aggression, violation of privacy of the home; trial and conviction of trade union leaders who are sentenced to long prison sentences; confiscation of trade union property and infiltration by state agents of the independent trade union movement.

**413.** In its meeting of November 2003, the Committee made the following recommendations [see 332nd Report, para. 531]:

(a) The Committee emphasizes that, in accordance with Convention No. 87, ratified by Cuba, workers should have the right to establish, in full freedom, the organizations that they consider necessary irrespective of whether or not they support the social and economic model of the Government, including the political model of the country, and that it is for these organizations to decide whether they shall receive funding for legitimate activities to promote and defend human rights and trade union rights.

(b) Noting that the proposals for revision of the Labour Code are currently being considered, the Committee requests the Government to adopt, without delay, new provisions and measures to recognize fully in law and in practice the right of workers to establish the organizations that they consider necessary at all levels, and the right of these organizations freely to organize their activities. The Committee requests the Government to keep it informed in this respect.

(c) The Committee requests the complainant organizations to send a copy of the statutes of each of the organizations mentioned in the complaint (Single Council of Cuban Workers (CUTC), Independent National Workers' Confederation of Cuba (CONIC) and Confederation of Democratic Workers of Cuba (CTDC)).

(d) The Committee requests the Government to provide detailed information on the various collective agreements signed in recent years (the parties to the agreements, the subject matter of the agreements, the number of workers covered in the private sector and in the public sector).

(e) Noting that it has always recognized the right to strike as a legitimate right of workers and their organizations in defence of their economic and social interests, the Committee requests the Government to take measures to ensure the effective recognition of the right to strike and guarantee that no one will be discriminated against or suffer prejudice in their employment as a result of the peaceful exercise of this right. The Committee requests the Government to keep it informed in this respect.

(f) The Committee is extremely concerned to note the allegations relating to the detention and the extremely harsh sentencing (between 15 and 26 years' imprisonment) of trade union officials of CUTC and CTDC.

(g) The Committee must remind the Government that the detention and sentencing of trade union officials or members for carrying out activities to defend workers' interests is a serious violation of public freedoms in general and trade union freedoms in particular. The Committee requests the Government to take steps to release immediately the people mentioned in the complaints: Pedro Pablo Alvarez Ramos, Carmelo Díaz Fernández, Miguel Galván, Héctor Raúl Valle Hernández, Oscar Espinosa Chepe, Nelson Molinet Espino and Iván Hernández Carrillo. The Committee also requests the Government to send copies of the criminal sentences handed down against these people.

(h) The Committee regrets that the Government has not replied to the allegations relating to the confiscation by the police in March 2003 of books from the CUTC trade union library, a computer, two fax machines, three typewriters and numerous documentation. The Committee urges the Government to send its observations without delay.

(i) The Committee regrets to note that the Government has not replied to the allegations of the International Confederation of Free Trade Unions (ICFTU), according to which Aleida de las Mercedes Godines, Secretary of CONIC, and Alicia Zamora Labrada,

Director of the Trade Union Press Agency Lux Info Press, were two state security agents infiltrated into the independent trade union movement (the former 13 years ago, according to information received from the ICFTU). The Committee urges the Government to send detailed observations in this respect without delay.

(j) The Committee notes with regret that the Government has given no specific reply to the allegations of the ICFTU relating to years 2001 and 2002 (threats against trade union members, sentencing of a trade union member to two years in prison, violence against trade union members, detentions, searches of houses and attempts by the police to prevent a trade union congress). The Committee urges the Government to send detailed observations on these allegations without delay.

(k) The Committee urges the Government to accept a direct contacts mission.

## B. The Government's reply

**414.** In its communication dated 20 January 2004, the Government confirms the information contained in its earlier reply and states that the Committee's report on Case No. 2258 contains statements and reflections that exceed its mandate. The Committee states in its interim conclusions that it notes the Government's statements but proceeds literally to repeat the false allegations made by the complainants, describing as trade union members convicted criminals who have been tried by courts that have been duly established in conformity with Cuban law. The charges for which they have been tried are totally unrelated to trade union activity.

**415.** The Government adds that it is not up to the Committee to question the legitimacy and independence of Cuban trade unions which are organizations that emerged from, and have been strengthened by the efforts and demands achieved by the trade union movement in the course of over a century. Neither is the Committee competent to legitimize and bestow the term "independent trade unions" upon the so-called organizations whose statutes it has not even taken the time to examine, as stated in paragraph 518 of its 332nd Report. The Committee should not term as "independent" groups which act under the orders of and are funded by the Government of a hostile foreign power, to engage in activities that are totally unrelated to the trade union sphere, as reported upon in detail and proven to the Committee in earlier reports. The Committee is again exceeding its mandate when it questions the collective labour agreements concluded in places of work in Cuba by trade union organizations belonging to the 19 national branch trade unions affiliated to the Central Organization of Cuban Trade Unions (CTC) which are not the subject of any complaint.

**416.** Moreover, as stated in earlier reports, no Cuban worker organization has elected the persons mentioned as their legitimate representatives at a place of work, for which reason the Committee does not and cannot have any information, of an accurate and objective nature, of their practical activity in places of work or of collective agreements concluded by them with the management of Cuban enterprises in defence of the interests that they claim to represent. The Committee also exceeds its mandate in seeking to impose obligations on member States that are not explicitly embodied in agreements. In this connection, we refer to the request made to the Government to take measures to recognize the right to strike. In this connection, the Committee is reminded that, while implicit, the right to strike is not explicitly established in Convention No. 87 concerning freedom of association and protection of the right to organize. Nowhere does current Cuban legislation ban the right to strike, nor does criminal legislation provide for any penalty for exercising such rights. It is the prerogative of trade union organizations to take decisions in this regard.

**417.** The Government states that the Committee exceeds its mandate (paragraphs 523 and 527) in assuming the right to describe as "extremely harsh" the penalties handed down by the

legally established courts of this country, in connection with the activities categorized as offences in current law. It should also be noted that the statement at the end of paragraph 523 of the 332nd Report is totally false, given that the treatment of offenders conforms fully with the principles and standards embodied in the instruments of international law to which Cuba is a party. Cuba's record, since 1959, is entirely free of such violations, or of any ill-treatment of individuals, in contrast to the scenes of police brutality that appear daily in the media of the countries of origin of the complainant organizations, without any of these organizations having complained to the Committee for such acts which hamper the exercise of citizens' activity and public freedoms in these countries.

**418.** The Committee, in paragraph 525, fails to mention Cuban Law No. 88 of 1999: "Law for the protection of national independence and the economy of Cuba", article 5.1 of which provides that: "anybody seeking information to be employed in connection with application of the Helms-Burton Law, the embargo and the economic war against our people, intended to disrupt domestic order, destabilize the country and liquidate the socialist state and the independence of Cuba, incurs the penalty of deprivation of liberty". It is incomprehensible that the Committee should be so meticulous with regard to the allegations by the complainants but fails to refer to this law which, as stated in our earlier report, is the basis of the legal rulings with regard to the persons sentenced, in connection with their real acts, as opposed to their alleged trade union activity.

**419.** The charges brought against them are not general and vague, as stated by the Committee. The allegations were duly proven with all the procedural guarantees embodied in legislation. Therefore, it is wrong to conclude, as stated in paragraph 527, that the Committee considers that the charges are "too vague and are not necessarily criminal and can come under the definition of legitimate trade union activities". The facts, the charges and the characterization of the offences were reported in detail in earlier replies, which unfortunately the Committee fails to consider in its conclusions, and which would have prevented it from going to the extreme, as it has in calling into question, without motive or competence to do so, rulings by the Cuban courts pursuant to our criminal and procedural laws.

**420.** In repose to the Committee's request that the Government should take steps to release immediately the people mentioned in the complaints, the Constitution of the Republic provides that "… the Popular Supreme Court holds ultimate judicial authority and its decisions in this regard are final" … "Judges, in their function of imparting justice, are independent and owe obedience only to the law."

**421.** With regard to the proposal appearing both in the interim conclusions and in the recommendations, on the subject of sending a direct contacts mission, the Government categorically rejects this possibility. The Cuban authorities are of the view that, in this matter, the Committee is motivated by obviously political interests, depriving it of any credibility, objectivity and impartiality.

**422.** It is totally unacceptable that the Committee should seek to legitimize funding by a foreign government, through its agencies and the country's Interests Section in Havana, to groups with the stated intention of supporting the economic embargo and carrying out actions against Cuba which the foreign country in question, without scruple or respect for basic standards of international law, has embodied in its so-called Helms-Burton Law. This Law, which is of an extraterritorial nature, boosts the economic war against the working people of Cuba, seeking to destabilize the country and liquidate the socialist state and Cuban independence. The activities carried out by these groups in keeping with the Helms-Burton Law cannot be disguised as legitimate trade union rights, as stated by the Committee. It is incomprehensible that the Committee should ignore the fact that the embargo by the

United States against Cuba has been condemned for 13 consecutive years by the international community in successive resolutions adopted by the overwhelming majority of Member States of the United Nations General Assembly. In light of the above considerations, the Committee is requested to discontinue examination of this case.

**423.** In its communication dated 25 February 2004, the Government states that, having sent three notes containing comments on Case No. 2258, the Cuban authorities were under the impression that they had provided sufficient information for the case to be concluded. Cuba disagrees with this exercise and rejects the underlying political motivation, as it has previously denounced. However, in a spirit of goodwill and readiness to cooperate with the ILO mechanisms, it has decided to submit the following reflections on those paragraphs of the 332nd Report by the Committee that supposedly remain unanswered.

**424.** With regard to the Labour Code review procedure, the preliminary draft has been revised and updated eight times and consultations are being held with trade union organizations on the latest version, with a view to receiving their comments and opinions and incorporating them into the final text. Moreover, as stated on previous occasions, Cuban national legislation recognizes freedom of association and the right to organize, as embodied in law. In this regard, the Cuban Constitution of 24 February 1976, and its reform of July 1992, provide that the Cuban Socialist State recognizes and encourages grass-roots and social organizations. Article 13 of the Labour Code provides that all manual and intellectual workers are entitled without prior authorization to freely associate and establish trade union organizations. Article 14 further provides that workers have the right to meet, discuss and freely express their opinions on all questions or matters affecting them.

**425.** The Government regrets that the Committee has failed to take note of the reflections contained in its communications dated 30 May 2003 and 20 January 2004, which provide a detailed explanation of the activities and acts for which the individuals referred to in Case No. 2258 were tried and convicted, in connection with offences that are typified and made punishable under the current Criminal Code. These offences are not connected in any way with trade union activity and, even less, with the enjoyment of freedom of association or the right to organize. These individuals have no regard for socially useful work and, of course, for trade unions of manual and intellectual workers. Their income derives from payment for mercenary activities at the service of a foreign power that envisages military aggression and imposition of its domination over Cuban workers.

**426.** Attention is drawn to the outrageous and politically motivated request to the Cuban Government to take measures to guarantee "the right of workers to establish the organizations that they consider necessary at all levels, and the right of these organizations freely to organize their activities". It was the triumph of the Revolution of labourers, peasants, manual and intellectual workers, artists, professionals and workers in general, on 1 January 1959, which removed the obstacles to the free exercise of the Cuban's right to organize. There are few other countries where trade unions play such an important role in the political system and in conducting national affairs. In Cuba, the necessary legal and practical provisions exist for workers to establish as many trade unions as they consider necessary to defend their rights. The existence of a single central organization of trade unions, and its embodiment in our legislation, constitute a demand and achievement of Cuban workers themselves, following decades of struggle to achieve their legitimate rights.

**427.** Trade union organizations in Cuba conduct their activities without interference by a foreign government, but neither, of course, do they accept interference by this foreign government. Cuban workers are opposed to the establishment of groups of mercenaries, who are paid by and at the service of the superpower and who, masquerading as trade unionists, carry out activities intended to subvert the constitutional order confirmed in a referendum by over 95 per cent of all Cubans in 1976.

**428.** Article 8 of ILO Convention No. 87 clearly states that, in exercising the rights embodied in this Convention, genuine trade union organizations, workers and their respective organizations are required, as are other individuals and organizations, to respect the legal order. Why is something being demanded of Cuba that is contrary to ILO Conventions? How can anyone condone such spurious manipulation that serves solely to further the objectives of aggression and hostility by a foreign government against the workers and creators of Cuba? Why does anybody believe in "yellow" trade unions at the service of corrupt governments and transnational capital? Why do these puppet trade unions not speak out openly in the ILO against the embargo intended to subjugate Cuban workers through hunger and disease; against terrorist acts which are planned, funded and carried out from United States territory against Cuban workers, resulting in assassinations and permanent mutilations; against the resurgence of the policy of anti-Cuban hostility by the current United States administration and the imminent danger of military aggression?

**429.** Convention No. 98, Article 2, deems to constitute acts of interference those acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the objective of placing such organizations under the control of employers or employers' organizations. It fails to apply this description to mercenary "trade union" groups that are established and financially supported by the government of a foreign country in Cuba through its Interests Section in Havana, for the purpose of destroying the political system which guarantees freedom of association and the right to organize and the exercise of power to Cuban workers.

**430.** The ICFTU complaint does not mention and, indeed, acts as an accessory in concealing the blatant interference by the Government of the United States in the enjoyment of the rights to self-determination and to freedom of association and the right to organize by the workers and people of Cuba. This is aggravated by the fact that the ICFTU is fully aware that during the oral trials of the convicted mercenaries it was proven – as admitted by the accused – that their illegal activities were funded by several federal agencies of the United States Government and of the Cuban American terrorist mafia acting with impunity from Miami.

**431.** It is not surprising that the ICFTU, encouraged by the AFL-CIO and in full complicity with the government of a foreign country, should seek to present as "trade union activities" acts targeting the security and constitutional order of the country and collaboration with the aggressive and hostile acts by the foreign superpower against the Cuban people, constituting an undeclared war.

**432.** The AFL-CIO's consistent aligning with and subordination to the policy of hostility by a foreign government towards the Cuban nation, in which it likewise involves the ICFTU, deprive it of any credibility and legitimacy as a source of allegations against Cuba.

**433.** It is regrettable that the Committee should fall into the trap of believing in such a manifest travesty of truth and justice, thereby besmirching and undermining the prestige of the ILO's work. We are aware that some have engaged in such a spurious exercise in full possession of the facts; they will be unmasked and denounced! However, for all those who were deceived by the United States media campaign or those who do not possess sufficient information, Cuba restates its determination to go to all necessary lengths and to provide all necessary information.

**434.** Cuba will work diligently to restore the credibility of the Committee which has been seriously undermined in recent years, by lack of democracy and transparency in its work and decision-making processes and it intends, together with many others, to turn this body into a genuine guarantor of the objectives it was originally established to achieve.

**435.** Moreover, the Government states that collective labour agreements have been signed in all bodies and offices of the Cuban Central State Administration, in production and/or services units and in undertakings belonging to the emerging economy. The vast majority of the 3,250,000 trade union members, grouped in the 101,700 grass-roots trade union sections existing in the country at the end of 2003, are protected by one of the over 10,000 collective agreements signed to date. The Cuban trade unions are responsible for drafting these agreements and establishing their scope, together with oversight of compliance, while the State intervenes only as mediator in the event of dispute. This function is carried out by the Ministry of Labour and Social Security. The department responsible for collective agreements in the Central Organization of Cuban Trade Unions (CTC) has been asked to provide the requested information. Any delay in forwarding this information is to be attributed to the careful review being carried out by the CTC of the large volume of existing information. The Government would like to emphasize that the number of current collective agreements, the subjects they cover and the number of workers protected by these agreements constitute an achievement of the State's labour policy and a conquest by the workers, of which the Cuban people are proud. It is a source of satisfaction for Cuban workers and for the Government that this information should appear in official ILO documents, as a further demonstration that Cuba has nothing to hide and much to be proud of in labour affairs, despite calumnies such as those appearing in the complaints giving rise to Case No. 2258.

**436.** With regard to the Committee's recommendations in connection with detentions and sentencing, the Government states that the underlying assumption and conclusions are totally erroneous. None of the persons arrested were genuine trade unionists and much less trade union leaders. None of them were tried or sentenced for any act relating to the defence of worker interest and, less still, with the exercise of public freedoms in general, and trade general freedoms in particular. The nature of the offences committed does not fall within the ambit of the ILO's activity; none of these activities which gave rise to the prosecution of the mercenaries referred to in the ICFTU complaint is described in any of the Organization's Conventions. The Cuban Government reminds the Committee that ILO Convention No. 135, Article 3, provides that, the term worker representatives refers to persons recognized as such, pursuant to national legislation or practice. None of the mercenaries mentioned in the complaint was elected as a trade union representative under national legislation, or under national practice; neither would they be accepted as trade unionists in any country at all for the simple reason that they had no connection whatsoever with any group or association of workers. Their only "labour-related activity" was their service as paid agents of the policy of aggression, embargo and hostility pursued by the Government of a foreign country and the terrorist mafia in Miami against the workers and entire population of Cuba. Cuba is a State under the rule of law, where the Constitution and practice embody the protection and judicial defence of its citizens. The decisions of the Popular Supreme Court, in its capacity as supreme judicial authority, are final. It is not acceptable that a mere supervisory body of the ILO, exceeding its mandate and acting contrary to the purposes for which it was established, with clear motives of political manipulation, should trample underfoot the minimum standards of respect for the sovereignty of states. Cuba rejects and denounces this action and demands that a rectification be made at the earliest opportunity.

**437.** The Government adds that, in the interest of continuing to clarify the real situation of the eight mercenaries who have been justly punished, referred to in the ICFTU complaint – under pressure from the government of a foreign country – the Government of Cuba should expand upon the information contained in its note of 20 May 2003, adding the following information:

- **Miguel Galván Gutiérrez,** with no labour link by his own choice for the past several years, was detained on 18 March 2003, prosecuted under preliminary investigation

File No. 341/03, with a prosecution request for 15 years' imprisonment. The Popular Provincial Court of the City of Havana, pursuant to article 91 of the current Criminal Code, sentenced him, in Judgement No. 12 of 2003, to 26 years' imprisonment for acts against the independence or territorial integrity of the State, with the aggravating factor of having committed the offence for personal gain. Galván maintained close conspiratorial links with officials of the United States Interests Section in Cuba, which he visited to deliver documents containing information of interest to the United States policy of hostility towards the Cuban people and to receive instruction and materials for his subversive work against the constitutional order of the country. Likewise, he maintained close conspiratorial links with terrorist organizations in Miami, from which he also received money, instructions and materials of a subversive nature. In his subversive activities, he fraudulently deceived several people, promising to facilitate the migration formalities to travel to the United States to carry out illegal acts.

- **Héctor Raúl Hernández,** with no known labour link for the past several years. Detained on 19 March 2003, prosecuted under preliminary investigation File No. 341/03, with a prosecution request for 15 years' imprisonment. The Popular Provincial Court of the City of Havana, pursuant to article 91 of the current Criminal Code, sentenced him, in Judgement No. 12 of 2003, to 12 years' imprisonment, for acts against the independence or territorial integrity of the State. This individual's income originates from unlawful activities, such as trafficking in currency of non-legal origin, and speculation and resale of articles stolen from shops, selling merchandise for foreign currency. He attempted illegally to leave the country in 1995, 1996, 1998, 2000 and 2002, and was returned to Cuba by the United States coastguards. He received funding from the Cuban American terrorist mafia based in Miami, including the organizations *Fundación Patria Libre* and *Partido Democrático 30 de noviembre – Franck País*. He used the money he received to recruit further mercenary agents and fabricated false allegations against the political system and the Cuban authorities, which are used by the Government of the United States, among other purposes, to work against members of Congress and broad sectors demanding change in the policy of aggression and embargo against the Cuban people. He also engaged in distributing materials provided to him by the United States Interests Section in Havana inciting the Cuban people to engage in subversion against the institutional order and against public order.

- **Nelson Molinet Espino,** with no labour link by his own desire, arrested on 20 March 2003, and tried on the basis of preliminary investigation File No. 345/03. The Popular Provincial Court of the City of Havana, in Judgement No. 7 of 2003, sentenced him to 20 years' imprisonment, pursuant to article 91 of the current Criminal Code, for offences against the independence or territorial integrity of the Cuban State. He has a long criminal record on account of his being a danger to society. He was tried in 1996, for threatening and attacking a public official. He carried out activities in Cuba commissioned and funded by terrorist organizations based in Miami: *Hermanos al Rescate* (brothers to the rescue) and *Movimiento Democracia*. In carrying out his illegal activities, he employed materials sent by these organizations and others provided by the United States Interests Section in Havana, providing instructions on methods for fostering insurrection in the country.

- **Iván Hernández Carrillo,** also with no known labour link. Detained on 18 March 2003 and prosecuted under preliminary investigation File No. 19/03, with a prosecution request for 30 years' imprisonment, pursuant to Law No. 88. The Popular Provincial Court of Matanzas sentenced him, in Judgement No. 2 of 2003, to 25 years' imprisonment for offences against national independence and the economy of Cuba. He is a habitual layabout and lives on money received from abroad. He has

received numerous warnings by the authorities for participating in and organizing public disturbances and street brawls. He maintains regular contact with officials of the United States Interests Section and with terrorist organizations in Miami from which he regularly receives money to fund subversive activities.

**438.** On the subject of the allegations relating to confiscation by the police in March 2003 from the CUTC trade union library of a computer, two fax machines, three typewriters and numerous documents, the Government states that the Cuban authorities have no knowledge of the supposed library referred to in this paragraph. Cuba is among the countries with the largest number of public libraries per capita, containing all manner of literature and naturally including ILO publications and extensive other material on the subject of trade unionism throughout the world and on labour rights. There is no knowledge of the existence in Cuba of any "trade union library" belonging to something referred to as "CUTC". The materials confiscated from the mercenaries, always in strict compliance with the law and the requirements of due process, did not include any library or documentation relating to trade unions, trade unionism or labour rights. The material confiscated, which was on all occasions duly presented to the corresponding judicial authorities, included: materials inciting subversion, written and printed by the United States Interests Section in Havana and the Cuban American terrorist mafia in Miami; equipment of which legal purchase could not be proven since they were brought in illegally or with a declaration of a false addressee in the country or illegally "donated" by the United States Interest Section in Havana, or bought with its money and which were being used to assist subversive conspiracy activities. Cuban trade unions and trade union members have untrammelled access, even through facilities such as Internet, to any literature they require or that they are interested in consulting on the subject of trade union activity and labour rights. Hence, the allegations included in paragraph *(h)* of the Committee's recommendations are ridiculous.

**439.** With regard to the ICFTU allegations that Aleida de las Mercedes Godines, Secretary of the Independent National Workers' Confederation of Cuba (CONIC) and Alicia Zamora Labrada, Director of the Trade Union Press Agency Lux Info Press, were two state security agents infiltrated into the independent trade union movement (the former 13 years ago, according to information received from the ICFTU), the Government states that if the ICFTU has no information in this regard, it is simply because, where Cuba is concerned, it receives and seeks only disinformation provided to it by the government of a foreign country and the Cuban American terrorist mafia in Miami. On this specific issue, extensive information has been published both by the Cuban Government (including an interview with the foreign press by the Minister of Foreign Affairs of the Republic of Cuba, His Excellency Felipe Pérez Roque, on 9 April 2003), and by Cuban authors and journalists (see the book *Los Disidentes. Agentes de la Seguridad Cubana revelan la Historia Real*, by Rosa Miriam Elizalde and Luis Baéz, *Editora Política*, Havana, 2003). However, this paragraph contains a number of totally false and biased premises:

– the Cuban patriots Aleida de las Mercedes Godines and Alicia Zamora Labrada participated voluntarily in defending the security and independence of their country, against the policy of the embargo, hostility and aggression by United States imperialism;

– they did not "infiltrate" any trade union organization. They merely studied and sought information regarding the *modus operandi* of the United States Interests Section in Havana, and the Cuban American terrorist mafia in Miami, in recruiting, funding and masterminding the conspiratorial activities of their mercenary groups, working on the island towards the overthrow of the national constitutional order;

– they fully fulfilled their duty as citizens to protect the independence and security of the entire people, against the aggressive threats of the superpower and the mercenary activities of their paid agents; and

– the statements and declarations by these Cubans in themselves demonstrate that the activities carried out by the eight mercenaries mentioned in the ICFTU complaint were totally incompatible with freedom of association and the right to organize and with the labour rights championed by the ILO.

**440.** Should the Committee or the ICFTU still have any doubts as to why the Cuban Government must use its security bodies to defend itself, with the support and collaboration of all patriotic Cubans and of any person of dignity who is prepared to do so, they have only to consult the documents that have been declassified by the Central Intelligence Agency of a foreign power, regarding plans of aggression against Cuba, and numerous planned attacks against its prominent leaders, with the support of terrorist groups and gangs operating against the Cuban people. It would be of interest to examine the United States Helms-Burton and Torricelli Laws (which even lay down the outlines of the political and economic system that would be imposed on the Cuban people once the current constitutional order has been overthrown), or study the recent statements threatening aggression against Cuba by high-ranking officials of the State and Defence Department in the current United States administration.

**441.** With regard to the ICFTU allegations for 2001 and 2002 (threats against trade unionists, sentencing of a trade union member to two years' house arrest, attempts by the police to prevent a trade union congress), the Government states that it has already replied to these ICFTU allegations in Case No. 1961, consideration of which has been discontinued. It is difficult to understand how allegations that have already been discussed and concluded in one case should subsequently be repeated in another case.

## C. Additional information by the World Confederation of Labour

**442.** In its communication dated 11 March 2004, the World Confederation of Labour (WCL) sends documentation regarding the Single Council of Cuban Workers (CUTC) including its statutes, and a statement of principles/plan of action.

## D. The Government's new reply

**443.** In communications dated 19 and 24 May 2004, the Government provides its observations concerning the communication of 11 March 2004 of the World Confederation of Labour (WCL):

> The documents provided by the WCL do not provide any evidence on the legitimacy, let alone the existence of the CUTC.
>
> The documents in question do not contain any mention of registration or validation by Cuban legal and civil authorities, and do not constitute the programme or statutes of any labour or trade union group that has such activities on the territory of the Republic of Cuba.
>
> None of the members of the so-called CUTC has had trade union or labour activity.
>
> The CUTC structure and functioning described in these documents are not based on any participation by workers or workers' organizations (the real and legitimate actors of trade union activity in service and production units) that would guarantee the election of leaders, the adoption of an action programme in line with workers' interests and, what is more important, the will to create structures, supposedly of a trade union nature, as described in these documents.

The documents attributed to the CUTC describe an organization that, since its establishment, has clearly renounced to have a real and large membership, to respect the will of its members and to put at their disposal democratic, transparent and participatory mechanisms. This has been a serious error or omission in the drafting of these documents.

If there was any doubt left as regards the illegitimacy of the CUTC as a trade union organization, these documents contribute in confirming its lack of representativity among Cuban workers. The drafters of these documents, obviously prepared hastily to comply with the request of the Committee on Freedom of Association, have forgotten to include among the CUTC mechanisms the element which is a fundamental feature of any legitimate and independent trade union activity, that is the support and participation of workers and labour collectives in the decisions concerning the election of their leaders or representatives, and in the decisions concerning the programmes of action of the so-called trade union activity which is mentioned in the documents.

The persons whom the WCL defends are not "trade unionists" and do not have any trade union activity. The "Statutes" demonstrate the lack of representativity of the persons mentioned by the WCL. The document itself indicates that the so-called "independent" trade union is nothing more than a group of self-appointed persons, who have not been elected by any group of workers, do not report and are not responsible to them.

The false "Statutes" attributed to the CUTC are unknown to the workers, and have not been submitted for analysis, discussion and approval by any workers' collective. The persons who fraudulently claim the title of trade union leaders have not been elected by any workers' collective. The drafters of these "Statutes" never thought of including representation mechanisms nor basic trade union structures, simply because the CUTC has no affiliates and does not have any worker among its members. It is a cover-up name intended to mislead naive observers; its activities have nothing to do with its name and with the "trade union activities" that are fraudulently included in the false "Statutes" attributed to the CUTC.

It is obvious that the "trade union activities" which the CUTC is allegedly pursuing are little more than a weak "statement of intentions" included in the documents submitted, where the drafters have mentioned interests that have no relationship whatsoever with trade union activities. The drafters have elaborated a document which is more reflective of conspiracy and subversion than of a trade union organization.

The documents submitted by the WCL do not constitute a trade union platform and merely replicate and apply, in a coherent manner, the scheme elaborated by the United States through their Helms Burton Law to interfere in Cuban affairs.

The documents submitted by the WCL contain multiple references which appear to be carbon copies of the provisions contained in various titles and sections of the Helms Burton Law, for example:

– **representative democracy and market economy:** Helms Burton Law, Title I, sections 109 and 111; Title II, section 201;

– **transformation of the armed forces and of the Ministry of Interior:** Helms Burton Law, Title II, sections 201, 202 and 205;

– **private property status:** Helms Burton Law, Title II, sections 205, 206 and 207; Title III, section 201, protection of the property rights of nationals of the United States;

– **liberation of "political prisoners":** Helms Burton Law, Title I, section 112; Title II, section 205;

– **multipartism and elections; "bourgeois" democratic scheme:** Helms Burton Law, Title II, sections 201 and 205;

– **methods of organization of elections:** Helms Burton Law, Title II, section 205;

– **transformation of judicial system:** Helms Burton Law, Title II, section 205.

These references are only examples of a constant intention in these documents, repeated and reproduced from the Helms Burton Law in the WCL documents, that aim at the destruction of the political, economic and social system which has been chosen in complete independence by the people and incorporated in the Constitution of the Republic, approved by

an overwhelming majority of the Cuban people through a universal referendum passed to that effect in 1996.

In any country of the world, a trade union organization must be established in conformity with the legal and constitutional order of that country, and not in violation of it or for its destruction.

On the other hand, a complete alignment is clearly demonstrated between the objectives of the Helms Burton Law and the documents attributed by the CMT to the so-called CUTC. In both cases the aim is to subordinate third countries and international organizations, including the ILO, to the policy of the United States Government which is directed towards the so-called "change of regime" in Cuba, without excluding military invasion.

The so-called Programme of Action contains open statements about "changes in the current Cuban society", laying down new plans for the reorganization of the economic foundations, artistic expression, education, culture and political and party system in the country.

The chapter entitled "On democratic reform: Its alternatives", is a faithful copy of the political organization that the United States Government tries to impose on the Cuban people through the Helms Burton Law.

Cuba, just like any other country in the world, has the right to defend its sovereignty, independence and economy through the implementation of the law.

The Act on the Protection of the National Independence and the Economy of Cuba, No. 88 of 1999, establishes in its article 5.1 the following: "anyone who looks for information to be used in application of the Helms Burton Law, the blockade and the economic war against our people, directed at ruining the domestic order, destabilizing the country and selling off the socialist state and the independence of Cuba, shall incur the penalty of imprisonment".

Moreover, Act No. 80 of 24 December 1996 on the Reaffirmation of the Cuban Dignity and Sovereignty declares illegal any form of collaboration to promote the application of the Helms Burton Law in the country.

How could persons be described as "independent trade unionists" when, as has been demonstrated, they act under the instructions of a foreign government against the constitutional order decided in a sovereign manner by the people, and enjoy a lucrative lifestyle through the financing of their mercenary activities, despite the suffering they cause to their people?

During the judicial proceedings brought against the mercenaries of the United States, who want to mask their criminal activities with false trade union activities, the competent Cuban tribunals relied on irrefutable proof of the acts committed, which are defined as crimes in the Criminal Code in force, Act No. 88 on the Protection of the National Independence and the Economy of Cuba and Act No. 80 of 24 December 1996.

Details of the certified proofs have been transmitted in previous responses. The abovementioned persons received financing in order to carry out the acts instructed by the United States Government and anti-Cuban terrorist groups which operate from Miami and New Jersey, in the territory of the United States.

Among the acts for which the mercenaries were punished should be emphasized:

– pressures and threats to potential and actual foreign investors so that they do not invest in or withdraw their investments from Cuba; they openly stated that their investments would not be respected in the event of a "change of regime";

– dissemination of false and distorted information on the state of the national economy and the social and political situation of the country with the objective to generate uncertainty and discourage foreign investments and the confidence of the Cuban market;

– fabrication of false allegations concerning the supposed violations of human rights and labour rights of Cuban workers, in order to "give substance" to the anti-Cuban practices promoted by the United States Government in international organs and organizations like the UN Commission on Human Rights and the ILO:

– support to the United States' objective to foster an artificial crisis which would be facilitated by a media campaign of misinformation in which Cuba would be presented in a state of anarchy and serious and massive violations of human rights so as to serve as a pretext for the military aggression of the United States.

With all the information provided, which demonstrated the political background of Case No. 2258, Cuba considers that all elements are gathered for an application of point 16 of the Procedure of the Committee on Freedom of Association which provides that: "The Committee (after a preliminary examination, and taking account of any observations made by the governments concerned, if received within a reasonable period of time) reports to the next session of the Governing Body that a case does not call for further examination if it finds, for example, that the alleged facts, if proved, would not constitute an infringement of the exercise of trade union rights, or that the allegations made are so purely political in character that it is undesirable to pursue the matter further; …." And therefore, the Committee on Freedom of Association is in a position to definitely close this case.

In order to facilitate the work of the Committee on Freedom of Association and its understanding of the circumstances in which the anti-Cuban campaign is conducted in the framework of the ILO, the Government annexes the texts of the Helms Burton Law, the 2003 USAID programme for Cuba, the executive summary of the report of the United States Presidential Commission "to help democracy in Cuba", all of which clearly demonstrate the mercenary nature of the evil called "independent trade unionism" in Cuba, and its complete subordination to the policy of hostility, blockade and aggression conducted by the United States Government against the Cuban people in order to destroy the political, economic and social system which the people selected in a sovereign manner. The communiqué of the Cuban Government on the aggressive measures against the Cuban people announced by the United States Government on 6 March of this year is also added.

Finally, the Government considers it necessary to reaffirm the validity of the abundant information previously sent to the Committee in relation to Case No. 2258.

## E. The Committee's conclusions

**444.** *The Committee deeply regrets that the Government categorically rejects the possibility of a direct contacts mission. It further regrets the fact that it has failed to send the judgements requested in connection with the main issue in this case and draws attention consequently to the absence of a desire to cooperate fully in the proceedings. The Committee cannot accept the Government's statements with regard to a lack of democracy and transparency in its work, to its "real political motivation" or the statement that it has exceeded its mandate, and recalls that its decisions are those of an impartial and specialized tripartite body with over 50 years' experience which, in this case – as in all others – has adopted its conclusions and recommendations by consensus. Before issuing its conclusions, the Committee carries out a detailed consideration of all the allegations submitted by the complainants and of the replies submitted by governments. In this case, it has proceeded in the same manner and must also emphasize that the principles underpinning its conclusions are of universal scope. These principles are applied to* ***all*** *countries involved in a given problem, regardless of their political, economic and social system. For this reason, the Committee's principles have acquired an authority that is widely recognized throughout the world both by different international entities dealing with social and trade union matters and by a substantial number of countries where these principles constitute the foundation of national legislation.*

**445.** *The Committee underlines that the AFL-CIO is not a complainant in this case and therefore the references made by the Government to this organization in its reply are not relevant.*

### *Only one trade union central is officially recognized and mentioned in this legislation; in practice independent trade unions are not recognized and the environment in which they carry out their activities is very hostile*

**446.** *In this connection, in its previous consideration of the case, the Committee took note of the fact that proposals to review the Labour Code were being analysed and requested the Government to adopt without delay other provisions and measures to recognize fully in law and in practice the right of workers to establish the organizations that they consider necessary at all levels and the right of these organizations freely to organize their activities. The Committee urges the Government to take measures in this respect.*

**447.** *The Committee notes the Government's statement that: the Labour Code is being reviewed, and a preliminary draft has been updated eight times and that the latest version is currently the subject of consultation with trade union organizations to obtain their comments and opinions in order to incorporate them into the final version. The Committee further notes the statements by the Government in which it repeats its earlier points of view on the absence of obstacles to freedom of association and the right to organize and the existence of a single central of workers which was a demand and conquest by workers themselves, restating that legislation embodies trade union rights and describes the so-called independent trade unions as groups of mercenaries, paid by, and at the service of the superpower which, in the disguise of would-be trade unionists, carry out activities intended to subvert the constitutional order, constituting an act of interference prohibited by Convention No. 98.*

**448.** *The Committee is aware of the historical context of the establishment and existence of the single central of workers in Cuba. However, it must remind the Government, as it has on all occasions when matters of this nature have arisen, that by including the term "organizations of their own choosing" in Convention No. 87 the International Labour Conference sought to take account of the fact that several organizations of employers and workers exist in some countries and concerned individuals may choose to belong to one or the other, for reasons of an occupational, religious or political nature, without giving an opinion hereby as to whether, for workers and employers, unity in trade union organization is preferable or not to trade union pluralism. However, the Conference sought likewise to embody the right of any group of workers (or of employers) to establish an organization outside the previously existing organization, if this solution was considered to be preferable in defending their material or moral interests [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 486]. The Committee requests the Government to keep the Committee of Experts informed on progress in revising the Labour Code as regards freedom of association and expresses the firm expectation that this review will provide for deletion of reference by name to the existing Central Organization of Cuban Trade Unions and will permit the establishment of trade unions outside the existing structure at all levels, should workers so desire.*

### *Information requested on collective bargaining*

**449.** *The Committee recalls the ICFTU's allegations that collective bargaining does not exist in Cuba.*

**450.** *The Committee notes that, according to the Government, over 10,000 collective agreements exist to protect the majority of the 3,250,000 trade union members in the sphere of the administration, production and/or services units and enterprises of the*

*emerging economy, which constitutes an achievement of the State's labour policy and a conquest by workers.*

**451.** *The Committee wishes to refer to the comments of the Committees of Experts in 2003 in the context of consideration of application of Convention No. 98, Article 4, relating to collective bargaining, which highlights interference by the authorities in collective bargaining and which is quoted hereafter:*

*(...)*

*The Committee also notes the Government's information concerning the promulgation of Legislative Decree No. 229 respecting collective labour agreements, dated 1 April 2002, and its implementing regulations, by means of resolution No. 27/2002.*

*Article 4 of the Convention. The Committee notes that section 14 of the Legislative Decree No. 229 provides that "discrepancies which arise in the process of formulating a draft collective labour agreement between the administration or its representative, on the one hand, and the trade union organization or its representative, on the other, shall be resolved by the respective superior levels as rapidly as possible, and with the participation of those affected". This section is supplemented by section 8 of the implementing regulations, which provides that "discrepancies which arise in the process of formulating, modifying (...) collective labour agreements, if the necessary measures are not adopted for their resolution, shall be submitted to the immediately superior level of the administration and the trade union organization determined by the corresponding national trade union, for such bodies to facilitate together the corresponding solution within a period of up to 30 working days". The Committee also notes that section 17 of the Legislative Decree provides that "discrepancies which arise in the process of formulating, modifying, revising or during the period in which the collective labour agreement is in force, after the exhaustion of the conciliation procedure (...) shall be submitted to arbitration by the National Labour Inspection Office with the participation of the Confederation of Workers of Cuba and the interested parties. The decision that is adopted is binding". Sections 9 and 10 of the implementing regulations further specify the provisions of section 17 of the Legislative Decree.*

*The Committee notes that these provisions constitute interference in the activities of the parties to the negotiations by the administrative authority or the higher level trade union organization in establishing the content of the collective agreement or resolving discrepancies which arise between the parties, in violation of the principles of the Convention. The Committee also emphasizes that, in general, the imposition of compulsory arbitration, whether at the request of only one of the parties or at the initiative of the authorities, is contrary to the principle of voluntary negotiation set forth in the Convention, and therefore to the principle of the autonomy of the parties to negotiations.*

*The Committee requests the Government to take measures with a view to amending the legislation so that the parties to the negotiations resolve their own differences during collective bargaining without external interference and so that recourse to arbitration with binding effect is only possible with the agreement of the parties to the negotiations.*

*(...)*

*The Committee notes that, in accordance with section 10 of Legislative Decree No. 229, promulgated on 1 April 2002, a draft collective agreement has to be brought to the knowledge of the workers so that they can express their criticisms in a general assembly of workers and that, by virtue of section 11 of the above Decree, "discussion of the draft collective labour agreement in the general assembly of workers shall proceed in accordance with the methodology determined for that purpose by the Confederation of Workers of Cuba". The Committee requests the Government to provide a copy of the above methodology in its next report.*

*The Committee also notes that section 3 of the implementing regulations appears to impose the obligation upon the parties to seek the prior approval of the National Labour Inspection Office to be able to conclude collective labour agreements. The Committee requests the Government to indicate the scope of the above provision and, if in practice it implies the*

*need to seek the approval of the National Labour Inspection Office on each occasion to be able to conclude a collective labour agreement, to take measures to repeal this provision.*

**452.** *The Committee shares the view of the Committee of Experts and urges the Government to take measures to amend legislation in the manner suggested with a view to ensuring that collective bargaining in places of work is carried out without recourse to binding compulsory arbitration prescribed by the legislation and without interference by the authorities, higher-level organizations or by the CTC.*

### *Non-recognition of the right to strike*

**453.** *The Committee takes note of the Government's statement that: (1) although the right to strike is implicit, it is not expressly stated in Convention No. 87; (2) legislation does not include any ban on the right to strike, nor do criminal laws establish any penalty for exercising such rights and it is a prerogative of trade union organizations to decide in such matters; and (3) the Committee's recommendation exceeds its mandate in seeking to impose obligations on member States that are not expressly embodied in the Conventions.*

**454.** *In this regard, the Committee has always recognized the right to strike as a* ***legitimate right*** *which may be used by workers and their organizations to defend their economic and social interests [see* ***Digest****, op. cit., para. 474]. The Committee has also stated that it would not appear that confining the right to call a strike exclusively to trade union organizations is incompatible with the standards laid down in Convention No. 87. It is necessary, however, that workers, and particularly their leaders in enterprises, are protected against possible acts of discrimination when a strike has been called, and that they are able to establish trade unions without falling victim to anti-union practices [see* ***Digest****, op. cit., para. 477].*

**455.** *In the circumstances, taking note that legislation does not ban the right to strike and that it does not embody any penalty for exercising such a right, the Committee strongly expects that the Government will ensure that the right to strike may be exercised in an effective manner in practice and that nobody will be discriminated against or prejudiced in their job for peacefully exercising this right.*

### *Seven trade union officials sentenced to long prison sentences (up to 26 years)*

**456.** *The Committee previously noted the sentencing of the following trade union officials to sentences of between 15 and 26 years' imprisonment: Pedro Pablo Alvarez Ramos (25 years), Carmelo Díaz Fernández (15 years), Miguel Galván (26 years), Héctor Raúl Valle Hernández (12 years), Oscar Espinosa Chepe (25 years), Nelson Molinet Espino (20 years) and Iván Hernández Carrillo (25 years) and requested the Government to take steps to release them immediately.*

**457.** *The Committee notes that the Government repeats its earlier statements denying that these individuals were trade union officials or that they were engaging in trade union activity or that they had any connection with any group of workers, calling them mercenaries and stating that they were carrying out activities typified as offences in current legislation and that Law No. 88 of 1999 (for the protection of national independence and the economy of Cuba) provides that: "Anyone seeking information to be used for application of the Helms-Burton Law, embargo or economic war against our people, intended to disturb domestic order, destabilize the country and liquidate the socialist state and the independence of Cuba is punishable by imprisonment." The Committee notes that the Government refutes earlier conclusions to the effect that the charges against these individuals are "too vague*

*or not necessarily criminal and can come under the definition of legitimate trade union activities"; the Government repeats that the charges were duly proven with all procedural guarantees embodied in legislation. The Government states that the illegal activities of the seven convicted individuals were funded by several federal agencies of a foreign government, and by money from the Cuban American terrorist mafia working out of Miami in the service of the policy of embargo and hostility against Cuba. The Government emphasizes, lastly, that it rejects the overstepping of minimum standards of respect for the sovereignty of states inherent in asking the Government to change final decisions by the Popular Supreme Court, whereby the Committee exceeds its mandate; likewise, according to the Government, none of the activities giving rise to the prosecution of the mercenaries in question is described in ILO Conventions.*

**458.** *The Committee notes the supplementary information provided by the Government, (which essentially coincides with the charges described by the Government in its first reply) in respect of four of the seven convicted individuals who are specifically alleged to have conspiratorial links with the Interests Section of a foreign country in Cuba, delivering documents and receiving instructions and materials for use in their subversive activities, maintaining contacts with terrorist organizations in Miami from which they received money, instructions and subversive materials; income from unlawful activities (trafficking in illegal foreign currencies and speculation and sale of stolen goods); recruiting mercenaries; fabricating false allegations against the Cuban political system and authorities; distributing materials inciting the Cuban people to subversion; participating in and organizing public disturbances and street brawls, etc. The Government further is of the view that these individuals are paid agents in the service of the government policy of a foreign country and of a terrorist mafia.*

**459.** *In these circumstances the Committee must emphasize that the Government has ignored its recommendation requesting the Government to send copies of the criminal sentences in question, with the result that the Committee cannot examine and draw any conclusion regarding the allegations against the convicted individuals and on the judiciary's interpretation of concepts and charges that are overly general and vague such as "conspiratorial links with officials of the United States Interests Section in Cuba", "delivery of documents containing information of interest to the United States policy of hostility towards the Cuban people and to receive instruction and materials for his subversive work against the constitutional order of the country", "close conspiratorial links with terrorist organizations in Miami, from which he also received money, instructions and materials of a subversive nature. In his subversive activities, he fraudulently deceived several people, promising to facilitate the migration formalities to travel to the United States, to carry out illegal acts", " fabrication of false allegations against the political system and the Cuban authorities", "subversion against the institutional order and against public order". The Committee is bound to point out that it has in the past dealt with cases of countries on different continents which use the words "conspiratorial", "insurrectional", "subversive" or "unlawful" to refer to activities in promoting and defending human rights and trade union rights or peaceful activities with a view to changing the economic and social system. Hence, the importance of sending to the Committee the decisions convicting trade union members so that it can see what specifically is being held against them.*

**460.** *The Committee recalls that, contrary to the Government, several complainant trade union organizations maintain that the convicted individuals are trade union members and that it is stated in the CUTC statutes that the duties of members include "to fight to claim the benefits and rights to which workers are entitled" and clearly provide the structure for a trade union organization. Moreover, the CUTC Declaration of Principles and other documents reveal that the CUTC ranks include all manual or intellectual workers (that is to say, whether they are working in a labour centre or elsewhere), that they are of peaceful*

*intentions, free of violence, and the product of the integration of a large number of independent trade union organizations, expressing the desire to carry out independent trade union activity with objectives including the defence of social, cultural, religious, economic and family interests of workers. The CUTC is also affiliated to the Latin American Central of Workers (CLAT) and the World Confederation of Labour (WCL). The Committee requests the complainant organizations to send a copy of the statutes of CONIC and CDTC. While noting the recent communications submitted on 19 and 24 May by the Government, in which it points out in particular that the structure and the functioning described in the documents concerning the CUTC are not based on workers' participation, nor workers' collectives, the Committee nevertheless considers that these communications – beyond the fact that they reiterate previous statements made by the Government – refer largely to facts posterior to the complaints and do not permit a conclusion that the CUTC is not a trade union organization and its leaders are not real trade union leaders, although they might not agree with the economic and social system of the country and want to transform it. The Committee emphasizes that the CUTC's lack of representativity invoked by the Government is in any event irrelevant for the determination of this complaint. As regards the illegal activities of the trade union leaders raised by the Government (including alleged criminal links with a foreign government), the Committee underlines that the Government has not sent copies of the judgements requested.*

**461.** *In these circumstances, given that during its previous consideration of the case the Committee had drawn attention to the fact that the sentencing was handed down in summary hearings of very short duration and given that the Government has for the second time failed to send the requested copies of the criminal convictions handed down and taking into account also the several earlier cases submitted to the Committee regarding harassment and detention of trade union members belonging to trade union organizations that are independent of the established structure, the Committee urges the Government to take steps to release immediately the persons mentioned in the complaints and to keep the Committee informed in this respect.*

### *Confiscation by the police in March 2003 of books from the CUTC trade union library, a computer, two fax machines, three typewriters and numerous documents*

**462.** *The Committee notes the Government's statement that it is not aware of the existence in Cuba of any "trade union library" belonging to the so-called CUTC and that the material confiscated from the mercenaries, in full compliance with the law and due process, did not include any library or documents relating to trade unions, trade unionism or labour rights, and that the confiscated material included: materials inciting subversion, written and printed by the United States Interests Section in Havana and the Cuban American terrorist mafia in Miami; equipment of which legal purchase could not be proven since they were brought in illegally or with a declaration of a false addressee in the country or illegally "donated" by the United States Interest Section in Havana, or bought with its money and which were being used to assist subversive conspiracy activities.*

**463.** *The Committee concludes that the Government admits that equipment was confiscated and has not specifically denied the confiscation of a computer, two fax machines and three typewriters and since it has failed in this second examination of the case to specifically explain exactly how it was used "to facilitate activities of subversive conspiracy", it is requested that this equipment be returned to its owners.*

### *Infiltration of state agents into the independent trade union movements*

**464.** *The Committee had previously noted the allegations of the ICFTU, stating that Aleida de las Mercedes Godines, Secretary of the Independent National Workers' Confederation of Cuba (CONIC), and Alicia Zamora Labrada, Director of the Trade Union Press, were two state security agents infiltrated into the trade union movement (the former for 13 years according to information received from the ICFTU). The Committee notes that the ICFTU has attached a press clipping from Gramma of 11 April 2003 that confirms these allegations. The Committee notes that, in this regard, the Government states:*

– *Aleida de las Mercedes Godines and Alicia Zamora Labrada participated voluntarily in defending the security and independence of their country, against the policy of the embargo, hostility and aggression by United States imperialism;*

– *they did not "infiltrate" any trade union organization. They merely studied and sought information regarding the modus operandi of the United States Interests Section in Havana, and the Cuban American terrorist mafia in Miami, in recruiting, funding and masterminding the conspiratorial activities of their mercenary groups, working on the island towards the overthrow of the national constitutional order;*

– *they fully fulfilled their duty as citizens to protect the independence and security of the entire people, against the aggressive threats of the superpower and the mercenary activities of their paid agents;*

– *the statements and declarations by these Cubans in themselves demonstrate that the activities carried out by the eight mercenaries mentioned in the ICFTU complaint were totally incompatible with freedom of association and the right to organize and with the labour rights championed by the ILO; and*

– *should the Committee or the ICFTU still have any doubts as to why the Cuban Government must use its security bodies to defend itself, with the support and collaboration of all patriotic Cubans and of any person of dignity who is prepared to do so, they have only to consult the documents that have been declassified by the Central Intelligence Agency of a foreign power, regarding plans of aggression against Cuba, and numerous planned attacks against its prominent leaders, with the support of terrorist groups and gangs operating against the Cuban people. It would be of interest to examine the United States Helms-Burton and Torricelli Laws (which even lay down the outlines of the political and economic system that would be imposed on the Cuban people once the current constitutional order has been overthrown), or study the recent statements threatening aggression against Cuba by high-ranking officials of a foreign country.*

**465.** *The Committee notes that the Government's reply gives details of the duties of Aleida de las Mercedes Godines and Alicia Zamora Labrada in their voluntary collaboration in the security and independence of the country. The Government also describes the duties of the state security bodies and the general reasons justifying their actions (planned attacks, support for terrorist groups, etc). The Committee notes that the Government maintains, in general terms, that the activities of the convicted individuals mentioned in earlier paragraphs were incompatible with the exercise of the right to organize and labour rights. The Committee notes that the Government has not denied that Aleida de las Mercedes Godines was the Secretary of the CONIC and that Alicia Zamora Labrada was the Director of the Trade Union Press Agency Lux Info Press and, on the contrary, acknowledges that they were agents of the state security services. The Committee deplores the infiltration of security agents in the CONIC trade union organization or in a trade*

*union press agency and urges the Government, in future, to comply with the principle of non-intervention or interference by the public authorities in the trade union activities embodied in Convention No. 87, Article 3.*

### *ICFTU allegations for 2001 and 2002 (threats against trade union members, sentencing of a trade union member to two years in prison, attempt by the police to prevent a trade union congress)*

**466.** *The Committee notes the Government's statement that it has already replied to the ICFTU allegations, in the context of Case No. 1961 which has been discontinued. The Committee emphasizes, however, that these ICFTU allegations (which are reproduced hereafter and relate primarily to the CONIC) do not appear in Case No. 1961 (submitted by the WCL). Therefore, the Committee urges the Government promptly to submit detailed comments on the following allegations:*

*2001*

– *On 26 January, Lázaro Estanislao Ramos, a delegate from the Pinar del Río branch of the Independent National Workers' Confederation of Cuba (CONIC), was threatened in his home by a state security employee, Captain René Godoy. The official warned him that his confederation had no future in Pinar del Río and that penalties against opposition would worsen, culminating, if necessary, in the disappearance of the dissidents.*

– *On 12 April, Lázaro García Farra, a trade union member of CONIC, who is currently in prison, was brutally assaulted by prison guards.*

– *On 27 April, Georgis Pileta, another independent trade union member in prison, was beaten by guards after he was sent to the punishment cells.*

– *On 24 May, José Orlando Gonzáles Bridón, Secretary-General of the independent trade union Confederation of Democratic Workers of Cuba (CTDC), was sentenced to two years in prison for having "spread false information".*

– *On 9 July, Manuel Lantigua, a trade union member of the CUTC, was beaten and stoned in the doorway of his home by members of the paramilitary group Rapid Response Brigades.*

– *On 14 December, the homes of independent labour activists Cecilia Chávez and Jordanis Rivas were raided. Both were detained on a number of occasions by security forces and threatened with imprisonment if they continued their trade union activities.*

*2002*

– *On 12 February, Luis Torres Cardosa, trade union member and representative of CONIC, was arrested by three policemen at his home in the province of Guantánamo and taken to Unit No. 1 of the National Revolutionary Police (PNR), where he was interrogated. He was detained as a result of his opposition, along with others, to an official eviction notice of a dwelling.*

– *On 6 September, CONIC held its second national meeting, amidst retaliation by the State. A massive operation was carried out by the political police to prevent the annual trade union assembly being held. The political police threatened trade union officials with possible charges of rebellion if there was any protest in the areas*

*surrounding the premises where the assembly was being held. Moreover, they stopped all people trying to enter the building, asking for their identification and the reason why they were coming to that place. They also prohibited various trade union members from entering the building and violently expelled them from the surrounding areas.*

## The Committee's recommendations

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

***(a) The Committee deeply regrets that the Government categorically rejects the possibility of a direct contacts mission. It further deplores that the Government has not sent the requested judgements with regard to the main issue in this case and therefore draws attention to the lack of will to cooperate fully in the proceedings.***

***(b) The Committee urges the Government promptly to adopt new provisions and measures fully to recognize in legislation and in practice the right of workers to establish the organizations they deem appropriate at all levels (in particular, organizations independent from the current trade union structure), and also the right of these organizations freely to organize their activities. The Committee requests the Government to keep the Committee of Experts informed of progress in revising the Labour Code with regard to freedom of association and expects that this review will provide for the removal of any reference by name to the existing Trade Union Central and that it will provide for the establishment of trade unions, outside the existing structure, at all levels, if workers so desire.***

***(c) The Committee urges the Government to take measures to amend legislation with regard to collective bargaining in the manner outlined in the conclusions, to ensure that collective bargaining in labour centres can take place without recourse to binding compulsory arbitration prescribed by the legislation and without interference by the authorities, organizations at a higher level or the CTC.***

***(d) The Committee strongly expects that the Government will ensure that the right to strike can be exercised in an effective manner in practice and that nobody will be discriminated against or prejudiced in their employment for peacefully exercising this right.***

***(e) Taking into account several earlier cases submitted to the Committee regarding harassment and detention of trade union members belonging to trade union organizations that are independent of the established structure, also taking into account the fact that the sentencing of seven trade union members was handed down in summary hearings of very short duration, and given that the Government has for the second time failed to send the requested copies of the criminal convictions handed down, the Committee urges the Government to take steps to release immediately the persons mentioned in the complaints: Pedro Pablo Alvarez Ramos (25 years); Carmelo Díaz Fernández (15 years); Miguel Galván (26 years); Héctor Raúl Valle Hernández (12 years); Oscar Espinosa Chepe (25 years); Nelson***

***Molinet Espino (20 years); and Iván Hernández Carrillo (25 years) and to keep the Committee informed in this respect.***

***(f) With regard to the allegations of the ICFTU, stating that Aleida de las Mercedes Godines, Secretary of CONIC, and Alicia Zamora Labrada, Director of the Trade Union Press, were two state security agents infiltrated into the trade union movement (the former for 13 years according to information received from the ICFTU), the Committee deplores the infiltration of security agents in the CONIC trade union organization or in a trade union press agency and urges the Government, in future, to comply with the principle of non-intervention or interference by the public authorities in the trade union activities embodied in Convention No. 87, Article 3.***

***(g) The Committee requests the complainant organizations to send a copy of the statutes of CONIC and CDTC.***

***(h) The Committee urges the Government to send detailed information on the following allegations, without delay:***

***2001***

- ***On 26 January, Lázaro Estanislao Ramos, a delegate from the Pinar del Río branch of the Independent National Workers' Confederation of Cuba (CONIC), was threatened in his home by a state security employee, Captain René Godoy. The official warned him that his confederation had no future in Pinar del Río and that penalties against opposition would worsen, culminating, if necessary, in the disappearance of the dissidents.***
- ***On 12 April, Lázaro García Farra, a trade union member of CONIC, who is currently in prison, was brutally assaulted by prison guards.***
- ***On 27 April, Georgis Pileta, another independent trade union member in prison, was beaten by guards after he was sent to the punishment cells.***
- ***On 24 May, José Orlando Gonzáles Bridón, Secretary-General of the independent trade union Confederation of Democratic Workers of Cuba (CTDC) was sentenced to two years in prison for having "spread false information".***
- ***On 9 July, Manuel Lantigua, a trade union member of the CUTC, was beaten and stoned in the doorway of his home by members of the paramilitary group Rapid Response Brigades.***
- ***On 14 December, the homes of independent labour activists Cecilia Chávez and Jordanis Rivas were raided. Both were detained on a number of occasions by security forces and threatened with imprisonment if they continued their trade union activities.***

***2002***

- ***On 12 February, Luis Torres Cardosa, trade union member and representative of CONIC, was arrested by three policemen at his home in the province of Guantánamo and taken to Unit No. 1 of the National***

***Revolutionary Police (PNR), where he was interrogated. He was detained as a result of his opposition, along with others, to an official eviction notice of a dwelling.***

– ***On 6 September, CONIC held its second national meeting, amidst retaliation by the State. A massive operation was carried out by the political police to prevent the annual trade union assembly being held. The political police threatened trade union officials with possible charges of rebellion if there was any protest in the areas surrounding the premises where the assembly was being held. Moreover, they stopped all people trying to enter the building, asking for their identification and the reason why they were coming to that place. They also prohibited various trade union members from entering the building and violently expelled them from the surrounding areas.***

CASE NO. 2214

INTERIM REPORT

## Complaints against the Government of El Salvador presented by
## — the World Confederation of Labour (WCL) and
## — the Trade Union of Workers of the Salvadoran Social Security Institute (STISSS)

***Allegations: The complainant organization alleges that the permanent contracts of members of SIMETRISSS were changed to temporary contracts of three months' duration, private armed guards were hired to discourage any protest attempts at the Salvadoran Social Security Institute (STISSS), illegal wage deductions were made for 11 people (some of them trade union members), 18 people were dismissed, two trade union members were transferred or prevented from applying for a job in violation of the arbitration award in force, and people and vehicles belonging to trade union members were searched at the Medical Surgical Hospital and the Specialized Treatment Hospital, including two trade union officials who are under surveillance and who have been deprived of freedom of movement. The complainant organization also refers to the privatization process and its labour-related consequences and to the alleged lack of collective bargaining***

**468.** The Committee last examined this complaint at its June 2003 meeting and on that occasion it submitted an interim report [see 331st Report, paras. 377-395, approved by the

Governing Body at its 287th Session (June 2003)]. The Trade Union of Workers of the Salvadoran Social Security Institute (STISSS) sent new allegations in a communication dated 25 November 2003. The Government sent its observations in communications dated 8 and 12 January and 15 March 2004.

**469.** El Salvador has ratified neither the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. Previous examination of the case

**470.** In its previous examination of the case at its June 2003 meeting, the Committee made the following recommendations [see 331st Report, para. 395]:

- The Committee requests the Government and the complainant to provide concrete details regarding the reasons for the dismissal of the 18 people listed by name in the allegations, and to indicate the extent to which these dismissals were related to the exercise of trade union rights and whether those dismissed were trade union members.
- The Committee requests the Government to send information without delay on the alleged transfer or prevention from applying for a job that affected Dr. Teresa de Jesús Sosa and Dr. Darío Sánchez, both members of the Union of Doctors and Workers of the Salvadoran Social Security Institute (SIMETRISSS), and regarding the alleged modification of permanent contracts to short-term contracts affecting members of the trade union.
- With regard to the allegations relating to illegal deductions from wages affecting 11 persons (some of them trade union members), the Committee requests the Government and the complainant to indicate the name of the workers who were not present at the workplace (ISSS) on 11 September 2001, as well as the legislation to which the Government refers.
- With regard to the alleged search of people and vehicles belonging to trade union members of SIMETRISSS and the hiring of private armed guards, the Committee requests the Government and the complainant to provide further information on these allegations.

## B. The complainant's new allegations

**471.** In its communication of 25 November 2003, the Trade Union of Workers of the Salvadoran Social Security Institute (STISSS) alleges that the strike that was declared jointly with the Union of Doctors and Workers of the Salvadoran Social Security Institute (SIMETRISSS) on 18 September 2002 and extended to 13 June 2003, and carried out to oppose the privatization process of the health and support services, led to many reprisals on the part of the authorities of the Institute. Specifically, the STISSS alleges that dialogue was closed down, 257 workers (among them trade union members, representatives and officials) were dismissed, labour centres were militarized and consequently access was prohibited to trade union representatives and some trade union members; the wages, bonus payments, holidays and other benefits were selectively and in a discriminatory manner withheld from more than 200 workers who supported the strike outside working hours and from the current executive committee, and the arrest of workers belonging to trade unions; trade union representatives guaranteed not to be removed from their posts according to clauses 4 and 37 of the current arbitration award were dismissed; the Institute administration coerced workers to withdraw their membership from the trade union; trade union representatives and officials were prevented from carrying out their duties; the Ministry of Labour deliberately delayed the revision process of the collective agreement and arbitrarily refused to recognize the coalition of the complainant organization and SIMETRISSS to negotiate the revision of the collective agreement; the Institute authorities

ordered the eviction of the trade union premises, even before the strike, violently and arbitrarily. With regard to the eviction, the complainant organization states that it has lodged a complaint with the Attorney-General's Office of the Republic, which has, at the time of sending this complaint, not yet handed down a decision in this respect.

**472.** In particular, the complainant organization alleges the dismissal of trade union representatives and an official of the acting General Board of Directors by the Institute authorities from 1 September 2003, i.e. two months and a half after the end of the strike, added to the 19 dismissals that took place during the strike.

## C. The Government's reply to the previous recommendations

**473.** The Government makes the following reply with regard to the specific facts motivating the alleged dismissal of 18 people mentioned by name in the allegations in its communications of 8 and 12 January 2004:

(a) Dr. Juan Bautista Caballero: the due internal institutional process with the right to a hearing attended by the defendant having run its course, it was decided that the conduct of the doctor fell into the category laid down in articles 31(3) and 50(12) of the Labour Code, for having changed the timing of his annual vacation without authorization, from 3-23 September 2001 to 6-27 August 2001, and also for failing to come to work with no explanation on 31 July, 1 and 2 August 2001, it was finally established that he failed to come to work with no explanation for the period from 31 July to 22 August 2001.

(b) Dr. Lilia Beatriz Córdova de Caballero: the due internal institutional process with the right to a hearing attended by the defendant having run its course, it was decided that the conduct of the doctor fell into the category laid down in articles 31(3) and 50(12) of the Labour Code, for having changed the timing of her annual vacation without authorization, from 3-23 September 2001 to 6-27 August 2001, and also for failing to come to work with no explanation on 1 and 2 August 2001, it was finally established that she failed to come to work with no explanation for the period from 1 to 22 August 2001.

(c) Dr. Aníbal Avelar Medrano: the due internal institutional process with the right to a hearing attended by the defendant having run its course, it was decided that the conduct of the doctor fell into the category laid down in article 50(8) and (20) of the Labour Code, relating to article 31(5) and (13) of the Labour Code and clause 11(a) and (b) of the arbitration award signed between the Institute and the STISSS, for having committed serious errors at the labour centre, consisting of verbally attacking the patient José Orlando Rivera Saavedra in the parking area of the Zacamil Medical Unit.

(d) Bernardo Escobar Gómez: the due internal institutional process with the right to a hearing attended by the defendant having run its course, it was decided that he had committed the error of pushing private security agent René Renderos Caballero who, as a result, broke the glass in a door without sustaining any physical injury, thereby not complying in his behaviour with the obligations laid down in clause 11(a) and (b) of the arbitration award signed between the Institute and the STISSS and article 31(5) of the Labour Code, his behaviour falling into the category laid down in article 50(8), (10) and (20) of the Labour Code.

(e) José Alberto Elías Torres and Camila Leticia Vaquerano: the due internal institutional process with the right to a hearing attended by the defendants having run its course, it

was established that the actions of these two people in the workplace were in violation of the obligations laid down in clauses 5, 6, 7 and 11(a) and (c) of the arbitration award signed between the Institute and the STISSS and article 31(2), (3), (5), (8) and (20) of the Labour Code, and falling into the category laid down in article 50(5), (6), (8), (10), (16) and (20) of the Labour Code for having acted aggressively and in an intimidating manner and for verbally attacking the medical director of the Maternity and Child Hospital on 1 May. The person listed second above entered the office of the hospital management without authorization and revised documentation belonging to the authorities.

(f) Nelson Rafael Olivo Méndez: the due internal institutional process with the right to a hearing attended by the defendant having run its course, and with sufficient evidentiary elements presented establishing that this person infringed clauses 7 and 11 of the arbitration award signed between the Institute and the STISSS relating to the "execution of work" and the "general obligations and prohibitions" and that he did not comply with the provisions of articles 31(3) and 32(1) of the Labour Code in abandoning his post without justification on 20 April 2002, the error of which could not be cancelled when he used his constitutional right of defence, which for his case is specified in article 50(20) of the Labour Code.

(g) Santos Carlos Vásquez: the due internal institutional process with the right to a hearing attended by the defendant having run its course, there was sufficient merit to decide that his behaviour violated the provisions of clause 7(1) and (11) of the arbitration award signed between the Institute and the STISSS and article 31(2) of the Labour Code, for allowing a person not associated with the Institute to drive vehicle No. 386 belonging to the Institute, omitting to tell his immediate superiors of such an irregularity.

(h) Walter Cecilio Serrano and Rigoberto Guillén Cruz: the due internal institutional process with the right to a hearing attended by the defendants having run its course, they were charged with drunkenness at the workplace in the former General Hospital of the Institute, their behaviour falling into the category laid down in article 50(18) of the Labour Code.

(i) Nora Edith Martínez de Colocho: the due internal institutional process with the right to a hearing attended by the defendant having run its course, it was established that she took advantage of her employment at the Procurement and Contracting Unit of the Institute to provide confidential information on bidding to a number of bidders, which gave them an advantage over the remaining bidders and potential contractors; this act is expressly prohibited in article 155 of the Public Administration Procurement and Contracting Act (LACAP), for which reason, in accordance with the provisions of articles 156 and 157 of the abovementioned Act, it was established that Nora Edith Martínez de Colocho was guilty of the violation and her contract was terminated.

(j) Jaime Francisco Murillo Reyes: violation of clauses 6, 7 and 11 of the arbitration award in force, by prohibiting access to the Ilopango Medical Unit Pharmacy of the Institute and by illegally ordering the doors of this institution to be closed, refusing access to the Institute authorities, when the members of the STISSS carried out stop-work action in this health-care centre, which took place on 4-11 September 2001, his behaviour invoking, the application of article 50(8), (10) and (11) of the Labour Code.

(k) Ricardo Marvin Rodriguez Claros: violation of clauses 6, 7 and 11 of the arbitration award in force, by prohibiting access to the Ilopango Medical Unit Pharmacy of the Institute and by illegally ordering the doors of this institution to be closed, refusing

access to the Institute authorities, when the members of the STISSS carried out stop-work action in this health-care centre, which took place on 4-11 September 2001, his behaviour invoking the application of article 50(8), (10) and (11) of the Labour Code.

(l) Delvia Elizabeth Antonio Beltrán: violation of clauses 6, 7 and 11 of the arbitration award in force, by prohibiting access to the Ilopango Medical Unit Pharmacy of the Institute and by illegally ordering the doors of this institution to be closed, refusing access to the Institute authorities, when the members of the STISSS carried out stop-work action in this health-care centre, which took place on 4-11 September 2001, her behaviour invoking the application of article 50(8), (10) and (11) of the Labour Code.

(m) Richard Edgardo Castro Escalante: violation of clauses 6, 7 and 11 of the arbitration award in force, by prohibiting access to the Ilopango Medical Unit Pharmacy of the Institute and by illegally ordering the doors of this institution to be closed, refusing access to the Institute authorities, when the members of the STISSS carried out stop-work action in this health-care centre, which took place on 4-11 September 2001, his behaviour invoking the application of article 50(8), (10) and (11) of the Labour Code.

(n) Angel Gabriel Aguilar Guerrero: violation of clauses 6, 7 and 11 of the arbitration award in force, by prohibiting access to the Ilopango Medical Unit Pharmacy of the Institute and by illegally ordering the doors of this institution to be closed, refusing access to the Institute authorities, when the members of the STISSS carried out stop-work action in this health-care centre, which occurred on 4-11 September 2001, his behaviour invoking the application of article 50(8), (10) and (11) of the Labour Code.

(o) Silvia Canales de Alfaro: violation of clauses 6, 7 and 11 of the arbitration award in force, by prohibiting access to the Ilopango Medical Unit Pharmacy of the Institute and by illegally ordering the doors to the institution to be closed, refusing access to the Institute authorities, when the members of the STISSS carried out stop-work action in the health-care centre, which occurred on 4-11 September 2001, her behaviour involving the application of article 50(8), (10) and (11) of the Labour Code.

(p) Juan Francisco Figueroa: non-compliance with clauses 6 and 11(c) of the arbitration award in force and article 31(2) of the Labour Code, for lack of respect for the head of the Transport Section of the Institute and for disobeying instructions relating to his duties, which occurred on 8 July 2002, his behaviour invoking the application of article 50(6), (16) and (20) of the Labour Code.

**474.** In conclusion, the Government confirms that the termination of these individual employment contracts was the result of violations by these employees in fulfilling their duties in accordance with labour legislation, which gives the employer the right to terminate their employment contracts with no liability.

## D. The Government's reply to the new allegations

**475.** In its communication of 15 March 2004, with regard to the alleged militarization of labour centres, the Government categorically denies that there has been any military intervention at the facilities of the Salvadoran Social Security Institute and indicates that the intervention of public security agents took place only as a result of the violent behaviour on the part of those on strike in order to provide protection to the health-care centres

mentioned to protect the physical safety of the people and assets of the institutions. This took place because the workers on strike prevented employees and rightful owners of the various health-care centres of the Institute from having access and upset the ordering and provision of services, which, moreover, prompted the lodging of a series of complaints before the competent courts. The judges hearing the complaints handed down, in many cases, decisions condemning those workers who were the instigators, which, according to the Government, clearly refutes the complainant organization's statements that all the decisions were favourable to them. The behaviour of the trade union members distorted the fundamental aim of the strike, which was the revision of the collective labour agreement, the current arbitration award in force.

**476.** With regard to the alleged withholding of wages, bonus payments, holidays and other benefits laid down in the collective labour agreement, the arbitration award currently in force, selectively and in a discriminatory manner, the Government denies that any such situation has occurred. It confirms, on the other hand, that, owing to the declaration by the judicial authorities of the illegal nature of the strike promoted by the complainant organization, the workers should have been carrying out their duties. As they did not do so, the Institute was not obliged to pay wages and benefits as the workers had not fulfilled their labour obligations. The failure of the striking workers to provide services was noted through the dates obtained by internal control mechanisms, such as the reports of the biometric marking system and reports provided by the directors of the various health-care centres that were affected. The workers participating in the strike, however, lodged a total of 768 complaints against the Institute for the wages owing, holidays, bonus payments and certification for personal merit assessment; these claims have largely been dropped by the workers and other claims have been declared unfavourable to the interests of the workers participating in the strike.

**477.** With regard to the alleged dismissal of trade union members by the Institute authorities from 1 September 2003, the Government states that on 13 June 2003 an "agreement for the resolution of the health conflict and the beginning of the comprehensive reform process" was signed between the trade union and the Institute; subsection IV of this agreement laid down provisions relating to the reinstatement of administrative workers and the establishment of the Special Tripartite Commission made up of the Institute, the complainant organization and conflict mediators. This Commission was to view the files of all the workers who were the subject of charges before the Attorney-General's Office of the Republic, and at the end of these sessions, the Commission, in Minute 10, declared itself unable to issue an opinion on the cases of 33 workers as these were pending criminal charges, a situation that included the secretary of the STISSS, Ricardo Monge Meléndez. In accordance with the authority conferred by the agreement, the Institute proceeded in good faith to review the files of the 33 workers who had not been reinstated and decided to reinstate three of them in their posts; in the remaining cases the Institute authorities acted in accordance with the provisions laid down in the labour legislation in force, the arbitration award, and the agreement for the resolution of the health conflict and the beginning of the comprehensive reform process of the sector.

**478.** With regard to the alleged deliberate delay by the Secretariat of Labour and Social Security in the revision of the collective labour agreement, the arbitration award, the Government emphasizes that at no time was there any delay and that the General Labour Directorate has carried out its work strictly within the law. With regard to this, the Government confirms that the request for revision was submitted jointly by the STISSS and the SIMETRISSS. The General Labour Directorate requested the general secretaries of both trade unions to prove their legal capacity to act for the institution that they were representing and that the SIMETRISSS prove its legal capacity to act with regard to the arbitration award. While the STISSS proved the legal capacity of the general secretary and its legal capacity to act with regard to the arbitration award, the SIMETRISSS did not prove its legal capacity to act

with regard to the arbitration award. The General Labour Directorate, faced with this situation, on 8 April 2003, decided to allow the revision of the arbitration award to proceed, accepting only the STISSS as a partner as it had demonstrated that it had legal capacity to act in this regard, in accordance with the registers to such effect held by the National Department of Social Organizations.

**479.** The Government indicates that, with regard to the legal reasons for refusing to accept the STISSS/SIMETRISSS coalition in the revision of the arbitration award: (a) the arbitration award announced in the collective conflict between the STISSS and the Institute shows that the institution with legal capacity to act with regard to this award, and, consequently, the only institution able to request revision of it is the STISSS; (b) legislation (article 271(2) of the Code) envisages the possibility of the trade union coalition only in those cases where a single trade union does not have the percentage necessary to sign a collective agreement but not in the case of revision; (c) article 512 of the Code provides that the arbitration award is valid for three years; however, as it has the nature of a collective labour agreement, the same rules that govern collective agreements are applied. In this regard, article 276 provides that the effects of a collective agreement that is being revised are extended for the duration of the negotiations. Given that the end of the validity period is not one of the reasons to end the collective labour agreement, in accordance with articles 283 and 284 of the Code, it is impossible that the agreement be ended owing to the end of the validity period, and, as a result, it cannot be considered that the claim made by the STISSS/SIMETRISSS coalition refers to a new agreement; (d) the resolution that was announced declaring that the trade union coalition was refused has been disputed by the SIMETRISSS in the Division of Administrative Law of the Supreme Court of Justice.

**480.** With regard to the alleged eviction of the trade union from its headquarters by the Institute authorities, the Government quotes clause 64 of the arbitration award in force entitled "Premises for the trade union", in which it is laid down that during the period of validity of the agreement in force, the Institute undertakes to build or to provide ... premises for the trade union in which the latter may carry out its normal administrative activities ... in as far as it does not comply with the provisions of this clause, the Institute undertakes to supply the trade union with premises or facilities so that it may carry out its activities. If not, the Institute undertakes to pay a reasonable amount to rent premises appropriate for carrying out such activities. According to the Government, the Institute's compliance with the previously quoted clause was confirmed by the relevant rental agreements in which the Institute rented a property to be used by the STISSS for carrying out its normal administrative activities. The Government confirms that it has been proven that the actions denounced as alleged violations of the right of association are without foundation, as the conduct of both the Institute and the Labour Secretariat have been in accordance with El Salvadoran Legislation.

## E. The Committee's conclusions

**481.** *The Committee recalls that in the present case the complainant organization had alleged that the permanent contracts of members of SIMETRISSS were changed to temporary contracts of three months' duration, private armed guards were hired to discourage any protest attempts at the Salvadoran Social Security Institute (ISSS), illegal wage deductions were made for 11 people (some of them trade union members), 18 people were dismissed, two trade union members were transferred or prevented from applying for a job in violation of the arbitration award in force, and people and vehicles belonging to trade union members were searched at the Medical Surgical Hospital and the Specialized Treatment Hospital, including two trade union officials who are under surveillance and who have been deprived of freedom of movement. Moreover, the Committee notes that the new allegations presented by the Trade Union of Workers of the Salvadoran Social Security Institute (STISSS) refer to a number of reprisals because of a strike, including the*

*closing down of dialogue, the dismissal of 257 workers (among them trade union members, representatives and officials), the militarization of labour centres and the prohibition of access to trade union representatives and some trade union members; the withholding of wages and other benefits from workers who supported the strike outside working hours, the arrest of trade union workers; the dismissal of trade union representatives who enjoy protection from being removed from their posts; coercion by the Institute administration of workers to withdraw their membership from the trade union; obstacles to trade union officials and representatives carrying out their duties; the deliberate delay by the Ministry of Labour in the revision process of the collective agreement and the arbitrary refusal to recognize the coalition of the STISSS and the SIMETRISSS to negotiate the revision of the collective agreement; eviction from the trade union premises by order of the Institute authorities violently and arbitrarily.*

**482.** *With regard to the first recommendation made during the previous examination of the case relating to the provision of the concrete details regarding the reasons for the dismissal of the 18 people listed by name in the allegations, the Committee notes the Government's information provided on 16 workers affected and that the dismissals were as a result of violations in carrying out their work that, in accordance with labour legislation, give the employer the right to terminate the employment contract without liability. The Committee requests the Government to indicate whether those workers have taken legal action and, if so, that it inform the Committee of the respective decisions and provide information on the dismissal of the two other workers. The Committee repeats its request to the complainant organization that it indicate the extent to which these dismissals were related to the exercise of trade union rights and whether those dismissed were trade union members.*

**483.** *The Committee also notes that neither the complainant organization nor the Government has sent the information requested in its recommendations during the previous examination of the case and it therefore repeats these:*

- *The Committee requests the Government to send information without delay on the alleged transfer or prevention from applying for a job that affected Dr. Teresa de Jesús Sosa and Dr. Darío Sánchez, both members of the SIMETRISSS, and regarding the alleged modification of permanent contracts to short-term contracts affecting members of the trade union.*
- *With regard to the allegations relating to the illegal deduction from wages affecting 11 persons (some of them trade union members), the Committee requests the Government and the complainant to indicate the name of the workers who were not present at the workplace (ISSS) on 11 September 2001, as well as the legislation to which the Government refers.*
- *With regard to the alleged search of people and vehicles belonging to trade union members of SIMETRISSS and the hiring of private armed guards, the Committee requests the Government and the complainant to provide further information on these allegations.*

**484.** *With regard to the allegation relating to the militarization of labour centres, the Committee notes that the Government confirms that the intervention of public security agents was limited to the action necessary to protect the health-care centres in order to safeguard the physical integrity of people and institutional assets in the face of the violent behaviour of the workers on strike, who prevented employees and rightful owners from accessing the various health-care centres. The Committee also notes the Government's statement that various events became the subject of judicial proceedings wherein, in many cases, the judicial authorities handed down decisions against the workers.*

**485.** *With regard to the alleged withholding of wages, bonus payments, holidays and other benefits selectively and in a discriminatory manner, the Committee notes that the Government confirms that this took place in accordance with the law and because of the*

*declaration by the judicial authorities that the strike was illegal. The Committee also notes the Government's statement that the workers who went on strike lodged a total of 768 complaints against the Institute, most of which have been dropped by the workers and others which have gone against the workers.*

**486.** *With regard to the alleged dismissal of trade union members and an official of the General Board of Directors by the Institute authorities as of 1 September 2003 (two-and-a-half months after the strike), added to the other 19 dismissals that took place during the strike, the Committee notes that the Government indicates that on 13 June 2003 an "agreement for the resolution of the health conflict and the beginning of the comprehensive reform process" was signed between the STISSS and the Institute. Subsection IV lays down the provisions for the reinstatement of administrative workers and the formation of the Special Tripartite Commission made up of the Institute, the STISSS and conflict mediators. The Commission's proposal was to review the files of the workers who had been charged with criminal offences before the Attorney-General's Office of the Republic. At the end of the relevant sessions, the Commission declared that it was not competent to issue an opinion on the cases of 33 workers as these had criminal cases pending. In accordance with the authority conferred by the agreement previously mentioned, the Institute proceeded in good faith to review the files of the 33 workers who had not been reinstated and decided to reinstate in their posts three of them; in the other 30 cases, the Institute authorities acted in accordance with legislation and the agreement for the resolution of the health conflict and the beginning of the comprehensive reform process of the sector. The Committee expects that, if the criminal charges laid against the 30 workers are rejected, the workers concerned will be reinstated in their posts without loss of wages.*

**487.** *With regard to the alleged deliberate delay by the Secretariat for Labour and Social Security in the revision process of the collective labour agreement, the arbitration award, the Committee notes that the Government confirms that the request for revision was presented jointly by the STISSS and the SIMETRISSS, but that the latter was unable to prove that it had legal capacity to act under the arbitration award. In the light of such a situation, the General Labour Directorate decided to admit the revision of the arbitration award taking as party to this only the STISSS, as it had legal capacity to negotiate.*

**488.** *In this respect, with regard to the legal reasons that led to the refusal to recognize the STISSS/SIMETRISSS coalition in the revision of the arbitration award, the Committee notes the Government's statement that the legislation allows trade union coalition only for those cases where one trade union will not have the necessary percentage to sign a collective agreement and not for the case of revision. The Committee notes that the issue is currently before the Division of Administrative Law of the Supreme Court of Justice and requests the Government to send it a copy of the decision when this is handed down. However, the Committee points out that legislation should not prevent two trade unions from negotiating jointly if they so wish, including in cases of revision of a collective agreement when one of them is less representative.*

**489.** *With regard to the allegation relating to the eviction of the trade union from its premises by the Institute authorities, the Committee notes that the complainant organization states that it has lodged a complaint with the Attorney-General's Office of the Republic, which had, at the time of sending this complaint, not handed down its decision. The Committee requests the Government to take all possible steps to ensure that the decision is not delayed, and that it send the Committee a copy of all decisions taken in this respect.*

## The Committee's recommendations

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

***(a) With regard to the dismissal of the 18 people listed by name in the allegations, the Committee requests the Government to indicate whether the 16 workers to whom it referred have taken legal action and, if so, that it inform the Committee of the respective decisions. The Committee requests the Government to provide information on the dismissal of the other workers. The Committee repeats its request to the complainant organization that it indicate the extent to which these dismissals were related to the exercise of trade union rights and whether those dismissed were trade union members.***

***(b) The Committee notes that neither the complainant organization nor the Government has sent the information requested by the Committee in its previous recommendations, which it reiterates here:***

- ***The Committee requests the Government to send information without delay on the alleged transfer or prevention from applying for a job that affected Dr. Teresa de Jesús Sosa and Dr. Darío Sánchez, both members of the SIMETRISSS, and regarding the alleged modification of permanent contracts to short-term contracts affecting members of the trade union.***
- ***With regard to the allegations relating to illegal deductions from wages affecting 11 persons (some of them trade union members), the Committee requests the Government and the complainant to indicate the name of the workers who were not present at the workplace (ISSS) on 11 September 2001, as well as the legislation to which the Government refers.***
- ***With regard to the alleged search of people and vehicles belonging to trade union members of SIMETRISSS and the hiring of private armed guards, the Committee requests the Government and the complainant to provide further information on these allegations.***

***(c) With regard to the alleged dismissal of 30 trade union members, the Committee expects that, if the criminal charges laid against these workers are rejected, the workers concerned will be reinstated in their posts without loss of wages.***

***(d) With regard to the refusal to recognize the STISSS/SIMETRISSS coalition in the revision of the arbitration award, the Committee notes that the issue is currently before the Division of Administrative Law of the Supreme Court of Justice and requests the Government to send it a copy of the decision when this is handed down. However, the Committee points out that legislation should not prevent two trade unions from negotiating jointly if they so wish, including in cases of revision of a collective agreement when one of them is less representative.***

***(e) With regard to the allegation of eviction of the trade union from its premises, the Committee requests the Government to take all possible steps to ensure that the decision of the Attorney-General's Office of the Republic is not delayed, and that it send the Committee a copy of all decisions taken in this respect.***

CASE NO. 2316

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

## Complaint against the Government of Fiji presented by
## — the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) and
## — on behalf of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE)

***Allegations: The complainant alleges that the Government failed to enforce a compulsory order for the recognition of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE) as the majority union in the Turtle Island Resort, and did not counter attempts by the employer to avoid recognition of the NUHCTIE through delaying tactics, as well as efforts to prevent workers from joining the union through anti-union dismissals and interference***

**491.** In a communication dated 8 January 2004 the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) submitted a complaint on behalf of its affiliated organization, the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE).

**492.** The Government sent its observations in communications dated 12 February and 7 April 2004.

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

## A. The complainant's allegations

**494.** In its communication dated 8 January 2004, the IUF states on behalf of its affiliated organization, the NUHCTIE, that the latter made an application for voluntary recognition to the management of the Turtle Island Resort on 7 November 2002. Following inaction on the part of management, the union applied one month later for compulsory recognition to the Ministry of Labour, Industrial Relations and Productivity. On 22 January 2003, the Government issued a Compulsory Recognition Order against Turtle Island Resort with retroactive effect to 7 November 2002. Management repeatedly refused to enforce this Order and the Turtle Island Resort was charged on 28 May 2003 for non-compliance with the Compulsory Recognition Order and violation of sections 12(1) and 12(3) of the Trade Unions (Recognition) Act, 1998.

**495.** The complainant alleges that despite the continued refusal of management to effectively recognize the NUHCTIE, the Ministry decided to withdraw the charge in November 2003 (Case No. 56/03 *Ministry of Labour, Industrial Relations* v. *Turtle Island Resort*).

**496.** The complainant adds that the current situation must be considered against the background of repeated attempts by the employer to prevent workers from joining the union, cases of unfair dismissal of union members and the setting up of a staff association. According to the complainant, the employer has repeatedly used delaying tactics to avoid having to meet with union leaders and to recognize NUHCTIE, while the Ministry of Labour, Industrial Relations and Productivity has failed to counter these anti-union measures in violation of Convention No. 98. The complainant further alleges that the employer dismissed at various times a number of workers who refused to withdraw from their union membership and that despite NUHCTIE's efforts, the relevant authorities have not intervened to oppose this. Finally, the complainant alleges that the employer has repeatedly and publicly promoted a staff association. In particular, through a letter dated 10 December 2002 and signed by the Turtle Island General Manager, the management allegedly promoted a staff association and expressed the wish that other employers "do follow our lead and develop staff associations which we firmly believe to be far more effective ...". Again, according to the complainant, no intervention has been made by the Government, in violation of Article 2 of Convention No. 98

**497.** The complainant requests that this complaint be examined with the aim that the Compulsory Recognition Order be enforced.

## B. The Government's reply

**498.** In its communications dated 12 February and 7 April 2004, the Government provides the chronology of events in this case. According to the Government, on 7 November 2002, the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE) applied for voluntary recognition. On 7 December 2002, after failing to receive such recognition, the union applied for issuance of a Compulsory Recognition Order. On 21 January 2003, the records of both the employer and the union were verified to establish the percentage membership. On 22 January 2003, the Compulsory Recognition Order was issued with effect from 7 November 2002.

**499.** The Government adds that on 28 March 2003, the NUHCTIE lodged a complaint that management had refused to allow them on the island to meet workers. The employer was charged on 20 May 2003. The complaint (and the charges made) concerned the management's refusal to allow the NUHCTIE on the island to meet with trade union members. However, this refusal did not constitute a breach of the Compulsory Recognition Order or an offence against section 12 of the Trade Unions (Recognition) Act, 1998. Moreover, there was no evidence to show that the employer had refused to discuss the log of claims with the NUHCTIE.

**500.** The Government further adds that the case was first called on 20 June 2003 and subsequent adjournments were granted until the case was formally withdrawn on 7 November 2003 on grounds that the NUHCTIE had made false allegations. On 11 November 2003, the union vide its letter voiced its concern regarding the withdrawal of the case. On 20 November 2003 the union wrote a reminder to the Ministry of Labour, Industrial Relations and Productivity wherein they also mentioned that they would recommend to the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), Asia and Pacific to report this case to IUF Geneva. On 24 November 2003, the Ministry wrote to the union to inform it of the circumstances under which it had withdrawn the charges against Turtle Island Resort.

**501.** The Government adds that the workers are guaranteed protection in the country under the 1997 Constitution and the labour legislation while any breach or non-compliance by either party with such legislation is viewed seriously by the Ministry of Labour, Industrial Relations and Productivity. The Government adds that despite this, the NUHCTIE has still to date not filed a formal complaint to the Ministry on the employer's failure to comply with the Compulsory Recognition Order. The Government suggests that the union be advised to report on any non-compliance to the Ministry for remedial action.

## C. The Committee's conclusions

**502.** *The Committee notes that this case concerns allegations that the Government failed to enforce a compulsory order for the recognition of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE) as the majority union in the Turtle Island Resort, and did not counter attempts by the employer to avoid recognition of the NUHCTIE through delaying tactics, as well as efforts to prevent workers from joining the union through anti-union dismissals and interference.*

**503.** *The Committee notes that on 7 November 2002, the NUHCTIE made an application for voluntary recognition to the management of the Turtle Island Resort. Following inaction on the part of management, the union applied to the Ministry of Labour, Industrial Relations and Productivity for compulsory recognition. After making the necessary verifications, the Ministry issued, on 22 January 2003, a Compulsory Recognition Order against Turtle Island Resort with retroactive effect to 7 November 2002. On 28 March 2003, the NUHCTIE, faced with management's continuing refusal to recognize the union, lodged a complaint for failure to implement the Compulsory Recognition Order, in violation of sections 12(1) and 12(3) of the Trade Unions (Recognition) Act, 1998 (which provide that an employer who fails to comply with the provisions of a compulsory recognition order commits an offence and is liable to a fine). Charges were brought against the employer on 28 May 2003. However, the case was formally withdrawn on 7 November 2003 on grounds that the NUHCTIE had made false allegations. In particular, according to the Government, the complaint lodged by NUHCTIE and the charges pressed related to the refusal of the management to allow the union representatives to enter the resort and meet with trade union members. However, this refusal did not constitute a breach of the Compulsory Recognition Order or an offence against section 12 of the Trade Unions (Recognition) Act, 1998. Moreover, there was no evidence to show that the employer had refused to discuss with the union. According to the Government, the NUHCTIE has to date not filed a formal complaint on the employer's failure to comply with the Compulsory Recognition Order. In the absence of any further information, the Committee is unable to pronounce itself on the withdrawal of the charges brought against the management of Turtle Island Resort.*

**504.** *The Committee observes that the request for the recognition of the NUHCTIE as the majority union at the Turtle Island Resort dates back to November 2002 and that a Compulsory Recognition Order has been issued in this respect. 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* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 824]. The Committee therefore requests the Government to take all necessary measures of inspection, conciliation and enforcement, in accordance with national law, with a view to ensuring the implementation of the Compulsory Recognition Order, and to keep it informed in this respect.*

**505.** *The Committee also notes that, according to the Government, the refusal by management to grant union representatives access to the workplace to meet with trade union members did not constitute a breach of the Compulsory Recognition Order or an offence against section 12 of the Trade Unions (Recognition) Act, 1998. The Committee recalls that according to Paragraphs 9(3), 12, 13 and 17(1) of the Workers' Representatives Recommendation, 1971 (No. 143), it is recommended that the facilities to be afforded to workers' representatives include access to the workplace and to the management of the undertaking as may be necessary for the proper exercise of their functions. Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned. In a case concerning the right of trade union leaders to enter an industrial free trade zone, the Committee drew the Government's attention to the principle that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces. Governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization [see* ***Digest****, op. cit., paras. 957 and 954]. The Committee therefore requests the Government to take all necessary measures so as to ensure that the NUHCTIE enjoys the facilities necessary for the proper exercise of its functions, including access to the Turtle Island Resort and the possibility to meet with management and trade union members without impairing the efficient operation of the undertaking. The Committee requests to be kept informed in this respect.*

**506.** *The Committee notes that the Government has not replied to the allegations concerning its alleged failure to counter repeated attempts by the employer to prevent workers from joining the union through ant-union dismissals and acts of interference such as the promotion of a staff association. The Committee emphasizes that no person should be prejudiced in his or her employment by reason of membership of a trade union, even if that trade union is not recognized by the employer as representing the majority of workers concerned, and that it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see* ***Digest****, op. cit., paras. 693 and 696]. The Committee also recalls that Article 2 of Convention No. 98 establishes the total independence of workers' organizations from employers in exercising their activities [see* ***Digest****, op. cit., para. 759]. It takes note of the comments made by the Committee of Experts on the Application of Conventions and Recommendations as well as the discussion which took place at the Conference Committee on the Application of Standards in 2002, on the basis of which, the Government has been repeatedly requested to adopt the necessary measures, including sufficiently effective and dissuasive sanctions, so as to guarantee adequate protection to workers' organizations against acts of interference by employers or their organizations [see Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference, 92nd Session, 2004 and Report of the Committee on the Application of Standards,* ***Provisional Record*** *No. 28, Part Two, International Labour Conference, 90th Session, 2002]. Deploring that the Government has not yet taken any such action despite repeated requests, the Committee urges it to take all necessary measures, including legislation, so as to investigate and put an end to any acts of anti-union discrimination and interference in this case. The Committee requests to be kept informed in this respect.*

## The Committee's recommendations

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

***(a) Noting that the request for the recognition of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE) as the majority union at the Turtle Island Resort dates back to November 2002 and that a Compulsory Recognition Order has been issued in this framework, the Committee requests the Government to take all necessary measures of inspection, conciliation and enforcement, in accordance with national law, with a view to ensuring the implementation of the Compulsory Recognition Order, and to keep it informed in this respect.***

***(b) The Committee requests the Government to take all necessary measures so as to ensure that the NUHCTIE enjoys the facilities necessary for the proper exercise of its functions, including access to the Turtle Island Resort and the possibility to meet with management and trade union members without impairing the efficient operation of the undertaking. The Committee requests to be kept informed in this respect.***

***(c) Deploring that the Government has not yet taken any action to guarantee protection against acts of interference despite repeated requests, the Committee urges it to take all necessary measures, including legislation, so as to investigate and put an end to any acts of anti-union discrimination and interference in this case. The Committee requests to be kept informed in this respect.***

INTERNATIONAL LABOUR OFFICE

Governing Body

GB.290/5(Part II)
290th Session

Geneva, June 2004

# Part II

CASE NO. 2241

INTERIM REPORT

## Complaints against the Government of Guatemala presented by
## — the Trade Union of Workers of Guatemala (UNSITRAGUA)
## — the Guatemalan Union of Workers (UGT)
## — the World Confederation of Labour (WCL) and
## — the Latin American Central of Workers (CLAT)

***Allegations: The complainant organizations allege a number of anti-union acts in the Municipality of San Juan Chamelco, enterprises, estates and the Higher Electoral Tribunal (dismissals, refusal to enter into collective bargaining with a union affiliated to UNSITRAGUA, as well as physical and verbal aggression of union officials and members and arrest and prosecution of a union official***

**508.** The complaints were made in communications from the Trade Union of Workers of Guatemala (UNSITRAGUA) dated 25, 26 and 27 October 2002, 4 September and 5 November 2003 and 3 May 2004, and from the Guatemalan Union of Workers (UGT) dated 9 July 2003. The Latin American Central of Workers (CLAT) and the World Confederation of Labour (WCT) endorsed the UGT's complaint in communications dated 11 and 15 July, and 30 October 2003 and 27 April 2004.

**509.** The Government sent its observations in communications dated 29 August, 21 November, 2 December 2003 and 9 January 2004.

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

## A. The complainants' allegations

**511.** In its communications dated 25, 26 and 27 October 2002 and 4 September and 5 November 2003 and 3 May 2004, the Trade Union of Workers of Guatemala (UNSITRAGUA) alleges:

(a) the dismissal, without any justifiable cause being duly presented to the judicial authority, of the secretary-general of the Union of Workers of the Municipality of San Juan Chamelco, Alta Verapaz, Mr. Edwin Roderico Botzoc Molina, on 19 August 2002. UNSITRAGUA adds that the Labour Inspectorate verified the dismissal but that the judicial authority refused to process the judicial appeal that was lodged against the dismissal;

(b) the anti-union harassment of Mr. Macedonio Perez Julián by La Comercial S.A. from the moment this worker started taking part in the activities of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit. UNSITRAGUA adds that the aforementioned worker was dismissed in February 2002 and that, when the enterprise learned that he had initiated proceedings to be reinstated in his job, it instituted criminal charges against him, accusing him of embezzlement, possession of stolen goods and concealment. At the time the complaint was presented he was still in prison;

(c) the anti-union harassment of Ms. Rocío Lily Fuentes Velásquez by La Comercial S.A. when she started taking part in the activities of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit. According to UNSITRAGUA, this worker was dismissed for anti-union reasons; she was subsequently reinstated by court order but was assigned to a lower post. She is alleged to be harassed by the authorities of the enterprise and to have been threatened with dismissal;

(d) the refusal of La Comercial S.A. and Distribuidora de Productos Alimenticios Diana S.A and other enterprises belonging to the same economic unit to recognize and enter into collective bargaining with the works' union unless it gives up its affiliation to UNSITRAGUA;

(e) the harassment by La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise. Specifically, it is alleged that the enterprise exerts pressure on workers belonging to the union (threatening them with dismissal, refusing to supply them with goods for sale or to allow them to engage in the sale of goods, etc.), that Mr. Manuel Rodolfo Mendizábal has been harassed by unmarked vehicles to discourage him from playing an active part in the union and that other union members have been the victims of a series of thefts and aggressions. Finally, the enterprise is alleged to have refused to deduct union dues from workers' wages;

(f) the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year;

(g) the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions. UNSITRAGUA adds that the members of the union were aggressed verbally and physically and that its secretary-general,

Mr. Timoteo Hernández Chávez, was attacked by armed men on his way home (the official recognized one of his aggressors as an agent of a private security company working at the university);

(h) the dismissal of all the members (including its officials) of the Union of Workers of the La Torre Estate, of the municipality of San Miguel Pochuta in the department of Chimaltenango, on 1 January 2002. UNSITRAGUA adds that, although the judicial authority ordered the reinstatement of the dismissed workers, it had not ruled on the request for effect to be given to their reinstatement;

(i) the dismissal of 50 members of the Union of Workers of the Asociación Movimiento Fe y Alegría in work centres located in the department of Guatemala on 31 October 2001 in reprisal against the trade union for the activities carried out in order to obtain equality of remuneration between the permanent and contract workers.

**512.** In its communication of 9 July 2003 the Guatemalan Union of Workers (UGT), backed by the World Confederation of Labour (WCL) and the Latin American Central of Workers (CLAT) in communications of 11 and 15 July and 30 October 2003 and 27 April 2004, alleges that Mr. Rigoberto Dueñas Morales, deputy secretary-general of the General Central of Workers of Guatemala and deputy representative of the UGT on the Board of Directors of the Guatemala Social Security Institute (IGSS), was arrested and charged with the crimes of fraud and possession of stolen goods. The complainants add that he was arrested after he denounced the decision of the board of directors of the institute to invest its technical reserves on the international financial markets, which gave rise to anomalies such as the disappearance of over US$43 million. In its communications of 30 October 2003 and 19 February 2004, the WCL adds that the official denounced and fought against abuse of privilege, influence peddling, corruption and absence of accountability within the institute and that, because of his attitude and his defence of the interests of the dues-paying members and of the institute itself, he was the victim of pressure and repressive measures by the institution's authorities (his allowances were cut off and he was no longer invited to attends meetings). Finally, the WCL alleges that: (1) the rules of due process have been violated inasmuch as a person charged with the offences of which Mr. Rigoberto Dueñas Morales is accused can be released from prison on oath or on bail, and yet it was decided to keep him under arrest since June 2003, despite a petition from the Attorney-General's Office that the case be provisionally dropped; (2) the Tenth Criminal Court of First Instance for Narcotics Activities and Crimes against the Environment decided to initiate criminal proceedings against Mr. Rigoberto Dueñas Morales; and (3) the management of the prison in which Mr. Dueñas Morales is detained raises obstacles to the application of the regime concerning visits.

## B. The Government's reply

**513.** In its communications of 29 August, 21 November and 2 December 2003 and 9 January 2004, the Government states that an investigation was conducted by the Regional Director of the Ministry of Labour and Social Security into the dismissal of Mr. Edwin Roderico Botzoc Molina of the Municipality of San Juan Chamelco, Alta Verapaz. The investigation reveals that on 18 September 2002 Mr. Botzoc Molina presented a memorandum to the regional headquarters of the Ministry of Labour indicating that he was the secretary-general of the Union of Workers of the Municipality of San Juan Chamelco, Alta Verapaz, and that, although he benefited from immunity against removal, he had been dismissed by his employer on 19 August 2002 without justifiable cause. The Government adds that the worker thereupon requested that the staff of the Ministry of Labour mediate his reinstatement and that, in the event of his employer's refusal, it should be considered that the administrative channels had been exhausted; two labour inspectors were accordingly appointed to undertake the requested mediation. On 19 September 2002 the inspectors held

a meeting at the Municipality of San Juan Chamelco, Alta Verapaz, in order to make arrangements for Mr. Botzoc Molina's reinstatement, drawing the employer's attention to the relevant provisions of sections 209 and 223, clause *(d)*, of the Labour Code; upon the employer's refusal, the administrative channels were considered to be exhausted and the worker was informed of his right to pursue his claim through judicial channels. In the course of inquiries conducted at the Municipality of San Juan Chamelco, it was learnt that Mr. Botzoc Molina is pursuing his claim for reinstatement through the appropriate court and that Mr. Arturo Jesús Chuc is acting as interim secretary-general of the Union of Municipal Workers of San Juan Chamelco, Alta Verapaz.

**514.** With regard to the allegations concerning events that occurred at La Comercial S.A., the Government states that, following a complaint lodged by one of the enterprise's workers, Mr. Macedonio Pérez Julián, an investigation was carried out by labour inspector Mr. Willian Henry Mazariegos Concoha, who on 6 March 2002 held a meeting on the premises of La Comercial S.A. at which he informed the enterprise of the rules that were applicable in such a case. Following the enterprise's failure to take the requisite action, an administrative sanction was imposed on La Comercial S.A. by resolution No. R.I.I. 410-2002-1318, of which it was duly notified on 24 October 2002 of the same year.

**515.** Concerning the situation of Mr. Macedonio Pérez Julián, the Government notes that it is aware that this worker applied to the Office of the Defence Attorney of the Ministry of Labour on 21 June 2002, which he informed of his dismissal and whose legal services he wished to engage; the office accordingly prepared the relevant documents for him to lodge an appeal with the Seventh Labour and Social Security Court and Third Notifying Office, where a hearing was set for 14 August 2002. Mr. Macedonio Pérez Julián was thereupon invited to meet at the address indicated in the appeal, but he failed to appear. On 24 September 2002, at the request of UNSITRAGUA and Mr. Macedonio Pérez Julián, the case was taken up again and Mr. Romeo Chinchilla was appointed as inspector. The latter then sent a cable to Mr. Macedonio Pérez Julián inviting him to a meeting on 2 October 2002; in a verbal agreement with the acting inspector he undertook to meet on 22 October 2002 at the office of La Comercial S.A. The labour inspector accordingly went to the office of La Comercial S.A. on 22 October 2002, but, since on that day Mr. Macedonio Pérez Julián did not appear as agreed, he was unable to take any action. The worker was again convened to a meeting, and again failed to attend; as a result, the acting labour inspector dismissed the case for lack of interest on the part of the appellant and submitted a report to that effect. In the view of the Assistant Labour Inspector, the inspectorate acted fully in accordance with the law and with its powers in the matter. Finally, the Government notes that Mr. Macedonio Pérez Julián never indicated that he had been dismissed in reprisal for his trade union activities.

**516.** With regard to Ms. Rocío Lily Fuentes Velásquez, this worker had already obtained her reinstatement through the Courts of Law, and labour inspector Mr. Saulo Servando Chamale Cotzojay had been appointed to verify compliance with the court order.

**517.** Regarding the alleged dismissal of workers at La Torre Estate in San Miguel Pochuta, Chimaltenango, the dispute has been resolved by means of a definitive agreement between the employer and the employees concluded in the city of Chimaltenango at 10 a.m. on 8 May 2003 at the Court of Inquiry presided over by labour court judge Coralia Carmina Contreras Flores de Aragón. The first part of the agreement declares that the two parties have reached an understanding providing for the following arrangements: (a) payment to 26 workers of the total amount of the benefits due to them to 31 December 2002; (b) payment to the 26 workers of wages due, and amounting to eight months' pay; (c) payment of 1,000 quetzales for the transport of the belongings of each of the 26 workers; (d) presentation to each worker of a package of galvanized sheet metal. Finally, the court was requested to verify in person that the agreement was carried out in

full on 15 May 2003 on the premises of the La Torre Estate. The agreement was approved by the labour court judge and was legally notified. On 15 May 2003 the execution of the agreement between the parties was officially recorded at the La Torre Estate, in the presence of the judge of the Labour and Social Security Court of First Instance, the secretary and recording officer, and the representatives of the employer and employees. It was accordingly verified that the calculation of the benefits due to each worker was correct and corresponded to the cheques drawn up in their names; these cheques were then handed over to the workers in payment of all the employment benefits due to them, along with a cheque for 1,000 quetzales for each worker to cover the cost of transport of their belongings. It was also duly recorded that the employer's representative handed over to the workers' representatives a cheque for 12,000 quetzales which UNSITRAGUA requested for the advisory services it had rendered; the cheque was received by the workers to be handed over to UNSITRAGUA. Following these proceedings, the parties present indicated their acceptance of the arrangement and signed the record, thus putting an end to the dispute.

**518.** Concerning the alleged arrest of Mr. Rigoberto Dueñas, the Government states that this is not a reflection of any anti-union policy on the part of the Government or the Office of the Attorney-General but is the outcome of a fraud involving millions of quetzales that was discovered at the IGSS, an institution which is in the service of the workers. Other persons with executive responsibilities at the IGSS have been arrested along with Mr. Dueñas. All of them have been charged with embezzlement and fraud involving more than 350 million quetzales. In addition to those arrested some 24 others involved in the fraud against the IGSS are on the run. The Government notes that the Office of the Attorney-General subsequently requested the case against Mr. Dueñas be provisionally dropped but the request was denied by the judge. The case is being heard by the Tenth Criminal Court of First Instance for Narcotics Activities and Crimes against the Environment. It can be inferred from the foregoing that Mr. Rigoberto Dueñas' arrest cannot be assimilated to any kind of anti-union policy but is part of the campaign against impunity and corruption.

## C. The Committee's conclusions

**519.** *The Committee observes that in the present case the complainant organizations allege: (1) anti-union dismissals at the Municipality of San Juan Chamelco, La Comercial S.A., the La Torre Estate, the Higher Electoral Tribunal and work centres located in the department of Guatemala; (2) the refusal of La Comercial S.A. to recognize and enter into collective bargaining with the works' union unless it gives up its affiliation to UNSITRAGUA and the adoption of anti-union measures against members of the works' union; (3) physical and verbal aggression against members of the Union of Workers of Rafael Landivar University following their submission of a draft collective agreement on working conditions; and (4) the arrest and charging of union official Mr. Rigoberto Dueñas Morales for having denounced abuse of privilege, corruption and absence of accountability within the Guatemala Social Security Institute (IGSS).*

**520.** *Regarding the alleged anti-union dismissal of the secretary-general of the Union of Workers of the Municipality of San Juan Chamelco, Alta Verapaz, Mr. Edwin Roderico Botzoc Molina, on 19 August 2002, the Committee notes the Government's statement that: (1) on 19 September 2002 labour inspectors went to the Municipality to make arrangements for the union official's reinstatement in accordance with section 223, clause* (d)*, of the Labour Code on immunity against removal of members of the executive committee during the course of their mandate, and for 12 months thereafter; (2) the employer refused to reinstate the worker and the administrative channels were therefore considered to have been exhausted; and (3) Mr. Botzoc Molina submitted a request for reinstatement through judicial channels. The Committee observes that the Government confirms the dismissal of this union official and that the administrative authority*

*concluded that the labour legislation had been violated with respect to the special protection to which union officials should be entitled. The Committee recalls that "one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 724]. In these circumstances, and given the gravity of the allegation, the Committee calls on the Government to take all the steps within its power to ensure that Mr. Edwin Roderico Botzoc is reinstated in his post, with payment of the wages due to him. The Committee further calls on the Government to keep it informed of the outcome of the judicial proceedings that have been initiated in this connection (according to the complainant organizations, the judicial authority refused to hear the complaint).*

**521.** *Regarding the alleged anti-union dismissal of Mr. Macedonio Pérez Julián by La Comercial S.A. when he began to take part in the activities of the Union of Workers of La Comercial S.A. and Distribuidora de Productos Alimenticios Diana S.A. and other enterprises of the same economic unit, as well as the initiation of criminal proceedings (with the arrest of the worker concerned) against him by the enterprise when it learned that he had lodged a judicial appeal for his reinstatement, the Committee notes the Government's statement that: (1) the labour inspectorate imposed a sanction on the enterprise for its dismissal of the worker; (2) the labour inspectorate convened the worker to meetings at the enterprise on several occasions, but the worker did not appear; and (3) the Office of the Defence Attorney of the Ministry of Labour assisted Mr. Macedonio Pérez Julián in lodging a complaint with the judicial authority. The Committee notes that the Government confirms the dismissal in question. The Committee also regrets that the Government did not send its observations on the criminal proceedings and on Mr. Macedonio Pérez Julián's dismissal. In these circumstances, the Committee requests the Government to send its observations without delay on the criminal proceedings under way, indicating whether the worker concerned is still under arrest or has been released, and on the judicial proceedings initiated by the worker with respect to his dismissal.*

**522.** *Concerning the alleged anti-union harassment of Ms. Rocío Lily Fuentes Velásquez by La Comercial S.A. when she started taking part in the activities of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit (according to the complainants the worker was dismissed for anti-union reasons and subsequently reinstated by court order, but was assigned to a lower level post and is currently being harassed by the authorities of the enterprise and threatened with dismissal), the Committee notes the Government's statement that the worker has already obtained her reinstatement and that the labour inspectorate is to verify compliance with the court order. In this respect, the Committee regrets that the Government has not communicated any information on the alleged harassment of Ms. Fuentes Velásquez subsequent to her reinstatement and on her assignment to a lower level post. In these circumstances, the Committee calls on the Government to take steps for a full and independent inquiry to be made into this allegation and, if it is confirmed, to take steps to ensure that the anti-union acts cease immediately and that those responsible are duly punished.*

**523.** *Concerning the alleged dismissal of all the members (including its officials) of the Union of Workers of La Torre Estate, of the Municipality of San Miguel Pochuta in the department of Chimaltenango, on 1 January 2002, the Committee notes the Government's statement that the collective dispute has been ended by the signing of an agreement*

*between the enterprise and the workers (providing inter alia for the payment of the benefits and wages due to the workers, transport costs, etc.) and that the agreement was approved by the judicial authority which also verified that it was properly executed. In these circumstances, the Committee will not pursue the examination of these allegations any further.*

**524.** *Concerning the alleged arrest – since June 2003 – and trial in violation of due process and further restricting the regime concerning visits (on charges of fraud and possession of stolen goods) of Mr. Rigoberto Dueñas Morales, deputy secretary-general of the General Central of Workers of Guatemala (CGTG) and deputy representative of the Guatemalan Union of Workers (UGT) on the Board of Directors of the Guatemala Social Security Institute (IGSS), after this worker denounced abuse of privilege, influence peddling, corruption and absence of accountability within the Institute, the Committee notes the Government's statement that: (1) the arrest of the official concerned is not a reflection of any anti-union policy on the part of the Government but is the outcome of a fraud involving millions of quetzales that was discovered at the IGSS; (2) other persons with executive responsibilities with the IGSS have been arrested along with Mr. Dueñas; (3) 24 persons involved in the fraud are on the run; (4) the Office of the Attorney-General requested that the charges against Mr. Rigoberto Dueñas be provisionally dropped but the request was denied by the judge handling the case; and (5) the union official's arrest cannot be assimilated to any kind of anti-union policy but is part of the campaign against impunity and corruption. Observing that the complainant organizations state that a person charged with the offences of which Mr. Rigoberto Dueñas Morales is accused can be released from prison on oath or on bail and above all that, as the Government confirms, the Attorney-General's Office requested that the charges against the union official be provisionally dropped, the Committee considers that steps should be taken to have him released and calls on the Government to take such action immediately. The Committee further expresses the firm expectation that due process will be observed in the trial of Mr. Dueñas and calls on the Government to keep it informed of the final outcome.*

**525.** *Finally, the Committee regrets that the Government has not sent its observations on the following allegations: (a) the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year; (b) the refusal of La Comercial S.A. and Distribuidora de Productos Alimenticios Diana S.A and other enterprises belonging to the same economic unit to recognize and enter into collective bargaining with the works' union unless it gave up its affiliation to UNSITRAGUA; (c) the harassment by La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise. Specifically, it is alleged that the enterprise exerts pressure on workers belonging to the union (threatening them with dismissal, refusing to supply them with goods for sale or to allow them to engage in the sale of goods, etc.), that Mr. Manuel Rodolfo Mendizábal has been harassed by people in unmarked vehicles to discourage him from playing an active part in the union and that other union members have been the victims of a series of thefts and aggressions. Finally, the enterprise is alleged to have refused to deduct union dues from workers' wages; (d) the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions (according to the complainants, the members of the union were aggressed verbally and physically and its secretary-general, Mr. Timoteo Hernández Chávez was attacked by armed men on his way home; and (e) the dismissal of 50 members of the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001, in reprisal against the trade union for the activities carried out in order to obtain equality*

*of remuneration between the permanent and contract workers. The Committee calls on the Government to send its observations on these allegations without delay.*

## The Committee's recommendations

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

***(a) Regarding the alleged anti-union dismissal of the secretary-general of the Union of Workers of the Municipality of San Juan Chamelco, Alta Verapaz, Mr. Edwin Roderico Botzoc Molina, on 19 August 2002, the Committee calls on the Government to take all the steps within its power to ensure that the union official is reinstated in his post, with payment of the wages due to him. The Committee further calls on the Government to keep it informed of the outcome of the judicial proceedings that have been initiated in this connection.***

***(b) Regarding the anti-union dismissal of Mr. Macedonio Pérez Julián by La Comercial S.A. and the initiation of criminal proceedings against him by the enterprise, the Committee requests the Government to send its observations without delay on the criminal proceedings under way, indicating whether the worker concerned is still under arrest or has been released, and on the judicial proceedings initiated by the worker with respect to his dismissal.***

***(c) Regarding the alleged anti-union harassment of Ms. Rocío Lily Fuentes Velásquez by La Comercial S.A. and her transfer to a lower level post, the Committee, while taking note of the information provided by the Government, calls on the Government to take steps for a full and independent inquiry to be made into these allegations and, if they are confirmed, to take steps to ensure that the anti-union acts cease immediately and that those responsible are duly punished.***

***(d) Regarding the alleged arrest – since June 2003 – and trial in violation of due process and restricting the regime concerning visits (on charges of fraud and possession of stolen goods) of Mr. Rigoberto Dueñas Morales, the deputy secretary-general of the General Central of Workers of Guatemala (CGTG) and deputy representative of the Guatemalan Union of Workers (UGT) on the Board of Directors of the Guatemala Social Security Institute (IGSS), after this worker denounced abuse of privilege, influence peddling, corruption and absence of accountability within the Institute, the Committee, observing that the complainant organizations state that a person charged with the offences of which Mr. Rigoberto Dueñas Morales is accused can be released from prison on oath or on bail and above all that, as the Government confirms, the Office of the Attorney-General requested that the charges against the union official concerned be provisionally dropped, considers that steps should be taken to have him released and calls on the Government to take such action immediately. The Committee further expresses the firm expectation that due process will be observed in the continuing trial of Mr. Dueñas and calls on the Government to keep it informed of the final outcome.***

***(e) The Committee regrets that the Government has not sent its observations on the following allegations: (a) the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year; (b) the refusal of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit to recognize and enter into collective bargaining with the works' union unless it gives up its affiliation to UNSITRAGUA; (c) the harassment by La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise. Specifically, it is alleged that the enterprise exerts pressure on workers belonging to the union (threatening them with dismissal, refusing to supply them with goods for sale or to allow them to engage in the sale of goods, etc.), that Mr. Manuel Rodolfo Mendizábal has been harassed by people in unmarked vehicles to discourage him from playing an active part in the union and that other union members have been the victims of a series of thefts and aggressions. Finally, the enterprise is alleged to have refused to deduct union dues from workers' wages; (d) the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions (according to the complainants, the members of the union were aggressed verbally and physically and its secretary-general, Mr. Timoteo Hernández Chávez was attacked by armed men on his way home); and (e) the dismissal of 50 members of the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001 in reprisal against the trade union for the activities carried out in order to obtain equality of remuneration between the permanent and contract workers. The Committee calls on the Government to send its observations on these allegations without delay.***

CASE NO. 2259

INTERIM REPORT

**Complaints against the Government of Guatemala presented by**
**— the Trade Union of Workers of Guatemala (UNSITRAGUA), together with the National Trade Union and People's Coordinating Body (CNSP) the General Confederation of Workers of Guatemala (CGTG) the Unified Trade Union Confederation of Guatemala (CUSG) the Federation of Workers' Trade Unions of the Ministry of Public Health and Social Aid (FESITRAMSA) the Federation of Bank and Insurance Employees (FESEBS) and the Trade Union of Food and Allied Workers (FESTRAS)**
**— the World Confederation of Labour (WCL) and**
**— the Latin American Central of Workers (CLAT)**

***Allegations: The complainants allege that the free exercising of the right to freedom of association has been violated through the supervision and interference of the State in managing union funds. UNSITRAGUA further alleges that numerous anti-union acts and dismissals have taken place in contravention of legislation and the collective agreement in force at the following enterprises and institutions: the Office of the Attorney-General of the Nation, the Supreme Electoral Tribunal, the Ministry of Public Health and Social Aid, the Secretariat of Public Works of the First Lady of the Republic of Guatemala, Industrial Agriculture Cecilia S.A., Finca Eskimo S.A., a subsidiary of Agropecuaria Omagua S.A., the University of San Carlos of Guatemala, the port enterprise Santo Tomás de Castilla, fincas Louisiana, Eskimo, Mariana and Pamaxán, all owned by Agropecuaria Hopy S.A. and Agroindustrias Chinook S.A., which are in turn the Guatemalan subsidiaries of the multinational banana company Chiquita Brand, and Bocadeli de Guatemala S.A.***

**527.** The complaints are contained in communications from the Trade Union of Workers of Guatemala (UNSITRAGUA) dated 25 March, 28 and 30 April, 17 July, 4 and 5 September and 2 October 2003. The World Confederation of Labour, in a communication dated 9 May 2003, expressed its support for the complaint. In a communication dated 16 May 2003, the Latin American Central of Workers (CLAT) also expressed its support for the

complaint. In a communication dated 5 April 2004, the General Confederation of Workers of Guatemala (CGTG) sent new allegations. In communications dated 19 and 30 April 2004, UNSITRAGUA sent new allegations.

**528.** The Government sent its observations in communications dated 3 September, 17 October and 2 December 2003 and 9 January 2004.

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

## A. The complainants' allegations

**530.** In its communications of 25 March and 17 July 2003, the complainants (UNSITRAGUA, together with the National Trade Union and People's Coordinating Body (CNSP), the General Confederation of Workers of Guatemala (CGTG), the Unified Trade Union Confederation of Guatemala (CUSG), the Federation of Workers' Trade Unions of the Ministry of Public Health and Social Aid (FESITRAMSA), the Federation of Bank and Insurance Employees (FESEBS) and the Trade Union of Food and Allied Workers (FESTRAS)) allege that the free exercising of the right to freedom of association has been violated through the supervision and interference of the State in managing union funds. The complainants state that, since 1947, trade unions have been exempt from paying taxes, particularly so as to avoid their finances being supervised and the possibility of using taxation pressure to legitimize repression or harassment of trade unions. This exemption from taxation is provided for in the Labour Code as regards both the property of a trade union, as a legal person distinct from its members, and trade union members, who subsidize it principally through their union dues, which may be offset against income tax (section 210). Under legislation, trade unions are exempt from fulfilling any form of State or municipal taxation requirement in respect of their real estate, revenues or income of any kind. In this respect, the complainants consider that the word "fulfil" refers not only to the obligation to pay but also to the formal duties of those who pay taxes, something which is specifically denied to trade unions by law.

**531.** In 2002, the Committee on the Application of Standards of the International Labour Conference noted with satisfaction the repeal, by means of Legislative Decree No. 13-2001, of the regulations contained in section 211 of the Labour Code, which allowed the Ministry of Labour to exercise strict supervision over trade unions, particularly with regard to the management of union funds. However, the Government has now overturned this reform, placing trade unions under the control and supervision of the Superintendent for Tax Administration (SAT), a decentralized, non-judicial institution. Before the SAT was established, all taxation matters were dealt with by the Ministry of Public Finances through the Directorate of Tax Inspection and the Directorate of Internal Revenues. This change has resulted, among other things, in: taxation regulations which have never previously been applied to trade unions being applied in place of the regulations contained in the Labour Code; trade unions becoming taxpayers; unions being placed on a separate register from the Public Register of Trade Unions; unions being obliged to keep accounts in duplicate and issue receipts for all contributions they receive; their finances and property being subject to supervision; and the possibility of union leaders being prosecuted for alleged tax offences (this would create an alternative offence, allowing penal action to be used as a means of coercion in labour disputes). The complainants allege that the powers accorded to the SAT by legislation could also allow searches to be made of trade union premises, and their archives, books and other documentation related to their activities to be registered. Furthermore, the SAT's extensive powers are reinforced by a system of penal and administrative sanctions. This gives rise to

the risk of state interference in the work, archives, premises and property of trade unions to an even greater degree than that permitted by the old section 211 of the Labour Code.

**532.** With regard to demands from the Ministry of Labour and Social Provision and sanctions for having refused the control of trade union finances and property by the tax administration, the complainants state that, for some time, the authorities in the Ministry have maintained at meetings with the trade union movement that trade unions must register as contributors on the SAT's register of contributors, obtain a tax identification number, keep formal accounts and make the declarations required by taxation laws, in order to avoid sanctions being imposed. In this regard, the complainants refer to Government Decree No. 315-2003, from the President of the Republic, which authorizes the SAT to exonerate trade unions completely, at their request, from fines, interest and charges incurred for failing to register on the unified taxation register, as well as for failing to prepare accounts, authorize documents or present at the correct time the declarations required by specific laws on taxation. The Decree further establishes that the SAT shall be able to verify the information that trade unions provide, for which purpose trade unions must facilitate access to all information and documentation concerning matters which give rise to tax obligations. This Decree, in the complainants' opinion, legitimizes and reinforces state interference in the activities of trade unions.

**533.** The complainants underline the fact that trade union finances are an extremely sensitive issue, given that economic problems could lead to a trade union being left without the minimum resources needed to fund its union activities. The complainants also state that there is a regulation applicable only to trade unions, in accordance with Convention No. 87, which sets out mechanisms for control, supervision, sanctions and registration under the charge of union members or the labour authorities, and which has been applied until the new legislation was adopted.

**534.** In communications dated 9 and 16 May 2003, the World Confederation of Labour (WCL) and the Latin American Central of Workers (CLAT), respectively, supported the complainants in this aspect of their complaint.

**535.** In its communications of 28 and 30 April 2003, UNSITRAGUA alleges that the worker Mr. Félix Alexander Gonzáles, a member of the Trade Union of Workers of the Office of the Attorney-General of the Nation, was dismissed from his post without cause on 8 January 2003, in contravention of various provisions of the current collective agreement on working conditions, in particular section 12(c), under which the process should have been open to evidence, giving the worker the opportunity to submit appropriate evidence in his defence, and section 50, under which the appointing authority should have sought authorization from an examining magistrate for labour and social provision before the dismissal took place. The worker is still unemployed and deprived of his fundamental labour rights. The complainant sent new observations in this regard in a communication dated 2 October 2003, stating that the court which heard the case ruled against reinstating Mr. Félix Alexander Gonzáles, which contravenes legislation and the collective agreement in force. The only recourse available in the face of such a ruling is to lodge an appeal for constitutional protection *(amparo)*, which, given the high costs involved, is beyond the means of both the worker and his union.

**536.** UNSITRAGUA further alleges that the worker Mr. Byron Saúl Lemus Lucero, a member of the Trade Union of Workers of the Supreme Electoral Tribunal, was dismissed without cause on 7 March 2003. The Supreme Electoral Tribunal has been summoned by the union in connection with a socio-economic labour dispute following its refusal to negotiate a new agreement, as laid down in sections 379 and 380 of the Labour Code. [Section 380 of the Labour Code lays down that, as of the summons being issued, the termination of any contract of employment at the enterprise where the dispute has arisen must be authorized

by a judge.] The worker subsequently began legal action which resulted in a ruling that he be reinstated in his post. However, on 17 April 2003, the Supreme Electoral Tribunal refused to implement this ruling.

**537.** UNSITRAGUA further alleges that the worker Mr. Luis Rolando Velásquez, a member of the Trade Union of Workers of the National Hospital for Orthopaedics and Rehabilitation, was dismissed without cause on 26 February 2003. The Ministry of Public Health and Social Aid was summoned by the union to appear before the labour courts in connection with a socio-economic labour dispute for its refusal to negotiate with workers. The dismissal was appealed before the labour court, which was aware of the labour dispute and which, instead of ordering the worker's reinstatement within 24 hours, as laid down in law, conducted proceedings in a manner quite at odds with due process by holding a previous audience with the State of Guatemala, which delayed proceedings unnecessarily. The worker is still unemployed and deprived of his fundamental labour rights.

**538.** UNSITRAGUA also alleges that the workers Ms. Rosa María Trujillo de Cordón, Ms. Xiomara Eugenia Paredes Peña de Galdamez and Ms. Zoila Jacqueline Sánchez De García, members of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic of Guatemala and all former employees of the Secretariat, were dismissed from their posts on 1 April 2003 in a reorganization (a reason not provided for in legislation). The workers were not permitted to have the leaders of their union present at the meeting during which they were informed of their dismissal. Although they have appealed to the National Civil Service Authority to be reinstated, no response has yet been received from this body, which has hindered progress in exhausting administrative channels and therefore the opportunity of having recourse to ordinary justice. The workers are still unemployed and deprived of their fundamental labour rights. The complainant also alleges that, although the union has existed for more than a year, it has still not been recognized by the Secretariat.

**539.** UNSITRAGUA alleges that, on 4 January 2003, 34 workers at Industrial Agriculture Cecilia S.A., all members of the trade union at the company, notified their employer that they considered themselves to have been subject to constructive dismissal under section 79 of the Labour Code, on the basis that their salaries had not been paid for almost two years, work was not being assigned to them and the management was failing to comply with the majority of its obligations. [Section 79 states that "The following, among others, are just grounds for workers to assume their contracts of employment to have been terminated, without any responsibility on their part: (a) if the appropriate salaries are not paid in full by the management (…).] The enterprise has now been summoned to appear before the Court of Quetzaltenango as a result of its refusal to negotiate a new collective agreement on working conditions with the union, in accordance with sections 379 and 380 of the Labour Code. The judge hearing the case, far from ordering the workers' immediate reinstatement as laid down in law, conducted proceedings as and when convenient to her, with the result that, almost five months after the case was presented, the workers' reinstatement has still not been ordered. A complaint was raised with the Supreme Court of Justice regarding this matter, but as yet it is not known whether the judge has been sanctioned in any way.

**540.** On 18 January 2003, the enterprise Finca Eskimo S.A., a subsidiary of Agropecuaria Omagua S.A., after being summoned to negotiate a collective agreement on working conditions, dismissed 16 workers belonging to the union at the enterprise, citing the termination of a fixed-term contract, despite the fact that the workers were carrying out duties of a permanent nature. The dismissals were appealed before the Examining Magistrate for Labour and Social Provision and the Family of the Izabal Department. The complainant sent new observations in a communication dated 2 October 2003, stating that the Second Chamber of the Court of Appeal for Labour and Social Provision had revoked the reinstatement orders given in favour of the workers.

**541.** The Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) is a union of workers in the informal economy who have been making and selling their products and craft articles on the Central Campus of the Autonomous University of Guatemala for more than ten years. UNSITRAGUA alleges that the university has refused to recognize the union and negotiate collectively with it to establish conditions for it to carry out its activities on university premises, which, since they are owned by the State, are areas for public use. The union approached the General Labour Inspectorate, which has so far not taken any steps. On 22 April 2003, eight university police officers confiscated the products and tools of union members without a court order. The union members affected included its general secretary, Mr. Ernesto Vladimir Paniagua Alvarez, who, when he attempted to talk to the police officers, was threatened with weapons and truncheons. The complainant alleges that such situations are a threat not only to workers' freedom of association but also to their physical integrity. In a communication dated 11 November 2003, sent in relation to Case No. 2295, the complainant alleges that on 28 October a worker belonging to the union was physically assaulted by members of the university police, who also confiscated and destroyed her working materials and tools. Subsequently, Mr. Fidel Ernesto Díaz Morales, a union official, was also assaulted and threatened when he attempted to distribute a flier around the university highlighting the constant persecution and harassment suffered by members of the union. The fliers were confiscated and he was threatened to prevent him from making his accusations known to the university community. A complaint was made to the Public Ministry but no investigation has been carried out yet.

**542.** On 6 April 2003 the Union of Dockers, Loaders, Unloaders and Other Workers at the port enterprise Santo Tomás de Castilla was formed. On 30 April of the same year, Santo Tomás de Castilla, a state-owned firm, dismissed the union's entire provisional executive committee, which had been elected by the general assembly for a two-year period. The officials affected are: Mr. Manuel Hernández Barrientos, the general secretary; Mr. Rolando Antonio Izales, the organization and publicity secretary; Mr. Agripino de María Villeda Lopez, the labour and disputes secretary; Mr. Alex Rolando Avila Pérez, the minutes and agreements secretary; and Mr. Adiel Yanes Barrera, the treasurer.

**543.** In its communications dated 4 and 5 September 2003, UNSITRAGUA alleges that around 600 workers have been dismissed from the Louisiana, Eskimo, Mariana and Pamaxán plantations, all owned by Agropecuaria Omagua S.A., Agropecuaria Hopy S.A. and Agroindustrias Chinook S.A., which in turn are the Guatemalan subsidiaries of the multinational banana company Chiquita Brand. The workers dismissed included members of the following unions: the Agropecuaria Laurel S.A. Workers' Union; the Agroganadera Sur Tropical S.A. Workers' Union; the Union of Rural Workers of Finca Mariana S.A. and other enterprises which fall within the same economic area of Entre Ríos, Puerto Barrios District, Izabal Department; and the Union of Rural Workers of Finca Pamaxán and annexes. These dismissals are part of a systematic policy to reduce costs by moving production to independent producers on the country's south coast, where working conditions are greatly inferior to those at the plantations mentioned above, and where there is no trade union presence. The dismissals took place at the point when the unions were preparing their respective complaints regarding the expiry of the time limits of the current collective agreements for proposing fresh negotiations with employers.

**544.** UNSITRAGUA further alleges that the enterprise Bocadeli de Guatemala S.A. has, since beginning its operations, introduced a series of unfair salary reductions. The actions, both administrative and judicial, taken by the Union of Workers of Bocadeli de Guatemala S.A. and other enterprises which are part of the same economic entity led to repressive measures on the part of the management, which exerted various forms of pressure on workers belonging to the union, including threats of dismissal, not providing them with sufficient products to sell and refusing to grant the regular loans they receive, in order to

make workers sign documents resigning from the union and retracting their allegations of illegal reductions in their salaries. Copies of such documents are attached to the complaint. In particular, the complainant alleges that Mr. Manuel Natividad Lemus Zavala, the union's general secretary, has been constantly threatened with dismissal and been assigned a supervisor, which places him in a state of constant harassment.

## B. The Government's reply

**545.** In a communication dated 3 September 2003, with reference to the allegation of violations of the free exercising of the right to freedom of association through the supervision and interference of the State in managing union funds, the Government explains the general nature of tax exemptions for trade unions. It states that section 210 of the Labour Code does indeed exempt trade unions from all forms of state or municipal tax which could be levied on their real estate, revenues or income of any kind (including income tax and capital gains tax). All other forms of taxation, such as road tax or value added tax (VAT), are excluded from this regulation, so that if a trade union's activities render it liable to pay such taxes it must necessarily be included on the unified taxation register. The Government further points out that current legislation exempts trade unions from stamp duty and that exemption or otherwise from other forms of tax is based on the State's general policy on taxation.

**546.** With regard to the obligation to register for tax, the Government states that the obligation to register is a general requirement for all associations, foundations and other non-profit organizations, and is not aimed specifically at trade unions. This obligation has been in force since 1964 as a prerequisite for exemption from income tax. It is intended not to control the general operation of organizations but to guarantee that persons who are not exempt shall not use such exemptions fraudulently. The annual sworn declaration has the same purpose, so that, unless an organization's non-profit aims are misrepresented, tax will not be levied in any case. The only things required for registration are a certificate of legal personality issued by the Ministry of Labour and Social Provision and a photocopy of the residence permit(s) of its representative(s).

**547.** With regard to required accounts and authorized invoices, the Government states that all non-profit organizations, including trade unions but without it being a special provision for them, are obliged to maintain accounts of income and outgoings and full inventories for the purpose of basic tax inspection, and not for control to be exercised over their internal operations. These records are not authorized by the SAT, which simply attaches a sticker detailing the amount of exemption from stamp duty on presentation of the records. Since trade unions are not exempt from paying VAT if their activities incur it, for example if they have shops selling consumer goods, which is not generally the case, they must keep the relevant record books showing stock in and out, which can be easily obtained. As regards invoices, the Government states that, as a general rule, any non-profit organization may be asked for authorized invoices in certain circumstances, and that authorization is a simple matter. Donations received, as with donations made to trade unions, are expenses which may be offset against the donor's income tax; the aim is to ensure that the said donors declare their expenses in the proper manner, as otherwise it would be simple to "invent" receipts so as to avoid tax liability on the part of persons not exempt from payment of such tax. Invoices are also required for VAT, from which trade unions are not exempt, as has already been stated.

**548.** With regard to the tax sanctions imposed for failure to comply with the formal obligations mentioned above, the Government states that these sanctions are a general requirement laid down in legislation, without any particular reference to trade unions. It insists that, in the case of income tax, these obligations are derived not from any supposed characteristics of contributors but from the purposes of tax control already mentioned; in the case of VAT,

they are derived from the characteristics of contributors but only in so far as they determine which transactions are taxable.

**549.** The Government reports that many trade unions have complied with their formal obligations in this area, especially as regards donations. Many others have failed to comply with them and, when they decided to fulfil them spontaneously, the appropriate sanctions were imposed. It was for this reason that the Ministry of Labour and Social Provision, with the prior agreement of trade union confederations and the SAT, promoted the Government Decree on exoneration from fines and sanctions. In this respect, the Government explains that, with the aim of achieving conciliation, the President of the Republic, bearing in mind that various trade unions had expressed a desire to rectify omissions stemming from breaches of the type described in laws on taxation, and that these organizations did not have sufficient funds to enable them to bear the relevant sanctions, gave authorization to the SAT so that trade unions with legal personality recognized by the Ministry of Labour could, at their own request, be completely exonerated from fines, interest and charges incurred through having failed to register on the unified taxation register, submit accounts, authorize documents or present the declarations required by laws on taxation at the proper time. This exoneration was in force from the issuing of Government Decree No. 315-2003 on 19 May 2003 until the last working day of July 2003.

**550.** The Government insists that the tax obligations in question do not violate Conventions Nos. 87 and 98, since their purpose is not to control the functioning of trade union rights or to obstruct the exercising of those rights; instead they form a basic general control for all non-profit organizations, intended to avoid tax advantages being transferred to third parties. In the case of taxes from which non-profit organizations are not exempt, such as VAT, these obligations are imposed as for any general tax. Lastly, the Government recalls that trade unions must exercise their rights within the law and points out that control over illicit activities cannot be considered interference, since that would be to attribute complete impunity to such organizations.

**551.** As regards the proceedings against the worker Mr. Félix Alexander Gonzáles, the Government reports that the Second Chamber of the Court of Appeal has ruled (without right of appeal) in favour of the Office of the Attorney-General of the Nation and against the worker's reinstatement. The Court of Appeal considers that serious misconduct on the part of Mr. Gonzáles was demonstrated at the hearing. With regard to the allegation of violations of the collective agreement on working conditions, the Government categorically states that such claims are false.

**552.** With regard to Mr. Byron Saúl Lemus Lucero, who was dismissed by the Supreme Electoral Tribunal, the Government reports that he was dismissed as a disciplinary measure by resolution No. 0007-2003, issued by the Tribunal on 21 January 2003, and that this resolution came into effect through Decree No. 092-2003 of 7 March 2003, with no responsibility attaching to the Supreme Electoral Tribunal and as a result of misconduct on the part of the worker in discharging his duties.

**553.** In connection with the dismissal of Mr. Luis Rolando Velásquez, the Government states that the worker in question was reported to the authorities by the Director of the National Hospital for Orthopaedics and Rehabilitation on 9 October 2002 for having given rise to proper grounds for dismissal. Under section 79 of the Civil Service Bill, the terms of his contract gave him five days to exercise his right to defence, which he did within the given time. The relevant authorities decided that he had not disproved the charges against him and, consequently, the appointing authority, exercising the power invested in it by law, issued a decree of dismissal on the grounds that it had been clearly demonstrated at the hearing that the worker in question had given rise to just cause for dismissal.

**554.** With regard to the Secretariat of Public Works of the First Lady of the Republic of Guatemala, the Government reports that on 1 April 2003 Ms. Rosa María Trujillo de Cordón, Ms. Xiomara Eugenia Paredes Peña de Galdamez and Ms. Zoila Jacqueline Sánchez De García were dismissed as a result of reorganization. The files of these workers were reviewed and in no case had the Secretariat been summoned to appear before the courts, since it was free to dismiss workers for the reasons established in law without the need for judicial authorization. The Government also states that, under section 223(d) of the Labour Code, only members of the executive committee of a properly constituted trade union enjoy immunity from dismissal. It further points out that workers must exhaust administrative channels, through the National Office of the Civil Service, and legal channels before having recourse to other courts. The Government also reports that the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic of Guatemala was registered on 12 October 2001 (registration No. 1465).

**555.** With regard to the dismissal of 16 workers at Finca Eskimo S.A., whose reinstatement was ordered by the Examining Magistrate for Labour and Social Provision and the Family of the Izabal Department but not carried out by the Second Chamber of the Court of Appeal, the Government states that there has been a change of management at the enterprise in question and that the new enterprise has assumed liability for the workers, a form of takeover provided for in legislation. In the event that no workers are contracted by the enterprise, the task of the Ministry is to declare administrative channels exhausted so that they can have recourse to the appropriate labour courts.

**556.** As regards the allegations concerning the workers belonging to the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala, the Government states that these workers were engaged in commercial activity on the university campus on various study days and that the university only allows the sale of their products inside its buildings. If the university wishes, it may change the points of sale, and this is precisely what occurred in this dispute. The General Labour Inspectorate was requested by the workers affected to mediate in the dispute. However, during this process the workers abandoned their action. Everything has been placed on file so that it can be shown that at no stage has the Inspectorate denied the workers concerned the right of petition. If called upon to intervene, the Inspectorate would basically provide a mediation and conciliation service, rather than fulfilling a supervisory role, since the university has at no point contracted the services of the workers, who in turn are not providing a service to the university as employees, and therefore no labour relation exists between them.

**557.** With respect to the workers at the port enterprise Santo Tomás de Castilla, the Government reports that the Ministry of Labour intervened in this matter and the enterprise informed it that the services provided by the workers would be carried out by a private firm, that all the workers would be taken on by the new enterprise and that the workers were no longer its responsibility. Administrative channels were subsequently declared to have been exhausted and it will be the appropriate judge who decides whether reinstatement is required.

**558.** In a communication dated 17 October 2003, the Government sent its observations regarding the allegations that around 600 workers had been dismissed from the Louisiana, Eskimo, Mariana and Pamaxán plantations, all owned by Agropecuaria Omagua S.A., Agropecuaria Hopy S.A. and Agroindustrias Chinook S.A., which in turn are the Guatemalan subsidiaries of the multinational banana company Chiquita Brand. The Government reports that the Ministry of Labour intervened in the face of these mass dismissals through the labour inspector for Izabal. The employer stated that the plantations in question were no longer productive and that it had the power to dismiss the workers provided that it assumed the responsibility of paying unemployment benefit. In such cases,

the role of the General Labour Inspectorate is to take the steps necessary to reinstate workers if an enterprise is summoned to court, to verify that unemployment benefit is paid and to monitor the situation of union officials, who cannot be dismissed. In this case, it is known that union officials reached a conciliation agreement with the management. If no conciliation can be achieved with the intervention of the Ministry, then administrative channels have been exhausted and examination of the case passes to the appropriate courts. The Government states that the employer fulfilled all its labour obligations and that the workers received four additional salary payments, as well as compulsory payments and compensation. The Government states that the management uprooted the banana plantation to plant African palms, since they have more uses and are less problematic than banana palms, and recontracted the workers it considered necessary for the new process.

**559.** With regard to the allegations concerning Bocadeli de Guatemala S.A., the Government reports that the General Labour Inspectorate, after establishing that the enterprise was not making the proper payments for Sundays, breaks, holidays, Christmas bonuses or annual bonuses, cautioned the enterprise to pay the amounts owed to the workers retroactively. The enterprise stated that, as it had been summoned to appear before the Second Court of Labour and Social Provision, it would wait until the court hearing the case had made its ruling before making any payments. Following a second caution, the conciliatory administrative channels were declared exhausted, opening the way for workers to take the appropriate legal action. The case was passed to the sanctions department on 15 July 2003.

## C. The Committee's conclusions

**560.** *The Committee observes that this complaint refers to allegations of violations of the free exercising of the right to freedom of association through the supervision and interference of the State in managing union funds, together with anti-union dismissals in contravention of legislation and the collective agreement in force.*

**561.** *As regards the allegation of state interference in managing union funds, the Committee observes that, according to the complainants, placing trade unions under the control and supervision of the Superintendent for Tax Administration (SAT), a decentralized, non-judicial institution, will result, among other things, in: taxation regulations which have never previously been applied to trade unions being applied in place of the regulations contained in the Labour Code; trade unions becoming taxpayers; unions being placed on a separate register from the Public Register of Trade Unions; unions being obliged to keep accounts in duplicate and issue receipts for all contributions they receive; their finances and property being subject to supervision; and the possibility of union leaders being prosecuted for alleged tax offences. It is alleged that the SAT's extensive powers are reinforced by a system of penal and administrative sanctions and that the powers accorded to it by legislation could also allow searches to be made of trade union premises, and their archives, books and other documentation related to their activities to be registered.*

**562.** *The Committee observes that the Government, for its part, states that, although trade unions are exempt from all forms of state or municipal tax which could be levied on their real estate, revenues or income of any kind (section 210 of the Labour Code), all other forms of taxation, such as road tax or value added tax (VAT) are excluded from this regulation. The Government maintains that both the obligation to register for tax, and the annual sworn declaration, accounts required and authorized invoices, are requirements common to all non-profit organizations, without any specific reference to trade unions, intended as a basic tax control and not as interference in the internal functioning of organizations. As regards taxation sanctions, the Government states that they are a general requirement laid down in legislation, without any particular reference to trade unions. The Committee notes that, by means of Government Decree No. 315-2003, the President of the Republic authorized the SAT to exonerate trade unions completely, at their*

*request, from fines, interest and charges incurred for failing to comply with specific laws on taxation. The Committee also observes that this Decree further establishes that the SAT shall be able to verify the information that trade unions provide, for which purpose trade unions must facilitate access to all information and documentation concerning matters giving rise to tax obligations. This Government Decree, in the complainant's opinion, legitimizes and reinforces state interference in the activities of trade unions.*

**563.** *In this regard, the Committee recalls that the Committee of Experts has stated that there is no infringement of the right of organizations to organize their administration if, for example, the supervision is limited to the obligation of submitting periodic financial reports or if there are serious grounds for believing that the actions of an organization are contrary to its rules or the law (which should not infringe the principles of freedom of association); similarly, there is no violation of the Convention if such verification is limited to exceptional cases, for example in order to investigate a complaint, or if there have been allegations of embezzlement. Both the substance and the procedure of such verifications should always be subject to review by the competent judicial authority affording every guarantee of impartiality and objectivity. [See* ***General Survey of the Committee of Experts****, 1994, para. 125.]*

**564.** *Furthermore, the Committee recalls that, in general, trade union organizations appear to agree that legislative provisions requiring, for instance, financial statements to be annually presented to the authorities in prescribed form and the submission of other data on points which may not seem clear in the said statements, do not per se infringe trade union autonomy. In this respect, the Committee has observed that measures of supervision over the administration of trade unions may be useful if they are employed only to prevent abuses and to protect the members of the trade union themselves against mismanagement of their funds. However, it would seem that measures of this kind may, in certain cases, entail a danger of interference by the public authorities in the administration of trade unions and that this interference may be of such a nature as to restrict the rights of organizations or impede the lawful exercise thereof, contrary to Article 3 of Convention No. 87. It may be considered, however, to some extent, that a guarantee exists against such interference where the official appointed to exercise supervision enjoys some degree of independence of the administrative authorities and where that official is subject to the control of the judicial authorities [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 442].*

**565.** *The Committee observes that, on the one hand, section 1 of Decree No. 1-98, establishing the Superintendent for Tax Administration, makes provision for the SAT to enjoy operational, economic, financial, technical and administrative autonomy. Furthermore, section 161 of the Taxation Code (Decree No. 6-91) provides for administrative contention actions to be brought against rulings of revocation or reinstatement handed down from the Taxation Administration or the Ministry of Public Finances, to be heard in the appropriate Chamber of the Court of Administrative Contention, preferably by magistrates who specialize in matters of taxation. On the other hand, section 93 of the Taxation Code lays down that, after a non-extendible period of three days has elapsed, counting from the day following receipt of notification by the contributor that documentation or information concerning tax, accounts or finances must be presented, any action or omission which obstructs or hinders the supervisory activity of the Taxation Administration shall constitute resistance to the supervisory activity of the Taxation Administration.*

**566.** *Although it notes that the decisions of the administrative authority may be appealed through legal channels, the Committee underlines the fact that problems of compatibility with Convention No. 87 arise when administrative authorities are permitted to inspect at any time minute books, accounts or other documents kept by organizations, carry out*

*investigations and demand information, in particular when administrative actions do not stem from complaints made by union members.*

**567.** *In these circumstances, while noting that the system of taxation supervision is applied equally to all non-profit organizations, the Committee concludes that the current regulations allow the authorities, by carrying out inspections without reasonable notice, to have excessive knowledge of and control over the internal management and range of activities of trade unions, in contravention of Article 3 of Convention No. 87, and requests the Government to ensure that the functions of the SAT are adjusted in line with the various principles mentioned above concerning the financial autonomy of trade unions, and, in consultation with trade union centrals, to modify legislation as necessary in this direction and to keep it informed of measures taken in this respect.*

**568.** *With regard to the allegation concerning the Office of the Attorney-General of the Nation (dismissal without cause of Mr. Félix Alexander Gonzáles, a union member, in violation of various provisions of the collective agreement in force), the Committee takes note of the Government's statement that the Second Chamber of the Court of Appeal ruled in favour of the Office of the Attorney-General of the Nation and against the worker's reinstatement, on the grounds of serious misconduct on the part of Mr. Gonzáles. The Government also categorically denies that there have been violations of the collective agreement. The Committee requests the Government to send it a copy of the court's ruling and also requests the complainants to provide further information in this regard.*

**569.** *With regard to the allegation concerning the Supreme Electoral Tribunal (dismissal without cause of Mr. Byron Saúl Lemus Lucero, a union member, when the Tribunal had been summoned to appear in connection with a collective dispute), the Committee notes that, according to the complainant, the Supreme Electoral Tribunal refused to implement the reinstatement order. The Committee observes that the Government has not sent any information on the failure to implement the reinstatement order. The Committee requests the Government to take the measures at its disposal to rectify the situation and to keep it informed in this respect.*

**570.** *With regard to the allegation concerning the Ministry of Public Health and Social Aid (dismissal without cause of Mr. Luis Rolando Velásquez, a member of the Trade Union of Workers of the National Hospital for Orthopaedics and Rehabilitation, when the Ministry had been summoned to appear before the courts in connection with a collective dispute), the Committee observes that, according to the complainant, UNSITRAGUA, the judge hearing the case for reinstatement conducted proceedings in a manner quite at odds with due process by holding a previous audience with the State of Guatemala, which delayed proceedings unnecessarily. The Committee notes that, according to the Government, the appointing authority issued a decree of dismissal on the grounds that it had been clearly demonstrated that there was just cause for dismissal which merited such a sanction, after Mr. Velásquez had exercised his right to defence. The Committee notes that judicial proceedings have been instigated in this respect, following the administrative proceedings mentioned by the Government in its observations, and requests the Government to take the necessary steps to ensure that the process will not be delayed unnecessarily and to keep it informed of the results of the proceedings.*

**571.** *With regard to the allegations concerning the Secretariat of Public Works of the First Lady of the Republic of Guatemala (dismissal of Ms. Rosa María Trujillo de Cordón, Ms. Xiomara Eugenia Paredes Peña de Galdamez and Ms. Zoila Jacqueline Sánchez De García, all union members, on the grounds of reorganization, without allowing them to have their union officials present at the meeting during which they were informed of their dismissal), the Committee notes that the Government confirms the dismissals in question and indicates that, since the Secretariat has not been summoned to appear before the*

*courts, it is able to dismiss workers for the reasons established in law. Given that the complainant itself states that the reorganization was given as grounds for dismissal, the Committee will not proceed with examining these allegations unless the complainant sends new information showing the anti-union nature of the dismissals. With regard to the alleged non-recognition of the union by the Secretariat, the Committee observes that the Government confines itself to stating that the union was registered on 12 October 2001. In this regard, the Committee requests the Government to ensure that the Secretariat of Public Works recognizes the union and to keep it informed in this respect.*

**572.** *The Committee regrets that the Government has not sent its observations with regard to the allegation concerning the state of constructive dismissal reported at Industrial Agriculture Cecilia S.A. by 34 workers belonging to the union there, resulting from failure to pay salaries, duties not being assigned, etc., and requests it to send its comments in this respect without delay.*

**573.** *With regard to the allegations concerning Finca Eskimo S.A., a subsidiary of Agropecuaria Omagua S.A. (dismissal of 16 workers belonging to the union, on the grounds of the termination of a fixed-term contract, despite the fact that the workers were carrying out duties of a permanent nature, when the enterprise had been summoned to appear before the courts), the Committee notes that, according to the Government, there has been a change of management provided for in law at the enterprise and that the case is proceeding through legal channels. The Committee also notes that, according to information received recently from the complainant, UNSITRAGUA, the Second Chamber of the Court of Appeal for Labour and Social Provision has revoked the reinstatement orders. The Committee requests the Government to send it a copy of the ruling handed down by the Court of Appeal in this respect.*

**574.** *With regard to the allegation concerning the failure to recognize and refusal to negotiate with the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) by the university, the Committee observes that, according to UNSITRAGUA, on two occasions university police officers have, without a court order, confiscated products and tools from union members, including the union's general secretary, Mr. Ernesto Vladimir Paniagua Alvarez, who was threatened with weapons and truncheons. Furthermore, the Committee notes that, according to the complainant, Mr. Fidel Ernesto Díaz Morales, a union official, was also assaulted and threatened when he attempted to distribute around the university fliers describing the constant persecution to which union members are subjected. The Committee notes that, according to the Government, this dispute arose as a result of the university's decision to alter the points of sale within the university campus, where the union's members engage in commercial activity. The Government also states that the General Labour Inspectorate initially intervened in a conciliatory capacity but that the workers concerned later abandoned their action. The Government stresses that there is no labour relation between the parties, since the university has not contracted the services of the workers, who in turn do not provide a service to the university as employees. Whilst it observes that there is no labour relation which could be the subject of collective bargaining, the Committee requests the Government to take the measures necessary to resolve the dispute peacefully through dialogue between parties, to begin appropriate investigations into the allegations of violence and to keep it informed in this respect.*

**575.** *As regards the alleged dismissal by the port enterprise Santo Tomás de Castilla of the entire provisional executive committee of the Union of Dockers, Loaders, Unloaders and Other Workers at the port enterprise Santo Tomás de Castilla (Mr. Manuel Hernández Barrientos, Mr. Rolando Antonio Izales, Mr. Agripino de María Villeda López, Mr. Alex Rolando Avila Pérez and Mr. Adiel Yanes Barrera), the Committee notes the Government's statement that the enterprise informed it that the services provided by the*

*workers would be carried out by a private firm, that all the workers would be taken on by the new enterprise and that therefore the workers were no longer its responsibility. According to the Government, it will be the appropriate judge who determines whether reinstatement is required. The Committee requests the Government, in the event that legal action is brought in this respect, to inform it of the ruling as soon as it is handed down, in order to discover whether the dismissals involve all workers or only the members of the union's provisional executive committee. If no legal action is brought, the Committee requests the Government to carry out an independent investigation to establish the true reasons for the dismissals and to keep it informed in this respect.*

**576.** *With regard to the dismissal of around 600 workers from the Louisiana, Eskimo, Mariana and Pamaxán plantations, all owned by Agropecuaria Omagua S.A., Agropecuaria Hopy S.A. and Agroindustrias Chinook S.A., which in turn are the Guatemalan subsidiaries of the multinational banana company Chiquita Brand, the Committee notes that, whilst the complainant, UNSITRAGUA, states that these dismissals are part of a systematic policy to reduce costs by moving production to the country's south coast, where working conditions are greatly inferior and where there is no trade union presence, the Government reports that, according to the employer, the plantations in question were no longer productive and it had the power to dismiss the workers provided that it assumed the responsibility of paying unemployment benefit. Furthermore, the General Labour Inspectorate verified that the appropriate unemployment benefits were paid and monitored the situation of union officials, who had reached a conciliatory agreement with the management. The Committee also notes the Government's statement that the management has uprooted the banana plantation to plant African palms, since they have more uses and are less problematic than banana palms, and recontracted the workers it considered necessary for the new process.*

**577.** *With regard to the allegations concerning Bocadeli de Guatemala S.A., the Committee notes that according to UNSITRAGUA, this enterprise: (1) has, since beginning its operations, introduced a series of unfair salary reductions; (2) the actions, both administrative and judicial, taken by the Union of Workers of Bocadeli de Guatemala S.A. and other enterprises which are part of the same economic entity led to repressive measures on the part of the management, which exerted various forms of pressure on workers belonging to the union, including threats of dismissal, not providing them with sufficient products to sell and refusing to grant the regular loans they receive, in order to make workers sign documents resigning from the union and retracting their allegations of illegal reductions in their salaries; (3) threats against Mr. Manuel Natividad Lemus Zavala, the union's general secretary, who has been constantly threatened with dismissal and been assigned a supervisor, which places him in a state of constant harassment. The Committee observes that the complainant refers in general terms to threats, dismissals and other actions, along with pressure on workers to sign documents resigning from the union and retracting their allegations of illegal reductions in their salaries (a copy of these documents was annexed to the complaint). The Committee notes that the complainant refers specifically to Mr. Manuel Natividad Lemus Zavala, the general secretary of the union, who, it is alleged, has been constantly threatened with dismissal and been assigned a supervisor, which places him in a state of constant harassment. The Committee observes that the Government confines itself to reporting the enterprise's statement that the question of the amounts owed to the workers, which prompted the workers' action and the subsequent reaction from the enterprise, is being dealt with by the courts and that it will await their ruling before taking any measures, but does not respond to the allegations made. This being the case, the Committee requests the Government to respond specifically to the allegations of anti-union actions, including those concerning pressure placed on Mr. Manuel Natividad Lemus Zavala.*

**578.** *The Committee notes the recent communication from the General Confederation of Workers of Guatemala (CGTG), dated 5 April 2004, in which it sent new allegations*

*concerning massive and selective dismissals in the municipality of Chiquimulilla. The Committee further notes the recent communications of UNSITRAGUA, dated 19 and 30 April 2004, in which it sent new allegations relating to the dismissal of 40 workers, the delay in the transmission of a set of claims to the Secretariat of Public Works of the First Lady of the Republic of Guatemala and the dismissal of a member of the executive committee of the Secretariat's trade union and requests the Government to send its observations in this respect.*

**579.** *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.*

## 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) With regard to the alleged supervision and interference of the State in managing union funds, the Committee, taking into account the observed violations of Convention No. 87, requests the Government to ensure that the functions of the SAT are adjusted in line with the various principles mentioned above concerning the financial autonomy of trade unions, and, in consultation with trade union confederations, to modify legislation as necessary in this direction and to keep it informed of measures taken in this respect.***

***(b) With regard to the dismissal of Mr. Félix Alexander Gonzáles from the Office of the Attorney-General of the Nation, the Committee requests the Government to send it a copy of the ruling of the Honourable Second Chamber of the Court of Appeal, and also requests the complainants to provide further information in this regard.***

***(c) With regard to the failure to implement the order to reinstate Mr. Byron Saúl Lemus Lucero in the Supreme Electoral Tribunal, the Committee requests the Government to take the measures at its disposal to rectify the situation and to keep it informed in this respect.***

***(d) With regard to the delay in the proceedings appealing for the reinstatement of Mr. Luis Rolando Velásquez at the National Hospital of Orthopaedics and Rehabilitation, the Committee requests the Government to take the necessary steps to ensure that the process will not be delayed unnecessarily and to keep it informed of the results of the proceedings.***

***(e) With regard to the dismissal of Ms. Rosa María Trujillo de Cordón, Ms. Xiomara Eugenia Paredes Peña de Galdamez and Ms. Zoila Jacqueline Sánchez De García, the Committee invites the complainant to send new information showing the anti-union nature of the dismissals. With regard to the alleged non-recognition of the union by the Secretariat of Public Works of the First Lady of the Republic of Guatemala, the Committee requests the Government to ensure that the Secretariat of Public Works recognizes the union and to keep it informed in this respect.***

***(f) The Committee regrets that the Government has not sent its observations with regard to the allegation concerning the state of indirect dismissal reported at Industrial Agriculture Cecilia S.A. by 34 workers belonging to the union there, resulting from failure to pay salaries, duties not being assigned, etc., and requests it to send its comments in this respect without delay.***

***(g) With regard to the dismissal of 16 workers from Finca Eskimo S.A., a subsidiary of Agropecuaria Omagua S.A., the Committee requests the Government to send it a copy of the ruling handed down by the Court of Appeal in this respect.***

***(h) With regard to the allegation concerning the failure to recognize and refusal to negotiate with the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) by the university, the Committee, observing that strictly speaking there is no labour relation obliging the employer to bargain collectively, requests the Government to take the measures necessary to resolve the dispute peacefully through dialogue between parties, to begin appropriate investigations into the allegations of violence and to keep it informed in this respect.***

***(i) As regards the alleged dismissal of the provisional executive committee of the union at the port enterprise Santo Tomás de Castilla, the Committee requests the Government, in the event that legal action is brought in this respect, to inform it of the ruling as soon as it is handed down, in order to discover whether the dismissals involve all workers or only the members of the union's provisional executive committee. If no legal action is brought, the Committee requests the Government to carry out an independent investigation to establish the true reasons for the dismissals and to keep it informed in this respect.***

***(j) With regard to the allegations concerning Bocadeli de Guatemala S.A., the Committee requests the Government to respond specifically to the allegations of anti-union actions, including those concerning pressure placed on Mr. Manuel Natividad Lemus Zavala.***

***(k) The Committee requests the Government to send its observations regarding the new allegations concerning massive and selective dismissals in the municipality of Chiquimulilla sent by the General Confederation of Workers of Guatemala in its recent communication dated 5 April 2004, and regarding the new allegations sent by UNSITRAGUA in its recent communications dated 19 and 30 April 2004 relating to the dismissal of 40 workers, the delay in the transmission of a set of claims to the Secretariat of Public Works of the First Lady of the Republic of Guatemala and the dismissal of a member of the executive committee of the Secretariat's trade union.***

***(l) The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.***

CASE NO. 2295

INTERIM REPORT

## Complaint against the Government of Guatemala presented by the Trade Union of Workers of Guatemala (UNSITRAGUA)

***Allegations: The complainant organization alleges the dismissal of members of a trade union by the Committee for the Blind and the Deaf of Guatemala, non-compliance with a legal order for reinstatement and the subsequent revocation by the Appeals Court of the reinstatement order, in violation of basic procedural guarantees; recognition of trade union representative status of a not-for-profit civil organization (UASP); anti-union dismissals; and delays in registering a trade union organization***

**581.** The complaint is contained in communications from the Trade Union of Workers of Guatemala (UNSITRAGUA) dated 28 August, 24 September, 3 and 8 October, 5 December 2003 and 31 March 2004. The complainant organization sent new allegations in communications dated 15 and 26 April 2004.

**582.** The Government sent its observations in communications dated 3 September, 17 October and 2 December 2003 and 9 January 2004.

**583.** 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

**584.** In its communication of 28 August 2003, the complainant organization alleges that on 29 December 2002 a socio-economic conflict was laid before the judicial authorities against the Committee for the Blind and the Deaf of Guatemala, in accordance with articles 379 and 380 of the Labour Code. (Article 380 of the Labour Code establishes that from the time of the summons, all employment contract terminations in the enterprise where the conflict has taken place should be authorized by the court.) In retaliation, the institution dismissed 38 workers without cause, the latter belonging to the two trade unions in the institution, who began the legal action in which the reinstatement of the workers was ordered. The institution refused to comply with the order and lodged two successive appeals for annulment which were rejected; after the second rejection of appeal, the institution lodged an appeal with the First Chamber of the Court of Appeals for Labour and Social Security, which, while it had only been called upon to decide the legitimacy of the appeal for annulment, decided to rescind the order to reinstate the workers.

**585.** In its communication of 24 September 2003, the complainant organization alleges that, on 18 September 2003, 47 workers at Carrocerías Rosmo S.A. were dismissed without cause

from the production centre in the Department of Quetzaltenango. These workers belong to the Trade Union of Workers of Carrocerías Rosmo S.A. The dismissals took place in violation of the collective agreement on labour conditions in force and as a means of intimidating the trade union, given that more than 50 per cent of its members were affected.

**586.** In its communication of 3 October 2003, the complainant organization alleges that the not-for-profit civil organization known as the Trade Unions' and People's Action Unit (UASP), established in February 2002, has been recognized by the Government as having trade union representative status on various occasions. The Government has allowed it to participate in collective bargaining, for example, in the context of a recent conflict of teachers; it authorized it, in the Tripartite Committee on International Labour Affairs, to act as a delegate at the International Labour Conference in 2002; and it has allowed it to take part in tripartite discussions, which are exclusively reserved for trade unions. According to the complainant, this shows damaging permissiveness and even sponsorship on the part of the Government in replacing trade union organizations with not-for-profit civil organizations in violation of Conventions Nos. 87 and 98. The complainant organization emphasizes that civil organizations are governed by general law and not by labour law and they seek to ensure that the specific interests of their members prevail. Although its members are workers, this institution should not act as a trade union, and even less should it assume responsibility for the legitimate representation of workers.

**587.** In its communication of 8 October 2003, the complainant organization alleges that on 10 September 2003 the documentation referring to the request for registration of the officials of the Trade Union of Workers of El Rosario Farm S.A. and Other Companies making up the Economic Unit was submitted to the General Labour Directorate of the Ministry of Labour and Social Security. Although the documents complied with all the legal prerequisites, the Directorate demanded that a prerequisite not laid down in legislation be complied with, thereby unnecessarily delaying the process by more than a month and causing the trade union organization to remain without an executive committee or representatives.

**588.** In its communication of 5 December 2003, the complainant organization alleges that on 29 November 2003, the Palo Gordo Agricultural, Industrial and Refining Company S.A. dismissed 50 workers without cause at its labour centre in the Municipality of San Antonio Suchitepéquez. The dismissals affected solely the members of the Workers' Trade Union of the Palo Gordo Refinery Company and were clearly in retaliation against the trade union's fight for equal pay and against the illegal withholding of wages. The institution received a summons for its refusal to negotiate in a collective conflict to appear before the Labour and Social Security Court of First Instance.

**589.** Finally, in a communication dated 31 March 2004, the complainant organization alleges that on that same day, the Quetzal Harbour Company, a decentralized state institution, dismissed four workers belonging to the Trade Union of Workers of the Quetzal Harbour Company shortly before the trade union was to submit a draft collective agreement to the institution.

## B. The Government's reply

**590.** With regard to the allegation relating to the Committee for the Blind and the Deaf of Guatemala, the Government provides information on why the First Chamber of the Court of Appeals for Labour and Social Security decided to rescind the reinstatement order issued by the Court of First Instance. According to the judicial authorities, the workers bringing the legal action of the collective conflict, mistakenly summoned in their complaint a different or inexistent company to the one in which they were working; the

workers who were dismissed requested in this collective conflict that they be reinstated and the judge gave the reinstatement order against a company that, in reality, was not part of the conflict and that in practice had been neither formally nor legally notified of any conflict. The Court of Appeals decided that, owing to a substantial error in the proceedings the employer company had not been summoned before the judicial authorities, it was not subject to the obligation to request judicial authorization to dismiss the workers as laid down in article 380 of the Labour Code and, therefore, the order for reinstatement was not legitimate. The workers subsequently corrected the error that had been made so that the judicial authorities notified the company of the collective conflict on 5 August 2003, while the dismissals took place on 10 January 2003. Moreover, according to the Government, the reason for the dismissals was administrative reorganization and not, as alleged, retaliation because of the conflict. The Government moreover denies that there has been any violation of freedom of association or collective bargaining and indicates that there are currently two trade unions in the Committee for the Blind and the Deaf of Guatemala, one of which is negotiating with the employer. The judicial authority emphasizes that it acted in accordance with the law and with complete impartiality.

**591.** With regard to the allegation of the dismissal of 47 workers without cause at the Carrocerías Rosmo S.A. company, the Government states that, owing to the intervention of the General Labour Inspectorate of Quetzaltenango, a payment agreement between the employer and the workers was signed relating to the payment of labour benefits to those workers affected, at the express request of the workers and the trade union of the company and, to date, no complaint with regard to non-compliance in the matter of amounts and dates of payment has been lodged.

**592.** With regard to the allegation that the Trade Unions' and People's Action Unit (UASP) has been recognized by the Government on various occasions as a trade union representative, the Government confirms that it has certainly faced difficulties in determining the organizations for the purpose of the composition of the tripartite bodies, such as the Consultative Council for the Re-establishment of State Workers, for the purpose of the election of the labour representative for the 91st Session of the International Labour Conference and in relation to the draft governmental agreement for the constitution of the Tripartite Committee for International Labour Affairs. Such difficulties led to the inclusion in these bodies of organizations that did not strictly fulfil the criteria of worker representativeness. In order to correct these failings, the Government has begun to revise the provisions regulating, among other things, the composition of the Tripartite Committee for International Labour Affairs, by issuing a new regulation that lays down the form of election of representatives for the sectors so that the most representative may be elected. The Government indicates also that the current composition of the Tripartite Committee should be renewed in January 2004 and for this it will convene all employers' and workers' organizations. The Government indicates that according to the registration of trade union organizations in the national department for the protection of workers of the General Labour Directorate, neither the Trade Union of Workers of Guatemala (UNSITRAGUA) nor the Trade Unions' and People's Action Unit (UASP) is registered as a trade union organization, for which reason both organizations are outside the sphere of application of the judicial labour system and, as a result, the tripartite system.

**593.** With regard to the delay in the registration of the directors of the Trade Union of Workers of the El Rosario Farm S.A. and Other Companies making up the Economic Unit, the Government states that the officials of the organization were registered on 15 October 2003.

## C. The Committee's conclusions

**594.** *With regard to the allegation relating to the dismissal of the members of the trade union in the Committee for the Blind and the Deaf of Guatemala, the Committee notes that according to the Government's statement, the First Chamber of the Court of Appeals for Labour and Social Security decided to rescind the reinstatement order handed down by the Court of First Instance, given that the workers had made a basic error of fact in legally summoning the company in their complaint so that the company had not been notified of the existence of the conflict and, therefore, was not subject to the obligation to request legal authorization to dismiss at the time when the dismissals took place. Consequently, the request for reinstatement was not legitimate. The Committee notes, in this respect, that article 380 of the Labour Code provides that from the time of receiving the summons, all employment contract terminations in the company where the conflict has been taking place shall be authorized by the court. The Committee notes the Government's statement that the employer company was only notified of the collective conflict complaint on 5 August 2003, while the dismissals took place on 10 January 2003. The Committee also notes that the Government emphasizes that the dismissals were a result of administrative restructuring and were not anti-union retaliation and that, in fact, there are currently two trade unions in the Committee for the Blind and the Deaf of Guatemala, one of which is negotiating with the employer. The Committee notes this information and will not proceed with a further examination of this matter.*

**595.** *With regard to the allegation of the dismissal of 47 workers from the Carrocerías Rosmo S.A. company without cause, the Committee notes that according to the complainant organization these dismissals were in violation of the collective agreement on labour conditions in force and were a means of intimidating the trade union as the dismissals affected more than 50 per cent of its members. The Committee also notes that according to the Government, owing to the intervention of the General Labour Inspectorate of Quetzaltenango, a payment agreement between the parties was signed relating to the payment of labour benefits to those workers affected, at the express request of the workers and the trade union of the company, and that subsequently no complaints have been lodged. The Committee recalls the importance of complying with collective agreements that are freely signed between the parties and requests the Government to keep it informed of developments.*

**596.** *With regard to the allegation relating to the trade union representative status recognized by the Government with regard to the Trade Unions' and People's Action Unit (UASP), the Committee notes that the Government confirms having had difficulties in determining the representative organizations for the purpose of the composition of the tripartite bodies, which led to the inclusion of organizations that do not strictly comply with the criteria of worker representativeness. The Committee also notes the Government's statement that in order to correct these failings it has called for the regulatory provisions relating to the constitution of tripartite bodies to be updated, in particular the Tripartite Committee for International Labour Affairs, through a new regulation which establishes the form of election of representatives for the sectors in order that the most representative be elected, and that the current composition of the Tripartite Committee will be renewed in January 2004. The Committee recalls that the legislative or other measures necessary should be taken in order to ensure that organizations that are separate from trade unions do not assume responsibility for trade union activities and to ensure effective protection against all forms of anti-union discrimination. In this regard, the Committee requests the Government that, in the framework of revising the regulatory provisions on the constitution of tripartite bodies, in particular the Tripartite Committee for International Labour Affairs, it adopts, following full consultation with all trade union organizations, the necessary steps to ensure the appropriate designation of the most representative organizations, through the use of objective criteria, and to avoid recognizing non-trade*

*union organizations as having trade union representative status, and to keep it informed in this respect.*

**597.** *With regard to the delay in the registration of officials of the Trade Union of Workers of the El Rosario Farm S.A. and Other Companies making up the Economic Unit, the Committee notes the Government's statement that this organization was registered by the General Labour Inspectorate on 15 October 2003. The Committee notes, however, that the Government has not sent its observations on the allegations relating to the Palo Gordo Agricultural, Industrial and Refining Company S.A. (dismissal of 50 workers), and the Quetzal Harbour Company (dismissal of four workers), and requests that it send its observations without delay.*

**598.** *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.*

## The Committee's recommendations

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

***(a) With regard to the allegation of the dismissal of 47 workers at the Carrocerías Rosmo S.A. company without cause, the Committee requests the Government to keep it informed of developments.***

***(b) With regard to the allegation relating to the Trade Unions' and People's Action Unit (UASP), the Committee requests the Government that, in the framework of revising the regulatory provisions on the constitution of tripartite bodies, in particular the Tripartite Committee for International Labour Affairs, it adopts, following full consultation with all trade union organizations, the necessary steps to ensure the appropriate designation of the most representative organizations, through the use of objective criteria, and to avoid recognizing non-trade union organizations as having trade union representative status, and to keep it informed in this respect.***

***(c) The Committee requests the Government to send its observations on the allegations relating to the Palo Gordo Agricultural, Industrial and Refining Company S.A. (dismissal of 50 workers), and the Quetzal Harbour Company (dismissal of four workers).***

***(d) The Committee requests the Government to send its observations on the new allegations submitted by the complainant organization in its communication dated 15 April 2004.***

***(e) The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.***

CASE NO. 2266

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

## Complaint against the Government of Lithuania presented by the Lithuanian Trade Unions Confederation

***Allegations: The complainants allege that the authorities interfered in trade union activities by intervening in the distribution of trade union property acquired under the former unitary system; more specifically, they contend that the General Prosecutor's Office filed an application on behalf of certain complainants to challenge trade union ownership of trade union property and stop its impending sale***

**600.** The Lithuanian Trade Unions Confederation filed a complaint of violations of freedom of association against the Government of Lithuania in a communication dated 14 May 2003.

**601.** The Government provided its observations in communications dated 12 August 2003 and 14 January 2004.

**602.** Lithuania has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

### A. The complainant's allegations

**603.** In its communication of 14 May 2003, the complainant organization states that after the country regained independence, the Supreme Soviet of the Republic of Lithuania officially recognized that former trade unions were not representing workers but were part of the existing political system, that the property acquired by these organizations belonged to all Lithuanian people, and that some part of it should be distributed to the most representative trade unions (resolution of 30 July 1990).

**604.** That property was identified in the Law of 25 May 1993 on Former Governmental Trade Unions Property, and in the resolution of 1 June 1993 of the Seimas of the Republic of Lithuania implementing the said Law. Article 3(2) of that Law also provided for the establishment of the Special Fund, whose objective was to support existing and emerging trade unions by listing, taking over and distributing trade union property. The Special Fund was to be managed by a Board composed of the most representative trade unions.

**605.** Article 3 of the Seimas decision of 1 June 1993 lists the assets (mostly buildings) to be transferred to the Special Fund, for later allocation. Article 5 of the Law of 25 May 1993 provides in addition that the: "Transfer and use of Lithuanian convalescence homes and resorts will be established by a separate law." That Law, adopted in 1994, provided that administrative buildings would be transferred to the most representative trade unions according to membership; however, the problem of distribution of convalescence homes and resorts (which represent a considerable amount of real estate) persisted.

**606.** According to the complainant, there was no just way to distribute this real estate, and consultations were held between the Government and the most representative trade unions. The trade unions eventually concluded an agreement concerning the distribution. Parliament adopted on 20 July 2000 a law on trade unions property distribution. That law provided for the allocation of property between the workers' organizations at various levels, and for the creation of the Trade Unions Support Fund, whose founders were a number of workers' organizations (including the complainant, after amalgamation). The Trade Unions Support Fund was established within the delay provided for in the law, and the four national trade union centres agreed to sell the relevant property and to transfer the proceeds to the Trade Unions Support Fund. One of the founders, the Lithuanian Workers' Union (later renamed "Solidarity"), broke the agreement at the end of 2002 and applied to the courts in order to stop the sale of that trade union property.

**607.** The General Prosecutor's Office, on behalf of the trade union centres, asked the court to adjudicate on the ownership of the convalescence homes and resorts, and to cancel the decision registering the assets as property of the Special Fund. If this request is upheld, this would mean that the property would be transferred to the State. Complaints on the same grounds were filed with the Vilnius and Klaipeda county courts, which stopped the sale of convalescence homes. The property in question is creating a loss of about €10,000 a month, due to real estate taxes, which damages trade union interests.

**608.** The complainant submits that, through its actions, the General Prosecutor Office is interfering in the organization of trade union activities and impede the lawful exercise of former trade unions' property distribution on the basis of the agreement between trade union centres, thereby violating Article 3 of Convention No. 87, since it imposes the will of the authorities on trade unions and exerts pressure through the judicial system. The complainant requests that the Government be ordered to stop without delay the interference of the General Prosecutor Office in trade union organizational activities.

## B. The Government's replies

**609.** In its communication of 12 August 2003, the Government states that the Constitution and the law on prosecution make it a duty for the General Prosecutor to defend public interest, and the rights of persons and society, under the rule of law.

**610.** In March 2002, the President of the Lithuanian Solidarity Trade Union had written to various officials (including the President of the Republic, the Chairman of Parliament, the General Prosecutor, the State Ombudsman and the media) asking to stop the selling of trade union property, to avoid that irreparable harm be done to trade union members. The General Prosecutor's Office received about 20 similar letters from local branches of Solidarity. The Parliamentary Commission on Anti-corruption also sent a message (on the legitimacy of the actions of the Special Fund) to the General Prosecutor's Office, whose officials were obliged by law to carry out an investigation; to that end, they had to define the status of the assets to be given to trade unions.

**611.** Resolution No. I-437, passed by the Supreme Soviet on 30 July 1990, stated that "… former trade unions were governmental and not public organizations; therefore, the property acquired in the name of trade unions with accumulated funds and state subsidies belongs to all people of Lithuania". This resolution also authorized the Government to make an inventory of the property owned by former trade unions. Accordingly, all that property was taken over by the State; only the Government was competent to decide on its legal status and to dispose of it. The Seimas resolution No. I-166 of 1 June 1993 defined which property would be recognized as being transferred to the Fund. Law No. I-160 of 25 May 1993 decided that the transfer and operation of health rehabilitation institutions and rest homes would be regulated by a separate statute (Law No. I-934 of 8 June 1995)

which stipulated that some rehabilitation institutions were recognized as the ownership of Lithuanian trade unions. Analysis of the legislation leads to the conclusion that the Fund did not become the owner in full of the property, as it was restricted by law to perform temporary functions in distributing and transferring the property to trade unions; in spite of this, certain branches (Klaipeda and Alytus) of former state entities registered some of these assets as being the property of the Fund. The investigation also revealed that the Board of the Fund had breached other legislation regulating its activities: some decisions were adopted unlawfully, e.g. deciding to sell assets that were to be transferred to trade unions, without following the legally approved procedure. All these acts breached constitutional principles and the property rights of trade unions and their members, and also amounted to violations of public interest.

**612.** Being in possession, upon investigation, of sufficient grounds to believe that the Board of the Fund had violated the legislation regulating its duties in managing the former trade unions property, and seeking to defend the interests of trade unions and their members, the General Prosecutor brought two civil lawsuits in the Vilnius and Klaipeda courts, in order to invalidate the registration of health rehabilitation and rest homes as property owned by the Fund.

**613.** In its communication of 14 January 2004, the Government indicates that on 26 August 2003, the district court of Klaipeda closed the civil case concerning the request for cancellation of the registration of the Fund's title, a decision which was confirmed by the Court of Appeal on 23 October 2003. Regarding the lawsuits filed in the Vilnius court, the court upheld the public prosecutor's claim on 16 December 2003 and invalidated the registration of the Fund's title in the disputed objects. The Government adds that the Constitutional Court ruled on 30 September 2002, that the law providing for the right of ownership of sanatoria and rest homes (under which these establishments were assigned to trade unions and transferred to the Fund) was unconstitutional. The Court also ruled that the powers of the Fund expired as of 1 July 2001.

**614.** The complainant's allegations that "there could be no just way to distribute this estate", that "the ownership of the property would be transferred to the State" and that the General Prosecutor "seeks to distribute former trade union property without taking into account the trade unions opinion" are an attempt to mislead the institutions investigating disputes on the property of trade unions, and the Committee on Freedom of Association. The lawsuits were instituted not for the purpose of distributing the property to certain trade unions as alleged in the complaint, but rather to restore justice and invalidate some unlawful decisions of the Board of the Fund concerning the disposition of trade union assets.

**615.** The complainant's allegations that "the property seized creates monthly losses of €10,000 and that the General Prosecutor's actions are damaging trade unions interests" are also false. In fact, the Board of the Fund, being aware of the investigation led by the General Prosecutor's Office on its activities, hastily decided, without proper planning, to sell the property that was to be given to trade unions. It made a contract with a real estate firm, which concluded 12 sale transactions on 28 October 2002; within a month, that private firm resold the major part of that real estate property for a much higher price to third parties, without being accountable to the Fund. These transactions had been made possible in part because of the delay in deciding to initiate lawsuits, with the result that the judicial order attempting to block the sale was issued only after that property had already been sold. This is why the Vilnius and Klapeida courts had decided to apply temporary protective measures immediately upon receiving the next lawsuits.

**616.** The lawsuits filed by the General Prosecutor are in no way related to violations or unlawful restrictions of freedoms and rights provided for in Article 3 of Convention No. 87, as alleged by the complainant. Quite the contrary, these actions aim at protecting the interests

of trade unions, as well as those of the Lithuanian Trade Unions Confederation. These lawsuits were filed against the Special Fund, an ad hoc body established by Parliament to administer the property of former trade unions before transferring its ownership to existing and emerging trade unions. The activities of the Fund are regulated by legislation, not by trade union arrangements. The monitoring of the Fund's activities was delegated by Parliament to the State Control Authority which found, upon investigation, that the Fund and its Board had committed a series of serious breaches in disposing of trade unions property. The Government concludes that the complaint is wholly unfounded and should be rejected.

## C. The Committee's conclusions

**617.** *The Committee notes that this complaint concerns allegations of the Government's interference in the organizational activities of trade unions, more specifically the distribution of trade union assets in the context of a transition from a trade union monopoly regime to a situation of trade union pluralism. According to the complainant, the actions of the General Prosecutor's Office violated Article 3 of Convention No. 87.*

**618.** *The Committee notes that when the country regained independence, the authorities acknowledged that the property acquired by trade unions under the monopoly regime belonged to all the people of Lithuania, and proceeded to establish a transitional system whereby these trade union assets would be inventoried, kept under control in a containment legal structure, and managed so that they could be later distributed to existing and emerging trade unions. The Government entrusted these tasks to a Special Fund which, in the Committee's view, was essentially a temporary caretaker; based on the legislation and implementing resolutions annexed to the complaint, it appears to the Committee that the Fund never acquired ownership of the assets. Be that as it may, it is not within the Committee's competence to decide whether or not the registration of some assets in the name of the Fund was lawfully obtained, nor to decide on the fate or allocation of said assets; this task belongs to Lithuanian judicial institutions.*

**619.** *Regarding more specifically the alleged violation of Article 3 of Convention No. 87, the Committee notes at the outset that the acts complained of by the Lithuanian Trade Unions Confederation, i.e. the lawsuits filed by the General Prosecutor, were neither directed towards the complainant nor other workers' organizations. Rather, acting on information gathered during an investigation by the official body in charge of government audits, the General Prosecutor's Office applied to the courts, on behalf of **all** trade unions and workers, so that an independent judicial body could examine whether the actions of the Fund's Board were in the larger interest of **all** trade unions and workers. In that context, the Fund was not a "workers' organization" within the meaning of Article 3 of Convention No. 87, which has therefore no relevance here.*

**620.** *The Committee also notes that the information collected from the Government during the investigation on the quick-flip sale of 12 buildings at a much higher price within one month gave reasonable grounds to the General Prosecutor's Office to file conservatory lawsuits, before further negative consequences could ensue for the wider interests of all trade unions and workers. The Committee noted that the authorities took action in establishing the inventory and distribution scheme, arguing that the interests of trade unions and workers were at stake.*

**621.** *In addition, the Committee notes that there obviously exist serious differences of opinion between the various workers' organizations about the decisions made by the Fund in the administration and disposal of trade union assets. The Committee therefore requests the Government to hold further discussions with all interested parties with a view to finding a*

*satisfactory solution to all concerned, and to keep it informed of developments in this respect.*

## The Committee's recommendation

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

***The Committee requests the Government to hold further discussions with all interested parties with a view to finding a satisfactory solution for all concerned, and to keep it informed of developments in this respect.***

CASE NO. 2282

DEFINITIVE REPORT

# Complaint against the Government of Mexico presented by the International Confederation of Free Trade Unions (ICFTU)

***Allegations: The complainant alleges that five months after an application was made, the Local Conciliation and Arbitration Board of Puebla State refused without any justification to grant legal recognition to the Independent Trade Union of Workers at the enterprise Matamoros Garment S.A.***

**623.** The complaint is set out in a communication dated 24 June 2003 from the International Confederation of Free Trade Unions (ICFTU).

**624.** The Government sent its observations in a communication dated 3 February 2004.

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

## A. The complainant's allegations

**626.** In its communication of 24 June 2003, the ICFTU states that on 20 January 2003, a total of 162 workers at the enterprise Matamoros Garment S.A. decided to establish the Independent Trade Union of Workers at Matamoros Garment S.A. (SITEMAG) and filed an application with the Local Conciliation and Arbitration Board (JLCA) of Puebla State for legal recognition. The ICFTU indicates that the company opposed the establishment of a new trade union and informed the workers that, as a result of their decision to organize a new union, one of the company's biggest customers had cancelled its contract.

**627.** The ICFTU alleges that on 19 March 2003, the JLCA rejected the application for legal recognition by SITEMAG. According to the complainant, the following reasons were given: (1) approval of the attendance list by the SITEMAG organization secretary, although the latter did not attend the meeting in question (the complainant states, however, that the person in question participated in the meeting and his name in abbreviated form is

included in the list of participants); (2) one of the two lists of members' names states the purpose of the assembly, while the other does not; since the lists are not identical, they are not legally valid (the complainant states that the lists are identical, and that one was completed by hand on the day of the meeting, while the other is machine-printed); (3) the lists submitted do not indicate whether the persons attending the constituent meeting were older than 14 years (the complainant indicates that while the age of the signatories was not indicated, a total of 162 workers signed, the minimum number required being only 20, and it seems highly unlikely that the 162 signatories did not include at least 20 who had reached the age of majority); (4) one of the signatories appeared before the JLCA on 16 March 2003 and complained that he had not ratified his signature (the complainant states that it does not know the motives of the worker in question, whose statement does not in any case invalidate the wishes of the other 161 workers who signed); and (5) on 18 March 2003, the company was closed and therefore the minimum number of 20 workers required to form a union was not available (the complainant indicates that the JLCA waited nearly two months to review the company's position and did so on the day of the temporary closure which was due to loss of production; according to the ICFTU, the closure was agreed with the other trade union at the enterprise, insufficient notice was given, and no evidence of the financial constraints was produced).

**628.** The ICFTU adds that the JLCA should have allowed SITEMAG an opportunity to correct irregularities or omissions encountered during the process of reviewing the application for legal recognition; however, the trade union received no comments until being notified that the application had been turned down.

**629.** Lastly, the ICFTU states that the question of legal recognition of SITEMAG is of fundamental importance because although the company Matamoros Garment S.A. is currently closed and has an uncertain future, it has not yet been liquidated and the refusal to recognize the union is a clear violation of freedom of association which sends out a negative message to other workers wishing to set up free and independent unions. Furthermore, the refusal is not an isolated case, given that the JLCA also refused a similar application from a trade union at the KUKDONG enterprise in Atlixco, and in 2002 the JLCA of Coahuila rejected an application for registration from an independent trade union of workers at the ALCOIA FUJIKURA company in Piedras Negras.

## B. The Government's reply

**630.** In its communication of 3 February 2004, the Government states that the International Confederation of Free Trade Unions (ICFTU) acknowledges the fact that the Independent Trade Union of Workers at Matamoros Garment S.A. (SITEMAG) freely exercised its right to be established as a trade union, with its own legal personality and assets, for the purpose of defending its members' interests in the form and terms which they considered to be appropriate and in accordance with ILO Convention No. 87. The Government also adds that the ICFTU communication shows that SITEMAG applied for registration to the Local Conciliation and Arbitration Board (JLCA) of Puebla State, by virtue of which it was fully constituted, had drafted its own by-laws and regulations, elected its representatives, organized its own administration and activities and drawn up a programme, in accordance with Article 3, paragraph 1, of Convention No. 87.

**631.** According to the Government, the decision of 19 March 2003 issued by the JLCA of Puebla State, which is provided as an attachment to the ICFTU communication, shows that the Board acted in accordance with the law in exercising full freedom of jurisdiction with regard to SITEMAG's application for registration, in accordance with the rules of procedure set out in sections 356, 364 and 365 of the Federal Labour Act, and provided reasoned arguments for its decision. The Government states that SITEMAG was not left without means of defending its rights since the Mexican legal system provides for the

opportunity to exercise rights through appeal and other applicable legal procedures to challenge the decision of the JLCA of Puebla State, but in fact the complaint contains no evidence that any such recourse was used against the JLCA decision.

**632.** As regards the allegations that SITEMAG should have been given an opportunity to correct irregularities and omissions encountered during the review procedure, the Government indicates that the conciliation and arbitration boards are not required to rectify defects in documents submitted by "the trade unions"; protection is only provided where "a worker" makes a written application which is deficient. In this case, substantive and procedural defence of the worker's interests is provided by the conciliation and arbitration board. The Government maintains that if SITEMAG does not agree with the Board's refusal to register it, it has recourse to appeal procedures under the law against the decisions which it considers to affect its interests.

**633.** In conclusion, the Government states that: (1) the issue was examined by the competent bodies which in accordance with the law decided not to register SITEMAG on the grounds that it did not comply with labour legislation; (2) the workers could have defended their rights by recourse to the competent bodies, through legal actions and appeals procedures available under Mexican law; (3) SITEMAG was not prevented from freely exercising its right to be established as a trade union, with its own legal personality and assets, for the purpose of defending its members' interests in the form and in terms which they consider appropriate; nor has it been prevented from drafting its by-laws and regulations, freely electing its representatives, organizing its administration and activities and formulating a programme, and for these reasons the principles of ILO Convention No. 87 are not considered to have been violated; and (4) the facts alleged by the complainant in its communication do not constitute non-compliance by the Government with the principle of freedom of association and the right to organize enshrined in Convention No. 87.

**634.** The Government attaches to its reply a communication from the Mexican Confederation of Chambers of Industry (CONCAMIN). The latter states that this is a case in which a group of individuals wishes to set up a new union, typically defined as a works union, and faces a situation in which the employer has no other option than to close his facilities because of the loss of production. The closure was agreed with the Francisco Villa Trade Union, which had the right of collective representation, and it is clear that the real intention behind the move to create a new trade union body was the profit motive; thanks to globalization, it is common for countries with much cheaper labour than Mexico's and without a developed trade union movement to welcome clothing enterprises, forcing Mexican companies to close down. CONCAMIN adds that the ICFTU fails to recognize the fact that the law allows employers and trade unions to agree on the closure of an enterprise, provided that appropriate compensation is paid, which is what happened in this case. Mexican law allows employers to close down the source of employment if it is not profitable, and this right is guaranteed by article 5 of the General Constitution of the Republic.

## C. The Committee's conclusions

**635.** *The Committee notes the complainant's allegations that on 20 January 2003, 162 workers at Matamoros Garment S.A. decided to set up the Independent Trade Union of Workers at the Matamoros Garment S.A. enterprise (SITEMAG) and filed an application for legal recognition with the Local Conciliation and Arbitration Board (JLCA) of Puebla State, and that the application was unjustifiably turned down on 19 March 2003.*

**636.** *The Committee notes the Government's statements in this regard to the effect that: (1) in accordance with Convention No. 87, SITEMAG freely exercised its right to be established as a trade union and applied for registration with the JLCA, a competent body; (2) the JLCA decision of 19 March 2003 indicates that the JLCA acted in accordance with the law*

*in examining the application by SITEMAG and providing reasoned arguments for its decision; (3) SITEMAG was not left without means of defending its rights, since the Mexican legal system provides for the possibility of exercising rights through appeal mechanisms and applicable legal remedies against the JLCA decision, but there is no indication in the complaint that use was made of those means; and (4) the conciliation and arbitration boards are not required to rectify deficiencies or defects in documentation submitted by trade unions. The Committee notes the communication of the Mexican Confederation of Chambers of Industry (CONCAMIN) transmitted by the Government with its reply, in which it is stated that: (i) the case in question is one in which a group of individuals is trying to set up an enterprise trade union and is facing a situation in which the employer has no other option than to close down the facilities owing to the loss of production; and (ii) the closure of the facilities – which according to CONCAMIN is provided for under national law – was agreed with the Francisco Villa Trade Union and the workers were paid appropriate compensation.*

**637.** *First, the Committee notes that the Government acknowledges the fact that SITEMAG has been refused legal recognition. The Committee notes that, according to the Government, it was not legally a requirement for the JLCA to inform the union of formal errors in the application or to ask it to rectify them before giving its ruling. Nevertheless, the Committee regrets that two months passed before the JLCA gave a ruling on the application for legal recognition for SITEMAG, and that it did so one day after the closure of the undertaking (this point was alleged by the complainant and not denied by the Government). The Committee considers that this delay adversely affected the workers, who decided to set up SITEMAG, given that the delay prevented the trade union from taking part in talks on the consequences of closure for the rights of workers, which was probably a consideration in the decision to set up a new union and is legitimate.*

**638.** *In any case, given that according to the complainant the undertaking has been closed but has not yet been liquidated, the Committee hopes that if the company Matamoros Garment S.A. reopens its facilities and SITEMAG applies again for legal recognition, the competent authority (JLCA) will take a decision promptly. The Committee urges the Government to take measures to ensure that in future, if the body responsible for granting legal recognition considers that there are irregularities in the documentation submitted, an opportunity is provided so that irregularities may be rectified. In this respect, the Committee recalls that the principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization. Such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or again authorization for taking steps prior to the establishment of the organization. The formalities prescribed by law for the establishment of a union should not be applied in such a way as to delay or prevent the setting up of occupational organizations [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 244 and 249].*

## The Committee's recommendations

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

***(a) Given that, according to the complainant, the undertaking has been closed but not yet liquidated, the Committee hopes that if the company Matamoros Garment S.A. reopens its facilities and the Independent Trade Union of Workers at Matamoros Garment S.A. (SITEMAG) applies again for legal recognition, the competent authority (JLCA) will take a decision promptly.***

***(b) The Committee urges to the Government to take measures to ensure that, in future, if the body responsible for granting legal recognition considers that there are irregularities in the documentation submitted, an opportunity is provided so that the irregularities may be rectified.***

CASE NO. 2267

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

## Complaint against the Government of Nigeria presented by the Academic Staff Union of Universities (ASUU)

***Allegations: The complainant organization alleges acts of anti-union discrimination including dismissals, and the raiding and sealing of trade union premises during a strike at the University of Ilorin***

**640.** The complaint is contained in communications dated 26 March and 28 April 2003 from the Academic Staff Union of Universities (ASUU).

**641.** The Government provided its observations in communications dated 20 August 2003 and 11 March 2004.

**642.** Nigeria 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

**643.** In its communications of 26 March and 28 April 2003, the ASUU indicates that it is a workers' organization duly registered in 1978 by the Registrar of Trade Unions, and an umbrella organization for 36 University lecturers' unions. The President of the country is the University Visitor; he also appoints the Governing Council and the Chairman and the Vice-Chancellor of the University, which is supervised by the National Universities Commission and the Federal Minister of Education. According to the complainant, violations of freedom of association that occur in this context may therefore only happen at the pleasure of the Federal Government.

**644.** The ASUU alleges that gross infringements of trade union rights in this case include the summary termination of appointment of staff because they had taken strike action, as well as harassment and victimization of trade union members.

**645.** On 2 April 2001, after two years of warning, the ASUU launched a strike which was followed by all branches of the union nationwide. However, by 30 April, strikers at the University of Ilorin were prevented from entering the campus. During the night of 11-12 May 2001, the Secretariat of the union was broken into by the University authority, vandalized and sealed up. Union property was removed to an unknown destination, later discovered to be the storeyard of the University. The Secretariat of the union remained sealed at the time of filing the complaint.

**646.** On 15 May 2001, five union officials involved in the strike action were unilaterally dismissed without due process. On 22 May 2001, 44 union members who remained on strike were also unilaterally dismissed. None of the dismissed staff were given a fair hearing as prescribed by national legislation, and a Court injunction forbidding the dismissal of academic staff was flagrantly violated. Two bailiffs who served related processes on the University were beaten up by University security. On 14 February 2002, six of the academic staff purportedly dismissed were brutally evicted from their living quarters.

**647.** On 30 June 2001, the ASUU and the Government signed an agreement that included a clause forbidding the victimization of persons who had participated in the strike action leading to the agreement. However, the Government has to date refused to compel the University to redress the violations. On 6 September 2001 and 27 May 2002, following extensive investigation, an Implementation Committee set up by the Federal Government and comprising several prominent Nigerians directed the reinstatement of the dismissed staff, but the relevant authorities have refused to comply. On 4 December 2001, a Reconciliation Committee set up by the National Universities Commission made similar recommendations but the relevant authorities also refused to comply. Several Nigerian stakeholders, including the National Assembly and sundry organizations, have also appealed for the reinstatement of the staff and restoration of normal industrial relations, to no avail. All appeals to the Federal Government to date have failed and the Government has also conveyed its refusal to the ILO in writing.

**648.** The ASUU's allegations are supported by extensive documentary evidence. It requests the Committee to declare the above actions a violation of the trade union rights of the organization and of the individuals concerned, and to direct the authorities to redress these violations, in particular to reinstate the dismissed academic staff.

## B. The Government's reply

**649.** In its communication of 20 August 2003, the Government states that, according to the agency responsible for higher education, the sequence of events in the two years preceding the dismissals does not lead to the conclusion that these persons were discharged because of their participation in the ASUU nationwide strike in 2001. What happened was that a group amongst the lecturers constituted themselves into a parallel administration and threatened to run the University down; the dismissed lecturers subverted the rules and regulations of the University; an attempt to restore discipline and uphold integrity of the University drew the ire of that group; there are several litigations pending about this matter.

**650.** The University did not officially take part in the ASUU national strike from 2 April to 3 July 2001, because it was on break when the strike began. Five lecturers were dismissed on 15 May 2001 because they had physically engaged in combat with students while attempting to disrupt the second semester examinations; they were released in accordance with the University statute (section 15(3)(c)), Chapter 455 of 1990, and with the authorization of the University Governing Council.

**651.** The 44 other lecturers were dismissed because they had stayed away from teaching and research duties for up to six months; in addition they refused to submit examination scripts which had long been concluded, as far back as November 2000, whereas the strike started on 2 April 2001. As their actions were considered to be a dereliction of duty and abdication of responsibilities, amounting to breach of employment, these 44 lecturers among others were warned in writing on 16 May 2001 to return to work, failing which they would be deemed to have voluntarily terminated their appointment. The University authorities deny all the allegations of harassment and victimization of the dismissed lecturers, who in fact

perpetrated a regime of anarchy in the University before their exit, as they had declared war on the administration. The University has considered throughout the events that this was a disciplinary matter.

**652.** Some of the affected lecturers were retired or relieved of their duties because of disciplinary action bordering on misconduct; others voluntarily terminated their appointments; others were contract employees who had served maximum service term after retirement; and others yet were on temporary appointments but failed to meet conditions for the regularization of their appointment.

**653.** In that same communication of 20 August 2003, the Government mentions that the ASUU embarked on a strike on 29 December 2002 and did not call it off until 18 June 2003. Between 13 and 27 January 2003, seven meetings were held with the ASUU to resolve the points in dispute; another meeting was held on 10 March 2003. A Technical Committee, set up at another meeting on 23 March, met regularly for six weeks and recommended that the National Universities Commission should offer the dismissed lecturers places in other universities with the continuation of their services being assured. The Government immediately accepted this proposal but the ASUU rejected it. As all measures taken by the Government to solve the impasse proved unsuccessful, a trade dispute was declared on 9 May 2003, and was referred to the Industrial Arbitration Panel for adjudication.

**654.** In its communication of 11 March 2004, the Government transmits the decision of the Panel, which concluded that, "… The University of Ilorin, given the circumstances of the strike action, is under no legal obligation to take back the striking lecturers whom it has successfully replaced with new recruits. The Tribunal welcomes the Government's readiness to redeploy the concerned persons to other universities". The parties to the dispute, including the ASUU, still have the right to raise objections to the award, in which case the matter would be referred to the National Industrial Court.

## C. The Committee's conclusions

**655.** *The Committee notes that this complaint concerns allegations of dismissals of trade union leaders and members in the context of national strike actions by the Academic Staff Union of Universities (ASUU) at the University of Ilorin in 2001, 2002 and 2003. The ASUU alleges that the 49 dismissals of academic staff are motivated by anti-union discrimination whereas the University authorities maintain that this was strictly a disciplinary matter.*

**656.** *While noting this diverging appreciation of the events, the Committee observes from the report dated 27 May 2002 (Appendix 9 of the complaint) of the Implementation Committee that:*

– *the Implementation Committee had an opportunity to examine the evidence and documents of both sides on 6 September 2001 and concluded that the 44 lecturers were sacked expressly on account of the national strike and that the other five, who are union leaders, were sacked during the national strike (page 2 of report);*

– *the problem persisted as the interventions of the Implementation Committee and the Reconciliation Committee were unsuccessful (page 3);*

– *the letters of termination of the 44 lecturers unequivocally indicated that they were dismissed because they remained on the national strike (page 4);*

– *while the University of Ilorin alleged other acts of indiscipline against the dismissed staff, no evidence of these acts, or of the staff having been taken through due disciplinary process, was presented to the Committee (page 4);*

– *the crisis at the University remains a sore point, a potential source of destabilization in the University system (page 4);*

– *the Implementation Committee requested the University to reverse its action regarding the 44 lecturers, while discussions would be held in respect of the other categories of staff (pages 2 and 5).*

**657.** *The Committee emphasizes that the Implementation Committee was a tripartite body set up at national level to implement the Agreement of 30 June 2001, whereby the parties clearly agreed that "… nobody shall be victimized in any way whatsoever for his/her role in the industrial action leading to this agreement" (Appendix 7 of the complaint). The Committee had the opportunity to consider facts, evidence and documents around the time of the events (almost three years ago now) and made recommendations with a view to maintaining harmonious labour relations in the University system. Also, the letter from the National Universities Commission to the University of Ilorin (Appendix 9 of the complaint) requests the latter to reverse the dismissal decision "… in order to ensure peace and harmony in the campuses in the country and in the spirit of the negotiations". Given the circumstances, the Committee considers that it would be inappropriate to attempt to anticipate the decision of the Implementation Committee, which it considers to be in accordance with sound bargaining and industrial relations practice.*

**658.** *The Committee recalls that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 475] that the dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98 [see* ***Digest****, op. cit., para. 591] and that when trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against [see* ***Digest****, op. cit., para. 592]. Noting that the issue may be referred to the National Industrial Court, the Committee urges the Government to draw immediately the attention of all social partners involved and of the competent labour institutions to the above considerations. The Committee firmly expects that the issue will be resolved by the labour institutions, including the National Industrial Court, into conformity with these principles of freedom of association. In view of the length of time elapsed since the events, the Committee requests the Government to keep it informed rapidly of developments in this respect.*

**659.** *The Committee notes that the Government has not replied to the allegations related to the closure of ASUU's office and the seizure of union property. Recalling that the occupation or sealing of trade union premises should be subject to independent judicial review before being undertaken by the authorities in view of the significant risk that such measures may paralyse trade union activities [see* ***Digest****, op. cit., para. 183]. The Committee requests the Government to ensure that ASUU may recover its property and use its premises, and requests it to keep it informed of developments in this respect.*

## The Committee's recommendations

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

***(a) The Committee expects the Government to ensure that the complaint concerning the 49 academic lecturers, including five trade union officials, dismissed for having exercised the right to strike is resolved by the***

***competent labour institutions, including the National Industrial Court, is in conformity with freedom of association principles, and to keep it informed rapidly of developments in this respect.***

***(b) The Committee requests the Government to ensure that the Academic Staff Union of Universities (ASUU) may recover its property and use its premises, and requests it to keep it informed of developments in this respect.***

CASE NO. 2211

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

## Complaints against the Government of Peru presented by — the Peruvian General Confederation of Workers (CGTP) — the Peruvian Unitary Confederation of Workers (CUT) and — the International Confederation of Free Trade Unions (ICFTU)

***Allegations: Mass dismissals of workers from Telefónica del Perú as part of a restructuring process, alleged by the Peruvian General Confederation of Workers (CGTP) and the Peruvian Unitary Confederation of Workers (CUT); violent repression including the arrest of many trade unionists and the dismissal of 41 workers as a result of a strike which took place from 2 July to 11 September 2002, alleged by the International Confederation of Free Trade Unions (ICFTU)***

**661.** The complaint is contained in a communication dated 2 July 2002 presented by the Peruvian General Confederation of Workers (CGTP) and the Peruvian Unitary Confederation of Workers (CUT).

**662.** In its communication dated 16 August 2002, the International Confederation of Free Trade Unions (ICFTU) joined the present complaint and submitted new allegations. In its communications dated 12 September and 29 October 2002, the ICFTU presented additional information.

**663.** The Government sent its observations in communications dated 30 December 2002 and 15 December 2003.

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

### A. The complainants' allegations

**665.** In its communication dated 2 July 2002, the Peruvian General Confederation of Workers (CGTP) and the Peruvian Unitary Confederation of Workers (CUT) observe that

Telefónica del Perú, a subsidiary of Telefónica de España, gained ownership of the fixed line and satellite telephone network for the whole of Peru during the process of privatization. Consequently, the company became a highly profitable monopoly.

**666.** The complainants allege that at the same time that the company acquired majority share control of Peruvian national telephony services, it embarked upon a human resources restructuring programme which, in practice, was nothing but a mass dismissal. The complainants observe that from the time of privatization until 2001, the company dismissed or terminated the contracts of 9,000 workers. In addition, at the end of June 2002, the company unduly dismissed 480 trade unionist workers throughout the country. According to the complainant organizations, the aim of these dismissals was to punish trade unionists (90 per cent of the total number of workers dismissed were union members), to weaken trade union organizations and to outsource services. The complainants point out that the latter was possible due to recent legislation in the "services" law permitting outsourcing, which was hitherto prohibited.

**667.** The complainant organizations stress that many trade union delegates were against Telefónica's policy of staff cuts from the outset. According to the complainant organizations, this policy violates collective agreements and a joint agreement between the company and the unions, stipulating that any cuts in the workforce should be made by means of voluntary programmes. The company did not respect this condition. In addition, the complainants observe that the company is in violation of international agreements signed between the Spanish multinational and Union Network International (UNI).

**668.** The complainants add that they have lodged an appeal for the protection of constitutional rights to the judicial authority in order for the mass dismissal to be reversed and workers returned to their posts. However, at the same time, they express their lack of trust in the Peruvian justice system.

**669.** In its communications dated 16 August, 12 September and 29 October 2002, the International Confederation of Free Trade Unions (ICFTU) observes that during a strike lasting from July to September 2002, police acted with undue force in the following manner:

- On 7 August, there was an attack on the headquarters of the Single Trade Union of Workers of Telefónica of Peru. Three workers were injured: Mr. Roberto Amaya Loo Kung, Mr. Herculeano Caballero and the secretary of the organization, Mr. Roberto Cuadros Timorán. Material damage was caused, and another office of the Trade Union of Telefónica del Perú was also attacked.

- On 9 August, Mr Gílmer Vásquez, Mr. Joel Mendo and Mr. Jorge Herrero were arrested when not present at strike-related meetings. They were released the following day.

- On 3 September, whilst taking part in a peaceful demonstration, workers belonging to Telefónica del Perú unions were violently repressed by national police as they called for 574 dismissed workers to be returned to their posts. Mr. Rubén González, Mr. Roberto Arroyo, Mr. Carlos Mendoza and Mr. Gaudencio Escobar were arrested and Mr. Johnny Chavez was injured.

- On 5 September, at another peaceful demonstration, 18 trade unionists were forcefully repressed and arrested. On the basis of false accusations of attacks on private property, criminal files were opened on them. The detainees were released the following day.

- Forty-one unionized workers were dismissed for participating and supporting the telephone workers' strike that took place from 2 July to 11 September 2002. This was despite the fact that the strike was terminated following a ruling by the Constitutional Court of the Republic of Peru stipulating that the 574 dismissed workers should be reinstated.

## B. The Government's reply

**670.** In its communications dated 30 December 2002 and 15 December 2003, the Government refers to information supplied by Telefónica del Perú.

**671.** The company observes that in all actions taken, it has complied with the law and Constitution in an attempt to minimize negative effects upon workers. It adds that there is no absolute job security in Peru, although there is a legal safety net in the form of compensation for unjustified dismissal. This is equivalent to one and a half months' salary for each year of service, up to a limit of 12 months. The company observes that it exceeded this requirement.

**672.** The company also maintains that in accordance with agreements dated 7 December 2000 and 16 April 2001, both parties agreed that reductions in workforce numbers would be voluntary in nature, and that workers who volunteered would be offered the possibility of immediate redeployment via subcontractors. The company observes that it did not, at any time, agree to set up joint mechanisms for all cases of termination of employment and denies the alleged anti-unionist nature of the dismissals. It also observes that although the Constitutional Court has declared article 34 of Supreme Decree No. 003-97 TR to be incompatible with the Constitution, this does not mean that the company has acted unlawfully.

**673.** Lastly, with regard to the allegations arising from the dismissal of 41 workers who participated or supported the strike of July to September 2002, the company observes that only 13 of the 41 workers were directly employed by the company. Of those 13, 11 were dismissed for unauthorized use of company vehicles and two for other misdemeanours (a falsified medical certificate in one case and acts of violence in the other). The remaining 28 employees dismissed worked for the subcontractor Telefónica de Gestión de Servicios Compartidos S.A.C. TGSC. Of these, 26 were dismissed for abandoning their duties and two were dismissed before the start of the strike. The company adds that on 17 March 2003, Telefónica del Perú and TGSC signed an extraordinary agreement with trade unionist organizations, by means of which 31 of the 41 workers were reinstated. Of these, ten were employed by Telefónica and 21 by TGSC.

**674.** The Government points out that the workers dismissed have the right to seek legal remedy in order to ascertain the legality of the dismissals.

## C. The Committee's conclusions

**675.** *The Committee observes that this case regards mass dismissal of workers at Telefónica del Perú, in the framework of privatization and restructuring, and violent repression including the arrest of many unionists and the dismissal of 41 workers in connection with a strike that took place from 2 July to 11 September 2002.*

**676.** *The Committee points out that the Government refers to Telefónica del Perú's general declarations on the dismissals, particularly those relating to the dismissal of 41 workers for taking part in the strike that took place from July to September 2002. According to these declaration: (1) the mass dismissals took place within a legal framework and in the*

*context of a process of privatization and restructuring; (2) the company and trade union organizations signed a collective agreement on 7 December 2000 and an agreement on 16 April 2001, where both parties agreed that workforce cuts would be voluntary in nature and that workers who volunteered would be offered the possibility of immediate deployment by means of subcontractors; (3) at no time did the company undertake to extend the joint mechanism to cover other types of dismissal; (4) with regard to the dismissal of 41 workers for participating or supporting the strike that took place from July to September 2002, only 13 workers belonged to the company, the remaining being employed by a subcontractor; (5) the dismissals resulted from non-strike related causes (unauthorized use of company vehicles, use of falsified certificates and acts of violence); and (6) on 17 March 2003, Telefónica del Perú and TGSC signed an extraordinary agreement with union organizations by which 31 of the 41 workers were returned to their posts. Of these, ten were employed by Telefónica and 21 by TGSC.*

**677.** *The Committee notes the Constitutional Court of the Republic of Peru's ruling ordering the reinstatement of the 574 telephone sector workers whose dismissal sparked the strike of July-September 2002.*

**678.** *The Committee observes, however, that 26 of the 28 dismissed workers employed by the subcontractor Telefónica de Gestión de Servicios Compartidos S.A. TGSC were dismissed because they had abandoned their duties to participate in the strike that took place from July to September 2002. The Committee notes with interest that according to information received, the company has reinstated 21 of the 26 workers dismissed. The Committee understands that these workers are part of the 574 whose reinstatement was, according to ICFTU, demanded by a court ruling. The Committee recalls that the dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98 [see* ***Digest of decisions and principles of the Committee of Freedom of Association****, 4th edition, 1996, para. 591] and consequently calls upon the Government to intercede with the parties concerned with a view to reinstating the five remaining workers. The Committee requests the Government to confirm the reinstatement of the 574 workers in question, including the five workers of the subcontractor Telefónica de Gestión de Servicios Compartidos S.A. TGSC, according to the court ruling. The Committee requests the Government to keep it informed in this respect.*

**679.** *The Committee regrets to note that the Government has not submitted its comments on the allegations presented by ICFTU regarding police repression in the framework of the strike that took place from July to September 2002 and in which many unionists were arrested and many others injured and material damage was caused to trade union headquarters. The Committee expresses its deep concern regarding the gravity of these allegations. It requests the Government to carry out an independent investigation without delay into the allegations and, if proven to be guilty, to punish the guilty parties and ensure that such interference does not occur in the future. The Committee requests the Government to keep it informed in this respect.*

## The Committee's recommendations

**680.** ***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 confirm the reinstatement of the 574 workers of the telecommunications sector who were dismissed, including the five workers of the subcontractor, Telefónica de Gestión de***

***Servicios Compartidos S.A. TGSC, according to the court ruling. The Committee requests the Government to keep it informed in this respect.***

***(b) Regarding the allegations presented by the ICFTU concerning police repression in the framework of the strike that took place from July to September 2002 and in which many unionists were arrested and many others injured and two union headquarters damaged, the Committee expresses its concern at the gravity of the allegations. It requests the Government to carry out an independent investigation without delay into the allegations and if proven to be guilty, to punish the guilty parties and ensure that such interference does not occur in the future. The Committee requests the Government to keep it informed in this respect.***

CASE NO. 2279

INTERIM REPORT

## Complaint against the Government of Peru presented by the General Confederation of Workers of Peru (CGTP)

***Allegations: The complainant organization alleges the mass dismissal of workers at the Congress of the Republic and the savage repression of workers, detentions of trade union members and raids on trade union headquarters during the state of emergency declared by the Government on 28 May 2003***

**681.** The complaint is presented by the General Confederation of Workers of Peru (CGTP) in communications dated 2 and 6 June 2003.

**682.** The Government sent its observations in communications dated 4 August and 2 December 2003 and 12 January 2004.

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

## A. The complainant's allegations

**684.** In its communication of 2 June 2003, the General Confederation of Workers of Peru (CGTP) alleges that, on 28 May 2003, the Government issued Supreme Decree No. 055-2003-PCM, in which it declared a state of emergency throughout the country for a period of 30 days, during which time the constitutional rights laid down in paragraphs 9 (the right to the inviolability of premises), 11 (the right to choose one's place of residence, travel in the national territory, enter and leave the country), 12 (the right to peaceful unarmed assembly) and 24(f) (the right to personal freedom and security) of article 2 of the Political Constitution of Peru. The Government justified this step because the tranquillity and peace, as well as the fundamental rights of citizens, were being disrupted by acts of violence.

**685.** According to the complainant organization, as a result of the state of emergency being declared, the constitutional guarantee protecting the right of assembly of workers and trade union officials was suspended and there has been savage repression, with the use of force, firearms and tear gas, of demonstrations called by the United Trade Union of Educational Workers of Peru (SUTEP), the Peruvian Union of Higher Education Teachers (SIDESP), the Unified Trade Union of Education Centre Workers (SUTACE), the National Federation of Education Administrative Workers (FENTASE), the Federation of Workers of the Judiciary, the Single Central of Workers of ESSALUD, the National Board of Irrigation Users – all of whom are members of the CGTP. These demonstrations took place in accordance with the constitutional right of strike action and for valid claims for an improvement in the economic and labour conditions in each sector.

**686.** The trade union organization also alleges that, by virtue of the state of emergency, trade union officials and workers have been prevented from entering trade union headquarters, with investigations and searches of headquarters being carried out without the authorization of trade union officials and without legal warrants. According to the complainant organization, the guarantee of the right to travel in the national territory has been suspended, savagely repressing the marches towards the city of Lima.

**687.** The complainant organization alleges that more than 150 trade union officials and workers of SUTEP, SIDESP, SUTACE, FENTASE, the National Board of Irrigation Users and the Federation of Students of Peru (FEP) have been arrested, and one of the students was fatally wounded by a military unit of the armed forces.

**688.** In its communication of 6 June 2003, the complainant organization alleges the mass dismissal of 1,117 workers at the Congress of the Republic since 5 April 1992. It states that 257 former workers lodged various complaints, with negative results. As a last resort, the complaint organization appealed to the Inter-American Commission on Human Rights of the Organization of American States, which made itself available to the parties in order to find an amicable resolution.

**689.** The complainant organization alleges that the mass dismissal of workers of the Congress of the Republic led to the dissolution of the representative trade union, with the resulting end to collective bargaining and the guarantees of trade union immunity.

## B. The Government's reply

**690.** With regard to the allegations relating to the issuing of Supreme Decree No. 055-2003-PCM, which provided for the suspension of constitutional rights and declared the state of emergency, the Government indicates that the need to oversee the normal progression of the State and to ensure the security of society gave rise to the recognition in the constitutional sphere of the authority of the Head of State to declare a state of emergency or siege throughout the national territory or in a part of it. According to the Government, these are exceptional situations defined by the temporary suspension of the exercise of certain constitutional rights. The President's authority for this is laid down in article 137 of the Constitution of Peru, which provides that the decision must contain the length of time that the measure will be in place and the rights that will be affected. The Government emphasizes that, as a proportional measure during a state of emergency or siege, the guarantees of habeas corpus and protection of constitutional rights *(amparo)* may not be suspended.

**691.** With regard to the allegations relating to the mass dismissal of 1,117 workers at the Congress of the Republic, the Government states that in Decrees Nos. 25438, 25640 and 25759, the Congress of the Republic proceeded with a plan of internal reorganization that culminated in the dismissal of the workers mentioned, 257 of whom lodged an action for

protection of constitutional rights denying its plans. The workers concerned lodged a complaint for violation of their rights before the Inter-American Commission on Human Rights of the Organization of American States, which declared itself legally competent to hear the case in June 2000. In July 2000, the Commission invited the parties to come to an amicable resolution of the issue. This proceeding has still not been concluded.

**692.** The Government states that, in order to resolve the conflict, the Multisectoral Commission was established and mandated to draw up a final proposal relating to the case of the 257 workers. This Commission delivered the proposed final settlement to the workers, which involved reinstatement plus financial compensation with prior evaluation by a specialized company and new contracts without recognition of length of service or accrued earnings. This proposal was rejected by the workers' representatives who issued a counter-proposal that the Commission considered inadmissible. In these circumstances, the amicable resolution stage was considered over and the Commission on Human Rights was to send a final report.

**693.** The Government indicates that Decrees Nos. 27452 and 27487 were issued to review the procedures carried out in order to proceed with the dismissals of the workers, which according to the workers had been unconstitutional. The Government indicates that many of the complaints lodged received unfavourable decisions or were barred. Furthermore, Decree No. 27803, issued subsequently, has provided for the establishment of an Executive Commission, made of up of representatives of the three most representative trade union confederations in order to find an alternative solution to the arbitrary or abusive collective dismissals carried out between 1990 and 2000.

## C. The Committee's conclusions

**694.** *The Committee notes that the present case refers to: (1) the mass dismissal of 1,117 workers at the Congress of the Republic because of reorganization and the complaint laid by 257 of those workers before the Inter-American Commission on Human Rights of the Organization of American States; and (2) the declaration of the state of emergency of 28 May 2003, which involved the suspension of the right to assembly, the severe repression of marches and demonstrations, the realization of investigations and searches of trade union headquarters without the authorization of trade union officials and without legal warrants and the arrest of more than 150 trade union officials and workers of the United Trade Union of Educational Workers of Peru (SUTEP), the Peruvian Union of Higher Education Teachers (SIDESP), the Unified Trade Union of Education Centre Workers (SUTACE), the National Federation of Education Administrative Workers (FENTASE), the National Board of Irrigation Users and the Federation of Students of Peru (FEP), one of the students being fatally wounded by a military unit of the armed forces.*

**695.** *With regard to the mass dismissal of the 1,117 workers at the Congress of the Republic, 257 of whom lodged a complaint before the Inter-American Commission on Human Rights, the Committee notes the Government's information that the dismissals were ordered in 1992 through Decrees Nos. 25438, 25640 and 25759. The 257 workers lodged various internal complaints that were rejected at the highest levels. Finally, the workers decided to lodge a complaint with the Inter-American Court of Human Rights, which made itself available to the parties in order to find an amicable resolution. The Committee notes that, in the framework of this amicable resolution, a Multisectoral Commission was established that did not have positive results and that, as a result, the Inter-American Commission was to issue a final report, which is still pending. The Committee also notes that, in accordance with Decree No. 27803, the establishment at the national level of an Executive Commission made up of representatives of the three most representative trade union confederations was proposed in order to find an alternative solution to the arbitrary or abusive collective dismissals that took place between 1990 and 2000. The Committee requests the*

*Government to keep it informed of the outcome of the report of the Inter-American Commission on Human Rights and of the decisions taken by the Executive Commission established in accordance with Decree No. 27803.*

**696.** *With regard to the declaration of a state of emergency on 28 May 2003, which involved, according to the allegations, the suspension of the right to assembly, the severe repression of marches and demonstrations, the realization of investigations and searches of trade union headquarters without the authorization of trade union officials and without legal warrants and the arrest of more than 150 trade union officials and workers of SUTEP, SIDESP, SUTACE, FENTASE, the National Board of Irrigation Users and the FEP, one of the students being fatally wounded by a military unit of the armed forces, the Committee notes the Government's statement that the authority to declare a state of emergency, suspending the exercise of some constitutional guarantees, is laid down in article 137 of the Constitution of Peru, which establishes that the decision must contain the duration of the measure (in this specific case the Decree laid down a period of 30 days) and the rights that will be affected.*

**697.** *While the Committee has considered that the enactment of emergency regulations which empower the Government to place restrictions on not only public assembly for trade union purposes but all public assembly, and which was occasioned by events that the Government considered to be sufficiently serious as to call for a declaration of a state of emergency, does not in itself constitute a violation of trade union rights [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 190], the Committee notes that from the allegations and the information in the press cuttings provided by the complainant organization it can be deduced that the latter was committed to generalized strike action that extended across the country, over a long period of time, and during which a number of roads were cut off.*

**698.** *The Committee notes that, according to the allegations, the demonstrations organized by various trade unions belonging to the General Confederation of Workers of Peru (CGTP) led to severe repression by the armed forces, the arrest of 150 trade union officials and searches of the various trade union headquarters. The Committee notes that the Government does not deny these allegations. In these circumstances, the Committee requests the Government: (1) to take measures to ensure that an independent investigation is carried out into the repression exerted by the security forces during the demonstrations, and to send its observations in this respect; and (2) to inform it whether the trade union officials arrested have been released and, if they are still in custody, to ensure that they benefit from due procedural guarantees, and to inform it of the state of the proceedings under way.*

## The Committee's recommendations

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

***(a) With regard to the mass dismissal of 1,117 workers at the Congress of the Republic, 257 of whom lodged a complaint before the Inter-American Commission on Human Rights, the Committee requests the Government to keep it informed of the outcome of the report of the Inter-American Commission on Human Rights and of the decisions taken by the Executive Commission established in accordance with Decree No. 27803.***

***(b) With regard to the declaration of a state of emergency on 28 May 2003, which involved, according to the allegations, the suspension of the right to***

***assembly, the severe repression of the demonstrations, the realization of investigations and searches of trade union headquarters without the authorization of trade union officials and without legal warrants and the arrest of more than 150 trade union officials and workers of the United Trade Union of Educational Workers of Peru (SUTEP), the Peruvian Union of Higher Education Teachers (SIDESP), the Unified Trade Union of Education Centre Workers (SUTACE), the National Federation of Education Administrative Workers (FENTASE) and the National Board of Irrigation Users, the Committee requests the Government: (1) to take measures to ensure that an independent investigation is carried out into the repression exerted by the security forces during the demonstrations, and to send its observations in this respect; and (2) to inform it whether the trade union officials arrested have been released and, if they are still in custody, to ensure that they benefit from due procedural guarantees, and to inform it of the state of the proceedings under way.***

CASE NO. 2310

DEFINITIVE REPORT

## Complaint against the Government of Poland presented by NSZZ "Solidarnosc"

***Allegations: The complainant alleges that the Government contravenes Convention No. 98 by refusing to bargain in good faith and make every effort to reach an agreement, in a context of restructuring and privatization of the coalmining sector***

**700.** The complaint of NSZZ Solidarnosc is contained in a communication dated 5 November 2003.

**701.** The Government sent its observations in a communication dated 17 February 2004.

**702.** Poland 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

**703.** In its communication of 5 November 2003, NSZZ Solidarnosc alleges that the Government has not fulfilled its obligations related to promotion of collective bargaining and voluntary negotiations, as it has not negotiated in good faith. NSZZ is the biggest trade union in the coalmining sector, where it represents about 44,000 out of 134,000 workers.

**704.** The complainant NSZZ Solidarnosc indicates that in 1992, the Government had reached an agreement with it on the rules to be followed for the settlement of disputes with the public administration. Under that agreement, in case of a dispute, the parties were to start

immediately the dispute settlement process and, in particular, should schedule the first explanatory meeting within 14 days from the date of a party's demand.

**705.** By the end of 2002, the Government announced its restructuring programme for the hard coalmining sector in years 2003-06, which involved resorting to anti-crisis legislation and the privatization of some of the coalmines, including the closing of at least five mines. In November 2002, the complainant filed a notice of dispute, as provided in the 1992 Agreement, and presented its demands to the Council of Ministers. In spite of this, the Government has neither adopted an official position nor conducted any talks about the dispute. No answers were given to several communications sent in 2003 to the Prime Minister (15 and 30 January 2003; 29 August 2003) and to the Under-Secretary of State, Ministry of Economy, Labour and Social Policy (10 April 2003) to open discussions.

**706.** Simultaneously, from December 2002, the Government conducted negotiations with other trade unions in order to give the impression that it was conducting social consultations and was trying to reach agreement with trade unions. However, no agreement has been concluded concerning the social cost of restructuring the hard coalmining industry. The complainant is therefore unable to protect the interests of workers since the Government has ignored the notice of dispute filed by NSZZ and its proposals to enter into discussions, while holding talks with other trade unions. This constitutes a breach of the 1992 Agreement and creates an impression of discriminatory treatment, as compared with other trade unions.

**707.** Article 4 of Convention No. 98, ratified by Poland, provides for promotion of collective bargaining in both the private sector and nationalized undertakings. The restructuring and privatization of a formerly state-owned sector relate primarily to conditions of employment, which fall under the scope of collective bargaining that should be conducted in an atmosphere of mutual good faith and trust. Employers, including governmental authorities, should recognize for collective bargaining purposes the organizations representative of workers employed by them.

## B. The Government's reply

**708.** In its communication of 17 February 2004, the Government indicates that Article 4 of Convention No. 98 provides that collective bargaining is to lead to the conclusion of collective agreements between employers or employers' organizations, on the one hand, and workers' organizations, on the other hand. Under Act No. 55 of 13 May 1991 on the settlement of collective labour disputes, a collective labour dispute is defined as a dispute between employees (whose rights and interests are represented by a trade union) and an employer or employers; such dispute may concern the conditions of work, pay and social benefits, and trade union rights and freedoms.

**709.** Therefore, the question of the restructuring of the coalmining industry, and the Government's 2003-06 programme which includes privatization plans for selected mines, does not fall within the scope of collective disputes, either in the meaning of Convention No. 98 or national legislation. The subject matters of the dispute, as expressed in NSZZ letter of 19 November 2002 to the Prime Minister were: lack of economic solutions for the functioning of the hard coalmining sector; lack of solutions to prevent the bankruptcy of hard coalmines; and guarantees for the continued application of collective agreements.

**710.** Secondly, the governmental administration is not the employer in this case, nor can it be deemed a *sui generis* organization of employers, even where the legislative or executive activities of such agencies are directly linked with the activity of a given sector. It is thus impossible under Polish law to enter into a collective dispute with the Government.

**711.** The 1992 Agreement invoked by the complainants cannot constitute a basis for a dispute with the Government since article 2.1 of the agreement provides that "subjects of dispute are limited to questions falling within the competencies of trade unions, unless the rules and procedures in such cases have been defined by provisions in the law". Since 2001, the goals which were to be served by the agreement have been addressed by the Act of 6 July 2001 on the Tripartite Commission for Social and Economic Affairs and on Voivodship Commissions for Social Dialogue, jointly with the Rules of Order of the Commission. Under article 1.1 of this Act, the Commission constitutes the appropriate forum for social dialogue between workers and employers; its objective is to shape and maintain social dialogue and its terms of reference include the holding of social dialogue on questions of pay and benefits, and on other social or economic issues. Article 2.1 of the Act provides that each party may bring up before the Commission a matter of major social or economic importance when it considers that the solution of that issue is vital to the preservation of social peace. In such cases, the procedure is governed by article 20 of the rules: upon receiving notification, the Chairman must immediately convene a meeting of the Commission, which may review the case during that same meeting or refer it to a special team. That team must proceed to work immediately; it must be guided by the objective of assessing the economic and financial feasibility of implementation of requested actions, evaluating their social and economic consequences, and formulating a position. The Commission then adopts a resolution; if it cannot come to an agreement, it must present the positions of the parties.

**712.** As a representative workers' organization, NSZZ is a member of the Commission, which is the appropriate forum for disputes arising out of the problems of the hard coalmining sector, including restructuring, but it did not bring the issue before the Commission in 2002.

**713.** Social dialogue regarding the hard coalmining sector is conducted within the Tripartite Team for Social Welfare of Miners, set up in 1992 and independent from the Tripartite Commission. That team follows certain rules of procedure, under which it includes 12 national trade unions of the mining sector, including NSZZ Solidarnosc Hard Coalmining National Section and the National Secretariat of Mines and Energy Workers' Union ("Solidarnosc 80"). In 2002-03, the team held a total of 19 meetings devoted to the problems of the sector, namely: restructuring of hard coalmining, including the privatization of some mines; legal and organizational changes of the sector; financial situation and debt relief of mining companies; collective agreements; employees' claims; restructuring employment and establishing safety nets; benefits for employees and former employees of liquidated undertakings; cost of coal production, transport, import and export.

**714.** The Team discussed the 2003-06 programme adopted in November 2002 by the Council of Ministers, criticized it and requested that it be amended; as a result, an agreement was signed on 11 December 2002, concerning mine closures and the rehiring of employees of the closed mines, as well as the continued application of existing collective agreements. Solidarnosc 80 and the Kontra trade unions of Gliwice and Katowice refused to sign the agreement. On 28 January 2003, the Council of Ministers accepted the amendments to the restructuring programme reflecting the December agreement.

**715.** Taking into consideration the fact that not all parties had signed the agreement, the rules of conduct for social dialogue were changed with a view to maintaining social peace. As a result, outside the framework of the tripartite team meetings, separate meetings were held with the signatories of the agreement on the methods of implementation of the programme, and with the NSZZ Solidarnosc Hard Coalmining National Section (on 7 and 12 November 2003). In accordance with the proposals of NSZZ, the discussions covered: the possibility of reducing external burdens, including tax, VAT and transport costs; external factors and

their impact on the implementation of the programme; the continued application of collective agreements; the problem of miners' pensions; the rationale for privatization of mining enterprises; and the situation of the mining sector following Poland's accession to the EU.

**716.** According to the Government, the complainant's allegations of discrimination are unfounded because NSZZ Solidarnosc took part in the discussions concerning the implementation of the 2003-06 programme, although it refused to sign it. In spite of this, the Government continued the dialogue with the complainant on the question of restructuring, as shown by the list of meetings above. The Tripartite Commission took up the question of coalmines restructuring at a meeting on 17 June 2003, which was attended by, among others, the Chairman of NSZZ Solidarnosc National Commission and Chairman of Solidarnosc Hard Coalmining National Section.

**717.** On 28 November 2003, the Parliament adopted the Hard Coalmining Restructuring Act, which provides safety nets for employees and make it possible to restructure employment in the sector. Representatives of trade unions active in the mining sector took part in the legislative process, including at the drafting stage, in accordance with article 19 of Act No. 79 of 23 May on Trade Unions, as well as during the examination by Parliament. Many proposals of these representatives have been incorporated in the text of the Act. The Government considers that the complainant's allegations are unfounded. The question of restructuring of the hard coalmining sector has been and continues to be the subject of discussions and dialogue with social partners in the Tripartite Team for Social Welfare of Miners, in the Tripartite Commission for Social and Economic Affairs, and outside of these bodies. According to the Government, initiating now separate dialogue on this subject with the complainant would mean discrimination against the other parties of the Tripartite Team for Social Welfare of Miners and of the Tripartite Commission, and would violate the principles of social dialogue. The question of a multi-stream restructuring programme could not have become a subject matter of collective dispute with the Government due to the irreceivability of such a negotiation subject and also because the Government, not being an employer, could not hold such negotiations. Given the provisions of the Act on the Tripartite Commission for Social and Economic Affairs, it was not possible for NSZZ Solidarnosc to institute in November 2002 (at a time where the Tripartite Commission was already established and operating) a dispute with the Government under the terms of the 1992 Agreement. NSZZ Solidarnosc took part in the talks within the Tripartite Team for Social Welfare of Miners and was also involved in discussions in other forums.

## C. The Committee's conclusions

**718.** *The Committee notes that the complainant in this case alleges that the Government has not conducted negotiations in good faith, ignored the notice of dispute it served in accordance with a 1992 Agreement on the settlement of disputes, and ignored its requests to open discussions on the social consequences of the restructuring of the coalmining sector, thereby contravening Article 4 of Convention No. 98, ratified by Poland. The Government submits for its part that, since 2001, the 1992 Agreement has been superseded by the Act on the Tripartite Commission for Social and Economic Affairs and on the Voivodship Commissions for Social Dialogue, and that appropriate consultations and negotiations were held with social partners in that forum and within the Tripartite Team for Social Welfare of Miners, where the complainant organization participated.*

**719.** *The Committee emphasizes at the outset that this complaint is filed in the context of a major restructuring of a whole industrial sector, involving privatization and the possible closure of a number of undertakings. The Committee has already underlined the importance it attaches to consultations between governments and trade unions to discuss*

*the consequences of restructuring programmes on the employment and working conditions of employees [**Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 937]. It has pointed out however that it can examine allegations concerning economic rationalization programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions [**Digest**, op. cit., para. 935].*

**720.** *Based on the evidence adduced in the present case, the Committee cannot conclude that there have been such acts of discrimination or interference against NSZZ Solidarnosc and its members. In fact, there were lengthy and in-depth consultations with trade unions, including the complainant, on all the issues affecting the workers concerned; these discussions eventually led to an agreement being signed (although not by the complainant) in December 2002 incorporating amendments requested by trade unions to the 2003-06 Restructuring Programme and, in November 2003, to the adoption of the Hard Coalmining Restructuring Act, a process in which trade union representatives took part at all stages. The Committee further notes that additional discussions on all major issues were pursued separately with those organizations that had not signed the December 2002 Agreement. In the absence of evidence of discrimination and interference against the complainant organization, the Committee is bound to conclude that this case does not call for further examination.*

## The Committee's recommendation

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

CASE NO. 2200

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

## Complaint against the Government of Turkey presented by
## — the Confederation of Public Employees Trade Unions (KESK)
## — the Independent Public Works and Construction Employees' Union (BAGIMSIZ YAPI-IMAR SEN) and
## — the Independent Transport Union (Railways, Airports, Sea and Land Transport Services Public Employees) (BAGIMSIZ ULASIM-SEN)

***Allegations: The complainants allege the incompatibility of Act No. 4688 on public employees' trade unions with Conventions Nos. 87, 98 and 151; they also allege violations in practice consisting of favouritism displayed towards certain unions as well as of acts of anti-union discrimination***

**722.** The Committee examined this case at its March 2003 meeting and presented an interim report to the Governing Body [330th Report, paras. 1077-1105, approved by the Governing Body at its 286th Session (March 2003)].

**723.** The Government sent two communications, dated 10 September 2003 and 9 March 2004, respectively, to submit its observations following the Committee's interim conclusions and recommendations.

**724.** Turkey 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

**725.** The Committee recalls that the case relates to the application of Conventions Nos. 87, 98 and 151, both in law and practice, to civil servants, following the entry into force of Act No. 4688 relating to public servants' trade unions. The factual allegations raise in essence a general issue of anti-union discrimination against the complainants, their members and officers.

**726.** More specifically, the Confederation of Public Employees Trade Unions (KESK) questioned the conformity of some of the provisions of Act No. 4688 with Conventions Nos. 87, 98 and 151 [see 330th Report, para. 1080]. Further, KESK alleged acts of anti-union discrimination committed against members and officers of its constituent unions as well as workers participating in their activities. These acts mainly consisted of transferring these public employees, against their will, from one duty station or workplace to another; they also consisted of initiating court actions against some of them. The Committee recalls that three groups of public employees allegedly suffered anti-union discrimination: (i) 107 officers and members of the Health Workers' Union (SES), affiliated to KESK, as well as workers who participated in the union's activities; (ii) 30 members and officers of EGITIM-SEN, the education union affiliated to KESK, the majority of whom were also subject to court actions by the administration; and (iii) 13 officers and members of affiliated unions who were subject to a number of penalties such as imprisonment, administrative sanctions and refusal of promotion [see 330th Report, para. 1083]. KESK also alleged that both the Office of Agricultural Products and Türk TELEKOM displayed favouritism towards some unions to the detriment of its constituent unions [see 330th Report, paras. 1081 and 1082].

**727.** The Committee recalls that, for its part, the Independent Public Works and Construction Employees' Union (BAGIMSIZ YAPI-IMAR SEN) submitted that its members were subject to pressure from officials of the Ministry of Construction and Housing and the Surveying Office to resign from the union; these officials also threatened workers who considered joining the union [see 330th Report, para. 1084]. The complainant alleged that the workers concerned were told that these acts were in pursuance of orders from the hierarchy. The Independent Transport Union (Railways, Airports, Sea and Land Transport Services Public Employees) (BAGIMSIZ ULASIM-SEN) contended that officials of the Turkish State Railways subjected officers and members of the union to acts of intimidation and pressure. It also submitted specific allegations in relation to three employees of the Mersin Port Operations – i.e. Mr. Nazmi Vural (chief of terminal services and founding member of the union), Mr. Mehmet Yildiz (head tally clerk) and Mr. Okan Nar (specialist and president of the union) – and referred to an investigation carried out by the Ministry of Transport in this respect.

**728.** The Government only replied to the legislative aspects of the complaints, although it confirmed that the Ministry of Transport had initiated an investigation into the allegations of anti-union discrimination in the Mersin Port Operations.

**729.** At its 286th Session, in light of the interim conclusions of the Committee, the Governing Body approved the following recommendations:

(a) The Committee requests the Government to take the necessary measures so as to amend Act No. 4688 to fulfil its obligations deriving from the provisions of Conventions Nos. 87, 98 and 151, including measures to ensure an effective protection of public servants against acts of anti-union discrimination.

(b) Concerning the particular allegations of favouritism relating to the establishment of an Institution Administrative Committee in Türk TELEKOM and the distribution by the Office of Agricultural Products of membership forms in favour of Türk Tarim-Orman Sen union, the Committee requests the Government to take any appropriate steps to ensure that all the unions are treated on an equal footing and that the workers concerned may freely choose the union they wish to join. The Committee requests the Government to answer to the allegations, in particular by describing any measures taken in this respect.

(c) The Committee requests the Government to promptly institute independent inquiries in the following individual cases, in order to establish whether the workers concerned have been adversely affected in their employment by reason of their legitimate trade union activities and, if so, to take suitable measures to remedy without delay any effects of anti-union discrimination:

(i) the 107 cases concerning members, officers of the Health Workers' Union (SES) and workers participating in its activities;

(ii) the 30 cases concerning members or officers of EGITIM-SEN;

(iii) the 13 cases of workers mentioned in the third list submitted by KESK in its complaint.

The Committee requests the Government to answer the allegations made in all these individual cases, in particular by indicating any developments relating to the corresponding investigations.

(d) Regarding the allegations concerning the three employees of the Mersin Port Operations – i.e. Mr. Nazmi Vura (chief of terminal services), Mr. Mehmet Yildiz (head tally clerk) and Mr. Okan Nar (specialist) – the Committee requests the Government to answer the allegations relating to these three cases, in particular by indicating the results of the investigation of the Ministry of Transport as well as any subsequent measures taken. Moreover, concerning the allegations of anti-union discrimination on the part of officials of the Ministry of Construction and Housing and of the Surveying Office and officials of the Turkish State Railways, the Committee requests the Independent Public Works and Construction Employees' Union (BAGIMSIZ YAPI-IMAR SEN) and the Independent Transport Union (Railways, Airports, Sea and Land Transport Services Public Employees) (BAGIMSIZ ULASIM-SEN) to submit any additional information they consider useful.

## B. The Government's new observations

**730.** In its communication of 10 September 2003, the Government underlines that all the necessary information has already been provided in its previous communications and states that the Committee will be kept informed of any developments. Emphasizing that the definite rules on freedom of association in the public service are set out in Act No. 4688, the Government indicates that developments in this field are closely followed both by the Prime Minister and the Ministry of Labour and Social Security with a view to ensuring the full enforcement of the law. With regard to the cases of the members of the Health Workers' Union (SES) and of the Trade Union of Public Servants of the Education Sector (EGITIM-SEN), the Government states that the office of the public prosecutor handed down decisions whereby the charges were withdrawn.

**731.** In its communication of 9 March 2004, the Government makes further observations and, in support thereof, attaches a number of documents. With respect to the legislative issues of the case, the Government provides a copy of Circular No. 25136, dated 12 June 2003 on

the application of Act No. 4688, as well as a copy of the draft bill on amendments to the Trade Unions Act No. 2821.

**732.** With regard to the allegations concerning factual issues, the Government states that the Ministry of Labour and Social Security has never received any complaint in respect of the following allegations:

– the 13 workers mentioned in the third list submitted by KESK in its complaint;

– the allegations of favouritism relating to the establishment of an institution administrative committee in Türk TELEKOM; and

– the distribution by the Office of Agricultural Products of membership forms in favour of Türk Tarim-Orman Sen union.

**733.** Regarding the members of the Health Workers' Union (SES) and of the Trade Union of Public Servants of the Education Sector (EGITIM-SEN), the Government reiterates that public prosecutors decided to withdraw the charges. The Government indicates that copies of the corresponding decisions are attached to its reply and numbered as Annexes 5, 6, 7, 8 and 9. The documents submitted in the original language, with signatures and official stamps, have been translated and can be summarized as follows.

**734.** The first decision is signed by the public prosecutor of the Office of the Attorney General of the Republic in Ankara. It bears the reference number 2002/656 and designates the defendants as being "members of the executive committee of the Education, Knowledge and Cultural Union of Retired Persons". The date of the offence is "29.3.2002 and before". It appears that reference in the statutes of the union to "mother tongue education" was considered to be illegal by the Amasya public prosecutor. This decision was overturned by the public prosecutor in Ankara. The latter decided that there was insufficient evidence to bring a case against the members of the union executive committee.

**735.** The second decision, dated 24 January 2003, has been issued under the signature of the public prosecutor of the Office of the Attorney General of the Republic of Turkey in Balikesir. It bears the reference number 2003/208 and designates the defendant as being "Mehmet Aslan and 65 friends". The offence is described as a "meeting held without permission" and as occurring on 10 January 2003 in front of the building of the Balikesir branch of EGITIM-SEN. It appears that 65 persons participated in this meeting, the purpose of which was to protest against the one-month suspension of two students by the administration of the university. The public prosecutor decided that no charges would be pressed against the defendants.

**736.** The third decision, dated 18 April 2003, is a decision of the "Heavy Penal Court" under the signatures of "clerk 380" and "Minister 29996", bearing the reference number 2003/239 MÜT. This decision in fact confirms the decision of the public prosecutor of Balikesir described in the previous paragraph not to prosecute the defendants.

**737.** The fourth decision is a decision of the public prosecutor of the Office of the Attorney General, in Balikesir, bearing the reference number 2003/43 and addressed to the Regional Office for Labour and Social Security in Bursa. Mr. Necmettin Karakus, the "informant", appears to have claimed that irregularities were committed within the Health Union of Retired Persons. In particular, it was alleged that the president of the union, Mr. Tamer Özcan, arranged a meal in a hotel without a decision of the executive committee and that he withdrew money under a falsified signature. The public prosecutor took a "decision of equitable abstention" in relation to these claims, in view of the administrative and financial audit to be carried by the Ministry of Labour and Social Security on 17 September 2003.

**738.** The fifth document is a communication, dated 25 March 2002, of the Office of the Director of Security and concerns the decision of the public prosecutor of Diyarbakir "State Security Court" in relation to the general committee meeting held by the Bingöl branch of EGITIM-SEN. It bears the reference B.05.1.EGM.4.12.00.12.02/1718. During this meeting, posters, with the legends "Mother tongue is a right – it may not be impeded" and "Mother tongue education does not divide – it unifies", were displayed. It appears that the Office of the Director of Security considered that the legends were illegal and submitted the matter to the public prosecutor of the province in a letter of 6 February 2002. The public prosecutor took a decision on 7 March 2002 not to press charges against the officers of the union, as these slogans appeared in union statutes duly approved by the Ministry of Labour and Social Security.

**739.** With respect to the allegations concerning the three employees of the Mersin Port Operations – Mr. Nazmi Vural, Mr. Okan Nar (chairperson of BAGIMISIZ ULASIM-SEN) and Mr. Mehmet Yildiz – the Government indicates that the chairperson of BAGIMIZ ULASIM-SEN submitted a complaint, dated 16 May 2002, to the Office of the Prime Minister. Inspectors of the Ministry of Transport investigated the allegations and the Director of Mersin Port Operations, Mr. Kenan Sen, was found to be guilty of exerting pressure on trade union members. As a result, a sanction of warning was applied to him and recorded in his personal file on 30 September 2002.

**740.** The Government has attached a copy of a letter of the president of the committee of inspectors bearing the reference number B.11.2.DDY.0.60.00.00/1450. This letter summarizes the findings of the investigation carried out by the inspectors. It seems that the matter arose from Mr. Okan Nar's resignation from the Turkish Communication Union and his subsequent establishment, with Mr. Nazmi Vural and Mr. Mehmet Yildiz, of the Independent Transport Union. They were threatened with transfer to other duty stations, although it seems that these threats were not carried out. Nevertheless, the inspectors established that three members of the Independent Transport Union resigned, including Mr. Memet Yildiz, because of the hostility displayed by the head of the port authority, Mr. Kenan Sen, towards the new union; indeed, a member of the Turkish Communication Union witnessed examples of such hostile behaviour. The inspectors concluded, therefore, that there was some justification to the claim that the head of the port authority had shown hostility towards the new union and exerted pressure on its members to resign.

**741.** Mr. Nar was suddenly deprived of an office, assigned to him while he was the administrative head of the Turkish Communication Union, immediately following his resignation from the latter union and at the time he was participating in the creation of the Independent Transport Union. The inspectors considered that this action was carried out for anti-union reasons and did not rest on sound grounds. The inspectors noted also that the head of the port authority had exerted pressure on officials, for anti-union reasons, not to deliver medical certificates to Mr. Okan Nar and Nazmi Vural.

**742.** In these circumstances, the inspectors concluded that the head of the port authority displayed favouritism towards one union to the detriment of the Independent Transport Union and thereby demonstrated discrimination towards the founders and the members of this latter union. The inspectors were of the opinion that such behaviour was in contravention of Act No. 4688, Act No. 2821, the Prime Ministerial Circular No. 2002/17 and Conventions Nos. 87 and 151. The inspectors recommended that the sanction of a reprimand be applied to the head of the port authority. Should such behaviour persist, the inspectors recommended that he be assigned to other functions at a different duty station.

**743.** In the absence of concrete evidence to support the claim that such anti-union behaviour was based on instructions coming from the Minister, the inspectors decided that no further action was required in this respect.

**744.** The Government provides a copy of what appears to be the notification of the sanction by the Minister for Port Administration to the head of the Mersin Port Operations. This notification was duly acknowledged and signed by the latter. The decision of sanction was taken on 18 September 2002, notified on 23 September and filed on 30 September 2002.

## C. The Committee's conclusions

**745.** *The Committee recalls that, during in its last examination of the case, it requested the Government's observations on the factual issues of the complaint in order to examine them on their merits. Since the Government also refers, albeit briefly, to the legislative issues of the complaint, the Committee will first address this matter before reviewing in turn each of the factual allegations submitted.*

**746.** *The Committee recalls that, while Act No. 4688 represented at the time it was adopted an important step towards the recognition of public employees' trade union rights, the ILO supervisory mechanisms have highlighted a number of discrepancies between the provisions of the law and that of Conventions Nos. 87, 98 and 151. During its previous examination of the case, the Committee underlined some of the issues raising problems of compatibility with these Conventions, recalling at the same time the relevant principles of freedom of association [see 330th Report, paras. 1095 to 1098]. These issues were the following: the exclusion of certain categories of public employees from the scope of Act No. 4688 and therefore from the right to organize (sections 3(a) and 15); the suspension and termination of a union officer's mandate in case of candidacy to local or general elections (section 10); the right to bargain collectively (section 28); and the absence of recognition of the right to strike of public servants who are not exercising authority in the name of the State and who cannot be considered to be carrying out essential services in the strict sense of the term. Further, the Committee pointed out that sections 14 and 30 of Act No. 4688 did not contain sufficient guarantees to ensure a fully objective determination of the most representative union [See 330th Report, para. 1098]. Finally, the Committee emphasized that legislative measures should be taken to ensure an effective protection of public servants against all acts of anti-union discrimination [see 330th Report, paras. 1101 and 1102].*

**747.** *The Committee is aware that the Government is currently carrying out a number of legislative reforms in relation to freedom of association and collective bargaining, an example of which is the draft bill on amendments to the Trade Unions Act No. 2821 provided by the Government as an attachment to its communication of 9 March 2004. The Committee further understands that a process is taking place to amend Act No. 4688; that specific amendments have been considered; and that a draft bill is currently being developed. However, the Committee has not received from the Government any confirmation in this respect let alone the exact wording of a text purporting to amend Act No. 4688.*

**748.** *The Committee trusts that amendments to Act No. 4688 will ensure public employees' rights to freedom of association and collective bargaining in a manner consistent with Conventions Nos. 87, 98 and 151 and the principles of freedom of association recalled in its previous examination. Bearing in mind that a process to amend Act No. 4688 is under way and that it is part of a more general reform process, the Committee requests the Government to provide the relevant texts amending Act No. 4688, in compliance with its obligations to the ILO supervisory mechanisms.*

**749.** *With respect to the factual allegations, the Committee notes that the Government has replied neither to the allegations of favouritism within Türk TELEKOM and the Office of Agricultural Products, nor to the allegations of anti-union discrimination in respect of 13 members and officers of unions affiliated to KESK. The Government limits itself to*

*observing that the Ministry of Labour and Social Security has never received any complaint in this respect. The Committee regrets that the Government has ignored the specific recommendations made by the Committee on these allegations during its previous examination. Further, the Committee wishes to recall that its competence does not depend on prior exhaustion of any domestic remedies.*

**750.** *In these circumstances, the Committee must recall, once again, the following principles with respect to the allegations of favouritism. By according favourable or unfavourable treatment to a given organization as compared with others, a government may be able to influence the choice of workers as to the organization they intend to join; in addition, a government which deliberately acts in this manner violates the principle laid down in Convention No. 87 that public authorities should refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise. On more than one occasion, the Committee has examined cases in which allegations were made that public authorities had, by their attitude, favoured or discriminated against one or more trade union organizations. Any discrimination of this kind jeopardizes the right of workers set out in Convention No. 87, Article 2, to establish and join organizations of their own choosing [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 304 and 306]. The Committee urges the Government therefore to examine without delay the allegations on the establishment of an institution administrative committee in Türk TELEKOM with the participation of Türk Haber-Sen and the distribution by the Office of Agricultural Products of membership forms in favour of Türk Tarim-Orman Sen union, including any concomitant acts of anti-union discrimination that might have occurred. The Committee urges the Government to take the necessary steps to ensure that all unions are treated on an equal footing and that the workers concerned may freely choose the union they wish to join. The Committee requests the Government to keep it informed of any developments in this respect.*

**751.** *As concerns the allegations of anti-union discrimination, the Committee will first examine those relating to the Health Workers' Union (SES) and the Trade Union of Public Servants of the Education Sector (EGITIM-SEN), including the case of the 13 workers mentioned above, as they all raise similar questions.*

**752.** *As a preliminary step, the Committee wishes to highlight the following elements of the allegations relating to SES and EGITIM-SEN. First, allegations concerning SES referred to acts of anti-union discrimination consisting only of public employees' transfers to different duty stations or workplaces; there was no mention of any court action having been initiated against these public employees. By contrast, allegations concerning EGITIM-SEN referred to acts of anti-union discrimination consisting of public employees' transfers as well as of court actions having been brought against some of these workers. Second, KESK submitted a list of 107 workers who were involved in trade union activities with SES, either as members or officers of the union or as workers who participated in union activities without apparently being affiliated, whereas the list concerning EGITIM-SEN, covered 30 workers who were members or officers of the union. In both cases, the lists specified the workers' name and occupation, and their union responsibilities; they also indicated the original city and the workplace of each of these workers and the city or workplace to which they had been transferred. Third, KESK indicated that the alleged acts of anti-union discrimination, relating to SES occurred in the course of the last six months preceding the complaint, that is between December 2001 and May 2002, since the complaint is dated 28 May 2002. No time frame was specified in respect of the alleged acts of anti-union discrimination concerning EGITIM-SEN but these presumably had occurred before 28 May 2002.*

**753.** *In light of the above, the Committee first notes that the Government refers only to charges which have been withdrawn by public prosecutors and that it does not address the question*

*of the transfers to other duty stations or workplaces allegedly based on anti-union grounds. Further, the Committee notes that with respect to the allegations concerning SES, the Government has only provided one decision concerning an officer of the union. This leaves the 106 other cases unanswered.*

**754.** *Moreover, in the Committee's view, questions arise as to whether the documents provided by the Government relate indeed to the cases submitted by KESK, as they differ in many ways. In this respect, the Committee stresses in particular the following considerations. First, the one decision transmitted by the Government and relating to an officer of SES refers to a court action while KESK never alleged that members and officers of SES had been subject to court actions.*

**755.** *Further, the Government has provided four decisions that refer to EGITIM-SEN. Two decisions of the public prosecutor concern the executive committee members of the union and the reference to "mother tongue" in the statutes of the union. In one of these decisions, dated 7 March 2002, the public prosecutor withdrew the charges pressed against trade unionists. In the Committee's view, it seems unlikely that a case no longer subject to court action would have been mentioned in a complaint for anti-union discrimination lodged nearly three months after the public prosecutor's decision had been rendered. The other two decisions linked with EGITIM-SEN refer to an offence committed on 10 January 2003 by 65 persons who participated in a meeting in front of the building of the Balikesir branch of EGITIM-SEN. The Committee notes that the date of the offence is subsequent to the date of the complaint lodged by KESK and thus could not have been raised by the complainant organization.*

**756.** *In light of the above, the Committee observes that the Government's observations are incomplete and that the differences highlighted above cast doubts as to whether the evidence provided relates to the allegations submitted by KESK and under consideration here. This is all the more regrettable as the allegations relate to events which occurred two years ago and which, if proven, may have serious consequences for the individuals concerned. In these circumstances, the Committee must recall that governments should recognize the importance for their own reputation of formulating detailed replies to the allegations brought by the complainant organizations, so as to allow the Committee to undertake an objective examination [see **Digest**, op. cit., para. 20]. Given the incomplete nature of the Government's observations as well as the numerous differences between its evidence and the allegations submitted, the Committee trusts that the Government will fully cooperate in the future with the procedure before the Committee.*

**757.** *In light of the above, the Committee must recall the following principles:*

- *no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities [see **Digest**, op. cit., para. 690];*

- *protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular, transfers, downgrading and other acts that are prejudicial to the workers [see **Digest**, op. cit., para. 695];*

- *protection against acts of anti-union discrimination is particularly desirable in the case of trade union officials to enable them to perform their trade union duties in full independence [see **Digest**, op. cit., para. 724];*

- *the government is responsible for preventing all acts of anti-union discrimination and ensuring that workers subject to such treatment have access to means of redress*

*which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., paras. 738 and 741];*

– *where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 754].*

**758.** *The Committee urges the Government to institute, without any further delay, independent inquiries in the following individual cases, in order to establish whether the workers concerned have been adversely affected in their employment by reason of their legitimate trade union activities:*

*(a) the 107 cases concerning members and officers of SES and workers participating in its activities;*

*(b) the 30 cases concerning members and officers of EGITIM-SEN;*

*(c) the 13 cases of workers mentioned in the third list submitted by KESK in its complaint.*

**759.** *If it is established that these workers have been subject to anti-union discrimination, the Committee urges the Government to take all the necessary measures to remedy without delay any effects of anti-union discrimination. In particular, the Government should declare null and void transfers decided for anti-union reasons and should take immediate measures so that the workers concerned be returned to the positions they held before being transferred.*

**760.** *Concerning the three employees of the Mersin Port Operations, the Committee notes that the Government has ordered an investigation by the inspectors of the Ministry of Transport; that these inspectors found that the head of the port authority took an anti-union approach in his dealing with the members and officers of the Independent Transport Union (Railways, Airports, Sea and Land Transport Services Public Employees) (BAGIMSIZ ULASIM-SEN); that, as a result, the Ministry of Transport applied a disciplinary sanction to this senior officer; that the sanction was recorded in his personnel file; and that there was no evidence to support the claim that the anti-union behaviour was based on instructions from the Minister. The Committee notes that the anti-union behaviour did not adversely affect the career of the workers concerned. The Committee is therefore satisfied that these three individual cases do not call for further examination.*

**761.** *Finally, the Committee notes that the Independent Public Works and Construction Employees' Union (BAGIMSIZ YAPI-IMAR SEN) and the Independent Transport Union (Railways, Airports, Sea and Land Transport Services Public Employees) (BAGIMSIZ ULASIM-SEN) have not submitted any further information to specify the general allegations of anti-union discrimination on the part of officials of the Ministry of Construction and Housing and of the Surveying Office and officials of the Turkish State Railways. The Committee considers therefore that these allegations do not call for further examination.*

## The Committee's recommendations

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

***(a) Bearing in mind that a process to amend Act No. 4688 is under way and that it is part of a more general reform process, the Committee requests the Government to provide the relevant texts amending Act No. 4688 in compliance with its obligations to the ILO supervisory mechanisms.***

***(b) With respect to the allegations of favouritism within Türk TELEKOM and the Office of Agricultural Products, the Committee urges the Government: (i) to examine without delay the allegations on the establishment of an institution administrative committee in Türk TELEKOM with the participation of Türk Haber-Sen and the distribution by the Office of Agricultural Products of membership forms in favour of Türk Tarim-Orman Sen union, including any concomitant acts of anti-union discrimination that might have occurred; (ii) to take the necessary steps in order to ensure that all unions are treated on an equal footing and that the workers concerned may freely choose the union they wish to join; and (iii) to keep it informed of any developments in this respect.***

***(c) With respect to the 107 workers involved in SES' activities, the 30 members and officers of EGITIM-SEN and the 13 members and officers of unions affiliated to KESK, the Committee: (i) urges the Government to institute, without further delay, independent inquiries, in order to establish whether the workers concerned have been adversely affected in their employment by reason of their legitimate trade union activities; (ii) urges the Government, if it is established that these workers have been subject to anti-union discrimination, to take all the necessary measures to remedy without delay any effects of anti-union discrimination and in particular, to declare null and void transfers decided for anti-union reasons and take immediate measures so that the workers concerned be returned to the positions they held before being transferred; and (iii) requests the Government to keep it informed of developments in this respect.***

***(d) With respect to the allegations of anti-union discrimination concerning the three employees of the Mersin Port Operations, noting that the Government ordered an investigation, that a disciplinary sanction was applied to a senior officer who adopted an anti-union behaviour, and that such behaviour did not adversely affect the career of the workers concerned, the Committee is satisfied that these three individual cases do not call for further examination.***

***(e) Noting that the Independent Public Works and Construction Employees' Union (BAGIMSIZ YAPI-IMAR SEN) and the Independent Transport Union (Railways, Airports, Sea and Land Transport Services Public Employees) (BAGIMSIZ ULASIM-SEN) have not submitted any further information to specify the general allegations of anti-union discrimination on the part of officials of the Ministry of Construction and Housing and of the Surveying Office and officials of the Turkish State Railways, the Committee considers that these allegations do not call for further examination.***

CASE NO. 2269

INTERIM REPORT

## Complaint against the Government of Uruguay presented by
## — the InterUnion Workers' Assembly-National Confederation of Workers (PIT-CNT) and
## — the Confederation of Civil Service Trade Unions (COFE)

***Allegations: The complainants allege that the Government is in breach of Conventions Nos. 151 and 154 in view of the absence of collective agreements in the central administration and by imposing sanctions on trade union officials in the public administration for carrying out legitimate trade union activities***

**763.** The complaint is contained in a communication from the InterUnion Workers' Assembly-National Confederation of Workers (PIT-CNT) and the Confederation of Civil Service Trade Unions (COFE) dated June 2003. The Government sent its observations in a communication dated 30 December 2003.

**764.** Uruguay 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

**765.** In its communication of June 2003, the InterUnion Workers' Assembly-National Confederation of Workers (PIT-CNT) and the Confederation of Civil Service Trade Unions (COFE) allege that, with occasional exceptions, in the central administration, i.e. civil servants working for the departments of state, no form of collective bargaining exists to regulate working conditions. Furthermore, the authorities have in fact been negligent in addressing the unions' demands, in the sense that the reforms of the organizational structures were not negotiated as they had implications for the profession and jobs, and that they ostensibly caused very serious changes to working conditions.

**766.** As regards legislation, the only attempt at regulation has been section 739 of Act No. 16736 of 5 January 1996, which established a Permanent Committee on Labour Relations, within the purview of the Ministry of Labour and Social Security, for the central administration and the bodies included in article 220 of the Constitution of the Republic (judicial authority, court of auditors, administrative court, electoral court, autonomous bodies and decentralized services, these last with the exception of industrial and commercial organizations). This Permanent Committee was given the strict task of advising on matters concerning salaries, working conditions and other issues regulated by international labour Conventions.

**767.** However, neither the composition of the committee (since it is not bipartite) nor its mandate – to play an advisory role – corresponded to the standards laid down in ILO

Convention No. 154. The committee has not been established, nor has any kind of functioning been recorded. It has convened only on two occasions. Thus, the claims and expectations of the civil servants' trade unions were not considered. These facts influenced the observations of the Committee of Experts on the Application of Conventions and Recommendations in its reports for 1998 (69th Session), 1999 (70th Session), 2000 (71st Session) and 2001 (72nd Session).

**768.** The complainants state that, at present, there is a clear and growing tendency in the central administration to increase the precariousness of labour relations, as a result of labour stability being undermined, access to the civil service taking place through fixed-term contracts, trade union rights – and the freedoms and guarantees which support them – being violated, etc. This situation is the consequence of the unilateral imposition of working conditions in all areas imaginable and the absence of collective bargaining. The complainants cite several specific cases in this regard: (1) state reform programmes, under budgetary Act No. 16736 and its regulatory decrees, continuing the process of reforming budgetary and subsequent accounting standards which culminated in accounting Act No. 17556 of 18 September 2002 and its regulatory decree. According to the complainants, these standards have been used to introduce a regime of compulsory exclusion of civil servants from the administration and permanent civil servants are being replaced by civil servants with precarious contracts. In some cases, the authorities have declared their intention to force civil servants who are already in precarious situations to establish sole proprietorships; and (2) with regard to salaries, a further example of the various unilateral decisions which cannot be denied are Decrees No. 43/003 of 30 January 2003 "Advances on future salary increases for civil servants covered by the national budget and article 221 of the Constitution of the Republic" and No. 191/003 of 16 May 2003 "Pay adjustments for civil servants". According to the complainants, the first of these decrees implemented a salary increase through a loan contract taking the form of handing in "food vouchers" which, given its legal nature, is subject to the effect of future salary increases, and the second decree introduced a pay rise which contravened the regulations setting out the indices which must be taken into account for salary increases, as well as Convention No. 154 on collective bargaining.

**769.** The complainants add that, on the few occasions when collective bargaining has taken place, the administration has later failed to comply with what was agreed. This is the case with the agreements made between the Federation of Public Health Civil Servants and the Ministry of Health on 30 November and 27 December 2000, pertaining to the regulation of integral assistance benefit and later regulated by Decree No. 346/002 of 3 September 2002 as regards extending these benefits to disabled persons.

**770.** The complainants further state that, with regard to the enjoyment of trade union freedoms and immunity, situations have been recorded in which these were not recognized, in clear violation of the provisions of Convention No. 151. The most serious cases of this involve sums being discounted from the salaries of officials who participated in trade union activities. One of these was against an official of the Association of Civil Servants of the Ministry of Industry, Ms. Leonor Quefan, and ended in an action being brought before the administrative court, which found in favour of the worker; a second, involving an official of the Association of Civil Servants of the Radio Broadcasting Service, Ms. Anahí Oldán, is currently being contested. In addition, they allege that workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works resolved at an assembly to undertake industrial action; the decision was communicated to the authorities, who immediately afterwards began disciplinary proceedings against the said officials.

**771.** Lastly, the complainants state that the State's failure to recognize the right to collective bargaining creates a situation which is not only adverse in terms of current working

conditions in the civil service, but has also caused alarming new outbreaks of repression with regard to the exercising of fundamental civil rights. In this context, they allege that, up to the date when the complaint was presented, it had been determined that around 100 civil servants from the electoral court had been subject to sanctions for the mere fact of having exercised their right to petition in relation to certain working conditions. The sanctions were the only response to their petition, with no right to previous defence. However, more serious still, when these sanctions were contested by means of the mechanisms laid down in the Constitution of the Republic, greater sanctions were applied.

## B. The Government's reply

**772.** In its communication dated 30 December 2003, the Government first states that, in order to arrive at an approximation of the problem raised, it is necessary to define specifically the term "central administration". This refers to the executive authority with its various departments or secretariats of state. The existence of autonomous bodies and decentralized services linked to the executive authority via the various ministries should also be pointed out.

**773.** The Government states that civil servants in general, and those within the central administration in particular, are governed by a statute (an organic body of constitutional, legal and regulatory standards) which regulates their rights, duties and obligations. Certain of these rights stand out, namely, those relating to job stability, promotion, remuneration and the administrative disciplinary procedure with guarantees of due process, without prejudicing the right to a subsequent review through legal channels. This statute which, let us reiterate, has had constitutional value since 1934, forms a solid guarantee for civil servants, as regards protecting administrative careers, as well as citizens' rights and rights deriving from freedom of association and collective bargaining. One of the most characteristic features of the statute for civil servants in Uruguay, which also distinguishes them from private activity, governed by a relatively stable system, is the so-called security of tenure, which means that the State cannot terminate a civil servant's contract except in cases of incompetence, negligence or criminal offences, following disciplinary action, with full guarantees of due process, and authorization from the Senate of the Republic. It is up to the President of the Republic, acting with the appropriate minister or ministers, or the relevant council of ministers, to dismiss public servants for incompetence, negligence or criminal offences, in all cases with the agreement of the chamber of senators.

**774.** The Government points out that Uruguay has not been through a period of extensive privatization, and that instead, as a key part of its development strategy, it has begun a process of state reform aimed at reducing the State's influence on the economy and providing better public services, thus to some extent overcoming the problem of State versus privatization. One of the instruments used in the process of state reform has been Act No. 16736 of 5 January 1996, which created the Executive Committee for State Reform (CEPRE), consisting of the Director of the Office of Planning and Budget, who chairs it, the Minister of Economy and Finance and the Director of the Office for the Civil Service. This committee is in charge of supervising the implementation of state reforms within the central administration, and also controlling the administrative restructuring proposed by the various ministries. At the same time, the above Act allowed the executive authority to enter into contracts with third parties to supply non-essential and support services, giving preference to companies formed by ex-civil servants or civil servants who are available because they have been granted extended leave of absence.

**775.** With regard to the restructuring of the central administration, the executive authority approved Decree No. 186/96 dated 16 May 1996. State reform should focus on the major tasks within its mandate, reassigning to them the resources given to low productivity activities or the resources from activities which should not be directly funded by the State,

such as workshops, printing, cleaning, maintenance, security, transport of persons and goods, buildings, medical certificates and canteens, among others, which can all be contracted to third parties. Decree No. 361/96 of 12 September 1996 regulates the systems for reinserting civil servants in jobs or companies, and the system of extended leave of absence for jobs and tasks contracted by the public administration. The doctrine has characterized this process as structural adjustment measures to restrict the activities carried out directly by the State, to rationalize existing services, to reduce the number of civil servants, and to introduce changes to the management and system of remuneration, with an active policy of transferring civil servants to the private sector, by means of reinsertion in jobs and companies. At the same time, efforts are made at trying to establish areas in which civil servants can participate, through their most representative organizations, in the Permanent Committee on Labour Relations. Therefore, the "compulsory exclusion" alleged by the complainants does not reflect reality, since there are various alternatives for civil servants, with appropriate guarantees, time periods and procedures.

**776.** The Government adds that, more recently, it sanctioned Act No. 17556 of 18 September 2002 (accounting and budget execution balance for the 2001 accounting period), which continues the restructuring process for staff who fulfil roles in the public administration, reiterating the restrictions for designating staff for public service, creating incentives for civil servants to retire, modifying the payment system and creating a statute for staff with fixed-term contracts. In reality, this Act has not introduced the concept of fixed-term contracts, since they already existed. The Act represents another contribution, both for workers and for the State, to the rights and obligations of this type of contracting and, far from making the situation more precarious, in fact provides legal assurance and establishes in written form a series of rights such as social benefits, annual leave, sickness cover, unemployment insurance and severance pay.

**777.** The Government reports that Uruguay's enacted law has not limited freedom of association and has respected the autonomy and autarky of trade union organizations. The lack of heteronomous regulation of trade union organizations is perhaps one of the most characteristic aspects of Uruguayan labour law, and already incorporates a national legal conscience. By virtue of the national legal background and with the maximum guarantees, Uruguay's civil servants have formed and developed various trade union structures (COFE, ADEOM, AEBU), which in turn form part of the trade union umbrella organization PIT-CNT. From 1990, these organizations began to make collective agreements at the level of industrial and commercial entities, as well as within government departments. Even though the organization in charge of social security – the Social Security Bank, incorporating social representatives – was at that time already developing collective bargaining quite smoothly, section 224 of Act No. 16462 of 11 January 1994, and interpretative Act No. 16560 of 19 August 1994, expressly authorized it to make collective agreements with staff, with the agreement of the Office of Planning and Budget, as well as to give advances, if it could not obtain the Office's approval.

**778.** Act No. 16736 of 5 January 1996 established the Permanent Committee on Labour Relations for the central administration and the bodies included in article 220 of the Constitution of the Republic, i.e. the judicial authority, the administrative court, autonomous bodies, and non-industrial and commercial decentralized services, with the task of advising on matters concerning salaries, terms and conditions of employment and other issues regulated by international labour Conventions. In this respect, it should be pointed out that the committee maintained intensive activity in the period following its creation, but recently no meetings have been held between the parties. However, it should be stressed that, any of the parties involved can, by express legal provision, call a meeting on the basis of its interests. In fact, none of the organizations have done this, which can be explained by the fact that, independently of any meetings called in this framework, labour

relations in the public sector are developing in complete normality, among state civil servants who show the highest rates of union membership.

**779.** The Government points out that, between 1995 and 1999, there was free and smooth collective bargaining both in public companies and government departments and that, whilst it may be true that no collective agreements were made in the central administration, it is no less true that, in various bodies within the central government, there were instances of bargaining which enabled trade unions to carry out the demands of the administration in their respective budgetary provisions. This was the case with the Uruguayan Teachers' Federation (FUM), which pursued an intensive strategy of mobilization and participation, and was able to influence the transformation of the sector. Similarly, one could also cite the case of the Federation of Public Health Civil Servants (FFSP), which, during the aforementioned period, participated in the decision-making process concerning salary issues in its sector and influenced as a result both the five-year budget and the accounting Act.

**780.** The Government explains that, in public companies, between 1995 and 1999 there were two spheres of bargaining: one centralized, in the Office of Planning and Budget, dealing with general matters, and the other decentralized in each of the companies. Centralized bargaining was never interrupted and in this sphere successive agreements were signed in the National Ports Administration (ANP), the telecommunications sector (ANTEL), state factories (UTE), the National Postal Administration (ANC), and the Social Security Bank (BPS), among others. As in public companies, in the public banking sector a centralized agreement was drawn up and signed in 1998 to cover the four official banks, intended as a framework for improving and homogenizing labour relations within the sector, bringing them into line with the national and regional socio-economic climate.

**781.** In 2000 and 2001, the public sector maintained the same characteristics as in the preceding period. No agreements were registered in the central administration and ongoing bargaining took place in public companies and the public banking sector. At this level, it is interesting to point out the agreement signed by the National Administration of Fuels, Alcohol and Portland (ANCAP) in March 2000, which is a framework agreement that can be used in future as a basis for agreements in individual sections, modified to suit their own aims and objectives.

**782.** According to the Government, the above clearly demonstrates that collective bargaining exists in the public sector and, in a regional and international context which is extremely complex and restrictive from the point of view of economic resources, has allowed society to coordinate the legitimate interests of civil servants with those of society in general, since it is society that supplies the resources to finance the budget, as well as being the end-user of the services provided by the State.

**783.** In short, the Government repeats that there has been no change to the facilities offered by the Ministry of Labour and Social Security to parties wishing to bargain collectively, and that such bargaining is carried out without any kind of restriction. No laws have been repealed, nor have any international labour Conventions been denounced which would allow one to conclude that the country's legislation has disintegrated towards deregulation of working conditions or precarious employment.

**784.** The Government underlines, in relation to COFE's observations on the state reform provisions contained in Acts Nos. 16736 and 17556, that the application of these provisions has not led to compulsory exclusion of civil servants, nor is there any tendency for relations to become more precarious but, on the contrary, there has been a gain in security of law, with express recognition of labour and social security rights.

**785.** With regard to salaries, the Government states, in relation to Decree No. 43/003 of 30 January 2003, that it authorized the dependants of the bodies included in the national budget and article 221 of the Constitution of the Republic to obtain loans in respect of future salary increases, to be financed by the division of social credit of the Bank of the Oriental Republic of Uruguay which, by Decree No. 501/003 of 5 December 2003, stated that the advances in respect of future salary increases provided for in the Government's Decree "will be offset against general profits in the case of the bodies included in the national budget and debited from each of the relevant budgets".

**786.** As regards the alleged non-fulfilment of collective agreements on the part of the central administration, the Government states that civil servants, whether individually or collectively, have at their disposal the legal protection mechanisms provided under the rule of law. This can be illustrated by the case of civil servants in the Ministry of Public Health and the agreement recently concluded with the organization representing medical and non-medical staff.

**787.** In relation to the cases of Ms. Leonor Quefan, a civil servant in the Ministry of Industry and Energy, and Ms. Anahí Oldán, a civil servant in the Official Service for Broadcasting, Radio, Television and Public Performances (SODRE), as well as in connection with the situation of the workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works, the Government states that it has requested information on these state dependencies, which it will submit shortly. Without prejudice to the foregoing, the Government states that civil servants enjoy the highest guarantees, both in the administrative sphere and the legal channels, which are absolutely independent of any kind of influence from the administrative authority.

**788.** Lastly, with reference to COFE's allegations regarding civil servants in the electoral court, the Government states that the problem raised in no way relates to matters of freedom of association in its broadest sense and therefore falls beyond the natural remit of the Committee (the Government states that the issue in question is the right to petition as exercised by a group of non-affiliated civil servants requesting the revocation of a circular regulating the right to recourse to referendum on national legislation). This controversy has been brought before the administrative court in order to resolve the matter.

## C. The Committee's conclusions

**789.** *The Committee observes that, in the present case, the complainants allege that: (i) there is almost no collective bargaining for the regulation of the terms and conditions of employment in the central public administration (the complainants state that, when a collective agreement is eventually concluded, the administration does not honour it and that the Permanent Committee on Labour Relations for the Central Administration, created in 1996 to advise on matters concerning salaries, working conditions and other issues relating to international labour Conventions, has only been convened on two occasions); (ii) the Government, through acts and decrees, unilaterally imposes working conditions which affect civil servants (on matters relating to reinsertion in jobs, reducing the number of activities carried out directly by the State, reducing the number of civil servants, staff restructuring, fixed-term contracting, etc.); and (iii) acts of anti-union discrimination have been committed against union officials and civil servants for having participated in legitimate union activities (specifically, the complainants allege that: (1) union officials Ms. Leonor Quefan and Ms. Anahí Oldán suffered salary reductions; (2) disciplinary measures were taken against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works after its assembly had resolved to carry out industrial action; and (3) sanctions were imposed on civil servants at the electoral court for having exercised the right to petition in relation to certain conditions of work).*

**790.** *With regard to the alleged lack of collective bargaining in the central administration, the Committee notes the Government's statements that: (1) civil servants in general, and those within the central administration in particular, are governed by a statute which regulates their rights, duties and obligations; (2) from 1990, these organizations began to make collective agreements at the level of industrial and commercial entities, as well as within government departments; (3) the Permanent Committee on Labour Relations for the Central Administration maintained intensive activity in the period following its creation but has not been convened recently by any party; (4) whilst it may be true that no collective agreements were made in the central administration, in various bodies within the central government there were instances of bargaining which enabled trade unions to make demands which were taken up by the administration in their respective budgetary provisions; (5) in 2000 and 2001 there was ongoing bargaining in public companies and the public banking sector and no agreements were registered in the central administration; and (6) collective bargaining exists in the public sector and there has been no change to the facilities offered by the Government to parties wishing to bargain collectively.*

**791.** *In this respect, the Committee observes that, at its meeting in June 2003, it examined a complaint presented against the Government of Uruguay which also alleged that there was an absence of collective negotiation in the central administration [see 331st Report, Case No. 2209]. In these conditions, the Committee refers to the conclusions reached on that occasion which are repeated below [see 331st Report, para. 733]:*

> ... the Committee recalls that Article 1 of the Collective Bargaining Convention, 1981 (No. 154), ratified by Uruguay in 1989, provides that it "applies to all branches of economic activity" and that "as regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice", and Article 2 provides that "the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for determining working conditions and terms of employment". In these circumstances, the Committee requests the Government to take the necessary measures to ensure full application of Convention No. 154 and promote collective bargaining also in the central public administration through appropriate mechanisms, in consultation with the trade union organizations concerned.

**792.** *With regard to the allegations relating to the unilateral imposition by the Government of terms and conditions of employment which affect civil servants through the promulgation of laws or decrees, the Committee notes that the Government refers to the necessity, the content and the impact of the laws and decrees which it promulgated as part of the process of state reform. In this respect, as the allegations are serious, the Committee underlines that, although the measures which countries adopt as part of the process of state reform pertain essentially to the competence of the public authority, insofar as such measures may affect the terms and conditions of employment of civil servants or public sector workers (as seems to be the case with the laws and decrees cited by the complainants) their organizations should be consulted before such legislation is adopted. The Committee urges the Government to promote consultations with the organizations concerned in cases of this nature. Finally, the Committee recalls that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service. It is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultations with the appropriate organizations of workers and employers [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *4th edition, 1996, paras. 793 and 931].*

**793.** *As regards the alleged non-fulfilment of agreements made between the Federation of Public Health Civil Servants and the Ministry of Public Health on 30 November and 27 December 2000, the Committee notes the Government's statement that the parties involved concluded a new agreement on 12 September 2003 (the Government has attached a copy of this agreement to its reply).*

**794.** *With regard to the alleged acts of anti-union discrimination relating to the salary reductions imposed on union officials Ms. Leonor Quefan and Ms. Anahí Oldán, and the disciplinary measures taken against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works after its assembly had resolved to undertake industrial action, the Committee notes the Government's statement that it has requested information on these state dependencies, which it will submit shortly, and that civil servants enjoy the highest guarantees, in terms of both the administrative sphere and legal channels. In this respect, observing that the allegations refer to events which occurred in the central public administration more than eight months ago, the Committee regrets the absence of observations from the Government and requests it to send its observations in this respect as soon as possible.*

**795.** *As regards the alleged imposition of sanctions on civil servants at the electoral court for having exercised the right to petition in relation to certain working conditions, the Committee notes the Government's statement that the issue in question is the right to petition as exercised by a group of non-affiliated civil servants and that the problem raised in no way relates to matters of freedom of association (the matter is a request for the revocation of a circular regulating the right to recourse to referendum on national legislation). The Committee also notes the Government's response that the matter has been brought before an administrative court for resolution. Bearing in mind this explanation, the Committee will not proceed with the examination of these allegations.*

## The Committee's recommendations

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

***(a) With regard to the alleged absence of collective bargaining in the central administration, the Committee reiterates that Article 1 of the Collective Bargaining Convention, 1981 (No. 154), ratified by Uruguay in 1989, provides that it "applies to all branches of economic activity" and that "as regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice", and Article 2 provides that "the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for determining working conditions and terms of employment". In these circumstances, the Committee requests the Government to take the necessary measures to ensure full application of Convention No. 154 and promote collective bargaining also in the central public administration through appropriate mechanisms, in consultation with the trade union organizations concerned.***

***(b) With regard to the allegations relating to the unilateral imposition by the Government of working conditions which affect civil servants through the promulgation of laws or decrees, the Committee underlines that, although the measures which countries adopt as part of the process of state reform***

***pertain essentially to the competence of the public authority, insofar as such measures may affect the terms and conditions of employment of civil servants or public sector workers (as seems to be the case with the laws and decrees cited by the complainants) their organizations should be consulted before such legislation is adopted. The Committee urges the Government to promote consultations with the organizations concerned in cases of this nature and to take into account the principles mentioned in the conclusions.***

***(c) With regard to the alleged acts of anti-union discrimination relating to the salary reductions imposed on union officials Ms. Leonor Quefan and Ms. Anahí Oldán, and the disciplinary measures taken against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works after its assembly had resolved to undertake industrial action, the Committee, observing that the allegations refer to events which occurred in the central public administration more than eight months ago, regrets the absence of observations from the Government and requests it to send its observations in this respect as soon as possible.***

CASE NO. 2271

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

## Complaint against the Government of Uruguay presented by — the Graphic Arts Union (SAG) and — the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT)

***Allegations: The complainant alleges that the Government has been failing to comply with Article 4 of Convention No. 98 by creating obstacles, in most cases insurmountable, to the effective exercise of the right to collective bargaining***

**797.** The present complaint is contained in a communication from the Graphic Arts Union (SAG) together with the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT) dated 28 May 2003. The SAG sent supplementary information in a communication dated 1 July 2003.

**798.** The Government sent its observations in a communication dated 30 December 2003.

**799.** Uruguay 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

**800.** In its communications of 28 May and 1 July 2003, the Graphic Arts Union (SAG) and the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT) indicate that since

1992, successive governments including the present one, instead of promoting the full development and implementation of voluntary collective bargaining procedures with a view to establishing collective agreements on conditions of employment in accordance with Article 4 of Convention No. 98, have created obstacles, in most cases insurmountable ones, to the effective exercise of the right to collective bargaining. As a result, the proportion of the workforce covered by collective agreements has declined since 1992 from 95 per cent to 16 per cent. The SAG claims that in the case of graphic arts, the last collective agreements concluded for the daily newspaper and public works and roads sectors date respectively from 1989 and 1993 and have lapsed.

**801.** The complainants further state that obstacles to collective bargaining take the form of failure on the part of the Government to convene the Wages Councils since 1992. These are tripartite bodies made up of representatives of the Ministry of Labour, employers' organizations and trade unions in all sectors except construction, health and transport, where conditions are determined by the State. The Councils are the only bodies that allow negotiation of wages, categories and conditions of employment, that are binding for the entire sector. In 1998, the Ministry, at the express request of the SAG, invited the Association of Graphics Manufacturers of Uruguay (AIGU) and SAG to take part in negotiations, but when both those parties asked the Government to approve the agreement so as to ensure that it covered the entire sector, it refused to do so and the talks broke down.

## B. The Government's reply

**802.** In its communication of 30 December 2003, the Government outlined the historical background of the origins and development of collective bargaining in Uruguay and reviewed the current situation. The Government emphasizes that Uruguay has an excellent record of respecting and protecting freedom of association, collective bargaining and the right to strike. In 1943, Act No. 10449 was enacted, instituting the Wages Councils which, despite the fact that their role has been called into question, fulfilled an important role in improving workers' conditions and encouraging them to become unionized. Labour relations functioned normally until the advent of the military dictatorship in 1973. Civil liberties were to be restored with the full restoration of democracy in 1985.

**803.** That new phase was marked by meetings of the Wages Councils, making it possible to legitimize trade union activity and re-establish a culture of collective bargaining, while enabling the National Executive to establish a degree of control of wages by preventing wage increases from being passed on to the prices of products and services. The Government adds that once the objectives of restoring trade union activity were attained, and in accordance with the wishes of the social actors involved, the State began gradually to withdraw from collective bargaining.

**804.** The Government states that three types of collective bargaining are known in Uruguay, namely: (a) so-called "typical" collective bargaining, in the form of bilateral, unregulated and autonomous processes involving one or more enterprises and a trade union; (b) the system established within the Wages Councils set up in 1943 under Act No. 10449, the results of which were endorsed through awards which, once approved by the Executive, took effect even with regard to undertakings not represented in the talks; (c) "mixed" negotiations, marking a departure from the original terms of Act No. 10449 resulting from the tendency of social partners to engage in bargaining in areas outside the remit of the tripartite bodies, while still submitting the results to the respective Wages Council with a view to extending them to other undertakings in the same branch or sector that were not affiliated to the organizations directly party to the agreement. The Government states that at present the first of these systems is in force without restriction, and the National Executive does not promote the other two types of bargaining.

**805.** As regards the allegations concerning the sharp fall in the proportion of the workforce covered by collective agreements, the Government states that this phenomenon is evident in all countries and is due mainly to the decline in union membership. At the same time, there is a trend towards international collective bargaining.

**806.** The Government also indicates that, in the present case, the trade union organization and the employers' body conduct their activities and labour relations in the private sphere without interference or obstruction of any kind.

**807.** Lastly, the Government states that although there is currently no law on collective bargaining, attempts have been made, thus far without success, to establish a regulatory framework for collective bargaining.

## C. The Committee's conclusions

**808.** *The Committee notes that in the present case, the Graphic Arts Union (SAG) and the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT) allege that the Government has failed to encourage and develop collective bargaining, which has resulted in a decline in the proportion of the workforce covered by collective agreements from 95 per cent to 16 per cent. The complainants state that this is mainly due to the fact that the Government has not convened the Wages Councils since 1992. The latter, in accordance with a tradition established by the social partners, endorse collective agreements concluded by trade unions and employers outside the tripartite system set up by the Councils, in order to extend their provisions to the entire sector in question. As a result, there have been no collective agreements in the graphics sector since 1992, since, although there was a willingness to negotiate agreements on the part of the SAG and the Association of Graphics Manufacturers of Uruguay (AIGU), the Government puts an end to talks by its refusal to endorse them.*

**809.** *The Committee notes the Government's reply, in which it gives a historical outline of collective bargaining in the country and states that there are three types of bargaining: talks of the traditional type between a trade union and an employer or group of employers; bargaining of the type provided for in Act No. 10449, the results of which are approved by awards which, once certified by the National Executive, are applicable even to undertakings not represented in the talks; and lastly, a mixed system that responds to initiatives by the trade unions and the employers which submit agreements concluded among themselves in private for approval by the Executive so that their provisions can be extended to the entire sector in question.*

**810.** *The Committee notes that, according to the Government, the parties enjoy total freedom to negotiate conditions of employment. The Committee notes that the dispute in the present case has arisen from the impossibility of extending collective agreements to the entire sector owing to the Government's failure to confirm the extension of the collective agreement. The complainants state, by way of example, that in 1998 the Ministry of Labour, at the request of the SAG, invited the Association of Graphics Manufacturers of Uruguay (AIGU) and SAG to negotiate a collective agreement, but a request to the Government to confirm that the agreement would be applicable to the entire sector was rejected and talks broke down. The complainants maintain that the Government is thereby failing to observe Article 4 of Convention No. 98, which states the obligation "to encourage and promote the full development and utilization of machinery for voluntary negotiation". The Committee notes that the specific question of the extension of collective agreements is addressed not in Conventions Nos. 87 and 98, but in the Collective Agreements Recommendation, 1951 (No. 91), which does not provide for a strict obligation to extend the provisions of collective agreements. Nevertheless, the Committee underlines that Paragraph 5.1 of the Recommendation provides, "Where appropriate,*

*having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement".*

**811.** *The Committee, however, notes the sharp fall in the proportion of workers in all sectors covered by collective agreements, from 95 per cent to 16 per cent, a fact which is not denied by the Government. The Committee notes, with regard to the application of Convention No. 98, that the Committee of Experts has referred to observations by the PIT-CNT to the effect that collective bargaining is "impossible in major sectors", and requested the Government to provide "information on the number of collective agreements concluded by enterprise and by sector, including the public sector, with an indication of the sectors and numbers of workers covered" [see the Committee of Expert's observation on the application of Convention No. 98 in 2003]. In this context, the Committee requests the Government to examine, together with the complainant and all other concerned parties, the state of collective bargaining in the graphic arts sector, and to communicate any measures that may be adopted to promote collective bargaining in the sector in question.*

## The Committee's recommendations

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

***(a) The Committee requests the Government to take measures to promote collective bargaining in conformity with Article 4 of Convention No. 98.***

***(b) The Committee requests the Government to examine, with the complainant and all other concerned parties, the state of collective bargaining in the graphic arts sector.***

***(c) The Committee requests the Government to communicate any measure that may be taken to promote collective bargaining in the sector.***

CASE NO. 2280

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

## Complaints against the Government of Uruguay presented by
## — the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT) and
## — the Autonomous Union of Gas Workers and Employees (UAOEGAS)

***Allegations: The complainants allege that the Gaseba S.A. enterprise established a yellow union, put pressure on workers to resign from the UAOEGAS trade union and has not fulfilled some of the provisions of an agreement concluded in 1997***

**813.** The complaints are contained in communications from the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT) and the Autonomous Union of Gas Workers and Employees (UAOEGAS) dated 30 May and 20 July 2003, respectively. The UAOEGAS sent new allegations in a communication of 15 September 2003. The Government sent its observations in a communication of 30 December 2003.

**814.** Uruguay 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

**815.** In their communications of 30 May, 20 July and 15 September 2003, the Inter-Trade Union Assembly-Workers' National Convention (PIT-CNT) and the Autonomous Union of Gas Workers and Employees (UAOEGAS) allege that the Gaseba S.A. enterprise, a subsidiary company of Gaz de France, established a yellow union in 2000 through its human resources manager and used a fax machine belonging to the human resources office to make the initial announcement to workers. Furthermore, they allege that the enterprise constantly takes measures to prevent trade union communication amongst workers (trade union representations to the enterprise's management, informative talks, etc.) and puts pressure on workers to withdraw their support from the UAOEGAS and resign from this organization.

**816.** Furthermore, the enterprise rejected a petition presented by the UAOEGAS through the letter of 20 June 2003 to enter into dialogue with the executive committee of the UAOEGAS on specific priority issues, on the grounds that the letter in question was signed by Mr. Washington Beltrán (president of the trade union), who had been dismissed.

**817.** Moreover, the complainants allege that the enterprise has not fulfilled some of the provisions of the agreement of 12 March 1997, concluded following the dismissal of 33 workers (including some PIT-CNT officers), which, according to the enterprise (although never proven) was due to financial problems and restructuring. The non-fulfilment of these provisions (lack of training for workers who had been provisionally registered for

unemployment benefit; the failure to create the tripartite assessment commission and the possibility of special leave for up to 12 months) led, in practice, to the unilateral dismissal of Mr. Washington Beltrán, Mr. Angel García Almada and Mr. Luis A. Puig.

## B. The Government's reply

**818.** In its communication of 30 December 2003, the Government states that the Ministry of Labour and Social Security has repeatedly inspected the Gaseba Uruguay S.A. enterprise for occupational health and safety reasons as well as to assess the non-fulfilment of labour obligations that are subject to monitoring by the General Labour and Social Security Inspectorate and obviously include the respect of freedom of association. As regards the alleged establishment of a yellow union, it should be noted that although a new trade union called the Association of Gas Employees (AFGAS) was established at the enterprise in 2000, this organization was set up through the free exercise of freedom of association as prescribed by Convention No. 98 itself. According to the Government, it should be noted that although this accusation is one of major significance, it was made three years after the alleged false creation of the trade union.

**819.** The Government points out that since its establishment in 2000, the Association of Gas Employees (AFGAS) has proceeded to elect its executive members through secret voting by its members, has participated in elections for members of the Executive Committee for Standard Medical Insurance at Gaseba S.A. enterprise and enjoys the same privileges that the enterprise has traditionally granted the UAOEGAS. Therefore, the UAOEGAS and the AFGAS have use of the trade union noticeboard and, at the same time, the enterprise uses a check-off facility for the members of both organizations.

**820.** The Government states that, of a total of 218 employees, 99 are members of the UAOEGAS, which represents 46.12 per cent of the workers, 41 are members of the AFGAS, representing 17.81 per cent of the workers, and the remaining 36 per cent do not belong to a trade union. These figures are a clear sign of the exercise of freedom of association, and of how the enterprise effectively respects the wishes of its workers, not only as regards the possibility of joining the trade union of their choice, but also regarding the participatory bodies involved in labour relations. There is nothing to suggest that the AFGAS is a trade union falsely created at the request of the enterprise or a yellow union. Quite the contrary, it is the result of the free exercise of freedom of association. Furthermore, the UAOEGAS is certainly respected as the majority trade union to the extent that its representatives, along with delegates designated by the enterprise, became members of the bipartite body which manages standard medical insurance through general and secret elections recently held at the institution.

**821.** The Government states that no further comments are required on the allegations made by the UAOEGAS regarding the dispute which occurred on 7 December 1996 and was concluded with the agreement of 12 March 1997 and the request to reinstate Mr. Washington Beltrán, Mr. Angel García Almada and Mr. Luis Puig. The Government recalls that as stated by the complainant itself, the PIT-CNT, the Ministry of Labour, various parliamentary commissions, the provincial government of Montevideo, the Municipal City Council of Montevideo and the Political Committee of the Broad Front were involved in the agreement that put an end to the dispute in question. Furthermore, this very case was assessed through administrative procedures as well as in the international sphere by the Committee on Freedom of Association itself.

**822.** The Government states that the Ministry of Labour and Social Security launched an official administrative investigation by the General Inspectorate to establish whether Gaseba S.A. enterprise had committed any acts of an anti-union nature in 1996 when it dismissed 33 workers, including some trade union officers. On that occasion, and

following extensive procedures which included processing the ample evidence provided by both parties involved (the trade union and the enterprise), the administration considered that trade union repression had not occurred and decided that the file on this case should be closed. The Government adds that the Committee on Freedom of Association came to a similar decision in Case No. 2033 when issuing its interim conclusions in Report No. 320.

## C. The Committee's conclusions

**823.** *The Committee observes that in the present case the complainants allege that the Gaseba S.A. enterprise: (1) established a yellow union in 2000; (2) takes measures to prevent trade union communication amongst workers and puts pressure on them to resign from the UAOEGAS trade union; (3) rejected a petition presented by the UAOEGAS in June 2003 to enter into dialogue on priority issues, on the grounds that the communication was signed by a dismissed worker (the president of the UAOEGAS, Mr. Washington Beltrán); and (4) has not fulfilled some of the articles of the agreement concluded on 12 March 1997 following the dismissal of 33 workers, which has led, in practice, to the dismissal of Mr. Washington Beltrán, Mr. Angel García Almada and Mr. Luis A. Puig.*

**824.** *As regards the alleged establishment of a yellow union by the enterprise (the complainant alleges that through the human resources manager a fax machine belonging to the enterprise was used to make the initial announcement to workers) as well as the alleged measures taken by the enterprise to prevent trade union communication amongst workers, pressure on workers to resign from the UAOEGAS and the rejection of a petition presented by the UAOEGAS in June 2003 to enter into dialogue on priority issues, on the grounds that the communication was signed by a dismissed worker, the Committee notes that the Government states that: (1) the Ministry of Labour and Social Security has repeatedly inspected the enterprise for occupational health and safety reasons as well as to assess the fulfilment of labour obligations; (2) in 2000, as a result of the free exercise of freedom of association, a new trade union called the Association of Gas Employees (AFGAS) was established at the enterprise; (3) the UAOEGAS and the AFGAS have use of the trade union noticeboard and, at the same time, the enterprise uses a check-off facility for the members of both organizations; (4) of a total of 218 employees, 99 are members of the UAOEGAS and 41 are members of the AFGAS; and (5) the UAOEGAS is respected as the majority trade union and as such its representatives, along with delegates designated by the enterprise, became members of the bipartite body which manages standard medical insurance through general and secret elections recently held at the institution. In this respect, the Committee does not have sufficient information to make any conclusions on the involvement of the enterprise in the establishment of the AFGAS. The Committee also observes that the Government has not sent precise observations on the alleged measures taken by the enterprise against the UAOEGAS (it indicates generally that inspections have been conducted) and that the allegations made by the complainants are general (for example, it does not provide the names of the workers who were put under pressure to resign from the UAOEGAS nor the dates when such pressure was applied). In these circumstances, the Committee requests the complainants and the Government to send precise information concerning these allegations, so that, if necessary, the Government may launch without delay an independent investigation in this respect. The Committee requests the Government to keep it informed in this respect.*

**825.** *As regards the alleged non-fulfilment by the Gaseba S.A. enterprise of some of the provisions of the agreement concluded on 12 March 1997 following the dismissal of 33 workers, which has led, in practice, to the dismissal of Mr. Washington Beltrán, Mr. Angel García Almada and Mr. Luis A. Puig, the Committee notes that the Government states that: (1) this case has already been assessed through administrative procedures and by the Committee (Case No. 2033); and (2) at that time the General Labour Inspectorate conducted an investigation and, following extensive procedures which included processing*

*the ample evidence provided, considered that trade union repression had not occurred. In this respect, the Committee recalls that the issue of the dismissals of the trade union officers in question was already assessed during the examination of a complaint presented by the PIT-CNT in 1999, and that on that occasion it was concluded that "there is not sufficient evidence to state with certainty that the dismissal of the trade union officials is linked to their trade union functions or activities, given that they took place under the terms of the agreement of 12 March 1997" [see 320th Report, Case No. 2033, para. 836]. In these circumstances, the Committee will not proceed with the examination of these allegations.*

## The Committee's recommendation

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

***As regards the alleged establishment of a yellow union by the Gaseba S.A. enterprise, as well as the alleged measures taken by the enterprise to prevent trade union communication amongst workers, pressure to resign from the UAOEGAS and the rejection of a petition presented by the UAOEGAS in June 2003 to enter into dialogue on priority issues, on the grounds that the communication was signed by a dismissed worker, the Committee requests both the Government and the complainants to send precise information concerning these allegations, so that, if necessary, the Government may launch an independent investigation without delay in this respect.***

CASE NO. 2249

INTERIM REPORT

## Complaints against the Government of Venezuela presented by
## — the Venezuelan Workers' Confederation (CTV)
## — the International Confederation of Free Trade Unions (ICFTU)
## — the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) and
## — the National Single Federation of Public Employees (FEDEUNEP)

***Allegations: Murder of a trade unionist; refusal to register a trade union; hostile statements by the authorities against the CTV; detention order against the CTV president; promotion of a parallel confederation by the authorities; obstruction of collective bargaining in the oil industry; detention orders and criminal proceedings against trade union officials; dismissal of more than 19,000 workers because of their trade union activities; non-compliance with collective agreements; interference by the authorities and by the Petróleos de Venezuela S.A. (PDVSA) enterprise, and anti-union acts; delays in proceedings concerning violations of trade union rights; negotiation with minority public employee organizations in disregard of the most representative ones; and action by the authorities to divide trade unions***

**827.** The Committee last examined this case at its March 2004 meeting [see 333rd Report, paras. 1037-1140, approved by the Governing Body at its 289th Session (March 2004)]. Additional information was sent by UNAPETROL with the support of CTV in a communication dated 20 April 2004.

**828.** The Government sent its observations in communications dated 11 and 23 March 2004 and a communication dated 26 May 2004, received while the Committee was meeting.

**829.** Venezuela has ratified the Freedom of Association and Protection of 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

**830.** At its session in March 2004, having examined the allegations in the present case, the Committee formulated the following recommendations [see 333rd Report, para. 1140]:

(a) The Committee deeply deplores the murder of the trade unionist Numar Ricardo Herrera, member of the Federation of Construction Workers, on 1 May 2003, emphasizing 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 and requests the Government to keep it informed of the outcome of the legal proceedings relating to the murder. The Committee requests the Government to indicate clearly whether other workers were injured in the march that took place on 1 May 2003, as asserted by the ICFTU, and if so, what legal action was taken.

(b) With respect to the alleged acts of violence by the military on 17 January 2003 against a group of workers from the Panamco de Venezuela S.A. enterprise, leaders of the Beverage Industry Union of the State of Carabobo, for protesting against the raid on the enterprise and the confiscation of its goods, which represented a threat to their jobs, the Committee deplores the acts of violence which occurred during the raid on the Panamco enterprise and urges the Government to institute an independent investigation without delay into the instances of detention and torture claimed by the CTV to have been suffered by workers Faustino Villamediana, Jorge Gregorio Flores Gallardo, Jhonathan Magdaleno Rivas, Juan Carlos Zavala and Ramón Díaz. The Committee urges the Government to keep it informed of the results.

(c) As regards the allegation concerning the detention order against Mr. Carlos Ortega, president of the CTV, for the presumed perpetration of political offences during the "national civic work stoppage" ("treason", "incitement to crime" and "criminal damage") without the guarantees of due process in view of a judge's lack of impartiality, and the allegations that the President of the Republic refuses to recognize the CTV leaders, promotes the establishment of a workers' confederation supportive of his party and makes hostile public statements against the CTV and its leaders in the context of the "national civic work stoppage" which began on 2 December 2002, the Committee notes that the Government has sent its observations, received one day before its meeting. The Committee regrets the delay in the sending of that reply, which it intends to examine at its meeting in May-June 2004.

*Allegations by UNAPETROL*

(d) With respect to the allegation concerning the Ministry of Labour's refusal to register UNAPETROL despite the fact that the relevant documentation was submitted on 3 July 2002, and regarding the Ministry's request to the state enterprise PDVSA to describe the duties performed by the promoters of UNAPETROL, the Committee deplores the fact that the Ministry of Labour informed PDVSA of the names of the UNAPETROL members in order to determine who belonged to the management staff and who did not, as well as the fact that the administrative process has been delayed for so many months partly because of a judicial appeal by UNAPETROL but largely owing to delays in administrative proceedings and because it was not clearly stated what specific steps should be taken by UNAPETROL in order to be registered (for example, suggesting that the representative role of the managers be eliminated or, conversely, that that of the non-managers be eliminated). The Committee hopes that in future the procedure for trade union registration will be more rapid and more transparent and requests the Government to inform it of the steps it plans to take in this respect and initiate direct contact with the members of UNAPETROL in order to find a solution to the problem of registering the union. The Committee requests the Government to keep it informed in this respect.

(e) With regard to the alleged dismissal of more than 18,000 workers from PDVSA and its subsidiaries, including the members of UNAPETROL, since the start of the "national civic work stoppage" in December 2002, the Committee deplores these mass dismissals, of a hasty and disproportionate nature, which affected 18,000 workers, and emphasizes the fact that mass penalties for trade union actions are tantamount to abuses and destroy labour relations. It requests the Government to inform it of the result of the legal action taken by the dismissed workers and to initiate negotiations with the most representative trade union confederations in order to find a solution to the mass dismissals which took place at PDVSA and its subsidiaries as a consequence of the "national civic work stoppage", and in particular with regard to the UNAPETROL members, to whom, moreover, article 94 of the Constitution should be applied, which states that the promoters and members of the executive committees of trade unions shall enjoy irremovability for the duration of, and under the conditions necessary for, the performance of their duties. It requests the Government to keep it informed in this

respect and that it send its observations on the alleged failure to observe legal standards and the standards of the collective agreement concerning the dismissal procedure. The Committee firmly urges the Government to examine together with the trade unions the evictions affecting hundreds of former workers of PDVSA and its subsidiaries in the State of Falcón and in the San Tomé and Anaco oilfields with a view to finding a solution to the problem and to keep it informed in this respect.

(f) The Committee requests the Government to provide information on the supposed offers of dialogue in the petroleum sector to which the document refers, as well as on the corresponding evidence.

(g) Regarding the alleged anti-union reprisal in the form of PDVSA's written request to its subsidiaries and a Cypriot company not to hire the dismissed workers, the Committee regrets that the Government has not replied to these allegations. The Committee requests the Government to institute an independent investigation into this matter without delay and, if the allegations are found to be true, ensure that the workers affected are paid appropriate compensation.

(h) As regards the detention orders of 26 February 2003 issued against the UNAPETROL president and labour management secretary, Mr. Horacio Medina and Mr. Edgar Quijano, respectively, at the request of the Office of the Attorney-General of the Republic of Venezuela, by a penal court for presumed acts of sabotage and damage to installations belonging to the PDVSA enterprise (alleged discontinuation of electricity or gas supplies), as well as presumed political offences, and as regards similar actions taken with respect to other UNAPETROL members (Juan Fernandez, Lino Carrillo, Mireya Ripanti de Amaya, Gonzalo Feijoo and Juan Luis Santana, former company directors), the Committee regrets that the Government has not replied specifically to these allegations and urges it to send its observations in this respect as a matter of urgency.

(i) With respect to the alleged systematic harassment of oil workers by the PDVSA loss prevention and control management and by a new pro-government workers' organization called the Association of Oil Workers (ASOPETROLEROS) (verbal and written threats via e-mail and Intranet; transfers of trained staff for political reasons; persecutions and espionage; arbitrary decisions concerning the structure and functioning of PDVSA and its subsidiaries having a direct effect on the workers), the Committee regrets that the Government has not replied to these allegations and urges it to do so fully and without delay.

*Allegations by FEDEUNEP*

(j) As regards the alleged obstruction by the labour inspectorate of the draft fourth collective agreement submitted by FEDEUNEP, imposing demands that go beyond the law or are impossible to fulfil in practice within the prescribed deadline and subsequently rejecting the draft, as well as acceptance of a new draft (which was converted into a collective agreement) originating from six of the 17 FEDEUNEP leaders who formed a federation (FENTRASEP) approved by the government authorities and the Ministry of Labour, the Committee regrets that the Government has not replied to these allegations and urges it to send its observations fully and without delay.

(k) As regards the alleged initiation of disciplinary proceedings against Mr. Gustavo Silva, SINTRAFORP general secretary, and Ms. Cecilia Palma, president of the FEDEUNEP disciplinary tribunal, the Committee regrets that the Government has not replied to these allegations and urges it to do so without delay.

(l) Finally, the Committee would underline that it remains seriously concerned about the situation of workers' and employers' organizations in Venezuela and urges the Government to implement all its recommendations without delay.

## B. New allegations

**831.** In its communication of 17 February 2004, the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL), supported by the CTV, alleged that the President of the Republic, Hugo Chávez Frías, in his message to the nation on 15 January 2004 to

mark the fifth year of his Government, made statements amounting to an admission of the extremely serious fact of having intentionally and treacherously provoked the crisis in the national oil industry and the consequences which he, together with his collaborators and perpetrators, had designed in order to implement the threat that he himself had made in his radio and television programme "Aló, Presidente" of 7 April 2002, when, with a referee's whistle between his lips, he announced the dismissal of Eddie Ramirez, Juan Fernandez, Horacio Medina, Gonzalo Feijoo, Edgar Quijano, Alfredo Gomez and Carmen Elisa Hernandez. In addition to this, he also "swore" to dismiss all the workers if necessary. Such behaviour amounts to serious misconduct on the part of the employer or his representatives, which is why the complainant organization went before the employment stability tribunals to seek the restoration of the workers' labour rights in the form of the return to work of all those unjustifiably dismissed.

**832.** The complainant organization adds that the workers of INTEVEP, S.A., a subsidiary of the Petróleos de Venezuela S.A. (PDVSA) company, were unjustifiably dismissed en masse. This particular occurrence comes within the framework of dismissals previously reported. According to the complainant organization, on 10 February 2003, seven workers acting on their own behalf and in their capacity as workers having been dismissed from the INTEVEP S.A. trading company, located on the Santa Rosa estate, El Tambor sector, Los Teques, State of Miranda, presented to the labour inspectorate of the municipality of Guaicaipuro, State of Miranda, pursuant to the provisions of articles 63 et seq. of the regulations of Venezuela's Organic Labour Act, a request for the opening of proceedings to suspend the mass dismissals, since INTEVEP had given notice of dismissal to 881 employees effective 31 January 2003, amounting to a mass dismissal since on one single day and in one single act it dismissed over 50 per cent of its paid workforce (article 34 of Venezuela's Organic Labour Act), which, at 31 January 2003, amounted to some 1,650 workers.

**833.** On 11 February 2003, the labour inspector of the municipality of Guaicaipuro, State of Miranda, accepted the request without comment and notified the representation of the INTEVEP company, in accordance with the provisions of article 63 of the regulations of the Organic Labour Act. At the request of the employer, the inspector issued a decision agreeing to open the probatory period of eight working days provided for in article 64 of the regulations of the Organic Labour Act. On 13 March 2003, the illegally dismissed workers confirmed the accusation of mass dismissal, and INTEVEP informed the labour inspector of a further decision on its part to notify the dismissal, on 6 March 2003, of 88 workers, in addition to the 881 already dismissed, thereby increasing the number of dismissals with respect to the company's paid workforce. The complainant organization states that on 13 May 2003 the labour inspector produced his report on the allegation of mass dismissal by the company INTEVEP S.A., asserting there to be no substance on which to make a pronouncement and no grounds for giving effect to the provisions of article 67 of the Organic Labour Act. The complainant points out that the dismissed workers were denied access to the case file.

**834.** On 1 July 2003, the dismissed workers lodged with the Ministry of Labour a hierarchical appeal against the report by the labour inspector of the municipality of Guaicaipuro, State of Miranda. The irregularities referred to included: (1) violation of the right of defence and of due process, as provided for in article 49 of the national Constitution; (2) violation of the right of defence, of due process and of petition, as provided for in articles 49 and 51 of the national Constitution and articles 2 and 22 of the Organic Act on Administrative Procedures, inasmuch as in his report corresponding to the culmination of the administrative procedure the labour inspector states that "... the quantitative requirement laid down in the legislation has not been met ..." since "... it is clear to anyone examining the current procedure that the only formal complainants regarding the alleged mass dismissal are the seven petitioners previously identified, there being no documentary

evidence of any wish on the part of the remaining 874 workers to lodge the said complaint ..."; in other words, the official considers it necessary to have an application on the part of all of the dismissed workers in order to request the opening of a procedure to suspend a mass dismissal, despite there being no such provision in the legislation; (3) incorrect appreciation of the law, the labour inspector having produced a number of inconsistencies and errors of interpretation of the labour legislation in force when he issued an administrative decision based on the content of a provision that does not apply to the case in question, namely article 34 of the Organic Labour Act, when he should have applied article 65 of the regulations of that same Act; (4) misuse and abuse of power, the labour inspector having distorted the understanding of labour regulations invoked as a legal foundation or basis. Finally, the complainant organization states that the Minister of Labour and other administrative officials directly involved with the field of labour repeatedly, publicly, in a discriminatory and biased manner and through the imposition of formalities not provided for in the legislation, repeatedly adopted, for the sole purpose of unduly delaying the administration of justice, a biased and condemnatory stance vis-à-vis the workers who had been dismissed from the national oil industry. The impartiality that is due from the Ministry of Labour with respect to the reported mass dismissal is seriously compromised inasmuch as the author of the mass dismissals is the Government of Venezuela, and inasmuch as the government body responsible under the law for defending the rights of workers, namely the Ministry of Labour, is acting in accordance with directives issued by the National Executive and has, through its highest representative, expressed an opinion with respect to the dismissed oil workers. The Minister of Labour, by resolution No. 3002, rejected the appeal that had been lodged, stating there to be no socially beneficial grounds in favour of suspending the mass dismissal of the workers of the INTEVEP company, a subsidiary of PDVSA. On the contrary, the shut-down of the oil, gas and petrochemical industry by its workers, including those of INTEVEP, disrupted the quality of life in all areas of Venezuelan society.

**835.** As regards the violation of the trade union immunity of Mr. Diesbalo Osbardo Espinoza Ortega, general secretary of the Union of Workers, Oil Employees and Associated of Carabobo State (SOEPC), the complainant organization states that, following the initiation of the procedure provided for in articles 453 et seq. of the Organic Labour Act for the "examination of the grounds of the dismissal" of the leaders of that trade union, including Mr. Diesbalo Osbardo Espinoza Ramírez, general secretary of the union, the owner of the company PDVSA Petróleo S.A. requested the labour inspector to order the precautionary measure of barring the union leaders from having access to the company premises, on the grounds that those union leaders had allegedly generated a strike in December 2002. That measure was agreed to, in addition to which the owner suspended the payment of salaries to the union leaders.

**836.** As regards the persecution of UNAPETROL leaders, warrants for the arrest of whom had been issued, the complainant organization states that on 25 June 2003, by a decision of the Constitutional Division of the Supreme Court of Justice, all of the litigation in the criminal proceedings under way was cancelled. Nevertheless, the process of persecution of the aforementioned union leaders and oil workers was reinitiated by the Office of the Attorney-General, with new writs being served on 1 and 2 March 2004.

**837.** The complainant organization goes on to describe the current situation with regard to the unjustified dismissals of workers from Petróleos de Venezuela. It states that, out of a total of some 41,000 workers, 20,000 were dismissed as from 13 December 2002. This was accompanied by 3,000 unjustified dismissals from the INTESA company, in which PDVSA had a shareholding of 40 per cent and SAIC of 60 per cent, the workers in question having been engaged in the process of incorporation into the PDVSA workforce prior to the national civic work stoppage of 2 December 2002.

**838.** The complainant affirms that UNAPETROL was established as a national trade union in an assembly of workers on 10 June 2002, with a total of 459 founder members, only 150 founders being necessary under the labour legislation in force, and with no requirements over and above those indicated in the legislation, no administrative body, in this case the Ministry of Labour, having any powers to prevent its registration beyond those provided for under the legislation to permit the registration of any trade union organization, which of course may not contravene constitutional provisions or the provisions of ILO Conventions Nos. 87 and 98 on freedom of association and the right to organize, both of which have been ratified by the Government of the Bolivarian Republic of Venezuela. The staff members who, under the statutes, may become members of UNAPETROL are those at the senior and middle management levels, these being terms defined internally by the PDVSA and which are not defined in the labour legislation in force in Venezuela. Over 95 per cent of these staff members do not perform managerial functions. The so-called senior and middle management find in UNAPETROL the body which represents and defends them in the absence of any representative organization for these workers, and these workers have working conditions that are specified in their individual contracts of employment and PDVSA's internal regulations. Only those workers belonging to the so-called lower levels of the workforce have, since 1940, had representative trade unions, which negotiate collective agreements with PDVSA. All these workers, apart from those indicated as being on the board of directors of PDVSA and a small number of others who, under the labour legislation, are characterized as human resources managers, have the constitutional right to establish free trade unions, as provided for in article 95 of the national Constitution adopted on 15 December 1999.

## C. The Government's reply

**839.** In its communication of 3 March 2004, the Government refers to the allegations presented by the Venezuelan Workers' Confederation (CTV) relating to the trade union's hostile treatment by the Government, using as an additional pretext CTV's participation in the "national civic work stoppage", the refusal to recognize its leaders, the promotion of a pro-government workers' confederation, and the use of state power to deprive the CTV president of his liberty (on 19 February 2003, an order was issued for the detention of Carlos Ortega).

**840.** The Government denies that it reserved hostile treatment to CTV or any trade union. The Government reaffirms, nonetheless, that it recognizes the institutional nature of the CTV, but has been provided with no factual or legal arguments for recognizing a so-called executive committee which has been challenged by other trade union sectors since the holding of the CTV elections in 2001. The Government insists that it is not a question of interference on the part of the Venezuelan State, but that on the contrary the State, as represented by the President of the Republic, is extremely concerned and responds politically to those who, politically on behalf of the CTV, take actions that run counter to the actions of trade union and trade association leaders and systematically promote a strictly political agenda that violates the Constitution of the Republic and is thus anti-democratic. That is the hostile treatment of which the CTV is complaining.

**841.** The Government adds that the CTV's intention is to discredit the Head of State. Indeed, the self-styled members of CTV's executive committee have turned aside from the fundamental objective of any workers' organization and have devoted themselves solely to political proselytism, systematically accusing the President of the Republic of being a dictator, it being clear from the subversive practices of the self-styled members of the CTV executive committee that their intention is to destabilize the State institutions, impose a dictatorship and take power by force, just as they did together with the employers' organization FEDECAMARAS for a short period on 12 and 13 April 2002. The Government underlines that one of the principal architects of the country's political,

economic and social destabilization is Mr. Carlos Ortega, who claims to be the president of the CTV. Indeed, Mr. Pedro Carmona Estanga, the self-proclaimed President of the Republic and the then (April 2002) president of the employers' organization FEDECAMARAS, said, in statements made to a local newspaper one year after mounting the *coup d'état*, that the self-styled president of the CTV, Mr. Carlos Ortega, had endorsed a part of the de facto cabinet at the time.

**842.** According to the Government, a few months after Mr. Carlos Ortega and other self-styled leaders of the CTV executive committee had proclaimed themselves members of that committee, with the systematic backing of private operators, owners of communication media and opposition parties involved in the conspiracy against a Government that had been legally established by popular vote, the self-styled CTV executive committee began to foster an attitude of ongoing conspiracy against Venezuelan democracy and its legitimately established authorities. Mr. Ortega dedicated himself systematically and solely, together with the other self-styled members of the CTV executive committee, to a succession of subversive actions, fostering hatred, intolerance and the sabotaging of the Venezuelan economy with clear political intentions having nothing to do with the Constitution, law or democracy, even though paradoxically he "spoke" in the name of democracy, until ultimately Mr. Ortega took part in the planning and implementation of the so-called "civic work stoppage" of 21 October and subsequently the whole of December 2002 and January 2003, aided and abetted by, and in association with, the representation of FEDECAMARAS. There can be no denying the lack of respect and climate of aggression that has been fostered by the self-styled representation of the CTV, together with the employers' organization FEDECAMARAS, whose former president signed, on 12 April 2002, the deed of constitution of the transitional Government, thereby seeking to justify the *coup d'état* that had been mounted by a minority portion of civil society.

**843.** The Government once again insists on its position of non-interference vis-à-vis the institution CTV and those who claim to be its representatives, who have still not been capable of demonstrating in a transparent, legal and convincing manner that they have been legitimately elected; nor have they ever presented the corresponding communication, certified and signed by CTV's electoral board, following the holding of an election by those affiliated to the confederation, as was the commitment at the request of the CTV's union management board, that commitment having been secured with the authorities of the National Electoral Council prior to the confederation's elections in October 2001.

**844.** As regards the alleged promotion of the establishment of a workers' confederation supportive of its party, the Government points out that the free establishment of a trade union, federation or confederation is perfectly normal on Venezuelan territory, just as it is strictly right and proper for the national Government not to interfere administratively in workers' affairs. In actual fact, it is the affiliated workers themselves who are settling and resolving their differences. Indeed, if the members of the CTV establish a new trade union which brings them together in the form of a confederation and which complies with the requirements laid down under the law and the ILO Conventions, the Government is bound to register it.

**845.** As regards the allegation that the President of the Bolivarian Republic of Venezuela is using the full weight of the State's power to deprive the president of the Confederation of his liberty, giving effect to his intention by having had issued, on 19 February 2003, a detention order against Carlos Ortega, the Government states that the judicial procedure was carried out by the competent authorities of the judiciary, and that the National Executive acted solely as a subsidiary body to the courts and through the Intelligence and Prevention Services Directorate, attached to the Justice and Interior Ministry. ILO Convention No. 87 requires trade union leaders to abide by the law. The Constitution specifies the manner in which the country's public authorities are divided, assigning to

each branch the corresponding competencies and powers. The judicial detention order issued by the relevant court against Mr. Carlos Ortega has absolutely nothing to do with any interference on the part of the national Government. Nor was it the consequence of the exercise of trade union activities, which means that the State's action was in accordance with the law, since the holder(s) of trade union office do not, by virtue of their position, have the right to transgress legal provisions in force, all the more so where those provisions have to do with the rights of persons, essentially the most vulnerable, who have been the most affected by incidents led by individuals who systematically deprived our population of essential public services, which they interrupted without any legality whatsoever, thereby putting in danger the lives, health and safety of the citizens.

**846.** The Government recalls that where ignorance of the law on the part of employers' or workers' trade associations is concerned, the Committee on Freedom of Association has clearly stated its opinion that "political matters which do not impair the exercise of freedom of association are outside the competence of the Committee. The Committee is not competent to deal with a complaint that is based on subversive acts, and it is likewise incompetent to deal with political matters that may be referred to in a government's reply" [see *Digest of decisions and principles of the Freedom of Association Committee*, para. 201], and that "In the interests of the normal development of the trade union movement, it would be desirable to have regard to the principles enunciated in the resolution on the independence of the trade union movement adopted by the International Labour Conference at its 35th Session (1952) that the fundamental and permanent mission of the trade union movement is the economic and social advancement of the workers and that when trade unions, in accordance with the national law and practice of their respective countries and at the decision of their members, decide to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social objectives, such political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social or economic functions, irrespective of political changes in the country."

**847.** The Committee has likewise stated that "Trade union organizations should not over-indulge in political activities and go beyond their true functions by promoting essentially political interests" [see *Digest*, op. cit., para. 355]. "It is only in so far as trade union organizations do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities. On the other hand, it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character. These two notions overlap and it is inevitable, and sometimes usual, for trade union publications to take a stand on questions having political aspects as well as on strictly economic and social questions" [see *Digest*, op. cit., 1985, para. 359].

**848.** The Government once again underlines the political, subversive and illegal character assumed by the self-styled executive committee of the CTV and of the person claiming to be its president, Mr. Carlos Ortega, as well as by the former president of the employers' organization FEDECAMARAS. These persons are seeking to conceal their strictly subversive and political activities, alleging that their "status as trade unionists" as established in ILO Convention No. 87 is being violated or disregarded. The Government urges the honourable Committee on Freedom of Association not to fall into this trap, since Mr. Ortega did not act in pursuit of the "promotion and defence of the economic and social interests of the workers".

**849.** The complaint lodged with the Committee on Freedom of Association provides particularly clear proof of a union of sectors that are historically different, the self-styled representatives of the workers (CTV) and of the employers (FEDECAMARAS) having clearly joined forces, just as they did in order to conspire and systematically disown the

constitutional State as from the latter part of 2001, with the anti-democratic participation, moreover, of former executives and other officials who held senior positions in the state company Petróleos de Venezuela (PDVSA), high-, middle- and low-ranking military personnel, totally outside the Constitution, and leaders of political parties from the opposition grouped together in the so-called "democratic coordination", who, claiming to be acting in support of the people and with the undue utilization and complicity of communication media belonging to private radio, television, electronic and press enterprises, issued military communiqués to the population and directly urged the inhabitants of the Republic to disown the democratic and legitimate Government chosen by the Venezuelan people.

**850.** The Government illustrates the authoritarian, political and anti-democratic involvement of Mr. Carlos Ortega with newspaper articles that demonstrate the illegal activities fostered by him and which had nothing whatsoever to do with any kind of struggle relating to claims of a union, labour, economic or social nature but resulted in legal proceedings under Venezuelan law, in full respect for the human rights of both of those charged, those legal proceedings having been initiated in accordance with the regulations in force in our country by the Office of the Attorney-General of the Republic and the respective courts for the following offences: treason, conspiracy, incitement to crime, civil rebellion and criminal damage.

**851.** Mr. Ortega never placed himself at the disposal of the Office of the Attorney-General of the Republic or of Control Court 34, becoming instead a fugitive from Venezuelan justice. Later, on 20 March 2003, Mr. Ortega took refuge in the Republic of Costa Rica.

**852.** The Government states that the so-called "civic work stoppage" and the sabotage promoted by the conspirators Carlos Ortega and Carlos Fernández destroyed 760,846 jobs (unemployment rose by 5 percentage points). Also significant is the economy's recovery in terms of the generation of jobs, there having been a fundamental recovery in this regard in the second half of 2003, with the jobs lost on account of the economic sabotage and so-called "civic work stoppage" fostered and led by Mr. Carlos Ortega in the name of the CTV, democracy and human rights, having been recovered. The "civic work stoppage" led, moreover, to a sharp rise in inflation owing to the paralysis of the main industry and the lack of foreign currency earnings, not to mention the capital outflow, cost speculation and the distribution chain. Even more crushing was the way in which the so-called "civic work stoppage" almost devastated the Venezuelan economy through the drop in GDP, something in which Mr. Carlos Ortega and Mr. Carlos Fernández, as president of FEDECAMARAS and on behalf of that employers' institution, played a direct part. Following the devastating drop in the level of GDP in the first three-quarters of the year, it began once again to rise in the last quarter, and this, together with the recovery of the oil industry and other factors, served to restore investor confidence.

**853.** The Government states that in a communication it was able to intercept between Mr. Ortega and the current president of the CTV, Mr. Ortega made anti-democratic statements in which he spoke of the setting up of a dictatorship. Recently, in a fresh conspiracy against the Government, Mr. Carlos Ortega, on 10 February 2004, made a number of public statements from Costa Rica in which he falsely and recklessly claimed that "President Hugo Chávez ... is preparing to launch a self-coup *(autogolpe)* sometime this week", the context for this supposed self-*coup d'état* being the non-acceptance of a decision by Venezuela's electoral branch regarding a possible referendum on revoking the mandate of the President of the Bolivarian Republic of Venezuela, an action permitted under the Constitution of the Republic and which is being implemented and supervised by the National Electoral Council, with a large number of observers from the Organization of American States (OAS), the Carter Center, as well as observers from the parties concerned.

The views expressed by Mr. Ortega, referred to in the previous paragraph, prompted a written warning from the authorities of the Republic of Costa Rica.

**854.** As regards the allegations made by FEDEUNEP, the Government states in its communication of 23 March 2003 that, on 17 September 2002, the National Single Federation of Public Employees (FEDEUNEP) presented to the National Inspectorate and Collective Labour Affairs Department (Public Sector) a draft collective agreement entitled "draft fourth collective labour agreement for public administration employees". On 18 September 2002, the National Labour Inspector requested FEDEUNEP to make corrections that were necessary for reasons of legality pursuant to the provisions of article 517 of the Organic Labour Act in force, giving it a period of 15 days to make the required corrections in accordance with the provisions of article 50 of the Organic Act on Administrative Procedures, all of which was notified to it on 19 September 2002. The official acted in accordance with the law and in the exercise of his duties and competencies, there having thus been no violation of freedom of association.

**855.** The Government adds that, on 14 October 2002, FEDEUNEP sent a communication to the National Labour Inspector stating that it was not going to comply with the request and that it did not recognize the competence of the National Labour Inspector. On 16 October 2002, the National Labour Inspector stated that he is indeed the competent official, that the stated requirements had to be complied with since they had to do with public order, and that the labour administration is obliged to monitor the observance of legal provisions not complied with by the Federation, declaring the procedure to be terminated. This decision can be appealed against through administrative channels. The case file contains no mention of any appeal being lodged against this decision, and the decision, considered thus to have been accepted by FEDEUNEP, therefore stands. It is clear from the foregoing that the termination of the said procedure and its legal consequences can be attributed to the lack of due diligence on the part of those who initiated it, in consequence of which the actions of the labour administration does not constitute disregard of union rights, interference or abuse of authority.

**856.** Subsequently, on 23 October 2002, the labour inspector received another draft collective agreement, entitled "fourth framework collective agreement for public administration employees, pensioners and retirees", presented by a number of citizens stating themselves to be FEDEUNEP executives. On the same date, it was recorded in the minutes that the supporting documents were received without any decision being taken, and the minutes were signed both by those claiming to be representatives of FEDEUNEP and by the leaders of the first-level trade unions supporting the agreement, whether or not affiliated to the Federation. On 8 November 2002, further signatures were received in support of the request by FEDEUNEP. On 27 December 2002, negotiations began on the draft collective agreement, not only with those claiming to belong to the Federation but also with the representatives of the first-level trade unions.

**857.** On 7 March 2003, the First Administrative Court notified the labour inspector that another group of citizens claiming to represent FEDEUNEP had lodged an appeal for the declaration of nullity of an administrative action together with a claim for the enforcement of their constitutional rights *(amparo constitucional)*. On 11 April 2003, the Court made a precautionary ruling allowing the appeal, declaring the precautionary *amparo* to be in order and, additionally, ordering the suspension of the administrative proceedings being pursued by the Director of the National Inspectorate and Collective Labour Affairs Department (Public Sector) of the Ministry of Labour in relation to the draft "fourth framework collective agreement for public administration employees, pensioners and retirees" presented on 23 October 2002; it also required the office to refer the case in the framework of the ongoing administrative annulment proceedings, thereby surmising as to a latent intra-union problem regarding which the labour administration is not competent.

**858.** In view of the precautionary ruling issued by the First Administrative Court, on 7 May 2003, collective bargaining having previously been suspended by that court order, the Director of the National Inspectorate and Collective Labour Affairs Department (Public Sector) of the Ministry of Labour presented a written objection to the effect that the ruling contained a large number of inconsistencies and fundamental errors which invalidated it and, in particular, stated that a dispute relating to trade union elections or a conflict within a given union could not be resolved by the administrative authority, that the ruling could not be made on the basis of the evidence contained in the case file, and that evidence could not be based on an opinion expressed by the labour inspector. The precautionary ruling should have been limited to determining the status of the persons in question and should not have brought the collective bargaining to a halt, especially when it involved not only the Federation but also the first-level trade unions, these being the direct and immediate beneficiaries of the right to voluntary collective bargaining. He advanced the view that the acceptance of the draft collective agreement that had been in process did not in any way imply the recognition of the representatives involved; that by 23 October 2002 nothing was known of the legitimacy or otherwise of the citizens claiming to be FEDEUNEP executives, inasmuch as the supporting documentation relating to personal status with which they were acting was never presented either by the requesting party or by the employer in accordance with the law, there being no mandatory requirement that the administration should inquire as to that situation; that the draft was not presented solely by the alleged representatives of FEDEUNEP but, on the contrary, by a number of trade unions not affiliated to it; and that for this reason the Director of the National Inspectorate and Collective Labour Affairs Department (Public Sector) of the Ministry of Labour was not in a position to refuse to process the draft presented. Finally, it was requested that the precautionary ruling be revoked on the grounds that it was the status of the FEDEUNEP representatives that was under discussion and not that of the first-level unions, and that it amounted to judicial interference in the freedom of association of the aforementioned Federation. He points out that a number of citizens objected to the precautionary measure on a third-party basis, affirming that the reported violations cannot be imputed to the director in question inasmuch as the lack of representativity or status of the trade union constitute, in the course of the negotiations, elements that the employer can use to his favour which cannot be opposed by the labour entity; and that matters were weighed up incorrectly inasmuch as an outrage was committed against the collective interests of more than 500,000 public sector workers who were prevented from engaging in collective bargaining for the purpose of improving their working conditions.

**859.** The First Administrative Court decided, by a ruling made on 14 August 2003, to declare the discontinuation of the appeal for declaration of nullity together with the precautionary decision to suspend the effect of the administrative proceedings instituted by the representatives of FEDEUNEP, considering the provisions of article 125 of the Organic Act of the Supreme Court of Justice to be applicable on account of the loss of interest on the part of the Federation and the consequent acceptance of all the actions of the labour administration. In other words, the inactivity and lack of diligence on the part of the complainants had resulted in the filing of the case, in consequence of which the conduct was deemed appropriate.

**860.** On 30 May 2003, the National Executive Coordination of the National Federation of Public Sector Workers (FENTRASEP) put before the Ministry of Labour a draft collective agreement for public administration employees, pensioners and retirees; it did so with the support of those first-level unions that were disaffiliated from FEDEUNEP, this having been placed on record when the draft was introduced, it being noted that no remarks of a legal nature were made concerning the draft. During the discussions, other unions expressed their support, both for the collective agreement and for FENTRASEP.

**861.** On 5 June 2003, other persons stating themselves to be FEDEUNEP leaders – the same persons who lodged the appeal without awaiting the ruling of the First Administrative Court – once again presented a draft collective agreement for discussion, that draft being received by the labour administration despite its having previously accepted a draft collective agreement presented by FENTRASEP. On 12 June 2003, pursuant to the provisions of article 517 of the Organic Labour Act, the presumed executive committee of FEDEUNEP was requested to make corrections that were necessary for reasons of legality, being given a period of 15 days to make the required corrections in accordance with the provisions of article 50 of the Organic Act on Administrative Procedures. FEDEUNEP refused to comply with that request, stating that the national inspector lacked jurisdiction. On 17 July 2003, the national inspector issued an administrative ruling declaring the conclusion of the procedure. The case file contains no record of any administrative appeal or administrative challenge against that ruling, which was thus accepted.

**862.** On 25 August 2003, once the discussions and voluntary negotiations had been completed between the public administration, the National Federation of Public Sector Workers (FENTRASEP) and the first-level unions disaffiliated from FEDEUNEP, and other unions having duly expressed their support both for the collective agreement and for FENTRASEP, the collective agreement for national public administration employees and officials, which benefits over 500,000 workers, was signed.

**863.** As regards the complaint lodged by FEDEUNEP regarding the dismissal of Cecilia Palma from the nominal post she occupied at the National Nutrition Institute (INN), the Government points out that the corresponding disciplinary proceedings were pursued against the aforementioned citizen, leading to a sufficiently well-substantiated administrative ruling on 6 November 2002 by which the aforementioned official was dismissed from her post of Attorney I, there having been sufficient grounds for such dismissal under article 62(2) of the Administrative Service Act. It should be noted that, in response to this, citizen Palma lodged an appeal for declaration of nullity of an administrative action, it being finally concluded by Higher Administrative Court No. 7 , on 1 September 2003, that "the attorney Cecilia de Lourdes Palma Maita displayed an extremely serious lack of integrity vis-à-vis the institution with which she was employed and her colleagues, entering into an irregular situation in which she took advantage of the situation the country was experiencing at the time, such behaviour on the part of the complainant being inexcusable. The judge notes that the misconduct with which the complainant was charged cannot be excused since her actions resulted in damages to the National Nutrition Institute". As can be seen, the judge dismissed the appeal for annulment of the administrative ruling, thereby establishing that the actions of the employer institution constituted neither a political retaliation to the events of 11, 12 and 13 April 2002, nor a violation of the citizen's right to exercise her union activities, nor anti-union discrimination, but rather that a punishment was imposed in response to the fact that her actions fell within one of the scenarios which the internal regulations punish by means of the disciplinary action taken.

## D. The Committee's conclusions

**864.** *The Committee notes the Government's observations. The Committee observes that the Government refers to events which occurred in April 2002, i.e. on dates that are different from those of the allegations presented which do not form part of the present complaints. For this reason, the Committee will not refer to those events.*

**865.** *As regards the allegations relating to the detention order served against Mr. Carlos Ortega, president of the Venezuelan Workers' Confederation (CTV), the Committee notes the Government's statements according to which: (1) the apparent trade union office of Mr. Ortega does not confer upon him an immunity that allows him to transgress the legal*

*provisions in force; (2) Mr. Ortega has devoted himself, in addition to union activities, to conspiring through subversive activities including participation in the planning and implementation of the so-called "civic work stoppage" of 21 October, and in the one carried out in the months of December 2002 and January 2003, in complicity and association with the representation of FEDECAMARAS, inciting hatred, intolerance and sabotage with clear political intentions; (3) the detention order against Mr. Ortega was issued by the judiciary, fully independently, in accordance with the system of division of powers, and the Executive confined itself to complying with the judicial arrest warrant, which is not motivated by any anti-union considerations.*

**866.** *The Committee observes, in respect of the civic work stoppages of October and December 2002, and January 2003, that the Government identifies the organization of, and participation in, those stoppages as subversive activities (in addition to having resulted in a 5 per cent increase in the level of unemployment and the devastation of the Venezuelan economy), and that, in short, it is on account of those activities that the arrest warrant was issued against Mr. Ortega, with the accusation of treason, incitement to crime and criminal damage. In this respect, the Committee recalls that in its previous examination of the case it had expressed the view that "the national civic work stoppage convened by the CTV, inter alia, and comprising a set of labour claims, can be likened to a general strike, and therefore to a trade union activity and that the detention of leaders of workers' and employers' organizations for activities connected with the exercise of their right to organize is contrary to the principles of freedom of association" [see* ***Digest of decisions and principles of the Committee on Freedom of Association****, 4th edition, 1996, para. 69]. The Committee recalls that hundreds of thousands of persons participated in the civic work stoppages, and that although the principal objective of the stoppages was to secure the departure from office of the President of the Republic or the holding of a recall referendum, they did not result in any* coup d'état*, what lay behind the demands having more to do with a clear protest against the Government's economic and social policy and its consequences, and against the failure to recognize the executive board of the CTV.*

**867.** *As regards the warrant for the arrest of Mr. Ortega, the Committee regrets to observe that the Government has not replied in full to the allegations to the effect that the arrest warrant was issued within the framework of a procedure without guarantees of due process, by a judge who lacked impartiality. The Committee observes that according to the Government, the civic work stoppage was the scene of sabotage and acts of violence resulting in physical injuries to a number of people, with numerous violations of human rights.*

**868.** *The Committee observes that although the Government considers Mr. Ortega and the president of FEDECAMARAS to have instigated a major part of the aforementioned offences, reference is made only to generic charges highlighting the very serious consequences of the civic work stoppages for the economy and level of employment, without any enumeration of the specific actions attributable to Mr. Ortega and which gave rise to the accusations. The Government has provided a chronological list of statements made by Mr. Ortega, in which verbal excesses are to be seen, but it cannot be deduced from those statements that there was any call for violence, nor can one justify the existence of a causal link between the statements made by Mr. Ortega and any offences committed during the civic work stoppages. The Committee emphasizes, moreover, that Mr. Ortega has taken refuge in another country. Finally, the Committee would underline that only Mr. Ortega, president of the CTV, which is the most representative trade union confederation in Venezuela, and the president of FEDECAMARAS were the subject of detention orders, despite the fact that other political sectors and parties took part in the civic work stoppage.*

**869.** *In these circumstances, the Committee considers that the purpose of the detention order against Mr. Ortega was to neutralize or take reprisals against this union leader for his activities in defence of workers' interests, and it therefore strongly urges the Government to take steps to vacate the detention order against Mr. Ortega and guarantee that he may return to the country so as to be able to perform the trade union functions corresponding to his post of president, without being subject to reprisals.*

**870.** *With respect to the failure to recognize the executive committee of the CTV, including its president Mr. Ortega, the Committee notes the Government's statement to the effect that those who claim to be its representatives have thus far been unable to demonstrate in a transparent, legal and convincing manner that they have been legitimately elected, and have not presented the communication, certified and signed by CTV's own electoral board, following the holding of an election by those affiliated to this Confederation, as was the commitment with the authorities of the national electoral council prior to the Confederation's elections in October 2001, at the request of the CTV's union management board; furthermore, that executive committee is being challenged by other union elements who participated in the CTV's electoral process. The Committee observes that this question was already examined in another case (see Case No. 2067, 330th Report, para. 173), repeats it previous observations and recommendations, and therefore once again urges the Government to recognize the executive committee of the CTV. The Committee recalls that the supervision of trade union elections should be carried out through judicial channels and that the various ILO supervisory bodies have pointed out that the national electoral council's intervention in the elections is not in conformity with Convention No. 87.*

**871.** *As regards the promotion of the establishment of a workers' confederation supportive of the party of the President of the Republic and the hostile statements towards the CTV, the Committee notes the Government's statement to the effect that: (1) the free establishment of a trade union, federation or confederation is perfectly normal on Venezuelan territory, just as it is strictly right and proper for the Government not to interfere in workers' affairs; it is the affiliated workers themselves who are settling and resolving their differences, and if the members of the CTV establish a new trade union which brings them together in the form of a confederation and which complies with the requirements laid down under the law and the ILO Conventions, the Government is bound to register it; (2) as regards the Government's hostile statements in regard to the CTV and its leaders, the Government denies treating the CTV or any other trade union with hostility, pointing out, nevertheless, that it is extremely concerned at the internal situation of the CTV, political responsibility for which lies with those who, politically, on behalf of the CTV, engage in actions that run counter to the conduct and actions of trade union leaders and systematically promote a strictly political agenda that violates the Constitution of the Republic and is hence anti-democratic. The Committee recalls that "on more than one occasion, it has examined cases in which allegations were made that the public authorities had, by their attitude, favoured or discriminated against one or more trade union organizations: (i) pressure exerted on workers by means of public statements made by the authorities; (ii) refusal to recognize the leaders of certain organizations in the performance of their legitimate activities; discrimination by such methods, or by others, may be an informal way of influencing the trade union membership of workers; they are, therefore, sometimes difficult to prove. The fact, nevertheless, remains that any discrimination of this kind jeopardizes the right of workers set out in Convention No. 87, Article 2, to establish and join organizations of their own choosing" [see **Digest**, op. cit., para. 306]. The Committee notes that the CTV and ICFTU have referred to specific hostile statements being directed at the CTV by the authorities and requests the Government to abstain from making statements in CTV's regard which could express hostility towards that trade union, as well as to abstain from promoting the establishment of other trade unions or confederations.*

**872.** *As regards the alleged obstruction by the labour inspectorate of the draft fourth collective agreement submitted by FEDEUNEP, imposing demands that go beyond the law or are impossible to fulfil in practice within the prescribed deadline and subsequently rejecting the draft, as well as acceptance of a new draft (which was converted into a collective agreement) originating from six of the 17 FEDEUNEP leaders who formed a federation (FENTRASEP) approved by the government authorities and the Ministry of Labour, the Committee notes the Government's observations to the effect that the draft fourth collective agreement submitted on 17 September 2002 by FEDEUNEP was observed by the labour inspectorate, pursuant to article 517 of the Organic Labour Act, not to be in compliance with the legal requirements (supplying of the FEDEUNEP statutes, correction of the record of the assembly of FEDEUNEP's national executive committee, supplying of an up-to-date list of the member unions or associations, supplying of an up-to-date list of the workers affiliated to each of the unions, presentation of the rank and file union membership's authorization for submitting the draft, among other things), the trade union having been given a period of 15 days within which to make the corrections, this having not been done by the union, which saw the labour inspectorate as lacking the competence to make the aforementioned observations. The Committee likewise notes that according to the Government, a number of FEDEUNEP officials subsequently submitted a new draft collective agreement which led to the commencement of negotiations on 27 December 2002, but was contested by another sector of the Federation through an appeal for annulment submitted to the First Administrative Court, that appeal being ultimately declared withdrawn. Finally, the Committee notes that on 30 May 2003, the national executive coordination of the National Federation of Public Sector Workers (FENTRASEP), supported by a group of first-level unions disaffiliated from FEDEUNEP, submitted a new draft collective agreement which drew no observations of a legal nature from the labour inspectorate. On 25 August 2003, the collective agreement was signed despite the fact that once again a sector of FEDEUNEP submitted a new draft which gave rise to new observations by the inspectorate. The Committee requests the Government to provide information on whether FEDEUNEP has lodged any judicial appeal against the collective agreement concluded between the public administration and FENTRASEP.*

**873.** *The Committee observes that the Government has not sent the observations and information requested regarding the other recommendations made in the context of the previous examination of the case and which are reproduced at the end. It therefore reiterates those recommendations while at the same time requesting the Government to send such observations and information without delay.*

**874.** *The Committee requests the complainant organizations to send their comments on the Government's declarations concerning the dismissal of FEDEUNEP official Cecilia Palma.*

**875.** *The Committee also observes that the Government has not sent its observations regarding the allegations presented by UNAPETROL on 17 February 2004, relating to the mass dismissals at the PDVSA oil company and its subsidiaries, the violation of the trade union immunity of Mr. Diesbalo Osbardo Espinoza Ortega, general secretary of the Union of Workers, Oil Employees and Associated of the State of Carabobo (SOEPC), and the persecution of UNAPETROL officials in respect of whom arrest warrants had been issued, and requests it to do so without delay. The Committee also requests the Government to send without delay its observations with regard to the additional information sent by UNAPETROL with the support of CTV in a communication dated 20 April 2004.*

## The Committee's recommendations

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

***(a) With respect to the warrant for the arrest of Mr. Ortega, the Committee strongly urges the Government to take steps to vacate the detention order against Mr. Ortega and to guarantee that he may return to the country so as to be able to perform the trade union functions corresponding to his post of president, without being subject to reprisals.***

***(b) With respect to the failure to recognize the executive committee of the CTV, including its president, Mr. Ortega, the Committee observes that this question was already examined in another case [see Case No. 2067, 330th Report, para. 173], repeats its previous observations and recommendations formulated within the framework of Case No. 2067, and therefore once again urges the Government to recognize the executive committee of the CTV.***

***(c) With respect to the promotion of the establishment of a workers' confederation supportive of the party of the President of the Republic and the hostile statements towards the CTV, the Committee requests the Government to abstain from making statements in the CTV's regard which could express hostility towards that trade union, as well as to abstain from promoting the establishment of other trade unions or confederations.***

***(d) As regards the alleged obstruction by the labour inspectorate of the draft fourth collective agreement submitted by FEDEUNEP, imposing demands that go beyond the law or are impossible to fulfil in practice within the prescribed deadline and subsequently rejecting the draft, as well as acceptance of a new draft (which was converted into a collective agreement) originating from six of the 17 FEDEUNEP leaders who formed a federation (FENTRASEP) approved by the government authorities and the Ministry of Labour, the Committee requests the Government to provide information on whether FEDEUNEP has lodged any judicial appeal against the collective agreement concluded between the public administration and FENTRASEP.***

***(e) The Committee observes that the Government has not sent the observations and information requested regarding the other recommendations made in the context of the previous examination of the case and therefore reiterates those recommendations and requests the Government to send its observations and information without delay. These recommendations relate to the following issues:***

- ***information on whether other workers were injured in the march that took place on 1 May 2003, as asserted by the ICFTU, and if so, what legal action was taken;***

- ***the alleged acts of violence by the military on 17 January 2003 against a group of workers from the Panamco de Venezuela S.A. enterprise, leaders of the Beverage Industry Union of the State of Carabobo; the need to institute an independent investigation without delay into the instances of detention and torture claimed by the CTV to have been suffered by workers Faustino Villamediana, Jorge Gregorio Flores Gallardo, Jhonathan Magdaleno Rivas, Juan Carlos Zavala and Ramón Díaz;***

– *the Ministry of Labour's refusal to register UNAPETROL and the Ministry's request to the state enterprise PDVSA to describe the duties performed by the promoters of UNAPETROL;*

– *the dismissal of more than 18,000 workers from PDVSA and its subsidiaries, including the members of UNAPETROL, since the start of the "national civic work stoppage" in December 2002; the result of the legal action taken by the dismissed workers and negotiations with the most representative trade union confederations in order to find a solution; the observations on the alleged failure to observe legal standards and the standards of the collective agreement concerning the dismissal procedure; the examination, together with the trade unions, of the evictions affecting hundreds of former workers of PDVSA and its subsidiaries in the State of Falcón and in the San Tomé and Anaco oilfields with a view to finding a solution to the problem;*

– *information on the supposed offers of dialogue in the petroleum sector to which the Government referred, as well as the corresponding evidence;*

– *the alleged anti-union reprisal in the form of PDVSA's written request to its subsidiaries and a Cypriot company not to hire the dismissed workers, the need to institute an independent investigation into this matter without delay and, if the allegations are found to be true, ensure that the workers affected are paid appropriate compensation;*

– *the detention orders of 26 February 2003 issued against the UNAPETROL president and labour management secretary, Mr. Horacio Medina and Mr. Edgar Quijano, respectively, and as regards similar actions taken with respect to other UNAPETROL members (Juan Fernandez, Lino Carrillo, Mireya Ripanti de Amaya, Gonzalo Feijoo and Juan Luis Santana, former company directors);*

– *the alleged systematic harassment of oil workers by the PDVSA loss prevention and control management and by a new pro-government workers' organization called the Association of Oil Workers (ASOPETROLEROS);*

– *allegations presented by UNAPETROL on 17 February 2004 relating to the mass dismissals at the PDVSA oil company and its subsidiaries, the violation of the trade union immunity of Mr Diesbalo Osbardo Espinoza Ortega, general secretary of the Union of Workers, Oil Employees and Associated of the State of Carabobo (SOEPC), and the persecution of UNAPETROL officials in respect of whom arrest warrants had been issued;*

– *the alleged initiation of disciplinary proceedings against Mr. Gustavo Silva, SINTRAFORP general secretary.*

*(f) The Committee requests the complainant organizations to send their comments on the Government's declarations concerning the dismissal of FEDEUNEP official Cecilia Palma.*

***(g) The Committee requests the Government to send without delay its observations concerning the additional information sent by UNAPETROL with the support of CTV in a communication dated 20 April 2004.***

***(h) The Committee would underline that it remains seriously concerned about the situation of workers' and employers' organizations in Venezuela and once again urges the Government to implement all its recommendations without delay.***

***(i) The Committee will examine the communication dated 26 May 2004, received while it was meeting, and which refers to the assassination of the trade unionist Mr. Numar Ricardo Herrera when it next examines the case.***

CASE NO. 2254

INTERIM REPORT

## Complaint against the Government of Venezuela presented by
## — the International Organisation of Employers (IOE) and
## — the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS)

***Allegations: The complainant organizations have presented the following allegations: the marginalization and exclusion of employers' associations in the decision-making process, excluding them from social dialogue, tripartism and the implementation of consultations in general (particularly in relation to the very important legislation that directly affects employers), thereby not complying with the recommendations of the Committee on Freedom of Association; action and interference by the Government to encourage the development of and to promote a new employers' organization in the agricultural and livestock sector to the detriment of FEDENGA, the most representative organization in the sector; the arrest of Carlos Fernández on 19 February 2003 in retaliation for his activities as president of FEDECAMARAS, without a legal warrant and without the guarantees of due process; according to the complainant organizations he was badly treated and insulted by violent groups headed by a government deputy; the physical, economic and moral harassment, including threats and attacks, of the Venezuelan employers and their officials by the authorities***

***or people close to the Government (various cases are listed); the operation of violent paramilitary groups with governmental support, with action against the facilities of an employers' organization and against demonstration activities by FEDECAMARAS; the creation of an atmosphere hostile to employers in order to allow the authorities (and on occasion to encourage them in) the dispossession and occupation of farms in full production, in violation with the Constitution and legislation and without following legal procedures; the complainant organizations refer to 180 cases of illegal invasions of productive land and indicate that most of these cases have not been resolved by the relevant authorities; the application of an exchange control system decided unilaterally by the authorities, discriminating against companies belonging to FEDECAMARAS in administrative authorization for the purchase of foreign currencies, in retaliation for participation by this employers' confederation in national civic work stoppages***

**877.** The complaint is contained in a communication from the International Organisation of Employers (IOE) on behalf of the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS) dated 17 March 2003, and further information in a communication dated 16 April 2003. The Government sent its observations in a communication dated 9 March 2004.

**878.** Venezuela 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

**879.** In their communications of 17 March and 16 April 2003, the International Organisation of Employers (IOE) and the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS) allege that the Government of Venezuela, in the past three years, has systematically carried out repressive and hostile action against Venezuelan employers and their officials in order to intervene, restrict and obstruct the exercise of civic, trade union and employers' organizations' freedoms that are necessary to defend their interests, as well as the exercise of their right to demonstrate peacefully, which is recognized in Venezuelan legislation. This information was reported to the International Labour Conference in 2001 and 2002, and to the American Regional Meeting of the ILO in December 2002.

**880.** This repressive action includes physical, economic and moral harassment of Venezuelan employers and their officials, as well as the exclusion and marginalization of employers'

organizations in the decision-making process, which affects the functioning of tripartism and social dialogue in the country.

**881.** The complainant organizations highlight the systematic behaviour of the Government in avoiding, in violation of the national Constitution, any type of participation by the most representative employers' and trade union organizations in national social dialogue. The Government has, on rare occasions, restricted itself to holding minimum superficial consultation with the most representative social partners in order to present the appearance that they are carrying out "consultations". Moreover, the Government has made it a habit to hold detailed consultations with groups that are not representative of the population but that are notorious sympathizers with the political regime. This behaviour has reduced the possibility of reconciling interests and achieving consensus on subjects of interest to the whole community.

### *Lack of dialogue by the Government with the most representative employers' organizations*

**882.** The IOE and FEDECAMARAS point out that it has been years since the Tripartite Commission of Venezuela has met and the Government does not carry out consultations with the main social partners or, rather, it has not done so in a significant way neither has it tried to reach shared solutions, particularly in the areas affecting the social partners. This was the case of the adoption of the Labour Procedure Act, the adoption of an order that granted a general increase in the minimum wage of 20 per cent (in violation of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), ratified by Venezuela in 1944) and the recent ratification of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (in violation of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)).

**883.** The Government of Venezuela has systematically ignored the recommendations of the Committee on Freedom of Association of the Governing Body of the International Labour Office, which has called to the attention of the Government the principle that the most representative employers' and workers' organizations, and in particular the confederations, should be fully and frankly consulted by the authorities on matters of mutual interest, including during the preparation and application of legislation which affects their interest and the determination of minimum wages. The Committee requested the Government to apply this principle in the future.

**884.** The IOE and FEDECAMARAS state that the Government has systematically sidelined the possibility of dialogue with the employers and with their most representative organizations and, in fact, it has been a long time since there has been active dialogue. This behaviour has been evident, specifically, in the preparation and drawing up of legislation that directly affects the interests of the Venezuelan employer sector. The most serious example was the way in which the Government proceeded to legislate, based on the Enabling Act of 13 November 2000, through the National Assembly, which expressly refused to hand the relevant drafts to the social partners for their analysis, and finally promulgated, in one day, 49 executive orders, 47 of which should have been submitted for consultation. In behaving this way, the Government not only directly attacked the social partners but also undermined legal security and violated the national Constitution, which, in article 206, establishes that: "legislation shall establish the means of consultation with civil society and other state institutions by the Council in such matters". The orders mentioned affect vital aspects of private property, free enterprise, the right to work, foreign and national investments and are annulled absolutely because, as well as their content, the way and the time in which they were issued undermines the Constitution of Venezuela, the organic Public Administration Act of the country and the Enabling Act itself. In particular, President Hugo Chávez has abused the powers that were granted to him by the Enabling

Act as the orders were promulgated outside the time limits of the Enabling Act and exceeded the areas for which it authorized legislation. In this respect, the complainant organizations highlight the following points:

– *Non-compliance with the requirement to provide preliminary information to the national legislative authority.* The Enabling Act, which was valid for one year, laid down in article 4 that no less than ten days before its publication in the *Gaceta Oficial [Official Gazette]*, the acts or orders issued by the President under these enabling powers should be sent to a special commission of the National Assembly in order that it be evaluated. This article states: "Article 4: The National Assembly shall designate, from among its own members, a Special Commission that reflects, as much as possible, the political constitution of the body that shall be informed by the National Executive, at least ten (10) days before its publication in the *Gaceta Oficial*, of the content of the orders drawn up based on the powers delegated by the present Act." This provision was to allow the National Assembly (the Venezuelan legislative authority) to identify sufficiently in advance whether the orders issued by the President were tailored to the subject matter of the powers granted by the Enabling Act. This was a formal prerequisite to carrying out enabling legislation, the omission of which undermined the terms and conditions of the Enabling Act and, consequently, all the laws issued by the President and without such a basic formality would suppose the non-authorized exercise of delegated legislative powers, which violates article 187 of the Constitution of Venezuela, which establishes the competency of the National Assembly, and articles 202-215 of the Constitution, which establishes the mechanism for the development of legislation in Venezuela.

– *The untimely exercise of powers granted by the Enabling Act.* The promulgation of the executive orders after 13 November 2001, the date on which the validity of one year of the Enabling Act expired, undermines constitutional law-making. Article 215 establishes that: "The Act shall be promulgated by publication with the corresponding *'Cúmplase'* [law to be obeyed] in the *Gaceta Oficial* of the Bolivarian Republic of Venezuela". The publication of any act in the *Gaceta Oficial* after 14 November 2001, i.e. after the expiry of the validity of the enabling legislation, implies the untimely exercise of powers granted by the Enabling Act. In other words, the executive orders promulgated outside this time are null and void as they have been issued by a body not competent to legislate on matters that are constitutionally reserved for the National Legislative Authority. This untimeliness undermines also article 236(8) of the Constitution of Venezuela, which empowers the President to legislate solely when he is authorized to do so.

– *Exceeding authority in subject matter and misuse of powers.* The Enabling Act grants the President broad-based powers to legislate on a wide range of issues. However, the six subheadings of article 1 of this Act expressly delineate subject matter, which supposes restrictions with regard to the exercise of the enabling legislation. A number of executive orders issued in accordance with the Enabling Act exceed those subject restrictions as they deal with matters exclusively reserved to the National Assembly. The fact that authority has been exceeded with regard to subject matter would imply misuse of powers that constitutionally belong to the Legislative Authority, which should lead to these acts being annulled.

– *Non-compliance with the duty to proceed with prior consultation in the organic Public Administration Act.* The organic Public Administration Act establishes expressly the procedure that the President of the Republic should follow in order to exercise legislative powers in accordance with the Constitution. Article 86 of this law provides the following: "article 86: ... the incumbent of the ministry proposing the legislation shall submit the draft to the Council of Ministers so that it may decide on the subsequent procedures and, in particular, on consultations, reports and

information that are advisable, as well as how it will be carried out ...". The discretion of the minister who proposes the draft bill extends until the preparation of the consultations, and in no situation does this regulation authorize the omission of the consultative stage that, moreover, is provided for in the national Constitution. The enabling legislation is received by the President to be implemented in the Council of Ministers for which this regulation is obligatory, except in cases of confirmed emergency, which did not take place with the executive orders issued in accordance with the Enabling Act. The validity period for the Enabling Act (one year) is the best proof that there was no claim to legislate in an emergency situation. The Public Administration Act is organic in nature, which means that it is hierarchically superior to the Enabling Act. The Public Administration Act entered into force on 17 October 2001, which is why the Executive Authority must comply with its provisions from that date with regard to the executive orders that it promulgates.

– *Non-compliance with the constitutional right of citizens' participation.* The Constitution of Venezuela establishes, as a general principle, the participation of the citizens of the country (i.e. legislative initiatives, consultation of the people to abrogate, derogate or revoke the mandate of civil servants). In this context, article 211 establishes, as part of the preparation process for executive orders, the consultation of citizens and organized society. This regulation establishes that in the development stages of acts: "... shall consult other state bodies, citizens and organized society in order to have their opinion ...". The most representative Venezuelan employers' and workers' organizations, FEDECAMARAS and the Confederation of Workers of Venezuela (CTV), the highest representatives of organized society, were excluded from the consultations. This consultative order applies to all acts that are sanctioned and promulgated by the National Assembly. There is no reason why the acts issued by the President in accordance with the Enabling Act should be an exception, as the Constitution makes no exceptions in this respect. The legislative delegation should be made in the same terms as the Constitution lays down for the Legislative Authority. It is not possible for the principal body (the Legislative Assembly) to transmit to the agent (the President) powers that it does not constitutionally hold.

– *Unconstitutionality specific to the promulgated executive orders.* An examination of the executive orders issued by the President exercising the powers granted to him by the Enabling Act shows that they undermine constitutional rights and guarantees. This situation implies their invalidity, as is the case of the right to private property and economic freedom, which are affected particularly by the Land and Hydrocarbon Acts.

**885.** FEDECAMARAS has always been ready to hold talks; however, the Government has maintained its hostile behaviour in the face of the legitimate right of the employers' organizations to participate constructively in the design and implementation of government policies that directly affect the operation of the country's productive sectors. Moreover, the Government has also not complied with its constitutional obligation (article 299) to "collaborate with private enterprise in promoting the balanced development of the national economy in order to create employment, ensure high national value added, improve the standard of living of the population and strengthen the economic sovereignty of the country, guaranteeing legal security, strength, dynamism, sustainability, permanence and equity in economic growth in order to ensure a fair distribution of wealth through strategic democratic, participatory and consultative planning". Moreover, the Government of Venezuela, in most cases through President Chávez himself, instead of creating conditions to combine the forces of the national public and private sectors to promote development, such as envisaged in the Constitution, has in practice maintained notoriously anti-employer language and guidelines in economic policy. The economic policies established by the Government, without consultation with the employer sector, have led to a severe national

economic crisis resulting in an increase in the poverty and unemployment indexes, mass closure of companies, an accumulated fall in GDP and per capita production and devaluation of the national currency. This aggressive behaviour has also, little by little, forced the closure of companies of all types and sizes, which, as well as creating poverty, weakens employers and workers and their respective organizations.

### *National civic work stoppages and the arrest of the president of FEDECAMARAS in February 2003 and other reprisals*

**886.** In the context described, and taking into account that the economic and social crisis is becoming daily more critical, and given the negative tendencies of the main economic indicators, reflected in the increase in poverty and unemployment, insecurity at all levels of the population and regions of the country, both rural and urban, of the violations of private property through invasions of agricultural lands and property provoked by the Head of State in his lengthy speeches to the country on television and radio, the organized employer sector exercised its right to demonstrate peacefully to defend its professional interests. On 2 December 2001, FEDECAMARAS convened the first national civic work stoppage of 24 hours. This initiative was supported by CTV and it paralysed the country for the whole day.

**887.** In the following months, in collaboration with the most representative trade union organizations, the main NGOs and democratic political parties united under an ad hoc structure known as the *Coordinadora Democrática*, FEDECAMARAS continued to request respect for employers' rights (i.e. inclusion in national consultations and the right to private property) without any success. This led to the second national civic work stoppage on 9, 10 and 11 April 2002, which led to the national crisis that brought about the resignation of the President of the Republic, which was publicly and personally confirmed in the media by the highest ranking military authority in the country, General Lucas Rincón, but which lasted only a couple of days as it was subsequently annulled by President Chávez himself.

**888.** The situation continued to deteriorate. In the following months, in repeated public messages and speeches by the President, transmitted on the national television and radio channels, the verbal attacks on employers and their officials continued and intensified, instead of the Government looking for dialogue and rapprochement.

**889.** This behaviour led to the various groups of the population adopting radical positions. And, this was when the employers' and workers' community, as a group, asked FEDECAMARAS and the CTV to act. Towards the middle of November 2002, these organizations announced that, having taken into account the absence of dialogue and the continuing violation of employers' and workers' interests, if it was not possible to establish the minimum base for facilitating an initial consensus to resolve the serious problems of the country, they would be obliged to stop all work on 25 November 2002.

**890.** The Negotiating and Agreements Table that had been set up in early November, with an equal membership of government and the *Coordinadora Democrática*, with the participation of Dr. César Gaviria, secretary-general of the OAS as facilitator, and the presence of representatives from UNDP, the United Nations and the Carter Center, was unable to arrive at an agreement and the civic work stoppage began on 2 December 2002.

**891.** The complainant organizations allege that the president of FEDECAMARAS, Carlos Fernández, was arrested in retaliation for his activities as representative of the Venezuelan employer sector. His arrest indicates the state of insecurity and flagrant violation of the

principles of Convention No. 87 and human and constitutional rights in Venezuela, as well as the absence of an effective defence of citizens' rights, which is the responsibility of the Office of the Public Defender, whose mandate is clearly defined in article 280 of the Constitution.

**892.** Carlos Fernández has not been a fugitive from justice; on the contrary, whenever he has been required to do so, he has fulfilled all the requests or petitions formulated by the bodies of the judicial authority, indicating his willingness to clarify the facts. His arrest was not only a violation of due process but it also occurred only one day after the Negotiating and Agreements Table presided over by the secretary-general of the OAS, after three months of negotiation, produced the first agreement against violence and for mutual respect, which was signed by the parties involved in the process.

**893.** The complainant organizations explain that at almost midnight on 19 February 2003, Carlos Fernández, on leaving a restaurant, was attacked by approximately ten individuals bearing no identification. According to eye witnesses, these people were not wearing uniforms neither did they appear to be civil servants or police. These people arrived in unidentified vehicles, without registration plates and without a legal warrant. Mr. Fernández believed that this was a kidnapping and tried to defend himself. After a violent struggle in which Mr. Fernández was beaten, with the resulting superficial injury and haematoma to the thorax, he was immobilized and thrust into his car. Shots also occurred, which were assuredly to prevent those present from intervening. Only after he had been immobilized did people identifying themselves as police appear.

**894.** The president of FEDECAMARAS was transferred, in his own vehicle, to the facilities of the Directorate for Intelligence and Prevention Services (DISIP), a body of the state political police, where he arrived at approximately 1 a.m. on 20 February. With only the formality of registration and without any other legal procedure, he was immediately imprisoned in a cell measuring 2 metres by 2 metres, without ventilation, without light and with only one mat on the floor. During his detention, Mr. Fernández was held incommunicado. It was not until the morning of the following day that his relatives were able to have contact with him. His lawyers were also not able to enter the facilities where he was being held. The harsh treatment meted out to Mr. Fernández contributed to a deterioration in his state of health to the extent where he had to receive emergency first aid treatment.

**895.** According to the Venezuelan press, Hugo Chávez, President of Venezuela, on the night of 19 February stated: "They called me at approximately midnight, I asked them do you have the warrant, proceed ... and I went to sleep with a smile; at 1 o'clock in the morning I ordered them to bring me the papaya sweet that my mother had sent me, which is very good, and he concluded, finally a judge that was capable of acting".

**896.** On 21 February, a day after his arrest, Carlos Fernández was transferred to the courts in a security operation that is reserved for high-risk criminals. He remained at the courts from approximately 9 a.m. until 11 p.m., when the hearing was suspended. On 22 February, the hearing was resumed at 8.30 a.m. and lasted until 10.30 p.m., when he was once again transferred to where he was being detained.

**897.** During those two days, outside the courts, violent groups gathered, led by a government deputy, which blocked the visitors' entrance, shouting insults and pressuring the judges.

**898.** The initial communications of the authorities publicly stated that the Venezuelan Government accused Mr. Fernández of the following crimes: (i) betrayal of his country; (ii) civil rebellion; (iii) incitement to commit criminal offences; (iv) conspiracy (criminal association); (v) destruction (incitement to pillage the nation).

**899.** In accordance with the decision of the judge responsible for the file, as the measure was stated it was challenged by the defence and it was withdrawn; of the five accusations, three were eliminated and two remained: civil rebellion and incitement to commit criminal offences.

**900.** Having taken into account the delicate state of health of Mr. Fernández, the judicial authorities allowed him to be placed under house arrest. However, the Office of the Attorney-General of the Nation contested this. Even when the charges against him were reduced and he was placed under house arrest, the facts formed an alarming picture that Carlos Fernández was being persecuted by the Government for his activities as an employers' official. His arrest and indictment are a threat to other employers' officials and other employers' organizations in Venezuela.

**901.** The National Federation of Stockbreeders (FEDENGA), a member of FEDECAMARAS, was excluded from the Agriculture and Livestock Council, which is responsible, among other things, for granting permits for the movement of animal and products and by-products of animal origin. This exclusion took place as a result of the support provided by FEDENGA for the popular condemnation by FEDECAMARAS of the Government of Venezuela. The Minister of Agriculture himself, Efrén Andrades, declared that FEDENGA was no longer part of the national permit system. The permit system controls the movement of animals with a view to preventing contagion or disease. The measure taken by the Government has prevented the stockbreeders affiliated to FEDENGA from carrying out their activities and has endangered the National Campaign for Foot and Mouth Disease Vaccination.

**902.** The Government has also encouraged the development and implementation of actions favouring a new organization called the National Confederation of Farmers and Stockbreeders of Venezuela (CONFAGAN), to the detriment of FEDENGA, which is the true representative organization of the agriculture and livestock sector of Venezuela. The Government's interference in the internal matters of employers' organizations is one more violation of freedom of association.

**903.** The representatives of the Government of Venezuela, starting with President Hugo Chávez himself, have repeatedly insulted, attacked and threatened the employer sectors of Venezuela. These attacks have taken place in written, radio and televised press communications. Some examples of these are listed below.

**904.** On 23 September 2002, the Attorney-General of the Republic, Marisol Plaza, issued threats that the Executive Power of Venezuela would come down heavily against the employers of FEDECAMARAS for their participation in the protest day in defence of the rights of national employers.

**905.** Legislator Omar Mezza, belonging to the party in power, stated that, should the employers of Venezuela decide to continue with their national protest, the Government would promote reforms to the labour law that would force owner-employers to continue production even against their will. The Director of the MVR alliances, Omar Mezza, indicated that this legal reform would authorize workers to take over the facilities of productive units with a view to ensuring continuity of business activity.

**906.** On 9 January 2003, Nicolás Maduro, spokesperson for the Executive Authority, threatened the national employers of the communications sector, stating that:

> ... the time for dialogue and opportunities on screen is over and the penalties laid down in the law currently in force should be applied ... it is time for steps to be taken, the four years of the Chávez government have been a media war ... penalties should be immediately applied

> because the communication media have not paid heed to the call for reflection that the majority of Venezuelans have made for them to simply get back on track and return to their educational duties.

On the same day, Mr. Maduro threatened the banking sector, which joined the national protest.

**907.** Moreover, on 15 January 2003, President Chávez, in public statements, insulted owner-employers of the private television channels in Venezuela.

**908.** On 17 February 2003, the President of the Republic threatened to intervene in the agro-industrial companies that had decided to close down as a result of the deterioration in sales caused by price regulation. During his Alo programme, the President said, "we cannot give ourselves the luxury of leaving a single saboteur in place, we must expel all the corrupt people in the industry".

**909.** On 12 December 2002, the facilities of the Lara Chamber of Commerce were vandalized by Bolivarian groups (supporters of the regime) for having denounced the government policy against the employers. Also in Lara, many businesspersons supporting the work stoppage were obliged to open their businesses as a result of violent pressure by people encouraged by the Government to contravene the legitimate activities of employers to defend their interests.

**910.** As well as the verbal attacks of the Government on the private sector, there have been various specific cases of harassment of employers' leaders. Some of the most relevant cases follow:

(1) The harassment of the president of CONSECOMERCIO: on 18 February 2003, as a result of his participation in the nationwide complaint of the Government's abuses, Julio Brazón, president of CONSECOMERCIO, had his office looted, causing serious material damage.

(2) The harassment of the president of the Bejuma Chamber of Commerce: on 29 October 2002, the president of the Bejuma Chamber of Commerce, Adip Anka, was threatened with violence by presumed members of the national government party. These threats were motivated by his support for the national demonstration called by FEDECAMARAS and they were appropriately part of a complaint to the national authorities, without any action being taken. Some days before, anonymous pamphlets were distributed throughout the streets of Bejuma, which terrorized the shopkeepers supporting the protest days called by FEDECAMARAS.

**911.** Another means of harassment, discrimination and punishment for defence of employers' rights through FEDECAMARAS support is taking place in the system of exchange control. The system of exchange control imposed by the Government has affected the commercial operation of thousands of the country's companies. Press statements made by civil servants indicate that the Government will decide, unilaterally, which companies will be able to buy foreign currencies. Official declarations by the highest ranking civil servants indicate that the employers and the companies that supported the civic work stoppage called by FEDECAMARAS will not be able to participate. The Government's attitude shows clear discrimination against the companies and the employers involved in FEDECAMARAS.

**912.** Specifically, on 25 January 2003, the Minister of Production and Trade, Ramón Rosales, stated in the *El Nacional* daily newspaper that only the importers and exporters supporting the Government have priority with regard to the allocation of dollars, referring to the national work stoppage in which FEDECAMARAS took part. On 5 February 2001, during the celebrations of the fourth year of the current Government, President Hugo Chávez

announced the implementation of a new system of exchange control throughout the country. When he made this announcement, he emphatically threatened that he would not authorize dollars to those who had not supported his rule. On 1 March, Edgar Hernández Behrens, president of the Currency Administration Commission, stated that it would be President Hugo Chávez himself who would decide the priority categories of those who would receive dollars and those who would not receive them.

**913.** After 55 days of suspended operations of buying and selling of currency, the employers belonging to FEDECAMARAS were in a situation of extreme crisis as they were not able to buy goods and materials to renew production of foodstuffs, containers, machinery, spare parts, textiles, equipment and numerous other goods and services that rely directly or indirectly on imports. The inventory of products in most sectors reached its lowest capacity when the demonstration period ended at the beginning of February 2003. The companies that relied on stocks of raw materials gradually resumed their activities, as in the case of corn processing, rice mills and producers of car parts, in spite of the problems of supply of gas and fuel. However, shortly afterwards, the Government of Venezuela imposed an exchange control, practically shutting down international trade by paralysing the buying and selling of foreign currencies. In the case of food processing industries, which have a colossal need for currencies to import wheat, milk powder, legumes, raw oils, this was particularly serious, as they were not able to pay their debts owing to a lack of currency. Therefore, the food processing companies that were part of the organized employer sector were penalized and their productive processes damaged. The sectors most affected by the lack of raw materials were those of foodstuffs, pharmaceutical laboratories, surgical and medical material, supplies for construction, petrochemical companies, plastics processors, vehicle assembly companies, metals, mining, agrochemicals, textiles and the clothing industry, among others.

**914.** The printed media play a key part in traditionally democratic countries, particularly at times when the dissatisfaction of an enormous part of the population is obvious. Originally, the category relating to the import of paper to print newspapers was on the list of products that would receive currencies. However, the order printed in the *Gaceta Oficial* No. 37647 excluded the category relating to paper for printing newspapers and replaced it with paper for printing educational textbooks. This implied discrimination as, while school education should receive special treatment, so also should the preservation of freedom of expression of thoughts and ideas. In this way, the Government implemented a policy of harassment of the private communications sector that formed part of FEDECAMARAS.

**915.** By the beginning of March 2003, there had been already more than 60 days of suspension of the exchange market. The agricultural sector was devastated owing to the problems arising from supplies of agrochemicals, fertilizers and machinery. At the date of the present complaint, this sector had not been authorized to buy foreign currencies. Venezuela consumes 500,000 tons of fertilizer, a large amount of which is imported. The delay in authorizing the buying and selling of currency in this sector has endangered the winter planting cycle, which produces 75 per cent of the year's production, mainly white corn, sorghum and rice, among other priority products for feeding the nation. The private agricultural and livestock sector that publicly denounced the anti-employer policy of the Government of Venezuela is being permanently punished for having exercised its constitutional rights to defend its own interests.

### *Illegal occupation of productive land*

**916.** The Government also has allowed, and on occasions has encouraged in the speeches of President Chávez himself, the dispossession and occupation of farms that are fully productive and that are fulfilling a social function. This situation has created a hostile atmosphere for employers, which is reflected in the enormous increase in the number of

kidnappings and illegal invasions of productive lands. These dispossessions have occurred through processes violating the legal code in force, ignoring the legitimate rights of possession of the producers affected, as laid down in article 115 of the Constitution in force which indicates that:

> The right to property is guaranteed. Every person has the right to use, enjoy, benefit and dispose of his property. Property will be subject to contributions, restrictions and obligations as laid down in the law for public use or general interest. All types of property may only be expropriated for reasons of public use or general interest, following final decision and timely payment of fair compensation.

Among other cases, there were the agriculture and livestock producers of the south of Lago de Maracaibo. The complainant organizations indicate that the national Government decided to concede provisional title to lands in the Lago de Maracaibo zone and threatened to continue this process in other states. This created understandable reaction on a national scale as it undermined rights and had negative effects on various productive units and their costly investments. The private sector did not oppose the State dividing up land but it asked that the procedures be carried out strictly according to the law. The respect for the state of law is the fundamental basis for confidence and it is therefore unacceptable that distribution of land is carried out through invasions or the confiscation of areas upon which there are rights of property or possession.

**917.** Article 115 of the Constitution establishes respect for private property but also provides for the expropriation of private property when this is in the public or social interest, after final decision and fair compensation. This is applicable to private land and also to agricultural and livestock development in national land where, over the years, there have been private investments. In order to recover or reclaim this land the State must appear before the agrarian courts and, in the case of uncultivated land, must follow the expropriation proceedings laid down in the legislation on agrarian proceedings and agrarian reform in force. The use of the National Guard to back the occupation of property or possessions without complying with the legal proceedings undermines the right of defence, due process, property and prohibition of confiscation laid down in the Constitution and legislation.

**918.** Since 1988 and with the current Government, up until April 2003, 180 cases of illegal invasion of productive land had been lodged in the following states: Anzoátegui, Apure, Barinas, Bolivar, Carabobo, Cojedes, Falcón, Guárico, Lara, Mérida, Miranda, Monágas, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy and Zulia. The majority of these cases of illegal invasion have not been resolved by the relevant authorities.

### *Paramilitary and armed Bolivarian groups with government support*

**919.** As was also stated in the complaint made by the officials of the Confederation of Workers of Venezuela (CTV) during the direct contacts mission carried out by the ILO in May 2002, "... the security and the lives of trade union officials are in danger from the paramilitary groups (Coordinadora Simón Bolívar, Tupamaro groups and armed Bolivarian groups) ...". They attacked the participants of the civil demonstrations called by the social partners and they organized counter-marches in order to provoke clashes and confrontations. The ILO direct contacts mission that visited Venezuela in May 2002 noted with concern the information provided on the allegations with regard to the establishment of paramilitary or violent groups with government support and the acts of violence and anti-union discrimination against the social partners in Venezuela. The mission considered that these issues, because of their seriousness, should be the subject of an appropriate and reliable investigation. In this regard, the mission suggested that, to the extent that this was

compatible with Venezuelan institutions, a commission comprising public figures in whom the most representative social partners had confidence should be set up to this effect. To date, the Government has ignored this recommendation and the situation has worsened since that time, with the continued activity of these violent groups with the tolerance, not to say the consent, of the Government of Venezuela. For example, on 18 October 2002, President Chávez incited the confrontation and violence of the Venezuelan population, in statements ordering his followers to go out in defence of the "revolution". As a result, the paramilitary groups (Quinta República, Juventud Revolucionaria del MVR, the Frente Institucional Militar and the Fuerza Bolivariana) carried out numerous violent actions to weaken the call for a national demonstration by FEDECAMARAS.

**920.** The complainant organizations state that the Government has violated Convention No. 87 and they refer to the principles established by the Committee on Freedom of Association with regard to the various issues in the complaint. They request that:

– all charges against the president of FEDECAMARAS, Carlos Fernández, be dropped and that he is immediately freed, and that, in future, the authorities refrain from taking intimidatory actions against employers, their officials and their organizations;

– all harassment and intimidation against employers' organizations and their representatives cease;

– policies that do not discriminate against enterprises and employers associated with FEDECAMARAS are developed;

– an analysis of the legislation adopted in the 49 executive orders is begun so that, in consultation with the most representatives employers' and workers' organizations, the areas where the rights of social partners are undermined may be identified and the relevant measures adopted; and

– meaningful consultations are held in the future with the employers' organizations before adopting any legislation that affects the professional interests of the country's employers.

**921.** The IOE and FEDECAMARAS conclude by stating that the events related in this communication are only a part of those actions undertaken by the Government of Venezuela against FEDECAMARAS and its organizations for its protest activities against the abuses of the Government. These abuses constituted unjustified interference and discrimination against the Venezuelan employer sector and threatened the principles of freedom of association as laid down in Convention No. 87 of the ILO, ratified by the Government of Venezuela.

## B. The Government's reply

**922.** In its communication of 9 March 2004, the Government points out, firstly, that the accusations of FEDECAMARAS and the IOE against the Government of Venezuela have, as their principle and only reason, the justification of their position, which has nothing to do with matters relating to employers' organizations and much less with the statements incorporated in the charge such as "national protest, civil demonstration and/or day of protest". The Government states that in the present observations it will put forward and demonstrate that the position of FEDECAMARAS is strictly political, anti-democratic, discriminatory, authoritarian and that FEDECAMARAS believes that, as the employer leadership, it is above good and evil. FEDECAMARAS tries to justify its call to bring about systematically and publicly the overthrow of the Constitutional President of the Bolivarian Republic of Venezuela, who was democratically elected as Constitutional

President by the large majority of the Venezuelan people on two occasions in less than two years and participated in victory in another five strategic elections, which absolutely does not indicate "national protest, civil demonstration and/or day of protest".

**923.** The members of the Executive Board of FEDECAMARAS have distorted the fundamental objective of any trade union organization of employers, dedicating themselves exclusively to political proselytization. FEDECAMARAS, with no proof whatsoever, has systematically accused the President of the Bolivarian Republic of Venezuela, Hugo Chávez Frías, of being a dictator, proving in the behaviour of the officials of FEDECAMARAS subversive actions with the clear intent of destabilizing state institutions and imposing a dictatorship and taking power by force, which they achieved for a short time on 12 and 13 April 2002, the de facto President being at that time Pedro Carmona Estanca, who, prior to swearing himself in as de facto President, was president of the employers' trade union FEDECAMARAS.

**924.** Carlos Fernández succeeded Carmona Estanca in the presidency of FEDECAMARAS, as he was the first vice-president of the association when the unconstitutional presidency of Carmona Estanca as de facto President was announced. The first official act of Carlos Fernández as president of FEDECAMARAS was to acknowledge the regime of Carmona Estanca, and it was on 12 April 2002 that Mr. Fernández signed the "Act of Constitution of the Government of Democratic Transition and National Unity" as representative of the employers. The act referred to tried unconstitutionally to justify the *coup d'état* by the employers, the military, opposition political parties and a minority of "civil society" with the so-called "Government of Democratic Transition and National Unity": is this "national protest, civil demonstration and/or day of protest"?

**925.** The above information provides some essential background to understanding and demonstrating that the position taken by Carlos Fernández as president of FEDECAMARAS was not that of a trade union but was strictly political, subversive and anti-democratic. One of the basic architects of the political, economic and social destabilization during April 2002 to March 2003 was Carlos Fernández, who misused his position as president of FEDECAMARAS in the name of "civic work stoppage" or strike, of "national protest, civil demonstration and/or day of protest", as can be seen in his allegations. In this regard, there has been no work stoppage or strike in Venezuela, and what has occurred on a number of occasions (10 December 2001, early in April 2002, 21 October, December 2002 to January 2003) was clearly a small employers' closure or lockout, and sabotage of our oil industry by the executive and management staff of the PDVSA. The great majority of workers did not join what was known as the "civic work stoppages"; if the majority of workers and employers had joined, then what government would have been able to resist four general work stoppages, paralysis of its main industry (sabotage) and all public and private production for two months as they tried to do in December 2002 and January 2003. The complainants implemented illegal, subversive and anti-democratic calls on the Venezuelan people, acts that were rejected by the great majority of the Venezuelan people, leaving Mr. Fernández and FEDECAMARAS the alternative of subverting constitutional order, ignoring democracy and encouraging illegal work stoppages and lockouts or closure of companies, premises and establishments on a strategic basis such as the food processing companies, fuel distributors and production of agricultural and livestock foodstuffs, which is "national protest, civil demonstration and/or day of protest".

**926.** FEDECAMARAS and its officials have been systematically acting in an anti-democratic way for four years, the first precedent was the Quinta Esmeralda agreement, which tried to recall or substitute through a *coup d'état* the "Punto Fijo Agreement", agreed by the political parties in 1961.

**927.** During the time of the Punto Fijo Agreement, which lasted 40 years, from 1958 to 1998, many employers enjoyed all kinds of privileges: loans, financing from the Venezuelan Government, impunity for failure to comply with tax obligations, occurring through the failure to pay all kinds of taxes, principally taxes on income. The common denominator was not honouring payments on loans granted by the Venezuelan Government leading to the task of liquidation of companies and businesses, while the State immediately resuscitated these through more loans, which were often not paid off. During the time of the Punto Fijo Agreement, many employers became exporters and not producers, taking advantage of the immense potential of oil income that flowed to privileged minorities, wallowing in corruption and impunity, with a State that acted as the accomplice of a certain type and a considerable number of employers, who were the main beneficiaries, along with a corrupt political class and indulgent political parties.

**928.** Many of these employers affiliated to FEDECAMARAS, since 1989 when it began systematically to apply neo-liberal economic measures and exclusive globalization in Venezuela, began an aggressive policy to impose a single solution, that of privatizing health, education, social security, relaxing and deregulating labour relations and the rights of workers, with the promise of greater well-being, in a country where they have led the population into poverty – poverty that affects 80 per cent of the inhabitants of the Republic.

**929.** In the face of this situation, it is important to understand that it is not lack of dialogue, disregard of Convention No. 87 or the lack of foreign currency for economic and employer activities, or an alleged disregard for private property, police harassment, political persecution or physical attacks on employers and FEDECAMARAS, much less favouritism towards duly registered trade union organizations; the true state of affairs is that FEDECAMARAS as the employer leadership is not above the Constitution of the Bolivarian Republic of Venezuela and social justice.

**930.** The facts are that FEDECAMARAS and its associated organizations, involved in the *coup d'état* of April 2002 and the attempted uprising in December 2002 to January 2003, no longer have the power to establish monopolies and high and usurious rates of interest, to control the economic apparatus of the State for their own benefit, and to control the military sectors of the National Armed Forces in order to boost smuggling and obtain windfalls by avoiding taxes. All of which, and much more, serves to show that the Bolivarian Republic of Venezuela is undergoing a comprehensive process of change and transformation in its institutions and in Venezuelan society.

**931.** FEDECAMARAS and its leaders planned four "civic work stoppages", all involving lockouts, of a strictly political nature, and sabotage of the economy and the human rights of the population from 10 December 2001; FEDECAMARAS taking as an excuse for this the approval of 48 executive orders. Subsequently, FEDECAMARAS, together with other destabilizing elements to Venezuelan democracy, marginalized all democratic principles when it encouraged the *coup d'état* in April 2002, which was justified, according to this employers' association, by the dismissal of employees from executive and managerial posts at the oil company PDVSA, and the "eviction of the tyrant", referring to the President of the Bolivarian Republic of Venezuela. This work stoppage or lockout produced the *coup d'état* during which the de facto President of the Bolivarian Republic of Venezuela was, for a brief time, Pedro Carmona Estanca, who at the time was president of FEDECAMARAS. Is this "national protest, civil demonstration and/or day of protest"? The union of historically different sectors occurred in a specific way, the alleged workers' representatives in the name of the CTV and the employers in the name of FEDECAMARAS, led by Carlos Fernández, clearly combined as they did to conspire and to systematically ignore the state of law from the end of 2001.

**932.** Ladies and gentlemen of the Committee on Freedom of Association, it is not "protest days" that FEDECAMARAS encouraged. This employer sector made an effort to systematically be on the margin of the state of law. In October 2002 it called another work stoppage or lockout, using as an excuse "eviction of the tyrant", referring to the President of the Bolivarian Republic of Venezuela. Finally, FEDECAMARAS and its president, Carlos Fernández, promoted, along with the alleged executive committee of the CTV, unconstitutional military elements and opposition political parties, the "civic work stoppage" or lockout of December 2002 to January 2003, directed through the media by the successor to Pedro Carmona Estanca, and ex-president of FEDECAMARAS, Carlos Fernández. Is this "national protect, civil demonstration and/or day of protest"?

**933.** The enormous capacity for tolerance, patience and irreducible democratic vocation of the Government is unquestionable in the face of these subversive activities of this employers' association and its co-conspirators. Since February 2002, the National Executive Authority has condemned and brought to the attention of the national and international communities that the agenda of the conflicts instigated by the employers' association FEDECAMARAS, the illegitimate leadership of the CTV and the owner-employers of the media was aimed at creating a climate of political instability in the country to justify a *coup d'état*, and that this state of subversiveness relied on the participation of the unpatriotic military sectors and sectors of the political extreme right, which had been democratically defeated in numerous elections by the Venezuelan people.

**934.** During December 2001 and even after the *coup d'état* in April 2002, FEDECAMARAS and other conspiring sectors recreated authoritarian and psychological models with low intensity actions used or carried out in past decades in Latin America as a product of the imposed cold war that enveloped the world for 45 years, these subversive actions taking as a fundamental point international help through countries (powers) and institutions that resurrected the manuals on *coup d'état* in the past century, including trying to apply the democratic charter of the OAS to the wronged government. The authoritarian sectors have not only tried to deceive and to act in an authoritarian manner at the national level, they are also doing so at the international level. Can what is described in this paragraph be called "the legitimate right of protest of FEDECAMARAS and its representatives"?

**935.** To encourage the *coup d'état*, the owner-employers of the media became the fundamental weapon of manipulation, lies and confusion of the population, specifically the middle classes of our society whom they frightened permanently by telling them that the Government would take away their property and implement an authoritarian system.

**936.** The *coup d'état*, led by FEDECAMARAS, took place in various stages. The illegitimate leadership of CTV began, in March 2002, a series of partial work stoppages that were not very successful: these took place basically among sectors that involved human rights such as the health sector, with doctors, teachers, and "surprisingly", support for the illegal paralysis of the upper-level management staff and trustworthy staff at the oil company PDVSA, a sector that represents employers and has no link whatsoever with trade union activity and even less with CTV or FEDECAMARAS.

**937.** The employers' association FEDECAMARAS joined the call to strike by the illegitimate leadership of CTV (thereby returning the "favour" that the illegitimate leadership of CTV had done by supporting FEDECAMARAS in the "civic work stoppage" of 10 December 2001), for at that time the president of FEDECAMARAS was Pedro Carmona Estanca, who, together with the illegitimate leadership of CTV, called a 24-hour work stoppage on 9 April. This was defeated, as was that of 10 December 2001, as the strike action did not mobilize 30 per cent of the country. That same night, the strike was converted to a 48-hour work stoppage and this was also defeated. The workers and the population in general intensified the defeat of those sectors by not acting on the call to strike, which was

subversive, unjustified and at social levels, as laid down in the Constitution. Despite these destabilizing elements, the work stoppage became, on 11 April, a general strike calling on all those in favour of a coup to demonstrate on 11 April 2002, giving the appearance of a great mass of people at the "protest" in order to justify the *coup d'état* that had been carefully planned for months.

**938.** Does what has just been described sound similar to what took place in the Republic of Chile before, during and after the bloody *coup d'état* on 11 September 1973 against a president who had been democratically elected by his people? Can this be catalogued as "national protest, civil demonstration and/or a day of protest"?

**939.** There is no doubt whatsoever by the Government that the call for a general strike by FEDECAMARAS and the illegitimate leadership of CTV was coordinated with the plan of the *coup d'état*, which included calling for a march by the opposition in one place and taking it afterwards to the seat of Government, situated approximately 10 kilometres from where the march should end, and up to which point the authorities had given permission. The aim of FEDECAMARAS, CTV and other destabilizing elements was to cause provocation and confrontation between the groups opposing the Government and the tens of thousands of men and women surrounding the seat of Government as a sign of support for the legitimate Government, their President, the Constitution and human rights.

**940.** During the opposition's march and the concentration of people at the seat of Government, the police played an important part as did the snipers placed by the Governor of Miranda State, Enrique Mendoza, from the ranks of Christian socialism, the mayors of the municipalities of Baruta and Chacao of Miranda State, Enrique Capriles Radonsky and Leopoldo López, both from the *Partido Primero* justice division of the Christian Socialist Party COPEI and the impressive participation of the magistrate, Alfredo Peña, head of the Metropolitan Police, the police corps of 12,000 men and women with special training to carry out operations such as those that took place during, before and after the *coup d'état* of 11 April.

**941.** Months before, the President of the Republic, Hugo Chávez Frías, had put out the alert that those sectors were looking for a death in order to blame it on the Government. In total, on 11 April, there were at least 19 deaths, most of which were from among the concentration of the thousands of people supporting President Chávez in the area surrounding the seat of Government, and as a common denominator most of the murders were the result of shots to the head or in that region.

**942.** When the provocation and confrontation in the street took place, with a lot of shooting, it was "justified" and the excuse was perfect – with the relevant images being shown by the media, controlled by them – for the announcement of an important group of generals and admirals and the justification for imprisonment – kidnapping – of the President of the Republic, whom they blamed for the deaths and murders during the day in which the *coup d'état* took place. This was how the idea that the President of the Republic had resigned occurred, said in a moment of confusion and with 20 high-ranking soldiers surrounding him and disregarding the Constitution. This alleged resignation could never be proven because it did not exist; the people involved in the *coup d'état* brandishing another idea: a power vacuum, which must be filled, which is what Carmona Estanca did when he swore himself in as de facto President of Venezuela.

**943.** Previously the conspirators had used the argument that President Chávez had removed Diosdado Cabello Rondón, his Executive Vice-President and successor on a temporary or complete basis, from his position; those taking part in the coup told national and international public opinion that the President had removed or dismissed all his ministers and, at the same time, that the President had resigned the presidency. "A suicide attempt

that it was impossible to believe, however, hypnotized Venezuela for some hours. From here also began the idea of considering the President responsible for the death of some of the protestors from Chuao, who tried to march towards Miraflores" (*Diario Panorama*, 22 April 2002).

**944.** Early in the morning of 12 April 2002, with the constitutional President kidnapped and imprisoned, Pedro Carmona Estanca, president of FEDECAMARAS, surrounded by the military involved in the coup, Vásquez Velasco, Medina Gómez and other high-ranking officials from the four branches of the armed forces, informally declared from Fort Tiuna itself, the main headquarters of the Venezuelan army, where the President was imprisoned, that he, Carmona Estanca, had been proposed as head of the government junta, and he immediately announced to the media his acceptance of the post and confirmed that he was going to make a government of national unity. In the afternoon he swore himself in and informed those in the future government to make up the cabinet of the temporary authoritarian regime.

**945.** Some hours later, Carmona Estanca held a press conference where he formally took responsibility to head the new de facto government; Pedro Carmona Estanca took responsibility to head the first "non-democratically elected" government of the past 45 years of history of the Bolivarian Republic of Venezuela. This was the end of just one further chapter in the subversive, authoritarian and anti-democratic actions of FEDECAMARAS and those who were acting as its officials at the time.

**946.** Months later, on 22 October 2002, a group of soldiers already linked to and recognized as participating in the *coup d'état* carried out on 11 April 2002, rebelled, rejecting President Chávez and calling for disobedience with the clear objective of provoking a civil and military rebellion, i.e. copying the format of 11 April 2002 that produced the short dictatorship of Pedro Carmona Estanca, then president of FEDECAMARAS. President Chávez, always holding on to the vision of reconciliation and preservation of dialogue, invited those soldiers to abandon their stance and to commit themselves to the Constitution and accept the legislation.

**947.** The insurgents' reply was robust: no amnesties (*El Universal*, 1 November 2002). The President of the Republic insisted, stating that coups and fascism and betrayal of democracy were not the way to go and that they should search for democratic agreement (*El Universal*, 8 November 2002). And what did Carlos Fernández, president of FEDECAMARAS do? He approached the soldiers to "unify criteria" (*El Universal*, 7 November 2002). A few days later, on 11 November, Carlos Fernández, president of FEDECAMARAS, allied himself with the rebel soldiers against the Constitution in order to sign a "Democratic Agreement" against the Government of President Chávez, appearing in photos with his fist raised, alongside General Medina Gómez, one of those involved in the *coup d'état*, and accompanied by the alleged president of CTV, Carlos Ortega. The expression "indefinite national work stoppage" was used in all the statements. The implied ultimatum was that if an agreement was not reached at the negotiating table on the electoral outcome, this mechanism would be activated.

**948.** The objectives of the sabotage/work stoppage were announced in various ways: to get a recall referendum, to get President Chávez to resign, to get the President to leave, to see the fall of the President, for the President to smooth the way for an election process. The current president of FEDECAMARAS, Albis Muñoz, acknowledged the political motive for the action in the annual assembly of the organization "the national civic work stoppage that we carried out together with all the opposition forces, between December and January last, was the greatest pressure we could bring to bear to demand a democratic and electoral outcome to the crisis the country was suffering (www.fedecamaras.org.ve).

**949.** There were two different attitudes with regard to the behaviour of the Government and the political opposition of Carlos Fernández when the so-called "work stoppage" began: on 2 December, the date on which the sabotage began, the Government organized megamarkets so that the population might buy low-cost food and provisions, among which were the ingredients for the popular and Venezuelan dish of cornmeal, meat and vegetables wrapped in banana leaves – a typical dish for the Christmas period in Venezuela. Carlos Fernández's comments were that the Government forced the public administration employees to twist and trail around the area where goods at the megamarket were being sold, arguing that the work stoppage started very convincingly (www.globovisión.com, 20 December 2002).

**950.** Already on 5 December, the *Coordinadora Democrática* (Democratic Organizing Committee), to which the CTV and FEDECAMARAS belonged, urged the population not to leave the streets until the goal of elections had been reached, remaining there permanently and monitoring the development of the work stoppage. At the same time, Vice-President José Vicente Rangel emphasized that the Government was still leaving the possibility of dialogue open, fine-tuning with Dr. Gaviria the details of the agenda to resume the Negotiating and Agreements Table (*El Mundo*, 5 December 2003), but Carlos Fernández, president of FEDECAMARAS had already stated that the work stoppage was a means of bringing equivalent pressure to bear on the Negotiating and Agreements Table (the latter is notorious; FEDECAMARAS was not interested in dialogue). Once again, the employers took a political, irrational and subversive position. Once again, it was proven that FEDECAMARAS does not believe in dialogue. Once again, they were defeated by the people of Venezuela, democracy and life.

**951.** Another crucial factor showing the illegal, conspiratorial and subversive behaviour, as well as the terrorist collusion, of Carlos Fernández, president of FEDECAMARAS at the time, arises out of the investigations carried out by the political bodies of Venezuela in view of the actions of the dissident soldiers (implicated in the *coup d'état* of 2002) in the Plaza Francia in Altamira, implicated in the murders by dissident soldiers under his orders while they held the Plaza, some of those soldiers were involved in the murders of three young people and in terrorist acts carried out on the premises of the Consulate of Colombia in Caracas, the Embassy of Spain in Venezuela and terrorist attacks on other premises. Is this the behaviour of an official of an employers' organization who fights for equality, progress, well-being and social justice, under Conventions Nos. 87 and 98?

**952.** Concerning the judicial detention of Carlos Fernández, president at that time of the employers' association FEDECAMARAS, it occurred following a legally valid request and was executed by the Office of the Attorney-General of the Republic, in the person of the Sixth Prosecuting Attorney of the Office of the Attorney-General, Luisa Ortega Díaz. The proceedings against Mr. Fernández were originally initiated for the offences of instigation to commit an offence, devastation, incitement to conspire and treason against one's country, at the request of the Office of the Attorney-General of the Republic, in accordance with the organic Criminal Procedure Code (COPP). These accusations were brought against him given the extent of the evidence that resulted from damage to the country owing to the sabotage of the oil industry during the public and notorious leadership by Mr. Fernández of the so-called "civic work stoppage" or lockout that took place in December 2002 and January 2003. The trial judge was No. 34 of the criminal jurisdiction of the Metropolitan Area of Caracas, Mikael Moreno, who in turn was challenged by the defence lawyers of Mr. Fernández and the file was transferred to trial judge No. 49, Gisela Hernández.

**953.** The offences of treason against one's country, incitement to conspire (conspiracy) and devastation were not accepted by the new judge to whom the judicial process was transferred following the abovementioned challenge. This judge upheld the accusations of

civil rebellion and instigation to commit offences and decided, in a preliminary hearing, to confine the president of FEDECAMARAS, Carlos Fernández, to imprisonment at his residence in Valencia, state of Carabobo, and not in a prison as should have been the case, while the judgement for the offences of instigation to commit offences and civil rebellion was being executed.

**954.** The penalty of house arrest instead of prison was requested of the court by Carlos Fernández, through his lawyers, as he had blood pressure problems from the time he was detained in a restaurant on the housing estate of Las Mercedes in the east of the city of Caracas by state security forces who were looking for him, on the basis of the judicial order to apprehend him handed down by trial judge No. 34 in Caracas.

**955.** From the time of the questioning to which he was subjected by the Office of the Attorney-General of the Republic, in the presence of his lawyers, to when he arrived at his house which the judge had nominated as the place he would be imprisoned, Mr. Fernández stated that he was well treated by the police force which carried out the judicial arrest, which is the DISIP (*El Norte*, 24 February 2003, www.elnorte.com.ve), and the wife of Mr. Fernández, Sonia de Fernández, also stated that "she was able to speak on the telephone with her husband, Carlos Fernández, who told her that he was at the DISIP headquarters together with his lawyers and that he had not been physically ill-treated (...). He told me that they had treated him very well, that I had no need to worry and that he had not been treated aggressively" (*El Universal*, 20 February 2003, www.eud.com).

**956.** On the proceedings carried out by the Office of the Attorney-General of the Republic, the Attorney-General, Dr. Isaías Rodríguez, issued a communication explaining that: "It should be recorded that the citizen Carlos Fernández made a statement on Thursday, 30 January, as a witness, before the representatives of the Attorney-General, at the premises of the Office of the Attorney-General, following which he informed the media that he had been summoned to make another statement as a defendant, a summons that he did not attend". For his part, the citizen Carlos Ortega did not attend any of the summons to make a statement issued by the Office of the Attorney-General.

**957.** On Tuesday, 18 February 2003, the representatives of the Attorney-General requested, carrying out the formality before the Distribution Office, in accordance with article 250 of the COPP, preventive judicial imprisonment before the court of jurisdiction which shall determine the distribution, in order for citizens Carlos Fernández and Carlos Ortega to be brought before the jurisdictional body and the judge to rule as appropriate.

**958.** On Wednesday, 19 February 2003, court No. 34, acting for the jurisdiction of the Metropolitan Area of Caracas, agreed to the request and issued an order of arrest and detention of the citizens mentioned. Within a period of 48 hours, the arrested citizen shall be brought before the judge.

**959.** Continuing with the account, proven in all its details on 20 March 2003, the Appeals Court decided to free Mr. Fernández, withdrawing the charges made against him, and at that time no more was heard of the blood pressure problems troubling Carlos Fernández. Mr. Fernández immediately travelled to the United States where today he is residing as a fugitive from justice.

**960.** Following the ruling handed down on 20 March by the Appeals Court of Caracas, the Sixth Prosecuting Attorney of the Office of the Attorney-General, Luisa Ortega Díaz, lodged an appeal for the protection of constitutional rights *(amparo)* with the Constitutional Division of the Supreme Court of Justice (TSJ), with an opinion by Judge José Delgado, who accepted the allegations set out by the Office of the Attorney-General of the Republic and once again ordered the house arrest of Carlos Fernández, and the Supreme Court of Justice

ruled to maintain the order of detention by means of a decision read out by the president of the Court on 2 August 2003, in which Penal Judicial Circuit Court No. 49 was ordered to convene a hearing to determine whether to maintain the custodial house arrest or to substitute it.

**961.** Ladies and gentlemen of the Committee on Freedom of Association, where, then, is the abuse of power and the violation of the human rights of Carlos Fernández? How could the complainants FEDECAMARAS/IOE prove the contrary? This inventory rejects the arguments of FEDECAMARAS/IOE on supposed irregularities in the judicial detention of Carlos Fernández.

**962.** But it is necessary to make an inventory of the actions carried out by Mr. Fernández during and following the sabotage (from 2 December 2003 until 4 February 2004), called for by him and Carlos Ortega, the supposed leader of the CTV, who each day by way of a "war report" in the media incited citizens to acts of sabotage to the economy, disregard for constitutionality and incitement of violence and social intolerance.

**963.** The facts to be recounted below demonstrate that the fundamental objective of Carlos Fernández and the employers' association FEDECAMARAS are of a strictly political and insurrectionary nature, and it is for this reason that the Office of the Attorney-General of the Republic accuses the now fugitive from justice, Carlos Fernández, of a series of offences.

**964.** Carlos Fernández, through daily instructions given by way of the mass media, during his actions in the so-called "civic work stoppage" of December 2002/January 2003, was behind various actions against the population, such as the illegal and fraudulent compilation of signatures to convene a consultative referendum, which they tried to turn into an annulment of the constitutional mandate of the President of the Bolivarian Republic of Venezuela, as well as a series of public calls that violated the fundamental rights of the population of Venezuela, such as: confiscation of the human right to work owing to the lockout by enterprises, essentially businesses located in the vicinity of the middle class residential areas; the closing of enterprises of very powerful economic groups from fundamental sectors such as the production sector and that of the distribution of foodstuffs and medicines which initially paid their workers wages without them completing their full day's work, despite their workers forming groups in the enterprises and establishments and demanding the employers to allow them to fulfil their obligations in their jobs. During the "work stoppage" the response to the workers by the alleged executive committee of the CTV and by the employers' association FEDECAMARAS was "make your sacrifice, this is what we have to do to escape the tyrant"; demonstrating the political, unconstitutional and unjustified slant denoted by a work stoppage or strike driven by workers or factors involved in labour relations.

**965.** During the period referred to specific sectors of the population were subjected to violent closures of motorways, avenues and roads (essentially in the middle-class sectors), having a de facto influence on the free exercise of the right to free passage, with serious repercussions on vulnerable sectors of the population (old people, ill people, young people, children and adolescents).

**966.** On an ongoing basis, this led fascist sectors, as an unequivocal demonstration of social intolerance, to carry out violent closures of shops, bakeries, supermarkets, restaurants and other service providers. The people involved were very aggressive and used a variety of objects to make a lot of noise and acted accompanied by gangs of motorcyclists on powerful motorbikes, as well as officials from the municipal police forces of the mayor's offices and governor's offices controlled by the opposition; resulting in innumerable cases, in disrespect between citizens, of the human right to physical integrity, to not being subject

to psychological torture and to freely exercise economic and social rights, fundamentally, such as the right to free work and to earn one's living through one's own efforts.

**967.** Before and during the so-called "civic work stoppage" or lockout, as a result of the argument of Mr. Fernández, there were attacks on public transport vehicles and workers, resulting in some cases in serious injury (due to the simple fact of being at work).

**968.** During the two months indicated the right to education was blocked and violated, disregarding the higher interests of children and adolescents established in the Constitution, the Organic Protection of Children and Adolescents Act, the international Convention on the rights of the child, events that essentially took place at private schools and at schools assigned to or under the protection of the governor's offices and mayor's offices of the opposition.

**969.** In the face of poverty that is the heritage of centuries of exclusion and that affects a large part of the population of Venezuela, employers from the countryside poured millions of litres of milk into rivers and down drains, using as a criminal excuse "this is a work stoppage and we must escape the tyrant", subjecting the majority of the population, notably children and adolescents, to a shortage of products necessary for daily subsistence, just as they acted during the April 2002 *coup d'état*, violating the human right to food in the name of democracy.

**970.** There was misuse, with the main culprits being Mr. Ortega and Mr. Fernández, of the right to information, to freedom of expression and to the use of licences for radio and television stations, with the intention of providing disinformation and inciting people to commit offences, promoting hatred and transmitting messages using subliminal advertising techniques and war propaganda, harming the mental health of the population (with regional and national printed media participating in this action). The spokespersons systematically executing the actions described above were the alleged president of the CTV, Carlos Ortega, representatives of former high-level officials of the PDVSA, and the president at that time of the employers' association FEDECAMARAS, Carlos Fernández, the latter the signatory of the governability agreement that "legitimated" the dictator Pedro Carmona Estanca, president at the time of the *coup d'état* of the employers' association FEDECAMARAS, turning the right to information and to freedom of expression into licentiousness, abuse, dirty propaganda, lies and manipulation.

**971.** There was incitement to violate free transit across the national territory, with a criminal opposition on many occasions seeking to and being successful in sabotaging the public transportation of fuel, medicines and the distribution of foodstuffs.

**972.** During the so-called "civic work stoppage", on a systematic basis, campaigns were mounted against the National Armed Forces, with threats to cause the dissolution of the institution if they took power, verbal abuse against the officials of the National Armed Forces and their families in the areas they reside, defacing their walls with insults and directing physical and verbal threats at the officers, non-commissioned officers and their families, directly inciting intolerance and the violation of the right to freedom and democracy.

**973.** The human right to identity and other civil rights was denied, by paralysing civil offices, prefectures and registry offices under the control of the fascist opposition, refusing citizens the right to register the births of children, to be issued certificates, to be able to contract marriage, to request evidence of residency, among other administrative formalities.

**974.** The facilities of Petróleos de Venezuela were broken into and sabotaged in a terrorist fashion, causing serious damage to expensive equipment and to the country's finances

(initially quantified at over US$10,000 million), which damaged the development of the national PDVSA which contributes 83 per cent of the Republic's GDP, affecting the national treasury's ability to go on investing in the social arena, that is to say in human rights. This sabotage was carried out by former members of the administrative and managerial staff of the oil industry, with the support of the media and of the so-called "Democratic Organizing Committee", which includes the employers' association FEDECAMARAS and the alleged executive committee of the CTV, directly sidestepping economic rights, which resulted in the loss of 500,000 jobs and over US$10 million.

**975.** However, the recovery of production levels from March 2003 speaks for itself, after the State took the respective measures to combat this sabotage of the economy.

**976.** The so-called "civic work stoppage" almost devastated the economy of Venezuela with the fall in GDP, a matter in which Carlos Fernández participated directly as president of FEDECAMARAS and on behalf of this employers' institution.

**977.** Following the devastating drop in GDP during the first three quarters of the year, it began to grow again during the last quarter, as at that time FEDECAMARAS as an association, lost the credibility of its members, who in a responsible manner, as the objectives of overthrowing the constitutional President of the Bolivarian Republic of Venezuela had not been achieved, began to invest; in other words they opened new enterprises, they revived enterprises that had been affected by the work stoppage, and the same went for the virtually impossible and fortunate recovery of the oil industry and other factors that generated confidence in investors. If there were a dictatorship, if there were not clear policies targeting the private sector of the economy, would it have recovered as has been seen in respect of GDP following the so-called "civic work stoppage"?

**978.** This shows that the arguments of FEDECAMARAS concerning the persecution of employers, exclusion of employers, lack of dialogue, etc., are false, as evidenced by the numbers.

**979.** Between November 2002 and February 2003 the unemployment rate went from 15.7 to 20.7 per cent, which meant an increase of 553,515 in the number of unemployed persons. In November 2002, the number of unemployed persons reached 1,852,736 and went up to 2,406,251 in February 2003. The so-called "civic work stoppage" and the sabotage promoted by the conspirators Carlos Fernández of FEDECAMARAS, and Carlos Ortega, the alleged leader of the CTV, destroyed 760,846 jobs (increasing unemployment by 5 per cent). Is it the work of trade union leaders to destroy jobs? Is this how FEDECAMARAS seeks to justify its actions and persuade the ILO that Convention No. 87 has been violated?

**980.** However, it is well known that by the end of 2003 employment had recovered to the level it was at prior to the "work stoppage" and the sabotage promoted by Carlos Fernández and FEDECAMARAS, job creation was at 100 per cent in the private sector of the economy. If there had been no clear economic rules and respect for private institutions, employers and dialogue with construction companies, would this recovery of employment have been possible? Which president of a country could have resisted a *coup d'état*, economic sabotage and a series of insults if he did not have the support of the overwhelming majority of his people?

**981.** During the so-called "civic work stoppage" the unscrupulous actions of Carlos Fernández and FEDECAMARAS impacted on the human right to a healthy environment, with the organizers of the work stoppage and their followers causing sabotage to refineries, oil wells and other facilities which in turn led to the spillage of crude oil and other components of hydrocarbons, with the intention of making national and international public opinion think that it was the Government that caused this situation and attributing

environmental damage to the Government, as supposedly it had placed "incapable" staff in the jobs abandoned irresponsibly by trustworthy managers and personnel who had been working in the oil industry, legally dismissed for having voluntarily abandoned their jobs. They even went as far as the criminal audacity of setting traps in sectors of the oil industry that could cause accidents which, if they had happened, would have resulted in incalculable loss of human life of the people living close to the centres of extraction, refining and distribution of various products of the oil industry, as well as resulting in the contamination of a healthy environment which is the heritage of humanity.

**982.** The provision of sources of energy for the basic industries of aluminium and iron in the industrial enclave of Guyana was sabotaged, as part of a plan to make the legitimate Government of Venezuela succumb and to damage enterprises of strategic importance for the Republic and suppliers of raw materials for international markets in Europe, America, Asia and Africa.

**983.** Vessels that transported fuel for vehicles and other national level transport were paralysed or sunk; the valves and access keys of computer centres that control oil activities were sabotaged; the "Democratic Organizing Committee" to which FEDECAMARAS belongs, gave orders through its spokespersons Mr. Ortega and Mr. Fernández, to abandon jobs in sensitive areas of the oil industry for the filling of tank trucks that transport fuel and the provision of domestic gas that allows millions of Venezuelan families to prepare food, with the population in general having to queue for endless hours to supply themselves with fuel and gas while the sabotage targeting the oil industry was sorted out, with direct consequences on the human rights of the majority.

**984.** In an uncontrolled manner, the "Democratic Organizing Committee" and its spokespersons Mr. Ortega and Mr. Fernández roused the middle-class sectors of the population to harass embassies accredited in Venezuela, such as the Embassy of Brazil for selling fuel to the Republic and the Embassy of Algeria for offering, in the framework of international cooperation, technical assistance to the oil industry following the brutal and heartless economic sabotage. Likewise, a grotesque media campaign was begun, targeting a series of employers and the Colombian Government for engaging in commercial relations with the Bolivarian Republic of Venezuela, for the simple fact of selling meat, milk and other foodstuffs in short supply to the Venezuelan population as a result of the stockpiling and lack of production because of the lockout agreed to with the alleged executive committee of the CTV and the employers' association FEDECAMARAS.

**985.** Mr. Fernández of FEDECAMARAS and Mr. Ortega allegedly of the CTV both mounted campaigns inciting the population to commit offences, trying to make employers and natural persons not pay taxes (fiscal obligations) or make social security contributions and other tax-related obligations, which resulted in the fact that over 600,000 pensioners did not receive their pensions on time, and that medical attention could not be given to people suffering catastrophic illnesses such as HIV/AIDS, diabetes, renal deficiency and other illnesses requiring delicate and costly care, this having an impact on the human right to health, to obtain one's pension on time, to tranquillity, to social security in general.

**986.** A restricted timetable was implemented for the normal operation of opening hours of banks and financial institutions, and there were threats to extend the closure of these financial institutions. During this period, the population could not access their money promptly or efficiently in order to cover their basic needs for food, the purchase of medicines, the use of public or private transportation, the purchase of clothing and shoes.

**987.** Cultural rights were violated by way of a publicity campaign and propaganda against Christmas celebrations (propaganda on television, radio and in the printed media, the slogan for the whole month of December was "Christmas for later!"), thus violating

cultural rights, religious belief and the freedom to profess one's religion. However, Mr. Fernández did enjoy the New Year's celebrations, travelling to the nearby island of Aruba, leaving his few followers behind who had been urged to spend New Year's Eve at the motorway access route at Plaza Altamira as part of the "national protest".

**988.** The right to health was violated, there were shortages in expenditure on medication, particularly for those in need of treatment for chronic and catastrophic illnesses, etc.

**989.** The human right to recreation was violated through the suspension of mass sources of entertainment such as cinemas, areas for walking and recreation, including the paralysis of the professional Venezuelan baseball season.

**990.** The human rights to non-discrimination and equality were violated when the media systematically harassed the mental health of adults and children by transmitting propaganda of racist, classist, exclusive content and discrediting the harmonious and peaceful coexistence of the various social strata of the population of Venezuela.

**991.** Violation of the human rights to life and physical integrity through the political and violent use of police forces which are under the responsibility of mayors and governors of the opposition against the population who were protesting publicly against the fascist actions of the opposition, with the spokespersons Ortega and Fernández using the opportunity to accuse the Government of such actions, calling the President of the Republic a tyrant, a murderer and a dictator.

**992.** Slander and insults were directed against family members of people who had died as a result of the repressive action of police and para-police groups belonging to the fascist opposition, this occurring on the occasion of the wakes following a series of protests where essentially people died who supported the national Government, thus violating the human right to reputation and religious beliefs.

**993.** Human economic rights were targeted, such as the right to individual and collective property and to work, as a consequence of the "work stoppage" the tenants of commercial centres suffered irreparable damage as a result of their arbitrary closure by the owners who are big capitalists who show very little concern for small and medium-sized enterprises and the sources of employment generated by such establishments.

**994.** The human right to work was trampled on in the so-called "civic work stoppage" or economic sabotage, this caused the loss of over 500,000 jobs in the commercial, industrial and services sectors, thus having a very worrying effect on the unemployment situation in the country, triggering a spiral of inflation and a major fall in economic activity.

**995.** Intolerance and fascist ideology were spread openly with the main spokespersons being the political parties of the opposition, the media, the spokespersons of the CTV and FEDECAMARAS, calling on the population to dress in black as a sign of death, desolation (it should also be taken into account that black is the colour favoured as a symbol of fascism), also having as a central element the slander of humble people, calling them rabble, under-class, drunks, ignorant, toothless, smelly, dirty, etc.

**996.** There were absurd calls to disown the public institutions and to persecute peace and justice. When the Supreme Court of Justice handed down judgements that "benefited" the opposition, such as, for example, the decision of 20 August 2002 that stated that there were no grounds to judge four generals and admirals of the National Armed Forces for their involvement in the *coup d'état* of April 2002, the judges were treated as heroes, impartial and just by the opposition. However, in the case of the decision of the Constitutional Division of the Supreme Court of Justice, where those who sabotaged the oil industry were

ordered to fulfil all the decrees and resolutions of the National Executive in order to restore normality, these opposition sectors accused the Supreme Court of Justice of the very opposite and of being "abducted" by the Executive Power.

**997.** The ultimate in irresponsibility of these sectors, following two months of supposed work stoppage, their spokespersons, Carlos Ortega and Carlos Fernández of FEDECAMARAS, in addition to the "Democratic Organizing Committee", did not know how to get out of the failed "civic work stoppage", and blame was thrown from one to the other and they said entirely shamelessly "the work stoppage got out of hand", "we did not call for an indefinite work stoppage", "we never called for a work stoppage to make the current President of the Republic leave"; with these cowardly and extremely irresponsible claims, those who in the national and international sphere "believed" and supported these sectors should be evaluated; the "IT WASN'T ME" attitude confirms that these sectors were not pursuing demands for progress and for the full application of human rights for the people of Venezuela, they were pursuing and are still insisting on an authoritarian outcome. Has everything described so far been "a national protest, civil demonstration and/or day of protest"?

**998.** The Committee on Freedom of Association has clearly stated its views on disregard for legislation by employers' or workers' organizations:

> 204. Political matters which do not impair the exercise of freedom of association are outside the competence of the Committee. The Committee is not competent to deal with a complaint that is based on subversive acts, and it is likewise incompetent to deal with political matters that may be referred to in a government's reply [see ***Digest***, 1985, para. 201].
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> 450. In the interests of the normal development of the trade union movement, it would be desirable to have regard to the principles enunciated in the resolution on the independence of the trade union movement adopted by the International Labour Conference at its 35th Session (1952) that the fundamental and permanent mission of the trade union movement is the economic and social advancement of the workers and that when trade unions, in accordance with the national law and practice of their respective countries and at the decision of their members, decide to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social objectives, such political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social or economic functions, irrespective of political changes in the country [see ***Digest***, 1985, para. 352].
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> 454. Trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests [see ***Digest***, 1985, para. 355].
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> 457. It is only in so far as trade union organizations do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities. On the other hand, it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character. These two notions overlap and it is inevitable, and sometimes usual, for trade union publications to take a stand on questions having political aspects, as well as on strictly economic and social questions [see ***Digest***, 1985, para. 359].

**999.** Carlos Fernández did not act in pursuit of the "promotion and defence of the economic and social interests of the workers", and neither did he promote a "national protest, civil demonstration and/or day of protest".

**1000.** As to the comments made by FEDECAMARAS and the IOE concerning the Enabling Act and dialogue, we wish to make certain observations below. The Government declares that the allegations put forward by FEDECAMARAS-IOE denote a very specific way of trying to hide the subversive, illegal and authoritarian actions of the association FEDECAMARAS and its officials; they establish in their allegations that there has been no

dialogue and take as an example the illegal promulgation of 49 executive orders, a matter that the Government of the Bolivarian Republic of Venezuela will provide detailed information about, as it is not the mandate of the Committee on Freedom of Association to examine matters that are unrelated to freedom of association, let alone suggest elements and opinions on these issues that are put before the Supreme Court of Justice and are not taken up in ILO Convention No. 87.

**1001.** However, in the best spirit of collaboration and cooperation, the Government of the Bolivarian Republic of Venezuela states seriously and responsibly that the executive orders promulgated in the Enabling Act arose from broad consultations with citizens, and various social, academic and cultural sectors of the country, the high-level and grass-roots employers' organizations were consulted and work was done together with them on the preparation of this legislation. First of all, the legislation was consulted on the basis of the democratic conviction of the current national Government of the Bolivarian Republic of Venezuela; secondly, because it is a constitutional obligation; and, thirdly, because it is a fundamental tool to promote the harmonious coexistence of the various social classes that live in the Bolivarian Republic of Venezuela.

**1002.** *Background.* It is important to clarify the process for the approval of the enabling acts by the National Executive.

**1003.** The promulgation of the Enabling Act is the constitutional authorization given to the President of the Republic to legislate by way of executive orders. This authority is clearly defined in the fourth paragraph of article 203 of the Constitution of the Bolivarian Republic of Venezuela: "Enabling acts are those enacted by the National Assembly by three-fifths of its members, in order to establish the guidelines, purposes and framework for matters that are being delegated to the President of the Republic, with the status and force of legislation. Enabling acts must establish the length of time for which they shall remain in force".

**1004.** In this way, under the mandate of the Constitution, a normal process in democracies such as Venezuela, the President of the Bolivarian Republic of Venezuela requested the sovereign National Assembly of the Bolivarian Republic of Venezuela to empower it to legislate on matters of vital importance for the attainment of human rights, and this was established by the National Assembly through the Act Authorizing the President of the Republic to Issue Orders With the Force of Law in the Subjects Delegated, published in *Official Gazette* No. 37077, dated 14 November 2000, with the National Executive having as a limit a period of one year to legislate on issues summarized in the following table:

| Productive or social sphere | Number of orders approved |
|---|---|
| Industrial development | 1 executive order |
| Agriculture and livestock development | 4 executive orders |
| Sustainable development | 3 executive orders |
| Financial system | 11 executive orders |
| Regional development, social well-being and communities | 3 executive orders |
| Oil industry | 1 executive order |
| Services sector | 7 executive orders |
| Institutional development | 19 executive orders |

**1005.** All the executive orders are of a strategic nature for the dignified development of the inhabitants of the Republic, that is to say, the legislation is an integral part of the gradual attainment and achievement of human rights in an integral, indivisible and direct manner. The enabling acts are interrelated to ensure compliance with the Constitution of the Bolivarian Republic of Venezuela and with the international commitments assumed by the Republic in the sphere of human rights.

**1006.** Consultations with and the participation of the employer sector in respect of the content and preparation of enabling acts began immediately the National Executive was constitutionally empowered on 14 November 2000. Thus began a systematic series of meetings to define work timetables, work methodology and respective proposals. Throughout this process each of the associations concerned and affiliated to the employers' association FEDECAMARAS participated.

**1007.** It should be noted that during the *coup d'état* of 12 April it was these executive orders that the employers' association FEDECAMARAS and the illegitimate leadership of the CTV, the media, opposition political parties, the "Democratic Organizing Committee", military coup supporters and recognized jurists in human rights in our country, all agreed to suspend fully with cheers and applause on 12 April 2002. The suspension of the enabling acts was also accompanied by the dissolution of all the public powers constitutionally and legitimately constituted and also endorsed by the sovereign popular vote; we refer to the executive, legislative, judicial, electoral and citizens' powers. So whom and which principles did the *coup d'état* target? A *coup d'état* that, as the Committee on Freedom of Association knows and as the international community in general knows, only lasted 47 hours, as the rule of law and the Constitution were restored by the people and the National Patriotic Armed Forces, which in turn and unequivocally restored the legitimate and constitutional President of the Bolivarian Republic of Venezuela, Hugo Chávez Frías, that is to say, the people and National Armed Forces fully restored human rights.

**1008.** During the period of drafting the executive orders referred to, consultations were held with numerous sectors of national life, including employers' and workers' organizations, with the employers' association FEDECAMARAS excluding itself unilaterally, and arrogantly not wishing to participate in the majority of consultations held. Nevertheless there were consultations with grass-roots employers' and workers' associations, in other words, first- and second-level federations and trade unions, with consensus being achieved on the majority of the executive orders, with a few exceptions, a controversy that is natural in democracies, and that has been gradually solved through discussions and agreement in the National Assembly with individual reforms, or simply by way of partial or total repeal depending on the complaints made by the respective plaintiffs before the Supreme Court of Justice. As the discussions progressed, differences of opinion were presented in which the employers made their positions more radical, insisting on imposing their will and not the will and interests of the historically excluded and impoverished population. In this way, the vice-president of FEDECAMARAS and representatives of the Chamber of Construction and of CONINDUSTRIA met with the Executive Office, headed by the Minister of Planning, Jorge Giordani, chief of the Economic Office of the National Executive, on 28 August 2001, and also with the special commission that drafted the Hydrocarbon Act, incorporated in fact in the Enabling Act, to give their observations. In subsequent meetings they discussed the other subjects covered by the Enabling Act, by economic sector.

**1009.** These facts and controversies are considered to be absolutely normal under the rule of law and in democracies, showing that the democracy of the Bolivarian Republic of Venezuela is not only representative, but also participative, elements that had long been aspired to and sought after by the Venezuelan people and that are now beginning to be seen in the most recent Bolivarian Constitution with the 49 enabling acts of which the Venezuelan people

feel proud, as we do not just have human rights described on paper, we are applying and progressively developing them with a profound democratic vocation.

**1010.** The 49 executive orders comprise the spirit, purpose and reason of the national Constitution and of social justice, the latter a fundamental assumption in the regional and universal system of human rights, particularly of the ILO. The executive orders referred to directly benefit rural families, artisanal and industrial fishermen, members of cooperatives, the environment and the huge number of impoverished Venezuelans, directly excluded for centuries by the so-called representative democracy that was in place from 1958 to 1998; during this period, paradoxically for many factors of national and international life, virtually nothing happened in Venezuela in the sphere of human rights and in fact these rights were systematically violated (paradoxically?) by those who are now assiduous campaigners before the supervisory bodies of the regional and universal systems of human rights.

**1011.** Since his constitutional arrival in 1999, democratically elected by the votes of the people of Venezuela, the current President Hugo Rafael Chávez Frías, has always maintained his readiness to participate in dialogue with all the social sectors, and in particular with the employer sector, this attitude has not changed and nor will it be changed by current government policies. This is how after intense days of dialogue between the various social sectors, both organized and not organized, in 1999 a new stage began, aiming to comply with the provisions of the Constitution of the Bolivarian Republic of Venezuela.

**1012.** This new stage of dialogue began in a systematic fashion with the approval of the Enabling Act. One example of this is what was said about Pedro Carmona Estanca, the recent president-elect of the employers' organization FEDECAMARAS:

> Less than 48 hours after having assumed the presidency of FEDECAMARAS, Pedro Carmona Estanca received not only the majority backing of the employers, but also of the members of the executive and legislative powers, and the employer sector promised to intensify dialogue, stating that "the public readiness of President Hugo Chávez to grant us an audience constitutes a major positive step because it will allow us to establish the bases for an institutional meeting and deal with fundamental issues such as economic recovery, investment as an instrument in national progress, employment and public insecurity, which must be overcome given its huge impact on our society. The president of CONINDUSTRIA, Lope Mendoza, was satisfied by the reaction of the Government in entering into a dialogue with the representatives of the national productive sector". Where is the lack of dialogue, the lack of consultation, the destruction of freedom of association and the right to private property?

**1013.** It is important to point out that during the previous administration of the employers' organization, presided over by Vicente Brito, the former president of FEDECAMARAS took on political/opposition positions against the Government, even during the constituent process brought forward to 1999. Mr. Brito consistently opposed it and, when the date approached to conduct the popular referendum that approved the new Constitution, FEDECAMARAS called on the population to vote "No", which was clearly discriminatory as one of the arguments in the campaign against the new Constitution and telling people to vote "No", was the recognition given in the Constitution to the indigenous peoples settled on our territory for thousands of years. The executive body presided over by Mr. Brito, the first vice-president of FEDECAMARAS was Pedro Carmona Estanca, the successor of Brito in the presidency of the employers' association.

**1014.** Mr. Carmona, as the new president of FEDECAMARAS, criticized his predecessor stating that "it is not for FEDECAMARAS to get involved in small-time politics, in partisan politics, but yes we should be involved in major politics, in the rules of the market economy, social equity, respect for private property, security, investment". With this objective, the entire executive committee of FEDECAMARAS was received at the seat of

Government on 10 August 2001 by President Hugo Rafael Chávez Frías, and Mr. Carmona publicly stated the following in that respect:

> … it was an in-depth and sincere meeting, with topics being duly addressed, held in a climate of mutual respect and readiness to promote constructive and institutional reconciliation (…) it was agreed to hold a working meeting between the executive committee of FEDECAMARAS, the presidents of the sectorial bodies and the Economic Office, in which specific topics will be addressed that require action or consultations (…) with the participation of the President of the Republic. It was also agreed to raise the tone of the debate and minimize public controversies whilst maintaining appropriate channels of communication. It was thus a positive balance that opens the doors to dialogue …

**1015.** We note the interest, the clear practice and the will of the Venezuelan Government to engage in dialogue and agreements with employers and the productive sectors of the population, as well as its spirit of sincerity, stressing in this respect that, when President Chávez left on an official tour in September 2001 to Colombia and Chile, Mr. Carmona was invited to form part of the presidential entourage as a sign that it was one single country that was concluding commercial and cultural agreements and agreements for the exchange of goods and services. Who could have been more suitable to negotiate with employers of other countries than the highest representative of the employers' association of the Bolivarian Republic of Venezuela?

**1016.** After this the officials of FEDECAMARAS began to distance themselves from opportunities for dialogue for selfish reasons, when they saw that their unilateral suggestions were not docilely accepted by the authority and other sectors participating in the preparation of the enabling acts, in dialogues and negotiations with conflicting interests of those who do not have a background of consensus, construction and equity as the employers' association FEDECAMARAS has historically shown. Why did the various employer sectors associated with FEDECAMARAS withdraw from the dialogues to reach agreements on the promulgation of the enabling acts? The reply to this question relates to the fact that the employers associated with FEDECAMARAS thought that the new Constitution of the Bolivarian Republic of Venezuela would not be observed, they thought that they would act in violation of the most recent Constitution, refusing to recognize it and adjusting it to their own interests, as they did with the 1961 Constitution, accompanied by the Punto Fijo Agreement, described earlier in this document.

**1017.** The employer sectors, far from adapting themselves to the requirements of a democracy for peaceful coexistence, opted to begin a series of illegal actions. First of all, without going to the judicial bodies, they demanded that the handing over of idle lands, lands owned by the State, to peasants and their families be stopped denying the possibility for peasants and their families to make them productive, in a country where at that time over 90 per cent of productive land were in the hands of landowners and unproductive, with many of those landowners not even proving that they owned the lands that they said they owned. Here the employers are opposing a social and economic policy for the social inclusion of the impoverished population, a constitutional mandate, they are trying to avoid that the lack of production of foodstuffs be corrected in order to make our country self-sufficient and avoid importing 90 per cent of the foodstuffs that the inhabitants of the Bolivarian Republic of Venezuela consume. Is the production of foodstuffs and the generation of wealth and the fair distribution of land currently in the hands of the few contrary to ILO Convention No. 87?

**1018.** The representatives of FEDECAMARAS accuse the Government of decreeing legislation unilaterally, without dialogue, in violation of the national Constitution. However, the employers of FEDECAMARAS, while they were doing this, were subversively meeting with opposition political factors and agreeing to carry out acts of economic sabotage with eminently political objectives, such as the convening of staggered work stoppages by

region, such as the case of the state of Zulia. They did this on 9 October 2001, including threats to stagger the protests even more, and more radical threats were made by the agriculture and livestock association of the National Federation of Stockbreeders (FEDENAGA), affiliated to FEDECAMARAS, which threatened to paralyse the production of meat and milk, and also to extend the work stoppage to other regions. Is this the way in which to promote dialogue?

**1019.** In parallel the Government created a favourable atmosphere for a meeting to discuss and establish agreements, and for this President Hugo Chávez set up a Special Commission to discuss the differences and the producers suspended the work stoppage "until further notice", at the request of the agriculture and livestock producers. Obviously, this first attempt to paralyse sectors of production failed as trade, transport and banks operated as usual, according to the Ministry of the Interior and Justice and the State Governor (*El Universal*, 10 October 2001): "Despite the closure of the Pan-American highway – which for over eight hours paralysed the free movement of traffic between the municipalities of the south of the lake – the civic work stoppage convened by the stockbreeders of Zulia did not have the success predicted by the agriculture and livestock association in the city, where the call to strike was heeded by less that 30 per cent" (ibid).

**1020.** However, FEDECAMARAS systematically and voluntarily closed itself off to dialogue and, in view of this systematic refusal to talk, the Government held dialogues and negotiations with small and medium-sized enterprise sectors, historically excluded from major political, economic, social and employers' decisions made by FEDECAMARAS and the governments in power before the current national leader assumed the presidency. This exclusion occurred as previously described in the framework of the Punto Fijo Agreement.

**1021.** The discussions, dialogue and agreements reached with the small employers grouped together in FEDEINDUSTRIA were fruitful, and resulted in cooperation and financing agreements for small and medium-sized enterprise owners and producers in the States of Cojedes, Táchira, Zulia, Monagas and Falcón through the National Fund for Reciprocal Guarantees for Small and Medium-sized Industries (FONPYME), with the president of FEDECAMARAS recognizing, in the state of Falcón, that having decreed the free zone in this federal entity "reactivated national tourism".

**1022.** The mechanisms to favour dialogue never ceased on the part of the national Government. It is important to point out that during the call to the "civic work stoppage" convened by FEDECAMARAS on 10 December 2001, the President of the Bolivarian Republic of Venezuela appointed the Minister of Defence at that time, José Vicente Rangel Vale, the current Executive Vice-President of the Republic, to develop higher-level efforts at dialogue. The response from the employers' association FEDECAMARAS and its president at that time, Pedro Carmona Estanca, was to refuse, giving as an excuse the fact that he would only speak with the Constitutional President of the Republic, Hugo Chávez Frías, one further element demonstrating the high-handedness of the employers' leadership and the more specific evidence of intolerance before the call to discuss and seek solutions to controversies, but in addition it indicated the clear position of the plans for the *coup d'état* which came to fruition in April 2002.

**1023.** Faced with the controversy created by the employer sector in relation to the approved enabling acts, a controversy stirred up fundamentally by the leadership of FEDECAMARAS, the National Assembly of the Bolivarian Republic of Venezuela formed a Special Commission which invited the various sectors to put forward their observations on the legal instruments, a normal occurrence as the amendment of approved enabling acts was the responsibility of this state body, as the mandate of empowerment to the National Executive had expired. The National Assembly meetings were attended by the

employer sectors to make their statements after having tried to paralyse the country on 10 December 2001, as indicated above.

**1024.** What has been described in the previous paragraph once more reveals the mechanisms of understanding established by the State of Venezuela, by means of dialogue and not of blackmail and intentions to refuse to recognize the rule of law, democracy and human rights which is what these employer sectors grouped together in FEDECAMARAS did, who always maintained a hidden coupist card, while they pretended to be democratic in the face of national and international public opinion.

**1025.** In January 2002 the president of FEDECAMARAS at the time, Pedro Carmona Estanca "... stressed his confidence in the independence of the National Assembly and in the Supreme Court of Justice in their decision-making". Apart from the legal resources provided by our democratic jurisdiction, which have been used, as they are entitled to do, by some officials of FEDECAMARAS as an employers' association, who have lodged annulment proceedings against the approved orders and against standards contained in various articles in the 48 executive orders. While they were doing this, the employers' officials were acting according to a very well-planned, authoritarian, political agenda, which partially culminated on 12 April 2002 with the de facto Government of Pedro Carmona Estanca, former president of FEDECAMARAS. In this short period of dictatorship, not only did FEDECAMARAS and Carmona repudiate the Constitution of the Republic, but they also violated and undermined all human rights, dissolving the state institutions; in addition they decided to suspend the validity of the 48 executive orders. Any more power and authoritarianism is difficult to imagine. Will the Committee on Freedom of Association endorse this conduct? Is this course of action taken by employers' associations and their officials protected under ILO Convention No. 87?

**1026.** If the employers' association FEDECAMARAS and its outgoing president Pedro Carmona Estanca and his successor as president Carlos Fernández really believed in democracy, then why did they not activate the provisions of article 74 of our national Constitution, which indicates the possibility of putting the executive orders to an abrogatory referendum, to be requested on the initiative of a number of no fewer than 5 per cent of the electorate and validated by the indispensable agreement of 40 per cent of the electorate? Why then did the former president of FEDECAMARAS prefer to act in violation of legislation and break the constitutional thread, with the support of his vice-president and subsequent president of the employers' association FEDECAMARAS, Carlos Fernández?

**1027.** The methods used by FEDECAMARAS with the previous governments, of putting legislation before the legislative power through deputies allied to their political views, which would be discussed for various periods of time depending on appearances, deals and the interests of the political and employer sectors, were gradually changed by the current government administration, with the participation of all social sectors and not just specific ones being encouraged.

**1028.** There were also changes to the custom and privilege of employers to stop or delay draft legislation detrimental to their economic and social benefits up to untenable limits. One example of this was the National Commission of Prices and Wages (in which FEDECAMARAS and the CTV participated), which held discussions for eight months between 1988 and 1989 on the wages to be paid to workers and the most appropriate prices for producers and traders, with the freezing of production and the stockpiling of basic foodstuffs exacerbating this.

**1029.** Such was the abuse by these commissions mediating for their interests, without concrete agreements, that at the same time social discontent was brewing and finally exploded with the events of the so-called Caracazo of 27 February 1989, an event whose repercussions

are still being felt and owing to which thousands of families are still in mourning, all from the popular districts and sectors of the country. It was an event for which the corresponding administrative, political and criminal responsibilities of those who held power at that time and gave the order to fire on the unarmed population have still not been attributed. A few days after the Caracazo, the Government in power decreed an increase in wages and the freezing of the price of basic essentials: the common denominator was over 400 murders by the armed forces and police force of that time.

**1030.** All these authoritarian attitudes by the employers' association FEDECAMARAS, such as the refusal to recognize dialogue, withdrawing from tables for dialogue, imposing their criteria and engaging in blackmail "if their interests were not included over and above the interests of the others", tearing up *Official Gazettes* where legislation was published, calling for insurrection, carrying out *coup d'état*s, which certainly made it necessary to change the dialogue between the national Government and this employer sector, FEDECAMARAS, which was positioned outside the law. The conduct of FEDECAMARAS did not frustrate the intentions of the national Government to transform dialogue, going from an exclusive type of dialogue and decision-making to a broad, inclusive, productive and non-discriminatory dialogue, within the Constitution and legality, not outside it in the manner adhered to by FEDECAMARAS.

**1031.** The consistent action of the Venezuelan Government in believing in dialogue led to the establishment of a Presidential Commission to Promote and Coordinate the National Tables for Dialogue, presided over by the Executive Vice-President of the Bolivarian Republic of Venezuela, Dr. José Vicente Rangel, by way of Order No. 1753, with the involvement of persons representing broad sectors of national life, and with the aim of establishing the practice of a social and participative democracy to open new channels of representativeness and participation in public management.

**1032.** This was immediately after the *coup d'état* driven by subversive actions with the clear intention of destabilizing the state institutions and imposing a dictatorship and taking power by force, which they succeeded in doing for a short time on 12 and 13 April 2002, the Government of Venezuela recalling that one of the fundamental architects of the political, economic and social destabilization was Pedro Carmona Estanca, president of FEDECAMARAS and then his first vice-president Carlos Fernández, who assumed the presidency of FEDECAMARAS following the exile of Mr. Carmona and is now a fugitive from Venezuelan justice, with the two leaders of FEDECAMARAS having in common the wrongful utilization of work stoppage or strike, making illegal and subversive calls for these measures.

**1033.** It should come as no surprise that FEDECAMARAS refused to form part of the tables for dialogue set up immediately after the people of Venezuela and its National Armed Forces restored the President of the Bolivarian Republic of Venezuela to his post and restored the Constitution and the democratic institutions repudiated by Carmona and Carlos Fernández, presidents of the employers' association FEDECAMARAS. This proves that the intention of these employers of FEDECAMARAS is to pursue their intentions of carrying out a *coup d'état* and go on maintaining exclusive dialogue to make labour relations more flexible and deregulated, as they show with their attitude that all they have in mind are their own interests, arrogance, exclusion and the position of a superior class.

**1034.** Following the *coup d'état* of April 2002, representatives of the employer sector, such as FEDEINDUSTRIA and CONFAGAN, participated in the meetings held in conjunction with the tables for dialogue, as did representatives of SMIs and SMEs, of economic sectors such as automobiles, textiles and pharmaceuticals, and persons from various spheres, such as Monsignor Mario Moronta for the Catholic Church, Mr. Francisco Natera, former president of FEDECAMARAS, representatives from the trade union sector, journalists,

media intellectuals, representatives of the automobile, chemical-pharmaceutical, clothing, textiles, social economy, public transport, tourism and many other sectors. These tables for dialogue helped to re-establish confidence between employers and workers with respect to government management, to solidify a truly productive, sustainable, diversified and united economy.

**1035.** The peculiarity is that FEDECAMARAS did not want to participate in the negotiations because the Venezuelan Workers' Confederation (CTV) was not incorporated into the dialogue; thus the National Executive could not do anything, as the CTV lacked legitimate trade union officials. In other words, owing to an intra-union legal controversy, some persons from the CTV sector who say they belong to the executive committee of the CTV, but have no means of proving it, could not participate in the tables for dialogue. However, this dispute led to the Government of Venezuela sending a personal invitation to the person who said he was the president of the CTV, Mr. Carlos Ortega, as the call for dialogue was without any exclusions, and even then FEDECAMARAS refused to participate. Once more, the blackmail can be seen: either you do what I want, or I will not participate, it is that simple, either you recognize an illegal executive committee of the CTV or I will not participate in the dialogue. This was once again the position held by FEDECAMARAS with respect to the calls for dialogue by the national Government.

**1036.** "The tables for dialogue held in May 2002 arose from a context of political confrontation between the defenders of the stockholders' and oligopolistic model who struggled for the control of the Government through unconstitutional means and those of us who defended the legality and legitimacy of the Venezuelan Government", with specific objectives of establishing consensus on the difficulties of the productive, employers' and workers' sectors and on the measures to be applied in the short, medium and long term; measures intended to reactivate the production apparatus, strengthen institutionality with respect to all legal regulations, the direct participation of the legal and legitimate representatives of the employers and workers, and re-establish respect for the rights of workers. These tables for dialogue constituted a forum where it was possible to take a distance from political confrontation, with a paradigmatic win-win approach, with dialogue predominating and consensus on contradiction and open conflict, in a climate of understanding, trust and favouring ideas and proposals to promote an economic solution and overall development.

**1037.** The implementation of the tables for dialogue, following the *coup d'état* promoted by FEDECAMARAS, helped to re-establish some form of government management, which was certainly affected by the events of the coup of April 2002, and with actions that contributed to the country's economic recovery, on the basis of the provisions of our Constitution and the plan of action for the nation established in the Economic and Social Development Plan 2001-07, to advance in the recovery, reactivation and restructuring of the industrial apparatus, of production and of employment. Intra- and inter-institutional cooperation has been strengthened, as has the process for the execution of agreements, with all of this leading to a transition process away from an economic model dependent on oil income towards an endogenous development model which is diversified, sustainable and viable with dignified and decent jobs. These are structural changes, not only in the political sphere but also in respect of social and economic issues.

**1038.** In this entire major process the leadership of FEDECAMARAS chose not to participate, but its members, grouped in sectoral and regional associations did, and thus dialogue was maintained, and is still continuing; there is also a methodology in place to monitor the agreements concluded. This form of management based on the direct and participative involvement of citizens establishes compromises and accountability by the Government, employers, workers, and organizations of the social and united economy.

**1039.** But in addition dialogue was maintained, achieving greater depths and developing in accordance with the political situation, dialogue at the highest level between the national Government and the political opposition, and in this way, in November 2002, the table for dialogue, negotiation and agreement was established, and in that forum there were representatives of the employers' association FEDECAMARAS, through the intermediary of Mr. Rafael Alfonso, president of the Venezuelan Association of Foodstuffs (CAVIDEA).

**1040.** The table for negotiation and agreement had as its facilitator César Gaviria Trujillo, Secretary-General of the Organization of American States (OAS), invited by the Government of Venezuela, and in addition had the support of the Carter Center and of the United Nations Development Programme (UNDP). During the period from November 2002 and May 2003 dialogue and negotiations progressed slowly, with the firm position of the members of the Government appointed as representatives to the table to always act in the framework of the national Constitution of the Bolivarian Republic of Venezuela, and not to stray from it, with the following slogan becoming popular: "Inside the Constitution everything, outside the Constitution, nothing". On 29 May 2002 the agreement referred to was signed.

**1041.** The establishment of the Currency Administration Commission (Cadivi) was a necessary measure in view of the political, social, anti-democratic and economic sabotage imposed by FEDECAMARAS.

**1042.** At the beginning of 2002, all the economic indicators predicted for the first six-month period of the year the country's gradual economic recovery. But external factors, driven by political and economic sectors, contrary to the plans for recovery established by the national Government, put the break on and put the Venezuelan economy frankly into a recession: the *coup d'état* of 11 April, capital flight, speculation, tax evasion and a work stoppage with sabotage to the oil industry, the country's main source of income.

**1043.** The repercussions of these actions contrary to the national interest had an immediate impact which translated as: reduction in international reserves and oil income, decrease in tax revenue, destabilization of the external value of the currency, uncertainty, investment to meet the shortfall caused by the shortage of fuel and some basic foodstuffs, resulting from the work stoppage, among other things.

**1044.** The Venezuelan economy was hard hit and was on the verge of collapse at the beginning of 2003, a year when in fact, in accordance with macroeconomic forecasts, the consolidation of social programmes intended to improve the quality of life of the entire population should have been achieved.

**1045.** Given this situation, the national Government decided to take an economic measure, which will be maintained until the disastrous effects caused to the national economy disappear and the sustainable growth that they tried to thwart is achieved.

**1046.** On 5 February, a system of exchange controls was established by way of an agreement signed by the Ministry of Finance, representing the National Executive and the Central Bank of Venezuela.

**1047.** For the implementation of this agreement on 5 February 2003, the President of the Republic, in the Council of Ministers, decreed the establishment of the Currency Administration Commission (Cadivi).

**1048.** Cadivi came into being with the mission to administer efficiently and transparently, in accordance with certain technical criteria, the national foreign exchange market, and has

the challenge of contributing through its smooth running and the help of other policies, to achieving economic stability and the progress of the nation, both consecrated as sovereign principles in the national Constitution of the Bolivarian Republic of Venezuela.

**1049.** The Government adds a graph and indicates that the graph conclusively explains the other side of the plan of the conspirators, including Carlos Fernández and FEDECAMARAS. On the right of the graph, appears the level of international reserves of Venezuela in dollars, and in the bottom of the graph appear the months of 2002 – note the fall in international reserves. This fall was what forced the national Government, together with the Central Bank of Venezuela, to monitor the disproportionate flow of currency abroad as, according to the indicators shown, the conspiracy against the country meant that in a short time the flight of capital would leave the Republic unable to cover the purchase of materials, foodstuffs or medicines abroad, even more so if there was no foreign currency income from the sale of oil and its derivatives owing to the sabotage that had systematically targeted the industry for two months.

**1050.** It should be pointed out that foreign currency monitoring meant an increase with respect to the amount of international reserves registered at the beginning of the year, when the combination of oil sabotage (that demolished exports) and the speculative attack on our currency (that produced a violent flight of foreign currency) had reduced international reserves to US$13,635 million (including the Intergovernmental Fund for Macroeconomic Stabilization – FIEM) in January 2003.

**1051.** The recovery followed. This was achieved with the recovery of over 700,000 jobs which were lost following the economic sabotage of our economy. If employers had been denied foreign currency, would it have been possible to recover over 700,000 jobs during the last three quarters of 2003?

**1052.** In this document the State of Venezuela, owing to the eminently political, subversive and anti-democratic nature of the official Carlos Fernández and of the employers' institution FEDECAMARAS that he represented following the *coup d'état* and during the sabotage of the Venezuelan economy, requests the Committee on Freedom of Association to consider that the complaint lodged does not deserve closer examination, and also reiterates its readiness to provide any information that the Committee may require to confirm all the observations provided.

## C. The Committee's conclusions

**1053.** *The Committee observes that in this case the IOE and FEDECAMARAS have submitted allegations relating to:*

– *the marginalization and exclusion of the employers' associations and FEDECAMARAS in the process of decision-making, thus excluding social dialogue, tripartism and in general the conducting of consultations (particularly in respect of very important legislation that directly affects the employers), in this way failing to comply with the recommendations of the Committee on Freedom of Association;*

– *actions and interference by the Government to promote the development of and encourage a new employers' organization in the agriculture and livestock sector to the detriment of FEDENGA, the most representative organization in this sector;*

– *violations of human rights and rights fundamental for the exercise of activities of employers' organizations as contained in Convention No. 87, and in particular acts of aggression and intimidation by the authorities and paramilitary groups and*

*reprisals against FEDECAMARAS, its affiliated organizations and its officials for exercising their right to strike in national civic work stoppages, namely:*

- *the detention of Mr. Carlos Fernández on 19 February 2003 in reprisal for his actions as president of FEDECAMARAS, without judicial order and without the guarantees of due process; according to the complainants he suffered ill-treatment and insults from violent groups led by a government deputy;*

- *physical, economic and moral harassment, even by means of threats and aggression against Venezuelan employers and their officials by the authorities or persons close to the Government (details are given of various cases);*

- *operation of violent paramilitary groups with government support, with action against the premises of an employers' organization and against the protest activities of FEDECAMARAS;*

- *creation of a hostile environment for employers by allowing the authorities (and at times encouraging) to dispossess and occupy farmland in full production in violation of the Constitution and of legislation and without adhering to legal procedures; the complainants refer to 180 cases of illegal invasions of estates in production and indicate that most of those cases have not been settled by the corresponding authorities;*

- *the application of a system of exchange control decided unilaterally, discriminating against enterprises belonging to FEDECAMARAS in awarding administrative authorization for the purchase of foreign currency as a reprisal for participation by this employers' confederation in national civic work stoppages.*

**1054.** *In general terms, the Committee stresses the severity of the allegations and deplores that despite the fact that the complaints were submitted in March 2003, the Government's reply dated 9 March 2004 does not specifically respond to a considerable portion of the allegations.*

**1055.** *The Committee observes that in response to the complaint as a whole and to an incidental claim by the complainants (that the national civic work stoppage on 9, 10 and 11 April 2002 led to the national crisis that resulted in the resignation of the President of the Republic which was publicly confirmed by the country's highest military official, but that only lasted a few days as it was later cancelled by the President himself), the Government states that: (1) the only reason for the complainants' accusations is to justify their positions which have nothing to do with occupational or trade union situations but that on the contrary are strictly illegal, anti-democratic and discriminatory policies and FEDECAMARAS is an eminently political, subversive and anti-democratic institution; (2) FEDECAMARAS executives have demonstrated subversive actions with the clear intention of destabilizing the state institutions and imposing a dictatorship and taking power by force, as achieved on 12 and 13 April 2002 with a coup d'état, the de facto president then being Mr. Pedro Carmona, former president of FEDECAMARAS; (3) the work stoppage by FEDECAMARAS in April 2002 became a general strike on 11 April 2002, calling all the coupist factors to a march, giving a certain mass character to the "protest" to justify the coup d'état that had been planned for months; (4) Carlos Fernández, the following president of FEDECAMARAS, endorsed the dictatorship on 12 April 2002 when he signed the "Act of Constitution of the Government of Democratic Transition and National Unity" in representation of the employers; (5) FEDECAMARAS, the CTV and other sectors in the civic work stoppages, between 2001 and 2003, made subversive calls in an attempt to achieve the overthrow of the President of the Republic and were resisted by the overwhelming majority of the people of Venezuela; these civic*

*work stoppages occurred as a result of the far-reaching process of change in Venezuelan institutions and society vis-à-vis the previous implementation of neo-liberal measures, exclusive globalization, privatization and the deregulation of the rights of workers and the loss of control of the state economic apparatus by FEDECAMARAS; the loss of privileges by FEDECAMARAS and the fact that it is not above the Constitution is what this case is about.*

**1056.** *In this respect, the Committee will deal with questions relating to the civic work stoppages further on, but wishes to point out that this complaint does not relate to Pedro Carmona, that the allegations relate to situations both preceding and following the events of 12 and 13 April 2002 (above all the national civic work stoppages of December 2002 to January 2003), that its mandate is limited to examining the allegations of violations of the rights of workers' and employers' organizations, their representatives and affiliates, and that it is not the competent international forum to deal with questions of an exclusively political nature.*

**1057.** *The Committee regrets, however, that in its reply the Government indiscriminately and repeatedly discredits FEDECAMARAS and all its officials, without supporting this widespread condemnation with solid proof or judicial decisions.*

(a) Conclusions on the allegations of exclusion and marginalization of employers' associations and of FEDECAMARAS from social dialogue, particularly as regards the development of laws that affect their interests and the establishment of economic policies

**1058.** *The IOE and FEDECAMARAS point out that the Government has not convened the Tripartite Commission of Venezuela for years and indicate that, in violation of legislation and the Constitution of the Republic, they have not been consulted in respect of the development of laws, legal texts or economic policies that directly affect their interests, specifically:*

– *the Labour Procedure Act;*

– *the awarding of a general increase in the minimum wage of 20 per cent by way of decree;*

– *the ratification of the Indigenous and Tribal Peoples Convention, 1989 (No. 169);*

– *the unilateral establishment of a new banking control scheme imposed by the authorities and more generally the establishment of blatantly anti-employer economic policies and guidelines; and*

– *the Enabling Act of 13 November 2002 that empowered the President of the Republic to issue 49 executive orders in areas affecting employers' interests.*

**1059.** *With respect to the 49 executive orders promulgated by the President of the Republic in accordance with the Enabling Act of the National Assembly dated 14 November 2000, the Committee notes that according to the Government: (1) those executive orders were the result of broad consultation with the citizens, a number of the country's social and cultural sectors and consultations with both top-level and grass-roots organizations, which were involved in drafting them; (2) from the outset each of the employers' associations concerned affiliated to FEDECAMARAS and numerous actors in national life were consulted, including the employers' and workers' organizations (trade unions and federations); (3) on 10 August 2001 the President of the Republic met with the executive committee of FEDECAMARAS in plenary and "it was agreed to hold a working meeting*

*between FEDECAMARAS and the Economic Office to deal with specific issues requiring action or consultations ... with the participation of the President of the Republic"; (4) on 28 August 2001 the vice-president of FEDECAMARAS and representatives of the Chamber of Construction and of CONINDUSTRIA met with the Executive Office, headed by the Minister of Planning. and with the special commission that drafted the Hydrocarbon Act, to give their observations; in subsequent meetings they discussed the other areas of the Enabling Act by economic sector; in September 2001 the president of FEDECAMARAS was invited to join the entourage of the President of the Republic on an official tour to make it known that the employers could engage in negotiations; (5) afterwards, when the officials of FEDECAMARAS realized that their unilateral plans were not accepted meekly by the authority and other sectors participating in the drafting of the executive orders, they began to distance themselves from opportunities for dialogue for selfish interests and voluntarily put an end to the dialogue of their own accord; (6) faced with this refusal, the Government maintained dialogue and negotiations with small and medium-sized enterprise sectors grouped together in FEDEINDUSTRIA, and reached cooperation and financing agreements; (7) there was consensus on most executive orders, with a few exceptions (it is not clear from the Government's reply whether when consensus is mentioned only FEDEINDUSTRIA is referred to or also some of the associations affiliated to FEDECAMARAS; nevertheless, given that the Government asks the question "Why do the various employer sectors associated to FEDECAMARAS withdraw from dialogues to reach agreement on the promulgation of the enabling acts?", it would appear that in the consensuses being referred to by the Government, those from the enterprise sectors associated to FEDECAMARAS were not included).*

**1060.** *The Committee notes that, according to the Government, the 49 executive orders covered subjects of vital importance for the attainment of human rights and directly benefited the vast impoverished Venezuelan population excluded for centuries from the so-called representative democracy. The Government also indicates that some FEDECAMARAS officials lodged annulment proceedings against the legislation approved and against regulations contained in various articles of the 49 executive orders and thus decided to cancel the validity of all of them.*

**1061.** *The Committee notes the Government's observations in support of its view about the self-exclusion of FEDECAMARAS from dialogue, as follows: (1) since attempts were made to paralyse the country on 10 December 2001, the National Assembly, in view of the controversy created essentially by the leadership of FEDECAMARAS, set up a special commission and invited the various sectors, and the employer sectors attended the meetings; and (2) during the civic work stoppage convened by FEDECAMARAS on 11 December 2001, this organization refused to engage in a dialogue with the Vice-President of the Republic on the grounds that it would only engage in a dialogue with the President of the Republic. The Committee also notes that the Government alleges that FEDECAMARAS refused to be part of the Presidential Commission and of the national tables for dialogue (May 2002) set up by the authorities, with the pretext that the Venezuelan Workers' Confederation had not joined them (according to the Government, the Confederation was not included because it lacks legitimate representatives). The Committee stresses, however, that, according to the Government, these commissions included journalists, intellectuals, the Catholic Church, etc., and that the tables for dialogue in question do not appear to relate to bipartite or tripartite negotiations or consultations in the sense imparted in ILO instruments (in effect, the Government indicates that it is "management in the framework of direct and leading participation of citizens, establishing compromises and the rendering of accounts by the Government, employers, workers and organizations of the social and joint economy"), and neither do those conducted in the framework of the special commission of the "Legislative Assembly" referred to by the Government nor do the negotiations and consultations of the table for negotiations and agreements set up in November 2002 in which, according to the*

*Government, FEDECAMARAS participated and in which the Government and "opposition" reached a political agreement on 29 May 2002 to always act within the framework of the national Constitution (the Secretary-General of the Organization of American States was invited to participate in this process).*

**1062.** *The Committee concludes that in the process of preparing the 49 executive orders in accordance with the Enabling Act of 13 November 2000 – a process that by law had to be completed within one year – consultations were conducted with FEDECAMARAS and its affiliated organizations in the first phase and particularly in August 2001. If these consultations were genuine consultations to achieve consensus, as maintained by the Government, or minimum superficial consultations for appearances, as maintained by the IOE and FEDECAMARAS (which point out, however, that the Government conducts detailed consultations with groups that are relatively unrepresentative of the population and that sympathize with the political regime), is something on which the Committee does not have sufficient elements to be able to make a decision. Whatever the case may be, the Committee observes that the Government's claim about the self-exclusion of FEDECAMARAS from dialogue in general and in particular with respect to the 49 executive orders as from September 2001 does not seem to be backed up by conclusive evidence (for example, institutional statements by FEDECAMARAS, invitations from government authorities to deal with labour, social or economic issues in bipartite or tripartite forums that were not accepted). Returning to the 49 executive orders, apart from its surprise that it was decided to regulate a number of vital and complex issues (hydrocarbons, economic and social development, agrarian reform, etc.) in the short period of one year and by reason of executive orders promulgated by the Executive Power, the Committee must point out that in its reply the Government has not specifically replied to the allegations concerning major defects of legality and constitutionality with respect to those executive orders and the procedures followed to adopt them, defects that the complainant organizations outline in considerable detail and in a relatively convincing manner in their complaint and also in a long annex that is not included in this report. In effect, the Government's reply did not go into the substance of these matters and limited itself to indicating that some FEDECAMARAS officials lodged annulment proceedings against the legislation approved and against regulations contained in the 49 executive orders and that they thus decided to suspend the validity of those executive orders as a whole (the Committee believes that the judicial authority has not yet handed down its decision in this respect). Consequently, the Committee cannot determine whether the Government took into account the point of view of FEDECAMARAS on the defects of illegality and unconstitutionality that it invokes or whether it preferred to ignore this point of view during the preparation of the 49 executive orders.*

**1063.** *With respect to the new system of exchange control, the Committee notes that the Government bases that system on the fact that the country was on the brink of collapse at the beginning of 2003 when there was a disproportionate flow of currency out of the country that would have prevented the Republic from being able to respond to the purchase of food, medicines and other materials abroad. The Committee notes the Government's indication that the new system of exchange control arose from an agreement signed between the Ministry of Finances and the Central Bank of Venezuela and that subsequently the President of the Republic in the Council of Ministers decreed, on 5 February 2003, the establishment of the Currency Administration Commission. The Committee observes, however, that although the Government cited a situation of economic emergency to justify the new system of exchange control, there is nothing in its reply to indicate that it carried out consultations with FEDECAMARAS about this new system, which is, however, a matter that clearly affects their interests.*

**1064.** *The Committee also wishes to point out the following: (1) the Government's reply does not mention any bipartite or tripartite agreement or consultation in the sense imparted by ILO*

*instruments with FEDECAMARAS as from September 2001 in matters (policies or legislation) of a labour or economic nature; (2) the Government has not denied that the National Tripartite Commission has not met for years as stated in the allegations; and (3) the Government has also not denied the alleged lack of consultations with FEDECAMARAS in respect of the process of drafting important legislation such as the Labour Procedure Act, the widespread increase in the minimum wage of 20 per cent by way of order or in respect of the process of ratification of ILO Convention No. 169, the new banking control scheme or, on a more general note, the establishment of economic policies and guidelines.*

**1065.** *This being the case, the Committee concludes and deplores that for years the Government has not convened the National Tripartite Commission and that, on an ongoing basis, it does not conduct bipartite or tripartite consultation with FEDECAMARAS in the sense imparted by ILO instruments with regard to policies and legislation that fundamentally affect their interests in labour, social or economic matters, thus violating the fundamental rights of this employers' confederation. The Committee calls the Government's attention to the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), which establishes that consultations "should aim, in particular, at joint consideration of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions" and includes among the matters for consultation "the preparation and implementation of laws and regulations affecting their interests". The Committee again points out to the Government the principle to which it already called its attention in its 330th Report, Case No. 2067 (Venezuela), paragraph 175, reproduced below:*

> *The most representative employers' and workers' organizations, and in particular the confederations, should be consulted at length, on matters of mutual interest, including everything relating to the preparation and application of legislation concerning matters relating to them and to the fixing of minimum wages; this would contribute to legislation, programmes and measures that the public authorities have to adopt or apply being more solidly founded and to greater compliance and better implementation. This being the case, the Government should, as far as possible, also base itself on the consensus of workers' and employers' organizations, which should share the responsibility for achieving well-being and prosperity for the community in general. This is particularly true in light of the growing complexity of problems facing societies, and also, of course, facing the people of Venezuela. No public authority should claim to hold all knowledge nor presume that what it proposes will always and entirely satisfy the objectives in any given situation.*

**1066.** *The Committee emphasizes that tripartite consultation should take place before the Government submits a draft to the Legislative Assembly or establishes a labour, social or economic policy and that that consultation should form part of the elements required for the Government to take its decision, specifically because the confederations principally representative of workers and employers represent them, that is to say, they represent in this case thousands of employers and a very considerable proportion of the labour world. Therefore, in more general terms, the Committee recalls that the 1944 Declaration of Philadelphia that forms part of the ILO Constitution reaffirms among the fundamental principles on which the ILO is based, the following: "the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare".*

**1067.** *For all the above reasons, the Committee urges the Government to stop marginalizing and excluding FEDECAMARAS from social dialogue and, in future, to fully apply the ILO Constitution and the principles therein on consultation and tripartism. The Committee also urges the Government, without delay, to convene periodically the Tripartite National*

*Commission and to examine in this context, together with the social partners, all laws and orders adopted without tripartite consultation.*

**1068.** *From a more global perspective, the Committee wishes to refer both to the Government's statement in which it indicates that it does not recognize the legitimacy of the executive committee of the Venezuelan Workers' Confederation (CTV) (the Committee expressly asked the Government to recognize it – see 330th Report, Case No. 2067, paragraph 173) and to the general context in the country where an ever more apparent climate of political and social confrontation prevails, which the Committee deeply regrets. The Committee believes that the failure to recognize the executive committee of the CTV and the marginalization and exclusion of FEDCAMARAS from social dialogue, irrespective of the Government's reasons, constitutes one of the essential factors in the social and political confrontation and, in the Committee's view, this situation must be urgently remedied. It is obvious that these organizations (which are the most representative confederations) do not share the Government's economic and social model, but excluding them from the social institutional system does not contribute to social peace, public tranquillity and social stability in general and, on the contrary, it generates in practice ongoing conflicts and the mobilization of thousands of employers and hundreds of thousands of workers who cannot make their voices heard through the organizations they have chosen. The Committee therefore considers that the Government should give a new orientation to labour relations and reconsider its attitude with respect to FEDECAMARAS and the CTV.*

**1069.** *At this critical juncture in the situation in the country, and observing that for many years there has been an ongoing conflict between the Government, on the one hand, and FEDECAMARAS and the CTV, on the other, the Committee offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and significant trends in the labour world.*

(b) Conclusions on the allegations concerning actions and interference by the Government to promote and encourage a new employers' organization in the agriculture and livestock sector to the detriment of FEDENGA, the most representative organization in the sector

**1070.** *The complainant organizations have alleged that the Government has promoted the development of the so-called National Confederation of Farmers and Stockbreeders of Venezuela (CONFAGAN) to the detriment of the National Federation of Stockbreeders (FEDENGA), the true representative organization in the sector, carrying out actions to benefit CONFAGAN, the Government interfering, in this way, in the internal affairs of the employers' organizations. The complainant organizations indicate that FEDENGA was excluded from the Agriculture and Livestock Council owing to the support it provided to the popular claim of FEDECAMARAS against the Government. The Committee deplores that the Government has not replied to these allegations (it has only indicated that FEDENGA threatened to paralyse the production of meat and milk in 2001 and to extend a work stoppage in the State of Zulia to other regions) and consequently it urges the Government to reinstate FEDENGA to the Agriculture and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENGA.*

(c) Conclusions on the national civic work stoppage of December 2002 to January 2003 and the arrest with ill treatment of president Carlos Fernández on 19 February 2003 in reprisal for his actions as president of FEDECAMARAS and without the guarantees of due process

**1071.** *Concerning the ill treatment suffered by Carlos Fernández, president of FEDECAMARAS, during his arrest, the Committee notes the Government's statements that his detention was replaced by the judicial authority with house arrest when the lawyers of Carlos Fernández alleged his blood pressure problems. The Committee notes the press articles to which the Government refers and according to which Carlos Fernández and his wife stated that they had been well treated by the police who carried out the arrest and that he had not been physically ill treated and that there had been no aggression against him. The Committee stresses that press articles are of limited value as evidence and that the complainant organization has alleged that: (1) Carlos Fernández was assaulted by unidentified individuals on 19 February 2003; they were not wearing uniforms and did not have the appearance of officials or police and had arrived in vehicles without identification, without number plates and without a judicial warrant; (2) Carlos Fernández thought that it was a kidnapping and tried to defend himself; following a violent struggle in which Mr. Fernández was hit causing superficial injuries and bruises to the chest area, he was immobilized and pushed into his car; (3) shots were fired and only afterwards people appeared and identified themselves as police; (4) on 20 February 2003, he was shut in a cell measuring 2 metres by 2 metres, without ventilation, without light and with only a mat on the floor.*

**1072.** *Given that the Government has not specifically replied to these points, the Committee requests it to carry out an investigation in this respect and to keep it informed.*

**1073.** *Concerning the allegations relating to the violation of due process, the Committee notes that, according to the allegations: (1) Carlos Fernández was detained on 19 February 2003 without being presented with a judicial warrant; (2) on 20 February 2003, he remained incommunicado and was not able to speak to his lawyers; (3) press articles attributed to the President of the Republic expressions from which it could be gathered that he was involved in this detention; (4) on 21 and 22 February, he made a statement before the judicial authority; (5) violent groups led by a government deputy tried to exert pressure on the judicial authority on 21 and 22 February by congregating and hindering access to the court and shouting insults; (6) on 23 February 2003 (it appears from the allegations), the imprisonment was changed to house arrest by judicial decision taking into account Carlos Fernández's state of health; (7) the judge who handed down the initial order of detention was challenged by the defence and withdrew; (8) of the five accusations initially made against Carlos Fernández three were eliminated (treason against one's country, conspiracy (criminal association) and devastation (incitement to plunder the nation), with the charges of civil rebellion and instigation to commit offences remaining.*

**1074.** *The Committee wishes to refer to an appendix sent by the complainants (which is not contained in the allegations to avoid repetitions) which is reproduced below and which describes a certain number of irregularities and violations of due process to most of which the Government has not responded:*

> *The process adhered to by the authorities of Venezuela in the detention of Carlos Fernández Pérez is evidence of the intention to leave him in a state of defencelessness before the charges imputed to him.*
>
> *Carlos Fernández was summoned to the Office of the Attorney-General on 30 January of the current year to make a statement as a witness.*

*After having begun the corresponding statement he was informed that his status has changed and he was sent a summons to make a further statement on 4 February, together with his defence lawyers, but this time as defendant.*

*The day fixed for the statement, the defence lawyers he appointed asked to postpone the statement on the grounds that they had not had access to the file. On that occasion, the Sixth Prosecuting Attorney of the Office of the Attorney-General refused to show the file to the lawyers and the grounds were entirely irregular.*

*In view of the conduct of the Office of the Attorney-General, Carlos Fernández went to the same judge who had witnessed the swearing in of his defence lawyers and exercised the right derived from the right of defence, consisting in that the statement that the procurators should have taken from him would not be given at the Office of the Attorney-General but instead in the court of jurisdiction (article 125(6), organic Criminal Procedure Code).*

*On 6 February, the Office of the Attorney-General gave access to the file. Irregularly, due to the conduct of the defence lawyers, the Sixth Prosecuting Attorney, Luisa Ortega, presented summons for Carlos Fernández, in order for him to make his statement at the Office of the Attorney-General. The summons were incoherent, because on one it was stated that he should appear on Monday, 10 February, and on the other on Tuesday, 11 February.*

*On Monday, 10 February, Carlos Fernández presented himself at the Office of the Attorney-General, accompanied by his defence lawyers, and stated that he would not be appearing because he had exercised the right for the prosecuting attorneys to take his statement before the court of jurisdiction.*

*On Wednesday, 12 February, the first court of jurisdiction refused him the right to make a statement before the court. On Monday, 17 February, the defence appealed and the decision remained pending as to whether he would be obliged to make his statement at the Office of the Attorney-General.*

*On the following day, 18 February, with the decision remaining pending that would imply the obligation to make the statement before the Office of the Attorney-General, and without anything having been said about the appeal, the Office of the Attorney-General went to a court other than the one that had been involved and requested that Carlos Fernández be detained.*

*This request, without him being allowed to exercise his defence through a statement, lacks sense. It should only be able to be applied to those who have refused to appear. This is not the case with Carlos Fernández who, faced with the proceedings initiated against him, was entirely ready to cooperate with the judicial authorities.*

*He appeared twice before the Office of the Attorney-General, on the first occasion when he made a statement as a witness, he committed legislative fraud because at that time, in accordance with the provisions of the organic Criminal Procedure Code, the content of the investigation made him a defendant, depriving him of the right of defence, given that he had not been given access to the proceedings and his lawyers were not allowed to be present. Despite this, Carlos Fernández did attend at the Office of the Attorney-General.*

*The second time he went to the Office of the Attorney-General was not to carry out an act of defiance, but to let the acting prosecuting attorneys know that he would not attend to make the statement because he was exercising the right to have his statement taken in court.*

*The reaction of Luisa Ortega, Sixth Prosecuting Attorney at the Office of the Attorney-General, to the exercise of the right indicated and to a decision that was not final, was to treat him in the way that people are treated who are reluctant to make statements and, without having heard him or allowed him to make a statement or defend himself, promoting proceedings that could benefit him and seeking, in this way, to destroy the basis of the accusation previously made against him, directly requested that he be detained.*

*Carlos Fernández was not reluctant or rebellious before the Office of the Attorney-General. He demonstrated with his actions his readiness to comply with the criminal accusation against him, becoming the one being persecuted, without due process.*

*The Procurator's actions violated the following rights:*

- *Effective judicial protection: the first court of jurisdiction refused to recognize the right whereby the statement could be taken by the Office of the Attorney-General in the presence of the judge so that he could monitor the activities of the Office of the Attorney-General.*
- *His right to defence was violated as he was not informed of the accusation against him prior to requesting that he be detained. The haste of the Prosecuting Attorney meant that she did not wait for the decision on the appeal on the right lodged by Carlos Fernández.*
- *He was not allowed to exercise the means of defence established in article 131 of the organic Criminal Procedure Code which materialized when he made the statement.*
- *In addition, before his detention he was illegally prevented from filing proceedings to demonstrate the absence of any offence.*
- *The containing order of the request for detention submitted by the Prosecuting Attorney also violated his right to defence because the incriminating elements were not presented individually and, although he was accused of five offences, it is not said what proof relates to each of them, presenting them as a whole, which means that the defence has to guess which is the evidence that is supposed to demonstrate each one of the five offences he is accused of.*
- *The request is lodged with a court that was not competent to hear it as it was not that court which had carried out the preliminary hearing. It was a court other than the one that carried out the first procedural acts, such as the appointment of defence lawyers and that decided on the requests for his statement to be taken before the court and that the inadmissibility of the means of preventive judicial imprisonment was declared in advance (article 125(6) and (8) of the organic Criminal Procedure Code).*
- *Despite the fact that the court to which the request was made knew after the detention that it was not competent and that the jurisdictional court was, it did not decline to hear the case, it did not return the records to the first jurisdictional court, which is why it was necessary to challenge it.*
- *Of the five offences of which he was accused, following the decision of the court to which the file was referred as a result of the challenge already mentioned, two survived: rebellion and instigation to commit an offence. The conduct attributed to Carlos Fernández is not consistent with these offences. As such, the principle of legality is violated, as established in article 49(6) of the national Constitution. For example, for rebellion there has to be insurrection, an armed uprising, and the work stoppage convened by FEDECAMARAS was peaceful, supported by civil society, not armed and in the exercise of a democratic right.*
- *The court that handed down the final decision violated the principle relating to the general jurisdictional court before or at the time of the indictment, because the one competent to hear the case, as has already been said, because it had carried out the preliminary hearing, was the court of jurisdiction.*
- *Despite there being a court that had carried out the preliminary hearing, the Office of the Attorney-General did not lodge its request for imprisonment with this court, but went to another that, incidentally, knew nothing about any of the abovementioned rights. The Representative of the Office of the Attorney-General mentions nothing in this respect; in other words this information was hidden at the time the detention of Carlos Fernández was being requested.*
- *Therefore, inter alia, the following have been violated: the right to defence, the right to the general jurisdictional court, the obligation of the Office of the Attorney-General to be a party in good faith in the criminal process (article 49 of the Constitution of Venezuela, Nos. 1, 3, 4 and 6).*

**1075.** *The Committee notes the Government's statements according to which: (1) the arrest of Carlos Fernández took place following a legally valid request and was executed by the Office of the Attorney-General of the Republic, in the person of the Sixth Prosecuting Attorney of the Office of the Attorney-General; (2) the proceedings were originally initiated for the offences of instigation to commit an offence, devastation, incitement to*

*conspire and treason against one's country, at the request of the Office of the Attorney-General of the Republic in accordance with the organic Criminal Procedure Code, accusations brought against him from the accumulated evidence that shows the damage to the country by the sabotage of the oil industry during the public and notorious leadership by Carlos Fernández of the so-called "civic work stoppage" or lockout that took place in December 2002 and January 2003; (3) the trial judge was No. 34 of the criminal jurisdiction of the Metropolitan Area of Caracas who in turn was challenged by the defence lawyers of Carlos Fernández and replaced with trial judge No. 49; (4) this judge did not accept the crimes of treason against one's country, incitement to conspire (conspiracy) and devastation and upheld the accusations of civil rebellion and instigation to commit offences and detained Carlos Fernández under house arrest while she continued the trial on the basis of blood pressure problems; (5) on 30 January 2003, Mr. Fernández testified as a witness at the Office of the Attorney-General and was then summoned to make another statement as a defendant, a summons that he did not attend to which he did not agree; (6) on 18 February 2003, the representatives of the Attorney-General asked for preventive judicial imprisonment before the court of jurisdiction, proposing that Mr. Fernández be brought before the jurisdictional committee and the judge to rule as appropriate; (7) on 19 February 2003, trial court No. 34 granted the request and issued a warrant to arrest and detain Mr. Fernández; (8) on 20 March 2003, the Appeals Court decided to free Mr. Fernández, withdrawing the charges against him; Mr. Fernández immediately left the country; (9) on 20 March 2003, the Sixth Prosecuting Attorney of the Office of the Attorney-General lodged an appeal for protection of constitutional rights* (amparo) *with the Constitutional Division of the Supreme Court of Justice, which accepted the allegations of the Office of the Attorney-General of the Republic and once again ordered the house arrest of Carlos Fernández, an order that the Supreme Court of Justice ruled to maintain in a decision read by the President of the Court on 2 August 2003; Mr. Fernández is therefore on the run.*

**1076.** *The Committee notes that the Government has sent the decision of the Supreme Court of Justice (8/VIII/03) that revokes the decision of the Appeals Court on procedural grounds (missing the signature of one of the three magistrates (21/III/03) who, for reasons of health, was absent from the court for some hours) but regrets that the Government has not sent the decision of the Appeals Court that ruled on the question of law. The Committee also notes that the Government's statements did not answer each one of the violations of due process and irregularities that, according to the complainant organization's annex listed previously, Mr. Fernández had been a victim and it believes that the complainant organization has provided sufficiently convincing evidence of a lack of impartiality in this case. Very specifically, the Committee expresses its surprise that a judge was challenged; three of the charges were suppressed by another judge and the Appeals Court ended up dropping all of them, although the decision of this court was brought before the Supreme Court of Justice, which revoked it for procedural reasons and once again decided at the request of the Office of the Attorney-General (the same prosecuting attorney that had originally accused him of five charges) to order the arrest of Mr. Fernández.*

**1077.** *With regard to the question of law, the Committee notes that the point of view of the complainant organizations and of the Government differ, although both match in the arrest of Carlos Fernández, President of FEDECAMARAS, in relation to the national civic work stoppage that took place between 2 December 2002 and the end of January 2003.*

**1078.** *The Committee notes the complainant organizations' statements that the arrest of Mr. Fernández was in retaliation and as discrimination against the exercise by FEDECAMARAS of its right to peaceful demonstration and for its protest activities against the abuses of the Government and the economic and social crisis brought about by the Government's policies, the lack of dialogue with FEDECAMARAS and the violation of the rights of employers and workers, which culminated in insecurity, violations of private*

*property with invasions of agricultural land and property, encouraged by the Head of State, an increase in poverty and unemployment, public verbal attacks by the Head of State on employers and their leaders, etc.; in this context a number of national civic work stoppages were carried out; the arrest of Carlos Fernández took place following the national work stoppage begun on 12 December 2002 and concluding at the end of January 2003; this stoppage was carried out by the Democratic Organizing Committee that united FEDECAMARAS, the most representative trade union organizations, the main NGOs and the political parties.*

**1079.** *However, the Committee notes that the Government maintains that: (1) the objective of the "civic work stoppage" of FEDECAMARAS and the Democratic Organizing Committee (of which it is a part) relates not to trade union purposes but to strictly political, insurrectional, subversive and anti-democratic purposes; the objective of the civic work stoppage which was begun in December 2002 was, on the contrary, the overthrow of the President of the Republic; the objectives were announced in various ways: "to get a recall referendum", "to see the fall of the President" or "for the President to initiate an election process"; (2) on the FEDECAMARAS web site it stated that the civic work stoppage was "our greatest pressure to demand a democratic and electoral outcome to the crisis in the country" and the Democratic Organizing Committee urged the population to continue until the electoral goal was achieved (a recall referendum for the President of the Republic); (3) during the civic work stoppage dissident soldiers in the Plaza Francia in Altamira were implicated in the murders of three young people and in terrorist acts at the Consulate of Colombia and the Embassy of Spain and in other areas; (4) before the civic work stoppage, Carlos Fernández approached the soldiers taking part in the coup of April 2002 in order to "unify criteria" and shortly afterwards he allied himself with those rebel soldiers (who called for civil disobedience with insurrectional objectives) to sign a "democratic agreement" against the Government; the expression "indefinite national work stoppage" was already present in all statements; (5) Mr. Fernández gave public instructions to illegally and fraudulently collect signatures to call for a consultative referendum that they tried to convert to a recall referendum; he publicly encouraged sabotage of the economy, violence and social intolerance; he publicly called for the employers to close their companies (including those producing food and medicines) that were paying wages to workers who did not complete their working hours; he subjected the population to violent closures of motorways and streets; he encouraged fascist sectors to undertake violent closures of businesses, supermarkets, etc., accompanied by municipal police belonging to the opposition during the work stoppage; as a result of the tirades of Mr. Fernández, there were attacks on workers and public transport vehicles and in some cases people were seriously injured; (6) the right to education, freedom of movement and the health of individuals was violated; employers in the country tipped millions of litres of milk into the rivers and other waterways, forcing the population to face a lack of necessary foodstuffs; (7) the right to information, freedom of expression, television and mass media were subject to abuse (and the main protagonists were Mr. Ortega and Mr. Fernández) with subliminal advertising techniques and war propaganda, lies, manipulation and disinformation, incitement to constrain freedom of movement; officials and their families were threatened physically and verbally; the installations of the Oil Refineries of Venezuela company were cut off and sabotaged using terrorist activity causing damage to equipment and the finances of the country (more than 10,000 million dollars) as this company provides 83 per cent of the GDP of the Republic; more than 500,000 labour posts were lost and unemployment increased five percentage points (from 15.7 to 20.7 per cent); the oil industry suffered sabotage to refineries and oil wells and other installations that led to the spillage of crude oil; boats were stopped or sunk; access valves and keys to computer centres in the oil industry were sabotaged; (8) the provision of energy sources to the aluminium and iron industries in Guyana was sabotaged; (9) there was harassment of foreign embassies; campaigns were initiated to encourage non-payment of taxes and social security payments; (10) a restricted work timetable was implemented in financial*

*organizations; a publicity and propaganda campaign against the celebration of Christmas, etc., was carried out.*

**1080.** *The Committee is aware that the civic national work stoppages were huge and complex public demonstrations in which not only members of employers' and workers' organizations participated but also members of sympathetic political parties, NGOs and where the right to demonstrate was combined with employers' lockouts and probably indefinite general strikes which lasted, in the case of the national civic work stoppage, from December 2002 to January 2003 – two months.*

**1081.** *The Committee notes that the Government has basically described the illegality and illegitimacy of these civic work stoppages from an exclusively political or insurrectional point of view (the aim to overthrow the President of the Republic) and has maintained the legality and the legitimacy of the arrest of Carlos Ortega. In order to deal with those issues, the Committee wishes to highlight a series of issues.*

**1082.** *The first issue is that the Constitution of the Republic very generously provides for the right to public assembly without prior permission (article 53) and the right to strike in the public and the private sectors (article 97) and other human rights, and it includes provisions on the recall of all mandates and magistracies through the calling of a referendum (article 72). Also, article 350 provides that "the people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights" (in this respect, a report of the general secretary of the OAS attached by the Government indicates that this provision must not be interpreted as a general right to rebellion). Because this is a recent Constitution, these rights have not been developed in legislation and this (for example, in cases of conflicts of constitutional rights; or of minimum services to be maintained during strikes) leads to confusion and, although it does not justify them, it may explain some of the abuses and excesses referred to by the Government, that the Committee deeply regrets. The second issue is whether the national civic work stoppage was exclusively political and insurrectional as indicated by the Government (in which case, the Committee would not have competence in this issue). In this respect, the Committee emphasizes that the national civic work stoppage did not give rise to any coup d'état and that while the Government has provided information that shows that the main objective was to depose the President of the Republic or achieve a recall referendum, the abovementioned constitutional provisions do not allow for illegality or illegitimacy or the classification of insurrectional nature to be attributed to this objective (or demand) on the hypothesis that it was the only one (moreover, the Government has annexed a political agreement with the support of the OAS) following the national civic work stoppage that the Government signed with the Democratic Organizing Committee – which organized the work stoppage – in which the parties issued a statement against violence and for peace and democracy and propose specifically to contribute to resolving the crisis in the country through the electoral process and refer to the concept of recall referenda (article 72 of the Constitution) if they are formally requested by a minimum number of voters. The Committee emphasizes, however, that the allegations in the present complaint show that FEDECAMARAS and the employers considered the national civic work stoppage directly linked to the social and political acts of the Government and their consequences and to the exclusion of FEDECAMARAS from social dialogue by the Government; moreover, the Government itself has recognized in its reply that it does not accept the legitimacy of the executive committee of the Confederation of Venezuelan Workers (CTV), which also took part in the national civic work stoppage and which is the most representative workers' confederation (the chronology itself of the statements during the national civic work stoppage, which the Government attached, includes, in the Committee's opinion, statements vindicating Mr. Fernández that show that the national civic work stoppage was an act of protest by*

*FEDECAMARAS for employer reasons and in fact this official mentions "mistaken economic policies, devaluation, controlled exchange rates ... the objective of the Government is to destroy private enterprise" ... "we do not agree that they continue with the closure of enterprises ..., 40,000 million dollars" are missing "through government mismanagement ..."). Consequently, the Committee cannot share the point of view of the Government that this national civic work stoppage had nothing to do with issues relevant to employers' organizations. Moreover, the Committee recalls the principle that "in a situation in which workers' organizations [and employers' organizations] consider that they do not enjoy the freedoms essential for the performance of their functions, they should be entitled to demand the recognition of these freedoms and such claims should be considered to form part of legitimate trade union activities" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 28].*

**1083.** *The third issue refers to the arrest of Carlos Fernández, president of FEDECAMARAS, with regard to which the complainant organizations indicate discrimination and the fact that it occurred as a result of his activities as an employers' official. The Committee notes that the participation in the civic work stoppage was out of the ordinary (according to statements by the current president of FEDECAMARAS, which appear in one of the Government's annexes, for some days participation rose to one and a half million people) and notes that the Government states that there was sabotage and violent acts with damage to physical integrity, as well as numerous violations of human rights and enormous economic and job losses. The Committee profoundly regrets this and hopes that those responsible for the crimes will be punished. The Committee notes that the Government ascribes to the president of the CTV and the president of FEDECAMARAS incitement to a large part of the crimes and offences mentioned but it has not proven nor highlighted the specific causal link between the various specific statements ("tirades" according to the Government) or possible acts of the president of FEDECAMARAS and such offences, such that it seems to credit him rather with a non-individualized or causal generic global incitement; moreover, in the chronology of statements during the civic work stoppage sent by the Government as an attachment there is no statement by Carlos Fernández showing calls to violence or the commission of crimes. The Committee recalls that "there should be no confusion between trade unions' [or employers' organizations'] performance of their specific functions, i.e. the defence and promotion of the occupational interests of workers [or employers], and the possible pursuit by certain of their members of other activities that are unconnected with trade union functions [or those of employers' organizations]. The penal responsibility which such persons may incur as a result of such acts should in no way lead to measures being taken to deprive the unions themselves or their leaders of their means of action" [see* ***Digest****, op. cit., para. 456]. Moreover, the Committee notes that the Government's reply seems to show that of the organizations involved in the national civic work stoppage and that made up the Democratic Organizing Committee (FEDECAMARAS, CTV, NGOs, important political parties, etc.), arrest warrants were issued only for the president of FEDECAMARAS and the president of CTV.*

**1084.** *Taking all these facts and the specific constitutional context of Venezuela into account, the Committee considers that the arrest of Carlos Fernández, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal. The Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle.*

(d) Conclusions on the allegations relating to discrimination in the application of a new system of exchange control

**1085.** *With regard to the allegations relating to the application of a new system of exchange control in 2001 (suspension of free buying and selling of currencies) unilaterally established by the authorities, discriminating against companies belonging to FEDECAMARAS in the administrative authorization for the purchase of foreign exchange currencies (in retaliation for its participation in the national civic work stoppages), the Committee notes that the Government replies by asking how, following the civic work stoppage (from December 2002 to January 2003), in the last three trimesters of 2003, would they have been able to recover the more than 700,000 posts that were lost after the economic sabotage of the national economy if they had refused companies foreign currencies. The Committee, however, points out that the allegations are based on quoted declarations of the Minister of Production and Trade and the President of the Republic. The Committee has examined elsewhere the justification given by the Government for this system.*

**1086.** *Having taken account of the alleged discrimination and serious difficulties expressed by the complainant organizations because of the negative impact in many industries of this system that was unilaterally established by the authorities, the Committee requests the Government to examine with FEDECAMARAS, without delay, the possibility of modifying the current system and that it guarantee, meanwhile, in case of complaints, the application of the same system, without discrimination of any sort, through impartial bodies. The Committee requests the Government to keep it informed in this respect.*

(e) Conclusions on the allegations relating to the physical, economic and moral harassment (including threats and attacks against the Venezuelan employer sector and its officials by the authorities or people close to the Government); the operations of violent paramilitary groups with governmental support against the facilities of an employers' organization and against the protest actions of FEDECAMARAS; the dispossessions and occupation of farms in full production that have been allowed or at times encouraged by the authorities in violation of the Constitution and without following legal procedures; the policy of harassment of the private communication sector

**1087.** *The Committee regrets that the Government has not specifically replied to these allegations. In these circumstances, the Committee urges the Government to take the necessary measures, without delay:*

– *to ensure that the authorities do not try to intimidate, pressure or threaten employers and their organizations for their activities with regard to legitimate demands, in particular in the communications and in the agro-industrial sectors;*

– *to carry out, without delay, an investigation with regard to: (1) the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the regime (12 December 2002); (2) the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); (3) the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce;*

– *to carry out an investigation, without delay, into the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lora, Mérida, Miranda, Monagas, Portuguesa, Sucre, Taclira, Trujillo, Yanacuy and Zulia, and requests that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures;*

– *to urgently carry out an independent investigation (by people in whom the workers' and employers' confederations have confidence) into the violent paramilitary groups mentioned in the allegations (Coordinadora Simón Bolívar, Tupamaros movements and Círculos Bolivarianos Armados, Quinta República, Juventud Revolucionaria del MVR, Frente Institucional Militar and Fuerza Bolivariana) with a view to dismantling and disarming them and that it ensure that there are no clashes or confrontations between these groups and protesters in demonstrations, and to keep it informed in this respect.*

**1088.** *In a general way, the Committee expresses its serious concern about these allegations and at the poor situation of the rights of employers' organizations, their representatives and their members. The Committee draws the Government's attention to the fact 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" [see **Digest**, op. cit., para. 47]. The Committee also underlines that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, due process and the protection of premises and property belonging to workers' and employers' organizations, are fully respected and guaranteed. The Committee urges the Government to fully guarantee these principles in the future.*

## The Committee's recommendations

**1089.** ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the present report and, in particular, the following recommendations:***

***(a) In a general way, the Committee wishes to underline the seriousness of the allegations and it regrets that, in spite of the fact that the complaints were presented in March 2003, the Government's reply, dated 9 March 2004, does not give specific replies to a large number of the allegations.***

***(b) Taking into account the nature of the allegations presented and the Government's reply, the Committee expresses generally its serious concern about the poor situation of the rights of employers' organizations, their representatives and their members. The Committee draws the Government's attention to the fact 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; the Committee also underlines that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, due process and the protection of premises and property belonging to workers' and employers' organizations, are fully respected and guaranteed. The Committee urges the Government to fully guarantee these principles in the future.***

***(c) The Committee regrets that the Government has not convened the National Tripartite Commission for a number of years and that it usually does not carry out bipartite or tripartite consultations with FEDECAMARAS regarding policy-making or legislation that has a fundamental effect on its interests in labour, social or economic matters, thereby violating the basic rights of this employers' confederation; the Committee urges the Government to stop marginalizing and excluding FEDECAMARAS from social dialogue and, in future, to fully apply the ILO Constitution and the principles therein on consultation and tripartism. The Committee also urges the Government, without delay, to convene periodically the National Tripartite Commission and to examine in this context, together with the social partners, laws and orders adopted without tripartite consultation.***

***(d) In the current critical situation facing the country and noting that there has for years existed a permanent conflict between the Government, on the one hand, and FEDECAMARAS and the CTV, on the other, the Committee offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and the social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and significant trends in the labour world.***

***(e) The Committee urges the Government to reinstate FEDENGA to the Agricultural and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENGA.***

***(f) The Committee considers that the arrest of Carlos Fernández, President of FEDECAMARAS, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal; the Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle; the Committee also requests the Government to take steps to carry out an investigation into how the police carried out the arrest of Carlos Fernández, his being imprisoned and held incommunicado for a day and the type of cell in which he was imprisoned, and to keep it informed in this respect.***

***(g) With regard to the allegations relating to the application of the new system of exchange control in 2001 (suspension of free buying and selling of currencies) unilaterally established by the authorities, discriminating against companies belonging to FEDECAMARAS in the administrative authorization for the purchase of foreign currencies (in retaliation for its participation in the national civic work stoppages); having taken account of***

***the alleged discrimination and serious difficulties expressed by the complainant organizations because of the negative impact in many industries of this system, the Committee requests the Government to examine with FEDECAMARAS, without delay, the possibility of modifying the current system and that it guarantee, meanwhile, in case of complaints, the application of this system without discrimination of any sort, through impartial bodies. The Committee requests the Government to keep it informed in this respect.***

***(h) The Committee urges the Government to take the necessary measures without delay:***

***(i) to ensure that the authorities do not try to intimidate, pressure or threaten employers and their organizations for their activities with regard to legitimate demands, in particular in the communications and in the agro-industrial sectors;***

***(ii) to carry out, without delay, an investigation with regard to: (1) the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the regime (12 December 2002); (2) the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); (3) the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce;***

***(iii) to carry out an investigation, without delay, into the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lora, Mérida, Miranda, Monagas, Portuguesa, Sucre, Taclira, Trujillo, Yanacuy and Zulia, and requests that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures; and***

***(iv) to urgently carry out an independent investigation (by people in whom the workers' and employers' confederations have confidence) into the violent paramilitary groups mentioned in the allegations (Coordinadora Simón Bolívar, Tupamaros movements and Círculos Bolivarianos Armados, Quinta República, Juventud Revolucionaria del MVR, Frente Institucional Militar and Fuerza Bolivariana) with a view to dismantling and disarming them, and that it ensure that there are no clashes or confrontations between these groups and protestors in demonstrations, and to keep it informed in this respect.***

CASE NO. 2313

INTERIM REPORT

## Complaint against the Government of Zimbabwe presented by the International Confederation of Free Trade Unions (ICFTU)

***Allegations: The complainant alleges continuing threats, intimidation, harassment, arrests and violations of human and trade union rights by the Government. The complainant refers in particular to violent police intervention and mass arrests of trade union leaders and members, in October and November 2003, during national protest actions called by the Zimbabwe Congress of Trade Unions (ZCTU)***

**1090.** The complaint is contained in a communication dated 20 November 2003 from the International Confederation of Free Trade Unions (ICFTU).

**1091.** The Government provided its observations in a communication dated 25 February 2004.

**1092.** Zimbabwe has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

### A. The complainant's allegations

**1093.** In its communication of 20 November 2003, the ICFTU alleges that the Government of Zimbabwe has again committed gross violations of human and trade union rights against trade union leaders and members, which took the form of threats, intimidation, harassment, assaults and arrests, while the Zimbabwe Congress of Trade Unions (ZCTU) was exercising legitimate trade union activities.

**1094.** On 8 October 2003, 165 trade union leaders were arrested across the country during a national protest against high taxation, high living costs, transport problems, cash shortages and violations of human and trade union rights. Among 41 trade unionists detained in Harare was Mr. Wellington Chibebe, general secretary of the ZCTU. Other trade unionists were detained in unknown places and some leaders, members and activists were assaulted, among them: Mr. Samuel Khumalo who was severely beaten by the police and left with clear marks on his body; Mr. Peter Munyukwi, chairperson of the ZCTU for the central region (City of Gweru) who was also severely assaulted; other persons were reportedly injured, including a member of the ZCTU Women's Advisory Council.

**1095.** On 9 October 2003, 21 of the 41 trade unionists arrested the previous day in Harare were released upon payment of a fine of Z$5,000. The remaining 20 trade unionists refused to pay the fine, insisting that they had been conducting a legitimate trade union campaign; a large number of those who refused to pay the fine were charged with "conduct likely to provoke a breach of peace" under the Miscellaneous Offences Act. The first two cases were to be tried on 23 October 2003; no sentence had been handed out at the time of presentation of the complaint. All unionists were eventually released by 10 October 2003; four of them received medical treatment for injuries inflicted by the police.

**1096.** Early in November 2003, the ZCTU organized a national protest, scheduled for 18 November 2003, and duly notified the police thereof as mandated by the Public Order and Security Act (POSA). The police threatened to quash the protest which it described as an illegitimate demonstration under the POSA. That legislation, enacted in 2002, is inspired by the Law and Order Maintenance Act, that had been adopted by the colonial power to suppress black uprising against the minority white rule before independence.

**1097.** Despite a letter sent on 17 November 2003 by the ICFTU requesting President Mugabe to allow the national protest to take place, the police pre-emptively arrested several trade union leaders and arrested 390 trade unionists participating in the protest on 18 November 2003. There are conflicting reports on the exact number of trade union leaders and members arrested on 17 and 18 November 2003, with government officials reporting two different figures, i.e. 88 and 105 arrests; the latter refers to 60 arrests in Harare, 30 in Gweru and 15 in Bulawayo. For its part, the union mentions 390 arrests (300 in Mutare, 50 in Harare, 19 in Bulawayo, 14 in Gweru, five in Maswingo, and one each in Victoria Falls and Gwanda).

**1098.** In Harare, the top leadership of the ZCTU was arrested on 18 November 2003, including Mr. Chibebe (general secretary), Mr. Lovemore Matombo (president) and Ms. Lucia Matibenga (vice-president). Mr. Chibebe was separated from the rest of the arrested union leaders and held in solitary confinement. The riot police stormed the hotel where the ZCTU General Council was meeting to review the response from the police to the protest and arrested the following persons and took them to the police station: Elisa Miotshwa (first vice-president), Langton Mugeyi, Thabitha Khumalo, Phibion Chenyika, Tecla Masamba, George Nkiwane, Raymond Majongwe, Innocent Sibanda and Mankawuzane. The detainees were separated into two groups: regular members were charged under the Miscellaneous Offences Act, and leaders, who were denied access to their lawyers, were charged under the POSA for organizing a strike (the POSA carries heavier penalties than the Miscellaneous Offences Act).

**1099.** In Bulawayo, Mr. David Shambare (western region vice-chairperson) was arrested in the early hours of 18 November 2003. He had already received threats for organizing industrial action at the National Railways of Zimbabwe and had been told at one time to vacate his home. Riot police broke up the demonstrations on 18 November 2003 by firing tear gas, beating up people and unleashing dogs on them; while fleeing from the police, one ZCTU activist was knocked down by a lorry and taken to hospital. A total of 19 persons, including the regional leadership, were arrested.

**1100.** In Gweru, Mr. Peter Munyukwi (central region chairperson) was pre-emptively arrested at his home at 3.15 a.m. on 17 November 2003 (he had been severely assaulted in the protest on 8 October 2003 and has been a target of the police ever since), and 13 other persons were arrested on 18 October 2003.

**1101.** In Mutare, 300 trade union activists were arrested while they were preparing to march into town; they were all released on 19 November 2003 upon payment of a fine of Z$5,000. In Maswingo, five people were arrested, and their release under a bail of Z$10,000 was being negotiated at the time of the complaint. In Victoria Falls, the district chairperson was arrested on 18 November 2003 for distributing flyers informing people about the ZCTU protest. In Gwanda, the district chairperson was arrested in the early morning of that same day.

**1102.** The complainant organization adds that, in a further restrictive development, state media have reported that the police chief plans to present before Parliament a bill that, if enacted, would mandate criminal courts to refuse bail to persons arrested for offences likely to

cause public unrest until they are tried. The ZCTU suspects that this law will apply to trade unionists taking part in strikes or related legitimate activities.

**1103.** Furthermore, the Government has continued, as a general rule and on a regular basis, to intimidate and harass members and leaders of the ZCTU while they are engaging in any type of trade union activity. For instance on 16 October 2003, members of the Central Intelligence Agency (CIA) tried to take part in a ZCTU collective bargaining workshop in Mutare; they only left after they were satisfied that the meeting did not have a political agenda. On 6 November 2003, two ZCTU staff members (Messrs. Elijah Mutemeri and Vimbal Mashongera) working on a ZCTU/CTUC project on the informal economy, travelled to Chivhu to organize a one-day workshop; when proceeding to the workshop venue the next day, they were met by a group of youths and activists of the ruling ZANU, who subjected them to hostile questioning for one-and-a-half hours; after the interrogation, they were told to cancel the workshop and were escorted back to the bus stop to travel back to Harare.

**1104.** For the complainant organization, these events are additional evidence that the Government of Zimbabwe continues to violate fundamental and trade union rights, particularly through continued police harassment of trade union leaders.

## B. The Government's reply

**1105.** In its communication of 25 February 2004, the Government states that the events of 8 October 2003 constituted an unlawful demonstration by the leadership of the Zimbabwe Congress of Trade Unions (ZCTU). It is true that 55 trade unionists, including the ZCTU leaders, were arrested across the country because they had breached the Public Order and Security Act (POSA) by calling for a demonstration without clearance from the responsible authorities. All the trade unionists concerned, including Mr. Chibebe, were released on 9 October 2003 after paying the fines for breach of the POSA.

**1106.** The Government adds that, on the day in question, workers ignored the ZCTU call for a demonstration; hence its leadership had to stage a demonstration on its own, which was done in contravention of the laws of the country. In fact, it was business as usual in all cities, towns and workplaces. According to the Government, the ZCTU leadership and, more generally, workers are very much aware of the Government's efforts to address the economic problems of the country; all social partners have agreed to a joint approach to discuss these problems in the Tripartite Negotiating Forum (TNF). However, the ZCTU withdrew from the TNF in April 2003; that withdrawal premised its participation in oppositional politics. The failed demonstration was uncalled for since the Government had either addressed the specific concerns or was in the process of doing so. By 30 September 2003, the issue of cash shortages had been addressed. As regards the high taxation rates, trade unions were informed that the amendment to taxation thresholds depended on the 2004 budget, the new figures of which were to be announced in the autumn of 2003. The issues of urban transportation and high cost of living are also on the Government's agenda: fuel has been earmarked for urban commuter bus operators; and measures to address macroeconomics fundamentals include price monitoring and surveillance mechanisms, particularly as regards basic commodities. According to the Government, trade unionists and workers rejected the ZCTU call as it was nothing more than the usual political expression of elements of the Movement for Democratic Change (MDC) within the ZCTU.

**1107.** According to the Government, no trade unionists were assaulted during the arrests that day and nothing to that effect was brought to the attention of the police or the courts. In order to address these allegations, the Government requests details on these alleged assaults, e.g. where these were reported and which courts are handling them, in particular as regards Messrs. S. Khumalo and P. Munyukwi.

**1108.** The Government further points out some contradictions in the complainant's communications: the ICFTU letter of 20 November 2003 mentions 165 trade unionists being arrested, whereas a communication of 8 October 2003 had referred to 55 trade unionists in connection with the same incidents; the ICFTU letter of 20 November 2003 mentions that 21 of the 41 trade unionists were released on 9 October 2003 after paying fines and that the remaining 20 refused to pay fines, but nothing is said about the rest except that all were released on 10 October 2003; reference is also made to four trade unionists who received medical treatment for injuries allegedly inflicted by the police. Without details on these individuals, the Government is unable to make meaningful inquiries, and therefore needs clarifications.

**1109.** As regards the demonstration of 18 November 2003, which again had not been authorized by the authorities under the POSA, the Government states that several trade unionists were arrested and fined. While the ICFTU acknowledges having conflicting figures, the investigation carried out by the Government reveals the following numbers of persons arrested: 53 in Harare, 13 in Gweru, 19 in Bulawayo and 222 in Mutare. It is true that several ZCTU leaders were arrested in Harare, including the following persons belonging to quasi-political organizations whose aim is to remove the legitimate Government by violence, in liaison with the main opposition political party: Mr. Lovemore Madhuku (chairperson, National Constitutional Assembly), Dr. John Makombe and Phillip Pasiral (both from Crisis Coalition).

**1110.** The arrested trade unionists appeared in court in Harare on 20 November 2003 and were released on free bail with certain reporting conditions. These include: Wellington Chibebe (general secretary), Lovemore Matombo (president), Lucia Matibenga (first vice-president), Langton Mugeyi, Thabitha Khumalo and Raymond Majongwe. The Government refutes the allegation that Mr. Chibebe was held in solitary confinement; like any other person arrested by police, he was put in a holding cell with other persons.

**1111.** In order to reply to the alleged interference by officials of the CIA in a collective bargaining meeting in Mutare on 16 October 2003, the Government requests more details as to which trade union and its employer counterpart were interfered with. The Government also requests further information on the alleged incidents in Chivhu on 6 November 2003.

**1112.** The Government is not aware of any bill which would criminalize trade union activities, including strikes, as alleged by the complainant. Issues relating to collective job actions are dealt with in the Labour Act, Chapter 28:01.

**1113.** The Government reiterates that the ZCTU has in its ranks elements pursuing the political agenda of the MDC, an opposition party whose formation was facilitated by the ZCTU. The MDC agenda is to remove the legitimate Government by violence. It is not surprising to see these ZCTU elements, together with members of quasi-political organizations such as the NCA, calling for or staging demonstrations over matters that could be easily discussed with the Government, and not following the procedures laid down in the POSA. Genuine meetings and demonstrations which are within the confines of labour are never interfered with, and are not even subject to the POSA. Only the courts of law, which are independent, may determine whether particular conducts are criminal.

## C. The Committee's conclusions

**1114.** *The Committee notes that this complaint concerns allegations of arrests of trade union leaders and members of the Zimbabwe Congress of Trade Unions (ZCTU), and of anti-union intimidation and harassment through repeated interventions by the authorities and*

*the police, including instances of trade union workshops being delayed or prevented from taking place.*

**1115.** *The Committee further observes that these incidents follow similar events in March 2002, as a result of which the Committee requested the Government to exercise great restraint in relation to interventions in the internal affairs of trade unions [Case No. 2184, 329th Report, para. 831] and in December 2002, where it reiterated its call to the Government to refrain from interfering in the ZCTU trade union activities and from arresting and detaining trade union leaders and members for reasons connected to their trade union activities [Case No. 2238, 332nd Report, para. 970]. Furthermore, the Committee felt sufficiently concerned with the extreme seriousness and urgency of that last case as to call the Governing Body's special attention to the situation [332nd Report, para. 4, approved by the Governing Body at its 288th Session].*

**1116.** *Regarding the political aspect raised by the Government, the Committee must recall once again that trade union activities cannot be restricted solely to occupational matters since government policies and choices are generally bound to have an impact on workers. While trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests, a general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government's economic and social policy [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1996, 4th edition, paras. 454-455] or, as in the present case, on issues relating to the high cost of living or trade union rights.*

**1117.** *The Committee notes that the Government only made general observations on some allegations and requested additional information in order to provide a complete answer. The Committee therefore requests the complainant to give details on: the circumstances of the arrest and detention of Messrs. S. Khumalo and P. Munyukwi; and the number and circumstances of arrests made on 8 October 2003, including particulars about the four trade unionists allegedly injured by police.*

**1118.** *Pending further information from both sides in connection with the October and November 2003 events, the Committee nevertheless recalls in general that the detention of trade union leaders or members for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular [see* ***Digest****, ibid., para. 71]. The Committee must again express its particular concern since this kind of government interference has already occurred several times in the country, and may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [see* ***Digest****, ibid., para. 76]. The Committee strongly urges once again the Government not to resort to such measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.*

**1119.** *As regards the incidents in Mutare on 16 October 2003 (collective bargaining workshop) and Chivhu on 6 November 2003 (ZCTU/CTUC workshop on the informal economy) the Committee notes that these meetings were prima facie legitimate trade union activities. The Mutare workshop was allowed to proceed only after the CIA officers were satisfied that the meeting did not have a political agenda (see the comments above in this respect); and the Chivhu workshop could not take place at all as the ZCTU representatives were ordered to travel back to Harare after hostile questioning by ZANU activists. Recalling that freedom of association implies not only the right of workers and employers freely to form organizations of their own choosing, but also the right for the organizations themselves to pursue lawful activities for the defence of their occupational interests*

*[**Digest**, ibid., para. 447], the Committee once again strongly urges the Government not to interfere in the ZCTU's legitimate trade union activities.*

**1120.** *As regards a bill that would allegedly be prepared and might be used against trade unionists and members taking part in strikes or related legitimate trade union activities, the Committee notes that no concrete evidence has been submitted and that the Government formally denies that any such legislation is being prepared, let alone considered.*

## The Committee's recommendations

**1121.** ***In the light of its interim foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

***(a) The Committee once again strongly urges the Government not to resort to measures of arrest and detention of trade union leaders or members for reasons connected to their legitimate trade union activities.***

***(b) The Committee once again strongly urges the Government not to interfere in the ZCTU's legitimate trade union activities, including the holding of workshops and seminars.***

***(c) The Committee requests the complainant organization to provide additional information on the circumstances of the arrest and detention of Messrs. S. Khumalo and P. Munyukwi, and on the number and circumstances of arrests made during the October 2003 events, including particulars about the four trade unionists allegedly injured by police, during the November 2003 events.***

Geneva, 4 June 2004. *(Signed)* Professor Paul van der Heijden, Chairperson.

*Points for decision:* Paragraph 131; Paragraph 146; Paragraph 165; Paragraph 226; Paragraph 241; Paragraph 274; Paragraph 320; Paragraph 360; Paragraph 380; Paragraph 396; Paragraph 407; Paragraph 467; Paragraph 490; Paragraph 507; Paragraph 526; Paragraph 580; Paragraph 599; Paragraph 622; Paragraph 639; Paragraph 660; Paragraph 680; Paragraph 699; Paragraph 721; Paragraph 762; Paragraph 796; Paragraph 812; Paragraph 826; Paragraph 876; Paragraph 1089; Paragraph 1121.